ARTICLES

Ireland's Constitutional Amendability and Europe's Constitutional Ambition: the Lisbon Referendum in Context

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A. Introduction

For some of those who support the Lisbon Treaty, it is difficult to accept that a 53% majority of the 53% voting electorate of a country of a population of 4.4 million should, by voting to reject ratification of the Treaty, single-handedly bring to a halt a process which involves 27 countries with a combined population of almost 500 million.[1] Their point is that there are undemocratic consequences for the whole of Europe if the Lisbon Treaty does not enter into force as a result of the referendum defeat in Ireland, and therefore they argue that there are democratic reasons for objecting to the agreed legal consequences of the result of the Irish referendum. This only holds if we manage to forget, for a moment, that the decision to make the implementation of the Treaty conditional on the unanimous support of all Member States was never something that was at the whim of the Irish electorate, and if we manage to endorse, for a moment, the argument that respecting the effect that an individual Member State's national constitutional and democratic procedures have on the other Member States is only important if lots of people live there. Furthermore, the credibility of the argument depends, in significant part, on the credibility of its three (dubious) assumptions: that Europe has one unified 'demos'; that democracy means majoritarianism by reference to that single demos; and that, even though the peoples of the other 26 Member States were not consulted prior to the ratification of the Lisbon Treaty in their countries, they were accurately represented by their governments who approved ratification. It is noteworthy,

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[1] This view was put forward most directly by the Italian President, Giorgio Napolitano, and Foreign Minister, Franco Frattini. See, *Il no dell' Irlanda gela l'Europa bocciato il Trattato, l'UE nel caos,* LA REPUBBLICA, 14 June 2008; *La Lega esulta e imbarazza il Governo*, LA REPUBBLICA, 14 June 2008; *L'Irlanda non può fermare l'Europa*, LA REPUBBLICA, 17 June 2008; *Europe's Reaction*, IRISH TIMES, 14 June 2008; Paddy Agnew, *Mixed Response from Political Elite to Irish Rejection of Treaty*, IRISH TIMES, 16 June 2008.

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however, that there should be an objection to the agreed legal consequences of the Lisbon Treaty rejection which claims for itself the democratic high-ground.
That claim to democratic high-ground becomes plausible because beneath the surface of this objection, and there is another more general, more important, and more understated, objection that goes along the following lines: it is more-than-vaguely ridiculous that 'ordinary' people should be trusted to read a 300-page document, to understand its jargon, to identify the salient amendments that it makes, and to have an informed opinion about their merit, and to weigh up all the various pros and cons in order to arrive at a final decision either to accept or to reject the overall package. The long, complex, technical, and obscure nature of the treaty creates circumstances in which, it is argued, direct democracy is an especially inappropriate instrument of political decision-making.[2] At worst, this is to put the cart before the horse, maintaining that the Lisbon Treaty can legitimately set the terms and conditions for its own ratification, rather than being subject to the terms and conditions of the polities and institutional structures that propose to ratify it. At best, it displays a lack of appreciation as to why there was a need for a referendum in the first place. It is with this more insidious objection that this article is primarily concerned.

Fundamentally, this objection misses the distinction between the use of direct democracy or popular referendum as a stand-alone procedure for political decision-making, and the use of direct democracy or popular referendum as a constitutional amendability procedure in a functioning constitutional democracy. This blindness to the significance of the referendum is perhaps most obvious after the treaty rejection, when the political emphasis is firmly focussed on the reasons for the 'no' vote and on what can be done to satisfy or to mitigate the concerns raised by those reasons in order to solve the political crisis that the referendum rejection has created.[3] This analysis often seems to miss the fact that this is not just a political crisis, but rather a constitutional crisis in which both the constitutional credibility of the Irish constitutional order and the constitutional credibility of the (putative) European constitutional order are at stake.

What is needed, instead, both in terms of the effort to understand what has happened in Ireland and its significance for Europe and in terms of the effort to set the terms of engagement for any potential 'solution-finding' exercise, is a deeper understanding not only of the reasons for and the significance of the 'no' vote, but a

[2] Rossa Fanning, *Lisbon Vote is not Democracy but an Exercise in Buck-Passing*, IRISH TIMES, 22 April 2008; Joe Humphreys, *Ancient Ideas could rejuvenate our Sickly Democracy*, IRISH TIMES, 30 August 2008.

[3] The reaction of the Irish government to the 'no' vote was to commission a report by the consultancy company, Millward Brown. The report was released on 10 September 2008 and is available at: http://www.dfa.ie/home/index.aspx.

deeper understanding of the reasons for and the significance of the referendum itself. Indeed, against a background where the precursor of the Lisbon Treaty had already been rejected twice in popular referendum and came before the Irish people as the compromise of compromise – which no other national government wanted to risk putting before their people for popular ratification – it is the decision to hold the referendum, rather than the decision to reject the Treaty, which is the more anomalous decision. Furthermore, it is the decision to hold the referendum, rather than the decision to reject the Treaty, which needs to be defended and vindicated with greater urgency because when we truly get to grips with the constitutional significance of the referendum itself we realise that the implications of this latest 'referendum rejection crisis' will endure long after something is done to 'fix' the Irish result.

For, as it was clear on the ground in Ireland, and as it is backed up by the statistics, what emerges most clearly from the months of campaigning, the result itself, and the national reaction to that result is that there is a growing clarity and consensus among Irish people about what it is that we do when we vote in popular referendum on the question of whether or not to ratify the Lisbon Treaty. It is increasingly obvious that, as a people, we know that we are not voting on the question of whether or not we like being part of the European Union, nor on the question of whether or not we are grateful to be part of the European Union; neither on the question of whether or not we want to co-operate in the European adventure, nor on the question of whether or not we want to leave – or be forced out of – the European Union. In the Eurobarometer polls conducted immediately after the result,[4] the vast majority of voters endorsed Ireland's continued membership of the European Union: 89% of all voters generally supported membership of the EU,[5] and were equally unambiguous in their rejection of the idea that a 'no' vote would mean that Ireland would be on its way out of EU: 89% of all voters similarly refused to see the question of the ratification of the treaty as linked to the question of Ireland's membership of the Union.[6] It is these numbers which tell the most important truths of the relationship between the Irish people and their European partners and it clear from them that, at least from the

[4] Flash Eurobaromter Polls No. 245, available at http://ec.europa.eu/public_opinion/archives/flash_arch_en.htm, last accessed 25 September 2008. The figure in the flash poll are corroborated by those in the standard Eurobarometer Poll No. 69 on Public Opinion in the European Union, conducted in spring 2008, according to which, Ireland consistently scored either highest or second highest on the questions which deal with support for membership (Q.7), the extent to which the Member State has benefited from membership (Q.8), and whether or not the EU conjures up a positive image (Q. 13). Available at http://ec.europa.eu/public_opinion/standard_en.htm, last accessed 25 September 2008.

[5] 98% of 'yes' voters and 80% of 'no' voters.

[6] 89% 'yes' voters and 88.5% 'no' voters.

perspective of Irish people themselves as they voted on the Lisbon Treaty, both Ireland's commitment to the European Union and the European Union's acceptance of that commitment were not in question.

This standpoint, it will be argued, not only reflects a very encouraging sociological reality, but it is also a very correct understanding of national constitutional law. The referendum was required not in order to assess the popularity of the European Union in Ireland, nor the level of support for Ireland's membership, but rather because our constitutional amendability rule provides that when there is a proposal to change the basic terms of our association, as enshrined in the Irish Constitution, that change must have the approval of the Irish people in popular referendum. The referendum was required prior to ratification of the Lisbon Treaty because the Treaty did propose changes to the basic terms of our association as enshrined in the Constitution. Thus, the issues that arise in the context of the referendum are issues that go to the heart of what our basic terms of association, as the people of Ireland, are and should be. The decision is not a decision about the objective merit of an externally-produced document but a much more personal decision about who we are and how we want to organise our living-in-common. It can happen, then, that Europe's political ambitions are at variance with the decisions taken by the people about what the basic terms of their association should be. When this happens, it is no ordinary political conflict. It is not just a conflict caused by different and opposing interests; it is not just a conflict caused by different and opposing conceptions of justice; and it is not just a conflict caused by different and opposing ideas of the kind of institutional structure that is needed in order to make the political decisions that privilege one interest over another, and one conception of justice over another. It is a conflict caused by different and opposing conceptions of what the basic terms of association are: it raises questions such as "who are the 'subjects' and what is the nature of their subjective bond to this 'felt need' to put things in common, and what is the proper 'sphere' and legitimate scope of this common enterprise …which constituency is appropriate and apt to put things in common … and to what extent and in what domains is it prepared to do so?"[7]

When this kind of constitutional conflict happens, as it has in the context of Ireland's rejection of the Lisbon Treaty, the first step towards its resolution must be that we try to explain and understand and vindicate, not only the immediate reasons motivating the 'no' vote, but the referendum itself as an example of Ireland's constitutional amendability procedure in action, and thereby to sustain and defend both the strength of Ireland's constitutional democracy and the credibility of the Europe's own constitutional ambitions.

[7] Neil Walker, *Europe's Constitutional Momentum and the Search for Polity Legitimacy*, (2005) 4 (2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 211, at 215.

The paper distinguishes, in Part B, the concept of direct democracy from the concept of constitutional democracy so as to clarify the importance of referenda when they are used as the constitutional amendability procedure in a functioning constitutional democracy. It goes on, in Part C, to examine the place of Ireland's constitutional amendability procedure in Irish constitutional history. Part D discusses Ireland's constitutional amendability procedure vis-à-vis European treaty referenda, while Part E concludes by examining the three ways in which Europe's constitutional ambitions are intimately tied up with national constitutional amendability procedures.

B. Direct Democracy vs. Constitutional Democracy

In this communication age, with the rise both in the number of people with whom we can be in communication and the speed at which we can communicate, direct democracy becomes feasible again, for perhaps the first time since its inception as the *modus operandi* of government in ancient Athens.[8] Indeed, in very informal ways, we do express our interests and issue preferences, and even our political views and ideologies, in blogs and online polls and surveys, etc. Furthermore, when we, in representative democracies, move towards e-voting for general elections,[9] it becomes more conceivable to think that the people might be consulted directly with increasing frequency and on an increasing number of issues. For these reasons, direct democracy is experiencing something of a renaissance.[10] Its deficiencies remain, of course:[11] there may not be sufficient time for the electorate to become informed as to the issues at stake in any given proposal; the electorate may lack the expertise necessary to understand the complexities of those issues; the electorate may be motivated by self-interest, rather than by principle; it may be unduly-influenced by specialist lobby groups or swayed by demagoguery; it might tend to make decisions based on the short-term perspectives rather than with a view towards its long-term goals; and, perhaps most importantly of all, direct

[8] See MOGENS HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES AND IDEOLOGY (1998); KURT RAAFLAUB, JOSIAH OBER, & ROBERT WALLACE, ORIGINS OF DEMOCRACY IN ANCIENT GREECE (2008).

[9] The studies of the E-Democracy Centre on the theory and practice of e-democracy are available at http://edc.unige.ch/index.php, last accessed 25 September 2008.

[10] DAVID BUTLER, & AUSTIN RAMNEY, REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY (1994).

[11] *Id.*, Chapter 2; THOMAS CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1999).

democracy panders to majoritarianism and, of itself, contains no protection from the violence that unrestrained majoritarianism can occasion.[12] Indeed, it is partly as a response to the inadequacies of direct democracy that constitutional democracy finds its mandate, establishing as it does a system of representative government, whereby decisions are made on behalf of the people by representatives directly elected by them, and a basic set of grounds rules, usually in the form of fundamental rights provisions, that provide institutionalised protection of minorities against majorities.[13]

When a constitutional democracy includes a direct democracy procedure as its constitutional amendability rule, direct democracy then becomes one of the mechanisms for constitutional modification that contributes to the iterative achievement of the correct balance between the success of the constitution as measured by its resilience and the success of the constitution as measured by its legitimacy.[14] This is because the chosen amendability procedure is not agreed in isolation from the rest of the constitutional bargain, but rather as an essential element of it; as part of the carefully-orchestrated balance established in the constitution that is designed to address the various political, institutional, and social tensions which are intrinsic and unique to the particular polity. The amendability procedure belongs, then, in the wider constitutional configuration in which it is conceived. This point is well made, in the context of American constitutionalism, by Christopher Eisgruber and Lawrence Sager.

Christopher Eisgruber begins by outlining three tensions that typically inform the choice as to which kind of constitutional amendability rule a constitutional

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[12] LOREN SAMONS, WHAT'S WRONG WITH DEMOCRACY? FROM ATHENIAN PRACTICE TO AMERICAN WORSHIP (2004); NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY (2008); NADIA URBINATI, MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT (2008).

[13] In the Federalist Papers, James Madison specifically argued that representative democracy was a better option than direct democracy or pure democracy, because, as he concluded that "a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole … and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths". Federalist No. 10, on the Union as a Safeguard against Domestic Faction and Insurrection, available at http://www.foundingfathers.info/federalistpapers/fed10.htm, last accessed 25 September 2008.

[14] In this sense, as Stanford Levinson puts it, the constitutional amendability procedures 'respond' to the 'imperfection' that is inherent in the constitution. STANFORD LEVINSON (ED.), RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (1995).

configuration will adopt. He suggests, first, that constitutional amendability rules must strike a reasonable balance between stability and flexibility, so that reform is possible while the institutional structures remain reasonably secure. In striving for the correct balance in this regard, he sees two possible options for constitution-makers: they can either make constitutional amendment notoriously difficult but "constitutionalise" only a very small number of decisions (thus allowing that most reforms are effected through non-constitutional channels), or they can chose to constitutionalise a wider range of decisions and make amendment slightly less difficult by establishing a "medium degree of unamendability".[15] He suggests, second, that there must be a healthy tension between political inertia and institutional quality, for the point is not that the constitution, in establishing institutions which endure through time, is problematic in direct proportion to the durability or obduracy of those institutions, but rather that it must be possible, periodically, to review the *quality* of those institutions and to affect change when necessary. Here, Eisgruber argues that inflexible amendment rules may prove to be the safer option, because while "[f]ormal constitutional rigidity forces decision-makers to acknowledge the long-term consequences of institutional reform … by contrast, when formal constitutional barriers to change are modest, people may pursue various 'experiments' in the mistaken belief that subsequent majorities can painlessly terminate the experiments if they go awry".[16] He argues, thirdly, "[c]onstitution-writing is a way to insist upon, and institutionalise, the distinction between democracy and majoritarianism",[17] and that constitutional amendability rules are a mechanism by which this can be emphasised. Inflexible, i.e. supermajoritarian, amendment rules "do indeed limit democracy", he argues, only "if by 'democracy', one means 'majoritarianism'".[18] For this reason, supermajoritarian amendment procedures can avoid a situation where the amendment procedure is vulnerable to majoritarianism and can thus be used "to degrade institutions that are valuable to the people as a whole",[19] by guarding such

[15] CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001), 14. "They might search for some medium degree of unamendability, in which constitutional amendment is more difficult than ordinary law-making but not so difficult as to frustrate reform. Or, alternatively, constitution-makers might make amendment arduously difficult, but constitutionalise a minimal number of decisions. The constitution-makers might hope that the constitution's unamendability would ensure a stable institutional foundation for democratic politics and also hope that most reforms and adjustments could be made through non-constitutional channels."

[16] EISGRUBER, *supra,* note 15, 16-7.

[17] EISGRUBER, *supra,* note 15, 18.

[18] EISGRUBER, *supra,* note 18-9.

[19] EISGRUBER, *supra,* note 15, 20. "If so, then any increase in democratic freedom brought about by more flexible amendment rules would be nullified by the destabilisation and corruption of other institutions that make democracy possible".

institutions against encroachment by majority will.[20] Eisgruber's purpose, in all of this, is to mount a double defence of the supermajoritarian amendment rule prescribed by Article V of the US Constitution.[21] He insists, first of all, that "it is an error to look at constitutional amendment rules in isolation from the other democratic institutions that compose a political system".[22] Further, and against those who loosely make the point that Article V is "undemocratic, mediocre, or even stupid",[23] he concludes that there are "democratic functions of inflexible constitutions".[24]

Lawrence Sager takes a complementary approach, arguing that, because it limits popular constitutional amendment to certain specific and controlled occasions, Article V "promotes a generosity of perspective, an impartiality born of the awareness of one's own possible future circumstance and the circumstances of one's children and children's children", and that because it insists on "a geographically broad and numerically deep consensus, article V looks directly for agreement among the diverse circumstances of our nation".[25] In this way, Sager reasons, the amendability procedure is part of a whole, contributing to the promotion of an ongoing dialogue about constitutional purpose:

> The process over time is one of dialogic collaboration, with the judiciary charged with carrying forward the project of constitutional justice upon which popular installation and periodic

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[20] EISGRUBER, *supra,* note 15, 20.

[21] Article V of the US Constitution reads as follows: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

[22] EISGRUBER, *supra,* note 15, 22.

[23] EISGRUBER, *supra*, note 15, 22. Eisgruber's principal target is Stephen Griffin and his contribution to the *Constitutional Stupidities* volume: Stephen Griffin, "The Nominee is … Article V", in Eskridge, William and Levinson, Sanford, eds, *Constitutional Stupidities, Constitutional Tragedies* (New York University Press, 1998).

[24] EISGRUBER *supra*, note 15, 10.

[25] Lawrence Sager, *The Incorrigible Constitution*, 65 NEW YORK UNIVERSITY LAW REVIEW 893 (1990), 959-60.

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> reshaping of the Constitution has embarked us. At times, the dialogue may be adversarial: a Supreme Court that is widely perceived to have run off the rails can be redirected by the requisite Article V consensus, while a morally laggard society can be prodded into reflection and change. But collaboration, it is to be hoped, will be the more general tone.[26]

The lesson to be drawn from the work of both of these scholars is that criticism of the particular constitutional amendability procedure chosen by a particular polity, when that criticism proceeds without reference to the wider constitutional configuration that prescribes its mandate, is indolent to the point of erroneousness. It is impossible to come to a definitive conclusion on the merits of a particular amendment rule in the absence of a wider and deeper examination of the particularities of the constitutional framework that includes that rule. Even then, the strengths or weaknesses of any particular amendment rule can only be evaluated, within that wider constitutional configuration, in a practical context, so that any broad conclusions on its merit will, in the end, as Eisgruber puts it, "be made out on the basis of an all-things-considered practical judgment about whether the … people would be better able to govern themselves"[27] if the amendment procedure were changed. Essential to this perspective, first of all, is acceptance that no constitutional amendability procedure, whether existing, proposed, or hypothetical, can remove the uncertainties or conflicts that pervade our efforts at living-in-common. As Sager concludes: "[t]here is nothing crisp or tidy about this picture: it does not present a model driven by firm claims of entitlement or informed decisively by collective will; and it certainly does not promise to purge our constitutional life of conflicts of value or errors of judgment".[28] Intrinsic to this argument, too, is the acknowledgment that different polities, having their own constitutional institutions that are designed to reinforce their particular strengths and to cope with their unique challenges, will have amendability rules that are unique and particular to the unique constitutional configuration of that polity.

Thus, the fact that the Irish Constitution can be amended by the majoritarian rule of direct democracy, rather than by a supermajoritarian procedure as *per* the American Constitution, does not, without more, condemn the Irish procedure. More to the point, the fact that the Irish Constitution requires that there be a referendum in Ireland prior to ratification of any European treaty that materially

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[26] SAGER, *supra*, note 25, 895.

[27] EISGRUBER, *supra*, note 15, 22.

[28] SAGER, *supra*, note 25, 960.

alters the 'essential scope and objectives' of the previous treaties, is not ridiculous just because no other Member State has this rule. Correspondingly, the fact that the Irish Constitution requires that there be a referendum in Ireland in such a circumstance, does not, without more, condemn any other Member State of the European Union whose constitutional configuration does not require referenda in order to ratify European treaties. Each amendability procedure must be considered from a point of view that is thoughtfully attentive to the constitutional configuration in which it belongs.

This is because a constitutional amendability procedure *belongs* in its constitutional configuration. It does not sit above or outside the constitution, and so it cannot be judged on its own merits, but only as part of the overall package. This means, to conclude this section, that even when the amendability procedure is a majoritarian amendability procedure, as is the case in Ireland, it cannot be entirely dismissed merely by re-statement of the general objections to direct democracy. It is not enough anymore to say that there are weaknesses in the manner in which the electorate approaches the task of making decisions by popular referendum. This is because the very holding of a referendum on a proposal to amend the constitution, is an instance where all the gravitas and power of constitutional democracy is brought to bear on a single decision taken by the people themselves, thereby requiring that that decision becomes worthy of the constitutional tradition which it then becomes part of. The very holding of a referendum on a proposal to amend the constitution is testament to the fact that what is at stake in the proposal is not something about which we can be casual; not something that costs us nothing; not something about which we can delegate our decision-making role, but rather something that goes to the heart of who we are, something that changes fundamentally those things that we take most seriously, something that has deep and enduring ramifications for our project of living-in-common.

C. Ireland's Constitutional Amendability Procedure

Ideally, of course, when a referendum is to take place, the electorate of that country will take the time to inform itself on the issues in question, will come to grips with the complexities of those issues, and will consider the proposal in a fair, principled, and un-self-interested way and reach a decision, which will reflect, as best it can, the most enlightened principles for living happily in common. In such a case, the decision, taken on the basis of the constitutional amendability procedure, supports an all-things-considered conclusion that the constitutional democracy in which the constitutional amendability procedure belongs is a healthy one. At times, however, this does not happen; people make up their minds without fully informing themselves, or fully understanding the issues, they are prejudiced or deceived or

unprincipled, and thus the decision, taken by means of the constitutional amendability procedure, tends to indicate that the constitutional democracy in question is not a healthy one. We must be careful, however, not to draw too-hasty conclusions. The point is that the weakness of any particular constitutional amendability procedure may be compensated for, or balanced out – or at least partly so – by the constitutional configuration as a whole to such an extent that it would be fallacious to say that they undermine the constitutional configuration as a whole. Since it is true to say, however, that the strengths and the weaknesses of the constitutional amendability rule have the potential to become the strengths and weaknesses of the constitutional democracy in which it operates, it follows, then, that the entire constitutional infrastructure – and in particular the legislative, executive, and judicial organs of government – has a vested interest in creating the conditions in which the constitutional amendability procedure is as robust as possible.

This section of the paper does not seek to defend the levels of knowledge, understanding, and engagement of 'ordinary' Irish people during referendum campaigns; nor does it propose to make a final judgment on the health or otherwise of our constitutional democracy. Instead, it provides an account of how constitutional amendability procedures have been dealt with throughout Irish constitutional history. The claim is that the entirety of Irish constitutional infrastructure and the manner in which that infrastructure has been employed throughout Irish constitutional history has brought us, through turbulent waters, to the point where, when we are asked to make a decision by popular referendum on a proposal to amend the constitution, we are in a good position to take that decision seriously.

The story of the place of constitutional amendability procedures in the overall constitutional configuration begins with the 1922 Constitution of the Saorstát Eireann (the Irish Free State). The 1922 Constitution was enacted on the basis of the Anglo-Irish Treaty, which marked the end of the Irish War of Independence, and gave Ireland limited sovereignty as a dominion state within the British Commonwealth. Article 50 of the 1922 Constitution provided that, for a period of eight years, the Constitution could be amended by ordinary legislation; that is, by the Houses of Parliament.[29] The political climate was still very tense at the

[29] Article 50 of the 1922 Constitution provided that: "Amendments of this constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their

foundation of the Free State, and a bloody Civil War absorbed the first two years of its life, because the country was torn in two over the question of whether or not to accept the limited sovereignty offered by the British or to continue to fight for full independence. Hence, the government of the day found that the Article 50 procedure was quite an expedient method of constitutional amendment, and, in due course, by means of the Constitution (Amendment No. 16) Act of 1929, made an amendment to Article 50 itself, extending the time period during which constitutional amendments could be made by ordinary legislation by another eight years. Pursuant to this, the Oireachtas then passed the Constitution (Amendment No. 17) Act of 1931, which, under the infamous Article 2A, allowed for a wide range of supplementary powers for the State in the repression of political violence and subversion. It established of a Special Powers Tribunal – a court martial consisting of officer judges appointed by the government – that could impose penalties, including the death penalty, above and beyond those prescribed by ordinary law, for a host of offences relating to subversion or attempted subversion, but also, quite extraordinarily, for any offence "in respect of which an Executive Minister certifies in writing under his hand that to the best of his belief the act constituting such offence was done with the object of impairing or impeding the machinery of government or the administration of justice".[30]

Both the Constitution (Amendment No. 16) Act of 1929 and the Constitution (Amendment No. 17) Act of 1931 were challenged in judicial review proceedings in the case of *The State (Ryan) v. Lennon*.[31] The sixteenth amendment was challenged on the basis that the Oireachtas could not accrue extra power unto itself (meaning that the seventeenth amendment was also invalid for being *ultra vires*) and the seventeenth amendment was challenged for being so radical and so draconian a piece of legislation as to amount to a *de facto* repeal of the entire Constitution. In the divisional High Court, the judges concluded that:

> Art. 50 conferred upon the Oireachtas the power to amend and alter the Constitution by way of ordinary legislation passed within a period of eight years from the date when the Constitution came into operation, and that, in the absence of any indication in the statute of an intention of the contrary, the power so conferred is

votes on such Referendum, and either the votes of a majority of the voters on the register, or two thirds of the votes recorded, shall have been cast in favour of such amendment…"

[30] Appendix, Constitution (Amendment No. 17) Act, 1931.

[31] *The State (Ryan) v. Lennon* [1935] IR 170.

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> unrestricted, and authorises the alteration of any Article of the Constitution, including Art. 50 itself.[32]

The majority of the Supreme Court judges upheld the High Court decision, holding that, drastic though the provisions were, they were within the scope of the Oireachtas to enact. Despite finding the Act valid, Mr. Justice Murnaghan made his objections clear when he stated that "the extreme rigour of the Act is such that its provisions pass far beyond anything having the semblance of legal procedure, and the judicial mind is staggered at the very complete departure from legal methods in use in these courts".[33] The sole dissenting judgment came from the Chief Justice, Mr. Justice Kennedy, who argued that:

> [T]he new Article 2A is no mere amendment in, but effects a radical alteration of, the basic scheme and principles of the Constitution enacted for the Saorstát by the Constituent Assembly. … The net effect … is that the Oireachtas has taken judicial power from the Judiciary and handed it to the Executive and has surrendered its own trust as a Legislature to the Executive Council, in respect of the extensive area of matters …[34]

On foot of this decision, successive governments used the ordinary legislation amendment procedure to whittle away at the residual power of British over Irish domestic affairs: removing the Oath of Allegiance to the British monarch and the requirement that the Free State Constitution be compatible with the Anglo-Irish Treaty,[35] abolishing the right of appeal to the Privy Council in London,[36] and eventually removing all references to the King and abolishing the office of the Governor-General, the King's representative in Ireland.[37] Thus, by means of ingenious – or disingenuous – use the amendability procedure, the entire basis for the 1922 Constitution was undermined and eroded, to the point where the Constitution itself was no longer worth the paper that it was written on.

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[32] *Id.*, 178. ('Oireachtas' is the Irish word for Legislature.)

[33] *The State (Ryan) v. Lennon, supra* note 31, 237.

[34] *The State (Ryan) v. Lennon*, *supra* note 31, 200-2. Mr. Justice Kennedy used canons of natural law to declare the provisions of Article 2A void and inoperative.

[35] Constitution (Removal of Oath) Act, 1933.

[36] Constitution (Amendment No. 22) Act, 1933.

[37] Constitution (Amendment No. 27) Act, 1936.

When it came to enacting Bunreacht na hÉireann – the Constitution of the Irish Republic – in 1937, and no doubt as a reaction to the constructed failure of the 1922 Constitution, Dáil debates reveal that there was unambiguous support for "the general principle that once the Constitution is adopted by the people as a whole it ought to be changed only by their direct and immediate will".[38] The Constitution under-scored this notion in the general principle, written into Article 6, that:

> All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.[39]

Article 46, section 2 established that constitutional amendments should take place in the following way: "Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed … by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law…". Although the Article also provided that, during a transitional period of three years, constitutional amendments could be effected by means of ordinary legislation, on this occasion, the time limit on that transitional period was expressly stated to be beyond the power of the Oireachtas to amend.

There have been twenty-three successful amendments of the 1937 Constitution during its seventy-one years as the fundamental law of Ireland. (For the sake of bald comparison it is worth noting in passing that there have been only twenty-seven amendments of the American Constitution during its two hundred and twenty-one year history.) Nine other proposals to amend the 1937 Constitution were rejected. Thus, despite the relatively short tenure of the constitution, we have already had quite a wealth of experience of holding referenda, and, there have been many occasions when those referenda have been so contentious that the country is split down the middle, particularly when the proposals deal with sensitive social issues in the area of family law. In 1996, divorce was introduced on the basis of a tiny majority of 50.3% in favour to 49.7% against. There have been three referenda on the right to life of unborn children, in 1983, 1992 and 2001, the first of which successfully included a clause in the constitution which states that the right to life of the unborn has equal status with the right to life of the mother, and the latter two

[38] Dáil Éireann is the lower House of Parliament. Dáil Debate of 4 June 1937. Available at http://historical-debates.oireachtas.ie/D/0067/D.0067.193706040007.html, last accessed 25 September 2008.

[39] Article 6 (1) of the Constitution.

which failed to introduce restrictions on the constitutional ban on abortion. In the 2001 referendum, the margin was similarly tight, with 50.42% of voters voting 'no' and 49.58% of voters voting 'yes'. Both sides of the 'social divide' know what it is to win and know what it is to lose these important and close-run decisions. Nonetheless, the Supreme Court insists,[40] and it is accepted in the popular imagination, that even when the decisions are won and lost on a knife-edge, the decisions are final.

Referenda on proposals to amend the Constitution are to be taken so seriously, according to the Supreme Court in, *inter alia*, the case of *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995*,[41] because it is nothing less than the 'fundamental and supreme law of the State' that is at stake. The Court ruled that "[t]he People were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended … is the fundamental and supreme law of the State representing as it does the will of the People".[42] As well as taking this strong line – and enforcing it in the *Hanafin* decision by refusing to strike down the result of a referendum[43] – the courts have also begun to insist that pre-referendum conditions should enable and justify the fact referendum decisions are taken so seriously. In other words, the courts require that pre-referendum conditions (specifically, the use of public funds and the allocation of air-time for public broadcasts) be tightly controlled in order that the basic requirements of fairness and transparency, breeding legitimacy, can be imputed to the referendum results. As noted above, Article 46, section 2 provides that all proposals to change the Constitution must go before the two Houses of Parliament before being submitted to the people for their approval, meaning that in order for a proposal to amend the Constitution to reach the people in the first place, it must necessarily already have the support of the government of the day. However, a series of judgments in the 1990s restricted the powers of the governments in relation to the promotion of a 'yes' vote to a referendum. In *McKenna v. An Taoiseach (No. 2)*,[44] the Supreme Court ruled that it was unconstitutional for the government to use state monies for the promotion of a particular result. The argument was that if the issue was important enough to warrant a referendum, then it was a breach of fair procedures for the government

[40] *Hanafin v. Minister for the Environment* [1996] 2 IR 321.

[41] *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

[42] *Id.*, 43.

[43] See, *supra*, note 40.

[44] *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10.

to use public monies to tip the balance in favour of amendment. The Chief Justice, Mr. Justice Hamilton stated that:

> "The use by the Government of public funds in a campaign designed to influence the voters in favour of a 'yes' vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State."[45]

(The government party or parties can, of course, use their own private funds for the promotion of their preferred outcome.) Following from the *McKenna* decision, the Oireachtas passed the Referendum Act in 1998, which established a Referendum Commission whose statutory role was to put the arguments for and against each referendum proposal. The Commission itself, on the occasion of the referendum to ratify the Amsterdam Treaty, shied away from such an arduous task, defining its mission as being rather "to explain the subject matter of the referendum to the public at large, as simply and effectively as possible, while ensuring that the arguments of those against the proposed amendment to the Constitution and those in favour are put forward in a manner that is fair to all interests involved".[46] Subsequently, the Referendum Act 2001 removed the Commission's statutory functions of putting arguments for and against the referendum proposals, and fostering and promoting public debate on referendum proposals. Now, its statutory function is to explain the subject-matter of the referendum, to promote public awareness of the referendum, and to encourage the electorate to vote. In a decision of 2000, *Coughlan v. The Broadcasting Complaints Commission*,[47] the Supreme Court ruled on the allocation of airtime for broadcasting of promotional messages for and against referendum proposals. Until then, airtime was being allocated on the basis of number of seats in the lower House of Parliament, but in the *Coughlan* decision, the Court applied the *McKenna* principles in order to rule that it was unconstitutional for there to be an imbalance in the number of broadcast messages between those in favour of the referendum proposal and those against the proposal.

It is this history and experience that we bring to each proposal to change the constitution by means of popular referendum. It is this history and experience that means that we are clear about what the basic rules of the game regarding referenda

[45] *Id.*, 42.

[46] Referendum Commission, Report on the Eighteenth Amendment of the Constitution – Consequential on the Amsterdam Treaty 1998, Dublin.

[47] *Coughlan v. The Broadcasting Complaints Commission* [2000] 3 IR 1.

are: those rules being that the pre-referendum conditions have to be fair; that each referendum proposal is a proposal, and can therefore be either accepted or rejected; that each proposal is accepted or rejected according to the option favoured by a majority of voters, even if that majority is a tiny majority; that the decision of the majority stands and cannot be reviewed; and, finally, that, no matter how sensitive the issue, no matter how divisive the campaign, and no matter how close-run the outcome, there is still room for everybody at the table and constitutional democracy continues. It is this history and experience that means that, even though our constitutional democracy is not perfect, and even though the constitutional amendability procedure that we use has some significant drawbacks, we do see the referendum as part of the constitutional bargain and we are in a good position to take it seriously as such. It is this history and experience, too, that we take with us to the question of the ratification of the treaties negotiated by the Council of Ministers of the European Union.

D. Ireland's Constitutional Amendability and European Treaties

Patricia Roberts-Thomson makes the point that the "unique characteristics" of European treaty referenda are so idiosyncratic that they "query conventional understandings of referendums".[48] She outlines their four distinctive characteristics and drawbacks as follows: "first, the purpose of treaty referendums in re-affirming what is essentially a previous decision and the consequences of this; secondly, the lessening of governmental control over the holding and timing of these referendums; thirdly, the loss of the sense of fairness as the *status quo* position 'moves' with the ratification or rejection of the treaties by other members; and fourthly, the conventional actors in referendums are changing". For the purposes of this discussion, these four characteristics are treated as two pairs, since the first and third features are concerned with the purpose and legitimacy of the referendum itself, and the second and fourth features are concerned with the role of national governments in the referendum campaigns.

Concerning the purpose and legitimacy of the referenda, and in relation to the first feature, Thomson argues that the use of treaty referenda as a mechanism for re-affirming what has already been agreed means that "treaty referendums mark a change in the use of referendums; from one-off affairs – at least when the outcome is positive, to periodic events where essentially the same decision is re-visited both with hindsight and present knowledge".[49] In relation to the third feature, she makes

[48] Patricia Roberts-Thomson, *EU Treaty Referendums and the European Union*, 23 JOURNAL OF EUROPEAN INTEGRATION 105 (2001), 119.

[49] ROBERTS-THOMSON, *supra* note 48, 125.

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the incisive point that the inherent sense of fairness which governs referenda is lost, when, as other member states ratify a treaty, the balance of expectations shifts for those member states which have not. This point cannot be over-estimated, she argues, because it is the inherent sense of fairness that is "one of the major attributes of referendums and a crucial component of their ability to confer political legitimacy. The assumption has always been that referenda were a very fair way of resolving issues – strictly majoritarian in nature so that a 'yes' result would give the authority to change, while a 'no' result would mean maintenance of the *status quo*. But, due to the underlying implications of a possible negative outcome, EU treaty referendums have lost this inherent sense of fairness. While the decisiveness remains, the consequences of the outcome have changed as the parallel actions of other members of the Union mean that there is no acceptable *status quo* position left which would respect a negative vote. This really changes treaty referendums into asymmetrical political instruments."[50] The reality, she recognises, is that the fact that the other Member States have ratified the treaty means that the one remaining Member State is under considerable pressure from them to also do so; making a negative outcome in the referendum an "unacceptable" result,[51] and thereby undermining the purpose and importance of the referendum in the first place.
As regards the role of national governments and their capacity to act as "agenda-setters" for referenda, and in relation to the second feature, she makes the valid point that treaty referenda expose the fact that the national government has less control over the decision to hold a referendum, the timing of the referendum, as well as the content of the proposal put before the people. This ties with the fourth characteristic, which is that conventional actors in the referendum process are changing. This point is corroborated by the studies of Min Shu who argues that "national governments are less competent to control the agenda of treaty referendums. Nor does the national party system function well. Instead, *ad hoc* social movements and interest groups are ready to align themselves with the yes/no camps. As a consequence, the voting campaigns of treaty referendums often draw a chaotic picture of campaign argumentation and political mobilization".[52]

In sum, her argument is that the unique circumstances in which European treaty referenda take place conspire to undermine both the meaning and legitimacy of the referendum itself and the role of the national government as agenda-setter for the referendum campaign. The overall effect of the conspiracy, ironically, is that treaty

[50] ROBERTS-THOMSON, *supra* note 48, 122.

[51] ROBERTS-THOMSON, *supra* note 48, 125.

[52] Min Shu, *Referendums and the Political Constitution of the EU*, 14 EUROPEAN LAW JOURNAL 423 (2008), 441.

referenda are very difficult for governments to 'win'.[53] I do not doubt that all of this is extremely plausible, nor would I dispute the fact that we need to become more conscious of the negative impact that the "unique characteristics" of European treaty referenda can have, but again, this analysis treats European treaty referenda as if they have nothing to do with the national constitutional commitments of Member States. In Ireland, at least, this kind of reasoning has been emphatically rejected by the Supreme Court.

In the case of *Crotty v. An Taoiseach*,[54] the Supreme Court established the rule that the government must arrange for a referendum when it proposes to ratify a European treaty that entails an amendment to the Irish Constitution. The case concerned the ratification of the Single European Act and although the decision is well-known, the reasoning for the decision is rarely discussed. The Chief Justice, Mr. Justice Finlay, opened the discussion by holding that the Irish people had signed up to a particular vision of the European Economic Communities in 1973, when they voted in a referendum to add the first sentence of Article 29.4.3 (as it was then) to the Constitution.[55] He ruled that this provision must be construed as:

> [A]n authorisation given to the State not only to join the Communities as they stood in 1973, but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities. To hold that the first sentence of Article 29.4.3 …. does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad.[56]

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[53] Shu, *supra* note 52, 441.

[54] *Crotty v. An Taoiseach* [1987] IR 713.

[55] Article 29.4.3 was inserted into the Constitution by the Third Amendment of the Constitution Bill, 1971 the purpose of which was to allow the State to become a member of the European Communities. Article 29.4.3 read as follows: "The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on 25th day of March,1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State".

[56] *Crotty v. An Taoiseach*, *supra* note 54, 767.

The question then was whether the Single European Act constituted an amendment in the "essential scope and objectives" of the European project as envisaged in 1973:

> In discharging its duty to interpret and uphold the Constitution the Court must consider the essential nature of the scope and objectives of the Communities as they must be deemed to have been envisaged by the people in enacting Article 29, section 4 sub-section 3. It is in the light of that scope and those objectives that the amendments proposed by the Single European Act fall to be considered.[57]

The Court went on to determine that the Single European Act had an aim, which if it "were ever achieved it would constitute an alteration in the essential scope and objectives of the Communities to which Ireland could not agree without an amendment of the Constitution."

The reason that the people must be consulted when the government wishes to transfer certain of its powers to the European institutions is because the powers invested in the government do not belong to the government, but belong rather, in the first instance and in the final analysis, to the people. It is not possible, then, for the government to divest itself of those powers without the approval of the people in accordance with the Constitution. In the words of Mr. Justice Walsh:

> It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution.[58] …
> The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the people, the contemplated restrictions upon freedom of action. To acquire the power to do so would … require a recourse to the people "whose right it is … in final appeal, to decide all questions of national policy, according to the requirements of the common good" … In the last analysis it is the people themselves who are the

[57] *Crotty v. An Taoiseach*, *supra* note 54, 768.

[58] *Crotty v. An Taoiseach*, *supra* note 54, 778.

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> guardians of the Constitution … the assent of the people is a necessary prerequisite to … ratification.[59]

Mr. Justice Hederman concurred, providing succinct summary of the ruling:

> [T]he essential point at issue is whether the State can by any act on the part of its various organs of government enter into binding agreements with other states, or groups of states, to subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other states … The State's organs cannot contract … in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers – not the disposers of them.[60]

It is this basic proposition that is at play every time that the Irish government negotiates a treaty with other countries: the government, as a whole, and the Minister for Foreign Affairs, in particular, do have plenipotentiary status in the sense that they are the rightful representatives of the Irish people at such negotiations and they negotiate on behalf of and with the authority of the Irish people, but they cannot give away their powers, because those powers do not belong to them, but belong, rather, and ultimately, to the Irish people.

It goes without saying, then, that we do not have referenda on European treaties in Ireland because the Irish people are fixated with the minutiae of European policies. Any treaty that proposes to transfer the power to develop European policies from our national organs of government to the European institutions necessarily entails an amendment to our Constitution, and therefore requires a popular referendum. Fundamentally, then, the popular referenda held in the context of European treaties do not presume to exalt the role of the Irish people beyond that of the peoples of the other Member States, but rather to honour the rightful place, in constitutional law, of the Irish Constitution itself. From the perspective of Irish constitutional law, a European treaty referendum is not about choosing to sanction or to refuse to sanction the projects and policy plans of the European Union, but rather about the decision of whether or not to change the Irish Constitution, in order to delegate to the European Union certain capacities for government which, under the Constitution, belong to the Irish Oireachtas.

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[59] *Crotty v. An Taoiseach*, *supra* note 54, 783-4. Here Mr. Justice Walsh is quoting from Article 6 of the Constitution, mentioned *supra* note 39.

[60] *Crotty v. An Taoiseach*, *supra* note 54, 794.

If we look at the Thomson characteristics in tandem with Irish constitutional law regarding the amendability procedure, and the *Crotty* decision in particular, the significance of these 'unique characteristics' of European treaty referenda changes. Concerning the purpose and legitimacy of the referenda, and in relation to the first feature, where Thomson had argued that treaty referenda are used for re-visiting the same decision over and over, the *Crotty* judgment makes clear that it is only when and because the original decision could not have anticipated the changes which subsequently follow that a new referendum must take place.[61] In relation to the third feature, Mr. Justice Finlay, Chief Justice, insists that the Irish people have sovereignty over the decision of whether or not to ratify the Single European Act, and that "[s]overeignty in this context is the unfettered right to decide: to say yes or no".[62] More generally, as regards the role of national governments and their capacity to act as "agenda-setters" for referenda, although it is true that the government does not have a free hand as regards the timing of European referenda whereas they do with national referenda, it is already the case, at national level, that the Irish government's role is tightly circumscribed under national constitutional law, and in the name of constitutional justice, so perhaps the difference here between the national referenda and European referenda is not as great as would typically be the case.

The point is that, in Ireland, the distinctive characteristic of "European treaty referenda" is that there is a good chance that they will be treated, as they ought, from a constitutional point of view, to be treated: as national referenda, which raise questions about the basic terms of association of the Irish people. Perhaps this makes Ireland different to other Member States. Perhaps this makes us more likely to vote no, or at least less reticent about voting no. But it does not make us anti-European. Nor does it mean that we are not taking either the European treaty in question or the national constitution seriously. It is not evidence of the failure of the constitutional amendability procedure. Nor does it undermine the strength of our national constitutional democracy. And, finally, it does not systematically scupper Europe's constitutional ambition.

E. Europe's Constitutional Ambition

[61] See a recent article by Benoît Keane which discusses the question of whether the ratification of the Lisbon Treaty required a referendum and concludes that it did. Benoît Keane, *The Lisbon Treaty: Does Ireland need a Referendum?*, 26 (7) IRISH LAW TIMES 108 (2008).

[62] *Crotty v. An Taoiseach*, *supra* note 54, 769.

The general haziness surrounding the question of what exactly Europe's constitutional ambitions are means that this section of the paper is perhaps the most tentative. However, since the possibility that Europe will one day have a (big 'C') Constitution does not take away from the fact that she is already operating under a (small 'c') constitution,[63] the general haziness surrounding the former does not obviate the need for careful consideration of the latter. Hence that haziness does not, of itself, make this section superfluous or unimportant as it seeks to shed some light on the subject of the connection between national constitutional amendability procedures and Europe's constitutional ambition. There are at least three levels at which the credibility of the national constitutional order and the credibility of the European constitutional order are connected and they are discussed in turn.

First, and most obviously, Europe's interest in supporting the national constitutions and the democratic outcomes of their constitutional amendability procedures of its Member States is more than a passing 'by-stander' interest. While the European Union may urge third countries to respect the decisions of their people in national elections, to honour national constitutions and democratic procedures, etc.,[64] it requires its own Member States and any potential new Member States to be above reproach in this regard.[65] This is because the Union itself is "founded on the values of respect for … democracy … [and] the rule of law",[66] and so for the Union to be founded on respect for democracy, its Member States must be functioning democracy.

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[63] On the question of whether or not Europe has a constitution see *inter alia* Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 (2) EUROPEAN LAW JOURNAL 125 (2002); Erik Oddvar Erikson, John Erik Fossum, & Augustín José Menéndez, DEVELOPING A CONSTITUTION FOR EUROPE (2004); Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUROPEAN LAW JOURNAL 282 (1995); Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REVIEW 5 (2001); Jürgen Habermas, *Comment on the Paper by Dieter Grimm: 'Does Europe Need a Constitution,'* 1 EUROPEAN LAW JOURNAL 303 (1995); Joseph Weiler, & Marlene Wind, EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (2003); Neil Walker, *Big 'C' or Small 'c'?*, 12 EUROPEAN LAW JOURNAL 12 (2006); Neil Walker, *Europe's Constitutional Engagement*, 18 RATIO JURIS 387 (2005); Neil Walker, *Europe's Constitutional Momentum and the Search for Polity Legitimacy*, 4 (2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 211 (2005).

[64] As, for example, in the case of the elections in Zimbabwe in June 2008. See statement of Javier Solana, EU High Representative for the Common Foreign and Security Policy, on the run-off presidential election in Zimbabwe, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/declarations/101547.pdf, last accessed 25 September 2008.

[65] Evidenced by the reaction, in 2000, to Jörg Haider's far right Freedom Party becoming part of the government in Austria, and by the stringent requirements imposed on acceding countries that they meet the requirements of the *acquis communautaire*.

[66] Article 1a of the Treaty on the European Union as proposed to be amended by the Treaty of Lisbon.

Second, to the extent to which Europe already has 'a constitution', the constitutional amendability procedure of that constitution is the requirement that all Member States unanimously ratify each Treaty according to the procedures prescribed by national law. Undeniably, this is an unusual constitutional amenability procedure, and indeed, as one of the basic rules of international law, we tend to think of such a procedure as evidence of the non-existence of a constitutional order. In this regard, it is a wonder that the Constitutional Treaty did not provide for a different constitutional amendability procedure, rather than seeking unanimity (albeit with the proviso that the European Council could consider the question if twenty of the twenty-five Member States were successful in its ratification). The point, however, is not whether or not the procedure is labelled a *constitutional* amenability procedure, but rather that the fact that this procedure was not accidentally chosen. This amenability procedure belongs in the (constitutional) configuration in which it was conceived. Therefore, it tells us important things about the nature of the order that was brought into being by that configuration.

As an amendability rule, unanimity of Member States is arguably much more demanding, than, for example, the Irish or American constitutional amendability rules. It is made more arduous still by the fact that the various Treaties 'constitutionalise' so many rules and procedures and policies. Eisgruber had argued, as noted above,[67] that the two most viable options for a constitutional amenability procedure were, either, to make the procedure relatively easy and to write quite a number of decisions into the constitution, or else to make the procedure relatively difficult, but to 'constitutionalise' only a small number of choices. Nobody could have been in any doubt that it would make amendment extremely difficult to achieve. Why, then, was it chosen as the amendability procedure? Why is it still being chosen as the amendability procedure? What is it that can be gained from the unanimity requirement that makes the price of that difficulty worth paying? The sheer political inefficiency of the unanimity requirement must have meant – and must continue to mean – that there is something very great to be gained by following such a procedure. Here, it is worth returning again to Eisgruber's analysis, where, discussing how a polity chooses its amendability procedure, he explains that:

> When a constitution is first established, one crucial objective of its framers will be to secure widespread, durable commitment to the new political system. Rarely will that be easy. Constitutions are usually, among other things, deals among parties who distrust one

[67] See, *supra*, note 15.

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> another. New constitutions are therefore fragile. After the constitutional system is launched, winners in the political process will be tempted to consolidate power, and losers will be tempted to reopen questions about the legitimacy of government institutions. If a constitution is to endure, its makers must strive both to create institutions that seem fair and to provide institutional guarantees that the deal will be honoured.[68]

The amenability procedure is chosen to be the warranty for the entire order – the guarantee that those who emerge strongest from the constitutional bargain will not undermine the bargain by re-configuring the constitutional order in a way that best suits their interests. In this sense, unanimity is in the European situation as Article V was in the US situation, the insurance against the fear that "states could collude after ratification to unravel the constitutional bargain". Of course, a more flexible amenability procedure would make it easier, in both polities, to affect change more efficiently and to produce a more energetic pattern of reform, but, as Eisgruber neatly puts it, "that fact would carry no weight if the rule made it impossible to establish a stable system of government in the first place".[69] The inflexible and arduous amendability procedure of unanimity is a price worth paying because it makes the political enterprise of the European Union viable in the first place, by providing the conditions that enable the constituent Member States to trust each other enough to put and to hold in common the good that they all strive for.

That is to say: if the constitutional ambition of the European Union is 'ever closer union between the peoples of Europe', unanimity on the basis of national constitutional amendability rules is the mechanism by which this 'ever closer union' has been made uniquely possible and upon which this 'ever closer union' continues to depend. Unanimity has been chosen – and continues to be chosen – as the amendability procedure for the European polity because it is the procedure that best guarantees the stability and endurance and continuing legitimacy of the entire (constitutional) bargain; that best ensures widespread durable commitment to that bargain; that best guarantees that those who are stronger do not undermine that bargain at the expense of those who are weaker. When we honour the unanimity requirement, then, we honour the basic bargain of the Member States of the European Union. We say that this basic bargain is more important than political expediency, or bureaucratic efficiency. We say that this basic bargain is more important than any policy reforms or institutional reforms that we might want to introduce. We say that, even when it costs and even when it hurts, the basic bargain

[68] EISGRUBER, *supra* note 15, 23.

[69] EISGRUBER, *supra* note 15, 24.

must be upheld for the sake of and in the name of the European Union itself. On the other hand, when we do not honour the unanimity requirement, then no matter how great the reforms we effect and no matter how efficiently we implement them, we have sacrificed the basic bargain of the Member States and we have disappointed the trust of the Member States who committed themselves, on the basis of the basic bargain, to the European order.

Finally, there is an even more intimate connection between the credibility of the national constitutional order and the credibility of the European (constitutional) order. That is that the European Union exists because of, and on the basis of the mandate provided by, the constitutions of its Member States. This is part of the reason why ratification of European treaties takes place according to the requirements of national law. There can be no canonical uniform method that provides for the insertion of European law into national law because it is the national constitution – unique to each Member States – that governs the conditions under which that insertion is possible. This argument is developed very capably, *inter alia*, by the judgments of the German *Bundesverfassungsgericht*, the Spanish *Tribunal Constitucional*, and the Polish *Trybunał Konstytucyjny* in their famous rulings on the relationship between national constitutional law and European law. The *Bundesverfassungsgericht* recognised in the German 'Maastricht' decision, *Brunner v. the European Union Treaty*,[70] that, it must itself be the final arbiter of all laws applicable in Germany as well as the extent of their application, because that is what the German Constitution provides. Extra-judicially, one of the judges used the metaphor of a "bridge"[71] to convey the meaning and importance of the point of connection. The Spanish *Tribunal Constitucional*, ruling on the compatibility of the Spanish Constitution with the Treaty establishing a European Constitution,[72] that Article 93 of the Spanish Constitution[73] was more than merely a formality that provided for Spain's accession to the European Union. Instead, the Court ruled, Article 93 is "a basic constitutional means of integrating other sets of laws into our own, by the transfer of the exercise of powers derived from the Constitution". The *Tribunal Constitucional* metaphorically describes it "as a hinge by means of which the Constitution itself admits other legal systems into our constitutional system

[70] Cases 2 BvR 2134/92 & 2159/92, *Brunner v. the European Union Treaty* [1994] 1 CMLR 57.

[71] Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 EUROPEAN LAW JOURNAL 225 (1999), 226.

[72] Declaration 1/2004, Case 6603-2004, *Re the EU Constitutional Treaty and the Spanish Constitution*, 13 December 2004, reported in [2005] 1 CMLR 981.

[73] Article 93 of the Spanish Constitution reads: "By means of an organic law, authorisation may be granted for concluding treaties by which the exercise of powers derived from the Constitution shall be vested in an international organisation or institution".

through the transfer of the exercise of powers".[74] The Polish *Trybunał Konstytucyjny*, similarly, ruled, in the judgment of 11th May 2005 on the compatibility of the Accession Treaty with the Polish Constitution,[75] that the Polish Constitution cannot be taken to have delegated to the EU "the competence to issue legal acts or take decisions contrary to the Constitution, being the 'supreme law of the Republic of Poland'.[76] In fact, according to the Court, "the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable *threshold* which may not be lowered or questioned as a result of the introduction of Community provisions".[77]

The three metaphors used by the Courts – bridge, hinge, and threshold – express that the national constitutional amendability procedure is the point of connection between national constitutional law and European law. All three judgments clearly make the point that it is only by means of the national constitution that European law enters the national legal order at all. That is, as well as being the final touchstone for the validity in national law of European law, the national constitution provides the point of connection through which European law is, actually, *law* in the national order. They expressly state that Europe's constitutional pedigree comes exclusively through national constitutional law and the national constitutional amendability procedures. They thereby expressly make the credibility and strength of the European order contingent on the credibility and strength of the national constitutional order. The implication, then, is that when we undermine national constitutional law, we undermine the fundamental basis of *existing* European law in the national legal and constitutional order.

To briefly summarise this final section: the interest that the European Union has in upholding and defending national constitutional amendability procedures, even when those procedures produce 'unpleasant' results is threefold. It is the interest that arises because the EU is founded on respect for democracy and the rule or law; the interest in defending the basic bargain of the Member States by upholding the amendability procedure inherent in that basic bargain; and the interest in protecting the legal basis, in national law, by which European law is deemed valid law for the national order. Perhaps it is over-stating things to claim that these three aspects alone comprise Europe's constitutional ambition, but they certainly are

[74] Declaration 1/2004, Case 6603-2004, *Re the EU Constitutional Treaty and the Spanish Constitution*, 13 December 2004, reported in [2005] 1 CMLR 981, 993; para. 34

[75] Judgement of 11 May 2005 r. in the case K 18/04.

[76] Article 8(1) of the Polish Constitution.

[77] Judgement of 11 May 2005 r. in the case K 18/04, para. 14 of the official summary. Emphasis added.

crucial aspects of that ambition. Those who are interested in pursuing that ambition should be clear, then, that they must also uphold the constitutional amendability procedures that make their ambition possible. Or, to put the matter in a slightly different way, the extent to which Europe's constitutional ambitions are premised on the necessity of overwhelming national constitutional amendability procedures, is the extent to which Europe's constitutional ambitions themselves undercut Europe's constitutional ambitions. This is why the problem created by the rejection of the Lisbon Treaty in Ireland is primarily not an Irish problem. This is why the reasons that induced the Irish people to vote 'no' are not nearly as interesting as the reasons that induced a hostile reaction to the 'no' vote.

F. Conclusion

The Open Europe survey conducted in Ireland after the visit of Nicolas Sarkozy, President of France and incumbent President of the European Union, on 21 July revealed that, by that stage, 71% of voters were against the idea of a re-vote on the Lisbon Treaty; 62% of them saying that they would reject the Treaty the second time around.[78] Whether or not a re-vote occurs, and whether or not the Lisbon Treaty will find acceptance, as the Nice Treaty did, at the second time of asking,[79] what matters most is that we re-awaken our sensibilities to the constitutional meaning of the results of European treaty referenda, not only for Ireland, or for any individual Member State, but for the entire European project. Our constitutional amendability procedures are delicate at the best of times, just as our constitutional democracies are delicate at the best of times, and the European project is delicate all the time. When they produce results that we do not like, they can be overwhelmed and overborne. If that happens, and even if it is hailed as a political victory, it is not won without enormous constitutional cost.

[78] Available at http://www.open-europe.org.uk/media-centre/pressrelease.aspx?pressreleaseid=81, last accessed 25 September 2008.

[79] Cathryn Costello, *Ireland's Nice Referenda*, 1 EUCONST 357 (2005); Katy Hayward, *'If at first you don't succeed…' The Second Referendum on the Treaty of Nice, 2002*, 18(1) IRISH POLITICAL STUDIES 120 (2003); Gerard Hogan , *The Nice Treaty and the Irish Constitution,* 7 (4) EUROPEAN PUBLIC LAW 565 (2001).