

TEXT OF AN ADDRESS

By Michael McDowell S.C.

To a Lawyers for Lisbon Meeting

Venue: Constitutional Room, Shelbourne Hotel, Dublin

Sunday 20th September, 2009

In his address, Mr. McDowell:

- **Examines the issue as to whether the Lisbon Treaty is creating a federal E.U. state or super-state**
- **Rejects the argument that an irreversible process of creating an E.U. state is started by the Treaty**

- **Examines powerful decisions of the Czech and German Constitutional Courts on the issue of Member State sovereignty and the nature of E.U. post Lisbon**
- **Concludes that the Lisbon Treaty does not create an E.U. state or create an unstoppable slide into such a state**
- **Points out that the E.U. institutions will remain the creatures of sovereign Member States who will remain “*Masters of the Treaties*”**
- **Re-affirms that Member States – and not the Union itself – retain the “*last say*” as to the future of the E.U.**
- **Makes clear that the E.U. is not, and will not become under the Lisbon Treaty – a sovereign state or a federal state**
- **Argues that, in the light of these important Member State Court decisions and in the light of the guarantees negotiated by Government, Ireland’s interest would be served by a “*Yes*” vote.**

Introductory

I want to thank the Lawyers for Lisbon Group for inviting me to be here today to address a central issue in the public debate concerning the Referendum to be held on the 2nd of October 2009, on the Lisbon Treaty.

I want to stress that I am not a member of Lawyers for Lisbon or any group participating in the campaign on either side of the Lisbon issue. I am speaking here on an entirely personal capacity.

Is the Lisbon Treaty the beginning of a federal European super-state?

In the course of the last number of years, many people have suggested that the constitutional treaty which was negotiated in 2004 was the start point of an irreversible process leading to the creation of a European Union in the form of a federal super-state.

The implication of such a view is that Ireland would lose its status as a sovereign independent state whose future lay in the hands of, and was determined by, the choice of its citizens alone and would be transformed into a province or federated state, giving it the same status in international matters as, say, Rhode Island or New Jersey has within the United States of America.

Concern has been expressed that this is, in effect, the last opportunity for the citizens of Ireland to take a stance against and reject the creation of a European federal super-state to be known as the European Union.

If that indeed were the consequence of voting “*Yes*” in the referendum on the Lisbon Treaty, many people would be reluctant to do so having regard to the obvious implications for Irish sovereignty, autonomy and for the independence of Ireland which is not yet a century old.

It is to this issue and to the concerns of many people in the centre ground of Irish politics that I wish to address my remarks today.

Context

I have, over the last eight years frequently spoken about what I consider to be a structural defect in the Irish public discourse on the question of our membership of the European Union.

The structural defect of which I speak is the failure of the Irish political establishment, in which I include the body politic, political parties, civic society and the media, to examine real, as opposed to the false, questions about Ireland’s membership of the European Union and its future.

Personal Perspective

As long ago as Monday the 18th of June, 2001, when I was Attorney General, I spoke in a personal capacity to the Institute of European Affairs in the immediate aftermath of the rejection of the Nice Treaty in the first referendum that year. I have appended a copy of that address to this paper for reference.

In the course of that address I examined what I even then considered was a failure in the Irish political system to address the real issues concerning our future membership of the European Union and our willingness to substitute for such a constructive debate a phony “*Punch and Judy*” between the extremes of the arguments – the Federalists at one end of the spectrum and those who have always rejected our joining the EU and each and every subsequent treaty at the other end of the spectrum.

At that time, I welcomed the proposed National Forum on Europe which was later established in the wake of the rejection of the first Nice referendum. I argued for a different perspective in the European debate – namely one which would concentrate on what kind of Europe we wanted to build rather than the sterile and unreal argument between those who were strongly Federalist on the one hand and those who were Euro rejectionists on the other.

Time went by and I eventually had the opportunity, in early 2007, as Tánaiste and as Leader of a political party, to address the Forum on Europe on a vision for the development of Europe based on the principle of partnership rather than the ambitious federalist agenda of creating a European super-state with a directly elected President, Government and Parliament. I append, also for reference sake, the text of my address to the National Forum on Europe in which I outlined the partnership vision for Europe as distinct from the federalist vision.

My reason for appending these documents to this address is to demonstrate (although I wish it was not necessary to do so) that I do not come to the issue either as a Euro Federalist or a Euro Sceptic, but as a Euro Realist.

“Are you for or against Europe?” – A Non-Question

In my view, we have been ill served by a public discourse which has been dominated by the extremes of opinion on Europe to the exclusion of the centre ground. It is not a matter simply of finding oneself uncomfortable at having to witness a debate in which the opposing points of view are largely articulated by persons and groups with whom one has little or nothing in common. The more important failure in the Irish political discourse has been a complete inability to get beyond the rhetorical question: *“Are you for or against Europe?”*

Being “*for*” the European Union does not constitute writing a blank cheque for the creation of a federal super-state.

Being “*against*” the creation of a federal super-state does not mean that one is against the European Union unless one is driven to the conclusion that the European Union, as we see it today and as it is intended to develop, must inevitably and irreversibly lead to the creation of a federal super-state.

For my part, I believe that the political ambitions of the Federalists (and I do not deny that they are entitled to hold such ambitions) are both wrong and unachievable.

As a person who intends to vote “*Yes*” in the referendum on the 2nd of October because I believe that it is overwhelmingly in Ireland’s interests to do so, I nonetheless need reassurance that by casting a yes vote, I am not simply signing a political cheque for the creation of a federal European super-state against my wishes.

That is the issue which concerns many people in the centre ground of Irish political opinion and it is the issue with which I intend to deal with today.

Constitutional Courts' Decisions on the Lisbon Treaty

Two European Union Member States have constitutional courts which have carefully examined the Lisbon Treaty with a view to establishing whether it does amount to the institution of a federal super-state.

These are the constitutional courts of the Czech Republic and of the German Federal Republic.

That it fell to the constitutional courts in those countries to decide on the issue rather than to the people under a referendum is, in part, due to the mode of incorporation of membership of the European Union in the respective laws of the Czech Republic and of the German Federal Republic.

Unlike in Ireland, where the provision for Ireland's membership of the European Union explicitly makes European law superior to Irish constitutional law, the Czech and German Constitutions have a different method of incorporation which empowers their constitutional courts to test the constitutionality of each of those States' ratification of the Lisbon Treaty by reference to the compatibility of the Treaty with their Constitutions as they stood.

The Czech Decision

In the Czech Constitutional Court's decision of the 26th of November 2008, a judgment on foot of a petition from the Senate of the Parliament of the Czech Republic, the court closely and carefully considered whether the Lisbon Treaty would have the effect of creating a European "state" whose laws were superior to those of the Czech Republic.

The Court concluded, after a lengthy analysis as to whether the Treaty was consistent with the status of the Czech Republic as a sovereign state, as follows:

"... it is important to point to the ability of a member state to withdraw from the European Union by the process set forth in Article 50 of the Treaty on EU; the explicit articulation of this possibility in the Treaty of Lisbon indisputably confirms in principle that 'States are the Masters of the Treaty' and the continuing sovereignty of member states."

The Court later stated:

"We can conclude from these deliberations that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but on the contrary, can lead to strengthening it within the joint actions

of an integrated whole. The EU's integration process is not taking place in a radical manner which would generally mean the 'loss' of national sovereignty; rather it is an evolutionary process and, among other things, a reaction to the increasing globalisation in the World."

The “Competence Competence” Issue

The Czech Constitutional Court also stated that there **would** be a breach of the Czech Constitution if, on the basis of a transfer of powers, an international organization could continue to change its powers at will, and independently of its members, i.e. if an autonomous binding constitutional competence (a so-called “*competence competence*”) were transferred to it.

But, the Court held, inter alia, that the Treaty of Lisbon does *not* have such consequences in relation to the European Union and consequently it was consistent with the constitutional order of the Czech Republic.

Here, then, is a valuable analysis of the sovereignty issue, the future role of Member States, and a clear statement by the Czech Constitutional Court that the “*competence competence*”, i.e. the capacity to finally and authoritatively decide to determine its own capacity were transferred to the institutions of the European Union to be developed at will and independently of its members has **not** been transferred to the European Union.

The German Decision

In June 2009, the German Constitutional Court based at Karlsruhe, the Bundesverfassungsgericht, also considered the question as to whether the Lisbon Treaty had the effect of creating a sovereign entity.

The German constitutional court held that the German Constitution, the basic law, gives powers to Germany to participate and develop a European Union which is designed as an association of sovereign nation states (Staatenverbund). It held that the concept of Verbund covers a close, long-term association of states which remain sovereign, an association which exercises public authority on the basis of a Treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the people of their Member States, i.e. the citizens of the states, remain the subject of democratic legitimization.

The Principle of Conferral

The German Constitutional Court also held that the “*principle of conferral*” was a fundamental principle which continued to apply to the European Union and that the German Constitutional Court had and retained the function under German law of determining whether any particular concern or competence upon the European Union was

consistent with the German Constitution in general and, in particular, with the status of Germany as an independent sovereign state.

The Lisbon Treaty neither creates a new state nor dissolves any existing state. It creates no new or competing source of sovereignty and it extinguishes no existing source of Member State sovereignty.

The principle of conferral is of fundamental importance. It means that the EU's powers are not innate or self-sustaining. They exist and subsist solely on foot of the individual Member State's continued adherence to the treaties that confer the power. They are not derived from the separate will or mandate of the people of the EU. They are powers lent by sovereign Member States to the Union, as the Czech court found.

In this respect, the suggestion that the Lisbon Treaty creates a sovereign state or super-state is clearly wrong. The fact that the Union may, like the United Nations, have "*legal personality*" does not constitute it a "*state*", let alone a "*sovereign state*".

The German Constitutional Court held that:

"The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, an institution conferred under an international agreement, i.e. a derived institution which will have legal effect in Germany only with the order to apply the law given by the Act approving the Treaty of Lisbon.

This connection of derivation is not altered by the fact that the institution, the primacy of application is not explicitly provided for in the Treaty but has been obtained in the early phase of European integration and the case law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of Member States that at any rate if the mandatory order to apply the law is evidently lacking, the inapplicability of such a legal instrument to Germany is established by the federal constitutional court. This establishment must also be made if within or without the sovereign powers conferred, these powers are exercised with effect on Germany in such a way that a violation of the constitutional identity which is inalienable pursuant to Article 79.3 of the Basic Law and which is also respected by European law under the Treaties” [my emphasis]

The German Constitution Court also held that European unification on the basis of a union of Member States under the Treaty could not be realized in such a way that the Member States would not retain sufficient room for the political formation of the economic, cultural and social circumstances of life. It held that this limitation applied in particular to areas which *“shaped the citizen’s circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by fundamental rights and to political decisions that particularly depend on previous understandings as regards culture, history and language which unfold in discourses in the space of a political public that is organized by party politics and parliament”*.

Citizenship of the EU

The Court held that the German Constitution aimed to integrate Germany into a legal community of peaceful and free States but does not waive the sovereignty contained in the last instance in the German Constitution. The Court held that after ratification of the Treaty of Lisbon, the Federal Republic of Germany would continue to have a “*State people*”.

It continued: “*The concept of the ‘citizen of the Union’ which has been more strongly elaborated in Union law, is exclusively founded on Treaty law. The citizenship of the Union is solely derived from the will of Member States and **does not constitute a people of the Union, which would be competent to exercise self determination as a legal entity giving itself a constitution***”. [My emphasis]

The Court also decided that the introduction of the citizenship of the Union did not permit the conclusion that a federal system had been founded.

Unless the people of each Member State at some point in the future voted to extinguish their own sovereignty and to create a European sovereignty based on citizenship, it was incompetent for their legislatures or for a European Union organ to attempt to do so.

Criminal Justice

The German Court also considered the whole issue of criminal law and the provisions of the Lisbon Treaty in relation to the area of criminal justice.

Of course, Ireland has secured an opt-out in respect of this area.

However, Germany which has no opt-out is, nonetheless, now required, by virtue of its Constitutional Court's decision to take a very narrow and conservative view of the scope for EU legislation in the area of criminal law. The Court said:

“Due to the fact that democratic self determination is effected in a specially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the treaties must be interpreted strictly – on no account extensively – and their use requires particular justification. The core content of criminal law does not serve as a technical instrument for effectuating international cooperation but stands for the particularly sensitive democratic decision on the minimum standard according to legal ethics. This is explicitly recognized by the Treaty of Lisbon where it equips the newly established competency in the administration of criminal law with a so-called emergency brake which permits a member of the council which is ultimately responsible to its Parliament to prevent directives with relevance to

criminal law at least for its own country, invoking 'fundamental aspects of its criminal justice system'.”

On a personal note, I find particular satisfaction in the analysis and findings of the German Constitutional Court in this area as, in the lead up to the Lisbon Treaty I had consistently argued that in the area of criminal justice Member States, as sovereign independent States, must retain their autonomy.

The German Court stated:

“Democratic self-determination is, however, effective in a particularly sensitive manner where a legal community is prevented from deciding on the punishability of conduct, or even the imposition of prison sentences, according to their own values. This applies all the more the closer these values are connected with historical experience, traditions of faith and other factors which are essential to the self-perception of the people and their society.”

The German Constitutional Court seriously limited the future capacity of the German Government or Bundestag to agree to approximation measures in the area of criminal law for these reasons.

Sovereign right of Member States to determine pace of integration

Looking at the process of European integration, the German Constitutional Court stated:

“From the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the States remain the Masters of the Treaties, it follows – at any rate until the formal foundation of a European Federal State and the changes of the subject of democratic legitimization which must be explicitly performed with it – that the Member States may not be deprived of the right to review adherence to the integration programme.”

The Court also held that Member States’ Constitutional Courts may not, within the limits of the competences conferred on them, be deprived of the responsibility for the boundaries of their own constitutional empowerment for integration and for *“safeguarding of the inalienable constitutional identity”* of their jurisdictions.

The right of Member States to withdraw

The German Court’s decision also considered the terms of the Treaty of Lisbon which deal with the right of Member States to withdraw from the European Union. In this context, the German Constitutional Court stated:

“The instruments covered by the Act approving the Treaty of Lisbon clearly shows the existing principle of association (Verbundprinzip) in the system of the responsible transfer of sovereign powers and thus satisfies constitutional requirements. The Treaty makes the existing right of each Member State to withdraw from the European Union visible in primary law for the first time (Article 50 TEU Lisbon). The right to withdraw underlines the Member State’s sovereignty and shows apart from this that the current state of development of the European Union does not transgress the boundary towards a State within the meaning of international law If a Member State can withdraw on account of a decision made on its own responsibility, the process of European integration is not irreversible. The membership of the Federal Republic of Germany depends instead from its lasting and continuing will to be a member of the European Union.”

The Court noted that every Member State was, in any event (and separate from Article 50 of the Lisbon Treaty) free to withdraw from the European Union even against the wishes of the other Member States under the Vienna Convention on the Law of Treaties. The right to withdraw was not necessarily based on prior agreement between the Union and the Member State in question.

“Kompetenz Kompetenz”

The German Court, like the Czech Court, held that the European Union had not been given any right of *“Kompetenz–Kompetenz”* and that the *“principle of conferral”* applied in relation to the capacity of the European Union to make decisions as far as Member States were concerned on the extent of its own competence.

Conclusion on State Sovereignty

From all of the foregoing, it seems very clear to me that it cannot be said on a fair analysis of the Lisbon Treaty that its ratification by all the Member States creates a European state or creates any new sovereignty which overrides State sovereignty or vests in the European Union a *“Kompetenz-Kompetenz”* which overrides the capacity of individual Member States, in final appeal, to determine for their own States whether decisions of the European institutions (including the European Court of Justice) lie within or without the competence of those institutions.

While these matters have not been, and may not ever be, argued before the Irish Supreme Court, it seems to me that the decisions make it abundantly clear that the ratification of the Treaty of Lisbon is not an irreversible step towards the creation of some federal state or super-state and, indeed, from the point of view of Member States, is **not** irreversible in any sense.

The Union remains an association (or as the Germans put it, a *Verbund*) of independent sovereign Member States which have not surrendered that status or the legal competence to adjudicate on that status to the institutions of the European Union.

Of course, it may be argued that leaving the European Union would be so problematical for a small State such as Ireland that, in a sense, the explicitly recognized right of succession is of little practical value.

However, if one considers the scenario (which is much more likely) that, say, 30% of the Member States of the European Union have a fundamental point of conflict with 70% of the Member States, then the entirely plausible scenario that they would insist that the process of integration went no further in the disputed area on threat of withdrawal.

Likewise, if the European Court of Justice were to interpret the Treaties in a manner which was wholly unacceptable to a considerable minority or, perhaps, even a majority, of the Member States, the Member States would be in a position, by invoking the possible use of Article 50, to effectively force a change or a climb-down by the Court or to insist on an amending Treaty having the effect of negating the Court decision.

Whatever about these possible scenarios, it seems to me that the logic and force of the two Constitutional Court decisions about the nature and impact of the Lisbon Treaty on Member State sovereignty is compelling and that it offers a very considerable reassurance to those in the centre ground of Irish political opinion on Europe who might be wary of

the reassurances of out-and-out Federalists that there is nothing to fear from the pooling of national sovereignty.

Likewise, it reassures people in the centre ground that the analysis offered by opponents of the Lisbon Treaty to the effect that it marks the end of the Member States as sovereign independent states and the creation of an EU state is also wrong.

I believe that the significance of these judgments is very substantial and can hardly be overstated.

Failure to publicly acknowledge and debate these judgments

I also believe that it was entirely predictable that the implications of these judgments would be largely ignored in the domestic Irish debate. Euro Federalists were not keen on the reasoning or the consequences of the judgment. Euro Rejectionists, on the other hand, preferred to keep in tact the bogey man of a European federal super-state as the consequence of voting “*Yes*” on the Lisbon Treaty.

In the polarised, entirely artificial and unreal model of debate on European issues – the Punch and Judy model referred to earlier – it suited both Punch and Judy, each for entirely separate reasons, to simply ignore the judgments and their implications.

My personal point of view is that these judgments give very substantial reassurance to many people in the centre ground that the Vote Yes for Lisbon is not a vote to create a European state or super-state or, indeed, a vote to end the partnership vision for Europe, or, for that matter, a vote to embark on an irreversible and inevitable journey towards the creation of a Federal United States of Europe along the lines of the American model.

Strong case for a “Yes” vote

In my view, the implications of these decisions, the very significant guarantees obtained by the Irish Government since the voters rejected the first Lisbon Referendum and the immediate economic interests of Ireland, when all combined, pose a strong case for a “Yes” vote on the Lisbon Treaty.

Let’s have a real European debate in future

There are other serious issues which must be dealt with after the 2nd of October. These include a new understanding that Euro-federalism is not the sole, authentic spirit of the European Union. This understanding should permeate the way in which the media debates the future of Europe. It involves abandoning the Punch and Judy show of debate between the extremes and substituting for it a nuanced realistic debate about degrees of integration. It also involves an end, in my view, to the categorization of a pragmatic partnership approach to Europe as “*a Eurosceptic approach*” simply because it is at odds with the views of Euro federalists.

When was the last time that an Irish newspaper or broadcaster really attempted to discuss the substance of integration, its degree and extent, as distinct from the principle?

For that matter, when was there a significant political debate at party level, within parties or between parties, about the issues of sovereignty, integration and the desired balance between the rights of Member States with the Union?

When the Constitutional Treaty and the Lisbon Treaty were being formulated, was the Irish democratic political system really a participant or was it an observer?

Did we collectively allow our diplomacy to become detached from our reasoned self interest?

Was there any mobilisation of political support and opinion in Ireland for the retention of each State's commissioner? Or was it considered better to "*let the sleeping dog lie*"?

And have we paid the price of allowing public opinion to diverge from our state craft?

A lesson from America

Perhaps we could learn from the difficulties which have been encountered in the United States in relation to the Israeli-Palestinian question consequent on the over-polarisation of comment. The equivalent in that context of our "*Punch and Judy*" approach to Europe

and its future gives rise to AIPAC driving the political debate in such a manner that people such as former President Mary Robinson are attacked as “*anti-Semitic*” because they dare to challenge the world view of AIPAC and of the hard line Zionist approach to Arab-Israeli issues.

The same distortion and mutilation of political debate happens in Ireland in relation to Europe if everyone who favours a Yes or a No vote on the Lisbon Treaty is demonized by the other side and if, entirely separate from referendum campaigns, only two extreme camps are recognized as the alternative champions or spokesmen on either side of what is a complex and multi-faceted set of political issues.

I think there are many people like me who would be reluctant to sign a political and constitutional blank cheque and to hand it to the Federalists in the European movement.

However, I hope that the analysis that I have offered today suggests that such a blank cheque for the creation of some European federal super-state is not signed by marking a ballot paper in the Yes box on October 2nd.

ENDS