

Address by Attorney General  
Michael McDowell SC  
To the Institute of European Affairs  
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## **Introductory**

When I was asked a few weeks ago to speak this evening at the Institute of European Affairs, I have to say that I anticipated that I would be addressing you in the context of a Yes decision on the Nice Treaty referendum. That context has not materialised and I have had to reflect on whether the substance of what I proposed to say should be radically altered as a consequence. I have decided to stick with the message that I intended to convey; at the same time I want to take on board the outcome of the referendum.

Because the outcome of the Nice referendum is still a matter of controversy, I am conscious that what I have to say here tonight might be seen to contribute to that controversy. At the outset therefore, can I stress what will become increasingly obvious - namely that I am speaking here in a personal capacity -not on behalf of the Government. I make, therefore, what has become a recurring, routine plea in addresses like this - a plea not to be half heard, half-read, half understood or reduced to a misleading sound-bite.

Can I say at the outset that I was personally in favour of ratification of Nice because I believe that it is necessary to separate the issues of enlargement and integration; that the Nice outcome was largely successful in doing so; that the success of the Taoiseach and others at Nice to a large extent lay in preventing federalists from "handcuffing" enlargement to their own version of integration; and that once enlargement had been given the green light by ratification it would have been possible to confront the federalist agenda head on without being accused of being

selfish. It was always apparent to me that Nice would contain little by way of self interested "good news" for the Irish voter; I had hoped that we could have rolled up our sleeves to face debate on the future of Europe without handing to our opponents in that debate the ammunition to the effect that were obstructing the process of enlargement.

### **EUROPE: A PARTNERSHIP OF STATES OR A STATE ITSELF**

While the reasons for the No decision remain to be teased out, I have little doubt that one major factor which influenced the electorate either not to support Nice or else to come out and vote against it was a widespread perception that developments in Europe were taking a turn, or moving in a direction, that caused deep unease. If I may use rather neutral language at the outset, there is a general perception that the European project is being energetically driven towards the creation of a "European State" with a much greater pooling of political sovereignty and with major implications for the independence of member states - particularly smaller nation states such as Ireland.

The concept of European Statehood lies at the centre of much of the reforms being canvassed in the context of the Inter Governmental Council being planned for 2004.

You will note that I have not used the terms "super-state" or "federal state" or "federation of nation states". That is not because I feel those terms lack meaning; it is because they are frequently used by their proponents or opponents to convey an idea that can be denied,

withdrawn or qualified if they evoke opposition. When Joschke Fischer, Foreign Minister of the German Federal Republic, made his Humboldt University speech, he set out a clearly federalist agenda. On its anniversary, he chose very different language in London. When he spoke a few weeks ago in this building, he was careful to the point of scrupulousness to avoid stoking the verbal fires of federalism. Like Lewis Carroll's "Cheshire Cat", the Humboldt agenda disappeared leaving nothing but a smile. Supporters of federalism have a tendency to fly balloons, haul them down, reconfigure them slightly, and fly them again - depending on geographical location and wind conditions.

There is also a different tendency on the part of some others to obfuscate their ambitions and intentions in *a* vague verbal miasma in which the European project is described as "*sui generis*" and "*unique*". These descriptions are, of course, correct insofar as they go. But they don't go very far in terms of analysis or prediction.

I was interested to note what the retiring Portuguese Secretary of State for European Affairs, Seixas Da Costa is reported to have said earlier this year in the context of a "Treaty of Competences". He stated that the EU had theretofore "thrived on ambiguity" and warned against any attempt to agree on a final model by 2004, particularly among the present 15 member states to the exclusion of the applicant countries.

The concept of "thriving on ambiguity" is, of course, well known. But for ambiguity to be a success in the long term, there has to be some working consensus and a maintenance of trust in the short term. If that consensus or trust breaks down, or if matters are forced prematurely to an unambiguous decision, the voters of Europe will cut through the

political rhetoric of ambiguity and give their judgement on the issues as **they** understand them.

If the IGC proposed for 2004 takes place (and although planned, it is by no means a foregone conclusion), it will only succeed to the extent that the people of Europe agree with and go along with its conclusions.

"Partnership of Member States" approach is the most likely to win and retain the hearts, minds and loyalties of the peoples of Europe. Creation of a European State is, in my judgement, very unlikely to command widespread support.

### **THE PROPOSED FORUM ON EUROPE**

In this context I personally warmly welcome the decision of the Taoiseach and the Government to establish a national Forum on Europe. I have pointed out on several occasions since my appointment that European affairs are not properly debated within Irish democracy. Voters are treated, instead, to a political Punch and Judy show, in which opinions tend to form around opposite and somewhat extreme poles. The real centre ground of ordinary people's opinions is not adequately addressed. The real options are not spelt out or teased out. Instead we have had a stultifying polarised debate, underpinned by the veneer of a stultifying Dail cross party consensus.

If someone forthrightly states his or her own view, instead of welcoming it for what it is, *a* personal view, there is uproar that any individual or contrary viewpoint should be expressed. The Forum will, I hope, allow for a very free exchange of ideas and opinions.

A narrowly based, "hot house" federalist view of the needs and future of the European Union which characterises other views as both morally flawed and intellectually Neanderthal is not pretty to behold. In my personal judgement, federalists who favour the creation of a European State do themselves little justice and no favours by portraying those who are not in agreement with them as moral and intellectual *untermenschen*.

Every European member state, at some stage, faces a "date with its voters" if the 2004 IGC project is to yield change which significantly alters the nature of the European Union or its relationship with its member states. In that context the intelligence of the electorate is not to be underestimated; if they want to create a "European State", they alone will do so. If that idea does not attract them, no amount of studied ambiguity, no stratagem of labelling or re-labelling, no appeals to the "*sui generis*" or "*unique*" nature of the European project will blind them to the substance and the implications of what is on offer. Nor will money.

And dressing up such a constitution in a harmless sounding veil as a "treaty of competences" won't wash either. Indeed, repeated calls made for "clarification" and "simplification" of the Treaties have a superficial attractiveness especially to anyone who has ever attempted to penetrate the verbal thickets which we now describe as "treaties". But perhaps the reason that they are complex, impenetrable to the citizen, and more akin to a lengthy legal contract than to a constitution is **precisely** because they represent a *modus vivendi* for the member states as partners, not a model or a template or a constitution for a European State.

Sooner or later the voters of Europe **will** make a choice between the continuance of the European Project as it now is - a "Partnership of Member States" with complex articles of partnerships and institutions of partnerships

set out and defined in its treaties and case law - or as a sovereign "European State" with its own constitution.

I personally favour the "Partnership of Member States" model; "federalists" favour the "European State" model. Either model is, of course, the stuff of legitimate political ambition and debate; but in my personal judgement, the Those citizens who, like me, strongly support Ireland's membership of the EU and its enlargement as a "Partnership of Member States", with partnership institutions, rules, dispute procedures and shared competences feel very alienated when our ambitions for Europe are categorised as **less** European than those of the "European State" lobby.

I personally believe that the partnership model is not merely legitimate - I feel it is more practical, more robust, more durable, more historical, more democratic and more in tune with the true spirit of Europe, which is complex, diverse and heterogeneous.

### **THE DRIVE FOR A EUROPEAN STATE**

It is my personal view that the negotiation of a Constitution for Europe - whether described as such or dressed up as a "treaty of competences" at this point is arguably previous and possibly quite unwise. To impose, or to attempt to impose, on an EU of 27 Member States, a constitutional order devised by 15 of them is to say the least morally and democratically dubious.

The drive to create a Europe with the attributes of a State is the ambition of what, I think, is only a minority, albeit an important and well placed minority, of Europeans. In recent times we have heard proposals for a

great variety of attributes of a sovereign European State:

- a Constitution
- a justiciable Bill of Rights.
- Citizenship (since Maastricht)
- the power to prosecute, try and punish citizens (the Corpus Juris proposal)
- direct taxation (by Europe)
  - tax harmonisation for the Member States
  - defence capacity
  - a two tier parliament modelled on the German model
  - a directly elected president
  - a Union Government

Few if any of these proposals carry popular significant support. While many of these proposals have been put forward separately, they constitute, in the round, the indicia of a European State in substance - it matters little whether it is described as a super-state or a federal state.

I fully accept that these political categorisations and labels cannot be black and white and that in politics there are few exact or scientific terms of art. But, like the elephant, we know a federal State when we see it, regardless of whether we can define it. These proposals are not coming forward from the people. They are being devised by a narrow class of activist office-holders, elected and unelected; most of the proposals appear to me to have all the potential for electoral take off of early experiments in steam powered flight. This has not inhibited their propagation.

Is it really realistic to expect voters to put them out of their minds when they



ask themselves the fairly basic question: "Do I want to encourage the process of European integration?"

The problem of course is that the inner circle of federalism, whether in the corridors of the Commission, or the European Parliament, or the wings of Council meetings, has the upper hand and the initiative in setting the agenda. If this is the agenda articulated variously by the Commission, by the European Parliament and by statesmen such as President Rau, Chancellor Schroder, and Foreign Minister Fischer, should we be completely surprised if voters, when given a rare chance, attempt to pass judgement on it? It can well be argued that the Nice outcome was effectively quite neutral on these choices. It can be argued with some considerable force that the outcome of Nice was deliberately tailored to be "without prejudice" to the Partnership/State choice. That was, and is, my view of the outcome of Nice.

But to expect voters not to have one eye on the "Partnership/State" issue when considering the merits of Nice was perhaps, in retrospect, a little unrealistic. That is why, I believe, the Forum should allow **all** issues to be addressed.

My personal regret at the defeat of Nice is that the likely outcome of enlargement will be to tip the balance decisively in favour of the "Partnership of States" approach and that the likelihood of a "European State" emerging would be dramatically reduced by enlargement. That is why I favour enlargement sooner rather than later. I also believe that the democracies which were formerly part of the "Warsaw Pact" have a moral entitlement to secure their liberty and prosperity by joining the E.U.

I personally feel that the enlargement agenda is distinguishable from many-aspects of the integration agenda. I certainly feel that it would be wrong to rush our fences on the future nature of the E.U., in order to present the applicant countries with *a fait accompli*.

I believe that, as far as Irish voters are concerned, it is essential to develop and articulate our own view of Europe's future with which the Irish are generally happy and for which the Irish Government can stand with some degree of confidence.

### **IRELAND'S DOMESTIC DEMOCRATIC DEFICIT**

Pausing here, a legal issue of fundamental importance arises. If the "sole and exclusive power to make laws for the State vests in the Oireachtas and not in any other legislative authority"(as Article 15.2 of the Constitution provides), should Irish Ministers have a constitutionally completely free hand to participate in Council meetings whose decisions can effectively abrogate the terms of the Constitution itself in adopting directives and making regulations?

An Irish Minister is, in Irish law, the creature of the Constitution. While under European law his or her colleagues in the EU Council of Ministers are entitled to assume full power and discretion, as a matter of Irish law an Irish Minister need not necessarily be a legal or constitutional plenipotentiary on the part of the Irish State or people.

It is for the Irish people and legislature to decide the policy terms on which Irish Ministers will vote or act at EU Council Meetings. They are subject to Irish law - constitutional and statutory. Such discretion as they enjoy, as a

matter of Irish law, results either from an express or implied constitutional authority.

The very first proposition to be noted is that such Ministers must meet **and act** as a "collective authority". Save in so far as they exercise statutory authority as corporations sole, they are obliged to have the authority of Government, express or implied, for what they do as Ministers. They are collectively responsible to Dail Eireann.

They exercise what is described at Article 28.2 of the Constitution as the "executive power of the State".

It is beyond contradiction that whatever the "executive power of the State" may include, it does not include the legislative power to make laws for the State.

Negotiation and conclusion of the State's external agreements and liabilities is classically seen as part of the "executive power of the State". But it is by no means clear, I think, as a matter of Irish constitutional theory, that the Government or any individual Minister, has the unlimited and unfettered right to oblige the State to make laws even to the point of abrogating established constitutional rights. The obligation to transpose European directives into Irish law rests constitutionally with the Oireachtas. The Oireachtas cannot constitutionally abdicate that function.

From a procedural point of view, it is far easier for an Irish Minister to agree on a European level to a directive with far reaching legal and constitutional consequences than it is to sponsor the most simple piece of domestic

legislation.

That an Irish Minister should be technically at large free to negotiate a regulation or directive which as a matter of European and Irish law the Oireachtas is absolutely bound to accept is a striking proposition; that the Oireachtas should eschew and abdicate any prior consultative right or role in the process leading to the adoption of a regulation or directive appears, on the face of it, greatly at odds with the spirit of the Constitution. With any other legislative measure, the Oireachtas has the power to reverse a decision with which it disagrees. A Minister who makes a delegated legislative decision itself faces the sack; the decision itself faces reversal. That is the legal context in which statutory instruments are usually made.

But in the context of the European Union, a regulation or directive is effectively irreversible once made. Insofar as it delimits and curtails the terms of constitutional rights and guarantees, such a measure has the status of sovereign legislation. It is remarkable, therefore, that present legislative practice has imposed no prior obligation of consultation in routine legislative matters and an obligation to seek at least the consent of the Oireachtas where such a measure would inevitably control or delimit Constitutional guarantees.

Prior consultation may be inconvenient in general, and in many areas might be very inconvenient. But the Danes have lived with that inconvenience and it may well be that the Oireachtas, if it is proposing to restore the people's confidence on European issues, might claim for itself what is arguable its clear entitlement under the Constitution - the role of ensuring that those elected to make laws in Ireland have a real and effective **prior** role in the legislative process in EU matters.

There is also a very strong case for a complete re-think on the way in which the Oireachtas gives its consent to the exercise of the "options and discretions" clause 29.5.6 of the Constitution. Present practice and theory in this area is somewhat tentative.

As a former member of the Oireachtas and as a lawyer and as a citizen, I find myself gravely troubled by the failure of parliamentarians over the last generation, of all parties and opinions, to vindicate the people's rights and fulfill their constitutional role. I have to say that I find myself very much in sympathy with much of the critique offered by one of my predecessors, John Rogers SC, on the absence in practice of real democratic input and accountability in what are potentially vital aspects of legislation affecting our rights as citizens.

In short, it seems to me that there is a strong case, in terms of democracy, constitutionalism and autonomy for a far-reaching reform of the interaction of the Oireachtas with European policy and legislation affairs. I fully acknowledge that it would be folly to equate the most technical and obscure regulation or directive with major policy oriented legislation and that any reform, to be worthwhile, will have to make practical discrimination between them.

My point is that the spirit of the Constitution and quite possibly its words, demand of the Oireachtas a quite different approach to EU matters. Regulations and directives can no longer be the exclusive concern of MEPs, Ministers and technocrats. They are the direct and unavoidable concern of TDs and Senators.

I could add that a full blooded and committed reform in this area would require not merely that the Oireachtas be given greatly increased resources; it would also demand that a core of consciousness, adequately resourced, be created at the centre of Government to ensure that the collective responsibility of the Cabinet and its procedures, have full effect in relation to these European matters.

Doubtless it will be argued that such measures will increase the complexity of Government; the price of full democratic accountability is, of course, not inconsiderable but the added value in terms of integrity and trust in the process may well pay rich rewards in the future, not least in bringing public opinion and Government policy on Europe into harmony.

### **THE THIRD PILLAR AND OTHER DEVELOPMENTS**

The emergence since Maastricht of a competence for the European Union to create an area of freedom, security and justice, and the provisions in the Treaty of Amsterdam concerning police and judicial cooperation have been seen by some as the opportunity to create a uniform or, at least, harmonized system of criminal law for the member states.

It is my personal view that the principle of subsidiarity is of major significance here. That principle is often misunderstood; it is not a principle that the competent centre should devolve responsibility and choice to the maximum degree among component states. Subsidiarity means ( and I quote the Oxford Dictionary):

"The principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level".

This principle, we are told, is a cornerstone of Europe.

Note it is the central authority that is to have the subsidiary function - not the member states. How does such a notion gel with the more elaborate federalist plans on offer at the moment?

The phrase "area of freedom security and justice" and the concept of "police and judicial cooperation" are by no means a mandate for creeping uniformity and approximation in the area of criminal law and criminal justice as ends in themselves.

We are privileged to have a criminal justice system with jury trial, liberal constitutional entitlement to bail, *habeas corpus*, proof beyond reasonable doubt, adversarial trial and a neutral non investigative independent judiciary. This common law heritage is something of great value and of constitutional status. It is, and has been, tried and tested not only here but throughout the common law world - a region where tyranny has never held sway, a region that has, on more than one occasion, formed the last bastion against tyranny and the moral arsenal from which tyranny was vanquished.

In that context, the Corpus Juris project which springs from no popular demand or initiative suggests that the European Union should be invested with the power to establish a public prosecution service for E.U. federal crimes; to establish an E.U. Criminal Court with no jury; to try and convict EU citizens and to jail them.

This project remains on the federalist agenda; it might be time that the need for it was critically examined. Is it consistent with the principle of subsidiarity? Is there any significant element in Irish public opinion that has heard of it - let alone wishes for it?

Third Pillar measures have potentially profound implications for our civil liberties and legal autonomy. Yet they can become binding upon the Irish State by a process that has little or no parliamentary involvement, little governmental scrutiny, and virtually no public awareness. The agenda for Third Pillar, measures is driven from outside this country with little or no domestic public debate.

As one of the relatively few common law jurisdictions in the E.U. Ireland has a particular interest that Third Pillar measures are not imposed on us by stealth or inadvertence. This area of law, above all others, is of profound significance constitutionally and legally to the nature of our society; a very different approach to our involvement with the Third Pillar is needed if the process is to be carried forward.

### **THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS**

I attach a copy of the remarks which I made last year at Trier on the Charter. The Irish Government, among others, strongly resisted the proposal made at Nice to give the Charter Treaty status and the subsequent proposal to incorporate it by reference in Article 6 of the Treaty.

The Taoiseach made it clear that Ireland did not want to accord the Charter constitutional status either at European or at national level. Our position was shared by other states which did not want to establish a new broadly based function for the ECJ. As a result, the Charter was dealt with as a political proclamation.

I have to say that I am a little troubled now to see the Charter fitting into European Law as though it had been formally ratified by the Member



States to become a justiciable component of the Acquis Communautaire. My own belief, as stated last year in Trier, was that the incorporation of the Charter into the Treaties would have been rejected by the people in a referendum. It is disturbing to see indications that enthusiasts for a federal European Constitution are already developing the beginnings of a jurisprudence based on the charter.

I would add that the Taoiseach and Minister Cowen have expressed a reluctance to regard the process which led to the Charter becoming the model for further significant proposals for the IGC planned for 2004.

### **THE NEED FOR SELF CONFIDENCE**

My fourth and last point this evening concerns the evolution of Irish attitudes to the EU. I do not accept the notion that the Irish electorate does not want the EU to enlarge or does not want to admit new member states. Perhaps a small proportion of voters holds those views but the leading spokesmen of the No campaign disavowed any hostility to enlargement per se. I believe that the great majority of Irish voters want the EU to succeed and want to remain part of that success.

I have mentioned before that it is perfectly natural for Irish voters' attitudes to the EU to vary in accordance with our status as a net recipient or net contributor. EU transfers to Ireland have played, and continue to play, a very significant role in our economic transformation. Suggestions, therefore, that we are a society of ingrates who, having crossed the moat, are attempting to pull up the drawbridge on other applicants are, I think, unjustified.

I presume that Ireland, like every other member state, predicates its

European policies and actions on what is termed "enlightened self interest". That is not to be equated with cynicism or greed. We have a collective interest in the success of the European project and as Irish per capita income approaches and exceeds the European average, we have all the more reason to re-evaluate where out-enlightened self interest really lies.

If we have a collective interest in the success of the European project, we also have an interest in participating in the future planning of that project. We have as much right as any member state to develop and articulate and advocate our view of the future architecture of the European Union. It would, I suggest, be folly to await the worked out proposals of the Commission, or of the various think tanks and sponsored researchers or, for that matter, to await the proposals of the larger players such as Germany or France. If we believe, as I personally do, that a Europe based on the idea of a partnership of member states is the model with which Irish people most identify, we should use the forthcoming Forum to elaborate that view. Furthermore, I think we should promote our view with a considerable degree of self confidence. The hand of an Irish Government at any IGC would be immeasurably strengthened by the emergence of a clear view as to where the Irish people stand - a view understood by other member States.

Sometimes, enthusiasts for European statehood justify their more ambitious (and perhaps less realistic) projects by reference to the need to maintain a degree of momentum in the development of Europe. There is an unstated assumption that the European project favoured by them is like a bicycle - unless it is driven forward, it will fall sideways. This mind set is used to justify a rather tightly knit, highly subsidised activism towards a federal

model of Europe. If the project falters or does not "progress" it will collapse.

For my part, I concede that there are certain projects in history which need to be sustained by a degree of momentum. But the danger of such momentum-based justifications is that other interests and perspectives and insights are cast aside in enthusiasm or out of fear of letting the project flounder or die. A robust European project needs four wheels - so that it can go forward if, when and at the pace the people of Europe decide.

Another down side of this mind set is impatience or dismissiveness towards doubters and dissentients. In the context of the EU, it is quite customary to have opponents of federalism dubbed as Euro-sceptics. Here I must profess a slight feeling of resentment. Those of us who are committed to a Europe based on a partnership among nation states are not sceptical about Europe—we are, on the contrary, strongly committed to our vision of Europe which we regards as legitimate, realistic, historically feasible, politically sustainable and democratically accountable. These ideals are every bit as challenging as the federalists' project of European statehood and, perhaps, they are a good deal more practicable.

To that I would add that the creation of a European state that is not subtended by a cohesive integrated and largely homogenous society may not simply be an unrealistic ambition, it might also be the recipe for democratic, cultural and, ultimately, economic disaster. To create the levers and institutions of great power without a corresponding political, cultural and economic and identity and cohesion might not simply be naive folly; it might easily create *a* moral and political power vacuum from which something much more lethal might spring. This is not argument based on scepticism; it is argument based on caution. Our

collective and individual liberties and rights are not necessarily available for experiment on the test bench of enthusiasts who do not command the confidence, yet alone the imaginations, of the peoples of Europe.

From an Irish perspective, our sense of identity and independence is an uplifting force; our membership of a partnership-based Europe has also been an uplifting force. It does not follow that the creation of a single European state with twenty or twenty seven or more semi-autonomous regions would prove more successful for us in terms of peace, prosperity, liberty or quality of life.

From which premise I argue that we must not allow the forthcoming Irish in Europe debate to become too polarised. We should not allow ourselves to be silenced by a sense of gratitude nor inhibited by a sense of relative size. Europe is at the moment a partnership of nation states and has succeeded as such; it is perfectly possible for Ireland and Irish people to make a rational, dispassionate but friendly and committed assessment of the future Europe we want to see. We need not take our cue from those who have, perhaps, a head start in the debate. Nor should we necessarily take our inspirations from the European centre. The unspoken assumption by federalist proponents of Europe that "he who is not for their view of Europe is against Europe itself" is, I think, unconvincing, unhistorical and arrogant.

Our priority must be to take an active role in developing and articulating a model of Europe which we want to see. If we confine ourselves to commenting on the plans of others, and to giving polite throat clearances of disapproval, we surrender the political issue to others. There is a sharp division between the federalist project and what Irish people want. It is not just a difference of timing or emphasis. And we should be sufficiently self

confident to say so.

ENDS