



The People's Movement campaigns against any measures that further develop the EU into a federal state and to defend and enhance popular sovereignty, democracy and social justice in Ireland.

Would the Proposed EU Constitution have Primacy over the Irish Constitution?

During the recent period, various media commentators and letter writers including Mr. Dempsey, our Minister for Europe, have questioned whether the primacy of the proposed EU Constitution over the Irish Constitution is in fact something new. Generally, these advocates maintain that “*Union Law*” enjoys primacy and is accepted to have done so for a considerable number of years. While their contentions reflect some of the facts of the case, they do not reflect them all. This has been a trend in the presentations of those who advocate adoption of the EU Constitution - and it is a disturbing one.

It is important at the outset to note that the European Union does not exist as a corporate entity, with legal personality and corporate existence in its own right. Therefore it cannot make laws and there can be no such thing as “*Union law*”. It is the European “Community” that has legal personality and that makes EC laws. So, it would be correct to speak of “*Community Law*” and the difference is very important indeed.

A second important point concerns the question of ‘primacy’. It is European “Community”, not European “Union”, law that has primacy over national law in any case of conflict. This situation exists at the present time and dates back to the *Costa v ENAL* and *Van Gend en Loos* cases of the early sixties at the European Court of Justice (ECJ). Nonetheless, the Court’s pretensions to establish new law are not universally accepted.

The latter judgement stated in part: “*the Community constitutes a new legal order in international law for whose benefit the states have limited their sovereign rights, albeit in limited fields*”. It should be noted that this “new legal order” is *not presented in the EC Treaty*, but was formulated by the ECJ as a result of its interpretation of the Treaty’s overall objects and purposes. It is one of the earliest and most blatant examples of “competence creep”. The ECJ is notorious for continually seeking to extend its own reach and the extent of supranational powers through an incremental “federalisation” of Community law.

So these judgements lacked Treaty authority and consequently were subjected to rejection by the courts in states like Italy, Britain and Germany. Nowhere was the rejection so emphatic as in Germany. There, the German Constitutional Court in the 1994

case, *Brunner v The European Treaty*, found that: “*if the EU institutions were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that was the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty*”. And so the situation remains today, and though the principle of EU Court supremacy may be long established, it is by no means accepted amongst all Member States, but is rejected by what is arguably the most important one.

Furthermore this claimed primacy of European Community law can only extend to the powers and competencies *conferred to date on the Community by its Member States*. These powers are grouped under the present “first pillar” - broadly speaking the economy and some related social issues. Under the proposed Union Constitution these powers would be extended to major “second and third pillar” issues, like foreign affairs and defence, crime, justice and domestic affairs, which at present are outside the boundaries of Community law and where Member States retain their sovereignty.

So if we accept the proposed EU Constitution we would for the first time be constitutionally bound to accept the primacy of Union, not Community, laws, whether through rulings of the ECJ or from the EU institutions themselves. We would greatly extend the Union’s areas of competence and would give the Union the legal and constitutional character of a Federal State, and Ireland the legal-constitutional character of a mere province of that State.

The purpose and essence of the proposed EU Constitution is to establish a new European Union that is qualitatively, legally, constitutionally and politically different from what we call the European Union today. It does not seek to establish something which is “close to”, or “almost”, or “virtually” a Federal State but *it does establish what is legally and constitutionally a Federal State in its proper legal form*. That is what it should be called and is what advocates such as Guy Verhofstadt for instance, call it. This is particularly important if one is to explain properly to the electorate what is proposed.

What we call the European Union at present is a *descriptive term for various different forms of co-operation between its Member States*. One form of this cooperation is the acceptance of supranational law in certain areas - called the European Community, where sovereignty is “pooled”. The other form co-operation occurs where States retain their sovereignty. This is where they make all the laws themselves and where the Commission does not operate because there are no laws it can propose. It is also the area where supranational EC law does not prevail, and where Member States cooperate with one another “inter-governmentally”, as independent equal sovereign partners.

The term “European Union” at present is a general term describing *all these various different forms of cooperation*; but the EU itself is not a corporate entity. It does not have legal personality. It cannot sue an individual in the courts. It is “the Community” or the three “Communities” that can do that.

The purpose of the Constitution is to change this.

The Treaty *on* European Union (Maastricht) makes all this quite clear. Note that it is the Treaty “*on*” Union, and not “*of*” Union. If it were the latter, the Maastricht Treaty would have created a Union with legal personality. This however is what is proposed in the Constitution. This is the effective establishment of a new entity, whose legal and constitutional significance must be highlighted to the electorate. Otherwise they will be tricked into agreeing to set up and obey a European Federal State without realising what precisely they are doing.

Title 1 of the Maastricht Treaty is where the phrase “European Union” originates from.

Its first sentence, *Article A*, states: “*By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called ‘the Union’*”, and it goes on to say: “*The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the member states and between their peoples.*”

The following title, *Title 2*, is called “*Provisions amending the Treaty Establishing the European Economic Community with a view to establishing the European Community*”.

So it is the Maastricht “Treaty *on* European Union” that actually legally establishes the “European Community” even though people had been using that phrase in common parlance for years.

Then *Title 3* amends the “Treaty Establishing the Coal and Steel Community”, *Title 4* the Atomic Energy Community, *Title 5* deals with Provisions on a common foreign and security policy and *Title 6* with Provisions on cooperation in the fields of Justice and Home Affairs.

The whole thing is then called “Treaty *on* European Union”. The proposed Constitution seeks to establish quite a different European Union, one that is constitutionally, legally and politically utterly different from the EU that we assume we are currently “members” of, and give this new EU the legal and constitutional forms of Statehood by the following logical and precise steps:

1. Repealing all the existing EC/EU treaties.
2. Thereby abolishing the existing European Community and its associated Communities’.
3. Establishing a new European Union on the basis of its own Constitution. (Article I-1).
4. Establishing that this Constitution and law made under it has primacy over the Constitution and law of its Member States, without any qualification (Article I-6). This is

to overcome reservations of such as the German Constitutional Court as outlined in the Brunner case.

5. Giving this new European Union, founded on its own Constitution, legal personality. This means that it would be established as a corporate entity, constitutionally separate from any of its individual Members in a way that was not previously the case. This parallels the situation of Texas, which is legally separate from the USA and vice versa, even though the USA includes Texas (Article I-7).

6. Failing to make any provision that would exclude some national powers and competences *permanently* from the union - which the proposed Constitution could have done. If that had been done, we would have a “Confederation”, like Switzerland, rather than a Federation.

The result of these steps is the establishment of what is legally, constitutionally and politically a European Federal State.

This State does not control everything of course, anymore than the early US or German Federation controlled everything. It does *actually* run some things and *potentially* could run lots more. That will depend on what further powers. Member States confer on the EU in the future. But the escalator article (IV-444) allows the Heads of State and Government to increase EU competencies in the Part III areas without further treaties and referendums. That could include indirect taxes for example.

The only major powers of government this new EU would not have should this Constitution be accepted, is the power to impose taxes and the power to force its Member States to go to war on its behalf. However, the escalator article can take care of that in the case of indirect taxes and the Constitution does provide for those Member States that are willing to go to war to do so, as long as the others “constructively abstain”. Of course, in a historical context, State Federations do not spring fully into being overnight. The Federal level tends to increase its powers with time. That has in fact been happening extraordinarily rapidly with the EU and if this Constitution is accepted, it will have reached its conclusion.

**The People’s Movement can be contacted at 25 Shanowen Crescent, Dublin 9
or 087-2308330 or through our website: www.people.ie**