A Road Less Travelled

REFLECTIONS ON THE **SUPREME COURT RULINGS** IN *CROTTY, COUGHLAN* AND *MCKENNA (NO. 2)*

Dr. Gavin Barrett

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Dr. Gavin Barrett [1]

"I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I—
I took the one less travelled by,
And that has made all the difference."

- Robert Frost, *The Road Less Travelled*

"I reiterate that it is an independent constitutional value, essential to the maintenance of parliamentary democracy, that the legislature and the executive retain their proper independence in their respective spheres of action."

- Hardiman J. in *Sinnott v. Minister for Education* [2]

"The people are the ultimate sovereign but there is no constitutional device which will ensure that their ultimate decision will be infallible or even that it will be prudent, just or wise. The most we can hope for in relation to any sovereign, including the sovereign people, is that before making its decision it will be well informed and well advised. In this context to play down, or neutralise, the role of political leaders in favour of committed amateurs would be, to say the least, unwise."

- Barrington J. in *Coughlan v. Broadcasting Complaints Commission* [3]

Introduction

It is not easy to find the optimum moment to pen a critique of the Irish Supreme Court rulings which form the legal framework according to which are determined the answers to the questions of whether and how to hold a referendum on a European Union Treaty. If one proffers ideas in this regard when no referendum has been held or is in the offing, the point will seem a rather abstract one, examination of which can wait for another day. If, in contrast, one writes in a critical manner on the holding or even the manner of conduct of such referendums at a moment like the present – when a referendum on a European Treaty has recently been defeated - one leaves oneself open to the charge that one's real motive is to help reverse the result of that referendum.[4] Although, as will become

[1] Senior Lecturer, Director of Doctoral Studies, School of Law, University College Dublin. This views expressed in this paper are solely those of the author. This paper was written in the period between the first unsuccessful referendum on the Lisbon Treaty in June 2008 and the second successful referendum in October 2009 and the law is stated as it stood in early 2009. The writer is grateful for the input of Professor David Gwynn Morgan, Cathryn Costello, Dr. Katya Ziegler, Dr. Alicia Hinarejos, T. John O' Dowd, Madeleine Coumount de Bairéid and of attendees both at the UCD Irish European Law Forum, *Responses to the Lisbon Treaty Referendum: EU and National Perspectives* held on 23 January, 2009, and at the presentation given by the author at the Institute of European and Comparative Law in Oxford University on 11 February, 2009. A less extensively footnoted version of what follows is to be found *sub. nom.* "*Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence"* (2009) 5 European Constitutional Law Review 32.

[2] [2001] 2 IR 545 at 707-708.

[3] [2000] 3 IR 1 at 43. Note that this was a dissenting opinion.

[4] The danger to be avoided has been well expressed by Senator Barack Obama (as he then was) in the following terms: "more often than not, if a particular procedural rule –the right to filibuster, say, or the Supreme Court's approach to constitutional interpretation – helps us win the argument and yields the outcome we want, then for that moment at least we think it's a pretty good rule. If it doesn't help us win, then we tend not to like it so much." (See B. Obama, *The Audacity of Hope* (Canongate, Edinburgh, 2006) at 88.) However, as Zakaria has observed, "the results of one piece of

evident in the course of this article, this writer's view is indeed that the law examined merits review and indeed amendment, this is not as a means to the end of reversing the June 2008 Lisbon Treaty referendum result (however welcome such a reversal would be). Rather it is argued that change should occur because the manner in which the ratification processes of European Treaties are conducted in Ireland does not seem the most appropriate method to ensure appropriate consideration of issues of this nature. This is not however to deny that the impact of the Supreme Court rulings considered in this article - *Crotty v. An Taoiseach* [5], *McKenna v. An Taoiseach (No. 2)* [6] and *Coughlan v. Broadcasting Complaints Commission and RTÉ* [7]- combined with the failure of successive executives and legislatures to react to them in an adequate manner with legislation - have played a highly significant role in the failure of Ireland to date to ratify the Treaty of Lisbon. Indeed, if the decision not to ratify the Lisbon Treaty is not ultimately reversed, it may well be that these judgments will collectively come to be regarded as the most significant exercises in judicial activism in Irish legal history.[8] Already the failure to ratify the Treaty of Lisbon has cast the process of reform of the European Union into yet another crisis, and raised again the spectre of a considerably more multi-speed Europe than exists at present. Continued Irish non-ratification (particularly if not joined by other member states) will clearly also involve risks regarding the nature of Ireland's future role in the European integration process. The debate about the Treaty of Lisbon itself is for another day, however: this article concerns process rather than substance.

Somewhat curiously, notwithstanding the very major impact which Supreme Court jurisprudence has had on the frequency and conduct of referendums on European Treaties in Ireland, the case-law examined here has until recently attracted relatively little public attention. It may be that the inadequate regard previously paid to the major changes instituted by these cases derives from (a) the gradual nature of such changes, occurring as they did over a series of cases involving factual scenarios which at times had little to do with European law; and (b) because notwithstanding the fact of the occurrence of this major change, the then Government nonetheless managed to secure the ratification of the last major European treaty – the Treaty of Nice - and attention was thereby deflected from the reality that there might be significant problems to be resolved in relation to decision-making in this field.[9] Perhaps for similar reasons, academic debate on these cases has also been relatively muted,[10] given their significance (apart from the blizzard of articles on the *Crotty*

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legislation are a short-sighted way to judge systemic change" (F. Zakaria, *The Future of Freedom,* (Norton, New York, 2003) at 190.), and although it is nonetheless important not to fail to learn lessons which each referendum experience has to teach us, to use the words of one Irish parliamentarian in the specific context of the outcome of the Lisbon Treaty referendum, we should not "seek to adjust the legislative environment or even the constitutional context to seek to achieve particular political outcomes." (Senator A. White, speaking in the Joint Oireachtas Committee on the Constitution, 11 November, 2008) (available online at http://debates.oireachtas.ie/DDebate.aspx?F=CNJ20081111.XML&Ex=All&Page=3).

[5] [1987] IR 713.

[6] [1995] 2 IR 10.

[7] [2000] 3 IR 1.

[8] Even should this eventuality never come about, it has already been observed by one writer that "the field of electoral law and procedure has a legitimate claim to be regarded as the one in which judges have made most impact on the political system, indeed on its very centre of gravity." (See D. G. Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press, Cork, 2001) at 82.)

[9] The lack of attention paid may also be an aspect of a more general tendency towards a lack of interest in judicial activism. Morgan has noted that

> "oddly enough the coming of judicial activism in the field of constitutional law-making has attracted relatively little discussion on the political plane. Comment in this area has consisted mainly of studies by lawyers (focusing on legal technique rather than the broader political and societal impact of judicial decisions); fulsome and ill-informed praise from the news media; and a gloomy silence from politicians, broken by only the occasional unreasoned squawk."

(D. G. Morgan, *op. cit.,*n. 8 at 1).

[10] The cases examined here are looked at in B. O'Neill, *"The Referendum Process in Ireland"* (2000) 35 Ir. Jur. 305 O'Neill concludes cheerfully (if without the benefit of hindsight) that "the *McKenna (No. 2)* and *Coughlan* cases cannot but inspire confidence. Taken together, they represent a welcome departure from the dogged non-interventionism of earlier cases. More importantly, they indicate an emerging understanding of the important democratic principles underpinning the referendum device." (*Ibid.,* at 343-344). As will become apparent from the remainder of this article, the

judgment just after that case was decided [11]). It may also be noted in passing that the initial academic reaction to these cases in general was far from negative. But the life of the law, one is told, is experience [12] and the recent experience of the application of this case-law (insufficiently modulated as it has been by subsequent statutory intervention) has not been a particularly happy one. At any rate, general public indifference has dissipated somewhat [13] since the first referendum on the Treaty of Lisbon was held (and defeated) on 12 June, 2008.[14]

A discussion of such case-law may be seen as an aspect of two different but interlocking discussions. The first discussion involves the quest to answer the complex question of how best and most appropriately to invest the European Union with sufficient democratic answerability to enable it to continue to function and prosper. The second discussion concerns how best to ensure that democracy within Ireland itself functions at optimum level. This is a debate which is closely linked with the first in that an important element in facing the challenge of developing and maintaining Irish democracy is that of ensuring an adequate democratic input in Irish decision-making in European Union matters.[15] But the debate on democracy in Ireland is a broader one than that since it is clear that Irish democracy generally has its own difficulties.[16] The questions of how Ireland should both influence and absorb European law in an adequately democratically responsive manner thus constitutes only one element within this broader debate, albeit one which tends to receive far more attention than other concerns regarding Irish democracy.

The question may well be raised of why the holding of referendums on European constitutive treaties in particular should form the subject of an article given that the rulings in *McKenna (No.2)* and *Coughlan* in particular apply to *all* constitutional referendums, not just those relating to European treaties. One answer to this is that it is in the field of referendums concerning European constitutive treaties that have seen these cases have their most recent and indeed spectacular results. A second response in this regard is that the application of the rulings may well be general, but their impact is not equally distributed. To take one example, much knowledge and experience of how the European Union works is in the province of the executive, which is after all responsible for conducting Ireland's relations with the European Union. Judicial rulings reducing the ability of the government to intervene effectively in a referendum campaign will therefore have a bigger effect in a referendum

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present writer's view is that - judged in the cold light of experience - the impact of these cases in anything but welcome. Nor is it clear that the rulings demonstrate sufficient understanding of the principles which ought arguably to underpin a referendum, in particular the leadership role of elected political leaders. (*Cf* Morgan, *op. cit.,*n. 8 at pp. 4-5.) For some interesting reflections on some of the case-law considered in this article, see also T. John O'Dowd, *"Broadcasting, Political Communication and Elections"* (unpublished paper presented in an earlier format at the *Symposium on Freedom of Expression* held in Trinity College Dublin on 5-6 December, 2003).

[11] See *e.g.,* G. Hogan, *"The Supreme Court and the Single European Act"* (1987) 22 Ir Jur 55, A.. Sherlock, *"Sovereignty, the Constitution and the Single European Act"* (1987) 9 DULJ 101, Chapter 3 of G. Hogan and A. Whelan, *"Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (Sweet and Maxwell, Dublin, 1995), J. Temple Lang, *"The Irish Court Case Which Delayed the Single European Act: Crotty v. An Taoiseach and others"* (1987) 24 CML Rev 709, K. Bradley, *"The Referendum on the Single European Act"* (1987) EL Rev 301 and G. Hogan, *"The Tenth Amendment of the Constitution Act, 1987"* (1987) ICLSA 87-03. See also F. Murphy, *"The Single European Act"* (1985) 20 Ir Jur 17 and *"The European Communities (Amendment) Act, 1986"* (1986) ICLSA 37-01.

[12] An observation originally made by Oliver Wendell Holmes on 23 November, 1880 in the first of his Lowell lectures which in turn formed the basis for his renowned work, *The Common Law*.

[13] Hence, for example, the Jont Oireachtas Committee on the Constitution has recently been undertaking a review of the constitutional framework governing the constitutional referendum process prescribed by Articles 46 and 47 of the Constitution. See in relation to this http://debates.oireachtas.ie/CommitteeMenu.aspx?Dail=30&Cid=CN

[14] The proposal to amend the Constitution contained in the Twenty-eighth Amendment of the Constitution Bill, 2008 was rejected in referendum on 12 June, 2008. Of a total electorate of 3,051,278, 53.1% (totalling 1,621,037 citizens) cast a vote. The vote against was 53.4% (totalling 862,415 votes), the vote for was 46.6% (totalling 752,451 votes) (the remaining number being spoiled votes).

[15] See generally G. Barrett, *National Parliaments and the European Union The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus, Dublin, 2008).

[16] For some interesting observations in this regard, see the observations by B. Andrews TD, *"Who runs this country? Certainly not Dail Eireann"* Irish Times, 7 July, 2003.

campaign of this kind than on referendums on other matters. A third response is that the combination of the application of these cases with the application of the *Crotty* ruling has resulted in Irish ratifications of European constitutive treaties being affected to a unique extent by *McKenna (No. 2)* and *Coughlan*.

All three cases examined in this article are examples of judicial activism.[17] All three were initiated by long-standing opponents either of the European Union itself or of all recent Treaty reforms of the European Union. All three represent a successful call to the unelected judicial branch of government to bring about ends with major ramifications for European policy that would not have been attained by what one may characterise as the normal method of securing legal change – *viz.,* election to the legislative and executive branches of government. *McKenna (No. 2)* and *Coughlan* did not concern referendums on European Treaties as such (but rather the 1995 divorce referendum). That may have distracted the attention of many – not excluding the Supreme Court itself - from their implications for the ratification of EU Treaties: it is nonetheless undeniable that the principal impact of these rulings has been in relation to Irish involvement in Treaty change in the European Union.[18]

The effect of the case-law examined in this article may be summarised as involving three steps. Step One has been that the *Crotty* case closed off the only possibility remaining (*i.e.,* given the strictness of the drafting of the 'necessitated' clause in what is now Article 29.4.10° of the Constitution) that representative democracy – the more usual decision-making process in Irish political life – would apply in relation to the question of the ratification of major European Treaties, thereby ensuring the ascendancy in this respect of direct democracy. In other words, it all but ensured that any major European Treaty will be sent to referendum rather than being decided upon by parliamentary democratic means. Step Two was that the ruling in *McKenna (No. 2),* then effectively crippled the Government's power to influence directly the course of any such referendum by forbidding it to spend resources on a campaign. This loss of influence is not exclusive to referendums on European Treaties but it is particularly keenly felt there given the dominant role of the executive in European matters (particularly in this jurisdiction). The result of *McKenna* has been to shift the task of persuasion in a referendum, making it fall by default on politicians and political parties. In practice, the difficulty of understanding, much less explaining a Treaty such as the Lisbon Treaty appears to be a daunting one for many politicians (many of whom, it should be recalled, have no particular expertise in European law or policy and have few dealings with European Union institutions in their daily lives). As if matters were not difficult enough, however, what we may call Step Three has been the application. of the *Coughlan* ruling, which has in practice had the effect of deprive those same politicians and political parties in a referendum campaign of the kind of influence and access to the airwaves that they would normally enjoy by virtue of their elected position. Instead they find themselves given literally not one second more time on the airwaves than unelected campaigners whose sole qualification before they are handed 50% of airtime on both public and private broadcast media to put forward their views is that they have uttered the word 'no'. Put another way, influence formerly enjoyed by elected politicians has been transferred directly to unelected pressure groups or politicians with a tiny proportion of national electoral support. The result of the application of this case-law, and – almost as crucially - the failure to provide an appropriate legislative reaction to it has been - to borrow the words of Barrington J. in his powerful dissenting opinion in *Coughlan* - 'to play

[17] Morgan has described as coming within the definition of activism the situation of where

> "in order to resolve the case one way or the other…a judge has to call on some element of policy choice or preference. In this sort of case, if the judge selects the option of not accepting the *status quo* as it is given in the form or law or government action, but instead strikes down the law or action as unconstitutional then the judge is (on the definition in use here) performing an act of 'judicial activism'".

Another formulation by the same writer is that "in some constitutional cases, an act of selection by the judge beyond the mere deployment of the skills of legal technique is called for, and if he/she makes the positive choice of departing from the path adopted by the legislative or executive, we may call this judicial activism." (D. G. Morgan, *op. cit.,*n. 8 at pp. 7 and 8.)

[18] The caution concerning judicial activism which issued by Chief Justice Ó Dálaigh in *McMahon v. Attorney General* in this respect comes to mind. "Constitutional rights" he asserted "are declared not alone because of bitter memories of the past but no less because of the improbable, but not-to-be-overlooked, perils of the future". (See [1972] IR 69 at 111).

down, or neutralise, the role of political leaders in favour of committed amateurs'.[19] The surprise, given such a constitutional and regulatory framework, has not been that the Irish Government has now lost a referendum on a European Treaty. The surprise is rather that it should be thought possible for a Government to keep winning such referendums in an environment like this.

It is not the contention of this article, however, that the entirety of the responsibility for this situation should lie on the shoulders of the judiciary. In the first place, an adequate legislative response to the *Coughlan* and *McKenna (No. 2)* rulings would have done much to ameliorate the situation, and helped to avoid defeat in the 2008 Lisbon Treaty referendum. Such a response was never given, however – in part, perhaps, because of the "gravity of past success" of the Government in the (second) Nice Treaty referendum of 2002.[20] Secondly, insofar as concerns the defeat of the 2008 Lisbon Treaty referendum, there were of course numerous reasons extraneous other than those examined this article which also played a role. Some were national (including disillusion with political leaders, the traditional figures of authority, in the wake of a number of well-publicised corruption scandals,[21] the tendency of farming and some trade union groups to use the Lisbon Treaty referendum simply as an opportunity to advance their own sectional interests [22] and the influence of a Eurosceptical element in the press, some of it domestic, some of it imported from the United Kingdom [23]). Some were of a European-wide nature: the European Union's difficulties in winning a share of the affections of its population which is commensurate with its achievements are no secret.[24] It is nonetheless the contention of this article that the jurisprudence of the Supreme Court examined here at the very least rendered the prospects for ratification of the Lisbon Treaty considerably worse than they otherwise would have been.

Crotty v. An Taoiseach [25]

Crotty v. An Taoiseach, the oldest of the three Irish Supreme Court decisions which form the focus of this article, has had a major impact on both the legal and political level and is the main judicial authority relating to the need to have recourse to a constitutional referendum in the process of the ratification of a European Union Treaty. The ruling in *Crotty v. An Taoiseach* itself related to an appeal brought by an individual against the dismissal by the High Court of (a) his claim that the European Communities (Amendment) Act, 1986 – which purported to incorporate much of the Single European Act [26] into domestic Irish law - was constitutionally invalid; and (b) his claim for an injunction restraining the Government from ratifying the Single European Act and associated declarations.

The ruling in *Crotty* was delivered in two parts, dealing with each of these issues respectively

[19] [2000] 3 IR 1 at 43.
[20] The expression is that used by former world chess champion, Gary Kasparov, who has referred to "the gravity of past success. Winning creates the illusion that everything is fine. There is a very strong temptation to think only of the positive result without considering all the things that went wrong – or could have gone wrong – on the way." (G. Kasparov, "How Life Imitates Chess" (Heinemann, London, 2007) at 180).
[21] See in this regard the Government-commissioned Millward Brown IMS, *Post Lisbon Treaty Research Findings* (Dublin, September, 2008) at p. 13. This loss of faith in politicians may explain in part the curiously high profile in the 2008 referendum campaign of the opinions of millionaire businessmen and media stars, notwithstanding the absence of any indication that either had any particular expertise or experience in relation to European Union matters.
[22] See in relation to the ongoing nature of this phenomenon, P. Leahy, *"Unions and Farmers Seek Lisbon Support Concessions"* Sunday Business Post, 14 December, 2008.
[23] On Euroscepticism in Ireland generally, see T. Brown, *"Battling the Beast of Brussels: the Methods of Irish Euroscepticism"*, Dublin Review of Books, Issue 5, Spring, 2008, available online at http://www.drb.ie/more_details/08-09-25/battling_the_beast_of_brussels.aspx
[24] Former senior Irish diplomat, Noel Dorr has referred to Ireland as having functioned as something of a 'canary in the mineshaft' for the rest of Europe in this respect by virtue of its ongoing resort to referendums.
[25] [1987] IR 713.
[26] A Treaty which amended the constitutive treaties of the European Union.

In the first part of its judgment in *Crotty* (which related to the constitutionality of legislation designed to incorporate the provisions of the Single European Act into Irish law [27]), the Supreme Court, as constitutionally required,[28] delivered a single judgment. The Court held that there was no unconstitutionality involved in adopting the incorporating legislation because, *inter alia*, the amendments effected by the Single European Act did not go beyond the essential scope or objectives of the original treaties.

The classic formulation of this rather vague test was delivered for the Court by Finlay CJ in the following terms:

> "it is the opinion of the Court that the first sentence in Article 29, s. 4, sub-s. 3 of the Constitution must be construed as an 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, s. 4, sub-s. 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." [29]

The approach taken in *Crotty* thus hinges largely on the question of whether a new Treaty (such as the Treaty of Lisbon) alters the essential scope or objectives of the existing Treaties. If it does, then *Crotty* establishes that the existing constitutional authorisations to join the Community and the Union respectively found in Articles 29.4.3° and 4° of the Irish Constitution (and the authorisations to ratify amending Treaties contained in the Constitution [30]) will not extend to permitting the ratification of the relevant Treaty should such ratification involve any unconstitutionality under any provision of the *Bunreacht*.[31] *Crotty* thus results in a constitutional amendment becoming necessary in Ireland whenever the Government wishes the State to ratify a Treaty which in the view of the Irish courts would go beyond the essential scope or objectives of the existing Treaties.[32]

If the Court adopted a non-purposive approach to the application of the 'essential scope or objectives' test in *Crotty*, at least neither can it be said to have adopted an entirely minimalistic approach to it. Hence, significantly, Finlay C.J. pointed out on behalf of the Court that

> "neither the proposed changes from unanimity to qualified majority, nor the identification of topics which while now separately stated, are within the original aims and objectives of the EEC, bring these proposed amendments outside the scope of the authorisation contained in

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[27] *Viz.,* the European Communities (Amendment) Act, 1986

[28] Article 34.4.5° of the Irish Constitution provides that

> "the decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed."

[29] [1987] I.R. 713 at 767. Emphasis added. The closing paragraphs of the single judgment of the Court delivered by Finlay C.J. elaborated slightly on this test by indicating that particular proposals contained in the Single European Act did not go beyond the existing constitutional authorisation in that they had not been shown to "alter the essential *character* of the Communities. Nor has it been shown that they *create a threat to fundamental constitutional rights*." ([1987] I.R. 713 at 770. Emphasis added.) The clear implication was that if they had, then the Article 29.4.3° licence to join the Communities would not have extended to them.

[30] Currently, these are the Article 29.4.5° and 7° authorisations to ratify the Treaties of Amsterdam and Nice respectively.

[31] Should such permission be constitutionally necessary by virtue of what would otherwise be an unconstitutionality inherent in its ratification.

[32] Should such permission be constitutionally necessary by virtue of what would otherwise be an unconstitutionality inherent in its ratification.

Article 29, s. 4, sub-s. 3 of the Constitution." [33]

Similarly, the power given by the Single European Act to the Council to attach a Court of First Instance to the European Court with limited jurisdiction and subject to appeal on questions of law, was held to be authorised since it did "not affect in any material way the extent to which the judicial power has already been ceded to the European Court." The power to adopt health and safety measures by qualified majority vote was also to be regarded as authorised "since the existing Treaty contains various provisions dealing with the approximation of laws in general, with freedom for the provision of services in the Member States, with working conditions and with the prevention of occupational accidents and diseases." [34]

Any misunderstanding that the manner of application of the 'essential scope or objectives' test in the first (single judgment) part of *Crotty* demonstrated that a liberal or permissive approach would be taken to Treaty reform was dissipated in the second part of the ruling. Separate judgments were delivered here. In this part of its ruling the Court was unanimously of the view that existing Constitutional immunities in respect of Community Treaties did not apply in relation to Title III of the SEA (which provided for cooperation in the field of foreign policy). This was because Title III did not amend or constitute an addition to the existing Treaties, and further was not necessitated by them. Rather, it was outside their scope and in effect, a new treaty agreement. This new treaty agreement was then held by the Supreme Court majority to infringe the Constitution because of its supposed implications for the sovereignty of the State.

As a preliminary point, it is difficult to find any objective commentator who is convinced by the approach of the Supreme Court majority to sovereignty in the latter part of the *Crotty* ruling.[35] The requirements of sovereignty which the Supreme Court asserted would be transgressed by ratification of the Single European Act were so extraordinarily demandingly framed by the Court that continued adherence to them would have raised doubts even as to the compatibility of Ireland's membership of the United Nations.[36] Hence Temple Lang and Gallagher have observed of the majority opinions that "in retrospect, the language of all three judges seems exaggerated." [37] More delicately, Hogan and Whyte have observed "the breadth of the majority's reasoning is such…that it could plausibly be regarded as casting doubt on the State's general treaty-making powers. Consequently it may be appropriate to take a less than sanguine view of its prospects for survival." [38] The Supreme Court itself arguably validated such criticisms in the 1990 case of *McGimpsey v. Ireland* [39] where the Court distinguished this aspect of *Crotty* – rather unconvincingly - rather than apply it in relation to the 1985 Anglo-Irish Agreement.[40]

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[33] [1987] I.R. 713 at 770. The Chief Justice also cautioned however that as far as Ireland was concerned, "it does not follow that all other decisions of the Council which now require unanimity could, without a further amendment of the Constitution, be changed to decisions requiring less than unanimity."

[34] [1987] I.R. 770.

[35] Contrast the very different approach to ratification of Title V of the Single European Act taken by the Queen's Bench Divisional Court in *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1993] 3 CMLR 101 cited by G. Hogan and G. Whyte, *J.M. Kelly: The Irish Constitution* (fourth edition, Tottel, Haywards Heath, 2006) at 97. In that case ratification was regarded as an exercise of sovereignty rather than as an infringement of it.

[36] See G. Hogan, "The Supreme Court and the Single European Act" (1987) XXII Ir Jur (ns) 55 at 69; also A. Whelan and L. Heffernan, *"Ireland the United Nations and the Gulf Conflict: Legal Aspects"* (1991) Irish Studies in International Affairs 115 at 140-145.

[37] J. Temple Lang & E. Gallagher, *Essential Steps for the European Union after the "No" Votes in France, the Netherlands & Ireland* CEPS Policy Brief No. 166 (August 2008) 1 at 7.

[38] Hogan and Whyte, *op. cit.,* n. 39 at *loc. cit.*.

[39] [1990] 1 IR 110, [1991] ILRM 400.

[40] The main - apparently significant - distinction to which reference was made by the Court in *McGimpsey* was the fact that the Anglo-Irish Agreement was an agreement reached between two sovereign governments rather than twelve. (See [1990] 1 IR 110 at 121-122.) Finlay CJ who delivered a judgment agreed to by four of the five judges also noted that

"the Government of Ireland at any time carrying out the functions which have been agreed under the Anglo-Irish Agreement is entirely free to do so in the manner in which it, and it alone, thinks most conducive to the achieving of the aims to which it is committed. A procedure which is likely to lead to peaceable and friendly co-operation at any

Even if the thoughts the Supreme Court regarding the requirements of sovereignty are to be regarded as now otiose, however, the second part of the *Crotty* judgment nevertheless remains significant for two reasons. In the first place, it functions as a warning to any Irish government of the potential alacrity with which the judicial branch is capable of invalidating parliamentary ratification of European treaties. (This is a warning which has been warily borne in mind by Irish Governments ever since, judging by the number of referendums it has held since *Crotty*: to date referendums have been held on five separate European constitutive treaties. 2009 will see the seventh referendum on such a treaty).

Secondly, this part of the ruling demonstrates the application of a narrow approach to the provisions of Article 29.4.3° (which provides that the state may become a member of the three founding European Communities). Indeed, the entire Court, not just the majority, appeared to take an approach not dissimilar to that which one would expect to see used in the interpretation of a commercial contract. Thus for Finlay C.J., the simple fact that "the relevant provisions do not purport to constitute amendments of or additions to any of the Treaties establishing the Communities" was sufficient alone to take them outside the scope of Article 29.4.3°. Along similar lines, Henchy J. – although he quoted the first words of the Preamble to the Single European Act in which the member states declared themselves "moved by the will to continue the work undertaken on the basis of the Treaties establishing the European Communities" nonetheless felt the fact that Title III of the Single European Act dealt, as he put it, "with matters which are outside the scope of the existing treaties" excluded the application of Article 29.4.3°.[41] Walsh J. and Griffin J. also felt that Title III brought into *terra nova*.[42]

In sum, the Supreme Court's approach seemed more or less predicated on a view that the provisions of Title III of the Single European Act had little or nothing to do with the existing treaties, rather than being (as they were) a development of the very idea of European integration which lay at the heart even of the first European Treaty agreed in 1951. If there is a criticism to be made of the Supreme Court approach in this regard, it is that it is as if for the Supreme Court the EEC Treaty was no more than a treaty on economic cooperation, the Euratom Treaty concerned nothing more than peaceful cooperation concerning nuclear power, and the Coal and Steel Treaty related only to trade in industrial raw materials. There is nothing self-evident about such an approach. Arguably, it does not accurately reflect the historical origins of the Treaties or the intention underlying them or the reality that from its inception European integration was intended to be, and has been an ongoing process. It requires little more than a brief perusal of the Schuman Declaration or the Preamble to the Treaty Establishing the European Coal and Steel Community [43] to realise that European integration has been an ongoing process since the distant beginnings of the European Union in the form of the now-defunct European Coal and Steel Community. Ireland, in other words, in common with all the other member states, in acceding to what is now the European Union, boarded a moving train, not a static legal entity.[44] It seems appropriate that the view taken of the breadth of the relevant provisions of the Irish Constitution (in particular both Article 29.4.3° and the further statement in Article 29. 4. 4° of the Constitution that "the State may ratify the Treaty on European Union signed at Maastricht

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given time must surely be consistent with the constitutional position of a state that affirms its devotion not only to the ideal of peace and friendly co-operation but to that ideal founded on international justice and morality."

([1990] 1 IR 110 at 121). Where, however, the Court saw any distinction in this regard between the Single European Act and the Anglo-Irish Agreement is not apparent.

[41] [1987] IR 713 at 784.

[42] Hence Walsh J. observed that "Title III of the Single European Act…in reality is itself a separate treaty although not so in form." (See [1987] IR 713 at 776). Similarly Griffin J. opined that "Title III, although included in the Single European Act (SEA), and set out in Article 30 in that Act, is effectively a separate treaty between the twelve countries who are the Member States of the European Communities" (See [1987] IR 713 at 789).

[43] Or, for that matter, that of the original Treaty Establishing the European Economic Community.

[44] Or to use Professor David Gwynn Morgan's rather more poetic recasting of my argument, "if one acquires a kitten, one can hardly complain if one wakes up one day to find oneself the owner of a cat, although one might have cause for complaint if one turned out to have bought a dog."

on the 7th day of February, 1992, and may become a member of that Union") should reflect this. One may take the view both that the *Crotty* 'essential scope or objectives' test is an appropriate one and that it should have been applied in a broad enough manner to cover provisions such as those considered in the latter part of the judgment in *Crotty*. Quite apart from the questionable interpretation given to the requirements of sovereignty by the Supreme Court majority in the second part of Crotty, the approach of the entire Supreme Court approach towards Title III of the Single European *Crotty* is arguably one which would better suit a situation in which Ireland had joined a static unchanging entity, not a constantly evolving organisation like the European Union.[45]

There is scope therefore for the Supreme Court in a future case to adopt a more flexible approach to its own test in its future case-law. There is no guarantee, however, that the Court will take any such course. Even should it wish to change direction, the Court would, like any other Court, have to be seised of a case which required a ruling on this issue. Until this happens, above and beyond the unsatisfactory vagueness of the *Crotty* test, we have only the single experience of the relatively restrictive manner of the application of the 'essential scope or objectives' test in *Crotty*. In such circumstances, it seems difficult to criticise excessively any Government for feeling that recourse to a referendum to ratify any significant European Union constitutive treaty is effectively *de rigeur* under Irish constitutional law as so as to avoid later difficulties associated with an unsuccessful parliamentary ratification.

A Problem of Uncertainty

Crucial to an understanding of this area of law is the realisation that, with *Crotty* having been to date the only case to have been decided on the point, however, it is virtually impossible to know in advance when an amending Treaty goes beyond the essential scope or objectives of the existing Treaties. Certainty - should the Government ever seek to ratify a constitutive European Treaty in whole or in part by parliamentary means alone - would normally only be capable of being provided by (a) a reference by the Irish President to the Supreme Court of any legislative Bill purporting to incorporate the terms of the Treaty into Irish law for an opinion on its Constitutionality,[46] or else by (b) a challenge by a private party to the constitutionality of incorporating legislation and/or to any attempt by the Government to ratify the Treaty or any part thereof without a referendum.

The question, for example, of whether and to what extent parliamentary ratification of the Treaty of Lisbon was ever possible is therefore shrouded in uncertainty and is impossible to answer definitively in the absence of a Supreme Court ruling. It has been *suggested* however that specific elements of the Treaty of Lisbon *might* go beyond 'the essential scope or objectives of the existing Treaties' test. The relevant aspects of the Treaty include: (i) its giving of legal effect to the provisions of the Charter of Fundamental Rights of the European Union; (ii) the ending of the situation whereby the European Community has a separate identity; (iii) the extension of qualified majority voting in the criminal justice field; (iv) the role of the proposed High Representative of the Union for Foreign Affairs and Security Policy.[47]

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[45] The further point may be made that the 'essential scope or objectives' of what is now the European Union have not stood still since *Crotty* was decided. In the 22 years since the ruling in *Crotty* was handed down, the Treaties have been subjected to no less than four major amendments (not including accession treaties), and the Irish Constitution itself been amended four times to accommodate this change. The scope and objectives of the Treaties are clearly wider than they were in 1987 (at which point, for example, the European Union as such had not been founded) and the cumulative effect of successive amendments to the Constitution – could perhaps be argued to require a broader approach to the 'essential scope or objectives' test (unimaginative though the drafting of such successive Constitutional amendments may have been). (My thanks to Professor David Gwynn Morgan for raising this point.)

[46] Such references can be made under Article 26 of the Constitution, and although the President is obliged to consult the Council of State before taking such action, the question of whether to make a reference is, ultimately, entirely a matter for his or her discretion, and thus outside the control of the Government.

[47] Most of the foregoing suggestions are taken from G. Hogan, *"Reflections on the Lisbon Referendum"* (unpublished paper delivered at a conference organised by the Irish Centre For European Law, *After Lisbon:The Future of Ireland and the EU* held at the Royal Irish Academy, Dublin on 23 October 2008.)

In practice, every Irish Government ratifying a Treaty since *Crotty* has found itself under immense pressure to hold a referendum even when there is merely a reasonable probability of Treaties going beyond the essential scope/objectives of existing constitutive Treaties. *Crotty* ushered in an era when having a referendum on a European Treaty became the legally safe option in ratifying. Referendums have been held as part of the Irish ratification process of all constitutive Treaties which followed on the judgment – the Treaty on European Union, the Treaty of Amsterdam, the Treaty of Nice and now the Treaty of Lisbon (as well of course as the Single European Act, which was the Treaty at issue in *Crotty* itself).

Political Implications

From a political perspective, the *Crotty* case has also contributed to an expectation on the part of many in the Irish public that every major European treaty will be accompanied by a referendum.– and thus political pressure to proceed in this manner

Overall, the effect of the *Crotty* ruling on the nature of Irish democracy is not to be underestimated. The combined impact of (a) the rule that the Irish Constitution can only be amended by a process involving a referendum,[48] (b) the strictness of the drafting of the 'necessitated' clause in what is now Article 29.4.10° [49] and (c) the *Crotty* case has led to the deployment in Ireland of direct democracy in the place of representative democracy to an extent unparalleled in any other state in the European Union. In practice, referendums are held on the ratification of European Treaties in Ireland independently of the will of both democratically-elected branches of government, which, correspondingly to this extent, lose control of the process of government here. To the extent that the Constitution is deemed to mandate a referendum, the role of these branches is reduced to one deciding matters such as the form of the referendum proposal and the timing of the referendum [50] – but not the question of whether a referendum should take place in the first place. Nor of course does a referendum take place because it is called for in any citizen initiative. It takes place because, *inter alia,* the Supreme Court in *Crotty* asserted that this is what the Constitution implicitly requires, the Constitution making no express provision on the point. [51]

Such referendums are thus held without independently of any individual assessment of the suitability of particular referendum topics for decision in referendum. The *Crotty* test makes no allowance for the complexity of the Treaty being considered, the subtle nature of the balances it may involve between competing interests, and the question of whether a document of such complexity is a suitable one with which to confront an electorate which has never been versed in the intricacies of how the institutions and bodies of the European Union function (and thus is open to being misled by ill-informed or deliberately incorrect assertions concerning the provisions of the Treaty in question).

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[48] See Article 46 of the Constitution, and in particular section 2 thereof.

[49] Article 29.4.10° provides that

> "no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State."

In its original (draft) version, this provision would have protected laws, acts or measures which were "consequent on" even if not "necessitated by" the obligations of membership. The tightening up of this formulation was an amendment effected at the behest of Fine Gael in Opposition, and advocated in the Dáil by the then Fine Gael spokesperson, Dr. Garret FitzGerald - before this provision was approved by the Oireachtas and subsequently by the people in referendum. This turned out to be a fateful change, at least when seen in the light of the *Crotty* ruling. (See 258 Dáil Debates 401-403 (25 January, 1972)).

[50] Although the timing of a referendum is not entirely a matter of Government discretion either, since the need to have the Treaty ratified within a reasonable time frame by all member states will in practice impose limits on the extent to which a referendum on a European treaty can be delayed to a point in time which suits the Government.

[51] It might be argued that the failure to amend the Constitution so as to alter the *Crotty* approach represents an implicit acceptance of that approach but the matter has never been put to the people.

The Appropriateness of Referendums in Given Situations

It is difficult to form an opinion about *Crotty* without also considering a more fundamental question raised implicitly by the case, which is that of in what circumstances referendums are to be viewed as an appropriate decision-making method, particularly (although not exclusively) in the context of European treaties.[52] This question, although too broad to be considered in an article as short as the present, clearly merits reflection. At times in Ireland, there has been a tendency among some (particularly opponents of European integration) to view the approach taken by all 26 other member states of the European Union in not having a referendum on the Treaty of Lisbon, as in some way meaning they having cheated their populations of their democratic rights.[53] For such individuals, the superiority of referendums as a democratic decision-making process seems utterly self-evident. But while respect for the outcomes of referendums is, of course, necessary, it is submitted that this should not absolve us of the responsibility to analyse the merits and defects of this form of democracy. Referendums, like any other democratic process have their own advantages - and disadvantages.

On the positive side, referendums give citizens the chance to express directly their view on a subject which may be enormously important to them. They can bring discussion of issues into the daily life of the citizen, and have an educational benefit. They can provide a vital element of legitimacy when used, for example to adopt a Constitution or confirm a major constitutional step such as initial accession to the European Union. They can also be a means of exerting control on a Government where one political party has a constant electoral majority (as in the state of Bavaria in Germany). But referendums also have disadvantages. They may confront an electorate completely unversed in a particular area of the law with the need to make a decision.[54] Even when this is not the case, they do not always lead to adequate consideration being given to issues. [55] They are also capable of producing answers to questions other than those asked. Hence Roberts-Thomson has opined that European Treaty referendums in particular, because of the way they are presented to electorates, rather than being used for "legitimating major changes…are increasingly becoming periodic votes of confidence in continued membership of the European Union." [56] The same writer has pointed out that such referendums are also prone to becoming "inextricably tied up with public attitudes towards the incumbent government. If these governments are unpopular, then the likelihood increases of referendums being used as a means of expressing public dissatisfaction with extraneous domestic ills." [57]

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[52] See for an examination of the use of European treaty referendums (and the drawing of distinctions between different kinds of such referendum), P. Roberts-Thomson, *"EU Treaty Referendums and the European Union"* (2001) 23 Journal of European Integration 105. *Cf.* M. Cahill, *"Ireland's Constitutional Amendability and Europe's Constitutional Ambition: the Lisbon Referendum in Context"* (2008) 9 German Law Journal 1191. Different forms of European treaty referendum are also distinguished in M. Shu, *"Referendums and the Political Constitution of the EU"* (2008) 14 European Law Journal 423.

[53] See for an example of this the arguments of one Eurosceptical campaign group at http://www.nationalplatform.org/wordpress/?page_id=67 and http://www.nationalplatform.org/wordpress/?tag=treaty-of-lisbon-irish-referendum

[54] According to the impressively comprehensive Government-commissioned Millward Brown IMS *Post Lisbon Treaty Research Findings* (Dublin, September, 2008, at p. 12 thereof) "the key (spontaneous) factor behind the No vote was a lack of understanding of the Treaty, which is mentioned by 45% of No voters. Indeed, 65% of soft No voters cite this reason, clearly indicating that lack of knowledge was the deciding issue in the campaign."

[55] Ackerman and Fishkin have argued that referendums involve "the people going to the polls to say Yes or No without taking preliminary steps to deliberate together on the choices facing the nation", and offered the view that "this populist method is unworthy of a modern democracy. If an issue is important enough to warrant decision by the people as a whole, it is important enough to require a more deliberate approach to decision-making." See B. Ackerman and J. Fishkin, *"A Better Way With Referendums"* Financial Times, 17 June, 2008. Note also the criticisms of Alain Lamassoure MEP reported in J. Smyth, *"Ireland Risks Splitting EU, Says Advisor to Sarkozy"* 4 July, 2008.

[56] P. Roberts-Thomson, *loc. cit.,* n. 59 at 121.

[57] *Loc. cit.,* n. 59 at 123.

Referendums also require 'yes' or 'no' answers to what are sometimes very complex questions. In addition, Zakaria has further argued that referendums lack the advantage of

> "the centuries-old method of lawmaking by legislature [which] requires debate and deliberation, takes opposition views into account, crafts compromises, and thus produces laws that are regarded as legitimate even by people who disagree with them. Politics did not work well when kings ruled by fiat and it does not work well when the people do the same." [58]

Finally, an perhaps paradoxically, referendums also seem capable of producing their own form of elite. Thus extensive use of initiatives in several American States - given new impetus by the 1978 California referendum on Proposition 13 (limiting that State's taxation powers) [59] - has "introduced an unexpected player to the political scene – the billionaire policy-entrepeneur".[60] (The role of extremely wealthy individuals has also been a feature of certain Swiss referendums and, since 2008, the Irish referendum scene).

To opponents of the increased use of direct democracy in the United States, the losers have been the institutions of representative democracy, the winners a new, unelected elite.[61] Hence Zakaria's conclusion that "by declaring war on elitism, we have produced politics by a hidden elite, unaccountable, unresponsive and often unconcerned with any larger public interest." [62]

The foregoing should not be taken as an argument by this writer that referendums should never occur – merely an argument that the issue of whether they should be held in an individual case merits careful reflection, founded in a realistic assessment of the merits and disadvantages of this form of democracy as applied to a particular situation. This is the very kind of reflection, however, that the *Crotty* ruling renders extremely difficult, where the ratification of a European Treaty is involved.

Reflections on an Appropriate Legislative Reaction to the *Crotty* Case

Unlike *Coughlan* and *McKenna (No. 2)* rulings, it is difficult to fault the other branches of government for any lethargy in relation to reacting to the *Crotty* case. It could be argued that in deciding whether or not to hold a referendum in relation to any Treaty, real consideration should be

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[58] F. Zakaria, *op. cit.,* n. 4 at 196. Note also Obama's observation (made in the US context) that

> "all of [the Constitution's] elaborate machinery – its separation of powers and checks and balances and federalist principles and Bill of Rights – are designed to force us into a conversation, a 'deliberative democracy' in which all citizens are required to engage in a process of testing their ideas against an external reality, persuading others of their point of view, and building shifting alliances of consent."

(*Op. cit.,* n. 4 at 92)

[59] Goebel has termed the property tax revolt that culminated in the successful passage of Proposition 13 in 1978 "the pivotal event that demonstrated the potential of the initiative". (See T. Goebel, *A Government by the People* (University of North Carolina Press, Chapel Hill, 2002).

[60] Zakaria, *op. cit.,* n. 4 at 197. See also on this theme R. Ellis, *Democratic Delusions: the Initiative Process in America* (University Press of Kansas, Lawrence, Kansas, 2002), 109-116.

[61] See generally on direct democracy, Goebel, *op. cit.,* Ellis, *op. cit.,* n. 67, D. Broder, *Democracy Derailed : Initiative Campaigns and the Power of Money* (Harcourt, New York, 2000), J. Haskell, *Direct Democracy or Representative Government? Dispelling the Populist Myth* (Westview Press, Boulder, Colorado, 2001), E. Gerber, *The Populist Paradox* (Princeton University Press, Princeton, New Jersey, 1999), E. Gerber, A. Lupia, M. McCubbins, A. Kiewiet, *Stealing the Initiative* (Prentice-Hall, Upper Saddle River, New Jersey, 2001) , D. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States,* John Hopkins University Press, Baltimore, 1984), P. Schrag, *Paradise Lost: California's Experience, America's Future* (University of California Press, Berkeley, 1999) and P. Schrag, *California – America's High Stakes Experiment* (University of California Press, Berkeley, 2006). *Cf.* J. Matsusaka, *For the Many or the Few* (University of Chicago Press, Chicago, 2004) and M. Qvortrup, *A Comparative Study of Referendums* (second edition, Manchester University Press, Manchester, 2005). See further L. LeDuc, *The Politics of Direct Democracy*, Broadview Press, Peterborough, Canada, 2003), D. Butler and A. Ranney (eds.), *Referendums – A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, Washington DC, 1978) and S. Bowler, T. Donovan and C. Tolbert, *Citizens as Legislators – Direct Democracy in the United States* (Ohio State University Press, Columbus, Ohio, 1998).

[62] Zakaria, *op. cit.,* n. 4 at 198.

given by the democratically-elected branches of government – *i.e.,* the executive and the legislature - to the question of whether the subject matter of the Treaty is an appropriate one for a referendum. If it is felt that legislation is a more suitable approach for deciding whether Ireland should ratify a given Treaty, it similarly seems arguable that legislation should be used to whatever extent is possible, rather than virtual automatic and entire recourse being made to a constitutional referendum on each occasion. However, such an approach would have difficulties attaching to it. In the first place, it seems likely that a referendum on any aspect of the Treaty in question might be used as a referendum on all of it. A further difficulty here might be coping with a 'no' vote in relation to any particular aspect of the ratification. Derogation from the relevant aspect of the Treaty in question, even if practicable, would normally require securing agreement on a Protocol, which in turn would require the accord of all of the other member states, which might or might not be forthcoming.

It could equally be argued that if *Crotty* is to continue to be the test regulating whether a constitutional amendment is required in order to ratify European Treaties, a less inflexible amendment procedure involving *e.g.,* super-majorities would be a more suitable amendment procedure than a referendum in that it might lead to more serious consideration of the issues raised by the Treaty in question. The difficulty is that bringing about such a change would itself require a referendum, however, since it would involve amending Article 46 of the Constitution.

McKenna v. An Taoiseach (No. 2)[63]

McKenna v. An Taoiseach (No. 2) is the second case it is proposed to examine in this article. This case was brought to challenge the voting of money by the Oireachtas to encourage a 'yes' vote in the referendum on the removal of the constitutional prohibition on divorce. The case followed the earlier unsuccessful case of *McKenna v. An Taoiseach (No. 1)*[64] - a unsuccessful claim for injunctive relief against Government expenditure during the Maastricht Treaty referendum campaign brought by the same litigant, but dismissed by Costello J at the interlocutory stage. Costello J.'s reasoning in this earlier case is worth quoting, based as it was on that judge's very clear idea of the relative role of the judicial and the other branches of government. Costello J. began with something of a caution to the judiciary

> "I can, of course, appreciate that the plaintiff as a member of a small party opposed to the Government's point of view may feel aggrieved that her party's campaign is deprived of the benefits which the Government has conferred on itself from public funds. But not every grievance can be remedied by the courts. And judges must not allow themselves to be led, or indeed voluntarily wander, into areas calling for adjudication on political and non-justiciable issues. They are charged by the Constitution with exercising the judicial power of government and it would both weaken their important constitutional role as well as amount to an unconstitutional act for judges to adjudicate on such issues. It seems to me that this is what the plaintiff in this action is requiring the court to do. The merits of ratification or non-ratification of the Maastricht Treaty are, of course, not matters on which this court should express a view."[65]

Costello J.'s further elaborated in the following terms:

> "the extent of the role the Government feels called upon to play to ensure ratification is a matter of concern for the executive arm of government, not the judicial. The Dáil decides what monies are to be voted for expenditure by the Government on information services (which would include an advertising campaign in support of an affirmative vote in a referendum). Should the Government decide that the national interest required that an advertising campaign be mounted

[63] [1995] 2 IR 10.
[64] [1995] 2 IR 1.
[65] [1995] 2 IR 1 at 5-6.

which was confined to extolling forcibly the benefits of an affirmative vote, it would be improper for the courts to express any view on such a decision." [66]

The considerable limitations which the judicial arena imposes in relation to such decision-making were also adverted to by Costello J.:

"The object of such a campaign would, of course, be to influence voters' attitudes. But to adjudicate on a claim that the use of public funds to finance such a campaign was unfair because it distorted public attitudes would involve an assessment of the effect of such a campaign on public attitudes, the strength of the opposing campaign of those propounding a "No" vote, and the forces influencing the voters' ultimate decision. Such an assessment is not just one of establishing facts but calls for a careful analysis and a balancing of complex political and social factors. It is one for political analysts to make, not for judges." [67]

Had this analysis been reflected in subsequent Supreme Court case-law, the future path of the European Union and the future nature of Ireland's involvement in it might look somewhat clearer and indeed less precarious at this moment in time. This did not happen, however. Undeterred by her initial setback, the same plaintiff sought to have the Courts revisit "precisely the same issue" [68] in *McKenna (No. 2).* This case was brought in the context not of a referendum on a European Treaty but that of the referendum seeking to remove the constitutional prohibition on divorce. But clearly the outcome of *McKenna (No. 2)* was always inevitably going to have a major impact in referendums on European treaties [given that the State has a particular concern and would inevitably seek to play an active role in seeing the ratification of such Treaties]. At first instance, McKenna's claim was dismissed by Keane J. in the High Court. Keane J. pointed out what the Constitution has to say expressly regarding the executive's role in a referendum – *i.e.,* nothing at all:

"there is no guidance in the wording of Article 46 as to the role, if any, to be played by the Government in the holding of a referendum, other than what may be gleaned from the requirement that the referendum be held 'in accordance with the law for the time being in force relating to the referendum'." [69]

The only other constitutional provisions referred to by Keane J. were Articles 17 and 28 dealing with, respectively, the relative roles of the Government and the Dáil in relation to expenditure. Keane J. was in no doubt about the need to defer to the other branches of Government in this regard, observing:

"these provisions are at the heart of the structures of parliamentary democracy which we have inherited, recognising as they do the primary role of the executive and the popularly elected assembly, to which it is responsible, in the raising and expenditure of monies. The extent to which, and the manner in which, the revenue and borrowing powers of the State are exercised and the purposes for which the funds are spent are the perennial subject of political debate and controversy, but the paramount role of those two organs of state, the Government and the Dáil, in this area is beyond question. For the courts to review decisions in this area by the Government or Dáil Éireann would be for them to assume a role which is exclusively entrusted to those organs of state, and one which the courts are conspicuously ill-quipped to undertake. While the expenditure by the Government of £500,000 in this case has given rise to debate and controversy, it is not the function of the courts under the Constitution to enter into, still less, purport to resolve such disputes." [70]

[66] [1995] 2 IR 1 at 6.
[67] [1995] 2 IR 1 at 6.
[68] See the High Court ruling of Keane J. (as he then was) in *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10 at 18.
[69] [1995] 2 IR 10 at 17.
[70] [1995] 2 IR 10 at 18.

On appeal, however, this degree of judicial deference failed to manifest itself: the judgment of Keane J. was reversed and the Supreme Court granted a declaration that the Government, in expending public monies in the promotion of a particular result in a referendum was acting in breach of the Constitution. The Court divided 4-1 in favour of this result with Hamilton CJ, O'Flaherty J., Blayney J. and Denham J. all in the majority. Egan J. dissented alone in a terse, vigorous ruling that asserted the right of the Government to express strong views even if the result might be to influence voters and based his conclusion that it could spend money on the referendum because there was no specific constitutional or statutory provision preventing it from doing so. He concluded that it was "a matter solely for the executive arm of government to decided how the money [apportioned by it for the referendum campaign] should be expended. Its decision is not for the scrutiny of the judicial branch of government."

The reasoning underlying the judgment of the majority was founded on the majority's interpretation of the requirements of (a) equality (b) democracy and (c) fairness.

Insofar as concerns equality,[71] all of the majority felt that this would be violated by allowing such expenditure. Hence O'Flaherty J. asserted that "to spend money in this way breaches the equality rights of the citizen enshrined in the Constitution as well as having the effect of putting the voting rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against)." [72] Blayney J. objected that "the Government has not held the scales equally between those who support and those who oppose the amendment. It has thrown its weight behind those who support it." [73] Most clearly of all, Denham J. pointed out that Article. 40.1 stated that all citizens shall, as human persons, be held equal before the law. She opined that

> "this recognises the equality of citizens. It also requires the organs of government in the execution of their powers to have due regard to the right of equality. The citizen has the right to be treated equally. This includes the concept that in the democratic process, including referenda, neither side of an issue will be favoured, treated unequally, by the government." [74]

This seems problematic on at least two grounds. The first is that it makes no mention of the limitation in Article 40.1 that citizens shall, 'as human persons' be held equal before the law.[75] The second is that saying that neither side of an issue will be favoured seems to create the rather strange notion of *ideas* having a right to equal treatment. Yet as Barrington J. pointed out in his dissenting judgment in the subsequent *Coughlan* case, "the equality referred to in Article 40 of the Irish Constitution is an equality of persons, not an equality of ideas. Ideas have no rights under our Constitution or otherwise because rights (including political rights) pertain to persons not to ideas." [76] Furthermore, ideas can be wrong. Statements can and have been issued in the course of referendum campaigns which are misleading or even untruthful and yet have succeed in gaining a foothold in the popular imagination of an electorate unversed through no fault of its own in the intricacies of European law and governance – something which became a serious problem in the

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[71] The impact of *McKenna (No. 2)* insofar as concerns the constitutional guarantee of equality has been significant. O'Dowd describes the case as having 'cast a long shadow' over most case-law concerning political rights, particularly those connected with referendums and elections. (*Loc. cit.,* n. 13 at 1.)

[72] [1995] 2 IR 10 at 43. O'Flaherty J. immediately added that "the public purse must not be expended to espouse a point of view which may be anathema to certain citizens who, of necessity, have contributed to it." As an argument in its own right, this seems unconvincing. As O' Dowd has asked,

> "are parents (or any other taxpayer for that matter) constitutionally entitled to object to particular sex education programmes, even if they have the right to withhold their children from them? Are those who value personal freedom particularly highly entitled to restrain health promotion campaigns which are contrary to their personal convictions?" (*Loc. cit.,*n. 13 at 19.)

[73] [1995] 2 IR 10 at 50.

[74] [1995] 2 IR 10 at 52

[75] See for some reflections on this issue, O' Dowd, *loc. cit.,* n. 13, and see more generally on the subject of constitutional equality, O. Doyle, *Constitutional Equality Law* (Thomson Round Hall, Dublin, 2004).

[76] [2000] 3 IR 1 at 45.

course of the Lisbon Treaty referendum campaign.[77] The value of freedom of expression is nonetheless not to be doubted. The application of a Supreme Court-imposed 'equality of ideas' approach in this context - deployed so as to negate the influence of a democratically-elected government - seems deeply problematic.

Insofar as concerns democracy, O' Flaherty J. observed (somewhat remarkably given that this view had been rejected in two separate High Court rulings [78]) that he thought it "bordering on the self-evident that in a democracy such as is enshrined in our Constitution…it is impermissible for the Government to spend public money in the course of a referendum campaign to benefit one side rather that the other." [79]

Denham J. also felt that "in referenda the People vote on the proposed amendment. Such vote must be free." [80] She asserted that spending public funds would infringe "the right to a democratic process in referenda."

> "Ireland is a democratic state. The citizen is entitled under the Constitution to a democratic process. The citizen is entitled to a democracy free from governmental intercession with the process, no matter how well intentioned. No branch of the government is entitled to use taxpayers' monies from the Central Fund to intercede with the democratic process either as to the voting process or as to the campaign prior to the vote.
>
> This is an implied right pursuant to Article 40, s. 3 which harmonises with Article 5, Article 6, s. 1, Article 16, Article 40, s. 1, Article 47, s. 3 and is in keeping with the democratic nature of Bunreacht na hÉireann." [81]

Such a view, however, arguably makes too little of the role of the elected Government which forms part and parcel of every democracy, and which far from being seen as 'interceding' in a referendum process ought arguably to have an important leadership role to play. In any referendum, it is to be expected one campaigner (or group of campaigners) will, in the end, succeed in the aim exercising the most persuasive force. All *McKenna (No. 2)* ensures is that the entity which arguably has the most democratic legitimacy claim to play this role – the elected Government – is largely prevented from doing so, and effectively emasculated in its leadership role. The ruling goes a considerable distance to privatising the referendum process. The Government is forbidden to exert influence. But anyone else may.

Denham J.'s judgment in this regard was prefaced by her observation that

> "The Constitution envisaged a government wherein there is a separation of powers between the legislative, executive and and judicial organs of government. They operate a system of checks and balances on each other. All three are subject to the Constitution, which recognises that the fundamental power rests in the People. The Constitution envisages a true democracy: the rule of the People. This case is about the constitutional relationship of the People to their government.

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[77] See *e.g.,* the complaints in this regard by Michael D'Arcy TD in the Joint Oireachtas Committee on the Constitution, 18 November, 2008 available online at http://debates.oireachtas.ie/CommitteeMenu.aspx?Dail=30&Cid=CN The level of public concern whipped up by erroneous assertions by the anti-Lisbon Treaty campaign led the Irish Government to seek (and receive) assurances from the Brussels European Council of 11-12 December 2008 that legal guarantees would be provided prior to any second Irish referendum, in relation to a number of matters in relation to which fears had been created, notwithstanding the fact that the Lisbon Treaty in reality poses no threat to these interests, even without such guarantees.

[78] It is also a view not reflected in the law of, for example, Denmark - which also has referendums as part of its democratic structure.

[79] [1995] 2 IR 10 at 42.

[80] [1995] 2 IR 10 at 52. See the observations below concerning Blayney J's judgment.

[81] [1995] 2 IR 10 at 53-54. See also in this regard the ruling of O'Flaherty J [1995] 2 IR 10 at 43.

> The most fundamental method by which the People decide all questions of national policy according to the requirements of the common good is by way of referendum…" [82]

Such language, however, at the very least seems to risks overstating the role of direct democracy in the Irish constitutional order. It is also difficult to avoid being reminded here of Ellis' trenchantly-expressed criticism, in the American context, of the remarkable paradox of hardened popular scepticism about politicians often going hand in hand with what he characterises as "a naïve innocence about 'the people'". Ellis notes that

> "power to the people promises to bypass politicians and bureaucrats, conflict and coercion. 'The people' are imagined as a harmonious and homogenous whole, completely unlike the political arena of government that is disfigured by competing self-interests and group interests, loud squabbling and unseemly fighting. The checks and balances, so necessary to control the avarice and ambition of politicians, are not needed when the will of the people can be directly expressed…" (*Op. cit.,* 125-127)

Insofar as concerns fairness, perhaps the most emphatic judgment was that of Blayney J. who focused very much on the question of fair procedures. Blayney J. even cited a judgment in a case concerning the requirement of fair procedures in dismissing an individual from his or her employment - not perhaps a precedent the applicability of which immediately suggests itself.[83] For Blayney J., constitutional justice required that the executive should act fairly in discharging its role, "not favouring any section of the People at the expense of any other section. This would seem to be a minimum requirement for the discharge of any constitutional obligation. The people *(sic.)* are entitled to be treated equally." [84]

The potentially sweeping impact of the *McKenna (No. 2)* ruling was quickly subjected to limits by the judiciary itself, however. In the subsequent *Hanafin* case,[85] the Supreme Court baulked at the idea of setting aside the result of the 1995 divorce referendum on the basis of its ruling in *McKenna (No. 2)*.[86] Subsequent case-law has led O'Dowd to conclude that "the courts are likely to be slow to extend an analysis based on different groups of voters' right to equal treatment to national, European or local election or to other contexts involving political communication." [87] Indeed, the same writer has observed that there now seems to be some judicial anxiety generally to limit the scope of application of the 'political equality' principle. [88] Overall, what we have seen is considerable judicial reluctance to accord *McKenna (No. 2)* much precedent value outside the context of referendums [89] –

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[82] [1995] 2 IR 10 at 51.

[83] [1995] 2 IR 49 to 50. The case in question was *Glover v. BLN Ltd.* [1973] IR 388, and is the only judgment cited by Blayney J in his opinion.

[84] [1995] 2 IR 10 at 49. (The differences in capitalisation of the word 'people' derive from Blayney J's judgment as reported, but seem to be without significance).

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

[86] As Morgan has observed, "a week after *McKenna (No. 2)*, the yes-side (that is, the Government side) won the referendum by only 9,000 in a total vote of 1.5 million. Yet curiously the Supreme Court…declined to upset the referendum result." (*Op. cit.,* n. 8 at 6.). Courts in other jurisdictions however have shown an analogous reluctance to deploy arguments of unconstitutionality against voter-approved measures. Ellis has noted the tendency of some state courts in the United States to show great deference to voter-approved initiatives, quoting an (unnamed) former California Supreme Court judge as having observed that "it is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional; to tell that to the people of a state who indicated their direct support for the measure through the ballot is another." (*Op. cit.,* n. 67 at 126 and more generally 125-127 and 168) In *Hanafin* itself, Barrington J. observed that "this Court will not lightly set aside what appears, *prima facie* , to be an act of the sovereign people." ([1996] 2 IR 321 at 457.)

[87] (*Loc. cit.,*n. 13 at 11.) O'Dowd bases his opinion in this respect on the High Court decision of Laffoy J. in *Ring v. Attorney General* [2004] 1 IR 185.

[88] *Loc. cit.,*n. 13 at 13 (and see more generally 5-13). The writer points in this regard to the High Court decision of Laffoy J. in *Ring v. Attorney General* [2004] 1 IR 185 and that of Carroll J. in *The Green Party v. RTÉ* [2003] 1 IR 558.

[89] In this, the ruling has something in common with the *Crotty* ruling, dealt with in the text above.

even in other electoral situations, where its applicability might have been expected to be most readily recognised.

The real impact of *McKenna (No. 2)* has rather been to affect the conduct (and therefore the outcome) of subsequent referendums – most particularly those on European treaties. *McKenna (No. 2)* has had a double effect on this latter kind of referendum. The first effect has been that once a combination of factors – including, crucially, the *Crotty* case - ensures that a matter is sent to referendum then *McKenna (No. 2)* operates in large measure to 'take the government out' of the equation. In other words, the Government, effectively forced into a referendum by a combination of the wording of Article 29.4.10° and the *Crotty* decision in the first place, is then deprived by *McKenna (No. 2)* of substantial means to persuade the electorate of the correctness of its cause, or to defend the outcome of the behaviour it may well have been engaging in on behalf of the electorate for several years.[90]

The approach of the Supreme Court in *McKenna (No. 2)* was based on the majority's interpretation of the requirements of concepts such as equality, democracy, fairness and the role of the people in a referendum. However, it is submitted that while a strong argument may be made on such bases for *limits* to be applied to Government spending on referendums, the elimination in large measure of a Government presence from referendum campaigns in the manner in which this was required in *McKenna (No. 2)* seems a disproportionate and extreme approach. Under *McKenna (No. 2)* the Government is not *limited* in the amount it can spend. It is deprived of the right to spend anything at all (apart from sums it would be impractical to prevent the Government from spending such as payments for ministerial chauffeurs *etc.*).[91]

This large-scale elimination of Governmental input has created the need for what might be termed a form of corporatism. The roles which would otherwise belong to the Government have to be passed on to other parties lacking in the same degree of expertise. Hence (insofar as concerns the Government's need to persuade and inform) political parties and (insofar as concerns the Government's need to inform alone) the Referendum Commission, both of which have a weaker

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[90] It is also worth mentioning that the Supreme Court ruling in *Hanafin v. Minister for the Environment* [1996] 2 IR 321, with its references to unlawful acts affecting the outcome of a referendum (see for example in this regard the ruling of Barrington J. [1996] 2 IR 321 at 457) might possibly have played some role in persuading the Government to have a second referendum on the entirety of the Lisbon Treaty. Partial ratification of major portions of the Lisbon Treaty by parliamentary means alone in the wake of the initial referendum defeat (which concerned the entirety of the Treaty) would probably have been regarded as politically unacceptable in any case, however. (See in this regard, P. Cox, *"Another Lisbon Vote Not a Great Option but it is a Democratic One",* Irish Times, August 26, 2008 and G. Barrett, *"Solving the Lisbon Conundrum",* Sunday Business Post, 31 August, 2008.) One anti-Lisbon Treaty group threatened a constitutional challenge in the Irish courts if any attempt were made to ratify any part of the Lisbon Treaty by parliamentary means alone subsequent to the 2008 referendum result. The same group's threatened challenge to a re-run of the 2008 referendum on the entire Treaty has not been acted upon and seems unlikely to succeed if it is. (See F. Gartland, *"Group May Challenge Legality of Treaty Rerun"* Irish Times, 11 December, 2008.)

[91] Hence O' Flaherty J. observed

> "we have had put before us, should we decide in favour of the plaintiff, the spectre of Government Ministers not being entitled to use their State transport in relation to the referendum; nor to avail of the radio and television and print media to put forward their point of view – none of those things has any application to this case and I believe it should not be represented as having such an effect."

([1995] 2 IR 10 at 46. See also the ruling by Keane J. in *Coughlan* at [2000] 3 IR 1 at 57.) Somewhat quixotically, Supreme Court judges in both *McKenna (No. 2)* and *Coughlan* insisted the Government the right or even the duty to inform the electorate of its views in a referendum situation, but simultaneously insisted that it has no right to incur expenditure with a view to influencing the result. Hence Keane J. suggested that the Government could campaign "with the utmost vigour" for a particular result - as long as it didn't spend public funds to influence the outcome. (*Ibid.* See also *e.g.,* the judgment of Flaherty J. in *McKenna (No. 2)* at [1995] 2 IR 10 at 43.) In *Coughlan,* Denham J. insisted that "the Government has a *duty* to inform the people of its views". ([2000] 3 IR 1 at 31.) As to how how the Government was supposed to inform the electorate directly and yet remain within the expenditure requirements laid down in *McKenna (No. 2),* Denham J.'s sole suggestion was that "this will have been done initially through the debates in the Dáil and the Seanad leading to the Bill grounding the referendum." (*Ibid.*) In an era in which national newspapers frequently do not even bother to report parliamentary proceedings, this does not however seem a realistic approach.

claim on public trust and confidence than does a democratically-elected government have had to take up the baton.[92] (Civil society groups could also intervene, but in practice intervention in this form in the Lisbon Treaty debate was largely (although not exclusively) populated by groups occupying the extremes of the political spectrum, opposed to, rather than supporting the Government position).

The difficulty is that political parties are less well equipped for the task of winning a referendum than is a Government. In the first place, they lack the moral authority of an elected Government. Secondly (and this is particularly the case given the executive-dominated nature of Irish politics) their membership may lack expertise in European matters. Thirdly, the *raison d'être* of political parties is to fight elections rather than referendum campaigns.[93] Placing the burden of winning a referendum on political parties makes the unrealistic demand of Opposition parties that they cast self-interest aside and campaign on behalf of the Government. Yet supporters of Opposition political parties have little incentive beyond the broader national interest to assist the Government even when in agreement that a Treaty should be ratified. They will find themselves in a difficult position regardless of whether the referendum succeeds (in which case the Government will collect much of the credit) or fails. Although all three of the major Irish political parties officially favoured a 'yes' vote regarding the Lisbon Treaty, serious questions were raised concerning how hard any of them campaigned,[94] and it could hardly have come as a surprise when, post-referendum, the comprehensive Government-commissioned Milward Brown IMS study revealed radical divergences in support for the Treaty among supporters of the different political parties.[95]

As for the Referendum Commission [96] - set up in successive referendums with a primary role limited to that of merely of explaining the subject matter of referendum proposals, promoting public awareness of the referendum and encouraging the electorate to vote - the impossibility (thanks to *McKenna (No. 2)*) of allowing this body to take sides means it can not replace the Government in the function of explaining the advantages of a negotiated Treaty to the public. It has therefore never been a replacement for the Government in any real sense. Furthermore, although the Referendum Commission has provided valuable information in the course of a succession of referendum campaigns, it has undeniably encountered serious difficulties in winning public confidence in more than one referendum, and the referendum concerning the Treaty of Lisbon was a case in point in this respect.[97]

Reflections on an Appropriate Legislative Reaction to *McKenna (No. 2)*

[92] Nonetheless, a major role for political parties was clearly envisaged by Denham J. in her judgment in *Coughlan,* where she observed that "it is entirely correct in a democracy that political parties inform people of their views and campaign on the issue [*i.e.,* in a referendum]. State funding may be allocated to enable a full debate and expended in a fair and constitutional fashion." ([2000] 3 IR 1 at 31.)

[93] See in this regard M. Shu, *"Referendums and the Political Constitution of the EU"* (2008) 14 European Law Journal 423.

[94] See *e.g.,* M. Hennessy, *"Opposition Parties Slow to Get Fully Behind Yes Campaign"*, Irish Times, 27 May, 2008.

[95] Amongst the main political parties, 63% of Fianna Fáil supporters voted for the Treaty, 52% of Fine Gael supporters in favour of it. Labour Party supporters and Green Party supporters voted against the Treaty by margins of 61% and 53% respectively as did Sinn Féin supporters, who voted no by a majority of 88%. (See *Post Lisbon Treaty Research Findings* (Millward Brown IMS, Dublin, September, 2008).

[96] In March, 2008, the Minister for the Environment, Heritage and Local Government made the Referendum Commission (Establishment) Order 2008 (Statutory Instrument No. 58 of 2008) under the Referendum Act 1998 (as amended by the Referendum Act 2001) establishing an independent statutory Referendum Commission for the purposes of the referendum on the Lisbon Treaty. A High Court judge was then appointed to act as its Chairperson with the other members of the Commission being the Comptroller and Auditor General, the Ombudsman, the Clerk of the Dáil and the Clerk of the Seanad. Remarkably, no expert either in European law or media relations was appointed to its ranks – which may help to explain the Commission's less-than-impressive performance of its task in the 2008 referendum campaign. The Commission itself complained that it was not given enough time to prepare its information campaign. (See in this regard, P. Leahy, *"Commission: Not Enough Time to Inform Public on Lisbon Treaty",* Sunday Business Post, 1 February, 2009.) The Commission's website is www.lisbontreaty2008.ie/

[97] See further H. McGee, *"Awareness Raising Campaign is Defended"*, Irish Times, June 16, 2008.

Whatever view one takes of the correctness of the majority view of the needs of equality, democracy, fairness *etc*, it is clear that once *McKenna (No. 2)* was applied to state action, that none of these interests could possibly be adequately served without a legislative riposte enforcing a prohibition on *private* financial intervention in a referendum campaign beyond minimal levels – including in the form of loans to campaigning groups.[98] A level playing pitch between both sides in a referendum campaign can be just as easily disrupted by large-scale *private* financial intervention as by the kind of governmental financial intervention which the Supreme Court majority in *McKenna (No. 2)* seemed to find so objectionable.

It also seems clear that - just like competition law - such legislative intervention, in order to have any hope of being effective would have to be properly enforced by a body equipped with adequate investigative, injunctive and other legal powers. The relevant norms must also be capable of timely enforcement. There is little point in having (as at present) campaign finance rules which purport to be enforced on the basis of accounts delivered only months after the referendum has taken place, since such rules make it possible for behaviour in breach of the relevant rules to influence the outcome of the poll. Notwithstanding the enactment of the Electoral Act, 1997 and the Electoral (Amendment) Acts, 2001 and 2002 and the creation of the Standards in Public Office Commission, no adequate such framework has ever been put in place.

Without such a legislative response, the ruling of the majority in *McKenna (No. 2)* takes one no closer to equality, however. Rather, it merely hobbles the biggest player on the pitch – in this case the democratically-elected government - making way for a new biggest player to take its place.

Overall, the result of the combination of judicial activism in *McKenna (No. 2)* and subsequent legislative lethargy has been the crippling of the power of democratically-elected governments to intervene in any effective sense in a referendum campaign, whilst private parties with no democratic mandate whatsoever suffer no equivalent such comprehensive disadvantage. The consequences have been predictable. In the context of the 2008 Lisbon referendum, *McKenna (No. 2)* and the failure to react adequately to it may be regarded as having constituted a significant factor in the emergence of Libertas as a considerable force in the referendum campaign – a corporate entity with no electoral mandate whatsoever, which seemed largely to represent the political views of one individual, also without any electoral mandate.

Coughlan v. Broadcasting Complaints Commission and RTÉ [99]

Coughlan is the next Supreme Court case which is of relevance in the present context. The case – brought by a well-known Eurosceptical campaigner – took place in the context of the referendum on removing the constitutional prohibition on divorce, although it is worth noting that proceedings were brought two years after the divorce referendum was held, the High Court ruling was delivered three years after this event and the Supreme Court ruling five years later. Plainly, if the proceedings were successful, their implications for European integration were likely to be more significant than their implications for Irish family law – notwithstanding the fact that at least one of the Supreme Court judges ascribed "great force", in reaching his conclusions, to an argument rooted in the very particular circumstances of the divorce referendum.[100]

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[98] Loans were availed of extensively by Libertas, a previously unknown corporate entity which largely represented the views of one individual (Anglo-Irish multi-millionaire Declan Ganley) and which mounted a remarkably well-resourced campaign on the 'no' side in the 2008 referendum on the Lisbon Treaty. (See C. Keena, *"Substantial Amount of Funding for Libertas Came from Ganley"*, Irish Times, October 3, 2008.)

[99] [2000] 3 IR 1.

[100] O' Flaherty J., noting that the referendum to remove the constitutional prohibition on divorce involved the same concept as had been involved in the (unsuccessful) referendum of 1986, observed that

> "the argument advanced on behalf of the plaintiff is to say that in the light of that background the Government has all the greater obligation to make sure that public money is not used to promote one side to the exclusion of the other. I think there is great force in this argument…"

(See [1995] 2 IR 10 at 45.)

The case arrived before the Supreme Court in the form of an appeal by the Broadcasting Complaints Commission and RTÉ, the national broadcasting service, against the High Court decision of Carney J. to grant an order of certiorari quashing a decision by the Commission – *viz.,* its decision to dismiss the applicant's complaints and to declare that in relation to the divorce referendum of 1995 the allocation of uncontested broadcasting time to each side of the argument had been significantly unequal and thereby constitutionally unfair. The alleged imbalance had been remarkably small – and entirely caused by the desire of RTÉ to recognise the role of political parties in the democratic process. As explained with great clarity by Barrington J. in his judgment

> "approximately 98% of the broadcast coverage of the campaign was monitored by [RTÉ] to ensure that a proper balance was kept between the advocates and the opponents of the divorce proposal. This case is concerned with the balance of the coverage amounting to just over 2%. This 2% is referred to - somewhat misleadingly - as the 'uncontested' broadcasts. It consists of two uncontested broadcasts from *ad hoc* campaign groups advocating a 'Yes' vote and two uncontested broadcasts from *ad hoc* groups advocating a 'No' vote. Each side received a total allotment of ten minutes so that if one looks at the *ad hoc* groups alone the time allotted was equal.
>
> But the second respondent also carried ten political party broadcasts amounting to thirty minutes in all. It so happened that all the political parties favoured a 'Yes' vote so that if one takes the aggregate of the 'uncontested' broadcasts forty minutes (or 80% of the time) was given to those who advocated a 'Yes' vote and only ten minutes (or 20% of the time) was given to those who advocated a 'No' vote. Whether it is correct in law to aggregate the 'uncontested' broadcasts in this way is one of the matters in dispute in these proceedings." [101]

As it turned out, the Supreme Court majority did aggregate the 'uncontested' broadcasts in this way, to this extent equating the largest and most representative political parties with the smallest and most unrepresentative pressure group. Ultimately the Court in *Coughlan* split 4-1 with Hamilton C.J., Denham J., Keane J. (as he then was) and Barron J. dismissing the appeal against the ruling of Carney J. and Barrington J. penning a masterful but solitary dissenting opinion.

Coughlan – Both Statute Law Interpretation and Constitutional Interpretation

Coughlan involved issues of both Constitutional and statute law. Indeed one of the four majority judgments (that of Barron J.) made no reference to anything other than statutory matters.[102] Even though the effects of some of the rulings concerning the correct interpretation of the legislation are still with us, it is obviously the Constitutional findings in *Coughlan* which are of the most importance, since barring a constitutional amendment or a change of mind by the Supreme Court,

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[101] [2000] 3 I.R. 1 at 34

[102] At issue in *Coughlan* were, apart from the constitutional issues concerned, certain statutory questions, in particular concerning s. 18 of the Broadcasting Authority Act, 1960. Sub-section 1 of this imposed on RTÉ the duty to ensure that news broadcast by it be reported and presented in an objective and impartial manner and without any expression of [RTÉ's] own views and further that the broadcast treatment of current affairs be fair to all interests concerned and broadcast matter be presented objectively and impartially and without any expression of the Authority's own views. Sub-section 2 of s. 18 stated that 'nothing in this section shall prevent [RTÉ] from transmitting party political broadcasts.' Notwithstanding the breadth of the wording of s. 18(2), Keane J (with whom Hamilton CJ and Denham J agreed) held that s. 18(2) did not liberate RTÉ from the s. 18(1) duty to be fair to all interests concerned when it came to allocating uncontested broadcasts (as opposed to determining their content). (Over and above this, Keane J. noted that a constitutional duty not to discriminate between political parties had been identified in State (Lynch) v. Cooney [1982] IR 337). As is noted above, Barron J who formed part of the majority, based his ruling exclusively on an interpretation of the 1960 Act as amended. He declined to consider constitutional issues or the meaning to be given to equality (although his ruling, questioning the balancing of political parties rather than the substance of broadcasts, demanding 'impartiality' between the interests involved in a referendum, objecting to 'the imbalance in favour of' one side of the referendum seems nonetheless clearly based on a '50-50' approach to equality).

they are inescapable as far as the legislator is concerned.[103] But Keane J's reliance on Hamilton CJ and Blayney J's rulings in *McKenna (No. 2)* – as well as certain concluding remarks in his judgment [104] - show that his statements concerning equality purported to be an interpretation of the requirements of the Constitution in this regard, not merely of the applicable legislation. Similarly Denham J. indicated that her approach came from the "standpoint of the overall obligations imposed by the legislation and the Constitution." [105]

Models of Equality

The overall approach of Keane J. (as he then was) to equality between the two opposing sides in a referendum campaign was clearly that it should be of a mathematical or '50-50' nature: Keane J.
a) quoted from Blayney J's ruling in *McKenna (No. 2)* criticising the Government for not having 'held the scales equally' between the yes and no side in the divorce referendum;[106]
b) quoted from Hamilton CJ's ruling in *McKenna (No. 2)* condemning government financial 'interference with the democratic process' as '[infringing] the concept of equality which is fundamental to the democratic nature of the State';[107]
c) attached importance to the fact that the distribution of broadcasting time gave the 'yes' side 'a considerable advantage';[108]
d) focused on the four to one imbalance in broadcasting time between the yes and no side – thereby implicitly regarding as equivalent time accorded to established political parties and anyone else;[109] and
e) condemned the very carefully allotted non-'50-50' allocation of broadcasting time which had been explicitly designed by RTÉ to take into account the role of political parties as 'legally impermissible'.[110]

Barrington J's ruling in which he dissented against this mathematical '50-50' appproach to equality seems more convincing. He noted that s. 18 of the 1960 Act rightly provided that RTÉ

> "as the principal broadcasting corporation in the State, should hold the scales equally between citizens and groups of citizens who wish to debate the merits and demerits of a referendum proposal. But political parties…are in a different category and for [RTÉ] – simply because the political parties were agreed on the policy to follow – to set up further broadcasts to contradict

[103] Had *Coughlan* involved merely an interpretation of a s. 18 of the 1960 Act, it might be viewed as simply a rather extraordinarily restrictive interpretation of a statutory provision which expressly provides that 'nothing in this section shall prevent [RTÉ] from transmitting party political broadcasts.'
[104] Note also Keane J's laconic final observation before dismissing the appeal that "whether the difficulties confronting [RTÉ] in this area *can* or should be dealt with by legislation and, if so, how, are not matters for this Court." (See [2000] 3 IR 1 at 58.)(Emphasis added.)
[105] [2000] 3 IR 1 at 32.
[106] [2000] 3 IR 1 at 56.
[107] *Ibid.*
[108] [2000] 3 IR 1 at 57. The 'considerable advantage' in question amounted to approximately 2% of the broadcast coverage by RTÉ, and amounted to a mere total of thirty minutes of broadcast time in the entire referendum campaign – all of it allocated for the purposes of recognising the special role of political parties. (See in this regard the judgment of Barrington J. at [2000] 3 IR 1 at 34.)
[109] [2000] 3 IR 1 at 47 and 56.
[110] [2000] 3 IR 1 at 57. Hamilton CJ's vision of equality also seems to have been a mathematical or '50-50' version thereof. Hence his remark that "in the case of a referendum which has as its objective the amendment of the Constitution, fair procedures require that the scales should be held equally between those who support and those who oppose the amendment" ([2000] 3 IR 1 at 25) and his further observation that

> "political parties undoubtedly have and are entitled to play an important role in the conduct of a referendum. There are many ways in which they can fulfil that role without recourse to a political party broadcast which can only be transmitted by the second respondent in the course of a referendum campaign *if they hold the balance equally between those who supported the referendum and those who opposed it.*"

(See [2000] 3 IR 1 at 26.)

> the advice of the political parties *would be to abandon its role as a neutral institution and to descend into the political arena."* [111]

These words aimed at the idea of equality between all uncontested broadcasts arguably have a wider application in relation to the 50-50 approach to all broadcasts which has subsequently taken hold in practice.

Barrington J. further noted that "just as [RTÉ] cannot interfere in the debate between politicians it cannot interfere to negative the collective advice of the politicians to the electorate. The fact that all the political parties are agreed on a particular aspect of national policy may be a political fact of the utmost importance." [112]

An End to Party Political Broadcasts?

Keane J. concluded his ruling by suggesting that not alone would there be a danger of statutory and constitutional rules being breached where all the political parties lined up on one or other side of a referendum. Even if government and opposition parties were *divided* on the desirable result of a referendum, party political broadcasts might be still nonetheless be illegal (using the rather contrived-sounding argument that they could end up being unbalanced in the - uncontrollable - event of a party changing its mind [113]). His conclusion was that

> "it may be that, having regard to those circumstances, the present state of the law leaves [RTÉ] in the position that it cannot safely transmit party political broadcasts during the course of referendum campaigns as distinct from other campaigns." [114]

A New Vision of the Role of Political Parties

It is interesting to note that the focus of Keane J.'s ruling was denying that RTÉ had the right to interfere with the result of a referendum. This arguably was to miss the point, however. No-one would argue that RTÉ should have the right to influence the outcome of the referendum. But most would argue that political parties should. The majority ruling in *Coughlan* in principle directed at RTÉ in reality worked to the disadvantage of political parties. That it should do so is all the more remarkable given that Keane J., midway through his judgment, had expressed 'no doubt that the Constitution envisaged that political parties would play a role of fundamental importance in the process of amending the Constitution by means of a referendum.' The majority vision of that role turned out to have very limited rights attaching to it in the context of a referendum campaign, however.

Coughlan is notable for the clear if ultimately questionable vision of how democracy should work put forward most clearly by Denham J. but apparently supported by Hamilton C.J. [115] and also implicitly by Keane J.[116] This vision was put forward in the following terms by Denham J.:

> "The referendum process is a different process to that of an election. In a general election or a local election political parties are key players. They are running for power, for government. The institutions of representative democracy are driven by the party political system. Thus, party politics are at the core of an election or a general election. The party political broadcast is

[111] [2000] 3 IR 1 at 39. (Emphasis added.)
[112] [2000] 3 IR 1 at 39.
[113] O'Dowd has remarked of this part of the judgment that "Keane J. seems to have gone out of his way to conjure up obstacles in the broadcasters' path." (*Loc. cit.,*n. 13 at 22.)
[114] [2000] 3 IR 1 at 58. Denham J. in her judgment also expressly found that it might be necessary to decide to hold no party political broadcasts in a referendum campaign. ([2000] 3 IR 1 at 32.)
[115] [2000] 3 IR 1 at 26.
[116] [2000] 3 IR 1 at 54

an important part of that process. In contrast, in a referendum the process is one of direct legislation. *It is an alternative approach to legislation by elected representatives. Consequently, the role of elected representatives is different.*" [117]

Denham J. further observed on this differing role:

"the presentation of the issue to the public is different to the presentation in an election. The referendum procedure established under the Constitution is an exercise in direct democracy. However, the process commences in the legislature. There the political parties have a key role. There is initial control of the process by the legislature. Thus, the referendum machinery is not a threat to the system of representative democracy. However, once the process leaves the Dáil and Seanad, the institutions of representative democracy, it is a tool of direct democracy and the system should be fair, equal and impartial." [118]

Denham J.'s vision is notable for two points. First, it is one in which a reduced role for political parties is explicitly envisaged once the referendum process 'leaves the Dáil and Seanad'. a vision in which equality and impartiality between both sides of the referendum are given the highest priority regardless of how rudderless this leaves the ship of state, and according no special respect or privilege whatsoever for democratically-elected governments and politicians regardless of how many voters they represent.

Secondly, this is a vision which corresponds closely with the way in which referendums now operate in Ireland, which thus far from being an accidental development seems to be the fulfilment of the vision of democracy envisaged by the Supreme Court in *Coughlan.*

Thirdly, it is worth observing that this view of democracy finds no express support in the text of the Constitution. For a vision which has turned out to be of such fundamental importance in redrawing Irish constitutional architecture, it is also unsupported, it must be said, by reference to any theory of democracy, to any examination of the intentions of the framers of the Constitution regarding the conduct of referendums, to any reference (in Ireland or elsewhere) of the actual historical conduct of referendums or by any comparative analysis. (The only case-law cited in this regard by Denham J. – who deserves credit as the only judge who attempted to provide an underlying model of what a referendum process should involve - were the Supreme Court's own then-recent decisions in *McKenna (No. 2)* and *Hanafin v. Minister for the Environment*.[119] These judgments, however, take one no further in the search for any such textual, historical, analytical or comparative support.) Ultimately, what one is left with is a highly contestable model of democracy constructed on the flimsiest of foundations by the Supreme Court. More than this (or alternatively, more deference to the other branches of government) ought surely to have been expected.

Finally, insofar as concerns Denham J.'s assertion that "the process commences in the legislature. There the political parties have a key role. There is initial control of the process by the legislature," this is not an accurate account of matters insofar as concerns referendums on European Treaties where the process does not commence in anything but the formal sense before the legislature. It commences with the legislature being forced to hold a referendum, regardless of how desirable they feel such a step is, by virtue of Articles 29.4.10°, Article 46, and (crucially) the Supreme Court judgment in *Crotty.*

The vision advanced by Denham J., but also by Hamilton C.J. [120] and implicitly by Keane J.[121] stands in marked distinction to that espoused by Barrington J. in dissent, who argued convincingly that:

[117] [2000] 3 IR 1 at 30. (Emphasis added.)
[118] [2000] 3 IR 1 at 30-31.
[119] [1996] 2 IR 321.
[120] [2000] 3 IR 1 at 26.
[121] [2000] 3 IR 1 at 54

> "when it comes to advising the people on a major political decision the principal role must rest with their political leaders. A distinguishing feature of a democratic society is that political leadership rests, not on power, but on persuasion. Likewise political authority rests on the consent of the electorate. It is right and appropriate that political leaders should use their authority and the arts of persuasion to lead the people towards the decision which their judgment tells them will best promote the common good. For [RTÉ] to attempt to neutralise the advice of political leaders would be to subvert the democratic values which it is directed to uphold." [122]

Again

> "when the people are performing the ultimate act of sovereignty it is clearly right and proper that the views of all citizens should, so far as practicable, be heard. But it is also right and proper that the special position of political leaders should be recognised. In my view there is, in principle, no constitutional inequality or unfairness and no breach of democratic values in allowing political leaders access to the airwaves at referendum time on conditions dissimilar to those granted to private citizens but related to their social function as political leaders of the people." [123]

Party Political Broadcasts and Other Uncontested Broadcasts – Accepted Comparability

Both Keane J. and Hamilton J. noted that no complaint had been made concerning the news and current affairs programmes, in respect of which approximately equal time had been allocated: merely in relation to the time allocated for party political broadcasts (which constituted 2% of the total coverage of the divorce referendum campaign). In respect of party political broadcasts, the five largest parties were allowed to make such broadcasts with time allocated by reference to numerical strength in the Dáil. Similar facilities were then allocated to groups campaigning respectively for a 'yes' and a 'no' vote. The end result was that 40 minutes of broadcasting time were allocated to those campaigning for a 'yes' vote and 10 minutes to those campaigning for a 'no' vote.

All of the four judges in the majority seemed happy to regard as comparable the forty minutes allocated to those campaigning for a 'yes' vote with the ten allocated to those campaigning for a 'no' vote, thereby treating all 'uncontested' broadcasts as equal. Only Barrington J. raised the question of whether it was correct in law to aggregate such broadcasts in this way – effectively raising the special role of political parties in political life, and the question of whether the requirement to treat like situations alike but unlike situations in an unlike manner was met by treating all 'uncontradicted broadcasts' alike.[124] The majority made no such distinction in favour of political parties.

A number of further observations can be made about the ruling of the Supreme Court in *Coughlan.*

1. The *Coughlan* ruling was directed only at uncontested broadcasts (including party political broadcasts), since no complaint was made in relation to any other kind of broadcast. In practice, since *Coughlan,* party political broadcasts in referendum situations have indeed come to and end – arguably depriving political parties of an important means of exerting influence. Hence for example the April 2008 Broadcasting Commission of Ireland *Guidelines in Respect of Coverage of the Referendum on the Treaty of Lisbon and Related Constitutional Amendments* [125] instructed broadcasters not to transmit party political broadcasts during the first Lisbon Treaty referendum campaign.

[122] [2000] 3 IR 1 at 45.
[123] [2000] 3 IR 1 at 46.
[124] See [2000] 3 IR 1 at 34.
[125] Available at the time of writing at http://www.bci.ie/documents/Treaty%20of%20Lisbon%20Referendum%20Guidelines%202008%20(Final).doc

2. The reasoning and standards deployed by the Supreme Court in reaching its conclusions in *Coughlan* have relevance to other kinds of broadcast however. An argument can be made that the observations made which are relevant to broadcasts other than party political broadcasts are *obiter dicta* (*i.e.,* an incidental or supplementary opinion offered upon a matter not essential to the decision, and therefore not binding as precedent) rather than the *ratio decidendi* (the legal principle upon which the decision was founded, binding on all inferior courts). However, it is not entirely clear that this is a correct view since they do represent the reasoning from which the Court in *Coughlan* arrived at its conclusions on uncontested broadcasts. The observations of the Court in this regard are at a minimum the best guide that we have in relation to the law concerning these other kinds of broadcast. A cautious approach to fulfilment of a broadcaster's obligations in a referendum in relation to these other kinds of broadcast will thus lead to a '50-50' allotment of time between campaigners in favour of constitutional change and campaigners against it.

In practice, this is exactly what is happening in the broadcast media in Ireland.[126] Once again (like funding rules) inadequately modulated to date by subsequent legislative intervention, and implemented by broadcasters who must take seriously the need to comply with legal obligations, and therefore are always likely to take the safe option in terms of complying with balance requirements, the effect of *Coughlan* has been to create a situation in which broadcasters feel constrained to give 50% of airtime to both sides of a referendum campaign. The overall consequence of this '50-50' approach has been to nullify any advantage that elected office-holders such as the Taoiseach, the leader of the Opposition, or the leader of a major party such as the Labour Party might be expected to enjoy by virtue of their position and to nullify any advantage elected politicians or major political parties would expect *vis à vis* politicians who have received no electoral mandate or support whatsoever and private undertakings – like Libertas - who had no mandate in the 2008 referendum to represent anybody other than whatever individual or individuals controlled them. It has arguably also assisted in creating a false impression that informed elected opinion is evenly split about the Treaty being voted on when this is anything but the truth. In addition, as the evidence of the Treaty of Lisbon campaign shows, the '50-50' approach can assist in bestowing of the aura of a mass movement to what is in fact merely a corporate entity.

In practice, the '50-50' rule creates a perverse political incentive to oppose Constitutional amendments on European treaties. A politician who supports such an amendment will normally find him- or herself occupying a crowded field of experienced politicians jostling for the maximum of 50% of the airtime guaranteed to the 'yes' side. A politician who opposes the amendment occupies a much less crowded space populated by much less experienced political actors. For the 'no' side, the 50% operates more as a minimum guarantee. The result is predictable. The electoral fortunes of the hardline nationalist Sinn Féin party improved considerably in 2008, buoyed by access to the airwaves on an otherwise undreamt-of scale given to it simply because it opposed the Lisbon Treaty.[127]

It may be observed in passing that the since the *Coughlan* ruling has no application to the printed media, it requires no even-handedness there. And in respect of large numbers of newspapers sold in Ireland every day, there is no even-handedness. Numerous publications, many (although not all) based in United Kingdom, and reflecting a United Kingdom perspective, campaign vehemently against the European Union. Formerly their influence might have been counterbalanced by the broadcast media. But since the *Coughlan* ruling, this no longer happens.

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[126] See generally here the evidence given to the Joint Oireachtas Committee on the Constitution, 11 November, 2008) (particularly that given on behalf of the Independent Broadcasters of Ireland and commercial broadcasters such as Newstalk and TV3)(available online at http://debates.oireachtas.ie/DDebate.aspx?F=CNJ20081111.XML&Ex=All&Page=3). See also F. Gartland, *"No Equal Airtime for Referendum 'Required'",* Irish Times, 12 November, 2008.

[127] See D. de Breadún, *"Nothing Ruled Out As Sinn Féin Focuses on a Greater Future Role",* Irish Times, 20 February, 2009.

3. *Coughlan* constitutes a strong precedent, in that four of the five Supreme Court judges who delivered a ruling found for the applicant, and of these three of them (Keane J., Hamilton CJ and Denham J.) agreed with the ruling of Keane J., which thus represents the views of a Supreme Court majority. On the other hand, the Irish Supreme Court is of course free to depart from its own previous rulings.[128] Moreover the composition of today's Supreme Court is almost entirely different to that of the Court that decided the *Coughlan* case: only one of the judges who ruled in *Coughlan* [129] is still a member of the Court.

4. The second respondent in *Coughlan* was Radio Telefís Éireann, the public broadcasting service. The first was the Broadcasting Complaints Commission (who presumably would have been subjected to a similar ruling were a similar complaint to be brought against a private broadcaster). The standards applied in *Coughlan* were in any case transmitted into private sector broadcasting in the last referendum campaign through the Broadcasting Commission of Ireland *Guidelines in Respect of Coverage of the Referendum on the Treaty of Lisbon and Related Constitutional Amendments*, [130] paragraph 6 of which (which applies to current affairs programmes) stipulated that

> "all interests concerned *should receive equal treatment* on such programmes; coverage should be fair to all interests and presented in an objective and impartial manner and *without any expression of the broadcaster's own views*." [131]

Assertions by the Commission statements to the effect that these Guidelines did not require mathematical equality sit awkwardly with the indications in *Coughlan* that this is exactly what is required, and with statements both by representatives of broadcasters such as Newstalk, TV3 and the Independent Broadcasters of Ireland both that this is what they see themselves as obliged to do, and are doing in practice.[132]

It should be noted that BCI 'guidelines' in this regard constitute 'guidelines' only in the sense that they are vague. They have the effect of binding rules, breach of which can lead to serious sanctions for radio stations if upheld by the Broadcasting Complaints Commission.[133] There is every reason for broadcasters to play it safe by according '50-50' treatment in reality – even if a more flexible standard is technically possible (which, in the light of *Coughlan* and even the wording of the Broadcasting Commission's standards, is far from clear).

Reflections on an Appropriate Legislative Reaction to the *Coughlan* Case

The elimination of party political broadcasts in referendum situations which followed on *Coughlan* is, it is submitted, an unwelcome dimunition of the influence of political parties in Irish democratic life. However, since the *Coughlan* case related only to the question of party political broadcasts, it remains technically open to the Government to regulate media broadcasts other than in relation to

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[128] *Attorney-General and Minister for Defence v. Ryan's Car Hire* [1965] IR 642.
[129] Denham J.
[130] Available at http://www.bci.ie/documents/Treaty%20of%20Lisbon%20Referendum%20Guidelines%202008%20(Final).doc
[131] Emphasis added. The above Guidelines themselves have given rise to further difficulties. The complexity of the subject matter involved in the Lisbon Treaty referendum already made it a challenge for journalists to detect and challenge untruths. Even where they did, misgivings about doing so were given rise to by the provision that coverage is required to be "*without any expression of the broadcaster's own views*." See Proceedings of the Oireachtas Joint Committee on the Constitution of 11 November, 2008 available at the time of writing at http://debates.oireachtas.ie/DDebate.aspx?F=CNJ20081111.xml&Node=H2#H2
[131] Some aspects of this were discussed in the Joint Committee on the Constitution on 16 December 2008 (available online at the time of writing at http://debates.oireachtas.ie/DDebate.aspx?F=CNJ20081216.xml&Node=H2&Page=1)
[132] Ibid. See also R. McGreevy, *"'Balance' Rules Explain Why We're Hearing Much Ado about No - and Yes"*, Irish Times, 2 June, 2008.
[133] See in this regard the evidence of Mr. A. Hanlon of TV3 to the Oireachtas Joint Committee on the Constitution (11 November, 2008) available online at http://debates.oireachtas.ie/DDebate.aspx?F=CNJ20081111.xml&Node=H2#H2

party political broadcasts in such a way as to ensure that due regard is given in the media to the fact that speakers are democratically elected representatives or the holders of positions such as that of Taoiseach, leader of the Opposition or other major political party and therefore have a different 'social function' – to use the language of the Constitution [134] - to others not in that position. Such legislation should be enacted, but it will undoubtedly be challenged before the Courts if it is. Its survival would thus depend on the (by-now differently constituted) Supreme Court adopting a different attitude to the meaning of equality than that taken by the majority in *Coughlan*. In other words, should the logic of *Coughlan* to be followed, such legislation would be struck down as unconstitutional.

Overall Conclusions

This writer is unconvinced that any of the *Crotty, McKenna (No. 2)* or *Coughlan* cases was correctly decided.[135] If there is a conclusion to be reached in relation to the subject of this article, it is that serious thought needs to be applied both to (a) the question of when referendums are held in relation to European Treaties in Ireland, and (b) the question of how such referendums are conducted. There is a role for both the judiciary and the legislature in such a reflective process. As for the judiciary, it is to be hoped that if a *Crotty*-like case ever comes before the Supreme Court again, the essential scope and objectives test formulated in that case and/or Article 29.4.3 and 4 will be given a considerably wider reading than they were in *Crotty* itself. This is not so as to prevent the possibility of referendums being held. Rather it is for the purpose of enabling the elected government and parliament to decide in a given case if such a referendum is appropriate. Even in advance of any such judicial rethink, it may be appropriate for Irish Governments to reflect more carefully on what they think is appropriate to submit to referendum – but their room for manoeuvre is clearly considerably circumscribed in this regard by the *Crotty* ruling.

As for how referendums are conducted, it would help matters considerably were the Supreme Court to overrule its decision in *McKenna (No. 2)* – not for the purpose of enabling Governments to deprive referendums of any meaning by outspending all other participants, but for the purpose of enabling the Government and legislature to work out what the appropriate balance should be in a referendum situation between their exercising their leadership role and the legislature's democratic rights. It is possible to take the view that *some* limited judicial restrictions on governmental action might be appropriate here without feeling that the Supreme Court should ever have gone as far as it did in *McKenna (No. 2).*In the absence of such a rethink by the Supreme Court, at least some of the damage done to the democratic process in referendums in *McKenna (No. 2)* could be effected by the Government and legislature enacting legislation which might avoid multi-millionaires with no democratic mandate whatsoever using the means available to them [136] to influence the outcome of a referendum in a way which is at present proscribed for democratically-elected Governments thanks to *McKenna (No. 2)*.

Finally, it is submitted that the *Coughlan* case, damaging as it does the ability of political parties to play their much-needed leadership role through it restrictions on the use of party political broadcasts, should also be overruled by the Supreme Court. Here too, even in the absence of such a step, there is a role for the Government and legislature. Legislation could be drafted enabling broadcasters to give appropriate recognition to elected representatives in distributing airtime and to relieve them from necessity to divide airtime precisely equally between both sides in a referendum campaign with all the bizarre and artificial consequences that this has. Such legislation might well face constitutional challenge, but hopefully not successful challenge.

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[134] Art. 40.1.

[135] Although the broad test promulgated in *Crotty,* if not the manner of its application, seems unobjectionable.

[136] *I.e.,* beyond a tightly controlled maximum limit. Note in this regard the far more tightly regulated position in the United Kingdom under the Political Parties, Elections and Referendums Act, 2000.

Ultimately, one theme of this article is that this area of law (as much and more as the area of socio-economic rights [137]) is one which requires a judicial approach more deferential to the democratically-elected branches of Government than that which has been seen to date in addressing questions such as (a) when referendums are required in relation to European Treaties and (b) how such referendums are to be conducted.[138] Equally, however, far more use needs to be made by the elected branches of the scope left to them for legislative activity - and this not just when a referendum concerning a European Union Treaty is lost. The field of referendums on European Treaties is one in which Ireland badly needs both less judicial activism and more legislative activity.

[137] On which much ink has been spilt. See in this regard, *e.g.,* A. Hardiman, *"The Role of the Supreme Court in our Democracy"* (paper originally delivered to the 2004 McGill Summer School and now published in J. Mulholland (ed.), *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill Summer School, Glenties, 2004) at 32, and, in response, G. Whyte, *"The Role of the Supreme Court in Our Democracy: A Response to Mr. Justice Hardiman"* (2006) 28 DULJ 1. On the topic of judicial deference in the field of human rights, see B. Foley, *"Diceyan Ghosts: Deference, Rights, Policy and Spatial Distinctions* (2006) 28 DULJ 77.

[138] It is interesting to note that Taoiseach (Prime Minister) Seán Lemass is said to have privately admonished both Chief Justice Ó Dálaigh CJ and Walsh J (part of the Supreme Court majority in *Crotty*) on their appointment on the same day in 1961 that he "would like the Supreme Court to become more like the United States Supreme Court". Whether, in the light of the subsequent five decades of experience, subsequent Taoisigh would now offer similar advice – or prefer to drive the process of legislative and constitutional reform themselves - is a moot point. (See Morgan, *op. cit.,*n. 8 at 12 and G. Sturgess and P. Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (Butterworths, Sydney, 1988) at 418-419.