

THE CONSTITUTION, THE COURTS AND THE LEGISLATURE

Lecture by Peter D Sutherland SC

SECOND **BRIAN LENIHAN MEMORIAL ADDRESS**

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I had a moment of hesitation when I was invited to deliver this Memorial Lecture. Recognising that it should have a legal theme I was acutely conscious that it has been a very long time since I have had any direct involvement in Irish legal matters. To be permitted to deliver a lecture on law, particularly before such a learned audience, is an undeserved indulgence. It is not with false humility that I confess that I am embarrassed. My only justification is the fact that I have had some experience at the interface between governments and the Courts in policy making both here and abroad and have witnessed some changes at international level.

My hesitation was only momentary because of my respect for Brian Lenihan. He was truly “a man for all seasons” in the sense that this phrase was originally expressed. He was a person of great personal courage and patriotism. But he had many other qualities too. His intelligence, wide reading and charm being the most obvious.

I only knew him in recent years but I vividly recall our few meetings. The first was a long conversation lasting four or five hours in London. There he spoke, with the eloquence and passion for which he was known, of his motivations for being in politics. He placed at the forefront of these a belief in European integration. Later I went to hear him speak at Béal Na Bláth. Having spoken previously at a Michael Collins anniversary event I appreciated the challenges in this. These were particularly obvious for someone from a different political tradition who had to rise above tribal divisions. In fact he soared above these differences and underlined the ephemeral nature of some of our political divisions.

Towards the end of his life in particular he provided an example of selfless dedication to public service. His passing was not merely a grievous loss to his family but also to the nation.

This evening I want to address the relationship between the executive, the legislature and the Courts under our Constitution. I do so with, indeed because of, an abiding memory of sitting at the Cabinet table of two governments in difficult times that sometimes had to grapple with the uncertainties of the prospect of later judicial interpretation of legislation that was being considered. Some of the uncertainties that I felt at that time were reflected in a Thomas Davis Lecture that I gave in the eighties. Observing subsequent developments from far away since then, the issues that gave rise to those concerns have not abated in the interval for more recent Attorneys General. Perhaps they have even increased.

Of course the Courts have not been invested by the Constitution with the power to make laws. The Oireachtas

has the sole law-making function. This reflects the essence of democracy. Abraham Lincoln in his Gettysburg address dedicated his nation “to government of the people by the people and for the people” and our Constitution seeks the same end. But this definition of democracy does not deny the legitimacy of intervention by the Courts to strike down laws duly enacted where these laws are repugnant to the Constitution. It should also be mentioned in this context that, unlike the United States Constitution, the Irish Constitution was adopted by plebiscite in 1937. The people thereby expressly empowered the Courts to protect its provisions.

Two of the lessons that may be drawn from the foregoing are: firstly, the legislature should make the laws and should not leave it to the Courts to do so and secondly, the Courts should not go further in their function in striking down laws or government action than it is reasonable to infer that the Constitution permits. My primary focus this evening will be on the latter issue but I will also comment first on the responsibilities of the other organs of government.

The respect that each organ of the state owes to another is fundamental to the trust that is required in a functioning democracy. This respect among the branches of government is undermined, for example, where measures are adopted by the legislature, which the Oireachtas knows or ought to know will, through their ambiguity or lack of clarity, require the judiciary to determine what they actually mean. Effectively delegating to the Courts decisions which legislators would rather not address themselves, particularly when the issue is one which is controversial politically or morally, is quite wrong. It may bring the judiciary into the centre of debates which they have neither the competence nor the democratic legitimacy to determine, and it is a denial of respect for the separation of powers.

One example of this is provided by Article 40.3.3, the anti abortion amendment. I do not wish to enter the current debate on this Article at all. I gave my opinion many years ago and I have nothing at all to add to what I said then. But one aspect is relevant to this lecture because it illustrates what I mean by asking too much of the Courts. In the pro life amendment the “unborn” were provided with protection. But, deliberately, the term “the unborn” was not defined. That definition could have been stated. Indeed some who favoured an amendment had argued for an explicit definition. But this complex issue was left to the Courts, a matter on which they had no particular competence and on which moral theologians and philosophers could have informed public debate and the legislature could have provided guidance. Indeed in the 2009 case of *Roche v Roche* this point was made by the Supreme Court. This case related to frozen embryos and, in its judgment, the

Supreme Court noted that there was uncertainty and an absence of consensus as to when human life began. Quite properly it stated that it was not for a Court of law faced with divergent views from many disciplines to pronounce on the truth of when life began. The Court further pointed to the obligation of the Oireachtas to make policy choices first. Chief Justice Murray stated that the Oireachtas had at least initial responsibility for the protection and regulation of constitutional rights in relation to the particular matter before the Court. That judgement was handed down in December 2009 and there has been no indication at all that the Oireachtas will take up the judiciary's exhortations to legislate or regulate on this controversial issue. This provides an illustration of the issue of respect in two aspects; first on requiring the court to make a decision of this kind with no input from the Oireachtas, and secondly, in the failure to properly implement a judgment of the Courts.

The democratic branches of government do not display respect towards the Courts either when there is substantial delay in implementing judicial decisions. Justice delayed is, of course, justice denied. It is particularly interesting to examine that issue in the context of the European Convention on Human Rights. It has only been possible to invoke the Convention's obligations in the Irish Courts since 2003, and then only in certain circumstances. Section 5 of the European Convention on Human Rights Act 2003 provides that where the High Court finds that a statute is incompatible with the Convention this does not affect the continuing operation of the law, unlike a declaration of unconstitutionality. Rather, the only obligation is that the Taoiseach shall cause a copy of the judgment to be laid before the Dáil within 21 working days. So an individual can sue the state and win on a breach of the Convention but the state need not provide an effective remedy. The result is that, rare as the examples of declarations of incompatibility have been, they have not been as rare as examples of a declaration actually being acted upon.

Where a statute has established a process that forces the judiciary to hear arguments, reason and decide as to whether a statute is or is not incompatible with the Convention it seems perverse that this should be simply ignored or left to linger. If governments have reasons for not acting on a particular judgment they should at least set these out. Failure to do anything undermines the judiciary itself.

I will turn now to the judiciary. Since the inception of the state the functioning of our legal system has been a source of stability for the state and of legitimate pride for the Irish people. The independent judiciary that is the cornerstone of the system has established and maintained the necessary checks and balances to ensure constitutional observance and has thereby sustained its essential values.

Their impartiality, high degree of erudition and competence and, above all, incorruptibility are qualities shared by the judiciaries of some other democracies but certainly not by all. Our judges may sometimes feel less than adequately appreciated but if so they are wrong. There is a great well of trust in the judiciary that is a precious element in our state. An essential factor in that trust is their independence from the executive. Thus, as I have said, drawing the judiciary into public debate beyond that engendered by legitimate criticisms of judgments given is generally to be avoided. In this regard I do not refer particularly to recent tensions between the government and the judiciary (highly regrettable though these are) because I do not believe that they reflect any fundamental conflicts. In fact I am sure that they are transient.

But the judiciary too can contribute to difficulties for the executive through the judicial review process. This is particularly the case in regard to interventions that can be argued to infringe upon the separation of powers.

Both the executive and the legislature have a legitimate expectation that the judiciary will use common sense above all in addressing alleged deficiencies in legislation or administrative actions. In general that is what the judiciary has done for ninety years.

The willingness of the Irish judiciary to interpret the Constitution expansively has been considerable in relative terms including, I believe, in comparison with the United States Supreme Court. This has been particularly evident in the definition and enforcement of constitutional rights since the mid 1960's where the Courts have established a series of unenumerated rights not mentioned in the Constitution at all and, on the face of it, not authorised by it.

I think that one may say with reasonable assurance that the unexpressed rights established by the Courts since *Ryan v AG* in 1965 were not intended to be justiciable by those who enacted the Constitution (namely the people). In other words, the Courts have elaborated and enforced various values or rights that have to be found other than by an examination of the text which expresses the original intent of the people. Over the last 45 years approximately twenty such rights have been found including the rights to bodily integrity, to work and to privacy. Mr Justice Hogan (as he now is) and Professor Gerry White in the 2004 ed. of Kelly's *Irish Constitution* confirmed that these last three rights are "not obvious corollaries of rights elsewhere" in the Constitution. However, it is interesting to note that its judgment in January in *Fleming v Ireland*, otherwise known as the right to die case, the Divisional High Court (of which Mr. Justice Hogan was a member) stated that

the right to bodily integrity was “overlapping and ancillary” with the protection of the “person” in Article 40.3. This may indicate a nascent preference for basing a decision upon a right in the text of the Constitution, where possible, rather than upon an unenumerated right.

The various judicial pronouncements upon the source of unenumerated rights, in the sense of how they are to be identified, provides some indication of the breadth of the authority that the Courts have assumed over the years. The resulting uncertainty of the scope and extent of these rights has sometimes troubled governments considering legislation. A sample of judicial quotations gives an indication of the uncertainties at the core of the issue. Mr Justice Henchy said that to be enforceable it must be shown that the right “inheres in the citizen in question by virtue of his human personality”. Mr Justice Kenny said that there were many personal rights of the citizen that flow “from the Christian and democratic nature of the State”. Mr Justice Walsh’s view, articulated in *McGee v AG* was that recourse to the natural law in defining the nature and extent of these rights is the correct method. Other references have mentioned the European Convention of Human Rights as being of possible relevance. Recently Mr Justice MacMenamin – although not in the context of unenumerated rights - looked at the UN Convention on the Rights of Persons with Disabilities and described it as “a helpful reference point for prevailing ideas and concepts”. This idea of interpreting rights in accordance with “prevailing concepts and ideas” had formed an important part of the earlier judgment of Mr. Justice Walsh in *McGee*. All of these cited examples, worthy as they are, individually underline how uncertain the limitations of judicial discretion actually are. They also demonstrate that, on difficult moral and ethical issues in particular, where attitudes are changing, the superior courts may be drawn into making decisions that may not merely have profound consequences but on which the Courts are not particularly well qualified to make judgments. Where are judges to seek the essence of the values to be upheld in the determinations related for example to the commencement or life or the right to terminate one’s own life? Is the Christian and democratic nature of the state to be the benchmark and to be defined by the Courts alone or by the legislature also? We are living in a time when the fundamental values of the dignity of man and the equality of man are defined in widely different ways and the Courts should not be left alone to make these determinations particularly at a time of profound change and debate about moral issues. In the end of the day, one is left with the impression that the Courts sometimes simply find and define these rights on the basis of broad concepts of justice and fairness on which differences may exist even between the judiciary themselves.

The former Chief Justice Ronan Keane wisely reflected on these issues in 2001 in *TD v Minister of Education*. He referred back to Kenny J’s reference to the Christian and democratic nature of the State and said “whether the formulation adopted by Kenny J is an altogether satisfactory guide is at least debatable.” He also said that there was no discussion in the judgment of the Supreme Court “as to whether the duty in declaring the unenumerated rights, assuming them to exist, should be the function of the Courts rather than the Oireachtas”. (The phrase “assuming them to exist” is particularly telling).

Although it is not clear how such a role for the Oireachtas might operate in practice – and the rigid application of the whip system does not engender confidence in that regard – it does seem that this is a question worthy of greater exploration in the context of the justification and test for unenumerated rights in particular. The current tests are unsatisfactory. That is a cause for concern notwithstanding that the tide of declarations of new unenumerated rights has certainly receded slightly, because the Courts could always be called upon again in the near future to declare that a new unenumerated right exists.

Even though the original intention of the people may not have been to provide the Courts with the license that has been taken by them the fact is that in many respects the activism of the Courts has breathed life into the Constitution itself and has been profoundly beneficial. As a result the interventions of the Supreme Court have been generally widely appreciated and indeed applauded and the rights that have been established are now part and parcel of the society in which we live.

But there are surely limits to the finding of new implied constitutional rights. This has been clearly recognised in the area of rights of a socio-economic nature.

The separation of powers is a particularly sensitive area for intervention by the judicial branch on the basis of implied rights. Chief Justice Roberts of the US Supreme Court declared in June 2012 (in *National Federation of Independent Business v Sebelious*) “It is not our job to protect the people from the consequences of their political decisions”. He stated that “elected leaders, unlike the Justices, could be thrown out of office if the people disagreed with them.”

It might also be pointed out that there are other reasons for great prudence in the expansion of categories of rights. Constitutional pronouncements of the superior courts after all are not truly subject to checks and balances themselves other than through referenda. In some ways judges might be considered, sometimes unfairly and incorrectly, to be a

law unto themselves and as human beings are not immune to the pressures of public opinion.

Let me turn to Ireland and its relations with what is now the European Union. I believe that this provides illustrations of excessive intervention by the Courts. Our engagement with the process of European integration since we joined the European Communities in 1973 has not been an altogether happy one in regard to subsequent Treaty changes either for Ireland or for our partners. We have had nine referenda since 1972 in order to ratify the Treaty of Rome and six subsequent treaties. No other country remotely has had a similar number. Our closest rival is Denmark with six including two reruns and nearly all of the others also have written constitutions. In a number of instances had we finally voted 'No' we could have caused irreparable damage to the European Union and such could have led to pressure for Ireland to "do the honorable thing" and leave.

When we joined the communities we joined an evolving project. The determination of the Member States, expressed in the preamble of the Treaty of Rome was "to lay the foundations of an even closer union of the peoples of Europe". That objective has been repeated in subsequent treaties. It was to be a developing and dynamic community. At its core, from the outset, was the concept of sharing sovereignty. It was abundantly clear from the original treaties that these further advances in the integration process would occur over a prolonged period and that there would require further amendments to the founding treaties.

The case of *Crotty v An Taoiseach* is generally identified as the reason for many of our subsequent referenda. In the judgment of the Court on the first issue, Title II of the Single European Act – which was a single judgment because it concerned the constitutionality of a statute – it was stated that the original amendment on accession should be construed as an authorisation given to the State not only to join the communities as they stood in 1973 but also to accept amendments so long as they did not alter the essential scope or objectives of the communities. In this context the Court decided that a further constitutional amendment was not required for various important changes proposed by the SEA in six instances.

When we joined the European Communities in 1973 we took the most important political decision in the history of our state. We knew what we were doing. We knew that the essential difference between the European Communities and any other existing association of states was the sharing of sovereignty which was at its core. We were told also (as indeed were the British in a White paper issued at the time), that we were joining a community in the course of development, not one which was static. We knew that it

was stipulated in the Treaty of Rome that we were entering a process leading "to a greater union of the people's of Europe". It was abundantly clear from the Treaty of Rome itself that the work in progress would demand further advances in treaties to provide, for example, for free movement of goods, people, services and capital. We may have joined what one observer has described as "a journey to an undefined destination" but, as Chief Justice Finlay noted in the judgment of the Court in the *Crotty* Case on Title II of the Single European Act "the Community which Ireland joined was a developing organisation with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress".

Amongst the provisions of the SEA was the introduction of majority voting in the Council of Ministers for the passage of some important EU legislation. Previously unanimity had been required and permitting majority voting (in other words removing what had effectively been a power of veto on important areas of legislation) constitutes on its face a real reduction in sovereign power. However the Supreme Court judgment concluded that this did not constitute unauthorised surrender of sovereignty because the change was within the scope of the authority that had already been given through the ratification of the Treaty of Rome. Nor, in the eyes of the Court, did the introduction of other important Articles dealing with economic and monetary policy, social and economic cohesion, or social policy, amongst other extensions of competences constitute surrendering sovereignty for the same reason. This judgment on Title II of the SEA provides a reasonable basis for the conclusion that many of the referenda that we have had on Europe could have been avoided even before the *Pringle* decision to which I will refer shortly. Exceptions might be the Maastricht and Lisbon Treaties. So, far from requiring every treaty to be submitted to a referendum the judgment suggests very much to the contrary.

The Supreme Court in the *Crotty* case, by a bare majority decided that Title III, dealing with foreign policy, would require a referendum because of its effect on national sovereignty. (It is this majority judgment that tends wrongly to be the focus). This was a surprising conclusion but the effect of this judgment by a majority decision has undoubtedly been an important influence on the decisions taken to have referenda on later Treaty changes. No other state including the United Kingdom had any difficulty with these provisions. The offending articles provide for purely intergovernmental cooperation between sovereign states in the formation of foreign policy. They impose obligations to consult; to take full account of the position of other partners; to ensure that common principles and objectives are gradually developed and defined; and to be ready to cooperate more closely on the political aspects of

security. As Finlay CJ in his dissent from the majority on this point said “they do not impose any obligations to cede any national interest in the sphere of foreign policy. They do not give other parties any right to override or veto the ultimate decision of the state on any issue of foreign policy”. So even believers in Westphalian sovereignty should not be offended by its text. But, an obligation to listen and consult and grant a right to be heard and to be consulted resulted in the majority finding which necessitated the SEA referendum and others subsequently. It also can be considered to have greatly influenced Irish negotiators in relation to subsequent treaties. They have often taken a minimalist position on important issues relating to both foreign relations and justice matters. This was evident for example in the negotiation of the Treaty on the European Union. How much of this is fear of having a referendum or political preference might be difficult to discern on occasions, but avoiding measures which would require a referendum has certainly been a consideration in Irish interactions at EU level in my view.

I find it impossible to agree with the majority judgment on Title III. I do not know of any analysis by a political scientist that would consider that its provisions abrogate national sovereignty. Indeed developments in this area ever since have proven the minority was correct in its conclusions. No country can be forced to take any position in foreign policy decisions of which it disapproves. Indeed EU countries took entirely divergent positions regarding the invasion of Iraq in 2003. Title III poses no threat whatsoever to our sovereignty but this judgment has still created an understandable uncertainty in the minds of Attorneys General and governments ever since that has influenced the subsequent referenda that have taken place.

Regrettably this part of the judgments in Crotty has remained decisive for 25 years. Its effects have been considerable and damaging for the state. Apart from the plethora of referenda I am convinced, as I have already indicated, that in various instances Ireland, because of a fear of referenda, has been influenced in its approach to European negotiations that may have the potential to trigger a referendum.

Last year’s Pringle decision was the Supreme Court’s first opportunity to revisit Crotty, and is to be welcomed. Mr Justice O’Donnell in his separate concurrence clearly stated that the core of the Crotty decision was not to be found in the comment that “sovereignty in this context is the right to decide to say yes or no but rather in other aspects of the judgment about the alienation of sovereignty.” He stated “A simple sentence rarely encapsulates the essence of a lengthy judgment and is not to be taken in isolation. There is always a danger of substituting the invocation of a vivid

and memorable phrase for the analysis of the substance of a judgment”. The actual sentence was used to very different effect by Chief Justice Finlay and Mr Justice Walsh both, of course, very eminent and authoritative judges. However it has been taken out of context and has influenced the history of referenda since.

In Pringle, Mr Justice O’Donnell also stated that “the decision to participate in the ESM was in my view an exercise in sovereignty rather than an alienation of it”. Surely he is correct. Sovereignty is about exercising influence over one’s own destiny and in the new interdependent world of these times an approach to the definition of sovereignty redolent of the time of the Treaty of Westphalia in 1648 is surely incorrect.

So the Pringle judgments in my view can be said to have significantly cleared the air around Crotty. They have created a better understanding regarding the ratification of EU treaties.

This is, of course, no mere academic debate. If, as Prime Minister David Cameron apparently believes, there will be further Treaty changes relating to the Eurozone within the next few years then these may stimulate debate as to whether another referendum is necessary. The Treaty changes that Mr Cameron anticipates are in the area of the likely proposals that will follow last year’s report by the Presidents of the Commission, The Council, the European Parliament and the European Central Bank. These set out a future path to “banking union, economic and monetary union, fiscal union and political union”. On reading the actual text of the road map that the Presidents propose it is clear the details are far less grandiose than the title of “political union”, for example, suggest. Even though one may anticipate possible treaty developments in the future I believe that referenda on them may well be possible to avoid. The scope and extent of what we have already agreed in all the treaties ratified to date can be taken into account and may well permit the ratification of a new Treaty in these areas without a referendum.

These changes should they take place will nonetheless be important. But if a further referendum is required on these or any other subject there is another aspect of Supreme Court intervention that will be relevant to it. This relates to referenda.

The Supreme Court has intervened in the conduct of referenda in two areas: public funding of the government and equality of broadcasting time. Both have been the subject of divergent views amongst distinguished members of the judiciary and relate essentially to the concept of equality and to the prerogatives of government and

legislature. For example in regard to the funding issue the former Attorney General Mr Justice Declan Costello said, “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 Should the Government decide that the national interest required that an advertising campaign be mounted 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”. Another distinguished former politician & Chief Justice Tom O’Higgins after the defeat of the Nice Treaty referendum in 2001 also attacked the McKenna judgment on funding in trenchant terms.

Criticism from such eminent lawyers both of whom were also senior politicians is no minor matter, and cannot be simply discounted. It demonstrates again that, in the end of the day, as with many instances of judicial intervention, where there is no clear textual reference the Constitution can be interpreted in different ways. In McKenna general principles - such as equality under Art. 40 fair procedures and respect for the democratic process - were called in aid to reach what the Court believed to be the fair and just conclusion.

The fact that the Supreme Court unanimously held last year in *McCrystal* that Government information had breached the McKenna principles, should not prevent us from reflecting, critically where necessary, on the relevant case law and, perhaps more importantly, on its implications.

In *McCrystal*, the State did not challenge the correctness of the McKenna judgment, so the Court had no need to rule in that regard. However, some of the judgments cited the Venice Commission Code on Good Practice in Referendums in support of the McKenna Principles on government funding. There may be reason to question whether the Irish Supreme Court’s interpretation of the steps necessary to comply with the Venice Commission report goes too far. The text of its conclusions are in fact not clear and leave open to interpretation what equality means in this context. I believe that the Irish position on referendum funding (and indeed on broadcasting) is more restrictive than that of comparable States including the European ones with most experience in this area, Switzerland and Denmark. It is an extreme outlier in comparative analysis. I am confirmed in this view by a study on the subject in the book *Financing Referendum Campaigns* (eds. Gillaud Lutz and Hug; Palgrave) and by Professor Sara Hobolt of the London School of Economics one of the authors. Indeed it seems to me that the Venice Commission itself would allow for other equitable forms of distribution of public funds such as equality across parties in parliament.

Denmark provides I think one better example of how we might have proceeded. In the Euro referendum in 2000 funding was allocated on the basis of two thirds to parties represented in the national parliament (based on support) and one third to the two Euro sceptic and pro EU movements. A separate Board consisting of a number of impartial persons allocated the funds for the advancement of information about the EU. The political consensus in Denmark has been to allocate substantial but not equal subsidies to the Eurosceptic movements.

However we are where we are and the *McCrystal* judgment is clear in its conclusions. But I worry about the implications. We have seen before in Ireland some evidence of substantial private funding and influence being directed against the adoption of a Yes vote proposed by government for a referendum. In the future such influence and funding may come from outside the state accompanied by substantial funds. Indeed there was some evidence of this in the recent referendum of the Fiscal Stability Treaty, when leaflets were posted to households from a foreign umbrella group in which the United Kingdom Independence Party was very prominent. Our elected government could be impeded in responding to disproportionate foreign intervention by a reasonable provision of state funding. The view could, of course, be taken that the referendum proposal should be allowed to speak for itself, or that the Referendum Commission should explain it. Successive referendum commissions have indeed done laudable work. Nonetheless, experience has shown that necessarily complex EU Treaties have sometimes been difficult for the public to understand, increasing the risk that well-financed foreign groups could misrepresent the contents of the same.

The divergence in views amongst some members of the judiciary on these issues may reflect differences in views about democracy itself. The current Chief Justice said in the judgment in the *McCrystal* case that “once the Amendment Bill leaves the Houses of the Oireachtas, the situation changes; the two organs of government, the executive and the legislature, have completed their role in this part of the referendum process. The situation changes from a process with the exercise of power by elected representatives in our democracy to an exercise of power directly by the people.” In other words it becomes a plebiscitary democracy. The government cannot use public funds to support its position. If money is to be spent from state funds at all it is to be shared equally. I do not seek to deny that there is force in such arguments, especially in the particular context of the solemn process of amending the constitution (as it was described in *Hanafin v Minister for the Environment*). However, the implications of this cannot be ignored either.

It means that if a tiny minority group (or theoretically perhaps even one person) wishes to publicly oppose a referendum and all or nearly all the representatives in the Oireachtas support it then the constitutional principle of equality demands that each side receives the same amount from the state. One could, of course, ask whether in such an instance any State funding should be provided to either side, given that the political parties and other groups are free to campaign from their own resources, and on the airwaves (more on which anon). Nonetheless, the fact that if such State funding were provided it would have to be divided on a 50-50 basis, is not beyond criticism.

If a no vote in one of our European referenda had won the day the consequences for the whole process of European integration would have been badly affected. This outcome might have been a prospect so much to be relished by anti European movements elsewhere that they would be interested in funding the “no” side in Ireland. On different referenda on moral issues similar external interventions might well occur. The conclusion one may legitimately draw is that the Supreme Court has defined the constitutional principle of equality in a manner which can be argued to be excessive and may conflict with the principle of the separation of powers. Thus it can be contended that the conclusions in McKenna (2) are “trespassing on the spheres of the political organs of government” which Mr Justice Hardiman correctly warned against in another context.

Compounding the decision in McKenna is the majority’s ruling in Coughlan v Broadcasting Complaint Commission. I accept that there are arguments in favour of the McKenna judgment (to which I do not fully subscribe), but in my view the situation which has unfolded on account of the Coughlan judgment is even less justifiable. Whilst primarily dealing with political broadcasts on RTE during the Divorce referendum, Coughlan has had wider application. It has been interpreted as requiring broadly equal time to the protagonists on either side of a referendum debate. Even if the majority judgments did not expressly require such a division – with Justice Denham saying that mathematical equality was not required – it was not indicated what kind of division would be appropriate in place of the 80%-20% allocation of political broadcasts which the Court condemned. Therefore, it is easy to see how RTE would take the view that its only safe option under the judgment is a 50-50 division, not only of political broadcasts, but also of speaking time on programmes too.

The law correctly requires impartiality and fairness on the part of the national broadcaster both under legislation and the Constitution but to go so far as to require broad equality for both sides of the debate is surely an unwarranted

interference. If, as has been the case, the three largest political parties in the state are in favour of a yes vote are they to be compressed in debates on television to roughly fifty per cent of the time thereby permitting a mixture of individuals and smaller groups (or, again, in theory, even one individual) to have equal time? This is in my view quite wrong. Dr. Blathna Ruane SC wrote an excellent article in the Irish Jurist which expressed a view also endorsed by many others. She wrote “The application of McKenna (No. 2) principles in Coughlan reinforced some of the problems caused by the removal of Government funding in favour of the proposal. It gives a potential publicity bonanza to small groups opposing the proposal, out of proportion to the actual support the groups reflect. This encourages opposition for extraneous purposes and gives an inaccurate picture of the degree of true opposition to the proposal.”

After McKenna and in the same year as the High Court judgment in Coughlan, legislation responded to these issues by establishing a Referendum Commission. This has undoubtedly improved the situation by providing a means for the clarification of the meaning of a proposed amendment. It also allows for the objective setting out of general information. But it has also resulted in further litigation and, valuable though it has been, in my view it does not provide an answer to all of the concerns in issue, some of which I have set out already.

So the result of the judicial interventions regarding the conduct of referenda can legitimately be considered to be the creation of possible distortion in the area of political debate rather than the contrary. They risk stimulating confusion rather than informed judgment on the part of the electorate.

In conclusion, I would summarise my remarks today by saying: We live in a time of great change when traditional values are questioned and contested as perhaps never before. We face also challenges from the changes in the political system driven by the new dimensions to our participation in the unprecedented project of regional integration that is the European Union. I have no doubt that, notwithstanding my particular reservations, our Courts - which have played such a prominent and effective role in the past in defining the rights of the people - will continue to provide an assurance of due process and fairness.

In doing so, the Courts will and should continue to recognise an important truth in a statement of Justice White of the US Supreme Court in *Bowers v Hardwick*. Even if the result of that decision was overruled in 2003, in my view this particular insight can survive. Justice White stated: “The Court is most vulnerable and comes nearest to

illegitimacy when it deals with judge made constitutional law having little or no cognisable roots in the language or design of the Constitution”.

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