OPEN LETTER TO MR JUSTICE FRANK CLARKE
23rd September 2009

Dear Mr Justice Clarke,

I am writing to question the role that the Referendum Commission, with you as Chairperson, is playing in the current Lisbon referendum. The referendum is being held because of the Crotty judgment, whereby significant EU developments are submitted to the people, "whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy" (Constitution, Art. 6.1). The constitution quite clearly sees the people, "under God", as superior to and as the ultimate source of all authority and policy in the state.

This may be a good or a bad idea, but it is anyhow our fundamental law. Recent governments, and our establishment, frequently bemoan the alleged defects and dangers of the constitutional referendum process, but they have not proposed to remove it; they have, however, taken steps to curtail it, and these shape the context in which you now operate. The most recent has been the gratuitous abolition of the National Forum on Europe, after the rejection of Lisbon in the first referendum, by a government claiming to value wider and deeper debate on EU issues.

Earlier, and more directly relevant, was the redefinition of the Commission's role, from one of setting out the various arguments for and against the proposal in question, to one of authoritatively explaining what the proposal is, and crucially what it is not. It is quite clear why this change was enacted: governments, and the majority political parties, were determined to discredit arguments of which they disapproved and which they asserted – with varying degrees of plausibility – to be false, due to either misunderstanding or misrepresentation of the various EU developments in question. As your own website puts it:

> Since the passing of the Referendum Act 2001 the Commission no longer has a statutory function in relation to putting the arguments for and against referendum proposals. The 2001 Act also removed from the Commission the statutory function of fostering and promoting debate or discussion on referendum proposals. (http://www.refcom.ie/en/AboutUs/Legislation/)

The implications of this redefinition are enormous, and of crucial constitutional significance. An institution, originally envisaged as furthering the people's deliberation by profiling the range of arguments, has been recast into a means of evaluating them and rebutting, or at least sidelining, those deemed to be irrelevant or erroneous. In a referendum, a

question is being put to the people, from whom "[a]ll powers of government, legislative, executive and judicial, derive, under God" (Art. 6.1): the citizens are sovereign. There is a vast difference between aiding their deliberations by outlining and summarising the various arguments on either side, and short-circuiting them by prejudging their verdict as to which of those arguments are true and relevant.

It is impossible to ignore the echoes of the late unlamented era of the "informed conscience"; we're free to think for ourselves, but not to ramble: Authority will indicate (and edges towards policing) the broad highways of Truth. This is deeply ironic, since those interpretations the establishment in general, and your Commission in particular, are keenest to dismiss are resonant of just that same era and its version of Christianity. I differ from your Commission not in advancing the relevance or truth of such claims, but in doubting that they are best responded to by erecting an authoritarian-liberal canopy over what purports to be a genuine forum, a free market in ideas.

You may suspect that my argument is merely a disguised attempt to promote my own viewpoint and (possibly unfounded) concerns: who would want untruths to circulate when we could all be set straight? But there's the rub, as always: whose "truth", and whose "error"; who is to judge? Within your own profession, there is a well-established controversy between on the one hand positivists, who are confident as to how "the facts" can be seen and "the law" stated and, on the other, critical accounts which regard it all as far more complex.

Such a critical view has just been restated by Professor Ronald Dworkin, who censures Justice Sonia Sotomayor for, in her recent US Senate confirmation hearings, perpetuating:

> the silly and democratically harmful fiction that a judge can interpret the key abstract clauses of the United States Constitution without making controversial judgments of political morality in the light of his or her own political principles. (*New York Review*, Volume 56, Number 14, September 24, 2009)

I have scrupulously quoted this phrase in full, specifying as it does "key abstract clauses"; maybe there are some "easier" clauses – and proposals – to assess, but then we would have to work towards consensus on which *they* are… and so it goes. The more incredulous the denial that "controversial judgments of political morality in the light of [your] own political principles" could possibly be involved in the Commission's work, the more it will illustrate Dworkin's point and justify the condemnation of a "silly and democratically harmful fiction".

It may well be that the Commission's task, of giving in a single voice an "independent and unbiased account of the Treaty content", *cannot* be fulfilled, because of the complexities of the question. Be that as it may, there are good grounds to argue that it is not currently being fulfilled, and that your publications and interventions therefore do not warrant your claim to be "impartial and factual" (http://www.lisbontreaty2009.ie/). It remains for me to make my key point – that these publications and interventions are not only democratically harmful but also in fact constitutionally improper in this referendum – concrete. I will mention some instances.

The Lisbon Treaty: Your Guide has five paragraphs on p. 8 about 'Defence and foreign policy', four of which are seriously questionable: the first misleadingly suggests that *all* decisions to do with this area will be made unanimously; the fourth implies that there are explicit EU "arrangements" for Irish neutrality – which there are not – and unblushingly recycles the term 'military neutrality', which far from simply indicating a topic under debate is itself a deeply partisan spin on that topic; the fifth deals with a decision on whether Ireland might in future sign up to the European Defence Agency, without mentioning that it already has done so.

The second paragraph, about helping a member state suffering armed aggression under the UN Charter – an existing obligation independent of any EU treaty – indicates none of the tension between our UN commitments and EU developments. Like many others, I have deplored how Ireland has allowed the EU's evolving structures to downgrade and even bypass the UN in favour primarily of NATO (*Defending Peace: Ireland's Role in a Changing Europe*, Cork University Press 2002). I have then traced the specific wording of Lisbon, which in Art's 3.5 and 42.1, and Protocol 10, asserts merely "accordance" with and "respect" for the "principles" of the UN Charter – precisely the "respect" which guided NATO's illegal Kosovo intervention in 1999 and the illegal Gulf War launched in 2003.

You know far better than I do that such documents are not only carefully interpreted: they are equally carefully drafted in the first place. It cannot have escaped your notice that only in a Declaration (No. 13) – outside their treaty text – do the framers of Lisbon convey some recognition of the binding, primary authority of the UN Security Council. Your Guide helpfully clarifies that the June 2009 Solemn Declaration on 'Workers'

rights and social services' is no more than "a political statement. It is not legally binding." (p. 8)

What is less helpful is the very clear implication that the other assurances – on 'Right to Life, Family and Education', on 'Taxation' and on 'Security and Defence' – *are* legally binding. They are not, but merely constitute various interpretations of Lisbon (which, they also make clear, in no way alter the existing treaty text), plus political promises as to how these might later be given various degrees of legal force and ultimately be incorporated in a protocol to some future treaty. The failure to clarify the precise status of such promises is in striking contrast to your recent trenchant discounting of a property developer's projections for the future viability of his enterprises, insisting on considering only what could be reliably established here and now.

Since Fianna Fáil broke their solemn manifesto promise to hold a referendum on joining NATO's "Partnership for Peace" in 1999, I have had scant regard for politicians' promises; you may find politicians more plausible than property developers, but you will I am sure allow that at least *that* judgment is debatable! Why all this matters, of course, is because the people are the only jury, *and* the only judges, in a referendum. We are entitled to have all the arguments available to us, and surely at least not to have partial and misleading interpretations presented to us as established fact; that perverts the proper constitutional relationship, and is particularly unfortunate when it bears the imprimatur of a senior judge.

I believe strongly in the ethos of citizenship, and citizen sovereignty, contained in our Constitution and so often lacking in our actual public life. I am writing to you essentially as one citizen to another, pleading that our decision on Lisbon, whatever it may prove to be, should be arrived at in accordance with that ethos, which I believe is not the case currently. I keenly await your response to the general and detailed points that I have raised. I hope that you might agree, in the spirit of your evident commitment to public availability, to debate them with me – or preferably with an informed member of your profession who shares, and could better articulate, such concerns.

Sincerely,

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John Maguire