THIRD BRIAN LENIHAN MEMORIAL ADDRESS

SATURDAY 15TH FEBRUARY 2014 – TRINITY COLLEGE DUBLIN

ADDRESS BY MICHAEL MC DOWELL SC

IRELAND'S FUTURE IN EUROPE

I am deeply honoured to be invited to deliver this commemorative lecture, an honour which has previously been conferred upon the eminent jurist Mr Justice Bryan McMahon and on my good friend Peter Sutherland SC.

In particular, I am very happy that this Colloquium should honour the memory of Brian Lenihan SC, a good and true friend to me in his political life and as an office holder, a long-standing colleague at the Bar, a kind-hearted, caring and quick-minded companion, and, in the ultimate, a dignified, courageous and upright patriot and statesman.

On a personal note, I miss his friendship. He truly became what his Jesuit mentors at Belvedere College (where he became School Captain) asked of all their pupils – to be *"a man for others"*.

On this occasion last year, Peter Sutherland addressed his audience on the relationship between the Executive, the Legislature and the Courts under the Irish Constitution.

He did so, he said, 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"*.

He pointed out that those relationships gave rise to concerns for successive attorneys general. And indeed I was one of them.

My address, however, will echo to some extent some of the issues raised by Peter Sutherland last year. But, as you might expect, I intend to approach my treatment of those issues from a somewhat different perspective.

The central theme of Peter Sutherland's address was his contention that 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"*.

It is hard to disagree with that general view thus put.

But I must confess that I would have a different perspective from Peter in respect of some of the problems that he instanced.

For example, I would be much more positive than Peter about the theory of judicially found un-enumerated constitutional rights. I find nothing worrying about the judicial development of the constitutional right to privacy, even though, as Peter pointed out, it was hardly in the minds of the original constitutional draftsmen.

And while I would go some way down the road with him on the question as to whether the terms of Single European Act were such as required a referendum for its ratification, I still support the main conclusion in the Crotty case - that significant transfers of sovereign powers to the European centre by the Irish state still require separate constitutional mandates over and above that given by the Accession Treaty in 1972.

And, as we shall see, I do not share Peter's view of the McKenna and Coughlan decisions.

The Future of the EU

This evening, I intend to focus primarily on some of the legal and constitutional issues that lie at the centre of our engagement with the great European project as a member state of the European Union.

Let me at the outset state that I consider myself to be pro-European and in favour of Ireland's membership of the European Union.

In addressing the National Forum on Europe in early 2007, I expressed my own attitude to Europe in the following terms:

> *"Ireland's membership of the European Union has, in my judgment, been massively beneficial for Ireland in many ways. We have benefitted economically. EU membership has been beneficial for us culturally, enriching us in many, many ways. It has been beneficial socially in allowing our citizens to live in other EU countries and in allowing us welcome EU citizens to live here, and in developing social policy change in accordance with international norms. It has also added considerably to our political independence allowing us to step out of the shadow of Britain some 60 years after the formal achievement of national independence. I would go further and say that if the European Union did not exist for any reason, then something very similar would have to be invented."*

For me, the European question is not one which involves *"opting in"* or *"opting out"*. Our membership of the European Union is well settled.

Regardless of how the UK resolves its present crisis of faith in the EU (and I tend to think that it will not withdraw from the EU), I think Ireland will stay in the EU.

But precisely because the EU is not a static or completed political, social or economic construct, and because it is in so many ways *"a work in progress"*, those very facts demands of its member states and of those member states' citizens an active, democratic involvement in determining the future of the European Union.

It is not, in my view, either sufficient or wise for anyone anywhere in Europe to stand back from the development of the Union as passive spectators when so much is at stake. On the contrary, the European Union demands of us that we should debate among ourselves and among the peoples and the member states of the Union where it is going and along what lines it should develop.

The EU: Federal, Confederal, Sui Generis Or A UPO

Attempting to locate the present European Union somewhere along the descriptive spectrum which stretches from the economic customs union at one end to federal super-state at the other is a difficult, perhaps futile, task.

In many ways the European Union is confederal in nature. It is a largely inter-governmental political entity. On the other hand, it does bear some evidence of federalist DNA. For example, the supremacy of EU law in member states is, however described, more federalist than confederal in nature.

Many learned articles have been written attempting to define the present European Union by reference to concepts such as federalism, confederalism, etc.

Nearly all of them acknowledge failure in that task.

Sometimes, analysts resort to terms such as *"unidentified political object"* or the tried and trusted *"sui generis"* to explain their inability to neatly compartmentalise the European Union in one or other stereotype of political entity.

As one analyst commented: *"If the EU is a UPO - an unidentified political object - it still flies"*. Like the elephant, the EU may be *"hard to define but you know it when you see it"*.

Two Constitutional Courts' Decisions on the Lisbon Treaty

That the EU is not yet a state or a federal state seems clear. That it cannot become such without a major political revolution also seems clear for reasons that I will come to.

Two European Union Member States have constitutional courts which carefully examined the Lisbon Treaty with a view to establishing whether it amounted to the institution of a federal super-state.

These were the constitutional courts of the Czech Republic and of the German Federal Republic.

That it fell to the constitutional courts in those countries to decide the issue rather than to their peoples by referendum is, in part, due to the mode of incorporation of membership of the European Union in the respective laws of the Czech Republic and of the German Federal Republic.

Unlike Ireland, where the provision for Ireland's membership of the European Union explicitly makes European law superior to Irish constitutional law, the Czech and German Constitutions used a different method of incorporation which empowered their constitutional courts to test the constitutionality of each of those States' ratification of the Lisbon Treaty by reference to the compatibility of the Treaty with their Constitutions as they stood.

The Czech Decision

In the Czech Constitutional Court's decision of the 26th of November 2008, a judgment on foot of a petition from the Senate of the Parliament of the Czech Republic, the court closely and carefully considered whether the Lisbon Treaty would have the effect of creating a European *"state"* whose laws were superior to those of the Czech Republic.

The Court concluded, after a lengthy analysis as to whether the Treaty was consistent with the status of the Czech Republic as a sovereign state, as follows:

> *"... it is important to point to the ability of a member state to withdraw from the European Union by the process set forth in Article 50 of the Treaty on EU; the explicit articulation of this possibility in the Treaty of Lisbon indisputably confirms in principle that '***States are the Masters of the Treaty***' and the continuing sovereignty of member states."*

The Court later stated:

> *"We can conclude from these deliberations that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner which would generally mean the 'loss' of national sovereignty; rather it is an evolutionary*

process and, among other things, a reaction to the increasing globalisation in the world."

The "Competence Competence" Issue

The Czech Constitutional Court also held that there **would** be a breach of the Czech Constitution if, on the basis of a transfer of powers, the EU as an international organization could continue to change its powers at will, and independently of its members, i.e. if an autonomous binding constitutional competence (a so-called *"competence competence"*) were transferred to it.

But the Court held, inter alia, that the Treaty of Lisbon did *not* have such consequences in relation to the European Union and consequently it was consistent with the constitutional order of the Czech Republic.

Here, then, was a valuable analysis of the sovereignty issue, the future role of Member States, and a clear statement by the Czech Constitutional Court that a *"competence competence"*, (i.e. the capacity to finally and authoritatively decide to determine its own capacity) to be developed at will and independently of its members had **not** been transferred to the European Union.

The German Decision

In June 2009, the German Constitutional Court based at Karlsrühe, the **Bundesverfassungsgericht**, also considered the question as to whether the Lisbon Treaty had the effect of creating a sovereign entity.

The German constitutional court held that the German Constitution, their basic law, gave powers to Germany to participate and develop a European Union which is designed as an association of sovereign nation states *("Staatenverbund*"). It held that the concept of "verbund" covered a close, long-term association of states which remain sovereign, an association which exercises public authority on the basis of a Treaty, whose fundamental order was subject to the disposal of the Member States alone and in which the people of the Member States, i.e. the citizens of the individual states, remained the basis of democratic legitimization.

The Principle of Conferral

The German Constitutional Court also held that the *"principle of conferral"* was a fundamental principle which continued to apply to the European Union and that the German Constitutional Court had *and retained* the function under German law of determining whether any particular conferral of competence upon the European Union was consistent with the German Constitution in general and, in particular, with the status of Germany as an independent sovereign state.

The Lisbon Treaty, it held, neither created a new state nor dissolved any existing state. It created no new or competing source of sovereignty, and it extinguished no existing source of Member State sovereignty.

This principle of conferral is of fundamental importance. It means that the EU's powers are not innate or self-sustaining. They exist and subsist solely on foot of the individual Member State's continued adherence to the treaties that confer the power. They are not derived from the separate will or mandate of the people of the EU. They are powers "lent" by sovereign Member States to the Union - as the Czech court found.

In this respect, the objectors' submission that the Lisbon Treaty created a sovereign state or a super-state was clearly wrong. The fact that the Union, like the United Nations, was to have *"legal personality"* did not constitute it a *"state"*, let alone a *"sovereign state"*.

The German Constitutional Court held that:

> *"The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon,* **an institution conferred under an international agreement**, *i.e. a derived institution which will have legal effect in Germany only with the order to apply the law given by the Act approving the Treaty of Lisbon. This connection of derivation is not altered by the fact that the institution, the primacy of application is not explicitly provided for in the Treaty but has been obtained in the early phase of European integration and the case law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of Member States that at any rate if the mandatory order to apply the law is evidently lacking, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. This establishment must also be made if, within or without the sovereign powers conferred, these powers are exercised with effect on Germany in such a way that a violation of the constitutional identity, which is inalienable pursuant to Article 79.3 of the Basic Law and which is also respected by European law under the Treaties"* [**My emphasis**]

The German Constitution Court also held that European unification on the basis of a union of Member States under the Treaty could not be realized in such a way that the Member States would not retain sufficient room for the political formation of the economic, cultural and social circumstances of life.

It held that this limitation applied in particular to areas which *"shaped the citizen's circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by fundamental rights and to political decisions that particularly depend on previous understandings as regards culture, history*

and language which unfold in discourses in the space of a political public that is organized by party politics and parliament".

Citizenship of the EU

The Court held that the German Constitution aimed to integrate Germany into a legal community of peaceful and free States but does not waive the sovereignty contained in the last instance in the German Constitution. The Court held that after ratification of the Treaty of Lisbon, the Federal Republic of Germany would continue to have a *"State people"*.

It continued: *"The concept of the 'citizen of the Union' which has been more strongly elaborated in Union law, is exclusively founded on Treaty law. The citizenship of the Union is solely derived from the will of Member States and* ***does not constitute a people of the Union, which would be competent to exercise self-determination as a legal entity giving itself a constitution****"*. [My emphasis]

The Court also decided that the introduction of the citizenship of the Union did not permit the conclusion that a federal system had been founded.

Unless the people of each Member State at some point in the future voted to extinguish their own sovereignty and to create a European sovereignty based on EU citizenship, it was incompetent for their legislatures or for a European Union organ to attempt to do so.

Criminal Justice

The German Court also considered the whole issue of criminal law and the provisions of the Lisbon Treaty in relation to the area of criminal justice.

Of course, Ireland had secured an opt-out in respect of this area.

However, Germany which had no opt-out is nonetheless now required, by virtue of its Constitutional Court's decision, to take a very narrow and conservative view of the scope for EU legislation in the area of criminal law.

The Court said:

> *"Due to the fact that democratic self determination is effected in a specially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the treaties must be interpreted strictly – on no account extensively – and their use requires particular justification. The core content of criminal law does not serve as a technical instrument for effectuating international cooperation but stands for the particularly sensitive democratic decision on the minimum standard according to legal ethics. This is explicitly recognized by the Treaty of Lisbon where it equips the newly established competency in the administration of criminal law with a so-called emergency brake which permits a member of the council which is ultimately responsible to its Parliament to prevent*

> *directives with relevance to criminal law at least for its own country, invoking 'fundamental aspects of its criminal justice system'."*

On a personal note, I found particular satisfaction in the analysis and findings of the German Constitutional Court in this area as, in the lead up to the Lisbon Treaty I had consistently argued that in the area of criminal justice Member States, as sovereign independent States, must retain their autonomy.

The German Court stated:

> *"Democratic self-determination is, however, effective in a particularly sensitive manner where a legal community is prevented from deciding on the punishability of conduct, or even the imposition of prison sentences, according to their own values. This applies all the more the closer these values are connected with historical experience, traditions of faith and other factors which are essential to the self-perception of the people and their society."*

The German Constitutional Court thus seriously limited the future capacity of the German Government or the Bundestag to agree to an EU capacity to approximate measures in the area of criminal law for these reasons.

Sovereign right of Member States to determine pace of integration

Looking at the process of European integration, the German Constitutional Court stated:

> *"From the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the States remain the Masters of the Treaties, it follows – at any rate until the formal foundation of a European Federal State and the changes of the subject of democratic legitimization which must be explicitly performed with it – that the Member States may not be deprived of the right to review adherence to the integration programme."*

The Court thus held that Member States' Constitutional Courts could not, within the limits of the competences conferred on them, be deprived of the responsibility for the boundaries of their own constitutional empowerment for integration and for *"safeguarding of the inalienable constitutional identity"* of their jurisdictions.

The right of Member States to withdraw

The German Court also considered the terms of the Treaty of Lisbon which deal with the right of Member States to withdraw from the European Union. In this context, the German Constitutional Court stated:

> *"The instruments covered by the Act approving the Treaty of Lisbon clearly shows the existing principle of association (Verbundprinzip) in the system of the responsible transfer of sovereign powers and thus satisfies constitutional requirements. The Treaty makes the existing right of each Member State to withdraw from the European Union visible in primary law for the first time (Article 50 TEU Lisbon).*
>
> *The right to withdraw underlines the Member State's sovereignty and shows apart from this that the current state of development of the European Union does not transgress the boundary towards a State within the meaning of international law ….*
>
> *If a Member State can withdraw on account of a decision made on its own responsibility, the process of European integration is not irreversible.*
>
> *The membership of the Federal Republic of Germany depends instead from its lasting and continuing will to be a member of the European Union."*

The Court noted that every Member State was, in any event (and separate from Article 50 of the Lisbon Treaty) free to withdraw from the European Union even against the wishes of the other Member States under the Vienna Convention on the Law of Treaties. The right to withdraw was not necessarily based on prior agreement between the Union and the Member State in question.

"Kompetenz Kompetenz"

The German Court, like the Czech Court, held that the European Union had not been given any right of *"Kompetenz–Kompetenz"* and that the *"principle of conferral"* applied in relation to the capacity of the European Union to make decisions as far as Member States were concerned on the extent of its own competence.

Conclusion on State Sovereignty

From all of the foregoing, it was very clear that it cannot be said on a fair analysis of the Lisbon Treaty that its ratification by all the Member States created a European state or created any new sovereignty which overrides State sovereignty or vests in the European Union a *"Kompetenz-Kompetenz"* which overrides the capacity of individual Member States, in final appeal, to determine for themselves whether decisions of the European institutions (including the European Court of Justice) lie within or without the competence of those institutions.

More importantly, the Lisbon Treaty does not create a future autonomous basis for the creation of a federal state or superstate.

While these issues have not been, and may not ever be, argued before the Irish Supreme Court, the decisions made it abundantly clear that the ratification of the Treaty of Lisbon was not an irreversible step towards the creation of some federal state or super-state and, indeed, from the point of view of Member States, was **not** irreversible in any sense.

The Union remains constitutionally an association (or as the Germans put it, a *Verbund*) of independent sovereign Member States which have not surrendered that "state" status or the legal competence to adjudicate authoritatively on that status to the institutions of the European Union.

Of course, it may be argued that leaving the European Union would be so problematical for a small State such as Ireland that, in a sense, the explicitly recognized right of secession is of little practical value.

However, if one considers the scenario (which is much more likely) that, say, 30% of the Member States of the European Union have a fundamental point of conflict with 70% of the Member States, then the entirely plausible scenario arises that they would on threat of withdrawal insist that the process of integration went no further in the disputed area.

Likewise, if the European Court of Justice were to interpret the Treaties in a manner which was wholly unacceptable to a considerable minority or, perhaps, even a majority, of the Member States, those Member States would be in a position, by invoking the possible collective use of Article 50, to effectively force a change or a climb-down by the Court or to insist on an amending Treaty having the effect of negativing the Court decision.

Whatever about those possible scenarios, the logic and force of these two constitutional court decisions about the nature and impact of the Lisbon Treaty on Member State sovereignty was compelling, and that it offered very considerable reassurance to those in the centre ground of Irish political opinion on Europe who might have been wary of the reassurances of out-and-out federalists.

Likewise, it reassured people in the centre ground that the analysis offered by opponents of the Lisbon Treaty to the effect that it markes the end of the Member States as sovereign independent states and the creation of an EU state was also wrong.

Failure to publicly acknowledge and debate these judgments

I also believe that it was entirely predictable that the implications of these judgments would be largely ignored in the domestic Irish debate. Euro Federalists were not keen on the reasoning or the consequences of the judgments. Euro Rejectionists, on the other hand, preferred to keep intact the bogey man of a European federal super-state as the immediate consequence of accepting the Lisbon Treaty.

Chief Justice Denham, however, drew the attention of lawyers to these decisions in her Brian Walsh lecture in November 2009.

In the polarised, entirely artificial and unreal Irish model of political debate on European issues – the Punch and Judy model referred to earlier – it suited both Punch and Judy, each for entirely separate reasons, to simply ignore these judgments and their implications.

One of the great deficiencies of Irish public discourse on the subject of the European Union, in my opinion, has been what I have termed the *"Punch and Judy"* debate between those who

have always opposed Ireland's membership of the European Economic Community and latterly the European Union, on the one hand, and those who have always supported it.

The fact that much of our media characterise any debate on the future of Europe in these *"in, out"* terms reflects a poverty of imagination and analysis that is staggering.

It also reflects an intellectual poverty among the Irish media that they draw labels from the highly polarised United Kingdom debate which is very much an *"in, out"* debate.

Anyone who challenges the strongly federalist ambitions of a small minority of very well placed Irish people for the European Union risks being described as *"Eurosceptic"*.

We are not confronted by a binary choice – that you either support European federalism or you oppose the European Union.

In my personal view, the future of Europe does not lie in the creation of a federal super-power, a United States of Europe, and although that outcome may be favoured by a minority of active Eurofederalists, I believe that the great majority of Irish and other European supporters of the European Union would be wary of creating such a dubious construct.

But, as we shall see presently, there is a strong desire on the part of some in the EU to bring the federalist project to a very early consummation.

Joschka Fischer

Some of you may recall that as far back as May of 2000, the then German foreign minister, Joschka Fischer famously spoke at the Humbolt University in Berlin.

Even at that point his conclusion was to support *"nothing less than a European parliament and a European government which really do exercise legislative and executive powers within the Federation."*

This federation, he acknowledged, would have to be based on a constituent treaty. And he went on to say: *"However all this will not mean the abolition of the nation state."*

And he qualified that by saying: *"Because even for the finalised Federation the nation state, with its cultural and democratic traditions, will be irreplaceable"*. Why?

Because in Fischer's words, *"It [the nation state] would be irreplaceable in ensuring the legitimation of a union of citizens and states that is wholly acceptable by the people"*.

But we will see later that even that very limited role for the member states is now doubted by one of Fischer's closest allies.

By 2004, Joschka Fischer was calling for a European Union that would be what he termed *"a strategic"* entity, a continental type power comparable to the United States, India, China or Russia, able to punch its weight in confronting threats to stability in the world.

Arguing in 2004 for the rapid inclusion of Turkey, Mr Fischer said that Turkey had *"a bridging function"* between Europe and Islam in the context of what he described as a *"structure of conflict in the 21st century"*. He argued that bringing Turkey into the European Union would enable it to better deal with the security issues at the edges of Europe's *"neighbourhood"*.

But, as we shall also see, his closest allies have cooled on Turkish accession to the EU.

The Simms-Ganley Proposal

More recently, prominent campaigners for the immediate establishment of a United States of Europe have included Dr Brendan Simms, a well-known political scientist now based in Cambridge, and Declan Ganley, whom many people wholly mistakenly believed to be anti-federalist at the time that he launched the Libertas party, most of whose members probably believed that they were joining an anti-federalist pan-European party.

In an article jointly penned by Simms and Ganley in the Sunday Business Post in January 2012, the authors made the case for the immediate creation of a federal United States of Europe.

Last year, Simms separately stated:

> *"History suggests that the current crisis requires the immediate creation of an Anglo-American style fiscal and military union of the Euro zone – a 'democratic union'. This would involve the creation of a European Parliament with legislative powers; and one-off federalising of all state debt through the issue of Union bonds to be backed by the entire tax revenue of the common currency zone (with a debt ceiling from member states therafter); the supervised dissolution of insolvent private sector financial institutions; and a single European army, with a monopoly on external force projection."*

Their vision for a federal Europe was to include a directly elected president exercising executive powers along the lines of the American model together with a two chamber parliament, one chamber being elected on a one person one vote basis similar to the House of Representatives in the United States, and a Senate in which each member state would have four senators.

Intriguingly, it was suggested that the common language and official language of the European Union should be the English language.

Ominously, the right of Member States of secession or withdrawal from the U.S.E was now to be restricted to cases where two thirds of their citizens supported a referendum to leave.

While this vision of a federal Europe may appear unlikely of achievement in the short or medium term, there is no doubt that it is, for all that, quite indicative of a desire on the part of more mainstream European federalists to create, under the aegis of integration, a centralised European state and government which would be and would act as a world power politically, diplomatically, militarily, economically and socially.

The notion that *"the only way forward for the Euro zone is to create a federal United States of Europe"* is rarely articulated in as stark a form as Simms and Ganley have done. Interestingly Simms seems to assume that the UK would opt out of such a federal Europe.

But those authors are by no means alone.

The Spinelli Group

More recently still, in late 2013, the Spinelli Group, a European federalist group, has published what it terms a *"Fundamental Law"* for consideration by a constitutional convention which, it says, will probably be called in spring 2015 to amend the EU Treaties.

Among the *"headline proposals"* of the Spinelli Group's *Fundamental Law* proposal are the following:

- That *"ever closer union"* is now to be defined as a federal union of states and citizens deriving its legitimacy from the popular sovereignty of the citizens of Europe

- That the Commission become the EU Government appointed by and answerable to the legislature consisting of the Council and Parliament

- That the Commission becomes smaller, and is nominated by its President

- That the ECJ should become the Unions Supreme Court

- Ending *"rigid unanimity*" for future Treaty change and entry into force

- Ending opt-outs in justice and home affairs

Describing their *"Fundamental Law"* proposal, the Spinelli Group states that:

"It signals federal union. It transforms the Commission from an overblown secretariat into a democratic constitutional government, keeping to the method built by Jean Monnet in which the Commission initiates laws which are then enacted jointly by the European Parliament representing the citizens and the Council representing the States.

We rejig the European Council to direct the affairs of the legislative Council of Ministers, returning to the Commission responsibility for the overall political direction of the Union.

The Court of Justice gains the attributes of the Supreme Court. And more competence is given to the Union in economic affairs, employment and energy policies. All the reforms are aimed at strengthening the capacity of the EU to act effectively. The new Treaty will be more permissive and less prohibitive.

A Convention made up of the Commission, Heads of Government, MPs and MEPs will be invited to consider this Fundamental Law. That body could start its work in Spring, 2015 once the new European Parliament and Commissioner are elected, and should be finished in good time for David Cameron's referendum in 2017.

The Union so reformed will be more efficient, transparent and accountable. Those States, like the UK, which make decide not to take the federal step forward can opt for the status of Associate Membership."

The EU according to Verhofstadt

Guy Verhofstadt, a former Prime Minister of Belgium (from 1999 – 2008) and current leader of the Euro Parliament Liberal grouping (*"ALDE"*), is also a founder of the Spinelli Group.

Other leading members of the Spinelli Group include Jacques Delors, Daniel Cohn-Bendit, Joschka Fischer and Pat Cox.

Importantly, Verhofstadt is the ALDE candidate to succeed Manuel Barroso as permanent President of the European Council.

In a recently published book entitled *"For Europe"* (co-authored with Daniel Cohn-Bendit), Guy Verhofstadt stated:

> *"Consequently, either a European Federal State must be created and a post national Europe come to light, or the European currency must disappear.* **There is no intermediate solution.** *But we must also realise that if the Eurozone collapses, the European Union itself will be doomed."* [My emphasis]

This apocalyptic vision dovetails neatly with Verhofstadt's underlying European ideology which they expressed thus:

"Let us not accept the biggest lie that the nation states continue to tell their citizens, i.e. that they are the foundation of the European Union - that the European Union is in fact a confederation or loose association of states, a sort of United Nations of Europe, instead of a United States of Europe, i.e. a federal union with a federal authority and federal rules. The nuclei of Europe are not its nations. The nuclei of Europe are its citizens."

Fischer's Humboldt 2000 concession that the member states are an essential component of legitimacy for a federal Europe has now been abandoned by his fellow Spinelli Group members..

Warming to this theme, Verhofstadt also states in an interview included in their book:

"The Euro sceptics want us to go back to the system of nation states, whose failure in Europe is clear. We want to fight against this false idea that only the nation state can protect us in the globalised world of tomorrow whereas that is not the case, whether it is socially, environmentally or commercially etc.

The world will be organised from now on around poles which can be described as empires, with all the precautions that word implies: the United States, China or even India, these are empires, not nation states.

The Indian sub-continent is a good example of what must be done. It is a geographical area where dozens of ethnic groups speaking dozens of languages and practising a multitude of religions live together. However it is indisputable that it forms a single entity and even a democratic entity."

At this point his interviewer interjects: *"But Europe is not an empire"*.

Verhofstadt replies:

"That is the problem! Europe must become an 'empire' in the good sense of the word, that is a continental pole able to include, on a voluntary basis, different nations, ethnic groups, cultures or religions."

When asked whether there was not a risk of Europe entering the area of technocratic dictatorship, Verhofstadt said:

"In a crisis, we often patch things up, which ends up with questionable results. But this is a transitional stage and it is possible to come out of these makeshift solutions in an upward direction, by creating a federal union which alone would allow democratic control.

The order of things should not be reversed: first of all there was the British state, then British democracy. First of all there was the French state, then French democracy. It is not

democracy which leads the state, it is the opposite and the movement is still carried by a bourgeois elite.

The British example is very clear: until the middle of the 19th Century only five or six percent of men had the right to vote. It was not until 1918 that the vote became 'universal' and 1928 until it was extended to women.

I think therefore that it is false to say that it is necessary to create a functional democracy first for European federation to emerge from it."

His alarming implication is that if you establish a fully-fledged federal Europe, democracy will somehow follow in its footsteps. He blithely wishes away the other possibility - that his trail-blazing federal benign empire/super-state might never become a functioning, accountable democracy based on any self-aware demos – but might become something far less accountable or benign.

When asked how an EU *"leap"* to a new federal Europe could be made, his co-author, Daniel Cohn-Bendit, stated in the same interview:

> *"We propose that after the 2014 election the European Parliament should proclaim itself as the Constituent Assembly, in agreement with the Council of Ministers, the other legislative chamber, and should draw up a draft European Constitution which will not be a repeat of the current Treaties as was the case in 2004. This text must define the principles of a Federal Europe and be brief. It must be approved by a referendum in all the countries by a double majority (majority of states and citizens). The states which vote 'No' must then decide by referendum whether to remain in the new Federal Europe or to leave it."*

This *"take it or leave it"* approach to the Federalist project is also reflected in their remarkably dismissive, intolerant and arrogant statement about those who doubt their plans:

> *"A radical shift is truly needed in Europe. A genuine revolution. A European Federal Union must be established. A Federal Union which allows Europe to take its place in the forthcoming post-national world as quickly as possible.* ***The Heads of State in government who do not realise this are cowardly, lazy and short-sighted."***

When, as Attorney General, in the wake of the defeat of the Nice 1 referendum in 2001, I once suggested at the IIEA that *"federalists who favour the creation of a European state do themselves little justice and no favours by portraying those who are not in agreement with them as moral and intellectual* ***untermenschen,"*** it was precisely the same attitude I had in mind.

Issues For The Irish To Ponder

I sense that the tide is not flowing in the federalists favour at this point. I do not think that the people of Europe will buy the proposition that the way out of present difficulties for the EU is to take the federalist plunge.

That may have something to do with the fact that there is simply no great democratic appetite across the member states of Europe for the creation of a federal super-state.

In particular, those in eastern and central Europe who escaped the clutches of the Soviet Union in the early 1990s do not share a desire to resume the status of *"satellite states"* of Germany within a federal Europe.

While the Euro zone undoubtedly requires the creation of a banking union, most Euro zone citizens would be deeply sceptical of any proposal to hand all levers of political and economic governance into the hands of a centralised Euro zone government along the lines suggested by Simms and Ganley or by the Spinelli Group.

Do we want to go down the road of the federal super-state with Joschka Fischer, Guy Verhofstadt, Brendan Simms, Declan Ganley and many others?

Is that road the only road open to us?

Is the only real issue in the future of Europe the speed at which it progresses towards that destination? Is there an inevitability about the creation of a European federal super-state?

Is such a super-state the inevitable consequence of having created a single currency?

Is reluctance to embrace the federalist idea merely evidence of political laziness, cowardice and myopia?

It seems to me that the Euro Federalist project is now pinning its hopes upon the convocation of some form of EU convention with a view to adopting a new EU Treaty designed to bring about most, if not all, of the transformation of the European Union into a Federal State.

Any such Treaty would, if worked out and agreed by the member states' governments, inevitably require to be the subject of referendums in a number of the member states of the European Union. That is the logic of the Czech and German decisions.

Before we once again go down the road which leads to Ireland (and perhaps a few other members states) holding a referendum on a Treaty which has achieved general support in the

EU, and before we find Ireland once again in the isolated and difficult position of making a *"make or break"* decision not only for ourselves but also for the entire Union, it seems to me that we very badly need a national debate on what Ireland wants in terms of the future of the European Union.

Do we want a federal super-state?

Do the Irish people want to be to Europe what North Dakota is to the United States of America?

Do we want to create and be part of what Guy Verhofstadt describes as a benign *"empire"*?

Do we want to create a single international diplomatic and military world power called the European Union?

These issues are of fundamental importance not merely to Ireland but to every member state in the European Union.

These questions, in turn, raise a different and more fundamental set of questions.

Could a single European federal government really be democratic and accountable to its demos or people?

Is there in reality a European *"demos"* at all?

Leaving aside whether Turkey, Ukraine, or Georgia will or will not eventually become members of the Union, can it be said that the peoples of the existing Member States constitute one demos or singular source of sovereign power for the purpose of creating a real democracy in Europe?

Is the European Union any more likely to succeed as a federal super-state than the Austro-Hungarian Empire was likely to succeed as a multinational political entity?

Is it possible to have a functioning democracy where the voters cannot even understand each other and where the speeches and utterances of elected leaders cannot be understood by the great majority of the people who are expected to vote for them?

Could political parties really come into existence as dynamic democratic forces where the party membership could not even converse with one another at a party conference?

Is not Europe so diverse that even if we had cross-country parties such as the present EPP or Socialist groupings, those groupings would be such loose alliances of convenience that they would come to resemble the Democratic party in early 20th century America, an unlikely

alliances of regional convenience made between reactionaries and liberals, between social democrats and outright racists?

And if a European *demos* does not exist, is it wise, or remotely justifiable, to start building a super-state which assumes its existence and hopes that it will later somehow become and remain democratic?

Just as the Eurozone crisis has taught us that you cannot engage on an ambitious and risky political project without providing in its architecture for predictable contingencies, should we not pause before demands are made for further integration of the powers of the Member States, and pose the question whether the ambitions of the federalist integrationists are sustainable and compatible with the maintenance of democratic values and real accountability in all parts of a federal European Union.

The phrase *"ever closer union"* when used in the European Union treaties is seen by some as a democratic mandate for relentless integration of sovereign powers. And it does seem to bear that meaning, at first glance.

But surely we should pause to ask ourselves whether the political rhetoric of *"ever closer union"* really does mean relentless blind pursuit of a European super-state when something in our hearts or our collective folk memories suggests to us that Europe is not a homogeneous society, and that its peoples do not form a demos or nation, and that the concentration of sovereignty at the centre of a continent which is not a singular democracy is fraught with the risk that such powers will end up in the hands of persons who have little or no democratic mandate and little or no democratic accountability.

Before we start building a fully integrated federal political entity which exercises greater and greater sovereignty, should we ask ourselves, like the workers on the biblical Tower of Babel, whether it can reach a federalist heaven and whether or not its construction is what we want at all.

An Alternative Vision for the EU

I do not believe that the opponents of Euro federalism lack vision or are lazy or cowardly, as Verhofstadt mockingly claims. They may simply not share his "vision of empire". They may have their own vision of partnership rather than "empire"

Intergovernmentalism is not a dirty word in my mind. The idea that Member States continue to be the source of EU legitimacy is one with which I am very comfortable.

The very real democratic relationships between the peoples of the Member States and their governments contrasts very clearly in my mind from the relationship which might very well exist between them and a distant federal government in Brussels.

The vision of a European Union as a voluntary partnership of free peoples may be challenging for those federalists who prefer order to "herding cats".

But such a free partnership of Member States is not threatening to its own peoples or to the outside world. It is an ideal and a vision that accommodates and sustains a richness of diversity.

The "principle of conferral" referred to by the German Constitutional Court is not a repugnant obstacle to progress; it is arguably a very real check and balance which is needed in these days of globalisation.

Just because the free partnership nature of the EU carries a price in terms of coherence does not mean that such a price is not well worth paying to sustain real democracy in the Member States.

Such a vision for the EU compares well, I think, with the potential nightmare of Verhofstadt's "benign empire" gone wrong.

The McKenna and Coughlan Decisions

I want to deal with *McKenna* and *Coughlan*.

It has been suggested by some commentators, and was re-echoed by Peter Sutherland here last year, that the decisions of the Irish Courts in the *McKenna* and *Coughlan* decisions relating to the conduct of State broadcasters and the use of Exchequer funding for advocacy purposes in the context of referendums on constitutional amendments are somehow an undesirable, unreasonable or unjustifiable judicial interference in the sphere of the Executive and/or the Legislature.

These criticisms, I think, are unjustified.

In the Irish context, the People are the sovereign power. They are the judges and decision-makers *"in final appeal"* on all matters of public policy. The Constitution recites (Article 5) that it is the right of the People to designate their rulers.

Looking back to the two constitutional referenda on proposals to abolish PR, I have never found anyone who believes that it would have been just or lawful for the sponsoring government to use large amounts of Exchequer funding to advocate the abolition of PR or to use the broadcast media one-sidedly to promote abolition of PR, or to allocate broadcasting time so as to achieve the same result.

But I have often found that in the context of referendums to do with the European Union or its predecessor, the EEC, those who favour passage of such enabling referendums argue strongly that the McKenna and Coughlan judgments are somehow wrong or indefensible.

They see no parallel with the PR referendum and they justify such a distinction by some vague reliance on the distinction between national/international affairs (where they consider State funding as justified) and internal political matters (where it is not).

The People are entitled, as the sovereign power, to decide all questions of constitutional importance, whether in referendums or in elections, without the use of their own resources to propagate one outcome over another.

In holding to this principle, the Irish Courts are not meddling in the democratic process or in the jurisprudence on this issue as an *"out-lier"* in terms of international thought and practice.

On the contrary, the Venice Commission of the Council of Europe, at the request of the Parliamentary Assembly of the Council of Europe, drafted a **Code of Good Practice in Electoral Matters** which was approved by the Parliamentary Assembly of the Council of Europe as far back as 2003.

In 2007, a **Code of Good Practice in Relation to Referendums** was adopted by the Council of Europe's Parliamentary Assembly.

Indeed, the Codes provide that the use of public funding for campaigning by the authorities must be prohibited and that there should be a *"neutral attitude"* in relation to public funding and the use of public broadcast media. The Explanatory Memorandum to the Codes of Good Practice states:

> *"The intention is different in the case of referendums, since it is legitimate for the different organs of Government to convey their viewpoint in the debate for or against the text put to the vote. They must not abuse their position, however.* **In any event, the use of public funds for campaigning purposes must be prohibited in order to guarantee equality of opportunity and the freedom of voters to form an opinion."**

In this respect, the Codes and Explanatory Memorandum are *precisely* the same as the jurisprudence of the Irish Courts as set out in the McKenna and Coughlan decisions.

In these circumstances, I fail to see how the decisions in McKenna and Coughlan merit any of the criticism heaped on them.

In particular, it seems to me that if the Irish Constitution requires amendment in order to bring us one stage further down the road of integration or pooling of sovereignty in the context of our membership of the European Union, those who advocate such a change must discharge the onus of sustaining the case for the proposed amendment.

And if their case is compelling, there is no need whatsoever to attempt to use the Exchequer, or the taxpayers' money, to fund the process of persuading the People of the merits of such constitutional change.

Let's have a real debate on the future of the EU

We need a new understanding that Euro-federalism is not the sole, orthodox or authentic vision or spirit of the European Union.

There are other ways to understand the EU and envision its future.

This understanding should permeate the way in which the media debates the future of Europe. It involves abandoning the Punch and Judy show of debate between the extremes and substituting for it a more nuanced realistic debate about degrees of integration.

It also involves an end, in my view, to the categorization of a pragmatic partnership approach to Europe as *"a Eurosceptic approach"* simply because it is at odds with the views of elitist Eurofederalists.

When was the last time that an Irish newspaper or broadcaster really attempted to discuss the substance of integration, its degree and extent, as distinct from the principle?

For that matter, when was there a significant political debate at political party level, within parties or between parties, about the issues of sovereignty, integration and the desired balance between the rights of Member States with the Union?

We need centres of political thought on Europe that are not all funded from federalist sources.

We have Jean Monnet professors, the IIEA, and heavily funded NGOs to research the future of Europe. We have Eurobarometers which measure public opinion on carefully selected issues and questions.

There is a sense that there is an orthodox magisterium which "owns" the debate on Europe and actively seeks to keep us safe from heresies and infidels.

I have no absolutely objection to the existence of such an "establishment". But we need diversity of thought.

While the boilers are being fired up again in federal circles to attempt one more and decisive step along the road to secure a Federal Europe, there is absolutely no debate in Ireland on these subjects.

We are about to enter into a three month period of inane debate leading to largely worthless European Parliament elections in which candidates are being sought and nominated by all parties chiefly because they are *"household names"* rather than by reference to what they believe about the future of Europe.

Unless the European parliamentary elections are decided on the basis of where the European Union is going and where Ireland is going in that context, they are a pointless charade. They are as much a charade as our system of local government itself is a charade.

Calling the people to the ballot box in May to participate in democratic charades which have nothing to do with the future of this country or with our vision for the future of the European Union is, alas, a process already well in train.

Nobody appears to be willing to contest the European elections by reference to the issues which really matter. Between the candidates there will be no debate whatsoever on where they actually stand in relation to the very real emergence of proposals to create a federal Europe.

Which, I think, is a terrible pity.