

In the matter of *Bunreacht na hÉireann: Patricia McKenna*, Plaintiff, v. *An Taoiseach and Others*, Defendants (No. 2) [S.C. Nos. 361 and 366 of 1995]

High Court

31st October, 1995

Supreme Court

17th November, 1995

Constitution - Amendment - Referendum - Role of Government - Government using public funds to promote particular outcome - Matching funds not made available to other side - No express constitutional or statutory provision authorising such expenditure - Whether such expenditure unconstitutional - Whether courts having jurisdiction to restrain such expenditure - Whether Government entitled to campaign for particular outcome by means not involving use of public funds - Constitution of Ireland, 1937, Article 40, ss.1 and 3, and Articles 46 and 47.

Constitution - Personal rights of citizen - Right to equality - Right to fair procedures - Right to equality in exercise of franchise - Right to democratic process - Whether infringed by use of public funds to promote particular outcome in referendum without provision of matching funds to promote alternative view - Constitution of Ireland, 1937, Article 40, s.1.

Constitution - Separation of powers - Public expenditure - Whether courts having jurisdiction in relation to expenditure voted by Dáil Éireann in accordance with Constitution - Constitution of Ireland, 1937, Articles 17 and 28.

Article 46, s.2 of the Constitution of Ireland, 1937, provides:-

“Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.”

Article 28 of the Constitution provides that the executive power of the State shall be exercised by or on the authority of the Government; that the Government shall be responsible to Dáil Éireann; and that the Government shall prepare estimates of the receipts and expenditure of the State for each financial year, and present them to Dáil Éireann for consideration. Article 17, s. 2 provides for Dáil Éireann to pass votes or resolutions and to enact laws for the appropriation of public moneys, on the recommendation of the Government.

Section 22 of the Referendum Act, 1994, provides that a Bill which is the subject of a referendum must be made available for inspection and purchase at post offices; and s. 23 provides for the issue of a statement for the information of voters, approved by the Dáil and Seanad, regarding the proposal the subject of the referendum.

Dáil Éireann voted £500,000 to the Minister for Equality and Law Reform, to be used for a publicity campaign to encourage a "Yes" vote in a forthcoming referendum on the removal of the constitutional prohibition on divorce.

The plaintiff sought an interlocutory injunction restraining the use of public funds to promote a "Yes" vote; or the provision of public funds to promote a "No" vote.

The plaintiff contended that once a Bill containing a proposal for the amendment of the Constitution had been passed by the Oireachtas, the Government's sole function was to provide the machinery for the holding of the necessary referendum; and that the use by the Government of public funds to promote a particular outcome went beyond that role and infringed the procedure laid down by Articles 46 and 47 for the amendment of the Constitution, which entrusted the decision exclusively to the People. It was also contended that the expenditure infringed the plaintiff's personal rights as a citizen. Alternatively, it was submitted that if public funds were used to promote a particular outcome, then the Constitution required that matching funds be made available to those opposing the amendment.

The defendants contended that they were obliged to promote their view that the Constitution be amended; and that this could only be done by the use of public funds. It was further argued that it would be an infringement of the doctrine of the separation of powers for the courts to review expenditure approved by Dáil Éireann in accordance with the procedure laid down by the Constitution. The defendants also challenged the standing of the plaintiff to institute and maintain the proceedings.

By consent the hearing of the motion was treated as the trial of the action.

Held by Keane J., in dismissing the plaintiff's claim, 1, that the plaintiff did have *locus standi* to institute and maintain the proceedings.

Crotty v. An Taoiseach [1987] I.R. 713 applied; *Cahill v. Sutton* [1980] I.R. 289 distinguished.

2. That Articles 17 and 28 of the Constitution were at the heart of the parliamentary democracy inherited by the State, in recognising the primary role of the executive and the elected assembly to which it was responsible in the raising and expenditure of monies; and that for the courts to review decisions in this area by the Government or Dáil Éireann would be to assume a role which was exclusively entrusted to those organs of state, and one which the courts were conspicuously ill-equipped to undertake.

McKenna v. An Taoiseach (No. 1) [1995] 2 I.R. 1 applied; *Baker v. Carr* (1962) 369 U.S. 186 approved in part.

Held by the Supreme Court (Hamilton C.J., O'Flaherty, Blayney and Denham JJ., Egan J. dissenting), in allowing the plaintiff's appeal and granting declaratory relief, 1, (Egan J. concurring) that the plaintiff did have *locus standi*.

2. That the Government, in expending public moneys in the promotion of a particular result, was acting in breach of the Constitution.

Per Hamilton C.J., O'Flaherty and Denham JJ.: That such expenditure was a breach of the constitutional right to equality.

Per Hamilton C.J.: That such expenditure was also a breach of the democratic process and the constitutional process for the amendment of the Constitution, which required not only compliance with Articles 46 and 47 of the Constitution, but also that regard be had for the constitutional rights of the citizen and the adoption of fair procedures.

Per O'Flaherty J.: That such expenditure also had the effect of putting the voting rights of those citizens in favour of the amendment above the voting rights of those citizens opposed to it.

Per Blayney J.: That the constitutional requirement that a proposal for the amendment of the Constitution be submitted to the People must be construed as providing for fair procedures; and that in expending public monies in the promotion of a particular result, the Government had failed to act fairly, in that it had favoured one section of the People at the expense of another.

Glover v. BLN Ltd. [1973] I.R. 338 applied.

Per Denham J.: That such expenditure as well as representing a breach of the constitutional right to equality also represented an infringement of the constitutional right to freedom of expression and the constitutional right to a democratic process in referenda.

Per Egan J., dissenting: That there was no specific prohibition in the Constitution or the Act of 1994 on such expenditure; that Dáil Éireann, in voting the monies to the Minister for Equality and Law Reform, had not directed that they be applied in any particular manner other than in connection with the referendum; and that accordingly, it was a matter solely for the executive arm of government to decide how the money should be so expended.

3. That the Court had jurisdiction to act in relation to the Government's breach of the Constitution.

Per Hamilton C.J. and Blayney J.: That in relation to the Court's jurisdiction, the following principles applied:-

- (a) The courts had no power, express or implied, to supervise or interfere with the exercise by the Government of its executive functions, provided that it had acted within the restraints imposed by the Constitution on the exercise of such powers;
- (b) If, however, the Government acted otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts were not only entitled but obliged to intervene;
- (c) The courts were only entitled to intervene if the circumstances were such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.

Boland v. An Taoiseach [1974] I.R. 338 and *Crotty v. An Taoiseach* [1987] I.R. 713 applied.

Per Hamilton C.J.: That in expending monies in the manner impugned, the Government had not been acting in pursuance of the executive power of the State; but that this did not of itself make the acts unlawful.

Per O'Flaherty and Egan JJ.: That the Government was entitled to campaign for a "Yes" vote by methods other than the expenditure of public funds.

Per O'Flaherty J.: That the prohibition on the use of public funds did not mean that Government Ministers were not entitled to use their State transport in relation to the referendum; or to avail of the media to put forward their point of view.

Per Denham J.: That the Government had a right and duty to give information, to clarify situations, to give explanations and to deal with unforeseen matters and emergencies.

Cases referred to in this report:-

- Abood v. Detroit Board of Education* (1977) 431 U.S. 209.
Amalgamated Society of Railway Servants v. Osborne [1910] A.C. 87.
Baker v. Carr (1962) 369 U.S. 186.
Boland v. An Taoiseach [1974] I.R. 338; (1974) 109 I.L.T.R. 13.
Buckley v. Valeo (1976) 424 U.S. 1.
Byrne v. Ireland [1972] I.R. 241.
Cahill v. Sutton [1980] I.R. 289.
Cashman v. Clifford [1989] I.R. 121; [1990] I.L.R.M. 200.
Crotty v. An Taoiseach [1987] I.R. 713; [1987] I.L.R.M. 400.
Duggan v. An Taoiseach [1989] I.L.R.M. 710.
Educational Company of Ireland v. Fitzpatrick (No. 2) [1961] I.R. 345; (1961) 97 I.L.T.R. 16.
Finn v. The Attorney General [1983] I.R. 154.
Glover v. B.L.N. Ltd. [1973] I.R. 388.
In re Haughey [1971] I.R. 217.
Howard v. The Commissioners of Public Works in Ireland [1994] 1 I.R. 101; [1993] I.L.R.M. 665.
International Association of Machinists v. Street (1961) 367 U.S. 740.
McCann v. An Taoiseach (Unreported, High Court, Carney J., 5th October, 1992).
McGimpsey v. Ireland [1988] I.R. 567.
McKenna v. An Taoiseach (No. 1) [1995] 2 I.R. 1.
Norris v. The Attorney General [1984] I.R. 36.
O'Byrne v. The Minister for Finance [1959] I.R. 1; (1958) 94 I.L.T.R. 11.
O'Donovan v. The Attorney General [1961] I.R. 114; (1961) 96 I.L.T.R. 121.
Official Propaganda Case (1977) 46 BVerf. GE 125.
In re O Laighleis [1960] I.R. 93; (1957) 95 I.L.T.R. 92.
Police Department of the City of Chicago v. Mosley (1972) 408 U.S. 92.
R. (Bridgeman) v. Drury [1894] 2 I.R. 489.
R. v. The Secretary of State for Foreign and Commonwealth Affairs (ex p. World Development Movement Ltd.) [1995] 1 W.L.R. 386; [1995] 1 All E.R. 611.
R. v. The Secretary of State for the Home Department (ex p. Fire Brigades Union) [1995] 2 W.L.R. 464; [1995] 2 All E.R. 244.
Roche v. Ireland (Unreported, High Court, 17th June, 1983).
Slattery v. An Taoiseach [1993] 1 I.R. 286.

The State (Gilliland) v. The Governor of Mountjoy Prison [1987] I.R. 201; [1987] I.L.R.M. 278.

Plenary summons.

The facts and the relevant constitutional and statutory provisions have been summarised in the headnote and fully set out in the judgments, *infra*.

A plenary summons was issued on the 23rd June, 1995. An amended statement of claim was delivered on the 8th August, 1995, and a defence delivered on the 16th October, 1995. A notice of motion was issued on the 23rd October, 1995, seeking interlocutory relief.

The motion was heard by the High Court (Keane J.) on the 27th October, 1995; the hearing of the motion was treated as the trial of the action.

Paul Callan S.C. and Diarmuid Rossa Phelan (with them *Eoin McGonigal S.C., Michael Forde S.C. and Seamus Ó Tuathail*) for the plaintiff.

John Rogers S.C. (with him *Anthony Aston*) for the defendants.

The court adjourned the pronouncement of its judgment.

Ex tempore.

Keane J.

31st October, 1995

Many people thought that the decision of the Government and Dáil Éireann to spend £500,000 of the taxpayers' money on a campaign urging the People to vote in favour of the proposal to remove the constitutional ban on divorce was ill advised. They may say that the Government has fully accepted that there was substance in their criticisms since the Government has now arranged for the dispatch to every house of a pamphlet, which was produced at the present hearing and which set out the arguments for and against the proposal in a fair and balanced manner. At the same time, however, the Government is maintaining what it claims is its right to spend public funds on urging the electorate to vote in favour of the proposal.

It is not the function of this court to pass judgment on the wisdom, still less the political expediency, of the actions of the Government and the Dáil. I am solely concerned with whether they are, as the plaintiff contends, invalid having regard to the provisions of the Constitution.

At the outset I must deal with the standing of the plaintiff to initiate and maintain the proceedings, since that has been put in issue on behalf of the defendants. It is clear that the present proceedings belong to a category of cases in which a challenge to the constitutionality of the legislation or other acts is unlikely to emerge if the specific criteria enunciated by the Supreme Court in *Cahill v. Sutton* [1980] I.R. 289 are applied. It is clear from the observations of Finlay C.J. in *Crotty v. An Taoiseach* [1987] I.R. 713 that a broader approach should be adopted in cases of this nature and I have no hesitation in concluding that the plaintiff was entitled to institute and maintain the present proceedings.

That brings me to the substance of the plaintiff's challenge. Shortly stated, it is based on the proposition that, by virtue of Article 46 of the Constitution, once a Bill containing a proposal for the amendment of the Constitution has been passed by both Houses of the Oireachtas the Government's sole function is to provide the machinery for the holding of the necessary referendum. Any use by the Government of public funds to secure an affirmative vote is, it is said, unwarranted, since under the Constitution the decision as to whether or not the Constitution should be amended is exclusively entrusted to the People. If public funds are to be lawfully expended for this matter, it is said, then the only basis on which it may be constitutionally done is if matching funds are made available to those opposing the amendment.

On behalf of the defendants, it is submitted that the decision as to whether or not the revenues of the State should be applied in this or any other manner, is entrusted exclusively to the Government and Dáil Éireann by virtue of Articles 17 and 28 of the Constitution. The courts have no function in reviewing such expenditure: to attribute such a function to them, it is said, is a clear infringement of the strict separation of the powers enjoined by the Constitution.

The same issue was decided by Costello J., as he then was, in *McKenna v. An Taoiseach (No. 1)* [1995] 2 I.R. 1 in which the plaintiff in these proceedings was also the plaintiff. In that case she claimed that an information campaign undertaken by the Government to secure an affirmative vote in favour of the amendment of the Constitution so as to permit the State to ratify the Treaty on European Union, generally known as the Maastricht Treaty, was unconstitutional. Costello J. dismissed the

claim but in the present case Mr. Callan, on behalf of the plaintiff, has invited me not to follow his decision as being erroneous in point of law.

I was also referred to the decision of the Supreme Court in *Slattery v. An Taoiseach* [1993] 1 I.R. 286 in which the plaintiff sought to restrain the actual holding of the referendum on the Maastricht Treaty on the ground that the Government could not lawfully hold a referendum without ensuring that the People were fully informed of the arguments against ratification as well as those in favour. In the course of his judgment Hederman J. said at p. 299 of the report:-

“The real point in this case is to ask the court to prevent the operation of legislative and constitutional procedures which are in train. This is something the Court has no jurisdiction to do. What the defendants are doing is implementing the decision of the Dáil and the Seanad. They are not controlling the referendum. There is no constitutional or legal obligation on the defendants to provide funds for those opposing the referendum. In *Crotty v. An Taoiseach* [1987] I.R. 713 Henchy J. said:-

‘There is, of course, nothing in the Constitution to prevent the Government or any persons or group or institution from campaigning, advocating for or otherwise working for a change in the Constitution. There is in my view no constitutional obligation on the Government to provide funds for those opposing the ratification of the treaty’.”

The report of Henchy J.’s judgment in the Irish Reports [[1987] I.R. 713, at p. 788] does not in fact contain the second sentence attributed to him in this passage. During the course of the submissions in the present case, the text of the two judgments as approved by the learned judges was supplied to the court by the Supreme Court registrar and it is clear that in each case the printed report in the Irish Reports reflects the actual text of the approved judgments. It is, however, sufficient to say that the passage quoted from the judgment of Hederman J., while it must, of course, be given due weight as the considered view of the learned judge, is clearly *obiter* having regard to the issue actually before the Court in that case and, in any event, goes no further than rejecting the suggestion that there was an obligation on the State to provide funds for those opposed to the amendment. It does not necessarily follow that Hederman J. was endorsing the proposition that the Government may constitutionally expend public funds for the purpose of securing an affirmative vote.

Article 46, s. 2 of the Constitution provides:-

“Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by referendum to the decision of the People in accordance with the law for the time being in force relating to the referendum.”

It was emphasised on behalf of the plaintiff that this sub-paragraph does not confer an exclusive role on the Government in the initiation of legislation to amend the Constitution. That is certainly the case: It is also the case that Article 20 of the Constitution, dealing with legislation, does not confer any exclusive role as to the initiation of legislation generally on the Government. The fact that, in theory, it is possible to initiate a Bill containing a provision amending the Constitution as a private member's measure and have it passed by both Houses of the Oireachtas is not, in my view, relevant to the issue that arises in the present case. There is no guidance in the wording of Article 46 as to the role, if any, to be played by the Government in the holding of a referendum, other than what may be gleaned from the requirement that the referendum be held ‘in accordance with the law for the time being in force relating to the referendum’.”

Article 28 of the Constitution provides in section 2:-

“The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on behalf of the Government.”

Article 28, s. 4 provides that:-

- “1° The Government shall be responsible to Dáil Éireann.
- 2° The Government shall meet and act as a collective authority and shall be collectively responsible for the Departments of State administered by members of the Government.
- 3° The Government shall prepare Estimates of the Receipts and Estimates of the Expenditure of the State for each financial year, and shall present them to Dáil Éireann for consideration.”

Article 17 provides that:-

- “1. 1° As soon as possible after the presentation to Dáil Éireann under Article 28 of this Constitution, of the Estimates of receipts and the Estimates of expenditure for any financial year, Dáil Éireann shall consider such Estimates.
- 2° Save insofar as may be provided by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year.

2. Dáil Éireann shall not pass any vote or resolution and no law shall be enacted for the appropriation of revenue or other public monies, unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government and signed by the Taoiseach."

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

In his judgment in *McKenna v. An Taoiseach (No. 1)* [1995] 2 I.R. 1, Costello J. at p. 6 of the report expressed his views thus:-

"... the plaintiff's complaint of misconduct by the Government is a complaint of *political* misconduct on which this court can express no view and ... she has failed to establish any *constitutional* impropriety in the exercise by the Government of the executive power of the Government in the conduct of the referendum campaign."

I entirely agree with that view. I should also say that, while it was suggested by Mr. Callan that the matter was not fully argued, it appears from a passage at the end of Costello J.'s judgment that, as in this case, the hearing of an application for an interlocutory injunction was treated as the trial of the action. It seems to me that this was a considered judgment on precisely the same issue as that which I have had to consider in the present case.

I was also referred to the decision of the United States Supreme Court in *Baker v. Carr* (1962) 369 U.S. 186 in which Brennan J. set out at p. 217 the following criteria for determining whether a particular question should be resolved by the judicial or the legislative and executive arms of government:-

“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing a lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

Judged by each of these criteria, with the exception of the penultimate one, the question in this case is clearly one for resolution by the legislative and executive arms of government and not by the judicial arm.

The plaintiff’s claim must, accordingly, be dismissed.

The plaintiff filed a notice of appeal on the 1st November, 1995. By notice filed on the 2nd November, 1995, the defendants sought to vary the order of the High Court to include a finding that the plaintiff had failed to establish a breach of any constitutional right affecting her; a finding that she did not have standing to maintain the proceedings; and, the High Court having made no order as to costs, an order fixing the plaintiff with the costs of the action.

The appeal and the application to vary the order of the High Court were heard by the Supreme Court (Hamilton C.J., O’Flaherty, Egan, Blayney and Denham JJ.) on the 8th and 9th November, 1995.

Eoin McGonigan S.C., Michael Forde S.C., and Diarmuid Rossa Phelan (with them *Paul Callan S.C. and Seamus Ó Tuathail*) for the plaintiff: Neither the Constitution or the Referendum Act, 1994, expressly authorise the spending of public monies to promote a particular outcome. Yet the defendants unequivocally assert such a right. Because of the dogmatic position taken by the defendants, the existence or otherwise of an implicit power to spend money in the manner impugned by the plaintiff may be tested at the extremities of the principle asserted - can extravagant amounts of public money be used by Government in the most outrageous manner to promote a constitutional amendment opposed by a substantial number of citizens?

Further, the Minister for Equality and Law Reform had no power to spend the money in the way he did - see the Ministers and Secretaries (Amendment) Act, 1939, and the Justice (Transfer of Departmental and Ministerial Functions) Order, 1993. The Order of 1993 transferred to the Minister "the functions vested in the Minister for Justice in relation to civil law reform, civil legal aid and the family mediation service." In this context, "civil law reform" means reform of statute law or the common law - not the amendment of the Constitution. Under Article 11 of the Constitution, public funds must be appropriated for the purposes determined by law. The courts have been prepared to review the legality of public expenditure for over 100 years - see *R. (Bridgeman) v. Drury*; *Howard v. The Commissioners of Public Works in Ireland*; *Byrne v. Ireland*; *R. v. The Secretary of State for Foreign and Commonwealth Affairs (ex p. World Development Movement Ltd.)*; and *R. v. The Secretary of State for the Home Department (ex p. Fire Brigades Union)*.

There must be equality and fairness - public funds are not there to boost the Government's view. If there had been equality in the distribution of funds, then there would be no need for these proceedings. At the very least, the plaintiff is entitled to declaratory relief. Participation in the constitutional amendment process is one of the most fundamental aspects of citizenship, and both laws and executive discretions in this area must avoid partisanship and respect the right to equality in the exercise of the franchise - see *O'Donovan v. The Attorney General*. The American Supreme Court has been particularly insistent on the principle of equal treatment in this area - *Buckley v. Valeo* and L.H. Tribe, *American Constitutional Law*, (2nd Ed., 1988), Chapter 13. See also the *Official Propaganda Case* decided by the German Constitutional Court.

There is a close analogy to be drawn between the expenditure of trade union funds for political purposes and the impugned expenditure by the defendants - see *Amalgamated Society of Railway Servants v. Osborne*; *Educational Company of Ireland v. Fitzpatrick (No.2)*; *International Association of Machinists v. Street* and *Abood v. Detroit Board of Education*. Taxpayers have far less choice than dissident union members - taxpayers face criminal sanction if they don't pay their taxes. The case against the partisan use of public funds is therefore all the stronger. Such expenditure is an infringement of the principle of freedom of expression - the right to receive and impart political ideas should be free of interference from a partisan campaign funded by the taxpayer. In *Police Department of the City of Chicago v. Mosley*, the U.S. Supreme Court held that the government could not unduly favour one set of ideas over another - in

that case by permitting economically motivated picketing while outlawing politically motivated picketing.

The plaintiff has a right to oblige the Government to act in accordance with the Constitution - see *Crotty v. An Taoiseach*; *McGimpsey v. Ireland*; *The State (Gilliland) v. The Governor of Mountjoy Prison*; *O'Byrne v. The Minister for Finance* and *Cashman v. Clifford*.

The Government already has ample means to present their point of view - televised coverage of statements in the Dáil and Seanad; access to the public airwaves to promote a partisan view - see s. 31, sub-s. 2 of the Broadcasting Act, 1960, and *McCann v. An Taoiseach*; the Government Information Office; public meetings and canvassing. If it is permissible to use public funds to promote a partisan campaign in a referendum without the provision of matching funds for the opposing viewpoint, on what point of principle can this be distinguished from the use of public funds to secure the re-election of an outgoing Government?

The expenditure of public funds to secure a "Yes" vote in the forthcoming referendum is a breach of Articles 8, 10 and 14 of the European Convention on Human Rights. Where relevant, the Court can take account of the Convention unless the plaintiff seeks to have legislation declared invalid (*Norris v. The Attorney General*) or inoperative (*In re Ó Laighleis*), or seeks redress against a non-governmental person or agency.

The Court must have regard to the unique nature of the process for the amendment of the Constitution. The referendum exists as a protection against constitutional change - e.g. abridgement of constitutional rights - without direct popular approval. In giving themselves the Constitution, the People delegated some powers and reserved others to themselves. By this means they preserved their right to direct participation in the shape of their polity. This is demonstrated by the fact that the initiation of the referendum process is not exclusive to the Government. Less than ten years ago, the People rejected an amendment in similar terms to the one on which they will shortly vote. It cannot be right that public funds now be used to secure a different result.

James O'Driscoll S.C. (with him *Anthony Aston*) for the defendants: When the Government submits a proposal to the People for the amendment of the Constitution in regard to social policy, there is not merely a right but a duty to submit the proposal in an affirmative way. This is a part of the executive power vested by the Constitution in the Government. This affirmative way requires a campaign; and such a campaign must be financed. In the absence of an express constitutional or statutory embargo

on such expenditure, it is justified. It is impractical to suggest that no public funds be used by the Government while at the same time recognising the Government's right - as the plaintiff does - to call for a "Yes" vote. For example, is a Minister not to travel in transport provided by the State if the purpose of his journey involves advocacy of a "Yes" vote?

The acts impugned by the plaintiff in no way restrict or inhibit the right or ability of any citizen to vote "No". The alleged infringements of the plaintiff's constitutional rights are authoritatively disposed of by Costello J. in *McKenna v. An Taoiseach (No.1)*. See also *Finn v. The Minister for the Environment*; *Boland v. An Taoiseach*; *Slattery v. An Taoiseach*; *Crotty v. An Taoiseach* and *Roche v. Ireland*.

The only way in which the plaintiff could impugn the decision of Dáil Éireann to vote monies to the Minister would be if the procedure laid down by the Constitution in Articles 28 and 17 for the appropriation of public funds had not been followed. Insofar as the plaintiff asks the Court to compel the Government to provide funds for the "No" campaign, this would make a nonsense of Articles 17 and 28. The Dáil cannot vote money for a specific purpose unless this is recommended by the Government - Article 17, section 2. It is beyond the jurisdiction of this Court to compel the Government to recommend expenditure to the Dáil when the Constitution entrusts the decision on such recommendation exclusively to the Government.

The provisions of the European Convention on Human Rights are not justiciable in the Irish courts - *In re Ó Laighleis*. Insofar as the plaintiff asks the Court to inform itself by reference to decisions of the European Court of Human Rights, there are no relevant judgments.

The plaintiff lacks the standing to maintain these proceedings - she is not a person adversely effected in the manner envisaged in the judgment of Henchy J. in *Cahill v. Sutton*, applied in *Duggan v. An Taoiseach* by Hamilton P.

Michael Forde S.C. in reply.

Cur. adv. vult.

Hamilton C.J.

17th November, 1995

This is an appeal brought by the plaintiff, Patricia McKenna MEP, against the judgment and order of the High Court (Keane J.) delivered and

made on the 31st October, 1995, whereby the plaintiff's claim was dismissed.

As appears from the statement of claim delivered on her behalf the plaintiff had claimed in these proceedings:-

- (1) (a) A declaration that the plaintiff is entitled to have referenda pursuant to Article 47 of Bunreacht na hÉireann conducted in a manner consistent with the democratic nature of the State as required by Bunreacht na hÉireann, in particular, the Preamble, Articles 5, 6 and 47 thereof,
- (b) A declaration that the defendants have acted and are acting *ultra vires* in their purported exercise of the executive power in the expenditure and threatened expenditure of public funds other than on the impartial organisation of the administration of the process of the amendment of the Constitution;
- (c) A declaration that the defendants have acted and are acting *ultra vires* in their purported exercise of the executive power in the allocation of funding in regard to amendment campaigns;
- (d) A declaration that the defendants have acted and are acting contrary to Article 11 of the Constitution in their allocation of funding in regard to amendment campaigns;
- (e) A declaration that the defendants have acted and are acting unconstitutionally in their promotion of a particular vote as the outcome to referenda, having regard in particular to the Preamble and Articles 5, 6, 46 and 47 of the Constitution;
- (f) A declaration that the defendants have acted and are acting unconstitutionally in their one-sided spending, selection and distribution of information, and advertising, contrary to the Preamble and Articles 5, 6, 46 and 47 of the Constitution;
- (g) (i) A declaration that the defendants have failed and are failing to vindicate the constitutional rights of the plaintiff in acting *ultra vires* outside their executive powers under the Constitution both in regard to participation in matters reserved to the People and in the expenditure of monies, and
(ii) in their one-sided spending, selection and distribution of information, and advertising, all contrary to Articles 5, 6, 11, 28, 40, s. 1, 40, s. 3, 40, s. 6, sub-s. 1 (i) and 41 of the Constitution.

- (2) a declaration that:
 - (a) the plaintiff was entitled to participate in the hereinbefore mentioned several referenda; and
 - (b) the plaintiff is entitled to participate in any prospective referendum, on terms of equality between citizens and groupings of citizens holding or having divergent views in accordance with the provisions of the Constitution generally and in particular the provisions of Article 40, s. 1, 40, s. 3, sub-s. 1 and 40, s. 3, sub-section 2.
- (3) A declaration that the plaintiff is entitled to an opportunity, by herself as a citizen, or as part of a grouping of concerned citizens, to express convictions and opinions and to communicate viewpoints to the general public and to receive such expressions and communications on the issues arising in the said referendum campaign, without Government intervention.
- (4) A declaration that the Government, as defendant herein, in spending public monies in the conduct of a referendum political campaign, and in particular in the promotion of a particular outcome of the referendum would be acting in breach of the Constitution.
- (5) An injunction restraining the Government as a Government or by its servants or agents from appropriating, utilising or disbursing state funds or revenue in the funding of a public political Referendum campaign.
- (6) An injunction restraining the Government as a Government or by its servants or agents from expending public funds in media advertising, public billboards or by any other means save as provided by the Referendum Acts or otherwise by law in any prospective or future referendum.
- (7) An injunction restraining the defendants from acting in purported exercise of the executive power in referenda, except for the purpose of impartially organising the mechanism of the referenda.
- (8)
 - (a) An injunction restraining the defendants from spending public funds in the promotion, advertising, or distribution of material advocating or supporting a particular outcome in regard to referenda or alternatively;
 - (b) An injunction requiring the defendants to make available an equal portion of public funds as expended by itself to fund campaigns, including advertising and the selection and distri-

bution of information, which seek a referendum result opposite to the result advocated by the Government.

- (9) An injunction restraining the defendants from infringing upon the prerogatives of the People contrary to the Constitution, its basis, and in particular to the Preamble and Articles 5, 6, 11, 28, 40, s. 3, 46 and 47 thereof.
- (10) Such further declarations or injunctions as to this Honourable Court may seem appropriate to secure, protect and vindicate the constitutional rights of the plaintiff in the context of the threatened expenditure of public monies by the Government in support of a "Yes" vote in the proposed referendum on divorce as included in the Government policy document entitled "A Government of Renewal" and as adverted to in ministerial and Government statements; and/or
- (11) Alternatively, for such further declarations or injunctions as to this Honourable Court may seem appropriate to secure, protect and vindicate the constitutional rights of the plaintiff in the context of expenditure of public monies by the Government in respect of all or any referenda to be held in pursuance of Article 46 and Article 47 of Bunreacht na hÉireann.
- (12) Further or other reliefs.
- (13) Costs.

In the defence delivered on behalf of the defendants (hereinafter referred to as the Government), the Government claims that it is entitled to expend public monies for the purpose of promoting a campaign for a particular outcome to the proposed referendum to amend the terms of the Constitution and paragraphs 4, 5, 6, 10 and 11 of the defence provide as follows:-

- "4. It is admitted that the Government proposes to expend certain monies in a publicity campaign designed to influence public opinion in relation to the proposed referendum on divorce. It is proposed that the said campaign shall not be confined solely to putting forward one point of view but will include arguments on both sides. However, the Government maintains the right, if thought appropriate in any particular case, to urge the electorate in favour of a particular outcome to the said or any proposed referendum.
- 5. It is admitted that the Government has from time to time spent money from public funds on advertising and promoting a number of referendum campaigns, including some expenditure which was

designed to persuade the electors to exercise their right in the manner put forward or suggested by the Government. The said expenditure has been in accordance with law and in accordance with the provisions of the Constitution and it is denied that the Government's actions are unconstitutional on the grounds set forth in paragraphs 9 or 10 of the statement of claim. The Government's said actions do not deny the plaintiff any constitutional right in the manner set forth at paragraph 11 of the statement of claim or at all, and the particulars set forth in the said paragraphs are denied as if the same were set forth hereunder and denied individually.

6. Further, it is denied that the Government are constitutionally obliged to fund the promulgation of contrary opinions and/or information where groups wish to promulgate such information and/or opinions whether for the reasons set out in paragraph 12 of the statement of claim or at all, and the particulars pleaded in paragraph 12 of the statement of claim are denied as if the same were set out hereunder and denied individually.
10. Insofar as the plaintiff in these proceedings raises political issues or issues of policy or issues involving political considerations the same are not amenable to resolution in the courts.
11. Further the propriety or appropriateness of the expenditure of public funds by the Government is a matter for the executive arm of the government and/or for the Oireachtas and is not justiciable in the courts."

In his affidavit filed on behalf of the Government on the 23rd October, 1995, Thomas Lynch, a principal officer and head of the Law Reform Division of the Department of Equality and Law Reform averred *inter alia* as follows:-

- "3. With regard to paragraph 5 of Ms. McKenna's affidavit, it is true that the Government's intention to spend money in a divorce referendum was made known in approximately April of 1994. The matter came before the Dáil on the 15th June, 1994, when departmental estimates were considered by the Legislative and Security Committee of the Dáil. On that occasion, the Minister addressed the Committee. During the course of his speech the Minister said:-

'Deputies will be aware that . . . a sum of £500,000 is provided for in respect of the information campaign in the run up to the divorce referendum. While it is by no means certain in the

light of the constitutional challenge to the Judicial Separation Act, 1989, that this money will be required in 1994 it would, I believe, be remiss of the Government not to provide an information campaign in view of the considerable legislative changes which have taken place since 1986'.

4. I beg to refer to an extract from the official debates of the Legislative and Security Committee of the Dáil containing the relevant part of the Minister's speech, upon which marked with the letters 'TL 1' I have signed my name prior to the swearing hereof. That estimate was subsequently approved by the Dáil by vote in the Dáil itself on the 30th June, 1994. I beg to refer to the extract from the official Dáil debates marked with letters 'TL 2' upon which I have signed my name prior to swearing hereof.
5. As the monies were not spent during that year, they were again voted as part of the estimate for the Department of Equality and Law Reform for the year ended the 31st December, 1995. Those estimates came before the Legislative and Security Committee on the 7th June, 1995. In this regard I beg to refer to the relevant page of the estimate dealing with the Department of Equality and Law Reform upon which marked with the letters 'TL 3' I have signed my name prior to the swearing hereof. Again, that estimate was passed and approved by the Dáil on the 7th July, 1995. I beg to refer to an extract from the official Dáil debate marked with the letters 'TL 4' upon which I have signed my name prior to swearing hereof.
6. As appears from the extract from the Minister's speech to the Committee in 1994, the principal purpose of the Minister's proposal at that time was to ensure that the people were sufficiently informed in relation to the factual and legal background to the proposed referendum, as well as for the purpose of making it clear the Government was in favour of a positive outcome to the proposed referendum."

In paragraphs 7, 8, 9, 10 and 11 Mr. Lynch deals with the expenditure of the monies.

At the end of paragraph 13 of the affidavit, Mr. Lynch avers that -

"the Government maintains the right, in appropriate circumstances and where it seems fit to let its view be known, with the aid of public funds and if necessary in trenchant and forthright manner."

Mr. Lynch then proceeded to set forth his and the Government's attitude to the issues raised by the plaintiff and averred as follows:-

- “14. I propose now to deal broadly with the issues of principle which appear to arise on the present application before the Court. Firstly, there has already been very detailed and wide ranging debates in both Houses of the Oireachtas in relation to the proposal to amend the Constitution to allow for remarriage. In addition, there has been widespread public debate in the media, which it is expected will continue until the referendum date, including extensive debate on radio and television. The defendants do not accept that it is impermissible for the Government to spend money in promulgating the Government’s sincerely held view in relation to important matters of policy, and indeed it is difficult to understand how Government could inform public opinion and promulgate its views and put forward the passing of a referendum on an important issue such as the right to remarry without involving the expenditure of monies.
15. Further, it is my understanding of the relationship between the various branches of government, that it is not open to the courts to direct the executive as to how public funds ought or ought not to be expended. Further, the defendants do not accept that the plaintiff’s rights as an individual citizen have in any way been or will be affected. Indeed, she appears to be particularly well informed for the purpose of reaching her own views on the issues which will be before the people.
16. So far as the application for an injunction made on behalf of the plaintiff is concerned, a considerable amount of expenditure has already been incurred particularly in the production of the proposed leaflet to each household ‘Referendum on Divorce, some questions and answers’, as well as on the consultancy fees relating thereto, and also on the leaflet ‘A right to remarry’ to which I have already referred. If an injunction is granted, that expenditure will have been wasted.”

The issues which arose in the High Court and in this Court were

- (i) whether the Government was entitled to expend public monies in the sum of £500,000 which had been made available by Dáil Éireann to the Minister of Equality and Law Reform under the heading of “Divorce Referendum” in the estimate of the amount required for the year ending the 31st December, 1995, for the salaries and expenses of his office, including certain services administered by his office, in the conduct of a campaign to provide informa-

tion with regard to the issues involved in the referendum and to advocate a vote in favour of the proposed amendment, and

- (ii) whether the court had any jurisdiction to interfere with such allocation and use by the Government of such funds, this being an exercise of the executive power of the State.

There is no dispute with regard to the facts in this case.

A proposal for an amendment of the Constitution was initiated in Dáil Éireann as a Bill and was passed by both Houses of the Oireachtas in accordance with the provisions of Article 46, s. 2 of the Constitution.

Article 46, s. 2 required and requires that the Bill be submitted by referendum to the decision of the People in accordance with the law for the time being in force relating to the referendum.

The Bill provided as follows:-

“An Act to amend the Constitution

WHEREAS by virtue of Article 46 of the Constitution any provision of the Constitution may be amended in the manner provided by that Article:

AND WHEREAS it is proposed to amend Article 41 of the Constitution:

Be it Therefore enacted by the Oireachtas as follows:-

1. Article 41 of the Constitution is hereby amended as follows:
 - (a) the subsection set out in Part I of the Schedule to this Act shall be substituted for subsection 2^o of section 3 of the Irish text,
 - (b) the subsection set out in Part II of the Schedule to this Act shall be substituted for subsection 2^o of section 3 of the English text.
2. (1) The amendment of the Constitution effected by this Act shall be called the Fifteenth Amendment of the Constitution.
(2) This Act may be cited as the Fifteenth Amendment of the Constitution Act, 1995.

SCHEDULE

Part II

- 2^o A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that -

- i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- iii. such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iv. any further conditions prescribed by law are complied with.”

The law in force relating to this referendum is contained in the Referendum Act, 1994.

As appears from the affidavit of Mr. Lynch and the defence filed and submissions made on its behalf, of the Government has and intends to let its view be known, with the aid of public funds and in a trenchant and forthright manner.

In the course of his judgment, the learned trial judge correctly stated at p. 15 of the report:-

“It is not the function of this court to pass judgment on the wisdom, still less the political expediency of the actions of the Government and the Dáil. I am solely concerned with whether they are, as the plaintiff contends, invalid having regard to the provisions of the Constitution.”

Having referred to the relevant provisions of the Constitution, the learned trial judge went on to state at p. 18 of the report:-

“These provisions are at the heart of the structures of parliamentary democracy which we have inherited, recognising as they do the primary role of the executive and the popularly elected assembly, to which it is responsible, in the raising and expenditure of monies. The extent to which, and the manner in which, the revenue and borrowing powers of the State are exercised and the purposes for which the funds are spent are the perennial subject of political debate and controversy but, the paramount role of those two organs of state, the Government and the Dáil, in this area is beyond question. For the courts to review decisions in this area by the Government or Dáil Éireann would be for them to assume a role which is exclusively entrusted to those organs of state, and one which the courts are conspicuously ill-equipped to undertake. While the expenditure by the Government of £500,000 in this case has given rise to debate and

controversy, it is not the function of the courts under the Constitution to enter into, still less, purport to resolve such disputes.”

At the conclusion of his judgment, he stated that “the question in this case is clearly one for resolution by the legislative and executive arms of Government and not by the judicial arm” and dismissed the plaintiff’s claim.

From this judgment and the order made in pursuance thereof, the plaintiff has appealed to this Court on the grounds set forth in the notice of appeal dated the 1st November 1995.

Jurisdiction of the Court

The first issue to be considered by the Court is the nature of the Court’s jurisdiction in the circumstances of this case.

The principle of the separation of powers is firmly entrenched in the Constitution.

FitzGerald C.J. in the course of his judgment in *Boland v. An Taoiseach* [1974] I.R. 338, stated that:-

“Article 6 of the Constitution established beyond question the separation of the executive, legislative and judicial powers of Government.”

Article 15, s. 2, sub-s. 1 of the Constitution provides that:-

“The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”

This function of the Oireachtas is, however, subject to the provisions of Article 15, s. 4 of the Constitution which provides that:-

- “1. The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof.
2. Every Act enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.”

The Oireachtas is subject to the provisions of the Constitution and this limits the powers conferred on it by the Constitution.

Article 28, s. 2 provides that:-

“The executive power of the State shall subject to the provisions of this Constitution be exercised by or on the authority of the Government.”

By virtue of the terms of Article 28, s. 2 the exercise by the Government of the executive power of the State is also subject to the provisions of the Constitution.

As stated by Walsh J. in the course of his judgment in *Crotty v. An Taoiseach* [1987] I.R. 713 at p. 778:-

“It is not within the competence of the Government, or indeed the Oireachtas to free themselves from the constraints of the Constitution . . . They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of Government alone is given the power conclusively to decide if there has been a breach of constitutional restraints.”

In the course of his judgment in *Boland v. An Taoiseach* [1974] I.R. 338, FitzGerald C.J. at p. 362 stated:-

“Consequently, in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.”

In the course of his judgment in *Crotty v. An Taoiseach* [1987] I.R. 713, Finlay C.J. stated, at p. 775, that:-

“... where an individual comes before the Courts and establishes that action on the part of the executive has breached or threatens to breach one or other of his constitutional rights that the Courts must intervene to protect those rights but that otherwise they cannot and should not.”

These *dicta* clearly establish that

1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.
2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene.
3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.

Having regard to the respect which each of the organs of government must pay to each other, I am satisfied that where it is alleged that either the Oireachtas or the Government has acted other than in accordance with the provisions of the Constitution, such fact must be clearly established.

The next issue to be considered is whether it has been established that they have so acted and this involves a consideration of the provisions of the Constitution with regard to the amendment thereof.

Article 46 of the Constitution provides for an amendment thereof by way of variation, addition or repeal as follows:-

- “1. Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.
2. Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.
3. Every such Bill shall be expressed to be ‘An Act to amend the Constitution’.
4. A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.
5. A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law.”

It should be noted that a Bill containing a proposal for an amendment of the Constitution differs from any other Bill passed by the Oireachtas in that it is not presented for signature by the President until after the Referendum and is not signed by the President unless the President is satisfied that the proposal has been duly approved by the people in accordance with s. 1 of Article 47 of the Constitution.

Article 47, sub-s. 4 of the Constitution provides that

“subject as aforesaid, the Referendum shall be regulated by law.”

In enacting the Constitution, the people provided for its amendment and set forth the procedures to be adopted with regard thereto.

They provided that the proposal for an amendment be initiated in Dáil Éireann as a Bill and provided that if the Bill is passed or deemed to have been passed by both Houses of the Oireachtas it must be submitted by referendum to the decision of the people in accordance with the law for the time being in force relating to the referendum.

In the course of his judgment in *Slattery v. An Taoiseach* [1993] 1 I.R. 286 McCarthy J. stated at p. 303:-

“Article 6 proclaims that all powers of Government, legislative, executive and judicial, are derived under God from the People. In having a referendum the People are taking a direct role in Government either by amending the Constitution or refusing to amend it. Such an amendment can only be initiated by the legislature, where the relevant legislation may be promoted by any member of the legislature. When the relevant legislation has been passed by both Houses the constitutional process must continue.”

The continuation of the constitutional process must, as stated in Article 46, s. 2 and Article 47, s. 1 of the Constitution, be in accordance with law.

The law relating to the holding of a referendum now in force is the Referendum Act, 1994.

That this was the law referred to in Article 47 of the Constitution is clear from the long title to the Act which states as follows:-

“An Act to provide for the reference to the People under Article 47 of the Constitution of Bills containing proposals for the amendment of the Constitution and for the reference to the People under Article 27 of the Constitution of other Bills and to provide for matters connected with the matters aforesaid.”

The Bill must be submitted to the decision of the people in accordance with the provisions of the Act. The Constitution is quite clear on this.

This Act sets out in detail the procedures to be followed in the holding of the referendum and it is not necessary to deal with all the provisions thereof.

The Act, however, provides that the Minister responsible for ensuring that the procedures are followed is the Minister for the Environment.

Section 4 of the Act provides that:-

- “(1) The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.
- (2) The expenses incurred by reason of this Act by An Post shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of the Central Fund or the growing produce thereof.”

Section 3 of the Act provides that:-

- “(1) The Minister may make regulations prescribing any matter or thing that is referred to in this Act, other than in section 23, as prescribed.
- (2) Every regulation made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.”

Of the 58 sections of the Act in respect of which the Minister for the Environment may make regulations the only section in respect of which he is precluded from making a regulation is section 23.

Section 23 provides that:-

- “(1) At a referendum a statement in relation to the proposal which is the subject of the referendum may be prescribed for the information of voters by resolution of each House of the Oireachtas and, where a statement is so prescribed -
- (a) a polling information card sent under section 92 of the Act of 1992 (as applied by section 32) shall contain a copy of the statement;
 - (b) copies of the statement shall also be sent by the local returning officer for a constituency to every elector whose name is on the register of presidential electors for such constituency and is on the postal voters list for such constituency at the same time as the ballot paper for the poll at the referendum is sent to the elector;
 - (c) copies of the statement shall also be sent by the local returning officer for a constituency to every elector whose name is on the register of presidential electors for such constituency and is on the special voters list for such constituency and shall be so sent in sufficient time to be delivered to the elector before the delivery of the ballot paper to the elector;
 - (d) copies of the statement shall be displayed by a presiding officer in and in the precincts of the polling station: Provided that the referendum shall not be invalidated by reason of any failure to display such copies in or in the precincts of any polling station.”

The provisions of sub-s. 2 are not relevant.

This section, which I have quoted, provided that a statement in relation to the proposal which is the subject of the referendum may be prescribed for the information of voters by resolution of each House of the Oireachtas and provides that where a statement is so prescribed, the polling card shall contain a copy of the statement: a copy must be sent by the local returning officer for a constituency to every elector, including those on the special voters list; and copies of the statement shall be displayed by the presiding officer in or in the precincts of the polling station.

Though it is not mandatory, under the provisions of s. 23 of the Act, that there be a resolution of each House of the Oireachtas prescribing a statement for the information of voters relating to the proposal which is the subject of the referendum, the Oireachtas was concerned to ensure that the Minister for the Environment did not have any power to make any regulation prescribing any matter contained in the said section 23. The Oireachtas reserved to itself the right to prescribe the terms of the statement in relation to the proposal which was to be prescribed for the information of the voters and did not authorise the prescribing of any other statement for the information of the voters.

I have quoted the provisions of s. 23 because they clearly illustrate the intention of the legislature with regard to the fact that the statement in relation to the proposal which may be prescribed for the information of the voters would be prescribed by resolution of each House of the Oireachtas.

This does not of course mean that information other than that prescribed in the resolutions could not be given.

Both Houses of the Oireachtas passed resolutions in the following terms -

“That the statement set out in the Schedule to this resolution be prescribed for the information of voters pursuant to s. 23 of the Referendum Act, 1994 (No. 2 of 1994), in relation to the proposal to amend Article 41 of the constitution which is contained in the Fifteenth Amendment of the Constitution (No. 2) Bill, 1995.”

The statement set out in the Schedule to the said resolutions was as follows:-

“1. The Fifteenth Amendment of the Constitution (No. 2) Bill, 1995, proposes to substitute the subsection here following for subsection 2^o of Article 41, s. 3 of the Constitution:

2^o A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that -

- (i) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
 - (ii) there is no reasonable prospect of a reconciliation between the spouses,
 - (iii) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
 - (iv) any further conditions prescribed by law are complied with.
2. If you approve of the proposal, mark X opposite the word YES on the ballot paper.
 3. If you do not approve of the proposal, mark X opposite the word NO on the ballot paper.
 4. A copy of the Bill can be inspected or obtained free of charge at any Post Office.”

The Government maintained at all times their right in exercising the executive power of the State, to let its view be known with the aid of public funds in a trenchant and forthright manner, or in the words used in the defence filed on its behalf to maintain the right to urge the electorate in favour of a particular outcome to the said or any proposed referendum.

This claim by the Government must be considered in the light of the provisions of the Constitution particularly in relation to the provisions of Article 46 and 47 and the role of the People therein.

It was the People who, in the words of the Preamble to the Constitution, adopted, enacted and gave to themselves, the Constitution, and under the terms of the said Constitution, it is the prerogative of the People to amend any provision thereof by way of variation addition or repeal in the manner provided by Article 46 of the Constitution.

Article 46 of the Constitution provided for the initiation in Dáil Éireann of every proposal for an amendment of the Constitution and for its submission, after it has been passed by both Houses of the Oireachtas, to the decision of the People “in accordance with the law for the time being in force in relation to the Referendum”.

This is the constitutional process by which the Constitution may be amended and neither the Constitution nor the law for the time being in force in relation to the referendum gives to the Government any role in the submission of the proposal for the decision of the People.

As already stated the law is contained in the Referendum Act, 1994; this Act does not allocate to the Government any role in the giving of information or in the conduct of the referendum.

Neither, it must be said, is there any prohibition against the Government acting as it claims to be entitled to act contained in either the Constitution or in the Referendum Act, 1994.

The Government is, however, a creature of the Constitution and cannot act free from the restraints of the Constitution. In the exercise of the executive power of the State it is subject to the provisions of the Constitution.

This raises a further issue *i.e.* whether in the circumstances outlined in this judgment the Government was in fact engaged in the exercise of the executive power of the State. It was not acting in pursuance of any statutory authority and any activity of Government is not *per se* an activity which assumes the character of the exercise of the executive power of the State.

I am satisfied that the action of the Government in publishing information with regard to the proposal which was the subject of the referendum, in expressing its views thereon and requesting or advising the voters to vote for the proposal was not an action in the exercise of the executive power of the State.

That does not mean that its action in so doing was not permissible. Many of the legitimate functions of Government are not part of the exercise by the Government of the executive power of the State.

No complaint is made in these proceedings that the Government was not entitled to give factual information with regard to the proposal.

What is complained of is that allied to the provision of such information is the request by the Government made to the voters to vote "Yes" to the proposal and to campaign, or have conducted on its behalf a campaign, to influence the voters to vote in favour of the proposal and expend public funds on such campaign.

It is submitted on behalf of the plaintiff that in so doing, the Government was acting in excess of the powers conferred on it by the Constitution and the law and other than in accordance with fair procedures and that it was within the jurisdiction of this Court to intervene to restrain it from expending public funds in such campaign.

The learned trial judge (Keane J.) stated in the course of his judgment, having set out the relevant provisions of Articles 28 and 17 of the Constitution, in a passage from his judgment already quoted in this judgment which is worth repeating:-

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

In the course of his judgment he referred to the judgment of Costello J. in *McKenna v. An Taoiseach (No. 1)* [1995] 2 I.R. 1.

In the course of this judgment Costello J. stated at p. 6 of the report in regard to the Maastricht Treaty Referendum:-

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

These statements were based on the concept of the separation of powers which is fundamental to all of the provisions of the Constitution.

In the course of his judgment in *Crotty v. An Taoiseach* [1987] I.R. 713 however, Finlay C.J. stated at p. 772 of the report:-

“The separation of powers involves for each of the three constitutional organs not only rights but duties; not only areas of activity and function but boundaries to them as well. With regard to the legislature, the right of the courts to intervene is clear and express.”

Having dealt with the nature of such rights with regard to the legislature, he then went on to say at p. 773 of the report that:-

“With regard to the executive the position would appear to be as follows:- this Court has on appeal from the High Court a right and duty to interfere with the activities of the executive in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those activities or where the activities of the executive threaten an invasion of such rights. This right of intervention is expressly vested in the High Court and Supreme Court by the provisions of Article 34, s. 3, sub-s. 1 and 34, s. 4, sub-s. 3 and impliedly arise from the form of the judicial oath contained in Article 34, s. 5, sub-section 1.”

Neither the powers of the Oireachtas nor of the Government are absolute even within their own domain.

The Oireachtas is inhibited from enacting any law which is in any respect repugnant to the Constitution or any provision thereof and the exercise by the Government of the executive power of the State is subject to the provisions of the Constitution.

They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. There are boundaries to their areas of activity and function. As stated by Walsh J. in the passage from *Crotty v. An Taoiseach* [1987] I.R. 713 already cited:-

“To the judicial organ of Government is given the power conclusively to decide if there has been a breach of constitutional restraints.”

Consequently, it is the right and duty of the Court to examine, and if necessary to review the activities of the Government to ascertain whether its activities are within its permitted areas of activity and function and whether the constitutional rights of the litigant are being invaded by such activity.

The plaintiff claims that her constitutional rights are being infringed by the activity of the Government in requesting or advising the voters to vote “Yes” to the proposal.

On the issue as to whether the plaintiff had the *locus standi* to institute and maintain the proceedings, the learned trial judge stated that:-

“I have no hesitation in concluding that the plaintiff was entitled to institute and maintain the present proceedings.”

Though the Government has appealed this finding, I am satisfied that the learned trial judge was correct.

For the purposes of this case I am prepared to accept that the Government was acting in accordance with its rights in the giving of factual information with regard to the proposal which is the subject of the

referendum, in expressing its views thereon and in urging the acceptance of such views.

The fundamental issue raised by the plaintiff in this case is whether the Government was entitled to expend public funds for the purpose of promoting a campaign for a 'Yes' vote in the proposed referendum to amend the terms of the Constitution.

As illustrated earlier in the course of this judgment, neither the Constitution nor the Referendum Act, 1994, envisaged any role for the Government in the submission of the Bill by referendum to the decision of the People.

The action of the Government in expending public funds on the promotion of such a campaign was not an action in pursuance of the executive power of the State.

Even if it were, it would still be subject to examination and review by the Court in accordance with the *dicta* quoted in the course of this judgment.

It is admitted by and on behalf of the Government that it has expended and proposes to expend certain monies in a publicity campaign designed to influence public opinion in relation to the proposed referendum.

The question for consideration is whether such activity constitutes an interference with the constitutional process of amending the Constitution and the constitutional rights of the plaintiff.

The constitutional process for the amendment of the Constitution has been set forth in detail earlier in this judgment as being governed by the provisions of Articles 46 and 47 of the Constitution and the terms of the Referendum Act, 1994.

As stated by McCarthy J. in *Crotty v. An Taoiseach* [1987] I.R. 713, the People in having a referendum "are taking a direct role in government either by amending the Constitution or refusing to amend it".

The role of the People in amending the Constitution cannot be over-emphasized. It is solely their prerogative to amend any provision thereof by way of variation, addition or repeal or to refuse to amend. The decision is theirs and theirs alone.

Having regard to the importance of the Constitution as the fundamental law of the State and the crucial role of the People in the adoption and enactment thereof, any amendment thereof must be in accordance with the constitutional process and no interference with that process can be permitted because, as stated by Walsh J. in *Crotty v. An Taoiseach* [1987]

I.R. 713, "it is the people themselves who are the guardians of the Constitution".

As the guardians of the Constitution and in taking a direct role in government either by amending the Constitution or by refusing to amend, the People, by virtue of the democratic nature of the State enshrined in the Constitution, are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.

The constitutional process to be followed in the amendment of the Constitution involves not only compliance with the provisions of Articles 46 and 47 of the Constitution and the terms of the Referendum Act, 1994, but also that regard be had for the constitutional rights of the citizens and the adoption of fair procedures.

The Bill containing the proposal to amend the Constitution was initiated in Dáil Éireann, passed by both Houses of the Oireachtas and then submitted for the decision of the People.

Once the Bill has been submitted for the decision of the People, the People were and are entitled to reach their decision in a free and democratic manner.

The use by the Government of public funds to fund a campaign designed to influence the voters in favour of a "Yes" vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State.

I would allow the appeal and declare that the Government, in expending public monies in the promotion of a particular result in the referendum is acting in breach of the Constitution.

O'Flaherty J.

The core question for resolution in this litigation is whether the Government is entitled to spend the sum of £500,000, which has been voted by the Dáil to the Minister for Equality and Law Reform in connection with the forthcoming divorce referendum to be held on November 24th,

- (a) to provide *information* with regard to the issues involved in the referendum, and
- (b) to *advocate* a vote in favour of the proposed change in the Constitution which will be set out in the voting paper.

I hold that the Government is clearly entitled to spend money in providing information to the public on the implications of the constitutional

amendment. Further, the Government, as such, is entitled to campaign for the change and the individual members of the Government are entitled either in their personal, party or ministerial capacities to advocate the proposed change.

While there is an argument to be made for saying that the People should be allowed make their decision in as calm and unaffected a manner as possible in a referendum, it is unrealistic to expect a Government to remain neutral on a topic which it has, through its initiative, brought to the People.

However, the Government must stop short of spending public money in favour of one side which has the consequence of being to the detriment of those opposed to the constitutional amendment.

To spend money in this way breaches the equality rights of the citizen enshrined in the Constitution as well as having the effect of putting the voting rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against). The public purse must not be expended to espouse a point of view which may be anathema to certain citizens who, of necessity, have contributed to it. No one would suggest that a Government is entitled to devote money from the exchequer in a direct manner in the course of a general election to secure its re-election. (I leave aside legislative enactments which it may have helped to bring about with the outcome of an election in mind.) The position of a referendum is not any different.

I should think it bordering on the self-evident that in a democracy such as is enshrined in our Constitution (which is not exclusively a parliamentary democracy; it has elements of a plebiciary democracy) it is impermissible for the Government to spend public money in the course of a referendum campaign to benefit one side rather than the other.

Before coming to this particular referendum, I wish to sketch briefly the historical background to the history of referendums as far as this jurisdiction is concerned.

Referendums are as old as democracy itself. They have a long tradition and hallowed place in the constitutional scheme of some countries: Switzerland is the prime example. Also, in a number of the States of the United States of America. They also, on the other hand, have been abused by tyrants from time to time.

In 1922, on the establishment of the State, the referendum was seen as an instrument that could curb an imbalance which was thought to exist in the British system which favoured the cabinet at the expense of parliamentary and popular control.

As Kohn relates:-

“The introduction of the machinery of direct legislation into the structure of the Irish Constitution reflects the democratic radicalism of its framers. The records of the constituent Assembly, indeed, throw little light on the notice underlying the innovation. The desirability, especially under Irish conditions, of an active association of the people with the function of law making was the only argument adduced in its support; yet its place in the general design of the Constitution leaves little doubt as to its inspiration and purpose. Its model is to be found less in the older American, Australian and Swiss precedents than in the post-War Constitutions of the new continental republics. In the latter, democratic zeal, political doctrinairism and distrust of the mechanism of parties and parliaments had combined to produce a highly involved design of direct legislation interwoven with the fabric of representative institutions. On that elaborate pattern the Irish system was framed.”

To concentrate on the method provided for amending the Constitution of 1922, it was to be by referendum and required a majority of voters on the register or two thirds of the votes recorded to be in favour of the amendment. This provision was not to be operative until 1930, since it was provided that the Constitution would be amended in a flexible way, namely by ordinary legislation, for its first eight years. Since that original eight year period was extended for a further eight year period, no referendum was in fact held under the Constitution of 1922.

In any event, along the way, the Government had become disenchanted of the referendum procedure and a Cabinet sub-committee set up in 1924 recommended its abolition. The circumstances surrounding that decision, and its consequences need not detain us now.

The Constitution of 1937 provided that it could be amended by ordinary legislation for a three year period only from the date of the coming into operation of the Constitution. Two amendments were thus effected. Thereafter, the Constitution could only be amended by vote of the People at a referendum in accordance with Articles 46 and 47 of the Constitution. It was not until 1959 that the first referendum was held. This involved a proposal to change the voting system from proportional representation to the straight vote, which was defeated; as was an identical attempt in a further referendum which was held in 1968.

The provision of the Constitution in issue in the forthcoming referendum is Article 41, s. 3, sub-s. 2, which provides:-

“No law shall be enacted providing for the grant of a dissolution of marriage.”

On the 26th June, 1986, the People were asked to remove the absolute prohibition on divorce contained in this Article and to replace it with a set of constitutional provisions allowing divorce in quite restricted circumstances.

As is well known, the opinion polls taken at the time when this proposal was first mooted suggested that there would be a decisive vote in favour of the amendment; things turned out differently on polling day when there was a decisive vote against the proposal. This has great relevance to the issue that we have to decide because it was submitted before us that not alone is the Government seeking to advocate a particular point of view but it does so against the background of what happened on the occasion of the last referendum on this topic. It is submitted that it is, by means of this advocacy, unfairly trying to tip the scales in favour of its position. While the proposed wording is different to 1986, the concept is the same which is to remove Article 41, s. 3, sub-s. 2 of the Constitution and permit of the right to persons who have separated to remarry. The argument advanced on behalf of the plaintiff is to say that in light of that background the Government has all the greater obligation to make sure that public money is not used to promote one side to the exclusion of the other.

I think there is great force in this argument and it must be remembered, too, that while a Bill containing a proposal to amend the Constitution cannot contain any other proposal, there is nothing to prevent a referendum being held on the same day as a general election or presidential election and this has, in fact, happened in the past. Therefore, if we were to uphold the legitimacy of the present proposal, there would be a temptation for Government in an election atmosphere to stray in other directions with further inducements and thus sully the right of the People to decide freely and fairly on what is put before them in the referendum without any inducements - aside from verbal inducements, which are the essence of any voting campaign.

I would wish to emphasise, however, that my decision is concerned with one single, solitary point and that is that it is impermissible for the Government to use public money to advocate a particular result in the forthcoming referendum. It is no answer to say, as has been said, that the advocacy [“The Government is asking you to vote ‘Yes’ on November 24th”] is gentle, bland and mild and is put forward in the context of making a fair effort on the Government’s part to put all matters before the

people; nor is it an answer to say that the amount involved, £500,000, is only a small amount; it may well be - but, even if it is so, the principle is not affected - nor, finally, is it any answer to say that it is either the entitlement or the "duty" of a Government so to educate the public. If the Government regards itself as having that right or duty, it must exercise it without resort to public funds.

On the other hand, I do not think the decision should be regarded as having consequences wider than is required by the matter at issue. We have had put before us, should we decide in favour of the plaintiff, the spectre of Government Ministers not being entitled to use their State transport in relation to the referendum; nor to avail of the radio and television and print media to put forward their point of view - none of those things has any application to this case and I believe it should not be represented as having such an effect.

I would allow the appeal and concur on the form of declaration proposed by the Chief Justice.

Egan J.

The background to this case is fully and clearly set forth in the judgment of the Chief Justice. In the final analysis we are concerned with whether or not the Government was entitled to expend public monies in the sum of £500,000 which had been made available by Dáil Éireann to the Minister for Equality and Law Reform under the heading of "Divorce Referendum" in the conduct of a campaign to advocate a vote in favour of the proposed amendment.

Two questions arise from the above:-

- (a) Apart from spending public money, was the Government entitled to advocate a vote in favour of the proposed amendment?
- (b) If it was so entitled, could it lawfully expend the said sum of £500,000 in the promotion of a vote in favour of the proposed amendment?

The answer to question (a) must be in the affirmative. It is clear that many persons, bodies and institutions hold different views as to what answers should be given to questions proposed to be asked in the referendum. They are entitled to hold these views, to express them to others and to advocate what answers should be given in the referendum. I can see no harm whatever in the Government expressing strong views in the matter even if the result may be to influence voters.

As regards (b) I can find no specific prohibition either in the Constitution itself or the Referendum Act, 1994, to prevent the sum of £500,000 being spent on the promotion of a vote in favour of the proposed amendment. The money was voted to the control of the Government under the heading "Divorce Referendum" and could, of course, only be applied for a purpose or purposes which would come under that heading. Apart from that, there is no direction, statutory or otherwise that it must be apportioned or applied in any particular manner. Apart from such a direction in clear terms it is a matter solely for the executive arm of government to decide how the money should be expended. Its decision is not for the scrutiny of the judicial branch of government.

I would dismiss the claim.

Blayney J.

Two very important issues arise for determination on this appeal: firstly, is the Government entitled to expend State monies on funding a publicity campaign directed to persuading the public to vote in favour of the proposed amendment in the referendum to be held on the 24th November? And secondly, if the Government is not entitled to do this, can the Court intervene by way of injunction to prevent it?

Article 46, s. 2 of the Constitution lays down the procedure for amending the Constitution:-

"Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum."

The law for the time being in force relating to a referendum is the Referendum Act, 1994. This Act is principally concerned with the manner in which a referendum is to be held and with the procedure for challenging the result of a referendum by referendum petition. Two sections, however, deal with how information in regard to the referendum may be given to the public. Section 22, sub-s. 1 provides as follows:-

"An Post shall cause copies of the Bill containing the proposal which is the subject of the referendum to be made available for inspection and purchase by members of the public at such post offices as shall be agreed upon between the Minister and An Post at all times at which such post offices are open during the period commencing on

the fifth day after the date of the order appointing the polling day and ending on the polling day.”

And s. 23, sub-s. 1 of the Act provides as follows:-

“At a referendum a statement in relation to the proposal which is the subject of the referendum may be prescribed for the information of voters by resolution of each House of the Oireachtas and, where a statement is so prescribed -

- (a) a polling information card sent under section 92 of the Act of 1922 (as applied by section 32), shall contain a copy of the statement;
- (b) copies of the statement shall also be sent by the local returning officer for a constituency to every elector whose name is on the register of presidential electors for such constituency and is on the postal voters list for such constituency at the same time as the ballot paper for the poll at the referendum is sent to the elector;
- (c) copies of the statement shall also be sent by the local returning officer for a constituency to every elector whose name is on the register of presidential electors for such constituency and is on the special voters list for such constituency and shall be so sent in sufficient time to be delivered to the elector before the delivery of the ballot paper to the elector;
- (d) copies of the statement shall be displayed by a presiding officer in and in the precincts of the polling station; provided that the referendum shall not be invalidated by reason of any failure to display such copies in or in the precincts of any polling station.”

In the light of the provisions of Art. 46, s. 2 of the Constitution, and of the Referendum Act, 1994, what is the role of the Government where a Bill to amend the Constitution has been passed or been deemed to have been passed by both Houses of the Oireachtas? It seems to me that it is clear that a duty is imposed on the Government to submit the Bill by referendum to the decision of the People in accordance with the Act of 1994. Neither the Constitution nor the Act gives any other role to the Government. And even in the matter of giving information to the electorate about the proposed amendment, the task of doing this, as appears from the terms of s. 23 of the Act which I have just cited, is given to the two Houses of the Oireachtas and not to the Government. It is reasonable, accordingly, to infer that neither the Constitution nor the Referendum Act, 1994, envisaged that the Government, once a Bill for the amendment of

the Constitution had been passed, would have any further role to play other than to submit the Bill by referendum to the decision of the People. In spite of this appearing to be the position, is the Government nonetheless justified not merely in advocating a "Yes" vote, but in using public funds to finance a publicity campaign in support of this view? On behalf of the plaintiff, Mr. Forde submitted very strongly that it is not. He submitted that the Government's action constitutes a breach of the individual's right to equality before the law. He argued that the Government, by employing public money in support of one side in the referendum debate, without express legislative authority to do so, was failing to observe equal treatment in a critical political process.

On behalf of the State, Mr. O'Driscoll submitted that there was a duty on the Government to submit the amendment to the People in an affirmative way, to campaign for a "Yes" vote and a necessary requirement was that the campaign should be financed. The expenditure on publicity was accordingly justified.

In considering how the first question which I outlined at the beginning of this judgment should be answered, one starts with the basic position that the Constitution requires that the amendment be submitted to the decision of the People and that this is to be done in accordance with the Act of 1994. As I indicated earlier, neither the provisions of the Constitution nor the provisions of the Act of 1994 envisage that the executive would have any role other than to submit the amendment to the decision of the People. No guidance is given as to how this role is to be carried out, but since it is a role imposed on the executive by the Constitution in connection with the very important constitutional right of the People, that is voting at a referendum, I am satisfied that constitutional justice requires that the executive should act fairly in discharging it, not favouring any section of the People at the expense of any other section. This would seem to be a minimum requirement for the discharge of any constitutional obligation. The people are entitled to be treated equally.

In the course of his judgment in *Glover v. B.L.N. Ltd.* [1973] I.R. 388, Walsh J. said at p. 425 of the report:-

"This court in *In re Haughey* [1971] I.R. 217 held that that provision of the Constitution [Article 40, s. 3] was a guarantee of fair procedures. It is not, in my opinion, necessary to discuss the full effect of this Article in the realm of private law or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up ma-

chinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures.”

This statement of the law was made in the context of the procedure to be followed by the board of directors of the defendant company in deciding whether or not to dismiss the plaintiff from his office as technical director. So it was made in the context of a decision by a body of persons which would affect an individual. The agreement under which the plaintiff was employed had to be construed as providing for fair procedures. In the instant case the Court is concerned with something of far greater weight and importance than an agreement affecting an individual. It is concerned with the Constitution itself and a decision by way of referendum which could have a profound influence on the whole of society in the State. Can it be doubted that the requirement that the amendment be submitted to the decision of the People should be construed as providing for fair procedures?

Has the executive observed fair procedures in submitting the amendment to the decision of the People? In my view it has not. The Government has not held the scales equally between those who support and those who oppose the amendment. It has thrown its weight behind those who support it. The Government’s intention, as indicated very clearly in a letter dated the 20th October, 1995, written on the direction of the Minister for Equality and Law Reform to a public relations firm engaged by the Department, is to spend a sum of over £400,000 in inserting advertisements in the national press and having leaflets printed, the object of which is to advocate a “Yes” vote. If this plan were implemented it would give a very considerable advantage to those who support the amendment as against those who oppose it. The Government would be acting unfairly in the manner in which it was submitting the amendment to the decision of the People.

I am satisfied accordingly that the answer to the first question which I posed at the commencement of this judgment is that the Government is not entitled to expend State monies for the purpose of securing an affirmative result in the referendum.

As regards the second question which I posed, whether the Court is entitled to intervene to restrain the Government from continuing to expend public funds for the purpose of securing an affirmative result in the referendum, I am satisfied that it is. The Chief Justice has dealt very fully in his judgment with the jurisdiction of the Court in this regard, and I am in complete agreement with his conclusions. The Government has in my opinion acted in disregard of the provisions of the Constitution in the

manner in which it has submitted the amendment to the decision of the people and the Court, accordingly, is obliged to intervene.

For all these reasons I would allow this appeal, and I concur in the form of declaration proposed by the Chief Justice.

Denham J.

I agree with the judgment of the Chief Justice that in expending public monies to campaign for a specific outcome to a referendum the Government are not acting within their powers under the Constitution and the law.

On the constitutional aspect of the case the fundamental issue is summarised in the first paragraph of the defence where it is stated:-

“The Government is entitled to expend public monies for the purpose of promoting a campaign for a particular outcome to a proposed referendum to amend the terms of the Constitution.”

The kernel of the case is the spending of public monies to promote one side in a referendum campaign. At issue are basic concepts of a democracy. Under *Bunreacht na hÉireann* the powers of government derive from the people. Article 6 states:-

- “1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.”

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

The most fundamental method by which the People decide all questions of national policy according to the requirements of the common good is by way of referendum. Walsh J. stated in *Crotty v. An Taoiseach* [1987] I.R. 713 at p. 783:-

“In the last analysis it is the people themselves who are the guardians of the Constitution.”

The People alone amend the Constitution. In *Byrne v. Ireland* [1972] I.R. 241 the matter was encapsulated by Walsh J. who stated at p. 262:-

“... the State is the creation of the People and is to be governed in accordance with the provisions of the Constitution which was enacted by the People and which can be amended by the People only, and ... the sovereign authority is the People.”

In referenda the People vote on the proposed amendment. Such vote must be free.

The issue is whether the Government may spend public monies to promote a result in a referendum i.e., “Vote Yes”. There is no difference in principle between £500,000 to promote this campaign and £50 million to promote a different constitutional change in another referendum.

I am satisfied that the Government are not entitled under the Constitution or law to spend public funds in this way. To so do would be to infringe upon at least three constitutional rights:-

- (1) The right of equality;
- (2) The right to freedom of expression; and
- (3) The right to a democratic process in referenda.

Right of Equality

Article 40, s. 1 states:-

“All citizens shall, as human persons, be held equal before the law.”

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

While there is no barrier created by the Government to people voting “no” in the upcoming referendum, that does not take into account the importance of media and communications in society today. To fund one side of a campaign in a referendum so as to enable media coverage and communications to promote a specific outcome, is to treat unequally those who believe to the contrary whether they be a majority or a minority. For the Government to fund one side of a campaign is to treat unequally those citizens who hold the opposite view. It is irrelevant what view the Government takes. To fund one side in a national referendum campaign, even if only to partially so fund, is to breach the spirit of equality.

The spirit of equality was recognised by Budd J. in the High Court decision of *O'Donovan v. The Attorney General* [1961] I.R. 114 at p. 137 where, considering the Electoral (Amendment) Act, 1959, and the aspects of the Constitution relevant to voting, he stated:-

“Article 40, s. 1 provides that all citizens shall, as human persons, be held equal before the law. . . . A ‘democratic state’ is one where government by the People prevails. In modern usage of the words I believe it to be correct to say a “democratic state” denotes one in which all citizens have equal political rights. That the words should be given such a meaning in our Constitution seems to be supported by the other two Articles I have referred to as to the restriction of voting power to one vote per person and the equality of all before the law. . . . There are thus contained in the Constitution other Articles the spirit of which demands equality of voting power and representation. The Articles I have just referred to admittedly have reference to equality of voting power, but are relevant in construing sub-clause 2.3° of Article 16 of this extent, that if it be established, as I believe it is, that the spirit and intendment of these other Articles is that the notion of equality in political matters is to be maintained, it would be illogical to find a different and inconsistent principle adumbrated elsewhere in the Constitution.”

The spirit and concept of equality applies to the process of a referendum. There is a right to equal treatment in the political process. It is a breach of the concept and spirit of the constitutional right to equality for the Government to spend public monies in funding a campaign to advocate a specific result in a referendum.

The right to freedom of expression

The freedom to express opinions incorporates the corollary right that in the democratic process of free elections, public funds should not be used to fund one side of an electoral process, whether it be a referendum or a general election, to the detriment of the other side of the argument.

Right to a democratic procedure in referenda

Ireland is a democratic state. The citizen is entitled under the Constitution to a democratic process. The citizen is entitled to a democracy free from governmental intercession with the process, no matter how well intentioned. No branch of the government is entitled to use taxpayers

monies from the Central Fund to intercede with the democratic process either as to the voting process or as to the campaign prior to the vote.

This is an implied right pursuant to Article 40, s. 3 which harmonises with Article 5, Article 6, s. 1, Article 16, Article 40, s. 1, Article 47, s. 3 and is in keeping with the democratic nature of Bunreacht na hÉireann.

Leo Kohn in "The Constitution of the Irish Free State" (published by Allen and Unwin, 1932) writing of the 1922 Constitution stated (see p. 116):-

"A constitution based on a wide suffrage, Proportional Representation and a rational distribution of constituencies, embodying an elaborate system of checks and balances designed to preclude the growth of autocratic tendencies in any of its organs, such a framework, whatever might be thought of the practicability of some of these devices, could claim to have not merely proclaimed the sovereignty of the people in the abstract, but to have invested it with concrete reality."

These words could have been written of Bunreacht na hÉireann. Today, with the jurisprudence which has grown around the Constitution, the words are fitting.

Power derives from the People, and is exercised under the Constitution through their organs of government (legislative, executive, judicial). Power and decision-making in referenda is with the People.

The organs of government are instruments of the People. Thus, the democratic process is fundamental and critical to the exercise of power under the Constitution.

German case law

Dr. Forde, on behalf of the plaintiffs, requested the Court to follow the view of the German Constitutional Court in the *Official Propaganda Case* (1977) 46 BVerf G.E. 125. This case:-

- (a) is based on a Constitution other than Bunreacht na hÉireann;
and
- (b) relates to a general election.

However, it is a persuasive authority (as a comparative Constitution) on fundamental principles of democracy and equality which, as a basic tenet, are common to both Constitutions.

Conclusion

The merits of the Government's message are not in issue. The question for consideration is the spending of public funds.

My decision in this case does not infringe upon the right and duty of the Government to give information, to clarify situations, or to give explanations and deal with unforeseen matters and emergencies. However, the Government is not entitled to expend public monies for the purpose of promoting a campaign for a particular outcome to a proposed referendum to amend the terms of the Constitution. I would allow the appeal.

Solicitors for the plaintiff: *MacGeehin & Toale*.

Solicitor for the defendants: *The Chief State Solicitor*.

James Devlin, Barrister
