An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
Dunne J
Charleton J
O'Malley J
Baker J
Hogan J
Murray J

Supreme Court appeal number: S:AP:IE:2022:000006
[2022] IESC 7
High Court (Divisional Court) record number 2019/893 JR
[2021] IEHC 716

Between

Tomás Heneghan
Plaintiff/Appellant

- and -

The Minister for Housing, Planning and Local Government, the Government of Ireland, the Attorney General and Ireland
Defendants/Respondents

Judgment of Mr Justice Peter Charleton delivered on Friday 31 March 2023

1. The purpose of this judgment is to indicate why, according to the analysis which follows, it is not appropriate to make the far-reaching order which the majority of the Court proposes. Instead, it is here posited that upon the passing by the People of the Seventh Amendment of the Constitution on 3 August 1979, a serious defect in the operation of our constitutional architecture occurred through the complete failure of the Government and the Oireachtas to respond to that referendum by considering what the will of the people had positively authorised in amending our fundamental law. In negation of fundamental democracy, in the aftermath of the positive vote to amend the Constitution, there was neither any parliamentary debate as to what the people had willed nor the sponsoring before either the Dáil or Seanad of any proposal as to how to respond to the vote of the people. On the analysis here offered, no judgment indicating any consequent obligation to legislate is possible on that referendum due to the wording of the amendment: but a fundamental political duty to consider and to take seriously the expression of the will of the people has arisen. Regrettably, a basic democratic obligation has been ignored. A declaration to that effect should issue: but only that declaration.

2. Essentially, a textual analysis of the Constitution, clearer in the Irish language structure, demonstrates that the actual amendment passed by the People by way of referendum is not capable of demanding of the Oireachtas that the representation of the graduates through the election of senators should be changed either in any particular manner or at all. That approach, however, does not detract from the obligation on the Oireachtas to consider and debate potential change to the electoral system consequent upon the people voting that the Constitution's text would be amended. As to what change, if any, should be made, any such decision was placed by the constitutional wording squarely within the sphere of political action.

3. Where this judgment differs from the majority is in analysing the text of the Constitution itself. Focus upon principles of statutory interpretation are inappropriate. The reason being that legislation reacts to and alters existing law, be it common law or a prior statute, or addresses issues that press for a political response that are unforeseen, and thus not covered, by prior law. Originating in crisis, political expediency, considered analysis as to policy or in response to gaps which emerge through litigation or in consequence of analysis, the reactive nature of legislation generates legal rules in utterly different contexts.

4. Consequently, rules have evolved whereby order in terms of analysis may be brought to bear on disparate laws emerging in situations often at odds with one another by way of the cannons of construction. Be those rules that of plain meaning, of presuming against unintended consequences, of bypassing absurdity or of contextual analysis, these are tools of analysis applicable to the chaotic emergence of laws through statutes separated in time, in motivation and in origin. Statutes require cannons of construction, whereby, as in this instance, and according to the majority, 'may' can be interpreted imperatively as 'must'. But, those are rules that emerged in utterly different circumstances and are not applicable to the carefully thought-through and considered text of a fundamental law.

5. In complete contrast to how statutes are formulated and now laws are subject to amendment by the Oireachtas, the Constitution of 1937 was a closely considered and self-contained text: one where not only every word is given meaning but where the use of words is predicated on the choice of key phrases, each of which drives a conclusion to proper interpretation, and each being based on aspiration, obligation, guarantee, qualification or the granting of political choice as to action. It is precisely the latter which this amendment mandated: and no more. To interpret the choice of action as anything beyond a mandate by the people to the political power to consider and make a choice, including declining to make a choice so as to leave matters as they were pre-referendum, endangers not only a harmonious interpretation of the Constitution but also potentially trenches on the separation of powers.

Background

6. The background facts and the interaction of the text of the referendum proposal with the original constitutional provisions are set out in detail in the judgment of Murray J. What follows suffices for the purposes of this partial dissent.

7. Bills to amend the Constitution follow a distinct path. These, under Article 46 of the Constitution, are initiated only in Dáil Éireann but are required to be passed, or deemed to be passed, by both the Dáil and Seanad, though they cannot be signed into law unless a majority of the People in referendum accept the proposal under Article 47. Hence, the

Seventh Amendment of the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education) Bill, a government proposal sponsored by the Minister for Education, was initiated and passed by both Houses of the Oireachtas, received "a majority of the votes cast at such Referendum" on 3 August 1979, as required by Article 47, and was signed into law by the President on that day. The Constitution was thereby amended.

8. The Bill contains the exact text of the new pieces of the Constitution to be slotted into Article 18. It is this Bill which is the "proposal for an amendment of this Constitution", or in the Irish text of Article 46 and 47, "togra chun an Bunreacht seo a leasú", upon which the people voted and which the people endorsed. Thus, the people agreed to slot into Article 18.4 text enabling provision "by law" for the election by "one or more" of Dublin University and the National University of Ireland and of "any other institutions of higher education in the State" of senators who could not exceed the original number of six senators in the original provision whereby Dublin University – commonly called Trinity College Dublin – graduates supplied three senators and National University of Ireland – Cork, Dublin and Galway – graduates supplied the other three. Hence, on the passing of the Seventh Amendment, there would still be six senators supplied by the institutions of higher education but the pool being broadened would mean the dilution of the original franchise. By the way, whereas the provision under the legislation (see ss 6 and 7 of the Seanad Electoral (University Members) Act 1937, which provide for the number of senators to be elected by each university constituency and that graduates will form the electorate in such elections respectively) is that graduates vote for six senators, the Constitution simply enables the election "on a franchise and in the manner to be provided by law", meaning that, for example, the governing body may constitute the electors if this is so stipulated by the Oireachtas. The use of the word "franchise" mandates a democratic process, however, as opposed to some form of anointment by university presidents.

9. Two principles have been argued on behalf of Tomás Heneghan to be important in the context of the passing of a referendum. Firstly, it is claimed that a proposal to amend should be judged differently when slotted into the Constitution than when analysing the original text from 1937. Secondly, on his part it is asserted that, where there is ambiguity in the wording of text to be inserted into the Constitution, the form of the proposal on the ballot paper upon which the people voted should inform the meaning. In *Roche v Roche* [2009] IESC 82, [2010] 2 IR 321, to follow this contention, the context of the insertion of Article 40.3.3°, namely the referendum, was considered by Geoghegan J who stated that it is appropriate to "take judicial notice of the fact that the referendum that led to the insertion of this provision in the Constitution was generally known as the 'abortion referendum'" at [209]. He goes on to state that it would be highly artificial if a judge could not "use as an aid to interpretation, the ordinary common understanding of what in context was involved in the referendum" at [210].

Ambiguity

10. Ambiguity is argued to arise from the actual wording of Article 18.4. But, this provision is not difficult to construe when read in context. There are a maximum of six university seats and by the original text the distribution is to Dublin University and to the National University of Ireland. By the amendment, that may change and may change in any manner "by law" so that those three-each may be redistributed, or the electorate may widen so that other institutions of higher learning may get one or more of those seats or

there may be a general pool. The original debates on the Bill, as recorded in the evidence of Professor Laura Cahillane, supposed that change would happen and, necessarily, that was the purpose of the proposal. In the appended newspaper commentary, speculation of a reduction for Dublin University seemed universal, with the possibility that what were then institutes of higher education, such as St Patrick's Pontifical University in Maynooth, would receive a senator. But, it was all up in the air.

11. Also mooted at the time was the possible splitting up, effectively the abolition, of the National University of Ireland and history has since demonstrated the determination of constituent colleges to forge an individual identity. Earlier, in the 1960s, the possibility of the merger of Dublin University with University College Dublin had been debated and then dropped. Hence, Article 18.4.3° declares that the mention of any university does not prohibit its dissolution.

12. If there is no ambiguity in the text, and in this instance, though the wording might be better, there is no difficulty in stating what it plainly means, then the consequent point of construing the amendment in accordance with the proposal on the ballot paper does not arise. The actual voting proposal that would be ticked yes or no, tá or níl, in the voting booths, read as follows, per the appendix of the Referendum (Amendment) Act 1979:

> The Seventh Amendment of the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education) Bill, 1979, proposes the election by universities and other institutions of higher education specified by law of such number of members of Seanad Éireann, not exceeding 6, as may be specified by law. Those so elected would be in substitution for an equal number of the members elected at present (3 each) by the National University of Ireland and the University of Dublin. The Bill also proposes that nothing in Article 18 of the Constitution shall prohibit the dissolution by law of those Universities.

13. Where is there an indication here that the law must change following on the acceptance of the proposal? It is true that a positive vote is an agreement with what is called a proposal. But the actual proposal is that there be the same number of senators as in the pre-amendment text elected by the higher education sector; but how that happens is to be "specified by law". So, what are people voting for? Further, while the first sentence seems to suggest that there may be less than six senators from that sector, the second sentence belies that this is to be done by making the senators "in substitution for an equal number of" the senators presently elected. So, whatever is to happen is to be cast back onto the Oireachtas. No one reading this could say that any particular institute of higher education would be allocated any particular number of senators, or that any university with senators at that time would lose however many senators.

14. Perfection in the drafting of a proposal is difficult to expect. Many proposals, for the introduction of divorce for instance, propose in specific terms the removal of a constitutional ban. These are more specific since what is expected in a positive vote is that an actual bar on a change of legal status be removed, leaving the choice of the manner and conditions of that event to legislation. The proposal contained within the 1979 Act must be differentiated as indicative of a possible change as opposed to a command to change the constitutional provisions, with the manner left to legislative intervention. It is possible, however, or even probable, that on a reading of that proposal, most electors qualified to vote under Article 47.3 (those eligible "to vote at an election for members of Dáil Éireann") would have expected a change on a positive vote; or,

equally, no change on voting no. Whatever that change might be was subject to a bewildering distribution or re-distribution by law; perhaps even a totally unexpected and disproportionate change. But there has been no change: not even a debate in either house of the Oireachtas.

15. What must be remembered is that in voting for a proposal, the electorate is entitled to inform themselves, to access the Constitution. With some proposals, notably the acceptance of the Maastricht Treaty, a dense text of thousands of words typically stating that paragraphs of the Treaty of Rome be removed or replaced by a snippet of wording meaning nothing save to the EU law *cognoscenti*, individual research is futile or impossible; but for this, the full text still indicates there may be some change or there may be no change: all depending on the lawmakers. Even still, even by the insertion of an amendment, the principle remains that "the Constitution was intended to function harmoniously"; per O'Donnell J in *Gilchrist & Rogers v Sunday Newspapers* [2017] IESC 18, [2017] 2 IR 284 at [37]. This approach allows for a modification of absoluteness of particular provisions, but not to ignore actual and particular words clearly used towards a defined end. In *State (DPP) v Walsh* [1981] IR 412, O'Higgins CJ stated at 425 that, if it were otherwise, the courts could not control their own enforcement of constitutional provisions effectively since:

> this result seems to me to follow logically and inevitably from a consideration of Article 38, s. 5, in isolation and apart from the other Articles and the general scheme of the Constitution. However, to do so is erroneous. Article 38, s. 5, may not be so considered. It must be construed and considered as part of the Constitution and it should be given, if possible, a meaning and an application which does not lead to conflict with other Articles and which conforms with the Constitution's general scheme.

16. Ultimately, the governing principle must be as stated by Henchy J in *Tormey v Ireland* [1985] IR 289 at pp 295 and 296, that reading the Constitution as a whole is more fundamental than literal readings, as each provision is an interlocking part of the general constitutional scheme, and that courts should adopt whatever construction will achieve smooth and harmonious operation of the Constitution. What is not permitted is the removal of a part of the Constitution and its isolated interpretation in a manner which clashes against the use of language and the inner harmony of the concepts expressed to an obvious purpose through the use of particular wording.

Particular words

17. In the common law system, the discursive nature of judgments, the distinction as between what is essential to the decision and what is merely an observation, the absence of a *dispositif* (meaning the *énoncé final d'un arrêt*, or the binding pronouncement of a judgment) and the loose use of language mean that the Anglo-American system of judgments leaves the reader searching for meaning within diffuse reasoning: an approach alien to civil law systems. Perhaps more recently, certainly in this jurisdiction, there has been development towards a summary paragraph for complex judgments; and in criminal judgments a statement of with what words busy and pressed trial judges should instruct juries and in what specific terms; see for instance *The People (DPP) v McNamara* [2020] IESC 34. But such an approach is by no means inevitable.

18. Within the civil law system, certainly as evidenced by the judgments of the Court of Justice of the European Union, there is a particular and recurring choice of words to convey a specific meaning. Some examples will suffice, since these phrases are everywhere and together add up to the building of an inescapable meaning in the original French language and point towards the final *dispositif*. Thus, in *V A and Z A v TP*, Case C 645/20 one meets the phrase meaning "in accordance with settled case-law" ("*Conformément à une jurisprudence constante*" at [27]), and in Joined Cases *Ministerul Public*, C-357/19, *DNA*, C-379/19, *CY and others*, C-547/19, *Ministerul Public*, C-811/19 and C-840/19 what means "in accordance with the law" ("*conformément à la loi*" at [43]). There may be a need to emphasise what is settled and hence in *Polskie Linie Lotnicze 'LOT' SA v Budapest Főváros Kormányhivatala*, Case C-597/20 the phrase setting out what accords to the court's settled case law is utilised ("*Selon une jurisprudence constante de la Cour*" at [21]). Other phrases may be of lesser importance, such as those referring to the parties, as in *Südwestrundfunk v Tilo Rittinger and Others*, Case C-492/17 ("*La procédure revêtant, à l'égard des parties au principal*" at [74]). But a phrase, such as in *Proceedings brought by Heinrich Weiss and Others*, Case C-493/17, which indicates a point on which the case turns may be put in terms of requirement to note where the law comes from and that the gravamen of the reasoning is important ("*Il convient de relever que, en vertu de l'article 119*" at [43]). Similarly, in pursuing a purposive interpretation of legislation, the phrase "having regard to that purpose", as in *Colin Brown v European Commission*, Case C-675/20 P ("*Eu égard à l'objectif de l'indemnité de dépaysement*" at [55]) vitally and inescapably declares the pivot of the court's reasoning.

Words and the Constitution

19. One of the arguments put forward by counsel for Tomás Heneghan is that the Constitution as it is altered according to a proposal put to and accepted by the people is to be construed differently from the existing constitutional text. To accept such a contention would mean the effective blocking off in a different highlighter text all such words as all thirty-eight amendments, or proposed since some failed, to the Constitution have introduced. Since that accounts for a significant portion of the text, the flaw in that proposition becomes apparent. And, in what way are they to be differently construed: from each other, from the text or from two or multiple points of analysis? This would be destructive to the integrity of the text of the Constitution and would change the existing order and careful selection of particular words into a random stew of meanings where what something was to declare becomes dependent not on an analysis of the entire body of the Constitution but on side notes as to what the people might have meant in passing a proposal. Who is to judge that and by what yardstick?

20. In contrast, counsel for the State parties persuasively advocated the internal logic of the Constitution, why particular words have been chosen towards particular ends, and how a harmonious interpretation must mean not jarring the consistency of the manner of the construction of the text through treating amendments as different moving parts carrying differing meanings from the clear dynamic of the text. According to counsel "one of the basic benefits of a written constitution is that it provides a fixed text, a level of certainty, a level of stability and predictability." Outside of that bedrock, there may be scope for "legitimate disagreement within a political system about whether the Constitution, as it stands, represents the values of society as they change." He argued that the point of the amendment process is to convert political discussions as to changes to the fundamental law "into a legal form" through "a specific form of legal language that can provide a resolution, even a provisional resolution, to that discussion." That

acceptance or rejection is rightly characterised as a "full stop to the political conversation." In other words, political discourse is changed into law. This submission posits that it is the putting of a particular "form of words to the people that brings the people into existence as a constitutional actor, that focuses their attention on the words" and that through that actual textual amendment that the people as rare constitutional actors but with ultimate authority express themselves, a process to "generate stability and certainty."

21. Central to the Constitution are not just rights but the functioning of the organs of government within a democratic polity. The text is there to "in advance clarify how institutions work, what are the institutions, what are their functions, how are they composed, what are they allowed to do, what are they not allowed to do". Therefore, it must be agreed that "the most fundamental starting point for interpretation" and "the natural and logical starting point is the words used in the text of the Constitution." That submission is correct. Thereafter, the context supplies the place of such words. As Henchy J said in *The People v O'Shea* [1982] IR 384, 426, context is to be informed by the manner of operation of the Constitution and isolation as a technique of interpretation is inoperable:

> Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument that 'the letter killeth but the spirit giveth life'. No single constitutional provision (particularly one designed to safeguard personal liberty or the social order) may be isolated and construed with undeviating literalness.

22. The manner of the construction of the Constitution is through individual phrases carrying particular force in a crystallised context. In that regard, the text is not discursive but is reduced to decisive and weighted commands towards particular legal meanings. This demands a rigorous textual analysis, since in the final analysis it is only through words that the people may express themselves. But such words do not drop out of a void and nor do they drop onto a *tabula rasa* since the deployment of particular words must chime harmoniously with the existing text of the Constitution and take meaning from that context. A context, it must be said, more exacting than political discourse and representing the exercise of choice, one much more precise because of its contextualisation than the argument on behalf of Tomás Heneghan would enable.

23. Here, the argument is that "may" in Article 18.4.2° either means "must" or "must change"; and that in itself is curious. That the Oireachtas being empowered to legislate must legislate, and do so in a particular manner, is to be directed where the following words enable a choice, or necessarily no choice: "to be provided by law". In *Sinnott v Minister for Education* [2001] IESC 63, [2001] 2 IR 545 Hardiman J stated at 688 that "tensions are said to exist between the methods of construction summarised in the use of adjectives such as "historical", "harmonious" and "purposive". In my view, much of this debate is otiose, because each of these words connotes an aspect of interpretation which legitimately forms part, but only part, of every exercise in constitutional construction."

24. While the Irish language text is definitive, the English wording carries betimes a lesser precision that can lead to the prospect of an argument, that cannot be correct, that

"may" as a word is to be taken as an imperative command. That is simply not possible from an analysis of the original text. Nor is that text to be approached as if it is mere legislation or whereby the cannons of construction of a statute may be made applicable so that in some contexts "may" can come to mean "must". That is impermissible in the analysis of our fundamental law, one passed by the people of Ireland for the purpose of governing themselves.

Textual context

25. Focus is put in the argument for Tomás Heneghan on the acceptance by the people of the insertion of Article 18.4.2° of a loose paragraph beginning: "Provision may be made by law for the election", meaning the redistribution or non-redistribution of university seats. But, the Irish text, beginning as it does here and in so many other places with an enabling, an imperative, or a conditional verb, renders an inescapable meaning that what is added to the text not only means nothing more than an enablement but one that through a choice of language weaves into the series of precise meanings throughout the Constitution: namely "Féadfar foráil a dhéanamh le dlí chun go . . .". That means it is made possible by law that something may happen. Not, and never, "must" happen.

26. That precise textual meaning occurs in Article 8 in declaring Irish to be the first official language, but recognising English as a second one, but enabling exclusive use of either for official purposes decided by law, "Ach féadfar socrú a dhéanamh le dlí d'fhonn ceachtar den dá theanga sin a bheith ina haonteanga"; similarly enabling is Article 10 in declaring that all "natural resources" belong to the State but allowing management (Article 10.3) or alienation or acquisition of property, "Féadfar socrú a dhéanamh le dlí" and "Féadfar socrú a dhéanamh le dlí, fairis sin," at Article 10.4; Articles 12 and 13 deal with the powers of the President but he or she may get, though never has gotten, additional powers, "féadfar tuilleadh cumhachtaí agus feidhmeanna a thabhairt"; in Article 12.10 it is clear that the President may be impeached and any suggestion that he or she must be thus traduced is inimical to the text, "Féadfar an tUachtarán a tháinseamh as ucht mí-iompair a luafar"; while the President is not answerable to the courts or the Oireachtas, even still the behaviour of that office-holder may be brought under review in accordance with Article 13.8, "Ach féadfar iompar an Uachtaráin a chur faoi léirmheas"; the right of commutation or remission of punishment is vested in the President under Article 13.6 but others may be so conferred by law, "ach féadfar an chumhacht maolaithe nó loghtha sin a thabhairt le dlí d'údaráis eile"; while the sole and exclusive law-making power is vested in the Oireachtas in Article 15.2, (see the judgments in *Costello v Ireland* [2022] IESC 44) there may also be subordinate legislatures with powers defined by law (enabling re-unification or a federalist system), "féadfar socrú a dhéanamh"; Dáil Éireann terms must not exceed seven years under Article 16.5 but may be for a shorter period by law, "féadfar ré is giorra"; using the same verb, the Cathaoirleach of the Dáil may be deemed elected, not must; the executive power of the State is exercisable by the Government under Article 29.4 but may be constrained, or not; the current form of Article 35.5 was brought into the Constitution by the Twenty-Ninth Amendment providing that judges' pay may be reduced, with no one suggesting that since this was a positive vote, the Oireachtas must reduce proportional reductions to civil servants in judicial remuneration, an impossibility in light of the words "féadfar socrú a dhéanamh"; in the trial of offences there is no stepping back from the imperative that these be in due course of law in Article 38, but the same verb enables summary trial and trial in special courts; the eighth and thirty-sixth amendments prohibited and enabled abortion respectively in Article 40, "Féadfar socrú a dhéanamh le dlí chun foirceannadh toirchis a

rialáil" but, as this was also posed as a political decision, the public advice over the proposal explicitly placed the circumstances for any such provision as being a matter for the "rial" within the province of the Oireachtas; there is a right to protest in Article 40.6 but there may be limitations, "Féadfar socrú a dhéanamh de réir dlí"; in enabling, through the sixteenth amendment of December 1996 following the murder of Veronica Guerin by career criminals, the prohibition of bail on proof of the risk of serious offences by the accused, this was not required but left to the Oireachtas in Article 40.4.6°, "Féadfar socrú a dhéanamh le dlí chun go bhféadfaidh cúirt bannaí a dhiúltú do dhuine atá cúisithe i gcion tromaí sa chás go measfar le réasún é a bheith riachtanach chun an duine sin a chosc ar chion tromaí a dhéanamh": finally, Articles 18 and 19, now under review and inserted on the same template in 1979, use the same sense in employing "féadfar".

27. In using the expression "ní cead" in dozens of places, the constitutional text makes clear what is beyond the powers of the organs of State; for instance, or in preserving laws for securing the public safety and the preservation of the State in time of war or armed rebellion; Article 28.3.3°. Often an acknowledgment of an ideal is the foundation of how that concept may be regulated; this is done through the verb "admhaíonn", as in Article 43 on personal property, and does not differ in concept or organisation from Article 28A introduced by the Twentieth Amendment of June 1999.

28. Such an analysis affirms the integrity of the submissions on behalf of the State; the Constitution is to be viewed as an entity, amendments carry specific meanings as linked to existing concepts within the text, an integrated approach to construction is required, and what is to be rejected is the forcing of any meaning onto words which skew the use of language as judged from those necessary perspectives.

The democratic mechanism

29. Articles 46 and 47 govern the conduct of referenda. No doubt, policy considerations led to the time and trouble and expense that this seventh amendment engaged. In current law, eleven senators are appointed by An Taoiseach, six are university or institutes of higher learning senators and forty-three come from what were originally supposed to be panels bringing to the considerable influence of the Senate, set out in the judgment of Murray J for the majority, real expertise on language and culture, agriculture and fisheries, labour, industry and commerce, and administration. Has that happened? That is a question for the electorate, but little can be done about reform since the Constitution has no parallel system for the initiation of change to the models in some other states for the collection of signatures. Meanwhile, Dublin University graduates elect three senators with about 65,000 graduate votes per senator taking a seat, with the National University of Ireland's graduates' power of election of their three senators halved with about 112,000 graduate voters; while the forty-three are put in place by an electorate of outgoing senators, the Seanad election taking place after that for Dáil Éireann, and incoming Dáil deputies and existing county councillors; about 1,169 voters. That can be some few dozens of votes with added transfers depending on how number shake out for a senator to be elected. In this regard, the analysis of Murray J in the principal judgment is compelling that the equality provision of the Constitution cannot be deployed to a forum where, no matter how looked at, and how jarring the apparent afront to fairness this may be contended by some to be, the people have made a choice for a second chamber of the legislature elected differently to the ordinary democratic mandate. But, that make-up is one for political will as might be any other arrangement of votes.

30. Since, under Article 6, all powers of government not only derive, under God, from the people but since that people have the right, "in final appeal, to decide all questions of national policy, according to the requirements of the common good", and since Ireland under Article 5 is a democratic state (see the judgments of Charleton and Hogan JJ in *Costello v Ireland* at [5] and [213] respectively), recourse to the people for their judgment is the most solemn of democratic exercises; hence Article 46.4 prohibits the addition of other proposals to a referendum, an dá thrá a fhreastal –that two birds be dispatched with one stone. There is one issue only. Only Dáil Éireann may initiate a referendum; Article 46.2. By Article 46 any provision of the Constitution may be amended "whether by way of variation, addition or repeal". But only if the people so vote in referendum, the qualification for voting being the same as for Dáil elections; Article 47.3. A proposal is taken as approved, under Article 47.1 when "a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law."

31. While the architecture of the Constitution does not allow an enabling provision, "may", "féadfar", to be treated as a mandatory imperative, equally that same construction requires that the democratic nature of the State and the empowerment of the people be reviewed as to how that public has voted through reversion of the people's will for consideration by the initiators; Dáil Éireann.

32. This vote need not have required change, though it may be safe to assume, as in the analysis of Murray J in the principal judgment, that the positive vote expected some change, if not, as the majority posit, require change, but it did require serious consideration. No consideration has been given to this proposal for over forty-three years. By what is required, in consequence of the trouble of the people being consulted and having voted in hundreds of thousands to mandate a possible change, is that there be a specific debate in Dáil Éireann. In consequence of the amendment by referendum, change may be effected or change may be determined to be inappropriate: but there must be a real consideration. There is no mandate in the text of the Constitution for a proposal to be considered politically, put to the people, for the people to vote for a changed form of wording and for the political establishment to then, and over decades, ignore what has happened.

Conclusion

33. In summary, in the wake of the outcome of the referendum it fell to the Government, as the body charged with the executive power of the State, to respond in some formal, considered way to the outcome of the vote of the people; and to do so within a reasonable time. That time has long since passed: but the obligation still remains. While it is true that the outcome of the 1979 referendum has been mentioned, but only as a side-issue, by a variety of official bodies – such as the All-Party Oireachtas Committee on the Constitution in their Second Progress Report from 1997 – the vote of the people still awaits a considered response from the Government.

34. Since the Government is alone empowered to back a proposal for a referendum to be put to the people, whether one devised at cabinet or accepted by virtue of a private member's bill, through their having a democratic majority securing in Dáil Éireann its passing into law, the responsibility is that of the Executive primarily. A result in a referendum, whereby the people have expressed their will is perhaps the most serious, certainly the most fundamental, step which can be taken in our democracy – one

whereby the rejection or acceptance of a proposal of Government is voted on as to a change in our fundamental law – and it cannot be ignored. That is not democratic. Disregarding the result of a referendum undermines the fundamental workings of the Constitution.

35. Since the Government, in proposing a referendum, have addressed the people and have been answered by the people through their vote on the proposal, and since that Government is, under Article 28.4 of the Constitution, answerable to Dáil Éireann, it is incumbent on the Executive to formulate not only a considered response but also to put a proposal for debate before the people's democratically elected representatives. Since, on the analysis in this judgment, the 1979 referendum result was merely enabling, as opposed to mandatory, that proposal could have been for a change to the distribution of the existing university franchise or to leave matters as they were (and currently are all of forty-three years later). It would be meaningless, and a negation of democracy, for the Irish people to accept a proposal put to them by Government and for nothing to happen by way of response by the political organs of the State to whom their will was solemnly expressed. That is what has happened.

36. The order of the Court proposed, on this analysis, should therefore be limited to pointing out the duty of the Government to formulate a response and for the Oireachtas to debate, even now, what the people have enabled in 1979, namely a change to university and institutes of higher education representation in Seanad Éireann, but cannot extend to a mandatory order of any kind that there must be such change. An order requiring change, on the basis of the analysis offered in this judgment, risks undermining the integrity of the precisely constructed text of the Constitution and the limits set in the separation of powers within.