Judgment of the Supreme Court of Ireland, 'Crotty v. An Taoiseach' (9 April 1987)

Caption: In April 1987, the Irish Supreme Court upholds Raymond Crotty's claim and challenges the ratification of the Single European Act. It appears that the ratification of any Community treaty containing at least one provision that fundamentally affects the legal nature, field of application or objectives of the Communities must give rise to a revision of the Irish Constitution, which requires a referendum.

Source: Judgment of the Court delivered pursuant to the provisions of Article 34.4.5° by Finlay CJ, No. 12036P, Dublin, 9 April 1987.

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The Supreme Court

1986 No. 12036P

Between

Raymond Crotty

Plaintiff

And

An Taoiseach and Others

Defendants

[9th April, 1987]

[Judgment of the Court delivered pursuant to the provisions of Article 34.4.5° by Finlay CJ]

Finlay C.J.:

Part of the plaintiff's appeal in this case is against the dismiss by the High Court of his claim for a declaration that the European Communities (Amendment) Act, 1986, is invalid having regard to the provisions of the Constitution. The Court in this decision deals with that issue only.

The European Communities (Amendment) Act, 1986, ("the Act of 1986") purports to amend the European Communities Act, 1972, and to bring into the domestic law of the State Article 3, s. 1; Title II; Article 31; Article 32; and in part Articles 33 and 34 of the Single European Act ("the SEA "). The Act of 1986 was enacted by the Oireachtas in December, 1986, but does not come into effect until the making of a statutory order which has not yet been made. The other provisions of the SEA largely consisting of the provisions on European cooperation in the sphere of foreign policy contained in Title III are not affected by the Act of 1986 and do not fall to be dealt with in this decision of the Court.

In the High Court the plaintiff's claim was rejected on the grounds that because the SEA had not yet been ratified by the State and because the Act of 1986 had not yet been brought into effect the plaintiff failed to establish that he had a *locus standi* to challenge the validity of the Act of 1986 having regard to the provisions of the Constitution. The Court is satisfied, in accordance with the principles laid down by the Court in *Cahill v. Sutton* [1980] IR 269, that in the particular circumstances of this case where the impugned legislation, namely the Act of 1986, will if made operative affect every citizen, the plaintiff has a *locus standi* to challenge the Act notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other citizen, arising from the Act.

The net issue therefore here arising is as to whether the provisions of Article 29, s. 4, sub-s. 3 of the Constitution authorise the ratification by the State of the provisions of the SEA intended to amend the Treaties establishing the European Communities. These provisions are the Articles and Title of the SEA referred to in the Act of 1986. Article 29, s. 4, sub-s. 3 reads as follows:-

> "3° The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State. "

This provision was enacted as the Third Amendment to the Constitution by virtue of a referendum held in 1972 and permitted the State to join the European Communities. The Court is satisfied that the first sentence of this provision authorised the State to join three Communities identified as to each by reference to the Treaty which established it.
It is clear and was not otherwise contended by the defendants that the ratification by the State of the SEA (which has not yet taken place) would not constitute an act "necessitated by the obligations of membership of the Communities". It accordingly follows that the second sentence in Article 29, s. 4, sub-s. 3 of the Constitution is not relevant to the issue as to whether the Act of 1986 is invalid having regard to the provisions of the Constitution. It was contended on behalf of the plaintiff that any amendment of the Treaties establishing the Communities made after the 1st January, 1973, when Ireland joined those Communities would require a further amendment of the Constitution. It was contended on behalf of the defendants that the authorisation contained in the first sentence of Article 29, s. 4, sub-s. 3 was to join Communities which were established by Treaties as dynamic and developing entities and that it should be interpreted as authorising the State to participate in and agree to amendments of the Treaties which are within the original scope and objectives of the Treaties. It is the opinion of the Court that the first sentence in Article 29, s. 4, sub-s. 3 of the Constitution must be construed as an authorisation given to the State not only to join the Communities as they stood in 1973, but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities. To hold that the first sentence of Article 29, s. 4, sub-s. 3 does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad. The issue then arises as to whether the effect of the amendments to the Treaties proposed by the SEA is such as would bring the introduction of them into the domestic law by the Act of 1986 outside the authorisation of Article 29, s. 4, sub-s. 3 as above construed.

The only provisions affecting the European Coal and Steel Community proposed in the SEA are Articles 4 and 5 thereof, and the only provisions affecting the European Atomic Energy Community proposed in the SEA are Articles 26 and 27 thereof. These Articles have essentially the same effect as Articles 11 and 12 with regard to the European Economic Community (the EEC). All of these Articles give a power to the European Council at the request of the Court of Justice of the European Communities to attach to that Court a court of first instance for the trial of certain classes of cases. It is sufficient, therefore, for the purpose of this decision to consider the EEC Treaty (the Treaty of Rome) and the proposed amendments and additions to it.

The Act of 1986 enjoys the presumption of constitutional validity, so the onus is on the plaintiff to show that it is in some respect invalid, having regard to the provisions of the Constitution. The contention made on behalf of the plaintiff on this issue was under four headings.

> (1) Changes which are proposed in the decision-making process of the Council in six instances from unanimity to a qualified majority were asserted to be an unauthorised surrender of sovereignty.
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> (2) The power given to the Council by unanimous decision at the request of the Court of Justice of the European Communities (the European Court) to attach to it a court of first instance with an appeal from the latter on questions of law to the European Court was said to be an unauthorised surrender of the judicial power.
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> (3) It is submitted that Article 20 dealing with cooperation in economic and monetary policy, Article 21 dealing with social policy, Article 23 dealing with economic and social cohesion, Article 24 dealing with research and technological development, and Article 25 dealing with the environment, all add new objectives to the Treaty of Rome which make them additions to the original Treaty which are outside the existing constitutional authorisation.
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> (4) It is submitted that powers granted to the Council by Articles 18 and 21 of the SEA would enable it by a qualified majority to direct the approximation of laws concerning the provision of services and concerning the working environment, health and safety of workers which amount to new powers outside the existing constitutional authorisation and which could encroach on existing guarantees of fundamental rights under the Constitution.

In discharging its duty to interpret and uphold the Constitution the Court must consider the essential nature of the scope and objectives of the Communities as they must be deemed to have been envisaged by the people in enacting Article 29, s. 4, sub-section 3. It is in the light of that scope and those objectives that the amendments proposed by the SEA fall to be considered.

Article 2 of the Treaty of Rome provided as follows:-

> "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it. "

Article 3 of that Treaty set out what the activities of the Community should include for the purposes stated in Article 2, and amongst these activities are:-

> "(*c*) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
> (*f*) the institution of a system ensuring that competition in the common market is

not distorted;
(*g*) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;
(*h*) the approximation of laws of Member States to the extent required for the proper functioning of the common market;
(*i*) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;
(*j*) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;
(*k*) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development."

For the purpose of attaining its objectives and implementing its provisions the Treaty of Rome established certain institutions. Amongst these is the Court of Justice of the European Communities which was established to ensure that in the interpretation and the application of the Treaty the law is observed. The decisions of that Court on the interpretation of the Treaty and on questions covering its implementation take precedence, in case of conflict, over the domestic law and the decisions of national courts of Member States:

Another institution of the EEC is the Council, whose decisions have primacy over domestic law and which for the purpose of ensuring that the objectives of the Treaty are attained is charged with ensuring the co-ordination of the general economic policies of the Member States. Some of its decisions must be unanimous, others may be taken by qualified majority, and still others by simple majority. The capacity of the Council to take decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this was one of the reasons why the Third Amendment to the Constitution was necessary .Sovereignty in this context is the unfettered right to decide: to say yes or no. In regard to proposals coming before the Council which the State might oppose, unanimity is a valuable shield. On the other hand, in proposals which the State might support, qualified or simple majority is of significant assistance. In many instances the Treaty of Rome provided a requirement that a decision on a particular topic should be unanimous, but would after the expiry of a particular stage or of the transitional period require only a qualified majority. The Community was thus a developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress, both in terms of the number of its Member States and in terms of the mechanics to be used in the achievement of its agreed objectives.

Having regard to these considerations, it is the opinion of the Court that neither the proposed changes from unanimity to qualified majority, nor the identification of topics which while now separately stated, are within the original aims and objectives of the EEC, bring these proposed amendments outside the scope of the authorisation contained in Article 29, s. 4, sub-s. 3 of the Constitution. As far as Ireland is concerned, it does not follow that all other decisions of the Council which now require unanimity could, without a further amendment of the Constitution, be changed to decisions requiring less than unanimity.

The power of the Council to attach to the European Court a court of first instance with

limited jurisdiction which would be subject to appeal on questions of law to the European Court, does not affect in any material way the extent to which the judicial power has already been ceded to the European Court. This Court is therefore of the opinion that the establishment of an additional court, if it occurs, has not been shown to exceed the constitutional authorisation.

The existing Treaty contains various provisions dealing with the approximation of laws in general, with freedom for the provision of services in the Member States, with working conditions and with the prevention of occupational accidents and diseases. The proposals contained in Articles 18 and 2l of the SEA have not been shown to contain new powers given to the Council which alter the essential character of the Communities. Neither has it been shown that they create a threat to fundamental constitutional rights. Therefore, it is the opinion of the Court that the appeal under this heading also fails.

For the foregoing reasons, it has not been shown to the satisfaction of the Court that any of the provisions of the European Communities (Amendment) Act, 1986, are invalid having regard to the provisions of the Constitution.

Finlay C.J.:

In addition to the appeal against the dismiss of his claim for a declaration that the European Communities (Amendment) Act, 1986, is invalid having regard to the provisions of the Constitution, which has been dealt with in the decision of the Court, the plaintiff has appealed against the dismiss of a claim for a declaration and injunction restraining the Government from ratifying the Single European Act ("the SEA "). The grounds for that claim, other than those already dealt with by the decision concerning the Act of 1986, are that the provisions contained in Article 30 under Title III of the SEA are inconsistent with the Constitution.

These provisions are entitled "Provisions on European cooperation in the sphere of foreign policy. " They do not purport to constitute amendments of or additions to any of the Treaties establishing the Communities. Adherence to these provisions of the SEA by the State could not be an act necessitated by any obligation of membership by the State of the Communities nor could such provisions be laws enacted, acts done or measures adopted by the Communities or institutions thereof. Article 29, s. 4, sub-s. 3 of the Constitution accordingly does not apply to the provisions concerning European Political Cooperation (EPC) contained in Article 30 under Title III of the Single European Act.

Article 29, s. 6 of the Constitution therefore applies to those provisions since they can derive no immunity from it by virtue of Article 29, s. 4, sub-s. 3 and they do not become part of the domestic law of the State unless and until the Oireachtas validly so determines. The Oireachtas has passed no law purporting to bring these provisions into the domestic law of the State. The provisions of the SEA contained in Article 30 therefore rank as part of an international treaty negotiated by the Government but not yet ratified, the terms of which have been approved by resolution of Dáil Éireann but which has not been brought into our domestic law.

Article 30 of the SEA is divided into twelve sub-articles. It constitutes an agreement between states adhering to the SEA, described in Title III as "High Contracting Parties", which are in fact the Member States of the Communities. From the preamble to the SEA and from the

terms of Article 30 themselves, it is clear that the agreements contained in that Article are arrived at with the possible ultimate objective of a form of European political union between the Member States of the Communities as an addition to the existing economic union between them. There can be no doubt that if that aim were ever achieved it would constitute an alteration in the essential scope and objectives of the Communities to which Ireland could not agree without an amendment of the Constitution. Article 30 in summary provides for:-

1. Cooperation in the formation of foreign policy between the parties, with the aim of formulating and putting into effect a joint foreign policy.
2. Cooperation with the Commission of the Communities.
3. Cooperation with the Parliament of the Communities.
4. Cooperation on European security.
5. The adoption of common positions at international conferences and in international institutions.
6. The state holding the Presidency of the Council of the Communities at any time shall hold the Presidency of the EPC which shall be responsible for initiating action and representing the position of Member States with third countries in relation to EPC activities.
7. A Secretariat is to be established, the members of which will have diplomatic status.

The detailed terms of these provisions impose obligations to consult; to take full account of the position of other partners; to ensure that common principles and objectives are gradually developed and defined; as far as possible to refrain from impeding the formation of a consensus and the joint action which this could produce; to be ready to cooperate policies more closely on the political aspects of security. They do not impose any obligations to cede any national interest in the sphere of foreign policy. They do not give to other High Contracting Parties any right to override or veto the ultimate decision of the State on any issue of foreign policy. They impose an obligation to listen and consult and grant a right to be heard and to be consulted.

The net issue which arises in this part of this appeal is whether, having regard to the general nature and effect of Article 30 of the SEA and its status in relation to our law as above outlined, this Court is entitled under the Constitution, at the instance of the plaintiff, to intervene so as to prevent the Government from ratifying this treaty. It is an issue of a fundamental nature, the importance of which, in my view, transcends by far the significance of the provisions of the SEA. The separation of powers between the legislature, the executive and the judiciary, set out in Article 6 of the Constitution, is fundamental to all its provisions. It was identified by the former Supreme Court in *Buckley and Others (Sinn Féin) v. Attorney General* [1950] IR 67 and has since been repeatedly acknowledged and implemented by this Court. It involves for each of the three constitutional organs concerned not only rights but duties also; not only areas of activity and function, but boundaries to them as well.

With regard to the legislature, the right and duty of the Courts to intervene is clear and express.

1. Article 15, s. 4, Article 34, s. 3, sub-s. 2 and Article 34, s. 4, sub-s. 4 of the Constitution vest in the High Court and, on appeal, in this Court the right and duty to examine the validity of

any impugned enactment of the Oireachtas and, if it be found inconsistent with the Constitution, to condemn it in whole or in part.

2. Article 26 of the Constitution confers on this Court the duty, upon the reference to it by the President of a Bill passed or deemed to have been passed by both houses of the Oireachtas, to decide whether such Bill or any specified provision or provisions of such Bill is or are repugnant to the Constitution or to any provision thereof.

3. The Courts do not, in my opinion, have any other right to intervene in the enactment of legislation by the Oireachtas.

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 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 Article: 34, s. 4, sub-s. 3 of the Constitution and impliedly arises from the form of the judicial oath contained in Article 34, s. 3, sub-s. 1 of the Constitution.

Article 29, s. 4, sub-s. 1 of the Constitution provides:-

> "The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government. "

Article 28, s. 2 of the Constitution provides:-

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

The combined effect of these two constitutional provisions clearly is that the executive power of the State in connection with its external relations shall be exercised by or on the authority of the Government but that in so exercising that power the Government is subject to the provisions of the Constitution.

Article 29, s. 5, sub-s. 1 provides:-

> "Every international agreement to which the State becomes a party shall be laid before Dáil Éireann. "

Article 29, s. 5, sub-s. 2 provides:-

> "The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil

Éireann."

I have already referred to the provisions of s. 6 of Article 29 of the Constitution vesting in the Oireachtas the right to determine the extent and manner in which an international agreement shall be part of the domestic law of the State. From these constitutional provisions, it seems reasonable to infer a scheme under the Constitution that by virtue of Article 29, s. 5, sub-s. 1, Dáil Éireann should have a primary control over the exercise by the Government of its executive power in relation to entering into international agreements, and that under Article 29, s. 5, sub-s. 2 no international agreement of major importance being one that involved a charge upon public funds could bind the State without the approval of Dáil Éireann as to its terms. This scheme is consistent with the provisions of Article 28, s. 3, sub-s. 1 which provide:-

> "War shall not be declared and the State shall not participate in. any war save with the assent of Dáil Éireann."

A declaration of war and participation in war is necessarily part and parcel of the external relations of the State. This provision again emphasises the control by Dáil Éireann of the Government in its exercise of executive power in external relations.

The overall provisions concerning the exercise of executive power in external relations do not contain any express provision for intervention by the Courts. There is nothing in the provisions of Articles 28 and 29 of the Constitution, in my opinion, from which it would be possible to imply any right in the Courts in general to interfere in the field or area of external relations with the exercise of an executive power. This does not mean that the executive is or can be without control by the Courts in relation to carrying out executive powers even in the field of external relations. In any instance where the exercise of that function constituted an actual or threatened invasion of the constitutional rights of an individual, the Courts would have a right and duty to intervene.

In this case where the plaintiff adduced no evidence at the hearing in the High Court but relied on matters pleaded and not denied, I am satisfied that he has not established any actual or threatened invasion of any constitutional right enjoyed by him as an individual arising from the terms of Article 30 of the Single European Act.

It was submitted that, whereas the plaintiff acknowledged that the Courts had no function to intervene with the Executive in the formation or statement of policy, either in external relations or in any other part of Government activity, a difference arose where the declaration of policy involved, as it is stated Article 30 of the SEA involves, a commitment to other states for consultation, discussion and an endeavour to coincide policies. I cannot accept this distinction. It appears probable that under modern conditions a state seeking cooperation with other states in the sphere of foreign policy must be prepared to enter into not merely vague promises but actual arrangements for consultation and discussion. I can find no warrant in the Constitution for suggesting that this activity would be inconsistent with the Constitution and would, as is suggested, presumably in each individual instance, require a specific amendment of the Constitution.

I am confirmed in the view which I have reached with regard to the constitutional limits

of the intervention by the Courts in the exercise by the Government of its executive functions by the decision of this Court in *Boland v. An Taoiseach* [1974] IR 338. FitzGerald C.J., in the course of his judgment in that case, at p. 362, stated as follows:-

> "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 the same case, Budd J., at p. 366, stated as follows:-

> "The judiciary has its own particular ambit of functions under the Constitution. Mainly, it deals with justiciable controversies between citizen and citizen or the citizen and the State and matters pertaining thereto. Such matters have nothing to do with matters of State policy. Viewing the matter from another angle, as to the nature of any relief that could properly be claimed in proceedings of this nature, I ask whether it could be said that the Courts could be called upon to pronounce adversely or otherwise on what the Government proposed to do on any matter of policy which it was in the course of formulating. It would seem that that would be an attempted interference with matters which are part of the functions of the Executive and no part of the functions of the judiciary. From a practical standpoint alone, what action would be open to the Courts? The Courts could clearly not state that any particular policy ought not to be pursued.
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> The Constitution goes further in indicating how far the policies involved in government decisions as to policy such as this are removed from the purview of the Courts in that it makes the Government responsible to the Dáil which can support or oppose those policies and review them. Ultimately, there is the responsibility of the Government to the people who must be consulted by way of referendum where any change of the Constitution is contemplated."

Griffin J., in the course of his judgment in that case, at p. 370, stated as follows:-

> "In the event of the Government acting in a manner which is in contravention of some provisions of the Constitution, in my view it would be the duty and the right of the Courts, as guardians of the Constitution, to intervene when called upon to do so if a complaint of a breach of any of the provisions of the Constitution is substantiated in proceedings brought before the Courts."

I do not consider that it has been established that adherence by the State to the terms of Article 30 of the SEA amounts, in the words of FitzGerald C.J., "to a clear disregard by the Government of the powers and duties conferred on it by the Constitution." Furthermore, I interpret the decision of Griffin J. in *Boland v. An Taoiseach* [1974] IR 338 as being consistent with the view already expressed by me that where an individual person 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 can not and should not.

I, therefore, am satisfied that this appeal on this issue should be dismissed.

Walsh J.:

This part of the proceedings deals only with Title III of the Single European Act. The heading of that title is "Provisions on European cooperation in the sphere of foreign policy." This title is not included in the European Communities (Amendment) Act, 1986. Neither is the preamble to the Single European Act incorporated in or referred to by the said Act. The terms of the preamble are however relevant to the issue now before the Court concerning Title III. In its first paragraph the preamble refers to the will to continue work to transform relations between the Member States of the European Communities into a European Union. It goes on to say that the signatories are resolved to implement "this European Union" firstly on the basis of the Communities operating according to their own rules and, secondly, of European Cooperation among the Signatory States "in the sphere of foreign policy" and to invest this union "with the necessary means of action". It is abundantly clear, and indeed was not contested in the present case, that so far as Ireland is concerned the creation of a European Union which would include Ireland would require an amendment of the Constitution. Title III of the Single European Act, which in reality is itself a separate treaty although not so in form, does not purport to create a European Union; but on the other hand openly acknowledges that such is the objective.

The preamble goes on to state that the parties are determined "to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice." So far as the latter aspirations are concerned no objection could be taken to them having regard to the fact that the preamble of the Constitution of Ireland sets out that one of the aims of the Constitution is to safeguard the dignity and freedom of the individual and to assist in establishing concord with other nations. Article 5 of the Constitution says that Ireland is a sovereign, independent and democratic state. Article 29, s. 1 of the Constitution contains the affirmation that Ireland is devoted to the ideal of peace and friendly co-operation amongst nations founded on international justice and international morality (see the Irish language text of the Constitution).

The preamble to the Single European Act further refers to "the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter." The sentiments there expressed are also unexceptionable as a general objective of the European Community and of the individual Member States, and as such would appear to be in no way incompatible with the aims and aspirations of the Constitution in those fields.

It is however the treaty provisions set out in Title III which have given rise to the plaintiff's claim for an order to restrain the Government from ratifying the treaty already executed by them. Article 33, s. 1 of the Single European Act provides that it will be ratified "by the High

Contracting Parties in accordance with their respective constitutional requirements." In essence therefore this part of the case is concerned with whether or not, as a matter of Irish law, the method of ratification proposed by the Government is in accordance with the Constitution, namely, whether it can now be ratified on the basis that its terms have been approved in their entirety by Dáil Éireann in accordance with Article 29, s. 5, sub-s. 2 of the constitution.

This brings me to a consideration of the relevant provisions of the Constitution and the treaty-making powers of the executive organ of Government (the "Government"). Article 6 of the Constitution refers to "all powers of government" and goes on to differentiate between the legislative, executive and judicial organs of government. It refers to the powers of government as being derived "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. " It must follow therefore that all the powers of government are to be exercised according to the requirements of the common good. Section 2 of the same Article provides that these powers of government are exercisable "only by or on the authority of the organs of State established by this Constitution." So far as external or foreign relations are concerned Article 29, s. 4, sub-s. 1 of the Constitution provides that "the executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of 1the Government." 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. "

The Constitution confers upon the Government the whole executive power of the State, subject to certain qualifications which I will deal with later, and the Government is bound to take care that the laws of the State are faithfully executed. In its external relations it has the power to make treaties, to maintain diplomatic relations with other sovereign States. The Government alone has the power to speak or to listen as a representative of the State in its external relations. It is the Government alone which negotiates and makes treaties and it is the sole organ of the State in the field of international affairs. For these functions it does not require as a basis for their exercise an Act of the Oireachtas. Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by 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.

The powers of external sovereignty on the part of the State do not depend on the affirmative grant of this in the Constitution. They are implicit in the provisions of Article 5 of the Constitution. The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states. These powers of the State include the power to declare war or to participate in a war, to conclude peace, to make treaties, and maintain diplomatic relations with other states.

However the exercise of the power is limited. In the first instance the Government alone has the power, as already mentioned, to speak and listen as the representative of the State, and,

subject to the constitutional restraints, to make treaties. Article 28, s. 3, sub-s. 1 of the Constitution provides that war shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann. That is one express constitutional prohibition on the exercise by the Government of its powers in its international relations. So far as treaties or international agreements are concerned Article 29, ss. 5 and 6 deal further with the matter. They provide that (a) every international agreement to which the State becomes a party shall be laid before Dáil Éireann, (b) the State shall not be bound by any international agreement involving a charge upon public funds unless: the terms of the agreement shall have been approved by Dáil Éireann (save where the agreements or conventions are of a technical and administrative character) and (c) no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. As a general rule neither the Government nor the Oireachtas can be restrained until their intentions are translated into acts. In proper cases they are subject to judicial cognisance, and judicial review and restraint. Thus statements of the Government policy as such are not restrainable by the Courts. But if the policies arc translated, for example, into treaties then different considerations arise.

In the present case counsel for the defendants submitted that even in the case of treaties the Courts are not empowered to interfere unless the treaties are translated into domestic legislation. To do so, the defendants asserted, would be for one of the organs of State to trespass upon the functions of another in a manner unauthorised by the Constitution. The defendants relied upon the decision of the former Supreme Court of Justice in *Buckley and Others (Sinn Féin) v. Attorney General* [1950] IR 67 in support of this proposition. That was a case in which legislation was impugned. The power to review legislation is expressly granted by the Constitution. What the Court was doing in that case was to interfere in what it regarded and described at p. 84 of the report as "an unwarrantable interference by the Oireachtas with the operation of the Courts in a purely judicial domain." It does not follow from that conclusion that the actions of the executive can never be reviewed by the Courts even in respect of matters which are on their face apparently within the exclusive domain of the Government. It is beyond dispute and well settled in many cases that one of the functions of the Courts is to uphold the Constitution. That includes restraining the Government from freeing themselves or purporting to free themselves from the restraints of the Constitution.

This issue was discussed at some length in this Court in the case of *Boland v. An Taoiseach* [1974] IR 338. The subject of that litigation was what became known as the "Sunningdale Agreement", and in particular clause 5 thereof. It was held by this Court that it was not an agreement or treaty but a communiqué containing declarations and assertions of policy, and therefore was not restrainable. In the course of his judgment in that case 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 upon it by the Constitution."

O'Keeffe P. in the course of his judgment at p. 363 stated that it was clearly not within the competence of the Government to agree to depart from the terms of the Constitution. He found that the document in question was not such an agreement but simply a statement of policy. Budd

J. stated, and in my view correctly so, that the Courts could clearly not state that any particular policy ought not to be pursued and was of opinion that nothing more than a declaration of policy had been made and that there was not any agreement between the parties. It is to be inferred from his judgment that if an agreement were in existence different considerations would apply. Griffin J. in his judgment was also of opinion that the stage had not been reached in that case where the Courts could intervene as no formal agreement had been reached between the parties, and furthermore that if the contemplated agreement were reached it would have led to legislation which itself could be the subject of a constitutional challenge in the Courts. Pringle J. agreed that the appeal in that case should be dismissed for the reasons stated in the judgments, and that the Courts had no power to interfere with the exercise by the Government of its executive functions in the circumstances relied upon by the plaintiff. That, as I understand it, meant that Pringle J. was in agreement with his colleagues that nothing beyond the pronouncemment of a policy had taken place and that therefore the Courts could not intervene at that stage.

What is at issue in the present case is not simply a declaration of policy but an actual treaty. As it will obviously involve a charge upon the public funds the requirement of the Constitution in Article 29, s. 5, sub-s. 2, that it should be approved by Dáil Éireann, has been complied with. The State is not yet bound by this Treaty even though it has been laid before Dáil Éireann because its binding effect depends upon ratification in accordance with Irish "constitutional requirements". The question therefore is whether the State in attempting to ratify this Treaty is endeavouring to act free from the restraints of the Constitution.

The object of this Treaty, so far as Ireland is concerned, is to bind this State in its relations with the other Member States of the European Communities. Adherence to the Treaty, or indeed the Treaty itself, is not in any sense an obligation arising from or necessitated by membership of the European Communities. I do not accept the submission made on behalf of the defendants that unless and until the terms of the Treaty are translated into domestic legislation the Court has no competence in the matter. In international law the State in entering into a treaty must act in good faith. That is why the provision in the Treaty itself for ratification in accordance with the constitutional requirements of this State is so important. If some part or all of the Treaty were subsequently translated into domestic legislation and found to be unconstitutional it would avail the State nothing in its obligations to its fellow members. It would still be bound by the Treaty. Therefore if the ratification of this Treaty under the Irish Constitution requires a referendum to amend the Constitution to give effect to it, the fact that the State did not hold a referendum would not prevent the State from being bound in international law by the Treaty. If a referendum were to be held or had been held and the Treaty were rejected then the State would not be in breach of its international obligations because it would not have ratified the Treaty. It is not for the other states to the Treaty to satisfy themselves that the Government of Ireland observed its own constitutional requirements. This is solely a matter for the Government of Ireland and if it fails to take the necessary steps, the State cannot afterwards be heard to plead that it is not bound by the Treaty.

The Treaty does not purport to commit the State to agreeing to the establishment of a European Union of which Ireland would be a part. That is manifestly something to which the Government could not commit the State. What the Treaty does is to commit the State to pursuing a policy which has, *inter alia*, as one of its objectives the transformation of the relations of Ireland with the other Member States of the European communities into a European Union. If this were simply a unilateral statement of policy on the part of the Government or part of a

multilateral declaration of policy to the like end it could not be called into question in this Court. As was pointed out by Budd J. in *Boland v. An Taoiseach* [1974] IR 338 at p. 366 it would, as such, be outside "the purview of the Courts in that it makes the Government responsible to the Dáil which can support or oppose those policies and review them. " The present Treaty provisions go much further than that and, notwithstanding that, they have been approved by Dáil Éireann. As was pointed out in the decision of the Court in the first part of this case the essential nature of sovereignty is the right to say yes or to say no. In the present Treaty provisions that right is to be materially qualified.

It commits the State, and therefore all future Governments and the Oireachtas, to the other Member States to do the following things:-

1. To endeavour to formulate and to implement a European foreign policy.
2. To undertake to inform or consult the other Member States on any foreign policy matters of general interest (not just of common interest) so as to ensure that the combined influence of the States is exercised as effectively as possible through co-ordination, the convergence of their positions and the implementation of joint action.
3. In adopting its position and in its national measures the State shall take full account of the position of the other Member States and shall give due consideration to the desirability of adopting and implementing common European positions.
4. The State will ensure that with its fellow Member States common principles and objectives are gradually developed and defined.
5. The State shall endeavour to avoid any action or position which impairs the effectiveness of the Community States as a cohesive force in international relations or within international organisations.
6. The State shall so far as possible refrain from impeding the formation of a consensus and the joint action which this could produce.
7. The State shall be ready to co-ordinate its position with the position of the other Member States more closely on the political and economic aspects of security.
8. The State shall maintain the technological and industrial conditions necessary for security of the Member States and it shall work to that end at national level and, where appropriate, within the framework of the competent institutions and bodies.
9. In international institutions and at international conferences which the State attends it shall endeavour to adopt a common position with the other Member States on subjects covered by Title III.
10. In international institutions and at international conferences in which not all of the Member States participate the State, if it is one of those participating, shall take full account of the positions agreed in European Political Cooperation.

One other matter expressed in somewhat ambiguous terms at Article 6 (c) in Title II is as follows:-

> "Nothing in this Title shall impede closer cooperation in the field of security between certain of the High Contracting Parties within the framework of the Western European Union or the Atlantic Alliance."

One interpretation of that is that the Member States who are members of the Western European Union or the Atlantic Alliance (Ireland is not a member of either) can develop their

own co-operation in those fields without being impeded by anything in Title III of this Treaty. However, it can also amount to an undertaking on the part of this State that in the exercise of whatever powers it may have under Title III it shall do nothing to impede such co-operation in the field of security in the framework of the Western European Union or the Atlantic Alliance on the part of those Member States which belong to those institutions.

All of these matters impinge upon the freedom of action of the State not only in certain areas of foreign policy but even within international organisations such as the United Nations or the Council of Europe. That latter effect of the Treaty could amount to the establishment of combinations within these organisations. In touching upon the maintenance of the technological and industrial conditions necessary for security the Treaty impinges upon the State's economic, industrial and defence policies. The obligation on the High Contracting Parties after five years to examine whether any revision of Title III is required does not give the Treaty a temporary character.

I mentioned earlier in this judgment that the Government is the sole organ of the State in the field of international relations. This power is conferred upon it by the Constitution which provides in Article 29, s. 4 that this power shall be exercised by or on the authority of the Government. In this area the Government must act as a collective authority and shall be collectively responsible to Dáil Éireann and ultimately to the people. In my view it would be quite incompatible with the freedom of action conferred on the Government by the Constitution for the Government to qualify that freedom or to inhibit it in any manner by formal agreement with other States as to qualify it. This view is, in my opinion, corroborated by the provisions of Article 29, s. 4, sub-s. 2 of the Constitution which provides:-

> "For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern."

The history of this particular provision is too well known to require elaboration but the wording is such that for the particular purpose of that provision the European Economic Community is in my view such a group or league of nations with which the State is associated for the purpose of international co-operation in matters of common concern. However the limitations are very clear. This provision relates solely to the exercise of the executive functions of this State in its external relations and is subject to such conditions, if any, as may be determined by law. Furthermore it simply provides for the adoption of any organ or instrument or method of procedure for the exercise of the executive functions of the State. It does not require prior consultation with any other State as to the policy itself. It also provides that there must be enabling legislation. The framers of the Constitution, and the people in enacting it, clearly foresaw the possibility of being associated with groups of nations for the purpose of international co-operation in matters of common concern and they provided for the possibility of the adoption of a common organ or instrument. Equally clearly they refrained from granting to the Government the power to bind the State by agreement with such groups of nations as to the manner or under what conditions that executive function of the State would be exercised.

In enacting the Constitution the people conferred full freedom of action upon the Government to decide matters of foreign policy and to act as it thinks fit on any particular issue so far as policy is concerned and as, in the opinion of the Government, the occasion requires. In my view, this freedom does not carry with it the power to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way or to refrain from exercising it save by particular procedures, and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate. The latter two have now been curtailed by the consent of the people to the amendment of the Constitution which is contained in Article 29, s. 4, sub-s. 3 of the Constitution. If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies as from time to time to the Government may seem proper, it is not within the power of the Government itself to do so. The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the people the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require a recourse to the people "whose right it is" in the words of Article 6 "...in final appeal, to decide all questions of national policy, according to the requirements of the common good." In the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act as consists of title III thereof. On these grounds I would allow this appeal.

Henchy J.:

The Single European Act (“the SEA”) is something of a misnomer, for it is a treaty rather than an instrument with the legislative connotations usually attaching to an Act. As a treaty it has a dual purpose: (1) to amend and supplement the Treaties on which the European Communities are founded; and (2) to put on a formal basis co-operation between the Member States in the field of foreign policy. It is with the latter objective, which is dealt with in Title III of the SEA, that we are concerned in this part of the plaintiff's appeal.

Title III (which is headed "Provisions on European cooperation in the sphere of foreign policy") deals with matters which are outside the scope of the existing treaties. This is evidenced by the two opening paragraphs of the preamble to the SEA:-

> "MOVED by the will to continue the work undertaken on the basis of the Treaties establishing the European Communities and to transform relations as a whole among their States into a European Union, in accordance with the Solemn Declaration of Stuttgart of 19 June 1983,
>
> RESOLVED to implement this European Union on the basis, firstly, of the Communities operating in accordance with their own rules and, secondly, of European Cooperation among the Signatory States in the sphere of foreign policy and to invest this union with the necessary means of action."

It is clear, therefore, that, so far as Title III is concerned, Ireland's constitutional authority for ratifying the SEA is not to be found in Article 29, s. 4, sub-s. 3 of the Constitution, which is

the constitutional amendment which allowed Ireland to become a member of the European Communities. One must look elsewhere in the Constitution to see if there are express or implied provisions which would make Ireland's ratification of Title III consistent with the Constitution.

It is first necessary to make clear the scope and objective of Title III, all of which is contained in Article 30 of the SEA. Article 30, s. 1 provides that the Member States of the European Communities "shall endeavour to formulate and implement a European foreign policy." Thus, unlike the main part of the SEA. Article 30 is not intended to be an amendment of the existing Treaties but sets the Member States on a course leading to an eventual European Union in the sphere of foreign policy. Pending the attainment of that objective, which is outside the stated aims of the existing Treaties, the Member States become bound to formulate and conduct their foreign policy according to the terms stated in Article 30. What had been no more than an objective declared by the Stuttgart Declaration of 1983 is now to become a matter of solemn treaty.

The essence of this fundamental transformation in the relations between the Member States of the European Communities is that they are no longer to have separate foreign policies but are, as far as possible, to merge their national foreign policies in a European (i.e. Community) foreign policy and to work together in the manner indicated, so as to implement what is called European Political Cooperation, with a view to achieving eventual European union.

The principal courses of conduct to which the High Contracting Parties bind themselves are set out in s. 2 of Article 30:-

> "(*a*) The High Contracting Parties undertake to inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through coordination, the convergence of their positions and the implementation of joint action.
> (*b*) Consultations shall take place before the High Contracting Parties decide on their final position.
> (*c*) In adopting its positions and in its national measures each High Contracting Party shall take full account of the positions of the other partners and shall give due consideration to the desirability of adopting and implementing common European positions.
> In order to increase their capacity for joint action in the foreign policy field, the High Contracting Parties shall ensure that common principles and objectives are gradually developed and defined.
> The determination of common positions shall constitute a point of reference for the policies of the High Contracting Parties.
> (*d*) The High Contracting Parties shall endeavour to avoid any action or position which impairs their effectiveness as a cohesive force in international relations or within international organizations."

Without going further into Article 30, it is clear from those provisions that once the Member States ratify this Treaty each state's foreign policy will move from a national to a European or Community level. Apart from becoming bound to *endeavour* jointly to formulate and implement a European foreign policy, each Member State will become specifically bound to inform and consult its fellow-members, to refrain from deciding on a final position as to an issue

of foreign policy without prior consultations, to *take full account* of the positions of the other partners in adopting its positions and in its national measures, to *ensure* that common principles and objectives are gradually developed and defined, and to recognise that the determination of common positions *shall* constitute a point of reference.

Those and other commitments expressed in Article 30 make manifest that, although the approach to the ultimate aim of European Union is to be reached by a pathway of gradualism, each Member State will immediately cede a portion of its sovereignty and freedom of action in matters of foreign policy. National objectives and ideological positions must defer to the aims and decisions of an institution known as European Political Cooperation, which is to work in tandem with the European Communities. A purely national approach to foreign policy is incompatible with accession to this Treaty. The methods of co-operation between the Member States, which hitherto have been informal, aspirational or, at most, declaratory (as under the Stuttgart Declaration), now pass into a realm of solemnly covenanted commitment to the conduct of foreign policy in a way that will lead to European political union, at least in the sphere of foreign policy. In that respect, Title III of the SEA is the threshold leading from what has hitherto been essentially an economic Community to what will now also be a political Community.

In the case of Ireland, it is proposed that this transformation be effected not by any amendment of the Constitution, nor by any statutory change in the domestic law, but by simply depositing an instrument of ratification of the SEA. The fundamental and far-reaching changes in the conduct of the State's foreign policy to which I have referred would thus be effected by the Government, without reference to the people and without an Act of parliament. Counsel for the Government has sought to justify this approach by submitting that, because Article 29, s. 4, sub-s. 1 of the Constitution has committed the conduct of foreign policy to the Government, the Courts are not entitled to control the Government in the way it decides to conduct foreign policy. It is therefore contended that the plaintiff's claim is ill-founded.

I am unable to accept the submission that the powers of Government in the conduct of foreign policy are not amenable to control by the Courts. It is true that Article 29, s. 4, sub-s. 1 of the Constitution provides that "the executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government." However, when one turns to Article 28 one finds that s. 2 of that Article clarifies the position by declaring 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." (Emphasis added). It follows, therefore, that in the conduct of the State's external relations, as in the exercise of the executive power in other respects, the Government is not immune from judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution. Such control is necessary to give effect to the limiting words "subject to the provisions of this Constitution."

In testing the constitutional validity of the proposed ratification of the SEA (insofar as it contains Title III) it is important to note that the Constitution at the very outset declares as follows in Article 1:-

> "The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right...to determine its relations with other nations...in accordance with its own genius and

traditions."

It appears to me that this affirmation means that the State's right to conduct its external relations is part of what is inalienable and indefeasible in what is described in Article 5 as "a sovereign, independent, democratic State." It follows, in my view, that any attempt by the Government to make a binding commitment to alienate in whole or in part to other states the conduct of foreign relations would be inconsistent with the Government's duty to conduct those relations in accordance with the Constitution.

The ultimate source and limits of the Government's powers in the conduct of foreign relations are to be found in Article 6, s. 1 of the Constitution: -

> "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."

It follows that the common good of the Irish people is the ultimate standard by which the constitutional validity of the conduct of foreign affairs by the Government is to be judged. In this and in a number of other respects throughout the Constitution the central position of the common good of the Irish people is stressed as one of the most fundamental characteristics of Ireland as a sovereign, independent, democratic state.

A perusal of Title III of the SEA satisfies me that each ratifying Member State will be bound to surrender part of its sovereignty in .the conduct of foreign relations. That is to happen as part of a process designed to formulate and implement a European foreign policy. The freedom of action of each state is to be curtailed in the interests of the common good of the Member States as a whole. Thus, for example, in regard to Ireland, while under the Constitution the point of reference for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under Title III the point of reference is required to be the common position determined by Member States. It is to be said that such a common position cannot be reached without Ireland's consent, but Title III is not framed in a manner which would allow Ireland to refuse to reach a common position on the ground of its obligations under the Irish Constitution. There is no provision in the Treaty for a derogation by Ireland where its constitutional obligations so require. On the contrary, Title III expressly provides:-

> "In adopting its positions and in its national measures [which presumably would include Acts of the Oireachtas] each High Contracting Party shall take full account of the positions of the other partners and shall give due consideration to the desirability of adopting and implementing common European positions."

Thus, if the other Member States were to take up a common position on an issue of external relations, Ireland, in adopting its own position and in its national measures, would be bound by Title III to "take full account" of the common position of the other Member States. To be bound by a solemn international treaty to act thus is, in my opinion, inconsistent with the obligation of the Government to conduct its foreign relations according to the common good of the Irish people. In this and in other respects Title III amounts to a diminution of Ireland's

sovereignty which is declared in unqualified terms in the Irish Constitution.

It is urged on behalf of the Government that the changes in existing inter-state relations effected by Title III are slight, that it does little more than formalise existing practices and procedures by converting them into binding obligations. This, I fear, is to underestimate the true nature in international law of a treaty as distinct from a mere practice or procedure, and to misinterpret the commitments for the future involved in Title III. As a treaty, Title III is not designed in static terms. It not alone envisages changes in inter-state relations, but also postulates and requires those changes. And the purpose of those changes is to erode national independence in the conduct of external relations in the interests of European political cohesion in foreign relations. As I have pointed out, the treaty marks the transformation of the European Communities from an organisation which has so far been essentially economic to one that is to be political also. It goes beyond existing arrangements and practices, in that it establishes within the framework of the Communities new institutions and offices (such as European Political Cooperation, the Political Director and the Political Committee) and charts a route of co-ordination, by means such as working parties, a secretariat and regular meetings, so as to give impetus to the drive for European unity.

All this means that if Ireland were to ratify the Treaty it would be bound in international law to engage actively in a programme which would trench progressively on Ireland's independence and sovereignty in the conduct of foreign relations. Ireland would therefore become bound to act in a way that would be inconsistent with the Constitution. The Government's constitutional mandate requires it to act in accordance with the Constitution. In proposing to ratify this treaty it is in effect seeking to evade that obligation and to substitute for it an obligation, or a series of obligations, in international law which cannot be reconciled with the constitutional obligations.

There is, of course, nothing in the Constitution to prevent the Government, or any person or group or institution, from advocating or campaigning for or otherwise working for a change in the Constitution. Likewise there does not appear to be any constitutional bar to a non-binding arrangement by the State to consult with other states in the conduct of its foreign policy. It is quite a different matter when, as here, it is proposed that the State be bound by an international treaty which requires the State to act in the sphere of foreign relations in a manner which would be inconsistent with constitutional requirements. What would be an imperative under international law would be proscribed under the Constitution. In such circumstances it is the Constitution that must prevail.

For the foregoing reasons I am of the opinion that, without the appropriate constitutional amendment, the ratification of the SEA (insofar as it contains Title III) would be impermissible under the Constitution. I would declare accordingly.

Griffin J.:

I agree with the judgment delivered by the Chief Justice. I should like however to add some observations of my own.

Title III, although included in the Single European Act (SEA), and set out in Article 30 in that Act, is effectively a separate treaty between the twelve countries who are the Member States of the European Communities. They are referred to throughout that Title as the High Contracting Parties ("the parties"), the designation usually applied to states in international treaties. The long term aim and objective of Title III is the formation of a European union. It is not in issue that if the State were to join such a union, a constitutional amendment would be necessary, but a European union is neither sought to be created nor is it created by the Treaty.

There has been European Political Cooperation (EPC) since October, 1970, (prior to the entry of the State to the Communities), when the first report of the Foreign Ministers of the Members States was adopted at Luxembourg. In that report the governments undertook to co-operate in the field of foreign policy by consulting regularly, harmonising views and opinions, concerting attitudes, and, where possible, undertaking joint action. There were three subsequent reports in 1973, 1981 and 1983, and Article I of the SEA provided that political co-operation should be governed by Title III and that the provisions of that Title should confirm and supplement the *procedures* agreed in the four reports and the *practices* gradually established among the Member States. The purpose of Title III - which is entitled "Treaty Provisions on European Cooperation in the sphere of foreign policy" - appears to be to formalise the procedures and practices of the EPC and to do so by means of a treaty. By virtue of Article 32 of the SEA, nothing in Title III is to affect the Treaties establishing the Communities, so it does not purport to amend the Treaties in any way.

Details or summaries of the provisions of Article 30 have been included in the judgments already delivered and I go not propose to repeat them, although I will refer to some of those provisions. The language used in Article 30 would appear to have been chosen with extreme care to ensure that the obligations of the parties under the treaty would permit the utmost freedom of action to each of the parties in the sphere of foreign policy, and is in stark contrast to that used in Title II. For example, the parties are to *endeavour* to formulate and implement a foreign policy; to *inform* and *consult* each other on foreign policy matters; *consultations* are to take place before deciding on their final position; they are to *endeavour to avoid* any action or position which impairs their effectiveness as a cohesive force; they are *as far as possible* to refrain from impeding a consensus; in international institutions and at international conferences they are to *endeavour to adopt* common positions on the subjects covered by the Title, and where not all the parties participate in such institutions or conferences, they are to take full account of positions agreed in EPC. On security, the parties are expressed to be ready to co-ordinate their positions more closely on the political and economic aspects of security - military and defence aspects of security are not included and in my view should accordingly be considered to be excluded. Under clause 6 (c) nothing in Title III is to impede closer co-operation in the field of security between certain of the parties within the framework of the Western European Union or the Atlantic Alliance - this provision would appear clearly to have been inserted to ensure that the declared stand on neutrality and military alliances taken by the State is fully respected, as the State is the only party which is not a member of either alliance, although four other parties are also not members of the Western European Union.

Having regard to the terms in which the provisions of Title III are expressed, I am in complete agreement with the Chief Justice in concluding that those provisions do not impose any obligations to cede any sovereignty or national interest in the field of foreign policy, nor do they

in any way allow a decision of the State on any issue of foreign policy to be overridden or vetoed. The Treaty, being an international agreement to which the State is a party, has been laid before and been approved by Dáil Éireann in compliance with the provisions of Article 29, s. 5, sub-ss. 1 and 2 of the Constitution. The Government is therefore, in my opinion, as the organ of government by which the executive power of the State is to be exercised pursuant to Article 29, s. 4 of the Constitution, entitled to ratify the Treaty without the necessity of an amendment of the Constitution.

However, there remains, as the Chief Justice pointed out in his judgment, an issue of a fundamental nature, i.e., as to whether the Court is entitled, at the instance of the plaintiff, to prevent the Government from ratifying the Treaty. In presenting the argument on behalf of the plaintiff, his counsel Mr. Browne, in relation to Title III, based his right to seek the intervention of this Court to prevent ratification of the Treaty on an apprehension on the part of the plaintiff that Title III would affect the independence of the State in relation to foreign policy, even though, as he put it, the Treaty had not become part of the domestic law of the State under Article 29, section 6. This brings into question the power of the Court to intervene in the acts of the Executive and inevitably to consideration of the separation of powers provided for in the Constitution.

Article 6 of the Constitution reads as follows:-

> "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 effect of this Article has been considered and interpreted in a number of cases, which include *Buckley and Others (Sinn Féin) v. Attorney General* [1950] IR 67 and *Boland v. An Taoiseach* [1974] IR 338. In *Buckley's Case* O'Byrne J. delivered the judgment of the Court and said at p. 81 that the object of Article 6 was:-

> "…to recognise and ordain that, in this State, all powers of government should be exercised in accordance with the well- recognised principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers should not be exercised otherwise. The subsequent articles are designed to carry into effect this distribution of powers."

Under Article 15, s. 2, sub-s. 1 the Oireachtas is the organ of State in which the sole and exclusive power of making laws is vested. Article 15, s. 4, sub-s. 1 provides that the Oireachtas shall not enact any law which is in any respect repugnant to the Constitution or to any provision thereof; and sub-s. 2 of that section provides that every law enacted by the Oireachtas which is in any respect repugnant to the Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid. Under Article 34, s. 1 the judicial power of government can be exercised only by judges duly appointed in the manner provided by the Constitution in courts established by law under the Constitution. The High Court and this Court on appeal from the

High Court are by Article 34, s. 3, sub-s. 2 expressly given jurisdiction to examine the validity of any law enacted under Article 15 which may be challenged as being repugnant to the Constitution or to any provision thereof. If the challenged Act or any provision thereof is found to be invalid by the High Court or by this Court, the Court so finding is bound to declare that the impugned Act or provision thereof is invalid. Those Articles provide the only power given to the Courts by the Constitution to declare invalid legislation enacted by the Oireachtas.

In the case of a Bill referred to this Court by the President, pursuant to Article 26 of the Constitution, for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to the Constitution or to any provision thereof, this Court is by Article 26, s. 2, sub-s. 1 given express power, and has the duty, to consider such question and pronounce its decision on such question. This is the only power given to any Court to consider a Bill which has not yet become law.

In my opinion, the Courts have no power, either express or implied, to interfere with the Oireachtas in the course of the passage of a Bill, and all efforts seeking to prevent by Court interference the introduction or passage of a Bill have failed, the most recent example being the unsuccessful attempt by the plaintiff in this case to prevent the introduction of the European Communities (Amendment) Bill, 1986.

Article 28, s. 2 provides that the executive power of the State shall, subject to the provisions of the Constitution, be exercised by or on the authority of the Government. Under s. 4, sub-s. 1 of Article 28 the Government shall be responsible to Dáil Éireann. Article 29, s. 4, sub-s. 1 provides that the executive power of the State in or in connection with its external relations shall in accordance with Article 28 of the Constitution be exercised by or on the authority of the Government.

No express power is given by the Constitution to the Courts to interfere in any way with the Government in exercising the executive power of the State. However, the Government, and all of its members and the administration in respect of which the members are responsible, are subject to the intervention of the Courts to ensure that in their actions they keep within the bounds of lawful authority. Where such actions infringe or threaten to infringe the rights of individual citizens or persons, the Courts not only have the right to interfere with the executive power but have the constitutional obligation and duty to do so. But that right to interfere arises only where the citizen or person who seeks the assistance of the Courts can show that there has been an actual or threatened invasion or infringement of such rights.

As stated earlier, the executive power of the State in or in connection with its external relations shall, in accordance with Article 28, be exercised by or on behalf of the Government. Under Article 29, s. 5, sub-s. 1 every international agreement to which the State becomes a party shall be laid before Dáil Éireann, and under sub-s. 2 of that section the State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann, Dáil Éireann being the body to which the Government is expressly answerable under Article 28, s. 4, sub-s. 1. The constitutional scheme in respect of international agreements would appear therefore to be that the Government, exercising the executive power, may enter into international agreements, but such agreements must be laid before Dáil Éireann, and if the agreement involves a charge on public funds, the State is not to be

bound by the agreement unless the terms of the agreement have been approved of by Dáil Éireann.

The power of the Court to interfere with the exercise by the Government of the executive power of the State was considered by this Court in *Boland v. An Taoiseach* [1974] IR 338. FitzGerald C.J., having referred to the statement of O'Byrne J. in *Buckley & Others (Sinn Féin) v. Attorney General* [1950] IR 67 and to the separation of the executive, legislative and judicial powers of government in Article 6 of the Constitution, said at p. 362:-

> "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 upon it by the Constitution."

And in the same case, I said at p. 370:-

> "Counsel for the defendants argued that in no circumstances may the Courts interfere with the Government in the exercise of its executive functions. For the purpose of this action it is not necessary to determine this question in the form in which the argument was made, as the defendants need only show that the Courts cannot and should not intervene having regard to the circumstances of the present case. In the event of the Government acting in a manner which is in contravention of some provisions of the constitution, in my view it would be the duty and right of the Courts, as guardians of the Constitution, to intervene when called upon to do so if a complaint of a breach of any of the provisions of the Constitution is substantiated in proceedings brought before the Courts."

I see no reason to resile from what is stated in that passage, which was said in the context of an unqualified submission by counsel for the defendants that it is no part of the function of the judicial organ of the State to interfere with the Government in the exercise by it of the executive power of the State. In that case, in discussions arising out of that submission, members of the Court put to counsel for the defendants the example of a declaration of war by the Government without the assent of Dáil Éireann, in clear breach of the provisions of Article 28, s. 3 of the Constitution, as being a circumstance in which the Court would be bound to intervene to protect a citizen against what would undoubtedly be an invasion of his rights and a justiciable matter. I fully endorse the opinion of the Chief Justice that there is nothing in the provisions of Articles 28 and 29 of the Constitution from which it would be possible to imply any general right in the Courts to interfere with the exercise of the executive power in the sphere or area of external relations, but that in any instance where the exercise of that power constitutes an actual or threatened invasion or breach of the constitutional rights of an individual the Courts must have both the right and the duty to intervene to protect those rights. The decision in *Boland v. An Taoiseach* [1974] IR 338 is in my opinion consistent with that view.

In my judgment, the plaintiff has failed to establish any such invasion or breach of any of his rights resulting from the State being a party to the Treaty the provisions of which are set out in Title III.

I would accordingly dismiss this appeal.

Hederman J.:

I agree with the judgments of Walsh J. and Henchy J. for the reasons given by them. There is little I can usefully add.

It appears to me that the essential point at issue is whether the State can by any act on the part of its various organs of government enter into binding agreements with other states, or groups of states, to subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other states, as distinct from electing from time to time to pursue its own particular policies in union or in concert with other states in their pursuit of their own similar or even identical policies.

The State's organs cannot contract to exercise in a particular procedure their policy-making roles or in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers -not the disposers of them. For the reasons already stated I would allow the appeal.