THE HIGH COURT

[2015 No. 8925P]

BETWEEN

BRIAN MOHAN

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Keane delivered on the 2nd February 2016

Introduction

1. In this action, the plaintiff seeks to challenge the constitutional validity of s. 17 (4B) of the Electoral Act 1997 ("the 1997 Act"), as inserted by s. 42 (c) of the Electoral (Amendment) (Political Funding) Act 2012.

Legislative Background

2. S. 17(4B) is contained in Part III of the 1997 Act. That part of the Act deals with State payments to qualified political parties. S. 16 of the 1997 Act provides that, in order to qualify, a party must be properly registered and its candidates must have obtained not less than two per cent of the total first preference votes cast at the last preceding general election. Under s. 17 (1) and (2), each qualified party that applies receives an annual allocation of funds comprising the euro equivalent of Ir£100,000, together with a further sum in the same proportion to the total fund available as the combined share of the first preference votes obtained by that party's candidates in the preceding general election bears to the total number of first preference votes obtained by the candidates of all qualified parties in that election.

The impugned provision

3. S. 17 (4B) provides:

> "(a) Payments calculated in accordance with this Part shall be reduced by 50 per cent, unless at least 30 per cent of the candidates whose candidatures were authenticated by the qualified party at the preceding general election were women and at least 30 per cent were men.
>
> (b) Paragraph (a) –
>
> > (i) comes into operation on the polling day at the general election held next after section 42 of the Electoral *(Amendment) (Political Funding*) Act 2012 comes into operation and
> >
> > (ii) ceases to have effect on the polling day at the general election held next after the expiration of 7 years from the polling day specified in subparagraph (i).
>
> (c) Payments calculated in accordance with this Part shall be reduced by 50 per cent, unless at least 40 per cent of the candidates whose candidatures were authenticated by the qualified party at the preceding general election were women and at least 40 per cent were men.
>
> (d) Paragraph (c) comes into operation on the day after the day on which paragraph (a) ceases to have effect."

Urgency

4. S. 42 of the Electoral (Amendment) (Political Funding) Act 2012 and, hence, s. 17 (4B) of the 1997 Act came into operation on the 27th September 2012, pursuant to the terms of the Electoral (Amendment) (Political Funding) Act 2012 (Commencement) Order 2012 (S.I. No. 368 of 2012). Accordingly, s. 17 (4B) (a) will apply to State payments made to qualified parties subsequent to the forthcoming general election after the dissolution of the current Dáil. That general election must take place no later than Monday, the 11th April 2016, and may, of course, occur sooner, imparting a specific urgency to the resolution of these proceedings.

The plaintiff's position

5. The plaintiff Brian Mohan, who gave evidence on his own behalf, is a member of the Con Colbert Cumann, or branch, of the Fianna Fáil party ("the party"). That cumann is located in the Dáil Éireann constituency of Dublin Central. The plaintiff is, at present, the Chair of the party's Dublin Central Comhairle Dáil Ceantair ("CDC") or constituency council.

6. In or about the month of July 2015, the party had selected 47 candidates to contest 31 constituencies. 10 of those candidates were women, representing a little over 21% of the total number, as it then stood, of the party's candidates.

7. The plaintiff was duly nominated to contest the party's convention to select a candidate or candidates to contest the impending general election in the Dublin Central constituency.

8. On or about the 18th September 2015, the plaintiff received a letter, dated the 17th September 2015, from the general secretary of the party, confirming that, following consultation with the CDC Officer Board, the party's candidate selection convention had been arranged to take place on the 7th October 2015. The letter continued:

> "Having considered the matter very carefully and consulted with the CDC Officer Board, the National Constituencies Committee ["NCC"] has directed that one candidate only be selected at the convention and that the candidate selected must be a woman.
>
> The following candidates are seeking selection:
>
> • Ms. Mary Fitzpatrick
>
> • Ms. Denise McMorrow

- Mr. Brian Mohan…"

9. On the 7th October 2015, the party's Dublin Central constituency candidate selection convention took place and was conducted in accordance with the foregoing direction or, as the plaintiff described it in his evidence, "diktat" of the party's NCC. The plaintiff was, thus, excluded from participation in the party's candidate selection contest.

10. The plaintiff has not challenged that direction. Fianna Fáil is not party to these proceedings. Instead, the plaintiff now challenges the constitutionality of s. 17 (4B) of the 1997 Act on the basis that the purpose of the direction was to enable the party to meet the candidate gender quota necessary to avoid the 50% reduction in the relevant State funding that the section imposes on any party that fails to do so.

11. The plaintiff was requested to provide particulars of the benefit to him of a declaration that s. 17 (4B) of the 1997 Act is constitutionally invalid. The response furnished on his behalf is that it will enable him to request the party to reconsider its candidate selection process in the Dublin Central constituency; will render him eligible for consideration in that regard; and will prevent the application of a 40% candidate gender quota by the party in respect of any future general election in respect of which the plaintiff may seek the party's nomination.

The plaintiff's claim
12. As I understand the arguments put forth in the pleadings and in the written and oral submissions that have been made on the plaintiff's behalf, it is contended that s. 17 (4B) of the 1997 Act is repugnant to the Constitution of Ireland on the following grounds:

> (a) It offends the principle, enshrined in Article 6 of the Constitution, that all powers of government, including all legislative powers, derive, under God, from the people, whose right it is to designate the rulers of the State.
>
> (b) It contravenes the requirement under Article 16.1.1º of the Constitution that every citizen, without distinction of sex, who has reached the age of twenty-one years, and who is not placed under a disability or incapacity by the Constitution or by law, shall be eligible for membership of Dáil Éireann, and does not fall within the terms of Article 16.7 whereby, subject to the foregoing provisions of that Article, elections for Dáil Éireann shall be regulated in accordance with law.
>
> (c) It breaches the requirement under Article 40 of the Constitution that all citizens shall, as human persons, be held equal before the law and it cannot be saved as a law enacted by the State with due regard to differences of capacity, physical and moral, and of social function.
>
> (d) It breaches the plaintiff's liberty, guaranteed by the State under Article 40.6.1º, to exercise freely his rights to freedom of expression, freedom of association and freedom of assembly, and does not amount to a permissible restriction upon, or regulation, of any of those rights. In particular, it cannot be justified as a law regulating or controlling the exercise of the right of association in the public interest, as expressly permitted under Article 40.6.1º (iii). Insofar as it could be so justified, it offends the requirement of Article 40.6.2º that any such law must contain no political discrimination.

The State's defence
13. The State joins issue with the plaintiff on each of the propositions just summarised and argues that the Constitution confers specific competence on the Oireachtas, under Article 15.2, Article 16.1 and Article 16.7 of the Constitution, to legislate in the manner it has done in enacting s. 17 (4B) of the 1997 Act.

14. Further and as a precursory argument, the State asserts that the plaintiff lacks standing to challenge s. 17 (4B), or is wrongly seeking to rely on third party rights in breach of the *ius tertii* rule in mounting that challenge, or both, so that the proceedings he has brought should be dismissed *in limine*. The kernel of that argument is that the rights that the plaintiff seeks to rely upon, in the circumstances presented, are those of the party (of which he is a member and by which he wishes to be selected as a candidate for election to Dáil Éireann) rather than his own.

Agreed facts
15. I do not believe it is in dispute between the parties that women make up approximately 51% of the population of the State.

16. The plaintiff and defendants have agreed certain facts for the purpose of the present action. Those facts include the following.

17. At present, Dáil Éireann is composed of 139 male TDs and 27 female TDs. In percentage terms, its composition is 83.7% male and 16.3% female.

18. The proportion of the members of Dáil Éireann who are women has never exceeded the current percentage of the whole, that is 16.3%, having fallen as low as 0.7% after both the second election of 1927 and the election of 1932.

Women TDs elected to Dáil Éireann at each general election, 1918 – 1977

Election	Number of TDs	Number of Women TDs Elected	Percentage of Women TDs Elected
1918	105	1	1.0%
1921	128	5	3.9%
1922	128	2	1.6%
1923	153	4	2.6%
1927 (June)	153	4	2.6%
1927 (Sept)	153	1	0.7%
1932	153	1	0.7%
1933	153	3	1.97%
1937	138	1	0.73%

1938	138	1	0.73%
1943	138	3	2.17%
1944	138	4	2.9%
1948	147	5	3.4%
1951	147	5	3.4%
1954	147	5	3.4%
1957	147	4	2.7%
1961	144	4	2.8%
1965	144	5	3.5%
1969	144	3	2.1%
1973	144	4	2.8%
1977	148	6	4.05%

19. In every general election from 1977 onwards, the proportion of women candidates has never exceeded 20% of the total (the high point being 19.8% in the 1997 election).

Women candidates and TDs at general elections, 1977 – 2011

and women TDs in 2015

Election	Candidates			Deputies		
	Total	Women	%	Total	Women	%
1977	376	25*	6.6	148	6	4.1
1981	404	41	10.1	166	11	6.6
1982 (Feb.)	366	35	9.6	166	8	4.8
1982 (Nov.)	365	31	8.5	166	14	8.4
1987	466	65	13.9	166	14	8.4
1989	371	52	14.0	166	13	7.8
1992	482	89	18.5	166	20	12.0
1997	484	96	19.8	166	20	12.0
2002	463	84	18.1	166	22	13.3
2007	470	82	17.4	166	22	13.3
2011	566	86	15.2	166	25	15.1
2015	-	-	-	166	27	16.3

20. The current proportion of Dáil members who are women puts Ireland joint 23rd (with Latvia) out of the EU28 for representation by women in a lower house of parliament.

21. Within the European Union, the average percentage of female representation in parliament is currently 28%. By way of specific examples, it is 36% in Germany; 38% in the Netherlands; 42% in Spain; 44% in Sweden; and 29% in the United Kingdom.

22. Ireland currently ranks joint 86th (with North Korea and the Republic of Korea) out of 140 countries worldwide in terms of percentage representation by women in parliament.

23. Turning to the separate (though, for the purposes of the legislative provision now at issue, linked) topic of the amount of exchequer funding provided to political parties under s. 17 of the 1997 Act, in 2014 (which is, apparently, the most recent year for which records are currently available) the total fund for distribution was €5,456,000. In the order in which the following figures appear in the *Agreed Statement of Facts*, Fianna Fáil received €1,168,000 of that total amount, Fine Gael €2,281,000, Labour €1,287,000, and Sinn Fein €720,000.

The State's evidence

24. The State called Dr Fiona Buckley as an expert witness. Dr Buckley is a lecturer in the Department of Government of University College Cork, who specialises in the study of gender politics, including women's political representation in Ireland. Dr Buckley had prepared a report, which was admitted into evidence and upon which she was examined.

i. under-representation of women in Dáil Éireann

25. In her report and in her evidence, Dr Buckley addressed what she described as the historic and continuing under-representation of women in Irish public life. Dr Buckley cited the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, *Second Report on Women's Participation in Politics*, October 2009, (PRN. A9/1468) ("the Joint Oireachtas Committee Report"), and its conclusion that international research shows that the following five key challenges (known as the "Five Cs") face women throughout the world who seek to enter politics (at para. 2.2. of the Rapporteur Report supported by the Committee):

- *Childcare* – women are more likely to have this responsibility
- *Cash* – women have less access to resources than men
- *Confidence* – women are less likely to go forward for selection
- *Culture* – a gendered culture is prevalent even within left-wing parties

o *Candidate selection procedures* – the processes by which political parties select candidates has been identified as posing a significant obstacle to women's political participation

26. In her report and in her evidence, Dr Buckley described the first four factors just listed as supply factors and the fifth, that of 'candidate selection procedures', as a demand factor.

27. In addressing the issue of political party candidate selection procedures, the Joint Oireachtas Committee Report noted (at para. 2.2.5.) that they have been identified (by Professor Yvonne Galligan; "Women in Politics" in Coakley & Gallagher (Eds.) *Politics in the Republic of Ireland* (Oxon: Routledge, 2005 at p. 279) as the single most important obstacle to women's political representation. Professor Galligan gave evidence to the Committee, stating (at p. 552-3):

> "As we clearly see, this process [the candidate selection process] is not working to bring women forward in any significant numbers. Although all parties have made efforts to attract more women to run, the result is less positive than everyone would wish. Therefore, it is incumbent on us to address closely how the proportion of women candidates can be increased."

28. Although, according to Dr Buckley, the causes of the under-representation of women in Irish public life generally are multifarious, "culture" appears to be a particularly significant one in the context of political party candidate selection. Professor Galligan gave the following evidence to the Joint Oireachtas Committee (at p. 552):

> "Fourth is the issue of culture. In this regard I would like to focus on the culture of political parties rather than on the wider societal culture. As parties are mainly led and run by men, the culture of behaviour and the informally accepted norms of language, views and expressions can mean that parties are uncomfortable places for women to be. Party networks too are often more at the disposal of aspiring men than women, and networks of influence and economic support are important elements in securing a nomination to run and in financing a campaign."

29. Returning to the fifth factor of candidate selection procedures, the Committee in its Report quoted the following statement from the European Commission for Democracy through Law ("the Venice Commission") *Report on the Impact of Electoral Systems on Women's Representation in Politics* (Strasbourg, 16 June 2009) (at p. 19, para. 124):

> "In general, political parties play a prominent role for balancing gender representation in parliament since they nominate the candidates for elections. The nomination process is the most critical one for women's access to parliament."

30. Quoting from an article written by Professor Galligan ("Bringing Women In: Global Strategies for Gender Parity in Political Representation", *U.Md.L.J. Race, Religion, Gender and Class*,Vol. 6; 319 at 332), the Joint Oireachtas Committee noted (at para. 2.2.5) that "candidate selection is aptly described as the 'secret garden' of politics, and this garden is highly male-dominated."

31. The Joint Oireachtas Committee also quoted part of the following passage to the same effect from a published study by Dahlerup and Friedenvall, commissioned by the European Parliament's Committee on Women's Rights and Gender Equality, on *Electoral Gender Quota Systems and their Implementation in Europe* PE 408.309 (September, 2008) (at para. 2.2.5):

> "The selection and nomination process is sometimes called 'the secret garden of nomination'; this refers to the fact that most often voters have very little knowledge of how the candidates they can choose between have emerged. Although voters may be able to choose candidates, they do so only after political parties have limited the options. Thus, parties are the real gatekeepers to public decision-making bodies…."

32. In her report and in her evidence, Dr Buckley referred to a study by McElroy and Marsh entitled "*Candidate gender and voter choice: analysis from a multimember preferential voting system"*, Political Research Quarterly, 2(1), 1-12 (2009) that, according to Dr Buckley, found no evidence to suggest that voters, all else being equal, are biased against women. That proposition appears to find broad support in the figures contained in the table set out in paragraph 19, *supra*, and in the following table compiled by Dr Buckley (based on figures calculated by Claire McGing of Maynooth University):

Table 4: Women candidates and women elected in the 2011 Dáil election

Party	Total number of candidates	Women candidates	Total number of TDs	Women TDs
Fianna Fáil	75	11 (15%)	20	0
Fine Gael	104	16 (15%)	76	11 (15%)
Labour	68	18 (27%)	37	8 (22%)
Sinn Féin	41	8 (20%)	14	2 (14%)
Greens	43	8 (19%)	0	0
United Left Alliance	20	5 (25%)	5	2 (40%)
Independents/Others	215	20 (9%)	15	2 (13%)
Total	566	86 (15%)	166	25 (15%)

33. Dr. Buckley further cited an article by Galligan, Laver and Carney on "*The effect of candidate gender on voting in Ireland"*, Irish Political Studies, 14, 118-122 (1997), as authority for the proposition that, in the 1997 general election, women candidates received fewer votes than men, not because of their sex but because they were less likely to be incumbents.

34. In other words, as I understand this aspect of the evidence, it is Dr Buckley's expert view, supported by the evidence that she cites, that the pinch point or bottle neck in relation to women's under-representation in Dáil Éireann is not at the ballot box (whether in getting women to vote or in getting voters generally to choose women candidates) but earlier in the electoral process at the point where political parties select their candidates. Moreover, as the table at paragraph 19 demonstrates, it is Dr Buckley's view, supported by the available data, that the number of women candidates elected to Dáil Éireann tends to increase broadly in proportion to any increase in the number of women candidates selected to run.

35. It was put to Dr Buckley on behalf of the plaintiff that the figures contained in the same table demonstrate little or no difference in the relationship between the number of women candidates in Dáil elections and the success rate of women candidates in those elections (the success rate having remained pretty constant over time while the number of women candidates has slowly, though

fairly consistently, increased). As I understood Dr Buckley's response to that line of questioning, it was that, while she accepts that the premise put to her is correct, she does not consider that it has any significance for the issue at hand, since the purpose or rationale of the provision under challenge is to increase the number of female parliamentarians in Dáil Éireann, not to increase the success rate of women candidates for election to Dáil Éireann.

ii. legislative gender quotas and political party funding

36. Through Dr Buckley's evidence, the Court's attention was drawn to Recommendation *Rec [2003] 3 of the Committee of Ministers of the Council of Europe* (2003) in which, after a number of recitals, the Committee:

> "Recommends that the governments of member states:
>
> I. commit themselves to promote balanced representation of women and men by recognising publicly that the equal sharing of decision-making power between women and men of different background and ages strengthens and enriches democracy;
>
> II. protect and promote the equal civil and political rights of women and men, including running for office and freedom of association;
>
> III. ensure that women and men can exercise their individual voting rights and, to this end, take all necessary measures to eliminate the practice of family voting;
>
> IV. review their legislation and practice, with the aim of ensuring that the strategies and measures described in this recommendation are applied and implemented;
>
> V. promote and encourage special measures to stimulate and support women's will to participate in political and public decision-making;
>
> VI. consider setting targets linked to a time scale with a view to reaching balanced participation of women and men in political and public decision making.
>
> …
>
> **Appendix**
>
> **to Recommendation Rec (2003) 3**
>
> For the purpose of this recommendation balanced participation of women and men is taken to mean that the representation of either women or men in any decision-making body in political or public life should not fall below 40%.
>
> On this basis, the governments of member states are invited to consider the following measures:
>
> **A. Legislative and Administrative Measures**
>
> Member states should:
>
> 1. consider possible constitutional and/or legislative changes, including positive action measures, which would facilitate a more balanced participation of women and men in political and public decision-making;
>
> …
>
> 3. consider adopting legislative reforms to introduce parity thresholds for candidates in elections at local, regional, national and supra-national levels….;
>
> 4. consider action through the public funding of political parties in order to encourage them to promote gender equality;
>
> …."

37. In 2010, the Parliamentary Assembly of the Council of Europe passed Resolution 1706 (2010) on "*Increasing women's representation in politics through the electoral system",* which states in material part:

> "1. Equal participation of women and men in political life is one of the foundations of democracy and one of the goals of the Council of Europe, reaffirmed by the Organisation's Committee of Ministers as recently as May 2009.
>
> 2. Unfortunately, nearly thirty-five years after the first United Nations Conference on Women in Mexico City, and nearly fifteen years after the fourth in Beijing, women remain grievously under-represented in politics. Women still hold less than 20% of parliamentary seats and ministerial portfolios worldwide, and less than 5% of heads of state are women. This under-representation constitutes a waste of talent, and also weakens democracy and human rights.
>
> …
>
> 4. The attitudes, customs and behaviour described above influence a country's institutional, party and electoral landscapes; but conversely, a change in that landscape can also impact on society's attitudes. Changing the electoral system to one more favourable to women's representation in politics, in particular by adopting gender quotas, can lead to more gender-balanced, and thus more legitimate, political and public decision making….
>
> …

6. The Assembly considers that the lack of equal representation of women and men in political and public decision making is a threat to the legitimacy of democracies and a violation of the basic human right of gender equality, and thus recommends that member states rectify this situation as a priority by:

6.1. associating the gender-equality and anti-discrimination provisions in their constitutions and electoral laws with the necessary exception, allowing positive discrimination measures for the under-represented sex, if they have not done so already, as a precondition recognised by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe;

6.2. fully implementing the recommendations contained in the Committee of Ministers Recommendation Rec (2003) 3, in Parliamentary Assembly Recommendation 1676 (2004) on women's participation in elections and Resolution 1489 (2006) on mechanisms to ensure women's participation in decision making, and in the Congress of Local and Regional Authorities of the Council of Europe's Recommendation 273 (2009) on equal access to local and regional elections, in particular as concerns changing electoral systems and introducing gender quotas;

6.3. reforming their electoral system to one more favourable to women's representation in parliament;

…

6.3.2. in countries with majority or plurality systems, consider introducing the principle of each party choosing a candidate amongst at least one female and one male nominee in each party district, or find other ways of ensuring increased representation of women in politics, such as, for example, applying innovative mandatory gender quotas within political parties, or "all-women shortlists" or "twinned" constituencies, again accompanied by effective sanctions for non-compliance;

…."

38. The State acceded to the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women on the 23rd December 1985. Article 4, paragraph 1 of that Convention provides:

"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

39. In its response to the State's fourth and fifth periodic reports pursuant to Article 18 of the said Convention, the concluding comments of the UN Committee on the Elimination of Discrimination against Women (CEDAW/C/IRL/CO/4-5) (22nd July 2005) included the following:

"32. While acknowledging that the President, the Deputy Prime Minister and three members of the Cabinet are women, and that women occupy other visible decision-making positions, including three Supreme Court judges, the President of the District Court, the President of the Law Reform Commission and the Ombudsman, the Committee is concerned at the significant underrepresentation of women in elected political structures, particularly the Oireachtas….

33. The Committee encourages the State party to take sustained measures to increase the representation of women in elected bodies, including temporary special measures in accordance with Article 4, paragraph 1, of the Convention and the Committee's general recommendation 25 on temporary special measures. It recommends that research be carried out under the aegis of a parliamentary committee into the root causes of the lack of progress in the area."

40. The Venice Commission, *Report on the Impact of Electoral Systems on Women's Representation in Politics* (Strasbourg, 16 June 2009), to which reference has already been made, includes the following observation (at p. 13, para. 84):

"Introducing electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation…. In recent years, an impressive number of countries have introduced quota regulations worldwide. There are almost 50 states with legal gender quotas or reserved women seats for national parliament. In many more countries political parties apply, additionally or alternatively, voluntary gender quotas."

41. In its 'Conclusions' section, the same report continues (at p. 18):

"115. Electoral gender quotas are highly controversial in some countries. Given the profound under-representation of women, however, quotas should be viewed as compensation for existing obstacles to women's access to parliament. They can help to overcome structural, cultural and political constraints on women's representation.

116. Since legal quotas are mandatory by nature they seem to be preferable to party quotas. However, voluntary quotas can, additionally or alternatively, contribute to an increase of women's representation, too.

117. In order to be effective, gender quotas should provide for at least 30% of women on party lists, while 40% or 50% is preferable."

42. The Joint Oireachtas Committee report, already referred to, addresses electoral gender quotas in the following way (at p. 20, para. 3.2.5):

"**Mandatory Opportunity Measures (electoral gender quotas);** these are laws requiring that a stated percentage of candidates nominated within political parties must be of each gender, backed up by a series of specified penalities. In Ireland new legislation would be required to implement this model…. The rationale for such measures is that they compensate for existing obstacles to women's access to politics, and they are usually introduced on a temporary basis, with a "sunset clause" inbuilt so that once the stated proportion of women is

reached the law lapses. Law providing for these "electoral gender quotas" are now in place across more than 100 states, particularly in Europe and Latin America. More than half of all Latin American states have now introduced such quotas."

43. In the final section of the Joint Oireachtas Committee, headed "Recommendations", the following text appears (at para. 5.2.5) under the sub-heading 'Candidate Selection Procedures':

> "All the recommendations above are important to encourage greater participation by women in politics, but a difficulty still remains for women in getting selected as candidates by political parties at local, national and European level.
>
> Different models for reform of candidate selection procedures have been reviewed.
>
> The model of reserving seats for women in parliament is not used in European countries, and might be problematic under EU gender equality laws.
>
> Although the voluntary political party quotas have been effective in some countries, notably Sweden, they require strong commitment by individual political parties, and generally take many years before results may be seen.
>
> Experience elsewhere in Europe, especially in Belgium and Spain, shows that legislative electoral quotas might be more effective in the Irish political system.
>
> Thus, it is recommended that candidate quota legislation be adopted, modelled on that used in France, Belgium and Spain, to oblige each political party to impose a maximum limit on the proportion of candidates of any one gender selected to run in elections at local, national and European levels.
>
> Such legislation should be introduced on a temporary basis only, and would have an inbuilt "sunset clause" to ensure that, when targets are met, the law will lapse.
>
> The legislation should provide initially, based on the original Belgian model, that no party could have more than two-thirds of their candidates of one gender in the next general election.
>
> The proportion of women required could then be revised upwards for candidate selection procedures in the 2014 local elections.
>
> Although there is no equivalent of a list system in Ireland, and no electoral commission to accept or reject candidate lists as in Belgium, a system of financial penalties should be imposed based on the French model, so that parties that do not achieve the target of at least 33.3% women candidates for the next general election, for example, would receive reduced levels of State funding as a result.
>
> Clearly, such legislation would require support from all of the political parties to ensure that it would be effective. But it is also clear that there is widespread concern about the low levels of women in Irish politics.
>
> Unless effective positive action measures are adopted, Ireland will continue to languish at the bottom of the international league tables for women's representation, and our democracy will remain 'unfinished'."

iii. the nature and scope of the legislative gender quota created by section 17 (4B)

44. In the course of her evidence and in the report that she had prepared for that purpose, Dr Buckley addressed a number of aspects of the candidate gender quota created by s. 17 (4B).

45. A fundamental feature of the legislative framework within which the candidate gender quota created by s. 17 (4B) is to operate is that the Oireachtas has not been in any way prescriptive concerning the manner in which a political party is to achieve compliance with it. Dr Buckley stated that the options available to political parties include, though are not limited to, the following: gender directives (where the party identifies certain constituencies in which the candidate selected must be a woman); all-women shortlists (such as those which, according to Dr Buckley, the British Labour Party has voluntarily applied for almost two decades to half of the House of Commons seats it deems winnable); minimum candidate lists (whereby a political party implements a rule that at least one candidate must be female in any constituency where the party proposes to run more than one candidate); open constituencies (where women candidates are run in some or all of the constituencies where the party has no incumbent TD or its incumbent TD is retiring); or add-on candidates (where a party centrally decides to add a woman candidate to the candidate(s) already selected locally).

46. Dr Buckley made specific reference to a document produced by the Fianna Fáil party in January 2015 described as the Markievicz Commission Report. That document recites that the Markievicz Commission was established by Uachtarán Fianna Fáil Micheál Martin TD at the 75ú Ard Fheis of the party in March 2014 with the purpose of advising how the party might significantly increase female participation within Fianna Fáil and increase the number of female candidates for the party in future national elections. In the report, the key recommendations of the Markievicz Commission are set out as follows (at pp. 5-6):

> "In the context of the forthcoming General Election, the [NCC] should work to field at least one woman candidate in half of the constituencies where the party has no sitting TD and in half of those constituencies where the Party holds one seat and where it wishes to run more than one candidate.
>
> Following on from the 2016 General Election, the Party should work towards selecting at least one woman and one man to contest the election in each constituency (except for constituencies with two incumbent male TDs, or in the future two incumbent male/female TDs).
>
> In giving effect to this framework, the Markievicz Commission recommends that:
>
> • The [NCC] ensures a woman candidate is run in half of the constituencies where the Party has no sitting TD and in half of those constituencies where the Party holds one seat and where it wishes to run more than one candidate.

> • In doing so, the NCC may direct constituencies to select a woman at selection convention.
>
> • To reach the minimum 30% candidate gender threshold, the Party should select between 20 and 27 women candidates depending on the overall number of candidates put forward.
>
> • A structured mentoring programme be put in place to aid the Party in fulfilling the 30% candidate gender quota.
>
> • Candidate workshops begin immediately to encourage, identify and support women who may be successful in seeking the party nomination for the general election."

47. In the context of the plaintiff's contention, addressed at greater length later in this judgment, that the party has acted strictly under the coercive effect of s. 17 (4B) of the 1997 Act in seeking to implement a 30% candidate gender quota in the forthcoming general election, it is interesting to note that, among the measures that the *Markievicz Commission Report* concludes must be put in place to sustain the flow of women candidates over the longer term is a 30% gender quota at local government election level.

48. A second feature of s. 17 (4B) of the 1997 Act to which Dr Buckley drew the Court's attention is that it is gender neutral. The 30% candidate gender quota it creates applies to both genders. Thus the representational interests of each gender receive equal protection or support.

49. A key feature of the provision is that it attempts to provide an effective sanction for non-compliance with the candidate gender quota it creates by reducing by 50% the payment to which a qualified party is otherwise entitled under s. 17 of the 1997 Act. In her report and in her evidence, Dr Buckley referred to this aspect of the provision as a 'sanction' for non-compliance, and under cross-examination freely accepted that in a blog post published on its website by the National Women's Council of Ireland on the 9th August 2013 she had made the following statement:

> "A comparative review of gender quota laws elsewhere indicates that the proposed gender quota law in Ireland will operate one of the most acute and robust sanctions for non-compliance."

50. However, on that point Dr. Buckley did take the opportunity in her evidence to qualify the statement quoted by reiterating the proposition, already noted above, that the provision is not prescriptive concerning the method or means used by any qualified party to achieve compliance with the quota.

51. Elsewhere in her evidence, Dr Buckley noted that the sanction imposed is not criminal in nature. In addition, as I understood the thrust of Dr Buckley's evidence, it was that the sanction, while regulatory in the sense that its very purpose is to create a legal norm intended to shape the conduct of qualified political parties, is not strictly coercive in that it operates directly neither to disqualify nor exclude a qualified party from full participation in the electoral process nor to limit or qualify the level of that participation. In that context, Dr Buckley stated in her report (at p. 14):

> "Sanctions for non-compliance vary in specifics between jurisdictions employing quotas, but in most cases involve either financial consequences (as is the case in Ireland, France and Portugal) or the rejection or non-admittance of candidate lists by independent electoral authorities. The rejection or non-admittance of lists in constituencies where parties fail to comply with quota thresholds is the most severe form of sanction and, in the EU, applies to Belgium, Poland, Slovenia and Spain. By contrast in Ireland, even though the financial penalty is highly encouraging and incentivising of compliance (particularly with the tightening up of private donations in the same legislation), and failure to comply with section 17 (4B) would see an Irish political party lose a significant proportion of State funding for their operations, they can continue to contest general elections as normal." (footnotes omitted)

52. It was put to Dr. Buckley in cross-examination that the sanction under s. 17 (4B) is anomalous in its nature and effect because of the provisions of s. 18 (1) of the 1997 Act, whereby State payments made under s. 17 of the Act are required to be applied to "the general conduct and management of the party's affairs and the lawful pursuit by it of its objectives." S. 18 (1) (a) goes on to list non-exhaustively specific purposes falling within that general description, namely: (i) the general administration of the party; (ii) research, education and training; (iii) policy formulation; and (iv) the co-ordination of the activities of the branches and the members of the party. S. 18 (1) (b) states that permitted payments under s. 17 shall be deemed to include provision in respect of expenditure by the party in relation to the promotion of participation by women and young persons in political activity.

53. As I understand the argument being made on behalf of the plaintiff in this regard, it is that there is an obvious anomaly in the State purporting to withhold a portion of the funding that it makes available to political parties for non-electoral purposes (indeed, for purposes that include the promotion of the participation of women in political activity) as a sanction for failure to comply with a measure designed to influence the selection of election candidates by that party with the aim of addressing the under-representation of women in Dáil Éireann.

54. There are three problems with that argument. The first flows from the following observation made by Whelan in his essay "*Changing the Rules of the Political Game*" in *Law and Government: A Tribute to Rory Brady* (Ruane, O'Callaghan and Barniville, Eds.) (Dublin, 2015) (at p. 48):

> "The Act specifically prohibits these monies being spent on elections, although of course in reality the availability of these substantial funds enables parties to divert other finances, such as the proceeds of members' draws or national collections exclusively to electoral activity."

An inevitable corollary of that argument is that a reduction in the State funding available to a political party for general administrative purposes will reduce the amount available to a party from its other finances to apply to electoral activity. Accordingly, the suggestion that the sanction is wrongly targeted appears to me to be one of form rather than substance.

55. The second problem is that, of the various streams of State funding available to political parties and candidates, that comprising payments under section 17 does seem to be the most appropriate one for the Oireachtas to target. As Whelan, *op. cit.,* points out (at pp. 49-50), there are broadly three lines of State funding available to political parties and candidates. The first is that under discussion. The second is the reimbursement of election expenses to election candidates under s. 21 of the 1997 Act. It is difficult to see the utility or fairness in targeting the electoral expenses to which an individual election candidate is otherwise entitled in order to sanction the political party of which he or she is a member for failing to meet an overall gender quota. The third is the 'parliamentary activities allowance' available to the parliamentary leader of a qualifying party under s. 10 of the Ministerial and Parliamentary Offices

Act 1938, as amended. S. 10 (6) of that Act contains an express prohibition on the use of that allowance for, or to recoup, election or poll expenses incurred for the purpose, *inter alia*, of any election held under the Electoral Acts. In addition, it does seem that the parliamentary activities of political parties are closer to the fulcrum of parliamentary democracy than their organisational and branch activities.

56. The third problem is that it is not at all clear how an anomaly of the kind asserted, even if it were found to exist, could render the law that gave rise to it constitutionally invalid on that basis.

57. In her evidence, Dr Buckley addressed another fundamental feature of the gender quota created by s. 17 (4A), which is that it is legislatively prescribed for, rather than voluntarily adopted by, the qualified parties that it affects. While Counsel for the plaintiff suggested to Dr Buckley that either the experience in other countries where voluntary quotas have operated successfully or the significant level of women's representation achieved in the most recent local and European Parliament elections in Ireland in 2014, or both, establish that the imposition of a legislative quota is unnecessary, Dr Buckley did not accept that view.

58. In her report, Dr Buckley acknowledges that voluntary action has been found to work in some European countries, being particularly well-established in the Scandinavian region, but states that there are a number of factors critical to their success in terms of achieving gender balance in parliament (at p. 15):

> "Voluntary quotas rely on strong dedication and political will from party leaders, a party ethos dedicated to gender equality or at least symbolically looking for more women in politics, highly institutionalised party organisations, and wider societal equality values. The [Joint Oirechtas Committee Report] states that all parties must be "fully committed" (p. 25) to voluntary measures to achieve significant change in the short-term. In contrast, the advantage of legislative quotas is that they are a fast-track measure and can be more effective in a shorter time at increasing women's political representation. They also contribute to a more even application of affirmative action across all parties rather than under voluntary systems where variation can exist across political parties."

59. The Joint Oireachtas Committee Report, in addressing voluntary quota measures in other countries, concluded (at p. 25, para. 4.2):

> "In Sweden, the success of these voluntary measures has required a sustained commitment from each political party over a long period of time – three decades. If change is to be brought about within a shorter time frame in Ireland, legislation imposing mandatory measures seems the preferable option."

60. Turning to the experience of voluntary quota measures in Ireland, Dr Buckley stated in her report:

> "Irish political parties have adopted a range of voluntary strategies, in line with their ideological orientation, to address women's political under-representation. For the most part however, strategies have been rhetorical and promotional in nature, and have not resulted in significant gains for women in electoral politics (Buckley, 2013; 341). These mostly 'soft' voluntary targets were adopted by party hierarchies in the late 1990s and 2000s but largely failed to enhance women's Dáil seat-holding, as local battles often won out and party leaders lacked a genuine commitment to change. According to McGing (2015) in the 2011 general election, despite a heightened focus on women's under-representation in politics, only the Labour Party seemed to have implemented a gender-based strategy, and even this proved modest. In light of the poor record in Ireland with regards voluntary approaches, legislative intervention is necessary if significant changes in women's political representation is to be achieved." (footnote omitted)

61. When asked specifically about the excellent level of women's representation achieved in Ireland in the 2014 European Parliament elections, Dr Buckley acknowledged that it was a significant accomplishment but pointed out that in both the European Parliament and local elections of that year, the main political parties had adopted voluntary quotas in anticipation of the legislative quota that is to apply in the forthcoming general election. Dr Buckley also made the point that the major political parties tend to view local and European Parliament elections as 'second order' elections when compared with Dáil elections and, in consequence, are more willing to experiment with candidate selection in the former. In addition, Dr Buckley noted when it was put to her by Counsel for the State that in the 2014 local elections, the two largest parties in the State failed to reach the voluntary gender quota that each had set for itself. Indeed, the *Markievicz Commission Report,* already referred to earlier in this judgment, notes (at p. 5) that "[t]he experience of the local elections in 2014 where Fianna Fáil did not reach its own voluntary quota of running at least 30% female candidates nationally provided further impetus for the establishment of this Commission."

Findings of fact

62. Three propositions of fact form a significant component of the plaintiff's case.

63. The first is that the statutory candidate gender quota under s. 17 (4B) is truly coercive in its effect upon the party because the party cannot continue to function or exist with a 50% reduction in its s. 17 funding.

64. In that regard, in the course of his examination in chief, the plaintiff was asked to comment on the statement contained in the party's *Markievicz Commission Report* (at p. 13) that failure to reach the s. 17 (4B) candidate gender quota at the forthcoming general election "resulting in a loss of 50% of state funding, is not an option for any successful political party representing Irish society in the 21st century." The relevant exchange between the plaintiff and his Counsel was as follows:

> "Q. ….And [Counsel for the State] said that the legislation doesn't put [the party] over a barrel, what have you to say about that statement, that it is not an option, if you lose 50% of your funding it's not an option?
>
> A. Well, as I said, it's over the barrel, it's as if it's turkeys over Christmas. 50% of your funding is gone. The party would – it is impossible to function with 50% of their funding gone if you look at the staffing of the party and everything else like that."

65. As has already been observed, three separate streams of State funding are available to political parties and their candidates, of which s. 17 funding, though no doubt significant, is just one.

66. In adverting to the legislative history of the State funding of political parties, Counsel for the plaintiff suggested that regard should be had to the essay by Whelan entitled "*Changing the Rules of the Political Game*" already cited earlier in this judgment. That essay traces the development of the regulation of political funding and election expenditure from the Ethics in Public Office Act 1995,

through the relevant provisions of the Electoral Act 1997 and the Electoral (Amendment) act 2001, to the Electoral (Amendment) Act 2012. It deals with the introduction of limits on individual and corporate political donations before going on to address the reciprocal arrangements for State funding of politics and electioneering which, Whelan observes, have attracted less attention. It then describes the three lines of State funding to political parties and election candidates that have already been described.

67. In this context, it is important to note that it is, of course, still perfectly permissible for parties to engage in fundraising. As Whelan states (op. cit. p. 48):

> "The size of donation that must be declared has shrunk in various Acts since 1997 but is still relatively high. The threshold at which donations to political parties must be published is now set at €1,500 and the threshold at which donations to individual candidates have to be published is now set at €600.
>
> In reality parties can always circumvent these limitations by diversifying their donor base, staggering donations over the years during a gap between elections or having hitherto corporate donors donate instead in a personal capacity. That said the restrictions posed by these limits and the publication requirements have operated, along with the economic downturn it must be said, to dramatically reduce the level of donations to parties and candidates."

68. Counsel for the plaintiff pointed to the figures released by the Standards in Public Office Commission ("SIPO") for the year 2014, which demonstrate that the party's donation statement disclosed no donation exceeding €1,500 in that period. However, no figures have been provided in respect of the number or aggregate value of donations that the party received which were less than that threshold sum.

69. There is no evidence whatsoever before the Court concerning the minimum level of funding that the party requires for general administration; research, education and training; policy formulation; and the co-ordination of branch and member activities, below which it would be 'impossible' for the party to function. Nor is there any evidence before the Court concerning the extent to which the party might be able to address any future reduction in State funding by, for example, diversifying its donor base.

70. Of course, the reduction in funding contemplated under s. 17 (4B) is, by its very nature, designed to have some unwelcome effect on the finances of a party that fails to meet the candidate gender quota that the provision creates. But no foundation whatsoever was laid for the plaintiff's bare assertion in evidence that the reduction in State funding concerned would render it impossible for the party of which he is a member to function. There is no suggestion that the plaintiff has any direct knowledge of the relevant minimum funding requirements of the party in that regard or of the potential scope of the alternative funding sources available to it. Nor is the plaintiff in a position to offer evidence of his opinion in that regard as an independent expert. The statement of the party's Markievicz Commission that failure to reach the relevant candidate gender quota is not an option for any successful party representing Irish society in the 21st century is far more plausibly a political value statement than an assertion of provable fact or of expert opinion to the effect that any party that fails to reach the quota will be unable to function effectively or will cease to exist.

71. Accordingly, the plaintiff has failed to satisfy me that a 50% reduction in the funding otherwise available to the party under s. 17 of the 1997 Act, would, if applied, make it impossible – or, for that matter, significantly difficult – for the party to continue to function.

72. A second proposition of fact central to the plaintiff's arguments is that the only effective means available to the party to meet the candidate gender quota set out in s. 17 (4B) of the 1997 Act was to exclude the plaintiff (as a male nominee) from the party's Dublin Central candidate selection convention, such that the Court should be satisfied that it is a requirement of s. 17 (4B), rather than the exercise of any discretion by the party's NCC, that resulted in the plaintiff's exclusion from that selection contest.

73. That proposition flies in the face of the evidence before the Court. Dr Buckley identified a number of alternative strategies available to political parties to meet the candidate gender quota; see para. 45 *supra*. The party's own *Markievicz Commission Report* (in section 1.3), acknowledged that there are a number of different means available to the party to meet the candidate gender quota (at p. 13), before recommending that the party adopt a strategy of working to field at least one woman candidate in half of the constituencies where the party has no sitting TD and, to that end, of permitting the party's NCC to direct a constituency to select a woman at selection convention (at p. 15). Thus, if the party did indeed adopt that strategy, it did so in the exercise of its discretion. And if, pursuant to that (or some other) strategy, the party's NCC chose to issue the direction that it did in relation to the Dublin Central constituency as opposed to another constituency or constituencies, that too was done at the discretion of the party and not by reference to any express or implied requirement to that effect imposed by s. 17 (4B) of the 1997 Act.

74. For those reasons, the plaintiff has failed to satisfy me that his exclusion from the Dublin Central candidate selection convention was a requirement imposed on the party by s. 17 (4B) of the 1997 Act rather than a decision made entirely at the discretion of the party.

75. The plaintiff's arguments rely to a notable extent on a third factual proposition, namely that, in the absence of a coercive statutory candidate gender quota, the party would not have sought to implement a candidate gender quota at all and, hence, the party's NCC would not have issued the direction that it did in respect of the Dublin Central candidate selection convention. That proposition is implicit in the plaintiff's assertion (in his replies to particulars) that, if he is granted the order he seeks declaring s. 17 (4B) of the 1997 Act constitutionally invalid, he will become eligible to be freely considered by the party as an additional candidate in the forthcoming general election.

76. Yet, it is common case that the party appeared to welcome the relevant provision upon the introduction of the Bill containing it in the Seanad. According to the *Seanad Éireann Debates* (Vol. 213, No. 3), Senator Averil Power, then a member of the party, stated in the course of the second stage debate on the Bill, on Thursday, 2 February 2012:

> "Like many others, I am a reluctant supporter of quotas. None of us want quotas and I do not think anybody thinks that they represent a good option. However, they are a necessary evil. I appreciate the significant opposition to them outside the House, and there is certainly significant opposition to them in my party. I have received e-mails and correspondence from people who are deeply unhappy about the idea which they see as undemocratic. Equally, I point out that in the history of the State the number of women elected points to the fact that the system is undemocratic and represents a failure of democracy. If the system was perfect, we would not need to tinker with it, but it is fundamentally flawed. The all-party committee came to the conclusion that the experience in other countries showed that the system could not and would not change unless positive measures were put in place. That is why we must support the Bill."

77. It is also common case that, at the Committee Stage of the Bill (*Electoral (Amendment) (Political Funding) Bill 2011*, Committee Debates, Wednesday, 11 July 2012), Deputy Niall Collins stated on behalf of the party:

> "I recognise what the Bill is trying to achieve given that were are not going down the route of having a radical discussion on reform of our electoral system or the working of the Oireachtas. In the absence of this, we will go with it and we want to see more gender balance."

78. The parties agree that no division was called on the enactment of the Bill, from which fact it seems reasonable to infer that the party did not oppose – indeed, supported - the introduction of the provision now at issue. What is more, on behalf of the party at the Committee Stage, Deputy Collins moved an amendment the effect of which, had it been accepted, would have been to extend the application of the relevant candidate gender quota to the following local elections. That amendment was defeated. Nevertheless, as noted earlier, the party adopted a voluntary gender quota of 30% for those local elections in 2014.

79. In the course of his evidence in chief, the plaintiff accepted that all of this had been foreshadowed in a press statement issued by the party on the 15th December 2011 in the following terms:

> "Fianna Fáil has welcomed the publication of gender quota legislation by Environment Minister Phil Hogan and stated its intention to publish an amendment to the Bill providing for the implementation of quotas for the 2014 local elections.
>
> 'While Minister Hogan's legislation will ensure that 30% of candidates are women at the next general election, Fianna Fáil believes it should go further. We will propose that a 30% quota is introduced for the next local elections in 2014. This would make local politics more representative while also increasing the pool of women with experience as public representatives who could run in the next general election. Fianna Fáil intends to ensure that 30% of its candidates at the next local election are female. All parties should do the same.'"

80. In rejecting the proposition that, independent of the requirements of s. 17 (4B), the party supports the imposition of candidate gender quotas, the plaintiff referred, in his evidence in chief, to his recollection that, at the party's 2012 Ard Fheis, two separate motions endorsing the introduction of such quotas were voted down by the delegates. In argument on the plaintiff's behalf, it was submitted that the Court should adopt the view that, under the party's internal constitutional structures or arrangements (of which there was no evidence whatsoever before the Court), these votes of the party's delegates at its Ard Fheis trump any statement made, or position adopted, by the parliamentary party, the party leader or the party's NCC. In the absence of the appropriate evidence to that effect, I cannot accept that submission.

81. Accordingly, the plaintiff has failed to satisfy me that, were it not for the provisions of s. 17 (4B) and the funding sanction it contains, the party would not have sought to implement a candidate gender quota for the forthcoming general election and that, in consequence, the party's NCC would not have issued the direction that it did in respect of the Dublin Central candidate selection convention with the result that the plaintiff would have become eligible to be freely considered by the party as its candidate for the Dublin Central constituency.

82. It is particularly striking that the three issues of fact just considered – the effect on the party of a 50% reduction in its s. 17 funding; the extent of the discretion available to the party in deciding whether and, if so, how to implement the s. 17 (4B) candidate gender quota; and the party's position on the adoption of candidate gender quotas apart from the requirements of s. 17 (4B) – are all issues that the party, rather than the plaintiff, is best placed to address.

83. That observation is, in turn, of significant relevance to the issue of the plaintiff's standing to mount a constitutional challenge to s. 17 (4B). I turn to that issue now.

Standing

i. primary rule

84. As is clear from the decision of the Supreme Court (per Henchy J) in *Cahill v Sutton* [1980] IR 269 at 286:

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected by the operation of the statute."

85. The plaintiff in this case cannot assert, on the limited evidence presented, that his rights (whether to stand as a candidate, to equal treatment, or to freedom of expression, assembly or association) have been adversely affected by the operation of s. 17 (4B) because he has failed to establish any, or any sufficient, causal nexus between the direction of the party excluding his nomination from consideration at the relevant candidate selection convention and the operation of that provision.

86. O'Higgins CJ addressed the issue in the following terms in the same case (at p. 276):

> "This Court's jurisdiction, and that of the High Court, to decide questions concerning the validity of laws passed by the Oireachtas is essential to the preservation and proper functioning of the Constitution itself. Without the exercise of such a jurisdiction, the checks and balances of the Constitution would cease to operate and those rights and liberties which are both the heritage and the mark of free men would be endangered. However, the jurisdiction should be exercised for the purpose for which it was conferred – in protection of the Constitution and of the rights and liberties thereby conferred. Where the person who questions the validity of a law can point to no right of his which has been broken, endangered or threatened by reason of the alleged invalidity, then, if nothing more can be advanced, the Courts should not entertain a question so raised."

87. In the present case, the plaintiff points to a number of his rights (already enumerated) which he asserts have been broken, but has failed to establish on the scant evidence he has placed before the Court that the reason for that alleged breach, which is to say the reason for the NCC's directive of the 17th September 2015 in relation to the party's Dublin Central selection convention, was the coercive effect on the party of s. 17 (4B) of the 1997 Act as opposed to the exercise of the party's own discretion in its choice of policy and in its selection of the appropriate means of pursuing that policy.

88. The rationale for the rule is a compelling one. Henchy J described it as follows (at p. 282):

> "It ensures that normally the controversy will rest on facts which are referable primarily or specifically to the challenger, thus giving concreteness and first-hand reality to what might otherwise be an abstract or hypothetical legal argument."

89. And later (at p. 283):

> "To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his case was wrongly or inadequately presented."

90. To concede standing to the plaintiff in the present action, insofar as he seeks to make a case in relation to the party's funding requirements, financial resilience, internal constitutional arrangements and internal and external policy positions, would be to run the grave risk of leaving the party with a well-founded grievance that any case it might wish to make in that regard had been wrongly or inadequately presented.

91. One part of the rationale for the rule of standing is of particular concern on the facts of the present case. Henchy J described it as follows (at p. 284):

> "In particular, the working interrelation that must be presumed to exist between Parliament and the Judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification were ever required for an attack in the Courts on the manner in which the legislature had exercised its law making powers. Without such a qualification, the Courts might be thought to encourage those who have opposed a particular Bill on its way through Parliament to ignore or devalue its elevation into an Act of Parliament by continuing their opposition to it by means of an action to have it invalidated on constitutional grounds. It would be contrary to the spirit of the Constitution if the Courts were to allow those who were opposed to a proposed legislative measure, inside or outside Parliament, to have an unrestricted and unqualified right to move from the political arena to the High Court once a Bill had become an Act. It would not accord with the smooth working of the organs of State established by the Constitution if the enactments of the National Parliament were liable to be thwarted or delayed in their operation by litigation which could be brought on the whim of every or any citizen, whether or not he had a personal interest in the outcome."

92. For the foregoing reasons, I conclude that the plaintiff does not have standing to mount the present action under the primary rule.

ii. grounds for waiver of the primary rule

93. In his judgment in *Cahill v Sutton* (at p. 277), O'Higgins CJ acknowledged the existence of an exceptional category of rare cases, where those whose rights are affected cannot speak for themselves, in which standing might be extended to allow someone to advance the appropriate claim on behalf of those persons. However, this case does not fall into that category. If s. 17 (4B) has had the effect upon the party that the plaintiff contends for, but which he has failed to prove, no impediment has been identified that would prevent the party itself from mounting a challenge to that provision.

94. The judgment of Henchy J in *Cahill v Sutton* makes plain (at p. 285) that the primary rule already described, as a rule of practice, is subject to qualification when the justice of the case so requires. While examples of such qualifications have been given, their scope (and, conversely, the limits of the rule) have not been clearly defined. Instead, the guiding principle is that the primary rule may be waived or relaxed if, in the particular circumstances of a case, the court finds that there are weighty countervailing considerations justifying a departure from it, amounting to a transcendent need to assert against the statute the constitutional provision that has been invoked.

95. In *Cahill v Sutton*, the Supreme Court provided two examples of situations warranting the relaxation or waiver of the primary rule. The first is where, although the challenger lacks the personal standing normally required, those prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights. The second is where, despite the absence of a prejudice or injury peculiar to the challenger, the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest – particularly in cases where, because of the subject matter, it is difficult to segregate those affected from those not affected by the challenged provision.

96. The facts of the present case as I have found them to be are not consistent with the situation posited in either of the two examples given by Henchy J. On those facts, the party is more obviously and directly affected by the prejudice asserted in the operation of the provision impugned than the plaintiff. Similarly, insofar as the party may be considered a grouping that includes the plaintiff (as a member of the party), the plaintiff has failed to satisfy me that the impugned provision is directed at or operable against a group interest or common interest in opposing gender quotas shared between the plaintiff and the party.

97. In seeking to suggest the existence of some other weighty countervailing factor justifying a departure from the primary rule, the plaintiff relies on three decisions, although without extensive analysis. The first is that of the High Court in *McGimpsey v Ireland* [1988] I.R. 56, a case which involved an unsuccessful challenge to the constitutional validity of an international agreement, namely the Anglo-Irish Agreement of 1985. In the plaintiff's written submissions it is stated that Barrington J recognised the standing of the plaintiffs in that case because of the importance of the constitutional issues they had raised, thereby suggesting that that is the test to be applied i.e. whether the plaintiff has raised an important constitutional issue or issues. The relevant portion of the judgment of Barrington J is as follows (at p. 580):

> "The present case is, to say the least, unusual and there is no exact precedent governing it. But it appears to me the plaintiffs are perfectly sincere and serious people who have raised an important constitutional issue which affects them and thousands of others on both sides of the border. Having regard to these factors and having regard to the wording of the preamble to the Constitution and of Articles 2 and 3 it appears to me that it would be inappropriate for this court to refuse to listen to their complaints."

98. It is clear from the foregoing analysis that the decision of Barrington J was based on several factors, including a finding that the plaintiffs in that case were directly affected by the impugned international agreement, thereby bringing them within the primary rule, together with a finding that, even in the absence of a prejudice or injury peculiar to the plaintiffs directly arising from that agreement,

they were part of a grouping, or had a common interest with a grouping, however defined, to which the impugned agreement was directed. Accordingly, I do not accept that the decision provides authority for the proposition that standing should be extended to any plaintiff who raises, or claims to have raised, an important constitutional issue, on the basis of that claim alone.

99. The second decision upon which the plaintiff relies is that in *Crotty v An Taoiseach* [1987] I.R. 713, another case involving a constitutional challenge to those parts of the international agreement known as the Single European Act that were to be enacted into domestic law by the European Communities (Amendment) Act 1986. The Supreme Court (*per* Finlay CJ) dealt with the issue of the plaintiffs standing as follows (at p. 766):

> "The Court is satisfied, in accordance with the principles laid down by the Court in *Cahill v. Sutton* [1980] I.R. 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."

100. As just described, the waiver or relaxation of the primary rule in *Crotty* occurred in the particular circumstances of that case where the impugned legislation was capable of affecting every citizen, thereby bringing it within the second example of an exceptional circumstance warranting such waiver as envisaged by the Supreme Court in *Cahill v Sutton*.

101. In the third decision relied upon by the plaintiff, which is *McKenna v An Taoiseach (No. 2)* [1995] 2 I.R. 10, the Supreme Court affirmed the decision of the High Court that the plaintiff in that case did have *locus standi* to challenge the vote of Ir£500,000 by Dáil Éireann to the Minister for Justice, Equality and Law Reform to be used in support of the campaign for a "Yes" vote in a referendum to remove the constitutional prohibition on divorce.

102. In the High Court, Keane J found that the proceedings clearly fell into a category of cases in which a challenge to the constitutionality of the legislation or other acts was unlikely to emerge if the primary rule in *Cahill v Sutton* was applied, before going on to conclude that it was clear from the observations of Finlay CJ in *Crotty* that a broader approach should be adopted in cases of that nature (at p. 15 of the report). That finding was affirmed in the Supreme Court by Hamilton CJ (at p. 40 of the report)

103. It seems to me to have been a common feature of the three cases just discussed that the plaintiff in each was an individual or citizen in a position broadly equivalent to -and certainly no worse than - that of thousands of other citizens, if not all other citizens, in raising the constitutional issue concerned, and that no other party had emerged or was likely to emerge with standing to raise that issue under the primary rule in *Cahill v Sutton*. The position in the present case is quite different. It is implicit, if not explicit, in both the plaintiff's assertions of fact and his arguments of law that the party (together with every other qualified party) is more fundamentally and directly affected by the impugned provision than he is.

104. In those circumstances, and mindful of the need to avoid the various potential problems that the general application of the primary rule is designed to prevent, I have come to the conclusion that there are no weighty countervailing considerations that would warrant the disapplication of that rule in this case.

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105. In the course of argument, Counsel for the plaintiff pointed to the potential effect of s. 17 (4B) of the 1997 Act on various actors other than the plaintiff or the party of which he is a member to illustrate the argument that the provision might give rise to certain anomalous results. Thus, reference was made to: a party that failed to meet the candidate gender quota but achieved an equivalent or greater quota of TDs actually elected; a party comprised solely of women members, formed for the purpose of the advancement of women's rights; a party that ran women candidates in constituencies where it had little or no support as a cynical exercise in meeting the candidate gender quota; or an embattled party seeking merely to protect the seats that it already holds in the face of a snap election and which will not, in those circumstances, meet the candidate gender quota. The purpose behind the identification of these hypothetical situations was, I must confess, not entirely clear to me, although it may have been done in support of a broader argument that the provision is potentially constitutionally infirm as arbitrary in its effects and, therefore, contrary to the requirements of the doctrine of proportionality.

106. In any event, I am satisfied that to permit the plaintiff to mount an argument in reliance on any such hypothetical situation would be to err contrary to the principle, considered earlier, that to allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. On top of that, it is a notable feature of each of the hypotheticals summarised above that the potential prejudice they apprehend is one to the interests of a qualified political party, lending further weight to the conclusion I have already reached on the question of the plaintiff's standing or, as I have found, his lack of standing in the absence of any prejudice to his own personal interests attributable to the operation of the provision.

Conclusion

107. For the reasons set out above, I have come to the conclusion that the plaintiff has failed to demonstrate that any of his interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of s. 17 (4B) of the 1997 Act and that, in consequence, the plaintiff has failed to establish his standing to bring the present action by operation of the primary rule. Further, I have decided that there is no, or no sufficiently weighty, countervailing consideration that would justify a departure from the primary rule in this case.

108. While, in circumstances of perceived urgency and in contemplation of a possible appeal, it would be tempting, in deference to the extensive arguments put forward on both sides, to offer a provisional view on the constitutional question presented, the decision of the Supreme Court in *Equality Authority v Portmarnock Golf Club* [2010] 1 IR 671 makes it clear that, in accordance with the requirements of the rule of avoidance, it would be wrong to do so.

109. The plaintiff's claim must, accordingly, be dismissed *in limine*.