

## *SYMPOSIUM*

### *UNENUMERATED RIGHTS IN THE IRISH CONSTITUTION: THE DEBATE CONTINUES*

#### UNENUMERATED CONSTITUTIONAL RIGHTS: THE CURRENT PROBLEMATIC POSITION

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The Irish Constitution's fundamental rights provisions are found in Articles 40 to 44. The Irish courts have found that the Constitution guarantees both the rights specified and those unspecified, which have been implied to date by the judiciary. This article questions the legitimacy of the courts' actions in the past with respect to unenumerated rights and advocates a solution to the problem currently at hand: the unstable and dubious situation of such unenumerated rights. To resolve this situation, the article advocates that specific unenumerated rights be enshrined either in statute or in the Constitution. However, while cognisant of the constitutional design and the potential danger of a "runaway" Supreme Court creating or eliminating "rights" on its own whim or on wholly ethereal grounds, the article posits that future circumstances may justifiably provoke and, indeed, necessitate the Supreme Court's development of unenumerated rights, even if they are not spelled out in legislation or endorsed by referendum.

In order to put the current Supreme Court's attitude toward unenumerated rights in context, it is first necessary to review the development of the jurisprudence in this area. Initially, very little litigation was taken before the courts on the question of justiciable rights. This reluctance stems from the earliest case worthy of note, *The State (Ryan) v Lennon*,<sup>1</sup> which established the dominance of the positivist view. Stated another way, there are no constitutional

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<sup>1</sup> *The State (Ryan) v Lennon* [1935] I.R. 370.

rights guaranteed, other than those expressly mentioned. An element of “timidity”<sup>2</sup> characterised the early years of constitutional litigation as the judiciary were accustomed to the common law system. Keane has commented that constitutional jurisprudence was “inhibited” by the fact that the judges “had been, in the main, educated in the English constitutional tradition.”<sup>3</sup>

Judicial reluctance to consider an expansive view was reiterated forcefully in *The State (Burke) v Lennon*<sup>4</sup> by Johnson J. and *The State (Walsh) v Lennon*,<sup>5</sup> where Maguire J. spoke of potential “mischief and inconvenience.” In *Re Article 26 and the Offences against the State (amendment) Bill*,<sup>6</sup> Sullivan C.J. “emphatically rejected”<sup>7</sup> the suggestion that the clause was applicable to particulars and established the court’s view that the rights of individuals concerning the rights of citizens in general lay within the remit of the Oireachtas.

These cases had the ultimate effect of discouraging any judicial investigation of the term “personal rights.” The general consensus at the time was that Article 40.3.1 could not be relied on to assert personal rights. Therefore, the provision received no attention for many years concerning its potential to become a valuable protection.

The natural law view<sup>8</sup> does not consider that Articles 40-44 are an exhaustive enunciation of the rights afforded constitutional protection, but espouses that unspecified rights inhere in natural law or are otherwise intrinsic in the Irish citizen due to the nature of the state. The many varying interpretations of natural law have caused problems in the development of Irish jurisprudence concerning fundamental rights. Criticism concentrates on inconsistency and a lack

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<sup>2</sup> Hamilton, “Remark: Matters of Life and Death,” 65 *Fordham Law Review* 543 at 544 (1996-97).

<sup>3</sup> Keane, “Judges as Lawmakers- The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1 at 9.

<sup>4</sup> *The State (Burke) v Lennon* [1940] I.R. 136.

<sup>5</sup> *The State (Walsh) v Lennon* [1942] I.R. 112 at 124.

<sup>6</sup> *Re Article 26 and The Offences Against the State (Amendment) Bill* [1940] I.R. 470.

<sup>7</sup> Hogan, “Unenumerated Personal Rights: Ryan’s Case Re-evaluated” (1990-92) 25-27 *Irish Jurist* 95 at 101.

<sup>8</sup> Kelly, *The Irish Constitution* (Dublin, 3<sup>rd</sup> Ed., 1994) at pp. 677-678.

of judicial objectivity, perhaps explaining the current restrictive stance taken by the Supreme Court on this issue.

In *Ryan v Attorney General*,<sup>9</sup> Justice Kenny introduced the concept of unenumerated rights. The pertinent part of the decision relates to the recognition of the right the plaintiff sought to assert under Article 40.3.1, the right to bodily integrity. Kenny J. found it unnecessary to define the right. He submitted that Article 40.3 guaranteed a right to bodily integrity.

Justice Kenny did not dwell on this “new” right to bodily integrity. He viewed the general guarantee in Article 40 as open to expansion, stipulating that these other personal rights “have to be formulated and defined by the High Court.”<sup>10</sup> He did not define the right to bodily integrity, though he explained briefly the nature and the origin of unenumerated rights. Kenny J. opined that these unspecified rights were of equal utility to those actually specified in ascertaining the constitutionality of legislation and that they “result from the Christian and Democratic nature of the State.”<sup>11</sup> He supported this view by reference to the encyclical letter, “Peace on Earth.”

On appeal, the Supreme Court found Kenny J.’s definition of the right too narrow, but the court agreed that “personal rights” are not exhausted by the enumeration of life, good name and property.

Considering the significant commentary pertaining to this landmark decision, it is evident that there is, in fact, very little criticism of Kenny J.’s use of the natural law view to furnish unspecified rights. The *ad hoc* nature in which they were identified is disapproved of, however, for it set a precedent for future decisions. Kelly refers to the “unfortunate... trackless delta” left behind as the “conceptual banks” burst and liberty and justice became confused without the

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<sup>9</sup> *Ryan v Attorney General* [1965] I.R. 294.

<sup>10</sup> *Ibid.* at 311.

<sup>11</sup> *Ibid.* at 312.

correct judicial analysis.<sup>12</sup> There is value in Kelly's point that Kenny J. did not fully address the issue, therefore, paving the way for future haphazard decisions in the area. The Supreme Court should also be criticised for failing to fully discuss his decision leaving the matter somewhat "up in the air," regarding the heavy emphasis on Catholic teaching and Christianity in the High Court verdict.

Kelly's 1967 publication<sup>13</sup> contends that *Ryan* contains flawed analysis and criticises the extravagant comparison between the Irish legal system, as it was in 1964, with that of the formative period of common law when the judiciary were the true developers of the law. This period ended, however, "scarcely later than 1600."<sup>14</sup> In his judgement, Kenny J. acknowledges the role of the legislature, but seems to assign to them a somewhat "humbler role vis-à-vis the courts" than the Constitution seems to envisage.<sup>15</sup>

How are we to rely on a judiciary so willing to depend upon such unpredictable ideas and sources of inspiration to justify their conclusions? It sets dubious precedent and is of little jurisprudential value.<sup>16</sup>

*Ryan* resulted in the introduction of an element of uncertainty into constitutional litigation, which Kelly describes as "repugnant to the... law itself."<sup>17</sup> Even then, he foresaw the problems that would ensue, along with the beneficial results. He cautioned that rights cannot be inferred without impliedly establishing corresponding obligations or liabilities. Kelly argued that *Ryan* left the Oireachtas in the dark regarding rights it must respect and regretted the departure from the "black and white rules," where legislation is tested on a "background of rules whose

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<sup>12</sup> Kelly, *The Irish Constitution* (Dublin, 3<sup>rd</sup> Ed., 1994) at pp. 755-56.

<sup>13</sup> See generally Kelly, *Fundamental Rights in the Irish Law and Constitution*, (Dublin, 1967).

<sup>14</sup> *Ibid* at 42.

<sup>15</sup> *Ibid*.

<sup>16</sup> Morgan, "Judicial Activism – Too Much of a Good Thing" in Murphy and Twomey (Eds.), *Ireland's Evolving Constitution 1937-1997 Collected Essays* (Oxford, 1998) at p. 107.

<sup>17</sup> *Ibid*.

recognition resides only in the breast of the judges.”<sup>18</sup> Kelly’s predictions have proved prophetic in some respects. Legislation has been examined in some cases on the court’s own criteria of wisdom or policy and it can only be speculated as to where they will draw authority from, particularly which interpretation of natural law they might choose to rely on.

Carey deems Kenny J.’s approach in *Ryan* problematic, describing it as “supertextual” and in excess of the “express jurisdiction of the courts” because it necessitates that the judiciary look beyond the Constitution and may precipitate the judges’ “imposing their own policy preferences.”<sup>19</sup>

Hogan identifies the “loose language of Article 40.3.1” and the “unprincipled expansion of the power of judicial review” as the main problems.<sup>20</sup> The existence of the unenumerated rights and their constitutional protection is, without a doubt, beneficial, but development of the doctrine took place in a somewhat unconsidered manner. Hogan refers to McCarthy J., who notes the difficulty the judiciary face in being alert to one another, taking care not to substitute personal preferences for the “perceived need of the people.”<sup>21</sup> Concerning judicial subjectivity, Hogan further criticises Kenny J.’s failure to provide an explanation for his reliance on the “Christian and Democratic nature of the state.” He questions the “practical utility” of such a basis for unenumerated rights.<sup>22</sup> Logic must be applied: how exactly does the right to privacy arise out of a purely Christian background? It doesn’t, and neither do many of the other rights identified. The right to travel and the right of access to the courts are but two examples. The rationale is “vague and subjective.”<sup>23</sup>

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<sup>18</sup> See generally Kelly, *Fundamental Rights in the Irish Law and Constitution*, (Dublin, 1967).

<sup>19</sup> Carey, “Police Targeting and Equality Rights” (2001) 19 *Irish Law Times* 8 at 14.

<sup>20</sup> Hogan, “Unenumerated Personal Rights: Ryan’s Case Re-evaluated” (1990-92) 25-27 *Irish Jurist* 95 at 114.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* at 104-05.

<sup>23</sup> Lesch Bodnik, , “Bringing Ireland Up To Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms,” 26 *Fordham International Law Journal* 396 at 446 (2002-03).

The Constitutional Review Group tracks the academic commentary on this issue. They lament the lack of explanation. They also address the effects of democracy on Article 40.3.1, noting that it is not always “self evident what extra dimension is added by the principle of democracy to the identification of rights.”<sup>24</sup> Democracy in this instance aids the vindication of these rights, but does not really enable their existence because they should be seen as inherent in humanity. Consequently, the validity of Christianity as a test for rights is questionable.<sup>25</sup>

There is evident merit in the views here referred to. It would be preferable that the judiciary should form their determinations without qualification, for they are subject to wide interpretations and applications. This lends uncertainty to those who wish to initiate proceedings and arouses public concern. Kenny J.’s judgment fails to connect the theory it pretends to rely on with the decision it reaches. Where is the connection between democracy, Christianity and bodily integrity? There does not appear to be any immediately apparent association. Would it not be preferable here to rely on the natural law doctrine as founded on our humanity? This wouldn’t offend any person and is a far less controversial, and a far more reliable and justifiable basis for a finding that there is in fact a constitutional right to bodily integrity. Our shared humanity, not religion, is a sustainable basis for the future enunciation of rights.

It is fallacious that Kenny J. chose to refer to the papal encyclical at all, for the values therein bear a remarkable resemblance to those in Article 45, which is not “cognisable” to the courts. If it was his intention to introduce such principles “through the backdoor,” it is a most reprehensible case of the judiciary overstepping their remit. This is an issue the current Supreme Court is fully aware and fearful of. It is not legitimate that Catholic doctrines and teaching be used by the judiciary in today’s Ireland, as society becomes increasingly multid denominational

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<sup>24</sup> Report of the Constitutional Review Group at 251.

<sup>25</sup> *Ibid.*

and role of the Roman Catholic Church diminishes. What will future courts refer to should they “discover” an unenumerated right? Outcry would ensue if there was a judicial reference to a papal encyclical. As a result, Kenny J’s judgement offers little valuable guidance to our current Supreme Court.

The next relevant case, *McGee v Attorney General*,<sup>26</sup> can be seen to have reinforced the main criticisms that already existed in relation to *Ryan*, but brought in a new dimension: inconsistency. The plaintiff alleged that the impugned legislation infringed her right to privacy, to bodily integrity and specifically her right to marital privacy. The Supreme Court ruled there was an unjustified infringement of the plaintiff’s personal right to marital privacy.

The court in *McGee* recognised the elusive nature of natural law<sup>27</sup> and the many possible interpretations. However, the court defined it as “the law of God... governing all the laws of humanity.”<sup>28</sup> Walsh J. writes, in an often quoted passage, that “articles 41, 42 and 43... indicate that justice is placed above the law” and that natural rights are only confirmed by the Constitution, they are not a creation of law.<sup>29</sup> The Constitutional Review Group also recognises the difficulties encountered in determining the content of natural law.<sup>30</sup>

Coffey asks whether expressly establishing some rights as natural law rights has the effect of excluding others from being defined as such. He states that the judiciary must define

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<sup>26</sup> *McGee v Attorney General* [1974] I.R. 284.

<sup>27</sup> *Ibid* at 319.

<sup>28</sup> Lesch Bodnik, “Bringing Ireland Up To Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms,” 26 *Fordham International Law Journal* 396 at 425.

<sup>29</sup> *McGee v Attorney General* [1974] I.R. 284.

<sup>30</sup> Report of the Constitutional Review Group at 250-52.

their role in this respect, by justifying their authority and “special capability to determine the natural law.”<sup>31</sup>

In *Ryan*, the Supreme Court stated it was, in fact, the duty of the courts to infer any rights that are protected, but not expressed. Yet there is no clear guidance as to how such rights will be engendered and the basis of their foundation in natural law. O’Hanlon says that Article 6 and the Preamble identify “unambiguously” the Most Holy Trinity as the “ultimate source” and that “all authority comes from God.”<sup>32</sup> His sectarian view provides little guidance for the Supreme Court in today’s Ireland.

Murphy wrote to berate O’Hanlon’s views, alleging them to be undemocratic. It is widely accepted that the duty of the judiciary is to consider the broader societal morals and to avoid imposing their own ethical prerogatives on society. O’Hanlon is a judge who may deliver subjective moral decisions without consideration of the numerous “inconsistencies”<sup>33</sup> within the Christian tradition.

In *McGee*, Walsh J. acknowledged this problem and argued that it was incorrect for courts to “choose between the differing views.”<sup>34</sup> But later, he says, in a manner entirely at odds with this, “[J]udges must...as best they can from their learning and experience interpret these rights in accordance with their ideas of prudence, justice and charity.”<sup>35</sup> Coffey criticises this particular judicial attitude, specifically addressing O’Hanlon. “O’Hanlon’s claim that the

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<sup>31</sup> Coffey, “Article 28.3.3, The Natural Law and The Judiciary- Three Easy Pieces” (2004) 22 *Irish Law Times* 310 at 312.

<sup>32</sup> O’Hanlon, R.J., “Natural Rights and the Irish Constitution” (1993) *Irish Law Times* 8 at 9.

<sup>33</sup> Murphy, T., “Democracy, Natural Law and the Irish Constitution” (1993) *Irish Law Times* 81.

<sup>34</sup> *McGee v Attorney General* [1974] I.R. 284 at 318.

<sup>35</sup> *Ibid.* at 319

judiciary enjoys special authority is a fallacy” and he asserts that the judiciary are in fact subject to, as an agent of, the law.<sup>36</sup>

The inconsistency of the Supreme Court is evident regarding the manner in which they are happy to rely on authority in one regard, but perhaps not in another. *Ryan* relies on a papal encyclical, while *McGee* directly contravenes Catholic doctrine and, subsequently, *Norris v Attorney General*<sup>37</sup> draws from Catholic teaching. In *Norris*, O’Higgins C.J. refers extensively to Catholic philosophy and to prejudicial fears of homosexuality. He concluded that homosexuality was morally wrong and, therefore, the state was entitled to discourage it. He referred to the state’s right to “discourage conduct which is morally wrong and harmful to a way of life and to values the state wishes to protect.”<sup>38</sup>

This on-off reliance by the courts on Christianity, specifically Catholicism, is disconcerting. It illustrates the judiciary’s unscrupulous will to enforce its own mores on the basis of the lowest common denominator that will justify their decisions. More recently, the Supreme Court has been unwilling to endorse then-prevailing attitudes and it is evident that the current courts have turned their back on this extreme activist approach. Keane C.J. has spoken of the “serious jurisprudential problems” encountered by such “judicial creativity.”<sup>39</sup> The problem is therefore twofold: dubious reasoning and inconsistent reasoning pervade the jurisprudence on unenumerated rights.<sup>40</sup>

Further problems lie in the rocky foundations of unenumerated rights. Having been haphazardly identified against the general, all purpose backdrop of Article 40.3.1, they are

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<sup>36</sup> Coffey, “Article 28.3.3, The Natural Law and The Judiciary- Three Easy Pieces” (2004) 22 *Irish Law Times* 310 at 312.

<sup>37</sup> *Norris v Attorney General* [1984] I.R. 36.

<sup>38</sup> *Ibid* at 65.

<sup>39</sup> Keane, “Judges as Lawmakers- The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1 at 9.

<sup>40</sup> Morgan, “Judicial Activism – Too Much of a Good Thing” in Murphy and Twomey (Eds.), *Ireland’s Evolving Constitution 1937-1997 Collected Essays* (Oxford, 1998) at p. 107.

insecure and could have been better located in a “well-understood, specific right.”<sup>41</sup> The Constitutional Review Group states that many are merely a “more particular example of a more general right.”<sup>42</sup> Henchy J.’s recently cited opinion<sup>43</sup> in *The People v O’Shea*,<sup>44</sup> that “any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions,” further reflects this reality.

It is axiomatic that courts must render explicit what is implicit in any written constitution. However, it is not acceptable for courts to reserve some sense of entitlement to discover new rights that are not only unenumerated in the text, but also not logically necessitated by the text “save by the exercise of hermeneutical somersaults.”<sup>45</sup>

In recent years, the Supreme Court has grown increasingly conservative. It cannot be forgotten that the Supreme Court, in the course of the adjudicatory process, can eliminate an existing unspecified right without a textual basis in the Constitution or a legislative enactment enforcing it. Illuminating the ever-present potential for the evisceration of “non-textual” rights, Keane C.J. recently wrote that he feels unease regarding the “dubious premises” on which unenumerated rights rest and recognises the danger of “unrestrained judicial activism in this area.”<sup>46</sup>

The Constitutional Review Group recommends the relocation of the unenumerated rights by amending the Constitution to expressly mention them within other suitable provisions.<sup>47</sup> The

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<sup>41</sup> Kelly, *The Irish Constitution* (Dublin, 3<sup>rd</sup> Ed., 1994) at p. 756. Kelly is critical on this point, advocating the use of Article 40.3.1 as a “safety net” for rights which cannot be reasonably accommodated against the rights already expressed.

<sup>42</sup> Report of the Constitutional Review Group at 261.

<sup>43</sup> *DPP v MS and Attorney General* [2003] 1 I.R. 606.

<sup>44</sup> *The People v O’Shea* [1982] I.R. 384 at 426.

<sup>45</sup> Casey, G., “Are there Unenumerated Rights in the Irish Constitution?” (2005) 23 *Irish Law Times* 123 at 125.

<sup>46</sup> Keane, “Judges as Lawmakers- The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1 at 14.

<sup>47</sup> Report of the Constitutional Review Group at 263.

solution rests with the legislature, to provide an interim remedy by passing a rights' statute or to investigate an amendment of the constitution.

A recent case that would seem to support this view is *Re Article 26 and the Regulation of Information (Services for Termination of Pregnancies) Bill 1995*.<sup>48</sup> The case represents a “backlash,”<sup>49</sup> as Carey describes it, against the super textual approach and O’Hanlon J.’s strong endorsement of natural law. Indeed, Hamilton C.J. did support a return to the “positivist” approach of constitutional adjudication and Keane is also an advocate of a “step by step” treatment of cases as a more propitious approach to the problems caused by unenumerated rights.<sup>50</sup>

Keane has established that judicial lawmaking has receded in the Supreme Court because “unease persists as to the underlying basis of the decision in Ryan.”<sup>51</sup> In the recent case, *I.O’T v. B*,<sup>52</sup> he stated that “some degree of judicial restraint is called for in identifying new rights of this nature.” This attitude persists in the more recent case of *T.D. v Minister for Education and others*,<sup>53</sup> where Keane addressed the unenumerated rights of children as endorsed by the court in *Ryan v Attorney General*.<sup>54</sup>

For the purposes of this essay, *T.D.* provides an analytical prism for considering the current Supreme Court’s attitude to unenumerated rights. In this case, the court clearly indicates its reluctance to apply that doctrine; it is reacting to a rapid expansion of rights which are highly qualified and often unenforceable, and also provoke considerable academic criticism. The court

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<sup>48</sup> *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] I.R. 1.

<sup>49</sup> Carey, “Police Targeting and Equality Rights” (2001) 19 *Irish Law Times* 8 at 15.

<sup>50</sup> Keane, “Judges as Lawmakers- The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1 at 13.

<sup>51</sup> *Ibid.* at 15.

<sup>52</sup> *I. O’T v B* [1998] 2 I.R. 321, 370.

<sup>53</sup> *T.D. v Minister for Education, Ireland, the Attorney General, the Eastern health board and the Minister for Health and Children* [2001] 4 I.R. 259.

<sup>54</sup> [1965] I.R. 294.

queries “the criteria by which the unenumerated rights are to be identified.”<sup>55</sup> It also notes that the Supreme Court never endorsed the view of Kenny J. that the rights flow from the “Christian and democratic nature of the state”<sup>56</sup> and then questions “[W]hether the formulation adopted by Kenny J. is an altogether satisfactory guide to the identification of such rights is at least debatable.”<sup>57</sup>

The court also asks whether the declaration of rights is the proper function of the courts, rather than the Oireachtas. For many academics, this analysis is untenable.<sup>58</sup> The judiciary have clearly taken note that policy making is the proper remit of the legislature because it is “difficult to square”<sup>59</sup> judicial activism with Article 15.2.1’s declaration that legislative power is solely “invested in the Oireachtas.”

Twomey foresees a future of “positivists and black letter lawyers.”<sup>60</sup> Indeed, with recent cases like *Re Ansbacher (Cayman) Ltd*,<sup>61</sup> which McCracken J. presided over in the High Court, it does appear that the judiciary are taking a much more restrictive and positivist attitude towards the issue of unenumerated rights. In *Ansbacher*, McCracken J. held that the plaintiff’s right to privacy did not justify anonymity in the court proceedings. He was in favour of the “harmonious construction.”

Keane C.J. quoted Henchy J. very recently in *DPP v MS and the Attorney General*<sup>62</sup> reiterating the view that a constitutional right is but a “component in an ensemble of

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<sup>55</sup> *T.D. v Minister for Education, Ireland, the Attorney General, the Eastern health board and the Minister for Health and Children* [2001] 4 I.R. 259 at 281.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Casey and Hogan, *inter alia*, are of this view.

<sup>59</sup> Morgan, “Judicial Activism – Too Much of a Good Thing” in Murphy and Twomey (Eds.), *Ireland’s Evolving Constitution 1937-1997 Collected Essays* (Oxford, 1998) at p. 125.

<sup>60</sup> Twomey, “The Death of Natural Law?” (1995) 13 *Irish Law Times* 270 at 272.

<sup>61</sup> *Re Ansbacher (Cayman) Ltd* [2002] I.R. 517.

<sup>62</sup> *DPP v MS and the Attorney General* [2003] 1 I.R. 606.

interconnected and interacting provisions.”<sup>63</sup> This approach to vindication of constitutional rights can only be described as restrictive, in comparison to the approach taken previously by the judiciary. Rights, in order to be vindicated, must not interfere with any other constitutional provision(s). Other recent cases taken in the Supreme Court which have followed this approach include *Desmond v Moriarty*,<sup>64</sup> where the right to privacy was again qualified in relation to the right to freedom of speech. Similarly, in *Breathnach v Ireland*,<sup>65</sup> Denham J. stressed the importance that rights be qualified so as to lend them a “rational meaning.”

In sum, it is evident from the above analysis that there lies an extreme contrast between the approach of the Supreme Court in the early days of constitutional litigation in the 1960s and 1970s in comparison to that taken by our current Supreme Court in relation to unenumerated rights.

The current view favours a “harmonious” approach and the judiciary have on many occasions called on the “legislative organ of the State to decide the broader issues.”<sup>66</sup> The era of judicial activism and “result oriented constitutional jurisprudence,”<sup>67</sup> as Gerard Hogan describes it, which has been strongly criticised for its unprincipled approach to problems on a very individualistic basis, seems to be over. More recently, it has been widely acknowledged that such an approach is highly unsuited to areas of mass policy.<sup>68</sup> Judicial activism is also criticised for weakening the value of democratically accountable policy.<sup>69</sup> Whyte refers to Henchy J., who wrote in 1962 that if a “judicial decision rejects the divine law...it has not the character of law”

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<sup>63</sup> *Ibid* at 619.

<sup>64</sup> *Desmond v Moriarty* [2004] I.E.S.C. 3 (20 January 2004).

<sup>65</sup> *Breathnach v Ireland and the Attorney General*, Unreported, Supreme Court, 2001.

<sup>66</sup> Hamilton, “Remark: Matters of Life and Death,” 65 *Fordham Law Review* 543 at 559 (1996-97).

<sup>67</sup> Coulter, “Hogan Criticises Attorney General’s Model for European Rights,” *The Irish Times*, 16 October 2000.

<sup>68</sup> Gwynn Morgan, “Article on the *Osayande* Immigration Case,” *The Irish Times*, 28 January 2003.

<sup>69</sup> Whyte, “Review Group’s Findings support Role for Courts in Social Change,” *The Irish Times*, 6 January 1996.

bearing in mind the Constitution.<sup>70</sup> However, it is also widely believed that the Constitution, which is written in the present tense, is a current, living document that must adapt with the times and society. As aforementioned, Ireland is now a more multi-denominational society. A more suitable basis for future enumeration of rights founded in the Constitution would be on grounds of our common humanity – in preference to overt judicial references to religious doctrines. Morals and ethics need not be founded on religion. The judiciary should reject the reasoning predicated strictly on Christian – and usually Catholic – doctrine. A far more beneficial, reliable and widely acceptable approach is to rely on the natural law doctrine that looks at our humanity as the basis for unenumerated rights. Such reasoning would be far more relevant in future as the Irish demographic continues to evolve and rests on more solid ground than the outdated justifications based on Christian teaching that have characterised so many decisions in the past. And such reasoning will facilitate further enumeration of rights as cases arise which is necessary for the currency and legitimacy of the Constitution.

It is extremely doubtful as to whether the current Supreme Court will identify a new unenumerated right in the years to come because they remain emphatically unwilling to “usurp what they regard as the role of the legislature.”<sup>71</sup> They are wary of the view that, at times, the natural law is employed as a mere “cloak” for judicial law making.

What is probable is further limitation of the unenumerated rights by the courts, as they balance them in view of other provisions as in the *Desmond* and *Breathnach* cases mentioned previously. Whether this current stance is to be welcomed is of course the issue. It is a fortunate development that the judiciary are more aware of the wider implications of their decisions and their unwillingness to set an unwanted precedent is laudable.

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<sup>70</sup> Whyte, “Natural Law and the Constitution” (1996) 14 *Irish Law Times* 8.

<sup>71</sup> Keane, “Judges as Lawmakers- The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1 at 12.

It is the proper and established role of the legislature to ground our fundamental rights. They must fulfil this role. It is also in the public's interest that ambiguity and uncertainty in relation to the status of unenumerated rights is resolved. This could be achieved by means of statutory provision or constitutional amendment. There are clear advantages to the former strategy in that it would 1) be simpler to achieve, 2) lend clarity and consistency to the exercise of constitutional rights, 3) curtail the courts' ability to unduly curtail the scope of these rights in future and 4) preserve the ability of the courts to enumerate rights founded in the Constitution not expressly identified as yet.

It is suitable for a Constitution written in the present tense to be constantly under scrutiny and development. This facilitates meeting the needs of the citizenry as times and norms change. However, the judiciary must be disposed to undertake this role; otherwise, the jurisprudence will grow stagnant and constitutional litigation ineffective.

There is merit in identifying religion as a key part of the problems outlined. Religion in Ireland, though the majority of the population remains Roman Catholic, is no longer as central to our social identity as a nation either at home or abroad. Consequently, its continuing relevance and the propriety of including religious considerations in policy making are questionable at best. For laws to be legitimate and judicial decisions to remain precedent in the future, it is necessary that the reason and principles behind each be divorced from religion and find their basis in humanity and wider societal morals so as to be acceptable to all. In this new fashion then, natural law can still play a pivotal role in the process – and a more acceptable role at that.

The Supreme Court will undoubtedly have opportunities in the near future to address the status of unenumerated rights whether already identified or now sought. In the absence of intervening legislation or constitutional amendment, this should be their aim: to lend legitimacy

and certainty to existing jurisprudence in this area by identifying humanist, non-religious bases for their enumeration. This will curtail the on-off reliance on different ethos and the *ad hoc*, unprincipled expansion of rights, which continue to provoke critical commentary in this area. As outlined *supra*, however, this would seem unlikely. Legislative intervention would be advantageous in this regard by helping to abandon the “old” approach to unenumerated rights. This would give the judiciary the opportunity to start afresh, on a more sustainable, principled and acceptable basis, and identify an unenumerated right if a case should arise in the future. It is time, as Hamilton has said, “for these questions to be examined afresh” and this task may well fall to the legislature as the current Supreme Court reverts to the positivist outlook.<sup>72</sup>

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<sup>72</sup> Hamilton, “Remark: Matters of Life and Death,” 65 *Fordham Law Review* 543 at 559 (1996-97).

# UNENUMERATED RIGHTS RECONSIDERED

NICOLA DALY

## I. INTRODUCTION

The founding of unenumerated rights ranks among the most significant development of in Irish constitutional law. First recognised in 1965,<sup>73</sup> their inception was greeted with relatively widespread praise. Doolan described the discovery of the doctrine as “paving the way for one of the most innovative features of our Constitutional law.”<sup>74</sup> However, over the years, criticisms have emerged regarding the absence of a consistent basis for their foundation. Yet that is not the sole criticism the present Supreme Court has offered these unwritten personal rights. It appears that the separation of powers and the role of socio-economic rights in the Constitution have also come under strict scrutiny in the consideration of unenumerated rights.

This essay examines the founding of unenumerated rights and their basis in the Irish Constitution, the effect of the separation of powers doctrine and the emergence of socio-economic rights. It also looks at possible solutions to the problems faced by the present Supreme Court and at the future of unenumerated rights. The issue of unenumerated rights is a complex one. Strong arguments can be made both for and against their development, both to date and in future.

## II. DISCOVERY OF UNENUMERATED RIGHTS

Unenumerated rights are those rights which are not expressly contained in the Constitution. The words “in particular” in Article 40.3.2<sup>75</sup> and “personal rights” in Article 40.3.1<sup>76</sup> suggest

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<sup>73</sup> *Ryan v. Attorney General* [1965] I.R. 294.

<sup>74</sup> Brian Doolan, *Constitutional Law & Constitutional Rights in Ireland* (Dublin, 1994) at p. 152.

<sup>75</sup> Article 40.3.1: “The State guarantees in its laws to respect and as far as practicable by its law to defend and vindicate the personal rights of the citizens.”

<sup>76</sup> Article 40.3.2: “The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

that the Constitution does not contain an exhaustive list of rights to be protected and it was on this basis that unenumerated rights were founded. In *Ryan v. Attorney General*,<sup>77</sup> Kenny J. stated that personal rights, which may be invoked to invalidate legislation, are not confined to those specified in Article 40, but flow from the “Christian and Democratic nature of the State” and it was on that basis that the right to bodily integrity was accorded constitutional protection. Kenny J. has since received some criticism for his deliberate choice to rely upon a papal encyclical ironically published during the course of the *Ryan* judgement, rather than on the constitutional text. Since the seminal *Ryan* decision, personal rights as diverse as the right to earn a living,<sup>78</sup> the right to litigate<sup>79</sup> and the right to communicate<sup>80</sup> have been found within Article 40.3. Also diverse is the basis on which judges founded these rights. According to Henchy J. in *McGee v. Attorney General*<sup>81</sup> these rights are “fundamental to the standing of the individual ....in the context of the social order envisaged by the constitution.” Other judges suggest that these rights are natural rights that inhere in the individual by virtue of her personality and also rely on natural law.<sup>82</sup>

The difficulty with natural law is its amorphous definition. Supporters of natural law advocate the view that natural law is superior to all positive or man-made law. However, the term lacks a precise definition. Hogan questions the very use of natural law in the doctrine of unenumerated rights

The nature of extent of it is a matter of considerable dispute indeed this is almost acknowledged by Walsh J. in *Mc Gee v. AG* when he states that the judges must interpret the natural law by reference to their ideas of prudence, justice and

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<sup>77</sup> *Ryan v. AG* [1965] I.R. 294 at 312.

<sup>78</sup> *Cafolla v. O' Malley* [1985] I.R. 486.

<sup>79</sup> *McCauley v. Minister for Posts and Telegraph* [1966] I.R. 345.

<sup>80</sup> *AG. v. Paperlink* [1984] I.L.R.M. 373.

<sup>81</sup> *McGee v. Attorney General* [1974] I.R. 284 at 325.

<sup>82</sup> *Murphy v. PMPA Insurance Co.* [1978] I.L.R.M. 25

charity this is practically tantamount to an open invitation to the judiciary to become later day philosopher kings via the guise of Constitutional adjudication.<sup>83</sup>

The issue then arises as to whether unenumerated rights actually exist in the constitution, i.e., were they intended to be discovered by the drafters of the Constitution and on what basis were they to be founded? Bunreacht na hEireann is modelled in many respects on the United States Constitution. The U.S. Constitution explicitly acknowledges the existence of unenumerated rights. The 9<sup>th</sup> Amendment thereof reads “The enumeration in the Constitution of Certain rights shall not be construed to deny or disparage others retained by the people.”<sup>84</sup> The Irish Constitution has no such express provision.

It is I believe significant that there is no explicit advertence to them in Bunreacht Na hEireann. That advertence together with the lack of textual evidence for such rights.....Constitutes a presumption that pace Mr. Kenny’s judgement and the concurrence of the legal establishment unenumerated rights except when logically necessitated by the Constitutional text are not to be found in Bunreacht na hEireann.<sup>85</sup>

There are many questions left unanswered in the tests used by the judges in the establishment of these rights. The lack of textual basis from which these rights are derived leads to uncertainty and the potential for judicial subjectivity in the identification of rights. The lack of objective criteria in the identification of unenumerated rights is one of the criticisms the present Supreme Court has made. Kelly highlights that uncertainty in the law is “repugnant to the central value of the law itself” and that “the result of the judgement in *Ryan v. AG* is to place the Oireachtas in a position of not knowing just what personal rights it must respect and how far it can go in delimiting them or abridging them.”<sup>86</sup>

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<sup>83</sup> Hogan, “Unenumerated Personal Rights: Ryan’s Case Re-evaluated” (1990-1992) 23 *Irish Jurist* 95 at 110.

<sup>84</sup> United States Constitution, Amendment IX.

<sup>85</sup> Casey, “Are there Unenumerated Rights in the Irish Constitution?” (2005) 23 *Irish Law Times* 123.

<sup>86</sup> Kelly, *Fundamental Rights in the Irish Law and Constitution* (2<sup>nd</sup> Ed., Dublin, 1967) at p. 360.

These sentiments were expressed by Keane J. (prior to his appointment as Chief Justice). “It is sufficient to say that save where such an unenumerated right has been unequivocally established by precedent as for example in the case of the right to travel, the right to privacy, some degree of judicial restraint is called for in identifying new rights of this nature.”<sup>87</sup> He alluded to problems that have been encountered in developing a coherent principled jurisprudence in this area of implied rights.

The present Supreme Court’s concern, if focused on the seeming inconsistency of the jurisprudence in this area, is not without justification. It is important to have a strong, respected judiciary. That can only be maintained if decisions are seen to have been derived from some consistently followed and rationally grounded principles. It appears that “judges are willing to rely on any such approach as will offer adventitious support for a conclusion they have already reach.”<sup>88</sup> Yet it is questionable whether complete consistency is ever achievable in the courts and whether striving to promote such certainty results in more costs than benefits in that fundamental rights that ought to be given protection are deprived of any such acknowledgement. The lack of a clear, consistent basis for founding these rights appears to many observers to be the primary flaw of the unenumerated rights jurisprudence, yet the Supreme Court has not dwelled significantly on this matter. In recent years, it appears that the separation of powers doctrine has come to the forefront as a significant limitation in the development and enforcement of unenumerated rights.

### III. SEPARATION OF POWERS

When the legislative powers are united in the same person or in the same body of magistrates there can be no liberty. Again there is no liberty if the power of judging is not separated from the legislative and executive.<sup>89</sup>

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<sup>87</sup> *I.O’T v. B.* [1998] 2 I.R. 321 at 370.

<sup>88</sup> Kelly, *The Irish Constitution* (3<sup>rd</sup> Ed., Dublin, 1994) at p. 98

<sup>89</sup> Montesquieu, *De l’esprit des loix.*

The doctrine of separation of powers is accorded much respect by the present Supreme Court, so much so that it appears that other constitutional provisions have been neglected. Judicial restraint has been displayed in all areas of law by the present Supreme Court. Accordingly, their manifest unwillingness to ever engage in “judicial activism” has been the subject of much commentary. The Constitution does not impose the doctrine of separation of powers. Article 6, however, does reflect three distinct types of powers: legislative, executive and judicial. Finlay C.J., in *Crotty v. An Taoiseach*,<sup>90</sup> highlights that the:

Separation of powers involves for each of the three constitutional organs not only rights but duties also, not only areas of activities 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.

He goes on to examine the instance in which the court is entitled to intervene in the legislative and executive process. In *Crotty*,<sup>91</sup> Finlay C.J. explicitly lays down the position in which the doctrine of separation of powers applies. He acknowledges that the Supreme Court has a duty to interfere with the activities of the executive in order to protect and to secure the constitutional rights of individuals.

It is evident both through case law (although only stated by many judges *obiter* or *ex judicially*) that the present Supreme Court does not believe it is the role of the judiciary to involve itself in the enforcement and recognition of fundamental rights, especially socio-economic rights.<sup>92</sup>

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<sup>90</sup> *Crotty v. An Taoiseach* [1987] I.L.R.M. 400 at 449.

<sup>91</sup> *Ibid.*

<sup>92</sup> See generally Quinlivan and Keys, “Official Indifference and Persistent Procrastination: An Analysis of *Sinnott*” (2002) 2(2) *Judicial Studies Institute Journal* 163.

Keane C.J. has been perhaps the most vocal Justice in his criticisms of the Court's role in the recognition of fundamental rights. In a recent article,<sup>93</sup> he openly expresses his criticisms, admitting that he shares the unease which has been expressed as to the dubious premise on which the doctrine of unenumerated rights rests and the dangers for democracy of unrestrained judicial activism in this area.

Yet he is not the only Supreme Court judge that has voiced concerns with regard to unenumerated rights. Hardiman J. strongly advocates that judges must respect and always respect the proper prerogatives of the other organs of government. "In the words of Costello J, which I do not apologise for repeating, there are claims which should comply with the constitution be advanced in Leinster House rather than the Four Courts."<sup>94</sup> He continues to elaborate that only a judiciary which sternly avoids political involvement will retain respect over a significant period of time.

The above statement by Costello J. has been reiterated by judges in a number of significantly important subsequent cases; most recently in *Sinnott v. Minister for Education*<sup>95</sup> and *TD v. Minister for Education*.<sup>96</sup> In *Sinnott*, three members of the Supreme Court, Hardiman J., Geoghegan J. and Keane C.J., relied heavily on the decision of Costello J. in *O'Reilly v. Limerick Corporation*.<sup>97</sup>

Clearly, it is a strong endorsement of the position adopted by Costello J. in that decision. Six years after this decision, however, Costello J. stated, in *O'Brien v. Wicklow UDC*,<sup>98</sup> a case factually similar to *O'Reilly*, that:

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<sup>93</sup> Keane, "Judges as Lawmakers: The Irish Experience" (2004) 4(2) *Judicial Studies Institute Journal* 1.

<sup>94</sup> *Sinnott v. Minister for Education* [2001] 4 I.R. 545 at 669.

<sup>95</sup> *Ibid.*

<sup>96</sup> *TD v. Minister for Education* [2001] 4 I.R. 259.

<sup>97</sup> *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181.

<sup>98</sup> *O'Brien v. Wicklow UDC*, High Court, unreported, 1995.

I don't think it necessary to say whether I am now expressing a different view to the one which I expressed in *O'Reilly v. Limerick Corporation*. Even however, if the view which I am now expressing represents a change of views on my part, then I accept that my views have changed.....I accept the argument that the plaintiffs have a constitutional right to bodily integrity which is being infringed by the conditions under which they are living.

In seminal cases, such as *TD*<sup>99</sup> and *Sinnott*,<sup>100</sup> the present Supreme Court relied on the sentiments expressed by Costello J., yet the fact that he has openly expressed his changed opinion since that case was decided somewhat undermines the basis on which the Supreme Court founded these judgements .

The significance of the *O'Reilly*<sup>101</sup> case is also manifest from exploring Costello J.'s analysis of commutative and distributive justice. Keating contends that "the distinction between distributive and commutative justice outlined by Costello J. in *O'Reilly* is the bedrock upon which this conception (separation of powers) has been based."<sup>102</sup> In distinguishing between the two types of justice, Costello J. held that the judicial sphere was commutative whereas the legislative was distributive. Distributive justice essentially involves the allocation of rights, duties and burdens in a community so that equilibrium is achieved.

In administering this function the court would not be administering justice as it does when determining an issue relating to commutative justice abut it would be engaged in an entirely different exercise, namely, adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources. Apart from the fact that members of the judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the Courts, that is on a case by case basis, make them a wholly inappropriate institution for the fulfilment of the suggested role. I cannot construe the Constitution as conferring it on them.<sup>103</sup>

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<sup>99</sup> *TD v. Minister for Education* [2001] 4 I.R. 259.

<sup>100</sup> *Sinnott v. Minister for Education* [2001] 4 I.R. 545.

<sup>101</sup> *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181.

<sup>102</sup> Keating, "The Separation of Powers – The Supreme Court's Approach to Affirmative Duties" (2003) 21 *Irish Law Times* 118.

<sup>103</sup> *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181 at 195.

Hardiman J., in *Sinnott*,<sup>104</sup> referred to the Constitution's mandated separation of powers as a vital constituent of the sovereign independent republican and democratic state envisaged by that document. He states that it is of high constitutional value and not inferior in importance to any other article of the Constitution. The Irish Constitution is, however, riddled with contradictions and it is necessary to strike a balance between any conflicting articles. It appears that Hardiman J. is advocating here the protection of the separation of powers before the protection of fundamental rights, whether express or otherwise.

#### IV. SOCIO-ECONOMIC RIGHTS

The most recent cases have concerned the propriety of the court's intervention in the functions of the legislature and/or executive for their failure to provide adequate services. This involves not just a declaration that the branch of government is in default, but also the issuance of a mandatory order to that effect requiring the implementation of positive action, potentially including the expenditure of money, to remedy the deficiency. *Sinnott*<sup>105</sup> and *TD*<sup>106</sup> are probably the two most prominent examples.

In *TD v. Minister for Education*,<sup>107</sup> Kelly J. had granted mandatory orders to vindicate constitutional rights of children. On appeal to the Supreme Court, the issue of socio-economic rights was addressed. Murphy J. stated that "[W]ith the exception of the provisions dealing with education, the personal rights identified in the Constitution all lie in the civil and political sphere."<sup>108</sup> The debate has now arisen as to whether socio-economic rights other than education can be given constitutional protection. If the Court is willing to recognise implied rights, like the

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<sup>104</sup> *Sinnott v. Minister for Education* [2001] 4 I.R. 545 at 702.

<sup>105</sup> *Sinnott v. Minister for Education* [2001] 4 I.R. 545.

<sup>106</sup> *TD v. Minister for Education* [2001] 4 I.R. 259.

<sup>107</sup> *Ibid.*

rights to communicate, to travel and to privacy, then should such basic rights as adequate shelter when under state care also warrant some form of protection?

The present Supreme Court's judicial restraint and unwillingness to intervene to protect constitutional rights have been subject to widespread criticism. According to Gerry Whyte, "[J]udicial restraint in circumstances involving the rights of vulnerable children would far from respecting the Constitution, through obeying the Separation of Powers arguably amount to an emasculation of the terms of Article 42.5."<sup>109</sup>

The preamble<sup>110</sup> of the Constitution and Article 45.1,<sup>111</sup> which have been used as a basis for founding certain unenumerated rights, refer to dignity of the individual, the attainment of true social order and the Christian virtues of justice and charity. These express references clearly support the argument that a commitment to social justice and social inclusion is an important interpretive principle in forming the Constitution. The pledge by the State in Article 45.4.1 again supports the view that Article 40.3 can protect socio-economic rights promoting social inclusion.

Whyte contends that the corpus of implied rights protected by the Constitution may embrace socio-economic rights necessary for participation by the individual in society.<sup>112</sup> The Constitution endorses values of social solidarity and social inclusion and these values can inform our reading of Article 40.3. Keane C.J. refers to the directive principles of social policy which he himself describes as leaning toward benign capitalism rather than socialism. He cites Article 45: "The application of those principles in the making of laws shall be the care of the Oireachtas

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<sup>109</sup> Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin, 2001) at p. 46.

<sup>110</sup> Preamble: "Seeking to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual may be assured and true social order attained...."

<sup>111</sup> Article 45.1: "The state shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institution of the national life."

<sup>112</sup> Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin, 2001) at p. 43-45.

exclusively and shall not be cognisable by any court under any provision of the Constitution.”<sup>113</sup>

He refers to the language as dated and in some respects at least even anachronistic, yet he then goes on to agree with the Directive stating that the “view of the framers of the Constitution that the enforcement of what has come to be called ‘socio-economic rights’ is the function of the parliament not the courts.”<sup>114</sup> Keane continues that the courts will not usurp what they regard as the role of the legislature and the executive in determining priorities in the allocation of national resources or in supervising the expenditure of money for specific social needs.

In *TD v. Minister for Education*,<sup>115</sup> the applicants claimed that they had an unenumerated right “to be placed and maintained in secure residential accommodation so as to ensure as far as practicable, his/her appropriate religious and moral, intellectual physical and social education.”

The applicant’s claim of this right was rejected by the Supreme Court. Keane C.J. cited Finlay J. in reference to the Adoption Bill 1987<sup>116</sup> and stated that Article 42.5 was not to be confined in its reference to the duty of parents towards their children, to the duty of providing education for them, but also the parental duty to cater for the other personal rights of the child.

If the legislature and the executive fail in their duty to preserve fundamental rights of the vulnerable (namely children as case law has transpired) which has clearly occurred in this jurisdiction, then what form of redress is available to these parties, other than to seek redress before the courts? In the absence of adequate legislation, what else can aggrieved parties do other than seek constitutional protection?

Commentators like Whyte do not argue that courts should be the first resort, yet he openly advocates the legitimacy of judicial activism in elaborating the constitutional rights of

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<sup>113</sup> Irish Constitution, Article 45.

<sup>114</sup> Keane, “Judges as Lawmakers: The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1 at 16.

<sup>115</sup> *TD v. Minister for Education* [2001] 4 I.R. 259.

<sup>116</sup> *Adoption (no.2) Bill* [1987] I.R. 663.

marginalised groups in circumstances where the existence of such rights is a necessary condition of ensuring participation in society and where it is apparent that these rights are not being adequately protected by the political process. The courts are willing to recognise certain implied rights on the basis of Article 45, the Christian and democratic nature of the State, human personality and natural law. It is unfair of the judiciary to pick and choose what rights warrant protection on the basis of monetary considerations in an effort to avoid conflict and unpopularity with the present government.<sup>117</sup>

That being said, the difficulty which the current Supreme Court has is not a false one. The Court cannot be seen to evolve into a third house of the Oireachtas. Since the judiciary and the legislature are not willing to tackle or address this problem as to the role of socio-economic rights and the Court's jurisdiction in the area, it appears that the vulnerable and deprived will bear the burden of the State's failure – whether willing or unwilling – to acknowledge its duty towards those most marginalised in Irish society.

The Supreme Court is not an elected body and to involve judges in budgetary and monetary matters would, according to the Constitutional Review Group (CRG), amount to a “distortion of democracy.” The separation of powers doctrine aims to confine each organ to the functions assigned it by the Constitution.<sup>118</sup> To give the judiciary additional power to take on a quasi-legislative role would only blur this doctrine and introduce an imbalance of power into our system.

In *Sinnott*, Hardiman J. expresses the reasons why the courts cannot become involved in social and economic issues.

Firstly to do so would offend the constitutional separation of powers, secondly it would lead the courts into taking of decisions in areas in which they have no

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<sup>117</sup> See generally Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin, 2001).

<sup>118</sup> Report of the Constitutional Review Group (1996) at pp. 245-272

special qualification or experience. Thirdly, it would permit the courts to take such decisions even though they are not and cannot be democratically responsible for them as the legislature and executive are for them, fourthly the evidence based adversarial procedures of the court which are excellent adapted from the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding issues of policy.<sup>119</sup>

The above statement demonstrates clearly the reasons why the courts should not and cannot be involved in budgetary matters barring exceptional circumstances. Whyte's impassioned argument to the contrary is not without merit, but it is extremely difficult to overcome the rational reasons for imposing some limitation on the judicial function crystallised in the foregoing passage.

#### V. POSSIBLE SOLUTIONS

There is undoubtedly a gap between the law and the practical provision of fundamental rights, particularly socio-economic rights. The CRG also had a number of criticisms regarding the development of unenumerated rights. The Christian and democratic nature of the State test developed in *Ryan* was criticised for not being sufficiently rooted in the constitutional text. The CRG concluded that the wording of Article 40.3.1 was "unsatisfactory" because it did not give the courts the requisite guidance for the identification of personal rights. They recommended that 40.3.1 be amended to create an exhaustive list of personal rights, thereby curbing judicial discretion and provoking improved clarity and consistency. The identification of additional personal rights would be confined to those necessarily implicit in the rights expressly listed and personal rights would be extended to all individuals, not just citizens.<sup>120</sup>

Kelly's 1967 excursion on the topic of fundamental rights in Irish law is as relevant today as it was then. He suggested that Article 40 be amended to include an expanded recital of

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<sup>119</sup> *Sinnott v. Minister for Education* [2001] I.R. 545 at 710.

<sup>120</sup> Report of the Constitutional Review Group (1996) at pp. 245-272.

specific personal rights, laying down in each case the standards upon which the Oireachtas may delimit such rights. The forward thinking by Kelly would result in a return to the relatively simple process of testing black and white Constitutional norms.<sup>121</sup>

Experience with the European Convention on Human Rights has shown that this approach advocated by the CRG and Kelly is preferable to that of open-ended subjectivity embodied by *Ryan* and its progeny. The CRG recommendations made in 1996 have, to date, not precipitated any action or change in Article 40.1.3.

The vast majority of recent case law in the area concerns the vindication of rights of vulnerable children. A recent report by the Law Society's Law Reform Committee<sup>122</sup> recommended that Article 41 of the Constitution be amended to include a charter of children's rights. This proposal was previously endorsed by the Kilkenny Incest Investigation report chaired by Catherine McGuinness SC (now a Justice of the Supreme Court)<sup>123</sup> and was recognised as essential by the CRG.<sup>124</sup> In particular, the CRG recommended the inclusion of the "judicially construed unenumerated rights of children in a coherent manner, particularly those rights which are not guaranteed elsewhere and are peculiar to children."<sup>125</sup>

The Committee for Reform recommend that a provision similar to Chapter 2, Section 28 of the South African Constitution be inserted into the Irish Constitution. The South African Constitution includes a statement entitling a child to an array of rights, such as basic nutrition, shelter, basic health care services and social services. The statement also recognises that the best interests of the child are of paramount importance in matters concerning the child. This

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<sup>121</sup> Kelly, *The Irish Constitution* (3<sup>rd</sup> Ed., Dublin) at p. 98

<sup>122</sup> Law Society of Ireland Law Reform Committee: "Right-Based Child Law: A Case for Reform" December 2005 at 17-28.

<sup>123</sup> Kilkenny Incest Investigation Report (Dublin, 1993).

<sup>124</sup> Report of the Constitutional Review Group (Dublin, 1996).

<sup>125</sup> *Ibid.*

recommendation is welcomed as it offers some form of protection to the vulnerable and powerless in society. Although this would mark a positive step, amendment of the Constitution to include such a provision would doubtless prove difficult.

While an express list of rights would reduce uncertainty in the area of unenumerated rights, it is important to acknowledge that any amendment of the Constitution would not automatically render court orders for the provision of services enforceable against the state, largely because of the separation of powers doctrine. This is a fundamental problem with socio-economic rights; even where there is an express acknowledgement (as with education) of a right, its vindication is by no means universally ensured. However, an express list of rights would remove uncertainty, bolster clarity and promote the enforcement and consequential vindication of rights in many instances.

A constitutional amendment is not, therefore, a wholly sufficient solution to the issue of unenumerated rights. It is perhaps time for the legislature to acknowledge that people's rights lie in the social and political sphere and sheer avoidance of whatever issue is invoked cannot continue – legislation of some form is required.

One hopeful related development in the aftermath of *Sinnott*<sup>126</sup> has been the enactment of the Disability Bill, 2005.

## VI. CONCLUSION

To condense the issues discussed *supra*, the following passage from the “founder” of unenumerated rights, Kenny J., is useful: “[T]he exciting feature of (unenumerated rights) is the

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<sup>126</sup> *Sinnott v. Minister for Education* [2001] 4 I.R. 545.

most unusual aspect of the constitution. Judges have become legislators and have the advantage that they do not face the opposition.”<sup>127</sup>

The separation of powers is a doctrine which must be respected. The issuance of mandatory orders directed at ministers is beyond the judiciary’s ambit, save in exceptional circumstances.

It is clear that there will be no expansion of unenumerated rights under the present Supreme Court, nor is there an indication of any plans to amend Article 40.3 and/or Article 40.2 into the near future. Given both the possibility that case law over the past 30 years may have exhausted the potential of the Constitution to engender any further implied rights and the Supreme Court’s commitment to a policy of judicial restraint, it seems unlikely that there will be any significant expansion in the cannon of implied rights. Implementation of the proposal in respect of children, however, would be revolutionary. It is evident though that some form of clarity is required with regard to unenumerated rights. Clarity is needed to ensure that implied rights previously created are protected, that the judiciary is respected and that Irish society’s most vulnerable members are protected.

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<sup>127</sup> Kenny, “The advantages of a constitution incorporating a Bill of Rights” (1979) 30 *Northern Ireland Legal Quarterly* 189 at 195-196.

## THE SEPARATION OF POWERS: A MEANS TO AN END OR AN END IN ITSELF?

MICHELLE DALY

In recent years a litany of cases have come before the courts brought by marginalised groups in Irish society who are forced, due to the failure of the political process to defend their rights, to turn to the courts as a last resort. The rights in question are in the socio-economic sphere. There has been reluctance on the part of the courts, the Supreme Court in particular, to enforce and vindicate these rights for fear of usurping the role of the other branches of government in contravention of the separation of powers doctrine. Their rationale is that compelling the government to carry out its constitutional obligations to these people is to trespass into the domain of the executive (and, in some cases, the legislature), thus breaching the doctrine. In taking this into consideration, it is clear how one could view the doctrine as a means to an end. This essay will address some of these cases and the shortcomings in the judgements. It asks what is to be done to protect these constitutional rights in the face of this judicial reluctance and suggests a way forward.

Former Chief Justice of the Supreme Court of Ireland, Ronan Keane,<sup>128</sup> notes that the development of the common law has been, in the main, the work of judges and not of legislatures. He cites the view of United States Supreme Court Justice Oliver Wendell Holmes that the “life of the law has not been logic, it has been experience.”<sup>129</sup> The idea of judges as lawmakers is not an alien concept. It is, as Justice Holmes opined, at the very heart of the common law. Indeed, Ireland’s constitutional jurisprudence evidences that judges have been prepared to engage in such an activist approach, where they feel it is warranted. In the case of

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<sup>128</sup> Keane, “Judges as Lawmakers: The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1.

<sup>129</sup> Holmes, *The Common Law* (New York, 1991) at p. 1.

*Crotty v An Taoiseach*,<sup>130</sup> Finlay C.J. stated the Supreme Court “had a right and a duty to interfere with the activities of the executive to protect the constitutional rights of individual litigants.”

Such a result-oriented approach is to be commended as it recognises the importance, and indeed the necessity, to vindicate constitutional rights where they have been flouted consistently by the state. This principle was reiterated by Hamilton J. in *DG v Eastern Health Board*,<sup>131</sup> in which he stated that “the courts have the jurisdiction to do all things necessary to vindicate such rights.” This activist approach is also reflected in *The State (Quinn) v Ryan*,<sup>132</sup> where O Dalaigh C.J. noted that the judiciary’s powers of vindication “are as ample as the defence of the Constitution requires.”

In recent years, however, this judicial activism in relation to the doctrine of the separation of powers has been abandoned in favour of a more conservative approach, where the boundaries of each function are strictly adhered to, the ironic point being that this comes at the cost of those whom the doctrine is designed to protect, i.e., the people of Ireland.

In particular, two cases manifest this conservative approach, the first being *TD v Minister for Education and Others*,<sup>133</sup> in which the judiciary sacrificed constitutionally guaranteed rights in favour of a strict compliance with the doctrine of the separation of powers. It is useful at this point to examine the background to the *TD* case. The constitutional right in question had previously been defined by the courts in *F (N) v Minister for Education*.<sup>134</sup> Here, it was upheld that where a child has very special needs which can’t be provided by his parents, the state has a constitutional obligation to make a reasonable effort to cater for these needs under Article 42.5.

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<sup>130</sup> [1987] I.R. 713 at 786.

<sup>131</sup> [1997] 3 I.R. 511.

<sup>132</sup> [1965] I.R. 70 at 122.

<sup>133</sup> [2000] 3 I.R. 66.

<sup>134</sup> [1995] 1 I.R. 409.

The case was adjourned. However, the state did furnish the court with proposals for high support units which it intended to build. Further cases came before the courts and the promised units still had not been built.<sup>135</sup> The courts had given the Minister the opportunity to act expeditiously to build units of high support for at risk children, but no steps had been taken to put matters right. By the date of the *TD* case, the court's patience was waning and it was clear that action needed to be taken. *TD* concerned disturbed children, all with special needs who were asking the court to compel the state to build units of high support to cater for their needs as had been promised by the State in *F (N)*. Kelly J., in the High Court, having become frustrated by "the Gilbertian bureaucratic haggles,"<sup>136</sup> stated the court was trying "to fill the vacuum which exists by reason of the failing of the legislative and the executive."

Accordingly, he granted the mandatory order. Kelly J. outlined the need for such steps to be taken expeditiously if the children concerned were to benefit at all. In addressing the argument that he was intruding onto the domain of the executive (i.e., making policy), he held he was simply enforcing a policy which the executive had already formulated in order to protect and vindicate the rights of the children in question. Kelly J. also stated that such orders be granted only in

Limited circumstances and where absolutely necessary in order for this court to carry out its duties under the Constitution in securing, vindicating and enforcing constitutional rights. Because of the respect which each branch of government is expected to afford to the others one would hope such a situation would not arise.<sup>137</sup>

The case was appealed to and subsequently overturned by the Supreme Court,<sup>138</sup> the court's majority finding that Judge Kelly's order was incompatible with the doctrine of the

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<sup>135</sup> *DB v Minister for Justice* [1999] 1 I.R. 29.

<sup>136</sup> [2000] 3 I.R. 62 at 76.

<sup>137</sup> *Ibid.* at 83.

<sup>138</sup> [2001] 4 I.R. 259.

separation of powers. Keane C.J. disagreed with Kelly J.'s judgment that he wasn't formulating policy, by saying that in effect he was determining the policy the executive had to follow for dealing with particular social issues. He also stated that Kelly J., in making such orders, had "crossed the Rubicon." In the Supreme Court's decision, the judgement of Costello J. in *O'Reilly v Limerick Corporation*<sup>139</sup> was cited with approval. This case concerned members of the travelling community who were residing in caravans on unofficial halting sites in Limerick in considerable deprivation and poverty. They sought a mandatory injunction from the court compelling the corporation to provide them with adequately serviced halting sites, claiming the corporation had a duty to do so under the Housing Act 1966. In *O'Reilly*, Costello J. outlined the distinction between commutative and distributive justice, the aim of the distinction being to determine what is political as opposed to justiciable. The distinction was first a theory of Aristotle. He found commutative justice to be "what is due to the individual from another individual from a relationship arising from their mutual dealings."<sup>140</sup>

Conversely, he held distributive justice to be concerned with the distribution of common goods and burdens. He argued that this is a matter for the government, a political question and that the courts were not the correct forum nor had they the experience to decide matters of distributive justice fairly. Stated simply, he considered distributive matters to be non-justiciable and that to decide on them would infringe on the doctrine of the separation of powers as it stands today. He further noted that, in order to comply with the Constitution, the plaintiffs' claim should "be advanced in Leinster House rather than the Four Courts."<sup>141</sup> It should be noted that to some this distinction is seen as no more than an analytical convenience.<sup>142</sup>

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<sup>139</sup> [1989] I.L.R.M. 181.

<sup>140</sup> *Ibid.* at 194.

<sup>141</sup> *Ibid.* at 195.

<sup>142</sup> See generally Finnis, *Natural Law and Natural Justice* (Oxford, 1980).

Keane C.J. and Hardiman J. applied the above distinction in *TD* and considered the matter to be non-justiciable. The court then went on to outline circumstances when mandatory orders, such as the one granted, would be warranted. It stated that such circumstances should be rare and exceptional, where there was

a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligations to other parties accompanied by bad faith or recklessness.

It is worthwhile to note that, in *O'Reilly*, Costello J. did not consider there to have been a breach of a constitutional right, a fact which wasn't contested in *TD*. It is also submitted that there are political and judicial aspects to any question brought before the courts<sup>143</sup> and that if the courts were to ask "is this a political controversy?" in every case then, more likely than not, the court would find the matter to be non-justiciable. Surely, a flexible approach to the doctrine is required where an express constitutional right has been flouted in such a persistent manner as occurred in *TD*. In setting the bar so high, the Supreme Court has rendered it virtually impossible for individuals to sue the state in this context. It has, in so doing, ignored the precedent set in *Crotty et al.* and concluded the courts have no jurisdiction in this situation.

The second case outlining such a conservative approach to the doctrine is that of *Sinnott v Minister for Education, Ireland and Attorney General*.<sup>144</sup> Jamie Sinnott, at the time of the case, was a 32 year old autistic man who sought to enforce his constitutionally guaranteed right to free primary education.<sup>145</sup> In his 23 years, he had received just three years of meaningful education. Barr J., in the High Court, granted a mandatory order directing the Minister for Education to provide Jamie with free primary education appropriate to his needs for as long as he was capable

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<sup>143</sup> See generally De Blacam, "Children, Constitutional Rights and The Separation of Powers" (2002) 37 *Irish Jurist* 113.

<sup>144</sup> [2001] 2 I.R. 545.

<sup>145</sup> Art. 42.4, Irish Const. "The State shall provide for free primary education...."

of benefiting from it. Barr J. concluded in his judgement, relying on the evidence of experts placed before the court, that, had Jamie received his constitutionally-based entitlements under Article 42.4, it would doubtless have improved his mental capacity and enjoyment of life. He would have been toilet trained, his drooling would have been cured or at least improved, he would have enjoyed increased mobility and possibly have had a greater capacity with language. It was also shown that Jamie's loss could never be fully restored. Barr J. stated Jamie had

suffered substantial personal harm and damage by reason of the breach of the constitutional duty of the State, its servants and agents and its failure to honour its constitutional obligation to provide him with education, training and health care appropriate to his particular situation.<sup>146</sup>

Unsurprisingly, Barr J.'s order was set aside on appeal to the Supreme Court. The court held that primary education was age, and not needs, appropriate, and thus the individual's right to free primary education ceased at 18. As a result, the issue of the separation of powers was moot, although it was addressed by some members of the court. Hardiman J. held the court had no jurisdiction to make such an order, positing that it was an issue for the legislative and executive arms of government and that the High Court was prohibited by virtue of Article 6 and the doctrine of the separation of powers from making such an order. Counsel for the plaintiff made the prescient point, however, that:

The separation of powers between the three branches of government was not pure and its most important feature in the Constitution was the strong role given to the judiciary as guardian of the personal rights recognised therein...In circumstances where the right was one which the executive did not have the competence to grant or withhold, but which was one provided for in the Constitution, the court would be failing to respect the Constitution in failing to vindicate that right in circumstances where findings of fact established such a breach.<sup>147</sup>

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<sup>146</sup> [2001] 2 I.R. 545 at 592.

<sup>147</sup> *Ibid.* at 605.

It is true that the separation of powers doctrine in the Irish Constitution is not pure or absolute. There is no sharp distinction between the three organs of government. As stated in *Abbey Films v Attorney General*<sup>148</sup> by Kenny J., “[T]he framers of the constitution did not adopt a rigid separation between legislative, executive and judicial powers.” It is not a straight division of powers, but a system of checks and balances, pursuant to which one organ of government can act as a restraining influence on the others.

Keane argues<sup>149</sup> that, where a declaration has been made that the legislature or the executive have failed to uphold a constitutional right, the courts are entitled to assume that their decision will be treated with respect. But he argues that it is unacceptable for the courts to “assume the roles specifically assigned under the Constitution to the legislative and executive.”<sup>150</sup> What of a situation, however, where this “respect” has not been extended to the courts decision, as in *TD* and *Sinnott*? In *Sinnott*, the court outlined how the Department of Finance “persistently dragged its feet in recognising and implementing the obligations of the State.”<sup>151</sup> In *TD*, the mandatory order was granted as the State had ignored previous declaratory orders in *DB* and *FN* cases. There is no option left but for the courts to intervene and, as guardians of the Constitution, to ensure the constitutional right in question. However, as a result of the decisions of the Supreme Court in recent cases where inadequate provision is made, the courts either have no role or their role is merely confined to making declarations that rights have been infringed in the hope that the government will respect such declarations.

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<sup>148</sup> [1981] I.R. 158 at 171.

<sup>149</sup> Keane, “Judges as Lawmakers: The Irish Experience” (2004) 4(2) *Judicial Studies Institute Journal* 1 at 16-17.

<sup>150</sup> *Ibid.* at 17.

<sup>151</sup> [2001] 2 I.R. 545 at 575.

The dissenting judgement of Denham J. in *TD v Minister for Education and Others*<sup>152</sup> is to be commended in that it suggests a way forward in situations such as these before the courts.

She states

The separation of powers is an important aspect of the Constitution. However in addition to that doctrine there is the jurisdiction of the courts to protect fundamental rights. This is not only a jurisdiction but a duty and obligation of the courts under the Constitution.

This concept of balancing the doctrine against the role given to the courts under the Constitution is surely the way forward. It is necessary in deciding where this balance lies to look at the purpose which the courts are trying to achieve through their activist approach, i.e., to protect and vindicate the rights of the citizen to which they are constitutionally entitled. Keane warns against the “dangers for democracy” of such an activist approach. But surely the danger for democracy lies in the judiciary’s reluctance to enforce constitutional rights where these have been flouted by the state.

*Sinnott* and *TD* both see doctrine of separation of powers being used as a bar to judicial activism in the field of socio-economic rights. It is in this context that the doctrine may be viewed as a means to an end, in that it is given superiority over vindication of an individual’s constitutional right. As explained by Whyte in his seminal work,<sup>153</sup> the judiciary’s constitutional duty to vindicate personal rights should inform their understanding of the doctrine, rather than, as appears to be the case at present, the doctrine informing the judiciary’s understanding of their power to protect constitutional rights. The following passage from the United States Supreme Court’s decision in the case of *Marbury v Madison* perhaps says it best:<sup>154</sup>

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<sup>152</sup> [2000] 3 I.R. 66 at 289.

<sup>153</sup> See generally Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin, 2002).

<sup>154</sup> 5 U.S. 137 at 163 (1803).

The essence of every civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives injury. One of the first duties of government is to afford him that protection.