

## Ireland

### The Separation of Powers Doctrine vs. Socio-economic Rights?

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#### 1. INTRODUCTION

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The Irish Constitution is the oldest in Europe and predates the international human rights discourses, including those regarding socio-economic rights. Its framers expressly included only one socio-economic right (the right to education) in the document, preferring instead to set out 'the principles for the State to apply towards the promotion of the people as a whole in the socio-economic field'<sup>1</sup> in the form of non-justiciable 'principles of social policy'. In the words of one commentator, while Eamon de Valera,<sup>2</sup> the leading figure in the drafting of the constitution, cleverly genuflected before socio-economic rights, he made sure to insert them in a part of the constitution that is *prima facie* unenforceable.<sup>3</sup>

Despite the lack of provision for a comprehensive range of socio-economic rights under the Irish Constitution, a number of judges have handed down decisions resulting in the direct or indi-

rect protection of socio-economic rights. However, concerns about the implications of adjudication of socio-economic rights for the separation of powers and the involvement of the courts in what have been deemed issues of 'distributive justice' has, in more recent times, resulted in a general reluctance on the part of courts to recognise and give proper effect to such rights.<sup>4</sup>

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#### 2. PROTECTION OF SOCIAL RIGHTS UNDER THE IRISH CONSTITUTION

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##### 2.1 Overview of Relevant Provisions

The Constitution contains a wide range of socio-economic, rights-related provisions of both a justiciable and non-justiciable nature. Article 42 provides that:

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty

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<sup>1</sup> Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996), p. 391 ('CRG').

<sup>2</sup> The Constitution was primarily the work of Eamon de Valera, President of the Executive Council of the Irish Free State, who oversaw, and was heavily involved in, its drafting.

<sup>3</sup> G. Quinn, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order', in C. Costello (ed.), *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Dublin: Trinity College, 2001), pp. 35–54, at 49.

<sup>4</sup> There is also a range of statutory socio-economic rights provided for under Irish law. However, this chapter focuses primarily on those socio-economic rights that arise under the Constitution. Furthermore, while there is no doubt that the supremacy of EU law over constitutional law may have future implications for Irish constitutional law on socio-economic rights, the (thus far negligible) impact of EU law on constitutional socio-economic rights jurisprudence is not dealt with in this chapter.

towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

The duty set out in the latter sub-section necessarily has a corresponding right, which can be used as the basis of a claim against the State.

Many of the socio-economic rights accorded under the Irish constitution are 'unenumerated' personal rights, which are primarily guaranteed under article 40.3.1 of the Constitution. This provision states that: '[t]he State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen' [emphasis added]. It is clear that this article imposes a duty on the State to take positive action in appropriate circumstances.<sup>5</sup> In *Ryan v. The Attorney General*, Justice Kenny in the High Court held that the 'personal rights' mentioned in article 40.3.1 are not exhausted by the rights to 'life, person, good name and property rights' expressly enumerated in the following section 40.3.2,<sup>6</sup> a position confirmed by the Supreme Court in the same case.<sup>7</sup> Court-identified, unenumerated (i.e. unwritten) socio-economic rights under article 40.3.1 include various rights of the child,<sup>8</sup> the right to bodily integrity,<sup>9</sup> including the right not to have health endangered by the State,<sup>10</sup> and the right to work or to earn a livelihood.<sup>11</sup> The Irish Courts have therefore been prepared to recognise that the Constitution protects unenumerated socio-economic rights, although only the first two of the rights just mentioned have been held to give rise to a positive obligation on the State.

In addition, civil and political rights have the potential to serve as sources of socio-economic rights under the Constitution or to be applied in such a way as to protect socio-economic rights.<sup>12</sup>

Article 45 of the Irish Constitution provides that:

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively and *shall not be cognisable by any Court* under any of the provisions of this Constitution. [Emphasis added]<sup>13</sup>

These principles have clear implications for the enjoyment of socio-economic rights. For example, article 45.2(ii) requires the State to direct its policy towards securing that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good. Meanwhile, in article 45(4)(i), the State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.

I will not discuss these directive principles in any detail, since the primary focus of this chapter is justiciable socio-economic rights under the Irish Constitution.<sup>14</sup> It should be noted, however, that article 45 has been used by the Irish courts as an interpretive instrument with regard to, amongst other things, the identification of unenumerated personal rights under article 40.3 of the Constitution. One example is the case of *Murtagh Properties v. Cleary*,<sup>15</sup> in which Justice Kenny in the High Court referred to the directive principle in article 45.2(i) that '[t]he State shall, in particular, direct its policy towards securing (i) That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs'. He held that the parenthesis recognises the right to

<sup>5</sup> G. Whyte, *Social Inclusion and the Legal System – Public Interest Law in Ireland* (Dublin: Institute of Public Administration, 2002), p. 19.

<sup>6</sup> [1965] IR 294, at 312–3 ('*Ryan v. Attorney General*').

<sup>7</sup> *Ibid.* p. 344.

<sup>8</sup> See section 4.5 below.

<sup>9</sup> See *Ryan v. Attorney General* (n. 6 above), p. 313.

<sup>10</sup> See *The State (C) v. Frawley* [1976] IR 365, as discussed in section 4.1. below.

<sup>11</sup> See section 4.2 below.

<sup>12</sup> See section 4.1 below.

<sup>13</sup> The Houses of the Oireachtas - Dáil Éireann and Seanad Éireann – are the Irish houses of parliament.

<sup>14</sup> For more on the content and judicial treatment of Article 45, see G. Whyte and G. Hogan (eds.), *J.M. Kelly: the Irish Constitution*, 4th edition (Dublin: Butterworths, 2003), pp. 2077–86; and G. Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution', *Irish Jurist*, Vol. 36 (2001), pp. 174–98, at 179–81. For more on the evolution of the directive principles, see Whyte and Hogan, *J.M. Kelly*, *ibid.* pp. 175–9.

<sup>15</sup> [1972] IR 330 ('*Murtagh Properties*').

an adequate means of livelihood and, while this is not enforceable against the State, its existence logically entails that each citizen has the right to earn a livelihood. He continued to state that the phrase 'all of whom, men and women equally' shows that the right is one conferred equally on men and women. Justice Kenny commented that the statement in article 45 on non-cognisability means that the courts have no jurisdiction to consider the application of the principles in article 45 in the making of laws. However, this does not mean that the courts may not take article 45 into consideration when deciding whether a claimed constitutional right exists.<sup>16</sup>

Hogan and Whyte have observed that there has been a progressive minimisation of the effect of the exclusion in article 45 but that this has not yet been considered by the Supreme Court.<sup>17</sup> The reluctance displayed by Irish courts towards addressing or employing directive principles in their decisions contrasts sharply with the approach adopted by courts in other jurisdictions, such as India.

## 2.2 Horizontal Application

While the wording of articles 40.3.1,<sup>18</sup> 42.4 and 42.5 refer expressly to the duties of the State to give effect to constitutional rights, the Irish Supreme Court has made it clear that constitutional rights (including socio-economic rights) may have direct horizontal effect and are not binding on the State alone.

The most significant case dealing with this issue is that of *Meskeil v. CIE*.<sup>19</sup> Here the defendant employers agreed with trade unions to terminate the contracts of employment of all their employees and to offer each employee immediate re-employment upon the same general terms as prior to the termination if he agreed, as a special and additional condition of his employment, to be 'at all times' a member of one of the four trade unions. Pursuant to that agreement, the plaintiff's contract of employment was terminated by the

defendants. The plaintiff was not re-employed by the defendants as he refused to accept the special condition.

The Supreme Court held that the right of citizens to form associations and unions, guaranteed by article 40.6.10 of the Constitution, necessarily recognised a correlative right to abstain from joining associations and unions. In this case, the plaintiff was entitled to damages because, amongst other things, he had suffered loss caused by the defendant employers' conduct in violating a right guaranteed to him by the Constitution. The Court stated, *per* Justice Walsh, that:

It has been said on a number of occasions in this Court... that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.<sup>20</sup>

The Court expressly agreed with the statements of Justice Budd in *Educational Company of Ireland Ltd v. Fitzpatrick (No. 2)*,<sup>21</sup> that 'if one citizen has a right under the Constitution there exists a correlative duty on the part of *other citizens* to respect that right and not to interfere with it'.<sup>22</sup> It has been observed that the defendant in *Meskeil* was a semi-state nationalised corporation – and hence not an entirely private entity.<sup>23</sup> In subsequent cases, however, Irish courts have held that constitutional rights can apply horizontally to purely private bodies.<sup>24</sup>

<sup>20</sup> *Ibid.*, p. 133.

<sup>21</sup> (1961) IR 345, p. 368 [emphasis added].

<sup>22</sup> *Meskeil* (n. 19 above), p. 133. See also, Justice Costello's statements in *Hosford v. Murphy & Sons Ltd* [1988] ILRM 300, at 304.

<sup>23</sup> C. O'Conneide, 'Grasping the Nettle: Irish Constitutional Law and Direct Effect' in J. Fedtke and D. Oliver (eds.), *Human Rights in the Private Sphere* (London: Cavendish, 2007), 213, p. 220.

<sup>24</sup> See, e.g., *Glover v. BLN Limited* [1973] IR 388, where the defendants were the board of directors of a private company. Here, the Supreme Court stated that 'public policy

<sup>16</sup> See also *Minister for Posts and Telegraphs v. Paperlink* [1984] ILRM 373.

<sup>17</sup> Whyte and Hogan, *J.M. Kelly* (n. 14 above), p. 2083.

<sup>18</sup> See p. 296 above.

<sup>19</sup> [1973] IR 121 (*Meskeil*).

There is very limited socio-economic rights-specific case law dealing with the issue of horizontal application and most of those cases that do exist involve the right to earn a livelihood or the right to education.<sup>25</sup>

### 2.3 The Potential of International Law

Ireland has ratified many of the international instruments that have been invoked by advocates bringing socio-economic rights litigation before courts and other decision-making bodies. These include the International Covenant on Economic Social and Cultural Rights ('ICESCR'), the Convention on the Rights of the Child ('CRC'), the International Covenant on Civil and Political Rights ('ICCPR'), the International Convention on the Elimination of All Forms of Racial Discrimination

and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures'

<sup>25</sup> See, e.g., *Murtagh Properties* (n. 15 above) in which Kenny J stated that 'It follows that a policy or general rule under which *anyone* seeks to prevent an employer from employing men or women on the ground of sex only is prohibited by the Constitution' (p. 336) [emphasis added]. See also *Lovett v. Gogan* [1995] 1 I.L.R.M. 12, which involved the right to livelihood. See also, *Crowley v. Ireland* [1980] IR 102 and *Conway v. Irish National Teachers Organisation* [1991] ILRM 497, which centered on the right to primary education. A further socio-economic, rights-related example is *Hosford v. Murphy & Sons Ltd* (n. 22 above). This case concerned an action taken against factory owners by children whose father had suffered a severe electric shock and permanent brain damage whilst working for the defendants in their factory premises. Amongst other things, the decision focused on article 42(1), according to which the State is obliged 'to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children'. Costello J in the High Court opined that the rights which Mr Hosford enjoyed under article 42.1 did not include an ancillary right not to be injured by a negligent act which interfered with his ability to exercise his rights vis-à-vis his children. Hence, his children would not enjoy any implied ancillary right that their father would not be negligently injured and the defendants' negligent act did not infringe any of their article 42 rights. It is important to note that, while denying the existence of the constitutional rights asserted by the plaintiffs, the Court stated that if the plaintiffs could have established that the defendants were guilty of a breach of a constitutionally imposed duty which inflicted harm on the plaintiffs then damages would have been recoverable even though at common law an award in respect of such harm could not be made.

('CERD') and the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'). Ireland's dualist system requires that its international obligations be expressly incorporated into domestic law in order for them to be enforceable before the national courts.<sup>26</sup> This has not occurred in relation to any of the UN human rights instruments that Ireland has ratified and, hence, their provisions (socio-economic or otherwise) are not directly enforceable by the national courts. The Supreme Court has stated that, in the absence of such incorporation, the principles of international treaty law do not prevail over domestic legislation.<sup>27</sup> Furthermore, the Supreme Court has held that, under article 29 of the Constitution, international law confers no rights capable of being invoked by individuals.<sup>28</sup> This finding does

<sup>26</sup> Article 29(6) of the Constitution states that: 'No international agreement shall be part of the domestic law of the State save as may be determined by Parliament'. For more on the impact of this provision, see, amongst others, the statements made by the Supreme Court in the following decisions: *Re Ó Láigléis* [1960] I.R. 93; *Application of Woods* [1970] IR 154; *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97; *Norris v. Att. Gen* [1984] IR 3, and *Crotty v. An Taoiseach* [1987] I.R. 713.

<sup>27</sup> See *Sumers Jennings v. Furlong* [1966] IR 183. However, the same is not necessarily true of customary international law, which may have a more forceful effect in Irish municipal law. There have been several cases in which the courts have taken the view that principles of customary international law form part of domestic law by virtue of article 29(3), see Whyte and Hogan, *J.M. Kelly* (n. 14 above), p. 492. For a discussion of the incorporation of customary international law into Irish law and the relationship of customary international law and Irish municipal law, see C. R. Symmons, 'The Incorporation of Customary International Law into Irish Law' in G. Biehler (ed.), *International Law in Practice: An Irish Perspective* (Dublin: Thompson Roundhall, 2005), pp. 111–183. However, principles of customary international law may only be regarded as incorporated into Irish domestic law where they are not contrary to the provisions of the Constitution, statute law or common law. In *Horgan v. Taoiseach* [2003] 2 I.L.R.M. 357, the High Court stated that, where a conflict arises between a principle of international law and domestic constitutional, statutory or other judge-made law, 'the rule of international law must in every case yield to domestic law' (at 393). For an exhaustive treatment of the interaction of international law and domestic law in the Irish context, see Whyte and Hogan, *J.M. Kelly* (n. 14 above), pp. 492–500.

<sup>28</sup> Section 29(3) states that 'Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States'. According to Fennelly J in *Kavanagh v. Governor of Mountjoy Prison* (n. 26 above): 'The obligation of Ireland to respect the invoked principles is expressed only in the sense that it is to be' its rule of conduct in its relations with other States. 'No single word in the section even

not auger well for those seeking to place reliance on international instruments in an attempt to secure rights being denied by the domestic legal order.<sup>29</sup>

Several judges have, however, been willing to recognise that while not binding on courts, international agreements may have a persuasive value, and have used such instruments as an aid to the interpretation of national rules.<sup>30</sup> For instance, in the case of *O'Donoghue v. The Minister for Health*,<sup>31</sup> discussed below, Justice O'Hanlon in the High Court referred to education-related provisions of the Universal Declaration of Human Rights and various articles of the CRC. The European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), in particular, has been called on in aid by various Irish judges to justify the 'discovery' of unenumerated rights, although not in the socio-economic area.<sup>32</sup>

Overall, however, Irish courts have not proved receptive to arguments based on international law – including instruments providing for socio-economic rights. Indeed, the reluctance of the

arguably expresses an intention to confer rights capable of being invoked by individuals' (p. 126). This statement was quoted approvingly by Justice Kearns in the High Court in *Horgan v. An Taoiseach* [2003] 2 IR 468.

<sup>29</sup> G. Biehler, 'International Law Procedures', in G. Biehler, (ed.), *International Law in Practice: An Irish Perspective* (Dublin: Thompson Roundhall, 2005), pp. 184–240, at 197–8. A more positive aspect of the *Kavanagh* and *Horgan* decisions is that, in both cases, the plaintiffs were allowed to bring their claims based on international law before the courts and obtained a decision on the merits (*ibid.* pp. 198–9). Biehler points out that there have been numerous instances of international law-based arguments being fully heard by Irish courts, notwithstanding that those arguments have ultimately been rejected (*ibid.* pp. 200).

<sup>30</sup> E. Ryan, *Constitutional Law* (Dublin: Round Hall, 2001), p. 55. It has also been suggested that unincorporated international agreements may also have indirect legal effect through the operation of a presumption of compatibility of domestic legislation with international obligations, see Whyte and Hogan, *J.M. Kelly* (n.14 above), p. 553.

<sup>31</sup> [1996] 2 IR 20. Hereinafter, '*O'Donoghue*' or the '*O'Donoghue* case'.

<sup>32</sup> Law Society of Ireland, *Human Rights Law* (2004), p. 37. See, e.g., *Heaney v. Ireland* [1994] 3 IR 593, in which Costello J in the High Court invoked Article 14(3)(g) of the ICCPR, as well as the European Court of Human Rights' interpretation of Article 6 of the ECHR, to support his identification of the right to silence as a latent constitutional guarantee (*ibid.*).

Irish courts to take international law, including the ICESCR, into account arguably amounts to a violation of the State's obligations under the ICESCR, in light of, amongst other things, the UN Committee on Economic, Social and Cultural Rights' statements in its General Comment No. 9 on the Domestic Application of the Covenant.<sup>33</sup>

## 2.4 Right to Civil Legal Aid for Socio-Economic Rights Litigation

Despite the fact that Ireland was a party in possibly the most celebrated case involving a regional human rights body recognising the right to civil legal aid, *Airey v. Ireland*,<sup>34</sup> the Irish courts have traditionally been highly reluctant to recognise a constitutional right to civil legal aid.<sup>35</sup> Recently, there has been a move towards judicial recognition of an unenumerated constitutional right under article 40.3.1 to civil legal aid in certain circumstances. In *O'Donoghue v. Legal Aid Board*,<sup>36</sup> the plaintiff was seeking a divorce and maintenance. She had experienced a delay of twenty-five months between contacting the Legal Aid Board for legal aid and ultimately obtaining a legal aid certificate. In the High Court, Justice Kelly held that the plaintiff had a constitutional right to civil legal aid derived from her constitutional right of access to the courts and her constitutional right to

<sup>33</sup> UN Doc. E/C.12/1998/24. The Committee stated that 'it is generally accepted that domestic law should be interpreted as far as possible in a way in which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter'. (At para. 15).

<sup>34</sup> (1980) 2 EHRR 305.

<sup>35</sup> An exception to this are two decisions of Lardner J in the early 1990s in the cases of *Stevenson v. Landy and others*, unreported, High Court, 10 February 1993, and *Kirwan v. Minister for Justice* [1994] 1 ILRM 444. In these cases, a right to civil legal aid was recognised in the context of wardship proceedings and the executive review of the detention of an individual found guilty but insane, respectively. Rather than focussing on the existence of a constitutional right to civil legal aid, these decisions centred on the need for civil legal aid in the particular cases in order to ensure the constitutional requirements of fair procedures, and that the courts should administer justice with fairness, be given effect to. Lardner J's approach was not followed by other judges, however. For more on this, see Whyte, 'Social Inclusion' (n. 5 above), pp. 246–254.

<sup>36</sup> [2004] IEHC 413.

fair procedures. Justice Kelly referred to previous High Court decisions in which it was held that legal aid was constitutionally mandated<sup>37</sup> and stated that 'it seems to me that the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid'. He found that the Board should have adhered to its own target of two to four months between a person first making contact with the Board and having a consultation with a solicitor.

This decision was confirmed in *Magee v. Minister for Justice, Equality and Law Reform*.<sup>38</sup> Justice Gilligan in the High Court quoted Justice Kelly's decision approvingly, holding that in this case the plaintiff was constitutionally entitled to be provided with legal aid for the purpose of being adequately represented at the inquest into her son's death while in garda (police) custody. It remains to be seen whether or not the approach of the High Court in these cases will be confirmed by the Supreme Court. Whyte observes that the reluctance of other judges to recognise a constitutional right to civil legal aid, taken together with the opposition expressed by leading members of the Supreme Court in *Sinnott v. Minister for Education*<sup>39</sup> and *TD v. Minister for Education*<sup>40</sup> (see below) to the judicial recognition of socio-economic rights, might give rise to grounds for pessimism on this point. This is despite the fact that Justice Kelly's decision in *O'Donoghue* brings the constitutional position on civil legal aid more into line with that of the European Convention on Human Rights as stated in *Airey*.<sup>41</sup>

In Ireland, civil legal aid is primarily provided for under legislation. Ireland has had a state-funded legal aid scheme since 1979.<sup>42</sup> Its current design is based on the provisions of the Civil Legal Aid Act 1995 ('1995 Act'), which aims 'to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases'.<sup>43</sup>

The 1995 Act provides for the establishment of a Legal Aid Board whose primary functions include the provision of legal aid and advice in civil cases to persons who satisfy the requirements of the Act.<sup>44</sup>

In terms of the 1995 Act, legal aid<sup>45</sup> and advice will not be granted by the Legal Aid Board in respect of a number of matters. For the purposes of socio-economic rights litigation, it is important to note that these include representative actions and class actions.<sup>46</sup> This has clear implications for those seeking to bring collective socio-economic rights claims. That said, the Act provides that an application for a legal aid certificate shall not be refused 'by reason only of the fact that a successful outcome to the proceedings for the applicant would benefit persons other than the applicant'.<sup>47</sup> The Act also expressly states that legal aid will not be granted in relation to 'test cases'.<sup>48</sup> Furthermore, the fact that the Legal Aid Board is not permitted to provide representation before administrative tribunals (with the exception of the Refugee Appeals tribunal)<sup>49</sup> means that legal aid is unavailable to those seeking to enforce their socio-economic rights-related entitlements before bodies such as the Social Welfare Appeals Office, the Equality Tribunal or the Employment Appeals Tribunal. Finally, under the Act there is a blanket exclusion of housing matters with some very limited exceptions, which has very serious implications for those of limited means threatened with losing their homes.<sup>50</sup>

<sup>44</sup> 1995 Act, Section 5(1).

<sup>45</sup> Legal aid is defined in Section 27(1) of the 1995 Act as: 'representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board under Section 11, in any civil proceedings to which this section applies and includes all such assistance as is usually given by a solicitor and, where appropriate, barrister in contemplation of, ancillary to or in connection with, such proceedings, whether for the purposes of arriving at or giving effect to any settlement in the proceedings or otherwise'.

<sup>46</sup> Section 28(9)(a)(vii), (ix).

<sup>47</sup> Section 28(9)(d).

<sup>48</sup> Section 28(9)(a)(viii).

<sup>49</sup> In 1991, the Legal Aid scheme was extended to apply to proceedings before the Refugee Appeals Tribunal by Ministerial Order.

<sup>50</sup> For instance, the 1995 Act fails to cover proceedings brought under the Housing Act 1966 ('1966 Act'), including proceedings seeking recovery of possession of dwellings from occupants of local authority accommodation under Section 62 of the 1966 Act. The High Court has found on two occasions that there is no right to legal aid under the constitutions in relation to defending eviction

<sup>37</sup> See the *Stevenson* and *Kirwan* cases (n. 35 above).

<sup>38</sup> Unreported, High Court, 26 October 2006, pp. 11–13.

<sup>39</sup> [2001] IESC 63 ('*Sinnott*').

<sup>40</sup> [2001] IESC 101 ('*TD*').

<sup>41</sup> In discussion with G. Whyte (1 June 2006).

<sup>42</sup> Free Legal Advice Centres, *Access to Justice: A Right or a Privilege?* (Dublin: FLAC, 2005), p. 7.

<sup>43</sup> Civil Legal Aid Act 1995. Cited in Free Legal Advice Centres, *Access to Justice* (n. 42 above), p. 7.

The Legal Aid Board has been criticised for prioritising family law and child care over any other kind of law. The Free Legal Advice Centre ('FLAC') points out that there is significant demand for assistance in the areas of debt, employment, housing and social welfare law (all of which have clear implications for socio-economic rights) that are not being met by the current civil legal aid scheme.<sup>51</sup> In addition, FLAC has argued that the merits test provided for under the 1995 Act is problematic,<sup>52</sup> highlighting that the criteria establishing whether applicants 'merit' legal aid include no provision that civil legal aid should be available to a person who needs it in order to access justice. This is despite the fact that the right to legal aid is based on that need.<sup>53</sup> In the past, the financial eligibility requirements set out under section 29 of the 1995 Act were criticised as too harsh.<sup>54</sup> However, in September 2006, these were reformed by means of ministerial regulation.

Finally, there are major problems in relation to how the scheme operates in practice. There have been numerous complaints about the inadequate money, staff and other resources allocated to the Legal Aid Board and about resultant delays experienced by those seeking civil legal aid. This has improved since *O'Donoghue v. Legal Aid Board*, however, with increased resources being made available to the Board and waiting lists being reduced.

Having highlighted the shortcomings of the statutory system in terms of providing for legal aid for social rights litigation, it is important to note the role that the Irish Human Rights Commission ('Commission') may play in this context. Where an applicant does not qualify for assistance under the Civil Legal Aid Act, the Criminal Justice (Legal Aid) Act 1962 or otherwise, the Commission may

proceedings taken by local authorities in terms of Section 62(3) of the 1966 Act, due to the fact that, according to the Court, eviction proceedings taken by public authorities are straightforward and relatively simple, involving the establishment of certain straightforward proofs. (*Dublin Corporation v. Hamilton*, unreported, High Court, 19 June 1998; *Byrne v. Scally and Dublin Corporation*, unreported, High Court, 12 October 2000).

<sup>51</sup> Free Legal Advice Centres, *Access to Justice* (n. 42 above), p. 35.

<sup>52</sup> See Section 24 of the 1995 Act.

<sup>53</sup> Free Legal Advice Centres, *Access to Justice* (n. 42 above), p. 52.

<sup>54</sup> *Ibid.*

choose to provide (or arrange the provision of) legal advice, legal representation or such other assistance as the Commission deems appropriate in the circumstances.<sup>55</sup> Furthermore, the Commission may institute proceedings for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights<sup>56</sup> of any person or class of persons.<sup>57</sup>

All in all, however, there is extremely limited civil legal aid available to those seeking to forward socio-economic rights claims before the Irish Courts.

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### 3. BACKGROUND TO THE CONTEMPORARY APPROACH OF THE IRISH COURTS

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The landmark High Court decision of *O'Reilly v. Limerick Corporation*<sup>58</sup> can be regarded as the origin of the contemporary and dominant approach of the Irish Supreme Court to socio-economic rights. In this case, the plaintiffs were members of the Traveller community, living in conditions of extreme deprivation. They initiated legal proceedings against the local authority, seeking a mandatory injunction requiring the authority to provide serviced halting sites under the Housing Act 1966. They also asserted that the State should pay them damages for sufferings, which they had undergone in the past. This latter claim was based on an allegation that the conditions which the plaintiffs had been required to endure amounted to a breach of their constitutional rights. They asserted that the right to be provided with a certain minimum standard of basic material conditions to foster and protect someone's dignity and freedom as a human

<sup>55</sup> The Human Rights Commission Act 2000, Section 10.

<sup>56</sup> 'Human rights' for the purposes of Section 10 means (a) constitutional rights or (b) rights guaranteed:

to persons by any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State, or by a provision of any such agreement, treaty or convention which has been given such force.

<sup>57</sup> Similarly, where the case has strategic importance or may set a precedent, the Equality Authority, at its discretion, may provide free legal assistance to those making complaints of discrimination under the Employment Equality Act 1998 and the Equal Status Act 2000, see Free Legal Advice Centres, *Access to Justice* (n. 42 above), p. 9.

<sup>58</sup> [1989] I.L.R.M. 181 ('*O'Reilly*' or the '*O'Reilly* case').

person was one of the unenumerated personal rights embraced under article 40.3.2<sup>c</sup>.<sup>59</sup>

The presiding judge, Justice Costello, claimed not to have jurisdiction to adjudicate on the claim. He argued that, in doing so, he would be adjudicating on an allegation that the organs of government responsible for the distribution of the nation's wealth had improperly exercised their powers. According to Justice Costello, the Aristotelian distinction between commutative and distributive justice marks out the dividing line between the judicial and legislative spheres of operation.<sup>60</sup> The courts are limited to dealing with issues of commutative justice, while the distribution of public resources (i.e. goods held in common for the benefit of the entire community):

[C]an only be made by reference to the common good and by those charged with furthering the common good (the Government); [distribution of public resources] cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due.<sup>61</sup>

Justice Costello continued:

What would be involved in the exercise of the suggested jurisdiction would be the imposition by the court of its view that there has been an unfair distribution of national resources. To arrive at such a conclusion it would have to make an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiff's claim. As the present case demonstrates, it may also be required to decide whether a correct allocation of physical resources available for public purposes has been made. In exercising this function the court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise, namely an adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources. Apart from the fact that mem-

bers of the judiciary have no special qualifications to undertake such a function, the manner in which justice is administered in the courts, that is, on a case by case basis, makes them a wholly inappropriate institution for the fulfilment of the suggested role. I cannot construe the Constitution as conferring it on them.<sup>62</sup>

The analysis of distributive and commutative justice employed by Justice Costello in *O'Reilly* is arguably unsuitable for application to cases in which the State has failed to vindicate a citizen's socio-economic rights. It would seem that such cases should actually be classified as commutative/rectificatory justice as they involve a wrong in the form of a breach of a constitutional right of a citizen: any remedy granted is aimed towards rectifying the wrong committed by the State.<sup>63</sup> Admittedly, such a remedy will usually involve, as a knock-on effect, the distribution of public resources; it is, however, merely a secondary symptom of the case, as is the distribution of public resources stemming from an award of damages in a case where a servant of the state commits a tort<sup>64</sup> or violates a civil and political right.

Justice Costello ultimately dismissed the claim stating that in order to comply with the Constitution, such a petition should 'be advanced in Leinster House rather than in the Four Courts'.<sup>65</sup> In doing so, he appeared to fail to recognise the often very limited ability of vulnerable and marginalised groups, such as the one at issue in this case, to ensure that their socio-economic rights are vindicated or forwarded through the democratic system as a result of, amongst other things, a lack of organisational ability or political clout, as well as the existence of hostility or indifference towards them by the elected branches of government and/or a majority of the electorate. Some groups that are particularly vulnerable to violations of their socio-economic rights – for instance, children and other disenfranchised groups – are effectively precluded from 'advancing their petition in Leinster House'. This is due to both their express

<sup>59</sup> *Ibid.* at 192.

<sup>60</sup> Whyte and Hogan, *J.M. Kelly*, (n. 14 above), p. 116.

<sup>61</sup> *O'Reilly* (n. 58 above), p. 194.

<sup>62</sup> *Ibid.* p. 195.

<sup>63</sup> C. O'Mahony, 'Education, Remedies and the Separation of Powers', *Dublin University Law Journal*, Vol. 24 (2002), pp. 57–95, at 76.

<sup>64</sup> *Ibid.*

<sup>65</sup> *O'Reilly* (n. 58 above), p. 195. Leinster House is the seat of the Irish parliament.



exclusion from the democratic decision-making processes as well as, in many instances, their inability to rely on other (enfranchised) members of society to ensure the 'virtual' or indirect representation of their interests in such processes.<sup>66</sup>

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#### 4. SELECTED RIGHTS

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##### 4.1 Protection of Socio-Economic Rights by Means of 'Civil and Political' Rights

There are several civil and political rights-related provisions of the constitution that could be used as a basis for indirect protection of socio-economic rights.<sup>67</sup> For instance, an expansive interpretation of the right to life protected by article 40.3.2 of the Constitution could give rise to socio-economic rights being protected by means of that right. Indeed, in rejecting calls for the explicit inclusion in the Irish Constitution of guarantees of socio-economic rights, the Constitution Review Group concluded that, where anyone falls below a minimum level of subsistence, the Constitution appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity.<sup>68</sup>

In addition to being employable to indirectly protect socio-economic rights-related interests, the right to life under the Constitution may also serve as a basis for the identification of socio-economic rights. This was clearly demonstrated by the decision in *Ryan v. AG*. Here, a woman challenged the fluoridation of the public water supply on the grounds that this constituted, amongst other

things, a violation of her and her children's personal rights under article 40.3. In that case, Justice Kenny in the High Court held that 'water today is a necessity of life and that the Plaintiff probably has a right of access to a supply of water'.<sup>69</sup> On appeal to the Supreme Court, it was accepted by the Attorney General that water is one of the essentials of life, and 'that man therefore has an inherent right to it'.<sup>70</sup> In its judgment, the Supreme Court did not take issue with this point. These dicta would appear to indicate that the right to life under article 40.3.2 encompasses the right to water. There have, however, been no further judicial statements on this issue. Another example of the right to life being interpreted expansively to encompass socio-economic rights is the decision of *G v. An Bord Uchtála*.<sup>71</sup> Here, Justice Walsh stated that the right to life 'necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation'.<sup>72</sup>

The unenumerated personal right to bodily integrity that has been judicially identified as protected by article 40.3.1 could perform a similar function. The case of *The State (C) v. Frawley*<sup>73</sup> concerned a prisoner who was suffering from a sociopathic personality disorder. According to the opinion of a clinical psychologist (which was not disputed by the State), the prisoner required expensive treatment in a highly specialised psychiatric unit, which was not available in Ireland and would only be appropriate to the needs of the prisoner and a very small number of other people. The High Court held that the right to bodily integrity operated to prevent an act or omission on the part of the Executive, which, without justification or necessity, would expose the health of a person to risk or danger.<sup>74</sup> The Executive is thus constitutionally obliged to protect the health of persons held in custody as well as was reasonably possible in all the circumstances of a case.<sup>75</sup> The Court found, however, that the failure on the

<sup>66</sup> For more on the 'virtual representation' of minority groups in majoritarian decision-making processes, see J. Ely, *Democracy & Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

<sup>67</sup> By 'indirect protection' I mean where other non-socio-economic rights are applied or interpreted by the courts so as to protect socio-economic rights-related interests.

<sup>68</sup> CRG (n. 1 above), p. 236. The prohibition on torture, inhuman or degrading treatment or punishment set out in Article 3 of the European Convention on Human Rights (and incorporated into Irish domestic law by the ECHR Act 2003) can arguably perform a similar function. Courts in the United Kingdom have accepted that intolerable living conditions for which the State is responsible can constitute a violation of Article 3: see King's chapter on the United Kingdom in this volume for an overview of the relevant cases.

<sup>69</sup> [1965] IR 294, at 315.

<sup>70</sup> *Ibid.* p. 342.

<sup>71</sup> [1980] IR 32 ('*G v. ABU*).

<sup>72</sup> *Ibid.* p. 69.

<sup>73</sup> [1976] IR 365 ('*Frawley*').

<sup>74</sup> *Ibid.* p. 372.

<sup>75</sup> *Ibid.* See also *The State (Richardson) v. The Governor of Mountjoy Prison* [1980] ILRM 82.

part of the Executive to provide the prisoner with expensive treatment in a special institution of a kind that was not present in Ireland did not constitute a failure to protect his health as well as was reasonably possible in all the circumstances of the case.<sup>76</sup>

On a related note, there are judicial statements suggesting that there is an unenumerated right to health protected by the Constitution, independent of the right to bodily integrity. In the case of *Heeney v. Dublin Corporation*,<sup>77</sup> Justice O'Flaherty of the Supreme Court stated that, it was 'beyond debate that there is a hierarchy of constitutional rights and at the top of the list is the right to life, followed by the right to health and with that the right to the integrity of one's dwellinghouse'.<sup>78</sup> However, the parameters of this judicially identified right to health are somewhat unclear, to say the least.<sup>79</sup>

There has been at least one instance of a court holding that the unenumerated right to bodily integrity imposes a positive obligation on the state. The case of *O'Brien v. Wicklow UDC*<sup>80</sup> concerned a claim by travellers that the State, acting through the local authority, had a duty to provide serviced halting sites for them. Justice Costello found that the deplorable conditions under which the plaintiffs were living infringed their constitutional right to bodily integrity.<sup>81</sup> Having considered the defendant local authority's statutory powers to provide serviced halting sites under the Housing Act 1988 in light of the plaintiff's constitutional right to bodily integrity, he held that the local authority was under a legal duty to provide such sites and he granted a mandatory order directing that the

defendants to provide at least three serviced halting sites.<sup>82</sup> It should be noted however that this was only an *ex tempore* judgment and hence has extremely limited precedential value. The decision is also probably at odds with the later Supreme Court findings in the cases *Sinnott v. Minister for Education*<sup>83</sup> and *TD v. Minister for Education*.<sup>84</sup> Certainly, thusfar, the Supreme Court (as opposed to lower courts) has not interpreted the right to bodily integrity so as to encompass social and economic rights within it.<sup>85</sup>

## 4.2 Labour Rights

There are a large number of Irish cases dealing with labour rights. Indeed, article 40.6.1 (iii) sets out the right of the citizens to form associations and unions. In this chapter, however, I will focus in particular on the right to work/earn a livelihood. In *Tierney v. The Amalgamated Society of Woodworkers*,<sup>86</sup> Justice Budd of the High Court agreed with the assertion that the right to work and earn one's livelihood, as an unenumerated right, is just as important a personal right of the citizen as a right to property and just as much entitled to vindication under article 40 of the Constitution. He went on to conclude, however, that the failure of a trade union to submit an individual's name for membership of the union or to hold an election, even though the individual was qualified for membership in accordance with the rules of the trade union, did not amount to any infringement of the Constitution.

Subsequently, as discussed in Section 2.1 above, the right to an adequate means of livelihood was recognised in the High Court case of *Murtagh Properties*.<sup>87</sup> In the later case of *Murphy v. Stewart*,<sup>88</sup>

<sup>76</sup> *Frawley* (n. 73 above), pp. 372–3.

<sup>77</sup> [1998] IESC 26.

<sup>78</sup> *Ibid.* para 16. In this case, the plaintiffs had sought an injunction commanding Dublin Corporation to take certain steps in relation to the breakdown in the elevator services in the Ballymun flats complex, in the City of Dublin. In granting the injunction, O'Flaherty J stated the corollary of the constitutional guarantee of inviolability of the dwelling of every citizen must be that a person should be entitled to the freedom to come and go from his dwelling provided he keeps to the law.

<sup>79</sup> See the discussion of *In re Article 26 and the Health (Amendment) (No.2) Bill 2004* [2005] IESC 7 for further discussion on the existence of a right to healthcare under the Constitution. Hereinafter '*In re Article 26 and the Health (Amendment) (No.2) Bill*'.

<sup>80</sup> Unreported, High Court 10 June 1994.

<sup>81</sup> *Ibid.* p. 4.

<sup>82</sup> In doing so, Costello J withdrew from the stance he had adopted in the *O'Reilly* case. He stated that, 'I don't think it is necessary to say whether I am now expressing a different view to the one which I expressed in the case of *O'Reilly and Ors v. Limerick Corporation*. . . . Even, however, if the view which I am now expressing represents a change of views on my part, then I accept my views have changed . . .' (*ibid.* pp. 3–4).

<sup>83</sup> N. 39 above.

<sup>84</sup> N. 40 above.

<sup>85</sup> There is, however, evidence that they might be prepared to do so in the future. See the discussion of *In re Article 26 and the Health (Amendment) (No. 2) Bill* for more on this.

<sup>86</sup> [1959] IR 254.

<sup>87</sup> See n. 15 above.

<sup>88</sup> [1973] IR 97.

the Supreme Court stated that, while citizens have a constitutional right to form associations and unions under article 40.6.1<sup>o</sup>(iii), there is no constitutional right to join the union of one's choice. Referring to *Murtagh Properties*, Justice Walsh accepted that among the unspecified personal rights guaranteed by the Constitution is the right to work. He stated that if the right to work was reserved exclusively to members of a trade union which held a monopoly in this field and the trade union was abusing the monopoly in such a way as to effectively prevent the exercise of a person's constitutional right to work, the question of compelling that union to accept the person concerned into membership (or, indeed, of breaking the monopoly) would fall to be considered for the purpose of vindicating the right to work.<sup>89</sup>

The courts have made clear that the freedom to exercise the constitutional right to earn a livelihood is not absolute and that it may be subject to legitimate legal restraints.<sup>90</sup> It is also primarily a negative right: in *Shanley v. Galway Corporation*,<sup>91</sup> the High Court stated that the Constitution 'does not impose a positive duty either on the State, or on any body such as a local authority to which the State may have delegated powers, to provide a livelihood for the plaintiff'.<sup>92</sup> In *Greally v. Minister for Education (No. 2)*,<sup>93</sup> Justice Geoghegan in the High Court stated that 'because a person has a right to a particular livelihood it does not mean that he has a right to receive employment from any particular employer'.<sup>94</sup> The Courts have held, however, that statutory restrictions on the right to earn a livelihood must be clear and that such restrictions must not be disproportionate.<sup>95</sup>

<sup>89</sup> See also *Yeates v. Minister for Posts and Telegraphs* [1978] ILRM 22; *Parsons v. Kavanagh* [1990] ILRM 560; *Lovett v. Gogan*, [1995] 1 I.L.R.M. 12; *Murtagh Properties v. Cleary* [1972] IR 330.

<sup>90</sup> Irish Human Rights Commission, *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document* (Dublin: IHRC, 2005), p. 112.

<sup>91</sup> [1995] 1 IR 396.

<sup>92</sup> Irish Human Rights Commission, 'Making ESC. Rights Effective' (n. 90 above), p. 112.

<sup>93</sup> [1999] 1 IR 1.

<sup>94</sup> *Ibid.*

<sup>95</sup> Irish Human Rights Commission (n. 90 above), p. 112. See, e.g., *Cox v. Ireland* [1992] 2 IR 503. For a detailed analysis of the right to work/earn a livelihood, see J. Casey, *Constitutional Law in Ireland* (Dublin: Roundhall, 2000), pp. 404–410.

### 4.3 Social Security Rights

Rights to social welfare entitlements are granted by statute, rather than under the constitution, so these will not be discussed at length. The Supreme Court has held that the right to receive benefit or retain benefit wrongly paid derives from statute and does not partake of the nature of a constitutional property right.<sup>96</sup> It is worth noting, however, that despite the absence of any constitutional provision setting out a right to social security, judicial application of the principles of natural and constitutional justice has significantly improved the legal position of the welfare claimant who wishes to challenge a departmental decision affecting his or her rights under the welfare code.<sup>97</sup> Attempts to protect social security rights—related entitlements through reliance on the constitutional guarantee to equality before the law have been generally unsuccessful,<sup>98</sup> largely due to the courts' employment of a highly restrictive 'invidious discrimination test'.<sup>99</sup> There have, however, been instances in which plaintiffs have relied successfully on article 41 (in particular article 41.3.1 obliging the State to protect the institution of marriage from attack), which enshrines the constitutional protection of the family unit, in challenging discrimination against married couples under welfare legislation.<sup>100</sup>

<sup>96</sup> *Minister for Social, Community and Family Affairs v. Scanlon* [2001] IESC 1, at 17.

<sup>97</sup> Whyte, 'Social Inclusion' (n. 5 above), p. 124.

<sup>98</sup> Article 40.1 of the Constitution. See, e.g., *MhicMhathúna v. Attorney General* [1995] 1 IR 484; *Dennehy v. Minister for Social Welfare*, unreported, High Court, 26 July 1984; *Lowth v. Minister for Social Welfare* [1999] 1 ILRM 5.

<sup>99</sup> See the Supreme Court decision in *O'Brien v. Keogh* [1972] IR 144, at 156, in which the Court stated that '(a)rticle 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances. [footnote omitted] It only forbids invidious discrimination'. See also *per Kenny J* in *Murphy v. Attorney General* [1982] IR 241, at 283 where he stated the court will set a legislative inequality aside as being repugnant to the Constitution if any state of facts exists which may reasonably justify it (see *Murphy v. The Attorney General* [1982] IR 241, at 283 and 284). The Courts have since distanced themselves from the 'invidious discrimination test, employing a 'rationality test' in a number of equality cases. The author is, however, unaware of any cases involving social security rights to which this test has been applied.

<sup>100</sup> *Hyland v. Minister for Social Welfare* [1989] IR 624; *J.H. v. Eastern Health Board* [1988] IR 747. Unsuccessful attempts to rely on Article 41 include *MhicMhathúna* (n. 98 above).

#### 4.4 The Right to Education

The right to education is set out in article 42.<sup>101</sup> In particular, article 42.4 provides that '[t]he State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation'. Quinn has suggested that the inclusion of the right to education in the Irish Constitution had less to do with the substantive right to education of the child *per se* and more to do with preserving the arrangement between the funders of education (the State) and the providers of education (religious bodies and parents) prevailing at the time at which the Constitution was being drafted.<sup>102</sup> In practice, however, the courts have begun separating out the substantive right from the tangled historical arrangements and have enforced it against the State so as to require education facilities and opportunities of a certain quantity as well as quality.<sup>103</sup>

It has been established that the article imposes both a duty to provide free primary education and a right to receive such education.<sup>104</sup> It does not necessarily place a duty on the State to provide free primary education itself, but rather enjoins it to provide *for* such education by ensuring that machinery exists under which, and in accordance with which, such education is provided (e.g. by funding private institutions which provide primary education).<sup>105</sup> While there is an explicit obligation on the State to provide for primary education, court decisions have been crucial in delineating the precise parameters of this duty.

<sup>101</sup> There are other Constitutional articles which might have a bearing on the provision of primary education in the absence of a specific articulation of that duty, (e.g. Article 40.3.1 (which provides protection for personal rights unenumerated in the Constitution), the guarantee of equality before the law contained in article 40.1 and, arguably, article 42.1. In this chapter, however, I shall focus exclusively on those provisions that expressly guarantee that right.

<sup>102</sup> Quinn, 'Rethinking the Nature of ESC Rights' (n. 3 above), p. 49.

<sup>103</sup> *Ibid.*

<sup>104</sup> See *Crowley v. Ireland* (n. 25 above), at 122.

<sup>105</sup> *Ibid.* p. 126.

In *O'Donoghue v. Minister for Health*,<sup>106</sup> the mother of a severely mentally disabled<sup>107</sup> eleven-year-old boy instituted legal proceedings against the Ministers for Health and Education. She sought an order from the High Court directing the defendants to provide for free primary education for her son and also a declaration that, in failing to provide for such education, the State had deprived him of his constitutional rights under articles 40 and 42. Up until the initiation of legal proceedings, State support for the child's education had been limited and wholly inadequate and the major part of such education as he had received was the result of private funding.

The State argued, amongst other things, that (a) the applicant, by reason of being profoundly mentally and physically disabled, was ineducable, and all that could be done for him to make his life more tolerable was to attempt to train him in the basics of bodily function and movement; and (b) the education that the State was obliged to provide pursuant to article 42.4 was education of a conventional, scholastic nature, and that such training as could be provided to the plaintiff could not be regarded as 'primary education' within the meaning of that expression as used in article 42.4.

In the High Court, Justice O'Hanlon referred to the definition of education set out by the Supreme Court in the earlier case of *Ryan v. A.G.*, in which education was defined as 'the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral'.<sup>108</sup> In light of this definition, taking into account the advances made internationally in the area of education for children who suffer from a severe or profound mental handicap, as well as the evidence (which was to the effect that the applicant had made good progress and could make further progress), he held that the applicant was not ineducable.

With regard to the second argument, the judge examined the dictionary definitions of the terms

<sup>106</sup> See n. 31 above.

<sup>107</sup> There are four categories of developmental disability (or 'handicap' which was the term employed by the Court in this case): 'mild', 'moderate', 'severe' and 'profound'.

<sup>108</sup> See n. 6 above, p. 350.

used in both the Irish and English versions of article 42.4.<sup>109</sup> He then stated that:

There is a constitutional obligation on the State by the provision of Article 42.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him/her to make the best possible use of his/her inherent and potential capacities, physical, mental and moral, however limited these capacities might be.<sup>110</sup>

He went on to say that as soon as it had been established in the 1970s that children with a severe mental handicap were educable, there arose a constitutional obligation on the part of the State to provide for free primary education for such children. He held further that education for profoundly handicapped children could correctly be described as 'primary education' within the meaning of the phrase used in article 42.4.<sup>111</sup>

Having considered a large volume of documentary evidence, as well as oral evidence, on the approaches adopted to the education of such children in numerous other jurisdictions, the judge stated that the evidence in the case gave rise to a strong conviction that, in order for primary education to meet the special needs of such people, a new approach from that currently available would be required in respect of the pupil-teacher ratio, the age of commencement, and continuity and duration of education. While Justice O'Hanlon did not actually prescribe a pupil-teacher ratio, he made it clear that the ratio of one-to-twelve would not discharge the State's obligations under article 42.4 to profoundly handicapped children. In relation to age of commencement, he pointed out that early intervention and assessment was of vital

importance if conditions of mental and physical handicap were not to become intractable. Furthermore, with regard to duration, he stated that the process of education should ideally continue for as long as the ability for further development was discernible.<sup>112</sup>

The judge made an order declaring that the respondent, in failing to provide for free primary education for the child and in discriminating against him as compared with other children, deprived him of constitutional rights arising under article 42 of the Constitution. He also granted damages.<sup>113</sup>

This case made it clear that the State's obligation under article 42.4 covers *all* children in the State and that special measures have to be put in place for those children who, because of their disability, are unable to benefit from conventional education. However, the issue of the right to primary education of adults remained unresolved.

The right to primary education of adults was the subject of the case of *Sinnott v. Minister for Education*.<sup>114</sup> Here, the plaintiff was a severely autistic twenty-three-year-old man. Despite a campaign conducted over two decades by his mother, the State had failed to provide him with any consistent suitable training or education. In these proceedings, the applicant and his mother sought declarations as to their constitutional rights, a mandatory injunction directing the Minister to discharge the State's obligations to the plaintiff and damages for negligence and breach of both constitutional and statutory rights. The State argued, amongst other things, that the duty to provide for primary education for the plaintiff ceased when he reached eighteen years of age.

In the High Court, Justice Barr argued that there is nothing in article 42.4 that supports the contention that there is an age limitation on a citizen's right to on-going primary education provided for by the State. He pointed out that in the plaintiff's case there was a fundamental need for continuous education and training which was not age-related.

<sup>109</sup> The Constitution was drafted in two languages, Irish and English, by two different authors almost simultaneously, with each co-author borrowing from the other's work. Where the texts clash, the national language, Irish, takes precedence (Article 25(4) of the Constitution).

<sup>110</sup> *O'Donoghue* (n. 31 above), p. 65. O'Hanlon J's comments were subsequently expressly accepted by McGuinness J in the High in *Comerford v. Minister for Education* [1997] 2 ILRM 134, 144. She also accepted the applicant's lawyer's assertion that 'the right to free primary education extends to every child, although the education provided must vary in accordance with the child's abilities and needs'. (ibid. p. 143).

<sup>111</sup> *O'Donoghue* (n. 31 above), p. 67.

<sup>112</sup> Ibid. p. 70.

<sup>113</sup> The case was appealed by the State. On 6 February 1997, the Supreme Court made the order that the plaintiff was entitled to free primary education in accordance with article 42.4 and the High Court's order was otherwise confirmed.

<sup>114</sup> See n. 39 above.

He argued that, in the absence of a specific provision in the constitutional article, it would be wrong to imply any age limitation on the constitutional obligation of the State to provide for the primary education of those who suffer severe or profound mental handicap.<sup>115</sup> Thus, the ultimate criterion in interpreting the State's constitutional obligation was 'need' and not 'age'.<sup>116</sup>

The case was appealed by the State to the Supreme Court, which was required to determine two key points. First, the extent of the right to free primary education under article 42.4, and, second, the right of the High Court, having regard to the doctrine of the separation of powers, to grant a mandatory injunction formulating and directing the application of future policy in relation to educational needs. The Court's findings in relation to the latter point will be dealt with later in this chapter in Section 7.

The Court found for the State on both issues. The majority took the view that the State's duty to provide, for free, primary education applies to children only, not adults, and that the duty ceased to apply even in the case of a person with severe mental handicap once the age of eighteen was reached. The judges argued that article 42 located education in the context of the family and that the word 'child' had a clear age-related meaning in this context. While any age would be arbitrary to some extent, the age of eighteen was reasonable as the age at which society no longer treated a young person as a child. One judge went so far as to say the obligation ended when a child reached twelve – that is, the age at which an ordinary child could be taken to have finished primary school!<sup>117</sup> Only one judge, Chief Justice Keane, agreed with Justice O'Hanlon in the High Court that the State's obligation was open-ended.

The definition of 'primary education' set out by Justice Barr in the High Court was not challenged by the State before the Supreme Court. However, all the judges, with the exception of Justice Murphy (who argued that the training required by Mr. Sinnott could not be described as education under an originalist interpretation of article 42.4), seemed satisfied that Justice Barr's definition was correct.

Thus, while the Court accepted the broad definition of the substantive content of the right to primary education set out in *O'Donoghue*, it proceeded to define the category of people entitled to assert this right in a very narrow 'age-' rather than 'need'-centred way.

The judicial reluctance to become involved in so-called distributive justice issues, as demonstrated in *O'Reilly*, had previously been reiterated in several cases and confirmed by the Supreme Court.<sup>118</sup> The issue arose again in *Sinnott*. Here, Justice Hardiman dealt expressly with the question of the power of the court to ensure that a person's constitutional rights (including those of a socio-economic nature) were not circumvented or denied. Having quoted Justice Costello's judgment in *O'Reilly* approvingly and at length,<sup>119</sup> he stated that, apart from in an extreme case where the government would ignore a constitutional imperative and defy a court declaration on a topic, the courts should refrain from exercising such a power. They should do so for several reasons. Firstly, were the courts to exercise such a power, this would offend the constitutional separation of powers.<sup>120</sup> Secondly, it would lead the courts into the taking of decisions in areas in which they have no 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. Finally, the evidence-based adversarial procedures of the court, which are excellently adapted for the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy. Justice Hardiman continued:

Central to this view [of the separation of powers] is a recognition that there is a proper sphere for both elected representatives of the people and the executive elected or endorsed by them in the taking of social and economic and legislative decisions, as well as another sphere where the judiciary is solely competent<sup>121</sup> ... [I]f judges were to become involved in such an enterprise, designing the details of

<sup>115</sup> (2000) IEHC 148, para. 85.

<sup>116</sup> *Ibid.* para. 86.

<sup>117</sup> Per Murphy J in *Sinnott* (n. 39 above), para. 236.

<sup>118</sup> E.g. see *MhicMhathúna v. Attorney General* [1995] 1 IR 484 and *Frawley* (n. 73 above).

<sup>119</sup> *Sinnott* (n. 39 above), paras. 335–346.

<sup>120</sup> *Ibid.* para. 374.

<sup>121</sup> *Ibid.* para. 375.

policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role.<sup>122</sup>

The rigid and conservative view of the separation of powers doctrine expressed by Justice Hardiman in this case foreshadowed the Supreme Court's holding in the *TD* case, which is discussed in Section 4.5.

A later case involving the right to education once again raised the issue of the obligation imposed by the State by article 42.4. In *O'Carolan v. Minister for Education*,<sup>123</sup> the parents of an autistic boy with challenging behaviour sought, inter alia, a mandatory order requiring the State to provide appropriate education for their son. The State had made a number of placement offers, none of which the applicants thought adequate in terms of being best suited to provide for their son's educational needs. The applicants wanted the State to fund placement at a Centre for Developmental Disabilities abroad. The State's most recent Dublin-based placement offer, which was at issue in the case, was, in the view of the applicants and expert witnesses, inappropriate, inadequate, and not in accordance with international best practice. With regard to the conflict of evidence, Justice MacMenamin in the High Court ultimately sided with the State's experts, finding the Irish placement to be suitable. However, the case is disturbing as the Judge's interpretation of the right to education would appear to involve a weakening of the obligation imposed on the State by article 42.4. Justice MacMenamin stated that the kernel of the case was whether the State had breached its duty, as set out under article 42 and identified by Justice O'Hanlon in the case of *O'Donoghue*. He found that the facility put forward by the State was 'objectively adequate and in compliance with the constitutional duties of the respondents'. In doing so, he stated that the test was not whether the State's offer was better than that desired by the plaintiffs or whether it was optimal. Rather, the question was whether it was 'appropriate'. O'Mahony observes that Justice MacMenamin's decision that the test was not whether an alternative placement was better or the best so long as the placement in question was appropriate to

the needs of a particular child would appear to run directly contrary to O'Hanlon's statement in *O'Donoghue* that the 'education' contemplated in article 42.4 should enable a child 'to make the best possible use of his or her inherent and potential capacities'.<sup>124</sup> It also contradicts Chief Justice O'Dalaigh's comments in *Ryan v. AG*.

The decision is arguably of limited jurisprudential value as, firstly, it is a High Court, rather than a Supreme Court decision, and secondly, Justice MacMenamin also failed to take into account any authorities other than *O'Donoghue* on the scope of the right to education under article 42.4.<sup>125</sup> Worryingly, however, a narrow conception of 'appropriateness' was also used in a subsequent High Court decision, *O'C. v. Minister for Education and Science & Ors*.<sup>126</sup> Here, Justice Peart held that the Minister's failure to provide an autistic child with a particular form of autism-specific education which had been demonstrated to be effective for that child did not mean that the Minister had failed to 'provide for an appropriate education as required by the Constitution' [emphasis added]. Notably the judge in that case did not cite the *O'Carolan* case or, indeed, any major right to education decision.

It remains to be seen what approach will be adopted by the Supreme Court. Should it choose to embrace the approach of Justice MacMenamin in *O'Carolan* in future cases, this would have a significant impact on the extent of the State's obligation under article 42.4. Indeed, it is arguable that the way in which the scope of the education right has been progressively curtailed through judicial interpretation in an era of increased resources is

<sup>124</sup> C. O'Mahony, 'The Right to Education and "Constitutionally Appropriate" Provision', *Dublin University Law Journal*, Vol. 28 (2006), p. 422.

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

<sup>126</sup> [2007] IEHC 170. This case was a challenge brought on behalf of a child with autism. His parents claimed, amongst other things, that in failing to provide free education and health care services for the child appropriate to his needs, and in discriminating against the child with respect to provision of appropriate educational and health care facilities vis-à-vis other children, the State had deprived the child of his constitutional rights pursuant to articles 40, 41 and 42 of the constitution. The Court concluded that the model of education provided for the child by the State was appropriate. In doing so, the Court emphasised that, when it came to deciding whether the education model proposed by the State was appropriate, it was not necessary for it to evaluate the alternative model recommended by the parents, which had proved beneficial to the child.

<sup>122</sup> *Ibid.*, para. 377.

<sup>123</sup> (2005) IEHC 296.

out of step with Ireland's obligation under the ICE-SCR to progressively realise economic and social rights.<sup>127</sup>

#### 4.5 Children's Rights

The Constitution contains one provision which expressly furnishes children with a socio-economic right operable against persons other than the State. Article 42.1 provides that parents are obliged 'to provide, according to their means, for the religious and moral, intellectual physical and social education of their children'. The constitutional duty imposed on parents by that article imposes a corresponding right on children to seek the provision for such education from their parents where their parents fail to provide such.<sup>128</sup> Applying article 42.5 to article 42.1, it would appear that where parents fail in their duty to provide for the religious and moral, intellectual, physical and social education of their children, the State 'by appropriate means shall endeavour to supply the place of the parents'. It would thus seem that article 42.1 may also serve as the basis for socio-economic rights claims of children against the State. The extent and nature of such a claim as might be made presumably depends on the interpretation adopted of what is required of the State where they 'endeavour to supply the place of parents'.<sup>129</sup>

<sup>127</sup> In discussion with Claire McHugh (15 September 2006).

<sup>128</sup> For more on this, see the statements of the High Court in *A.G. v. Douse & Anor* [2006] IEHC 64, where MacMenamin J stated that '[a]mongst the natural and imprescriptible rights of [the child] to which this Court must have due regard is the right to have his needs, including his religious, moral, intellectual, physical and social education provided for by the applicants [his adoptive parents] in accordance with their means'.

<sup>129</sup> It should be noted that the language of article 41.3.1 of the Constitution ('The State pledges itself to guard with special care the institution of marriage, on which the Family is founded...') clearly restricts constitutional recognition to families based on marriage. Thus, the rights and duties set out in article 41 and 42 of the Constitution apply to marital families and their members only. It has been stated by the courts on several occasions that the rights of children who are members of non-marital families are personal rights guaranteed by article 40.3, rather than by articles 41 and 42. For example, with regard to article 42.5, in *G v. An Bord Uchtála* [1980] IR 32, Justice Walsh concluded that the State owed a similar duty to protect children born outside the marital family as that prescribed by article 42.5. In his view, this obligation stemmed from article 40.3 of the Constitution. He continued to say that there was no difference between the

By far the most significant body of jurisprudence on children's socio-economic rights centres on children's unenumerated constitutional rights. The unenumerated rights of the child were first dealt with at length in *G v. An Bord Uchtála*.<sup>130</sup> Having upheld the right of a parent to the custody and control of the upbringing of a daughter, Chief Justice O'Higgins in the Supreme Court observed that:

The child also has natural rights... Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his/her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State, under the provisions of Article 42.5 of the Constitution, is given the duty, as guardian of the common good, to provide for a child born into a family where the parents fail in their duty towards that child for physical or moral reasons.<sup>131</sup>

This ruling was built on in the High Court decision of *FN v. Minister for Education*.<sup>132</sup> The 'FN case' involved a thirteen-year-old in state care who suffered from hyperkinetic conduct disorder and required a period of time in a secure unit that could contain him safely while confronting his behaviour. Having referred to the unenumerated rights of the child mentioned by the High Court and the Supreme Court in *G v. ABU*, and the further elaboration of children's constitutional rights by the Supreme Court in *The Adoption (No. 2) Bill, 1987*<sup>133</sup> and *M.F. v. Superintendent Ballymun*

obligations owed by an unmarried parent to their child under article 40.3 and those owed by a married parent under article 42.5. The constitutional amendment legislation presented in February 2007 (discussed in section 4.5) sought to ensure an equitable standard of protection for all children regardless of the marital status of their parents. The Bill proposed replacing the existing article 42.5 with, amongst other things, a statement that '(i) in exceptional cases, where the parents of *any* child for physical or moral reasons fail in their duty towards such child, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child' [emphasis added].

<sup>130</sup> See n. 129 above.

<sup>131</sup> *Ibid.* pp. 55–56.

<sup>132</sup> [1995] 1 IR 409. Hereinafter 'FN' or the 'FN case'.

<sup>133</sup> [1989] I.R. 656.



*Garda Station*,<sup>134</sup> Justice Geoghegan stated that: 'I would take the view that where there is a child with very special needs which cannot be provided by the parents or guardian, there is a constitutional obligation on the State under article 42, s. 5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child'.<sup>135</sup> Such secure accommodation, services and arrangements as were necessary to meet the requirements of FN were held to be not so impractical or so prohibitively expensive as to come within any notional limitation on the State's constitutional obligations.<sup>136</sup> Justice Geoghegan stated that he was of the view that the State was under a constitutional obligation towards the applicant to establish as soon as reasonably practicable suitable arrangements of containment with treatment for the applicant. The State did not appeal *FN* and, in the subsequent case of *DD v. Eastern Health Board*<sup>137</sup> involving a disturbed eleven-year-old boy, the Eastern Health Board did not dispute that it owed a constitutional duty to the child to meet his special needs and accepted that it was in breach of this constitutional duty.

The most important recent case focusing on children's socio-economic rights is that of *TD v. Minister for Education*.<sup>138</sup> The applicants in *TD* were a sample of a large group of non-offending children in the care of regional Health Boards (local authorities), whose special needs were not being met by the State. Due to a lack of treatment and secure accommodation, the court was forced to order the placement of such children in detention centres, police stations, hotels, adult prisons and even adult psychiatric hospitals.<sup>139</sup> In *TD*, the Supreme Court heard an appeal against a decision of Justice Kelly in the High Court granting a mandatory injunction directing the Minister to take all steps necessary to facilitate the building and opening of secure and high support units in set locations with a prescribed number of beds

and in accordance with a fixed time-scale.<sup>140</sup> The High Court made this decision primarily on the basis of the right/obligation identified in the *FN* case. The State's grounds of appeal chiefly centred on, amongst other things, the claim that, in making of the orders under appeal, the High Court had entered into questions of policy and usurped the executive power in violation of the principle of separation of powers.<sup>141</sup>

All five Supreme Court Justices in the *TD* case referred to Justice Costello's statements in the *O'Reilly* case approvingly. Even Denham J, who ultimately disagreed strongly with the finding of the majority, agreed with Justice Costello's ruling in *O'Reilly* that the distribution of the nation's wealth is a matter for the executive and the legislature.<sup>142</sup> The heavy reliance of the majority of the Court in *TD* and *Sinnott* on the reasoning and authority of the *O'Reilly* case is open to question. This is due to the failure of the majority of the Supreme Court to recognise that while the plaintiffs in *O'Reilly* relied on a previously unidentified unenumerated constitutional right, the applicants in *TD* and *Sinnott* relied on rights expressly identified in the text of the Constitution and in previous case law. Where such rights have previously been recognised as being protected by the constitution, adjudication involving them involves no more of a transfer of power to the judiciary at the expense of other branches of government than adjudication involving 'traditional' civil and political rights with implications for public expenditure and policy. Furthermore, in *O'Reilly*, Justice Costello did not determine that there had been a breach of a constitutional right. Rather he analysed the concept of distributive justice. However, in *TD* the applicants were not making a case that the nation's wealth be justly distributed, rather their cases were

<sup>134</sup> [1991] 1 IR 189.

<sup>135</sup> *FN* (n. 132 above), p. 416.

<sup>136</sup> Per Denham J, *TD* (n. 40 above), para. 103.

<sup>137</sup> Unreported, High Court, Costello J, 3 May 1995.

<sup>138</sup> See n. 40 above.

<sup>139</sup> R. Dooley & M. Corbett, 'Child Care, Juvenile Justice and the Children Act 2001', *Irish Youthwork Scene: A Journal for Youth Workers*, No. 36 (2002), available at <<http://www.childrensrights.ie/pubs/ChildCareJuvenileJustice.doc>> (last accessed 1 May 2008)

<sup>140</sup> *TD* (n. 40 above), paras. 14–31. In an earlier case, *DB v. Minister for Justice & Ors.* [1998] IEHC 123, Kelly J had already made a mandatory order, directing the respondents to, amongst other things, take all steps necessary to complete two developments in County Dublin within the time scale specified by departmental officials in evidence before the Court, and to ensure that there was adequate secure high support accommodation available for the applicant and for others with similar needs. This decision was not, however, appealed by the State.

<sup>141</sup> For more details on the State's submissions, see *TD* (n. 40 above), paras. 40–49, *per Keane J.*

<sup>142</sup> *TD* (n. 40 above), para. 137.

brought to protect recognised and acknowledged constitutional rights.<sup>143</sup>

In his judgment in *TD*, Justice Hardiman reiterated his concerns about judicial involvement in areas 'more obviously within the ambit of the legislative or executive government',<sup>144</sup> quoting approvingly a commentator who argued that incorporating justiciable socio-economic rights into the Constitution by referendum would mean a significant transfer of power from the elected branches of government to an unelected judiciary.<sup>145</sup> The other judges of the Court articulated similar views. Justice Murphy expressly doubted the existence of any socio-economic constitutional right apart from the right to education set out in article 42, stating 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 rather than the economic sphere'.<sup>146</sup> Another member of the court expressed 'the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as 'socio-economic rights' to be unenumerated rights guaranteed by Article 40'.<sup>147</sup> Thus, the correctness of the rights identified in *FN* were questioned directly or indirectly,<sup>148</sup> while two justices also appeared to question the binding nature of the statement of the Chief Justice in *G v. ABU*, set out above.<sup>149</sup>

The questioning of the rights enunciated in *FN* by various members of the Supreme Court in *TD* was done unilaterally, as the State did not dispute the conclusions in the earlier case. Therefore, these and other comments in relation to socio-economic rights were *obiter*. One of the results of this spontaneous questioning of *FN* by the Supreme Court was that lawyers on both sides were not given the opportunity to comment on, attack or defend the ruling. It was suggested by one Irish source that part of the reason for the Supreme Court's decision to question *FN* was that the Court realised that if it accepted that *FN* was correctly

decided and, therefore, that the rights identified by Justice Geoghegan existed, it would not make sense to say that there was no way of enforcing those rights.

In the earlier decision of *North Western Health Board v. W. (H.)*,<sup>150</sup> three Supreme Court judges mentioned *FN* in the context of discussing children's unenumerated personal rights without expressly declaring a reservation about the rights declared in that case.<sup>151</sup> Thus, the rights recognised by the High Court in *FN* must be regarded as part of Irish constitutional law as it stands at the moment. Although the Court's comments in *TD* on the correctness of the judgment in *FN* and the appropriateness of interpreting the Constitution to include socio-economic rights were also negative, it must be recalled that they were *obiter* and thus do not form part of a binding precedent.

In February 2007, the Irish Government published the Twenty-eighth Amendment to the Constitution Bill 2007. The draft legislation provided for the replacement of article 42.5 of the Constitution with a provision explicitly recognising constitutional rights of the child, other than those related to primary education. Despite the recommendation of a large number of children's rights advocates that any proposed amendment should include a statement of the child's socio-economic rights, the wording put forward by the Government did not make any express reference to such rights. However, the statement set out in the proposed provision article 42A.1 that 'The State acknowledges and affirms the natural and imprescriptible rights of all children' left open the possibility for further judicial 'discovery' or confirmation of unenumerated socio-economic rights of the child. Due to the dissolution of government prior to a general election in May 2007, the Bill fell. In December 2007, the Joint Committee on the Constitutional Amendment on Children was established. This Committee has been tasked to examine the 2007 Bill and to make any recommendations to the wording of the proposed constitutional amendment provided for in the bill that seem appropriate to it. It remains to be seen what wording (if any) will ultimately be put to the electorate and it is unclear whether or not the Committee will

<sup>143</sup> *Per* Denham J, *TD*, *ibid.* para. 137.

<sup>144</sup> *TD*, *ibid.* para. 241.

<sup>145</sup> *Ibid.* para. 244.

<sup>146</sup> *Ibid.* para. 167.

<sup>147</sup> *Ibid.* *per* Keane CJ, para. 66.

<sup>148</sup> *Ibid.* *per* Murphy J (paras. 172–6), Hardiman J (para. 260) and Keane CJ (para. 66).

<sup>149</sup> *Ibid.* *per* Murphy J (paras 173–176) and Keane CJ (para. 63–7).

<sup>150</sup> [2001] IESC 70 (8th November, 2001).

<sup>151</sup> *Ibid.* *per* Murphy J (para. 202), Keane CJ (para. 80) and Denham J (para. 160).

recommend the explicit inclusion of additional socio-economic rights of the child in the Constitution. Furthermore, it is not guaranteed that such a proposed amendment would be carried if put to the electorate by referendum.

##### 5. THE DEATH KNELL FOR UNENUMERATED SOCIO-ECONOMIC RIGHTS?

The statements made by various members of the Supreme Court in *TD* suggest that it is unlikely that the Court, as currently constituted, will be prepared to identify further unenumerated constitutional socio-economic rights under article 40.3.1.<sup>152</sup> However, the Supreme Court's approach in the case *In re Article 26 of the Constitution and the Health (Amendment)(No. 2) Bill 2004*<sup>153</sup> would appear to signal a slight softening in its stance. In this case, Counsel submitted that the Constitution, and specifically the right to life and the right to bodily integrity of such persons as derived from article 40.3.1<sup>1</sup> and 2<sup>2</sup>, imposes an obligation upon the State to provide at least a basic level of in-patient facilities to persons in need of care and maintenance who cannot provide for it themselves. Interestingly, rather than rejecting the existence of such a right out of hand (as might have been expected from its comments in *TD*), the Court stated that, '[i]n a discrete case in particular circumstances an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs'.<sup>154</sup>

The Court did not consider it necessary to examine such an issue in the circumstances that arose from an examination of the Bill referred to it. Instead, the Court focused on whether, assuming there is such a constitutional right to maintenance, the

charges for which the Bill provided could be considered an impermissible restriction of any such right. The Court did not consider, however, that it could be an inherent characteristic of any right to such services that they be provided free, regardless of the means of those receiving them.

Counsel assigned by the Court argued alternatively that the charges actually provided for in the Bill would cause undue hardship to persons of limited means who have, for a range of reasons, a special need for maintenance by a Health Board in receiving in-patient services. The Court held that the real question was whether the charges were such that they would so restrict access to the services in question by persons of limited means as to constitute an infringement or denial of the constitutional rights asserted. It concluded that, on the basis of the structure of the proposed statutory scheme, they were not. One commentator has observed that the fact that the Court upheld the proposed charge for in-patient services only after satisfying itself that the statutory regime would not unduly deny access to these services would suggest, by implication, that legislation that did unduly deny access to such services might be regarded as unconstitutional.<sup>155</sup>

This decision is a positive (albeit limited) departure from the strident, 'anti-unenumerated socio-economic rights' views expressed by the Supreme Court in *TD*. However, as Doyle and Whyte point out, before we conclude that the Supreme Court is in the throes of undergoing a 'Pauline conversion', particularly on the matter of implied constitutional rights and socio-economic rights, it is important to put the Court's decision in context.<sup>156</sup> Doyle and Whyte observe that the Bill in question was designed 'to shore up a policy that was known to be legally invalid at least since 2001 and that implementation of that policy had the whiff of bad faith about it'.<sup>157</sup> In their view it is more likely that

<sup>152</sup> I note, however, that since *TD*, the personnel of the Supreme Court have changed significantly with two members of the majority in *TD* having retired. In addition, Geoghegan J, who decided *FN*, was appointed to the Supreme Court in 1999 (although he was not on the panel that heard the *TD* case). Consequently, despite the existence of that precedent, future efforts to litigate children's socio-economic rights or seek mandatory orders may not meet with as cold a reception as they did in the *TD* case.

<sup>153</sup> See n. 79 above.

<sup>154</sup> *Ibid.*, *per Murray J*, para. 34.

<sup>155</sup> G. Whyte, 'Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement', paper presented at the Conference on *Economic, Social and Cultural Rights: Models of Enforcement* organised by the Irish Human Rights Commission, Dublin, Ireland, 9–10 December 2005.

<sup>156</sup> O. Doyle & G. Whyte, 'The Separation of Powers and Constitutional Egalitarianism after the *Health (Amendment) No. 2 Bill Reference*', in E. O'Dell (ed.), *Older People in Modern Ireland: Essays in Law and Policy* (Dublin: Firstlaw, 2006), pp. 393–426, at 425.

<sup>157</sup> O'Dell, *ibid.*, pp. 425–426. In 2001, legislation was passed that made it clear that people aged seventy and upwards

the decision simply indicates that there are limits to what even judicial conservatives will tolerate from the other branches of government, and that action taken in bad faith affecting constitutional rights will never pass muster.<sup>158</sup>

## 6. CRITIQUE OF SUPREME COURT'S APPROACH TO POSITIVE OBLIGATIONS

The restrictive approach adopted by the Irish Supreme Court to socio-economic rights issues is open to question on many grounds, including the fact that the distinction between distributive and commutative justice is hardly watertight.<sup>159</sup> It is also debatable whether the Constitution does erect an impenetrable barrier between the courts and issues of distributive justice, in light of provisions such as article 42.4, which would appear to give parents and children a justiciable right to insist that the State should finance primary education.<sup>160</sup> Furthermore, there is no reason in principle why distributive and commutative justice must be segregated in accordance with the constitutional function of the person making the decision, bearing in mind that the distinction between the two kinds of justice 'is no more than an analytical convenience, an aid to orderly consideration of problems'.<sup>161</sup> However, even if one accepts the conventional view that the elected branches of government are better equipped to design schemes of distributive justice, while courts are better at dealing with commutative justice, that does not necessarily justify the Court adopting such a restrictive approach to socio-economic rights issues. As mentioned previously during the discussion of the *O'Reilly* case above, it is arguable that in cases where the State has failed to vindicate a citizen's constitutional socio-economic right, the justice at issue is commutative rather than

distributive in nature. Therefore, in such cases, socio-economic rights issues will fall to be dealt with by the courts. In addition, the majority of the Supreme Court in *TD* appeared oblivious to the reality that judicial decisions in relation to civil and political rights can also have budgetary and policy implications.

Hogan and Whyte have stated that, in the absence of a subsequent decision reversing or qualifying the Court's approach in *TD*, it can be presumed that the Irish Supreme Court does not consider the resolution of socio-economic issues that have implications for public spending or policy to fall within the judicial sphere of operations.<sup>162</sup> However, recent developments have made it clear that this is not fully correct. In the case of *In re Article 26 of the Matter of Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004*,<sup>163</sup> the Supreme Court struck down an attempt by the government to retrospectively legalise illegal nursing home charges to medical card holders, finding that the attempt to retrospectively legalise the charges involved the abrogation of a property right protected by the Irish Constitution.<sup>164</sup> In doing so, the Court expressly stated that the property of persons of modest means must be deserving of particular protection, since any abridgement of the rights of such persons will normally be proportionately more severe in its effects.<sup>165</sup> According to government sources, repayments to former patients and their families who were illegally charged may cost the State between €500 million and €1.2 billion. This case demonstrates that the Court does not hesitate to deal with socio-economic issues that have implications for public spending or policy in situations where the constitutional rights at issue are not perceived as being 'socio-economic' in nature.

Finally, the Court's refusal to become involved in issues of policy fails to recognise the fact that sometimes a question put before a judge can be

were eligible for the relevant in-patient services free of charge. From then on, there was no possible room for doubt that Health Boards were not entitled to impose any charges for in-patient services on persons aged seventy or above. However, the practice continued.

<sup>158</sup> *Ibid.* p. 426. For more on judicial refusals to countenance 'bad faith' on the part of government in the context of remedies, see the statements of Murray J, below at p. 23.

<sup>159</sup> See Whyte, 'Social Inclusion' (n. 5 above), p. 13.

<sup>160</sup> *Ibid.*

<sup>161</sup> M. De Blacam, 'Children, Constitutional Rights and the Separation of Powers', *Irish Jurist*, Vol. 36 (2002), pp. 113–142, at 131, citing J. Finnis, *Natural Law and Natural Rights* (1980), at 179.

<sup>162</sup> Whyte and Hogan, *J.M. Kelly* (n. 14 above), p. 122.

<sup>163</sup> Unreported, 16 February 2005.

<sup>164</sup> While the right to property could be classified as a social right or used to support social rights, this does not appear to be how it is perceived by the Supreme Court and the right to property has not been subject to the same degree of judicial reluctance displayed towards the application and enforcement of more 'traditional' socio-economic rights.

<sup>165</sup> See n. 79 above, para. 120.

viewed as both a question of policy *and* as a question of law.<sup>166</sup> For instance, a case where a child has an unusual form of disability and no provision has been made by the State to meet his educational needs; meeting those needs may well entail issues of policy about the nature, delivery and cost of the service. However, at the same time, there is also a plain and simple issue about the failure of the State to meet the child's explicit constitutional entitlement under the Constitution. In such a case, to say that the issue is one of policy and is therefore not justiciable does not answer the plaintiff's case; it simply ignores it.<sup>167</sup> This might be viewed as an abdication of the Court's responsibility to give a decision on a constitutional question before it. Martha Minow has pointed out that judicial inaction, as well as judicial action, may impair relationships with other branches and undermine the government's overall obligation to respect persons.<sup>168</sup> While it is definitely important for judges to understand their relationships with other people and institutions, such understanding is quite different from ceding responsibility for what ensues. 'The courts' own responsibilities to the parties before them cannot be acquitted simply by asserting deference to other branches'.<sup>169</sup>

## 7. TD – A FLAWED BALANCING EXERCISE?

In the *TD* case, Justice Hardiman built upon his comments in the *Sinnott* case, in which he emphasised that '[the separation of powers] is not a mere administrative arrangement: it is itself a high constitutional value... It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution'.<sup>170</sup> In *TD*, he stated that the High Court's statement that the Court has to attempt to fill the vacuum

that exists by reason of the failure of the legislature and executive to vindicate children's constitutional rights came close to 'asserting a general residual power in the courts, in the event of a (judicially determined) failure by the other branches of government to discharge some (possibly judicially identified) constitutional duty'.<sup>171</sup> If this were accepted, it would have the effect of attributing a paramountcy to the judicial branch of government which was contrary to his view of the Constitution, under which no branch of government is attributed with 'an overall, or residual, supervisory power over the others'.<sup>172</sup> He rejected the premise that 'the boundaries [between the functions of the different organs] are porous or capable of being ignored or breached because one organ rightly or wrongly considers that another organ is unwise or inadequate in the discharge of its own duties'.<sup>173</sup> Acknowledging the checks and balances provided by the Constitution (including that of judicial review of legislation), he further stated that the existence of such powers does not suggest that a court, or any other organ of government, can strike its own balance, in a particular case, as to how the separation of powers is to be observed.<sup>174</sup>

These comments are inconsistent with previous Supreme Court statements that the segregation of functions under the Irish doctrine of separation of powers is not absolute,<sup>175</sup> and appear to ignore the role granted to the Court as guardian of the rights and principles set out in the Constitution.<sup>176</sup> Justice Hardiman's remarks on the courts' inability to strike a balance are especially worthy of note. They appear to suggest that the courts – who are undoubtedly the ultimate interpreters of the Constitution – are not entitled to rule on how the separation of powers doctrine operates in a particular situation. It has been pointed out that, contrary to what Justice Hardiman suggests, a balance *does* have to be struck in such a situation

<sup>166</sup> Paraphrased from De Blacam, 'Children, Constitutional Rights' (n. 161 above), p. 135.

<sup>167</sup> *Ibid.*

<sup>168</sup> She makes this assertion in the context of arguing that the separation of powers necessarily involves continuous relationships between the branches rather than confining each to entirely distinct fields of competence. M. Minow, *Making All the Difference – Inclusion, Exclusion and American Law* (London: Cornell University Press, 1990), p. 369.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Sinnott* (n. 39 above), at para. 346. Keane CJ expressly agreed with Hardiman J's analysis of the separation of powers doctrine (para. 109).

<sup>171</sup> *TD* (n. 40 above), para. 353.

<sup>172</sup> *Ibid.* para. 350.

<sup>173</sup> *Ibid.* para. 357.

<sup>174</sup> *Ibid.* para. 352.

<sup>175</sup> See *Lynham v. Butler (No. 2)* [1933] IR 74 and *Abbey Films Limited v. Attorney General* [1981] I.R. 158.

<sup>176</sup> For a contrasting view of the separation of powers under the Irish Constitution and the court's role in relation to both enforcing the separation of powers and upholding constitutional rights, see Denham J's dissenting judgment in *TD*.

and that even where the courts refuse to intervene in executive action, that in itself is striking a balance.<sup>177</sup> It is clear that the majority in *TD* considered the Court's power to vindicate constitutional rights to be limited by the principle of the separation of powers.<sup>178</sup> Thus, they regarded their duty to uphold (a very rigid version) of the separation of powers doctrine as outweighing their duty to protect and vindicate the constitutional rights at issue.<sup>179</sup>

Finally, it is also possible to classify the courts' duty to uphold constitutional socio-economic rights as an aspect of the judicial function under the separation of powers (as opposed to being part and parcel of the principle of constitutional supremacy). According to this view, judicial inaction or deference in the face of a failure by the State to give effect to constitutional socio-economic rights may itself amount to a breach of the separation of powers.

## 7. REMEDIES AVAILABLE TO IRISH COURTS

In a celebrated ruling, the Supreme Court asserted that it has a broad jurisdiction to protect the constitutional rights of citizens, stating that 'no one can with impunity set these rights at nought or circumvent them, and the courts' powers in this regard are as ample as the defence of the Constitution requires'.<sup>180</sup> In a later case, the Court stated further that, '[w]here the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available'.<sup>181</sup> In a judg-

ment involving the constitutional rights of a child with a serious personality disorder predating *TD*, Chief Justice Hamilton stated that '[it] is part of the courts' function to vindicate and defend the rights guaranteed by Article 40, section 3. If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights'.<sup>182</sup>

The Irish Supreme Court has adopted an extremely restrictive attitude towards the granting of positive orders against the State. In *Sinnott*, several of the judges' *obiter* either expressly or implicitly indicated a reluctance to grant a mandatory injunction in a constitutional context.<sup>183</sup> However, at least two of them acknowledged that there could be extreme circumstances in which such orders might be appropriate, but that the facts of this case were not so extreme as to warrant the granting of such an order.<sup>184</sup> Subsequently, the Supreme Court adopted an even harder line on the granting of mandatory orders against the state in the *TD* case.

In the High Court in *TD*, Justice Kelly had argued that, in directing the executive to adhere to its *own* policy, he was not making policy. However, a majority of the Supreme Court held that, in granting the mandatory orders under appeal, which required the executive power of the State to be implemented in a specific manner by the expenditure of money on defined objects within particular time limits, Justice Kelly had violated the constitutionally mandated separation of powers. The majority was of the view that making such orders involved the High Court effectively determining the policy which the executive is to follow in dealing with a particular social problem.<sup>185</sup>

<sup>177</sup> De Blacam, 'Children, Constitutional Rights' (n. 161 above), p. 141.

<sup>178</sup> Murray J and Hardiman J stated this expressly, while the findings of the other judges indicate implicit agreement.

<sup>179</sup> It is important to note, however, the Court's later statements in *In re Article 26 and the Health (Amendment) (No. 2) Bill* where it stated *per* Murray J that, 'the separation of powers, involving as it does respect for the powers of the various organs of State and specifically the power of the Oireachtas to make decisions on the allocation of resources, cannot in itself be a justification for the failure of the State to protect or vindicate a constitutional right'.

<sup>180</sup> *Per* Ó Dálaigh CJ in *State (Quinn) v. Ryan* [1965] I.R. 70, p. 122.

<sup>181</sup> *Per* Walsh J in *Byrne v. Ireland* [1972] I.R. 241, p. 281. See further comments by Walsh J in the same case, pp. 279–80. For similar comments, see *per* Budd J in *Company of Ireland Ltd. v. Fitzpatrick (No. 2)* [1961] I.R. 345, at 368; *per* Walsh J in *McGee v. Attorney General* 1974] IR 284.

<sup>182</sup> *DG v. Eastern Health Board & Ors* 1997 3 I.R. 511, at 522. Prior to *TD*, there were other judicial statements in cases involving children's constitutional rights indicating that, where appropriate, the Court was entitled to grant injunctive relief to ensure the enforcement of children's constitutional socio-economic rights. See, e.g., *DD v. Eastern Health Board* at 7; *Comerford v. Minister for Education* [1997] 2 ILRM 134, at 147–8.

<sup>183</sup> Geoghegan J (para. 417), Hardiman J (paras. 333–351), Denham J (para. 156) and Keane CJ (para. 80). Murray and Fennelly JJ stated that it was not necessary to consider the issue (paras. 272 and 424 respectively). Murphy J did not refer to the issue of remedies in the course of his judgment.

<sup>184</sup> Denham J (para. 156) and Geoghegan J (para. 417).

<sup>185</sup> *Per* Keane J (para. 80). See also, Murphy J (paras 224–5).

According to Murray J, such an order should only be granted where there has been 'a conscious and deliberate decision by [an] organ of State to act in breach of its constitutional obligations accompanied by bad faith or recklessness'.<sup>186</sup> In his view, a court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory order made by the court.<sup>187</sup> Justice Hardiman agreed with Murray stating that such an order could only be granted as 'an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself'.<sup>188</sup> In his view, no such circumstances that would justify the granting of such an order had occurred since the enactment of the Constitution in 1937.<sup>189</sup> According to both judges, even in such extreme circumstances, the mandatory order granted might direct the fulfilment of a manifest constitutional obligation, but should not specify the means or policy to be used in fulfilling the obligation.<sup>190</sup>

The single dissenting judge (Justice Denham) adopted a different approach, arguing that it was clear from the case law that in rare and exceptional cases (such as this one), to protect constitutional rights, a court may have a jurisdiction, and even a duty, to make a mandatory order against another branch of government.<sup>191</sup> She further pointed out that a decision of a court, even if it is in relation to a single individual, may affect policy: 'The expense of the case itself and its outcome may have profound and far-reaching effects. Simply because a case affects a policy of an institution does not *per se* render it unconstitutional or bring it into conflict with the principle of the separation of powers'.<sup>192</sup> She disagreed with the majority that in making an order such as that granted by the High Court against the executive, the court was formulating policy, stating instead

that the order merely mandated the State's own policy.<sup>193</sup>

The Irish Supreme Court has thus limited its ability to grant mandatory orders to such an extent that it is very unlikely that such an order will be granted against the state – particularly with regard to constitutional socio-economic rights, which raise their own especial concerns in relation to the doctrine of the separation of powers.<sup>194</sup> On a more constructive note, the *TD* case was positive in relation to at least one aspect of enforcing socio-economic rights. While the majority of

<sup>193</sup> *Ibid.* para. 134.

<sup>194</sup> I note, however, that dicta from various Supreme Court judges and High Court decisions suggest that advocates might have more success in obtaining mandatory orders where the socio-economic rights obligations at issue are statutory, rather than constitutional, in nature or where the services or facilities being demanded are already in existence. It is interesting to consider Hardiman J's comment in *Sinnott* that 'the enforcement of duties imposed by the legislature is obviously an exercise of a different kind from the devising or inferring of such duties without legislative intervention' (para. 379). In the *TD* case, Hardiman J discussed the possibility that relief could be afforded to the applicant under legislation (at paras. 261–2). These dicta appear to imply that it is possible that the Supreme Court would have been prepared to adopt a less restrictive approach to the granting of mandatory orders where the duties at issue were statutory rather than constitutional in nature. This is arguably borne out by the High Court decision in *Jeremiah Cronin (a minor) suing by his mother and next friend Margaret Cronin v. Minister for Education and Science & Ors*, Case 1144OP of 2003. In this case, Laffoy J granted a mandatory interlocutory order, ordering the Minister for Education and Science to provide twenty-nine hours home tuition a week to an autistic child, pending either the securing of an appropriate school place for the child or the outcome of his full action against the State. The complainants alleged that by failing to provide educational services appropriate to the child's needs, the defendants were in breach of their obligations under, amongst other things, the Education Act 1998. Laffoy stated that, in reaching her conclusion, she had regard to the decision of the Supreme Court in *TD* and, in particular, to the observations of (Keane CJ) at page 287 of that judgment. She said that she was 'satisfied that granting a mandatory injunction does not fall foul of that decision. The relief granted is limited to the particular needs of the Plaintiff and merely extends a programme which the First Defendant has already sanctioned'. According to O'Mahony, '[t]his analysis would suggest that the restriction imposed in *TD* on mandatory relief applies only to orders which require the implementation of whole new ranges of services or facilities and does not apply to individual plaintiffs who wish to be provided with facilities or services which are already in place. (C. O'Mahony, 'A New Slant on Educational Rights and Mandatory Injunctions?' *Dublin University Law Journal*, Vol. 27 (2005), pp. 363–367, at 365).

<sup>186</sup> *TD* (n. 40 above), para. 232.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.* para. 367. It is interesting to note that Hardiman J did not consider the circumstances in the case before him as being of 'great crisis'. Nor did he appear to view the consistent disregard of declaratory orders granted in similar cases preceding *TD* by the elected branches of government as constituting a threat to the constitutional order.

<sup>189</sup> *Ibid.* para. 367.

<sup>190</sup> *Per* Murray J (para. 232) and *per* Hardiman J (para. 366).

<sup>191</sup> *Ibid.* 139. See also para. 16.

<sup>192</sup> *Ibid.* para. 133.

the Supreme Court refused to grant a mandatory order on the basis that doing so would constitute a violation of the doctrine of separation of powers, they did not base their decision on inherent judicial incapacity to grant such an order. In fact, their judgments make it clear that in some extreme circumstances the courts could grant a mandatory order. This would suggest that the Court does not regard itself as institutionally *incapable* of formulating complex mandatory orders.

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## 8. CONCLUSION: FUTURE DEVELOPMENTS?

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This final section focuses on means by which socio-economic rights may be accorded a greater level of protection within the Irish legal order in future.

One way in which the restrictive approach adopted by the Irish courts to socio-economic rights might be addressed is by amending the Irish Constitution by referendum so as to include socio-economic rights. The recent developments with regard to the possible future amendment of the constitution to afford greater protection to children's rights have already been discussed. However, recommendations that the constitution be altered so as to include socio-economic rights have not been made solely in this context. In 1996, a majority of the Constitutional Review Group (CRG) rejected arguments in favour of including in the Constitution 'a personal right to freedom from poverty or of specific personal economic rights' (i.e., socio-economic rights).<sup>195</sup> This was largely due to concerns that rendering such rights justiciable would lead to a distortion of democracy by according judges power in relation to policy and budgetary matters that were more appropriately left to the elected branches of government. The CRG were also of the opinion that a right to freedom from poverty would not be capable of objective determination and that the elected branches of government might be placed in a position where they would have no discretion in relation to what amount of revenue would be necessary in order to satisfy such right.<sup>196</sup> This was an extremely disappointing development for proponents of socio-economic rights. It served to demonstrate the

misperceptions about socio-economic rights (and what judicial adjudication of them would entail) that underlay (and continue to underlie) the attitudes of legal professionals and others in Ireland.

Another means by which the Irish judiciary might positively develop its socio-economic rights jurisprudence is through more extensive reference to, and employment of, international law in its interpretation of the rights set out in the Constitution.

In addition, the passing of the European Convention of Human Rights Act (ECHR Act) in 2003 means that there is a new, albeit statutory, source of norms to be employed to give effect either directly or indirectly to socio-economic rights claims. Section 3(1) of the Act requires every organ of the state to perform its function in a manner compatible with the State's obligation under the convention provisions. This includes those convention obligations which have implications for the enforcement of socio-economic rights. The passing of the Act has increased the extent to which the ECHR is relied on and cited in Irish courts requiring, as it does, that, in interpreting and applying any statutory provision or rule of law, courts shall, as far as is possible 'do so in a manner compatible with the State's obligations under the Convention provisions'.<sup>197</sup> The Act also provides that judicial notice must be taken of, *inter alia*, the Convention provisions and jurisprudence of the European Court of Human Rights (ECtHR)<sup>198</sup> and that, when interpreting and applying the Convention provisions, courts must take due account of the principles laid down in, amongst other things, such decisions and judgments. Amongst other things, the Act empowers the High Court and the Supreme Court to make a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention, where no other legal remedy is adequate or available.<sup>199</sup>

In the United Kingdom, courts at all levels have relied on jurisprudence of the ECtHR in

<sup>195</sup> See CRG, *Report* (n. 1 above), pp. 234–6.

<sup>196</sup> For more on this, see *ibid.*

<sup>197</sup> Section 2, ECHR Act 2003. For information on how the Act has operated since its introduction, see D. O'Connell, S. Cummiskey, E. Meenaghan & P. O'Connell, *ECHR Act 2003: A Preliminary Assessment of Impact* (Dublin: Law Society of Ireland/Dublin Solicitors Bar Association, 2006).

<sup>198</sup> *Ibid.* Section 4.

<sup>199</sup> *Ibid.* Section 5.



considering socio-economic rights-related claims brought under the UK Human Rights Act 1998. It was hoped that the Irish courts would adopt a similar approach when dealing with socio-economic rights-related cases arising under the ECHR Act. Initially, however, there were relatively few cases in which the legislation was cited. In the case of *Dublin City Council v. Fennell*,<sup>200</sup> the Irish Supreme Court held that the ECHR Act did not operate retrospectively, either to past events (i.e. events prior to the coming into force of the Act), actions that have already been initiated or pending litigation. This decision meant that it was some time before the Irish courts (and particularly the Supreme Court) were able to develop jurisprudence under the Act.

There is a growing body of housing rights case law developing under the Act as a result of claimants bringing complaints based on Article 8 ECHR (right to respect for private and family life, home and correspondence). There have been a number of positive decisions in which the High Court has found the State not to be in compliance with its obligations under Article 8. In one instance, this occurred where a local authority failed to provide appropriate mobile home accommodation to members of a Traveller family living with severe

physical disabilities.<sup>201</sup> In another case, a section of the Housing Act 1966 was found to be in breach of Article 8, which set out a summary procedure for the recovery of possession of dwellings by local authorities from their tenants but did not provide adequate procedural safeguards.<sup>202</sup> Unfortunately, this judicial willingness to engage progressively with the State's obligations under Article 8 does not appear to be shared by all members of the bench.<sup>203</sup>

All in all, these developments taken together with the recent decisions involving the right to civil legal aid, as well as the Supreme Court's failure to expressly reject the existence of further unenumerated socio-economic rights in the case of *In the Matter of re Article 26 of the Constitution and the Health (Amendment)(No. 2)*, suggest that the debate on the judicial enforceability of socio-economic rights in Ireland has not been foreclosed by the decisions in *TD* and *Sinnott*.

<sup>200</sup> [2005] IESC 33.

<sup>201</sup> *O'Donnell v. South Dublin County Council*. Record No.2006/19, 22 May 2007.

<sup>202</sup> See M. Carolan, 'Judge Finds Housing Codes Breaches Rights' *Irish Times*, 9 May 2008, referring to the decision of Laffoy J in *Donegan v. Dublin Council and the Attorney General*, High Court, 8 May 2008.

<sup>203</sup> See, e.g., *Doherty & Anor. v. South Dublin County Council* [2007] IEHC 4; *Leonard v. Dublin City Council + Ors* [2008] IEHC 79.