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REPORT

**“The fundamental values contained in the Constitution of Ireland
and their application”**

by

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The fundamental values contained in the Constitution of Ireland and their application

Introduction – The Irish Legal System

The legal system of Ireland is one of common law. Although early Irish society had its own native legal system, known as Brehon Law, the common law was introduced by the English conquerors and settlers of Ireland and by the seventeenth century common law was firmly established in Ireland and has remained so until this day. When Ireland achieved self-governing status in 1922, nobody other than a small number of incurable romantics seriously suggested that the common law should cease to be the law of Ireland. However, the introduction for the first time in 1922 of a written constitution marked a major break with the English legal tradition. Although it had been intended that that constitution could be amended only by plebiscite after an initial period during which it could be extended by ordinary legislation the period during which the 1922 Constitution could be amended by the legislature was successively extended so that in effect until 1937 Ireland remained a country subject to a system of parliamentary sovereignty despite having a written constitution.

The Constitution of Ireland, 1937

Irish constitutional development came to full fruition in 1937 with the adoption of a fully republican form of constitution which abandoned the concept of parliamentary sovereignty in favour of the concept of sovereignty of the people. The 1937 Constitution was adopted by plebiscite and, following a three year transitional period, could thereafter be amended only by popular referendum. The constitutional structure provided for a bicameral legislature with a strict separation between the three branches of government. The independence of the judiciary is guaranteed as is the exclusive power of the Oireachtas (parliament) to make law. It contains detailed provisions concerning the fundamental rights of citizens and provides for an extensive power of judicial review, under which legislation which is inconsistent with the Constitution can be struck down by the courts. While it took some considerable time for judges and lawyers steeped in the old doctrine of parliamentary sovereignty to realise the implications of this constitutional revolution, by the 1960s judicial activism was in full swing and since then the Irish courts have developed an elaborate constitutional jurisprudence. Constitutional law and the concept of constitutional justice has informed and infused all aspects of Irish law and the Irish courts have given a firm constitutional basis to rules of fair procedure or due process.

In all of this, of course, Irish courts were doing something that had already been done in that great bastion of the common law, the United States of America, whose example has in this and the last century been followed by many other common law jurisdictions to a greater or lesser extent, most recently even by the United Kingdom since its adoption of the European Convention on Human Rights as part of its domestic law.

Express Fundamental Rights

The 1937 Constitution contains a number of express provisions concerning human rights. They, however, are only a part of the story of the protection of human rights on the constitutional plane. The Irish courts have also recognized the existence of a large number of rights which are not in fact specified in the text.

I will begin by describing briefly some of the principal fundamental rights which are expressed in the text. The 1937 Constitution is, of course, a product of its time. Hence some of the language used in 1937 as well as the content looks old-fashioned by the standards of 2008. The attitude to the role of women appears particularly outdated. Some of the text reflects a Catholic ethos particularly in the provisions concerning the family and education. On the other hand the Article on religion on the whole represents a clear separation between church and state. Much of the language reflects natural law thinking with its references to natural, inalienable and imprescriptable rights.

Many of the express fundamental rights are contained in the chapter entitled Fundamental Rights comprising Articles 40-44.

Article 40 contains a guarantee of equality before the law. The guarantee is extended to all citizens "as human persons". The Article contains a prohibition on the conferring of titles of nobility by the State and a prohibition on citizens accepting titles of nobility or of honour except with the prior approval of the Government. Article 40.3.1^o, to which I shall return, contains a guarantee by the State in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. The following paragraph goes on to state that the State shall, in particular, by its laws protect as best as it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

This provision is then followed with a clause which acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. This provision was inserted following a referendum in 1983. In *Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open-Door Counselling Ltd* [1988] IR 593 the Supreme Court granted an injunction restraining the defendants from providing information in Ireland about abortion services obtainable abroad. In *Attorney General v X* [1992] 1 IR 1 an injunction was granted by the High Court to prevent a 14 year old girl who was pregnant as a result of a rape from leaving the jurisdiction of Ireland to obtain an abortion. The decision of the High Court in *X* was on the facts of the particular case reversed by the Supreme Court on the grounds that there was a real and substantial risk that Ms. X might commit suicide, and in such circumstances termination of pregnancy was permissible. The possibility of injunctions being granted in other circumstances was, however, affirmed. Following the *Open-Door* and *X* cases two further provisions were inserted in the Constitution following further references in 1992 stating that the subsection "shall not limit freedom to travel between the State and another state" and that the subsection "shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law" information relating to services lawfully available in another state. A further proposal to exclude possible suicide as a permissible ground to allow an abortion was rejected by the electorate.

Article 40.4 provides that no citizen shall be deprived of his personal liberty save in accordance with law. It then goes on to set out what is effectively a habeas corpus provision which is, however, established as a constitutional procedure under this Article.

Article 40.5 provides that the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

Article 40.6 guarantees liberty for the exercise of a number of specified rights “subject to public order and morality”. The first of those rights is the right to the free expression of convictions and opinions. This is, however, qualified by a statement that organs of public opinion, such as the radio, the press, the cinema, while preserving the rightful liberty of expression, including criticism of government policy, shall not be used to undermine public order or morality or the authority of the State. The provision goes on to state that the publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law. Notwithstanding this apparently clear provision there is in fact no offence of blasphemy in Irish law.

The next specified right is the right to assemble peacefully and without arms. However, this right is qualified by a statement that provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of the parliament.

Finally, Article 40.6 guarantees the right of the citizens to form associations and unions but permits laws to regulate and control in the public interest the exercise of the foregoing right.

Article 41 deals with the family. The Family is recognised as the natural, primary and fundamental unit group of Society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. There is a guarantee to protect the Family in its constitution and authority. The Article goes on to provide that by her life within the home, woman gives to the State a support without which the common good cannot be achieved, and says that the State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. Next this Article contains a pledge to guard with special care the institution of marriage on which the Family is founded and to protect it against attack, but the succeeding provision allows for a grant of divorce on certain conditions. This latter provision was inserted following a referendum in 1995 and replaced the original provision which had prohibited the granting of divorces.

Article 42 deals with education. The Family is recognised as the primary and natural educator of the child and the “inalienable right and duty of the parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children” is guaranteed. Parents are stated to be free to provide this education in their homes or in private schools or in schools recognized or established by the State. Parents may not be obliged to send their children to state schools or any particular type of school designated by the State. However, the State may require that children receive a certain minimum education, moral, intellectual and social. There is an obligation to provide for free primary education, to endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, to provide other educational facilities or institutions. Where parents for physical or moral reasons fail in their duty towards their children the State may endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Article 43 acknowledges the right to private property, or as the Constitution puts it “to the private ownership of external goods”. There is a guarantee to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property. However, these rights may be regulated by the principles of social justice.

Finally, Article 44 deals with religion. The State acknowledges that the homage of public worship is due to Almighty God. The State is to hold His Name in reverence, and respect and honour religion. Originally there was a clause which recognized a number of named religions but that was deleted by referendum in 1972. Freedom of conscience and the free profession and practice of religion are guaranteed “subject to public order and morality”. There is a prohibition on the endowment of religion. There is a prohibition on making discrimination on the grounds of religious profession, belief or status. Legislation providing state aid for schools must not discriminate between schools under the management of different religions or denominations. Nor must it affect the right of any child to attend a school receiving public money without attending religious instruction at that school. The right of religious denominations to manage their own affairs, and to own, acquire and administer property and maintain religious or charitable institutions is guaranteed and their property may not be diverted save for necessary works of public utility and on payment of compensation.

It will be noted that this list of specified rights in Articles 40-44 is a relatively limited one. There are many rights which would generally be recognized today both in modern constitutions and in the international human rights instruments which are not expressly referred to in the Constitution of Ireland. It is also worth noting that many qualifying phrases appear in the text when describing the various specified rights, such as, “subject to public order and morality”.

The Unenumerated Rights

It is obvious that if the human rights protections in the Constitution of Ireland were confined to the rights expressly set out in it the Constitution would be seriously deficient by modern standards. But in a landmark case, *Ryan v Attorney General*, 1965, IR294, the Supreme Court held that the reference to the personal rights of the citizen in Article 40.3.1° of the Constitution did not refer only to the rights which are actually specified but also to various other unspecified personal rights. Over the years the courts have identified a substantial number of unspecified or unenumerated rights using this particular provision.

Ryan’s case was concerned with an allegation that the fluoridation of water infringed the personal rights of the citizen. While the Court rejected the plaintiff’s claim it nonetheless held that there was indeed an unspecified right to bodily integrity which was one of the personal rights referred to in that Article. This right was broadened in subsequent cases in to a wider right not to have one’s health endangered by the actions of the State¹.

Other rights which have been recognised include the right to freedom from torture, inhumane or degrading treatment², the right to work and earn a livelihood³ and the right to marital privacy⁴. A more general right to privacy has also been recognised⁵. The right to autonomy was recognised in *In re a Ward of Court (withholding medical treatment) (No. 2)*⁶ in which the Supreme Court

¹ *The State (C) v Frawley* [1976] IR 365

² *ibid*

³ *Murtagh Properties v Cleary* [1972] IR 330

⁴ *McGee v Attorney General* [1974] IR 284. In this case the Supreme Court held that provisions making access to contraception unlawful violated the right of a married person to privacy in regard to his or her marital relations.

⁵ *Kennedy v Ireland* [1987] IR 587. The case concerned a complaint by the plaintiffs of unjustifiable tapping of their telephones by the State.

⁶ [1996] 2 IR 79

authorized the withdrawal of artificial nutrition and hydration from a patient who had been in a near persistent vegetative state for many years. The right to refuse to submit to medical treatment was also recognised. Other rights which have been recognized include the right to litigate and to have access to the courts, the right to justice and fair procedures, the right to travel both within and outside the State, the right to know one's mother's identity, and the right to marry. The right to procreate was recognized in *Murray v Ireland*⁷, a case in which a married couple, both of whom had been convicted of murdering a policeman and were long term prisoners, sought the right to have children. While the court recognized the general right to procreate it held that the State was entitled to limit it in the case of prisoners. The rights of an unmarried mother in regard to her child⁸, certain rights of children and the right to communicate have also been upheld.

An obvious difficulty arises in identifying what is the source of these rights? At different times the Irish courts have given different answers to this question. In some cases the courts held that the rights derived from the "Christian and democratic nature of the State"⁹. Other sources have included papal encyclicals,¹⁰ international human rights instruments¹¹ and the principles of natural law. There is no doubt, however, that the courts have never found an entirely satisfactory answer to this problem and many commentators have criticised what they see as essentially judicial law making which does not have any mandate from the text. In recent years there has been less of a tendency to identify new and personal rights, although given the range of rights already identified it would be difficult not to conclude that there can be very few left which have not been considered at some time or other. In *OT v B*¹², Keane CJ in commenting on the nature of unspecified rights stated as follows:

"It would unduly prolong this judgment to consider in detail the problems that have subsequently been encountered in developing a coherent principled jurisprudence in this area. It is sufficient to say that, save where such an unenumerated right has been unequivocally established by precedent and, for example, in the case of the right to travel and the right of privacy, some degree of judicial restraint is called for in identifying new rights of this nature."

It may be noted that a similar phenomenon exists in relation to the interpretation of the United States Constitution and has been subjected to similar criticism from those who are opposed to too much judicial activism.

Other Rights in the Constitution

Apart from the Fundamental Rights Articles in the Constitution of Ireland, a number of other rights appear throughout the document. These include the right to trial by jury (Article 38.5), the right to vote (Article 16.1.2°), and the right to seek election (Article 16.1.1°).

⁷ [1985] IR 352

⁸ *The State (Nicolau) v An Bord Uchtála* [1966] IR 567, *G v An Bord Uchtála* [1980] IR32

⁹ For example, in *Ryan v Attorney General* [1965] IR 294

¹⁰ *ibid*

¹¹ *Doyle v Garda Commissioner* [1998] 2 ILRM 523

¹² [1998] 2 IR 321

Article 38.1 provides that no person shall be tried on any criminal charge save in due course of law. In a similar manner to the way in which the courts have elaborated on the reference to personal rights and defined innumerable unenumerated rights the term “due course of law” has been held to imply a large number of rights in the area of criminal law and procedures. These include the right to be presumed innocent of criminal charge until the case is proven¹³, the right to be informed of the nature and cause of the charge promptly, in detail, and in a language which is understood¹⁴, the right to be tried without undue delay¹⁵, the right to a fair public hearing by a competent, independent and impartial court¹⁶, the right to be allowed to appear, defend oneself, and be present throughout one’s trial¹⁷, the right to be legally represented, and if necessary to be assisted financially¹⁸, the right to be given reasonable time and opportunity for the preparation of defence¹⁹, the right to be given the assistance of an interpreter where necessary²⁰, the right to give evidence and secure the attendance and examination of witnesses and to present evidence in a manner prescribed by law²¹, the right not to be compelled to incriminate oneself²², the right to be subject to fair procedures relating to arrest, detention, charging, trial, appeal and sentence, which are prescribed or permitted by law²³, the right to be allowed to appeal against conviction or sentence as may be prescribed by law²⁴, and the right not to be tried a second time for the same offence following a valid conviction or acquittal²⁵.

Procedures

I propose to say a little about procedures which are followed by the Irish courts in relation to constitutional questions. By virtue of Article 34.3.2 the exclusive jurisdiction to question the validity of any law passed by the parliament on grounds of constitutionality is vested in the High Court and on appeal from the High Court to the Supreme Court. The effect of a finding of invalidity of a law is that the law is deemed never to have been valid and such a finding operates *ex tunc* rather than *ex nunc*. This, of course, on some occasions can present rather intractable problems because, as it has been succinctly put “the egg cannot be unscrambled”²⁶. For example, in the past electoral laws have been stricken down. Should this have resulted in a finding that previous legislatures had been invalidly elected and that their acts were null and void? Would Governments elected by those legislatures also be invalid? Such a finding would have carried with it the further proposition that the judges who struck down the law had not been duly appointed under the Constitution. We thereby come full circle. In one case the Supreme Court struck down a very significant aspect of the Income Tax Acts²⁷ but nonetheless held that the

¹³ *O’Leary v Attorney General* [1995] 1 IR 254

¹⁴ *The State (Buchan) v Coyne* [1936] 70 ILTR 185, *In re Haughey* [1974] IR 217, *Director of Public Prosecutions v Doyle* [1994] 2 IR 486

¹⁵ *Director of Public Prosecutions v Byrne* [1994] 2 IR 236, *Cahalane v Murphy* [1994] 2 IR 262

¹⁶ *The People (Director of Public Prosecutions) v McGinley* [1983] 3 Frewen 251, *The People (Director of Public Prosecutions) v WM* [1995] 1 IR 226, *Eccles v Ireland* [1985] IR545, *The People (Attorney General) v Singer* [1975] IR 408

¹⁷ *The People (Attorney General) v Messitt* [1972] IR 204, *Lawlor v Hogan* [1993] ILRM 606

¹⁸ *The State (Healy) v Donoghue* [1976] IR 325

¹⁹ *In re Haughey* [1971] IR 217, *O’Callaghan v Clifford* [1994] 2 ILRM

²⁰ *The State (Buchan) v Coyne* [1936] 70 ILTR 185

²¹ *In re Haughey* [1971] IR 217, *White v Ireland* [1995] 2 IR 268

²² *Heaney v Ireland* [1994] 3 IR 593

²³ *The People (Director of Public Prosecutions) v Healy* [1990] 2 IR 73, *Cox v Ireland* [1992] 2 IR 503

²⁴ *The People (Attorney General) v Conmey* [1975] IR 341

²⁵ *The People (Director of Public Prosecutions) v Quilligan (No 2)* [1989] IR 45, *McCarthy v Garda Commissioner* [1993] 1 IR 489

²⁶ See Griffin J. in *Murphy v Attorney General* [1982] IR 241 at p 331

²⁷ *Ibid*

practical consequences of this could not permit a refund of taxes before the date of issue of proceedings. A variety of legal stratagems have been devised in order to avoid the logic of the proposition that the law never existed, including, most remarkably, in the case of *A v Governor of Arbour Hill Prison*²⁸ a finding that (following the striking down of a law which prevented a person from having sex with underage children) a person convicted of such an offence (which was deemed never to have existed) could nonetheless be kept in prison on foot of a prior conviction because he had not raised the issue at the time. Finally, it may be noted that over the years the courts have been quite active in striking down provisions of statute law.

In addition to the power to declare a law invalid there is also a provision which allows the President of Ireland, instead of signing a law which has been passed by the parliament, to refer it to the Supreme Court for an advisory opinion on its validity which the Supreme Court must give within 60 days. However, if the law is upheld by the Supreme Court it can never thereafter be challenged. This provision has been criticized by the Constitutional Review Group which reported in May 1996. It is hard to avoid the conclusion that the Irish courts, being based on a common law tradition, are unhappy with this form of abstract review. There is a reluctance to guarantee forever the constitutionality of a statute when it is not possible to envisage all the circumstances in which something might be done on foot of it. For this reason the provision is rarely invoked. Typically it might be used in a case where a law dealing with a net issue contained a small number of provisions which are going to have a drastic effect if they are subsequently found to be unconstitutional. For example, the section has been used to test the validity of adoption legislation. In many cases where a law has been tested under this provision the Supreme Court has refused to give the law its seal of approval and it is hard to resist the impression that they are very reluctant to do this, particularly when a statute is long or complex. The Constitutional Review Group suggested that instead of the existing procedure a finding of constitutionality should not preclude a subsequent challenge – as in any other case where a constitutional challenge fails.

Finally, Ireland does not have a separate constitutional court. As in the United States of America constitutional issues are dealt with in its highest courts which also deal with other matters. It follows from this that constitutional issues may be raised together with other issues in various forms of litigation. Apart from bringing a declaratory action seeking a declaration of invalidity of a law, the possibility arises of raising constitutional issues in judicial review proceedings, in habeas corpus applications, or when such issues arise in the course of ordinary civil litigation or even in criminal cases. As well as striking down laws, courts may give injunctive relief to restrain breaches of the Constitution, may award damages, and must refuse to admit evidence obtained in breach of constitutional right²⁹.

The European Convention on Human Rights and the Irish Constitution

The European Convention for the Protection of Human Rights and Fundamental Freedoms was incorporated into Irish law by the European Convention on Human Rights Act 2003. The Act provided that courts must, as far as possible, interpret and apply Irish law in a manner compatible with the Convention, and that every organ of State must perform its functions in such a manner. Any contravention of the latter provision gives rise to an action in damages. The High Court and Supreme Court can make a declaration that a provision of Irish law is incompatible with the Constitution.

²⁸ [2006] 2 ILRM 481

²⁹ *People (DPP) v Kenny* [1990] 2 IR 110

These remedies, of course, co-exist with the existing remedies under the Constitution, including the power to strike down a law for unconstitutionality. One of the leading commentators on the Constitution of Ireland, Prof. Gerard Hogan, has commented on the

“striking degree of overlap between the respective guarantees (as judicially interpreted) contained in the Constitution and the Convention. The Constitution contains no significant omissions compared with the ECHR, although the guarantee of the rights to family life in Article 8 and free speech in Article 10 are probably more extensive than the corresponding constitutional guarantees, although, in the latter case, judicial attitudes seem to be changing

What does appear to be almost beyond question, however, is that there are no major deficiencies in the level of constitutional protections as compared with the ECHR. It is also true that the Constitution’s guarantees in respect of matters such as the separation of powers, the right to jury trial for major offences and the guarantees in respect of religious discrimination and non-endowment of religion go significantly beyond ECHR guarantees. Furthermore, the constitutional jurisprudence relating to remedies – the exclusion of evidence for breach of constitutional rights; the jurisdiction of the courts to restrain anticipated unconstitutional conduct by the executive or legislative branches, and the award of damages for breach of constitutional rights – is at least the equal of that provided by Strasbourg and is, in many significant respects, more developed.”³⁰

In their introduction to the fourth edition of J.M. Kelly’s *The Irish Constitution* the editors, Profs. Gerard Hogan and Gerry Whyte, commented that:

“the Constitution’s significantly superior system of judicial review and ancillary remedies (such as the declaration of invalidity, damages and injunction) ensures that it will remain the litigant’s first choice.”

Such has indeed proved the case. Although it is now the practice in many cases for litigants to assert breaches of both the Constitution and the Convention, in only one case since the Convention was incorporated has a law or an action been found by the Irish courts to be compatible with the Constitution of Ireland but not with the Convention³¹.

³⁰ Hogan, ‘The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland’ (1999) *Bar Review* 205 at 208-9 (footnotes omitted).

³¹ See *Foy -v- An t-Ard Chláraitheoir & Ors.*, Unreported, High Court, 19th October 2007, McKechnie J. The applicant was a post-operative male to female transsexual. In 2002, she failed in her application to have her name and gender altered on her birth certificate to reflect such change. The High Court held that the legal regime in place had not infringed her constitutional rights to privacy, dignity, equality and to marry an Irish male. By the time the applicant’s appeal came up for hearing there had been a number of significant changes in the legal landscape in relation to issues arising in her claim. As a result, the Supreme Court remitted the matter to the High Court so that new issues could be heard at first instance. McKechnie J., in giving judgment, noted that the applicant’s constitutional claim was almost identical to that in her earlier case, with the exception of one new point. Therefore, he felt bound by the court’s previous adjudication and found that there had been no infringement of the applicant’s constitutional rights. However, reviewing the recent pronouncements from the European Court of Human Rights, McKechnie J. held that there had been an infringement of the applicant’s Convention rights. He therefore held that a declaration of incompatibility under the 2003 Act was appropriate. This decision is under appeal to the Supreme Court. See Coulter, *State to Appeal Judgment in Foy Case to the Supreme Court*, Irish Times, 1st April 2008.

Conclusion

Despite the many obvious inadequacies in the written text of the Constitution of Ireland, the jurisdictional activism of the courts, especially from 1960 on, led to a vibrant constitutional law where judicial interpretation supplied many of the gaps. Despite the more restrained approach now usually maintained in the courts the Constitution continues to provide an effective protection for fundamental rights and has generally proved itself capable of being adapted to meet the challenges of ever-changing times.

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