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The constitutional protection of parental rights

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1 INTRODUCTION

This chapter explores some of the advantages and disadvantages of according a fundamental status in law to parental rights and duties. Its primary focus is on the Constitution of Ireland of 1937 which, in Article 42, guarantees respect by the State for '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.'(1) What is said also has some bearing on the protection of parental rights under other national constitutions, and under the European Convention of Human Rights and Fundamental Freedoms.

The Irish experience has shown that constitutional recognition of parental rights and duties may influence the legal system in a number of different ways. It has affected the interpretation of legislation(2) and the status of common law principles relating to the parent-child relationship(3) It has resulted in judicial decisions declaring legislation unconstitutional and therefore invalid.(4) It has had a sometimes remarkable influence on the drafting of legislation, especially relating

to adoption.(5) The constitutional provisions are frequently invoked in parliamentary debates during the passage of legislation. And on a broader front, the constitutional emphasis on parental rights and family autonomy (Article 41) has undoubtedly contributed to a social work tradition which places more emphasis on family support than family intervention.(6) Whether the present constitutional provisions have on balance acted as a beneficial break on excessive state interference in family life, or rather as a straitjacket preventing the passage of legislation which would promote the interests of children, has been hotly debated for many years.(7)

One consequence of elevating parental rights and duties to constitutional status is that their political, social and moral bases may become the subject of judicial consideration. The constitutional references to parents' rights and duties - and indeed to other relevant constitutional norms, such as children's rights or the principle of equal treatment under the law(8) - are expressed in broad and general terms. The doctrine of implied rights has also been invoked in support of parental rights.(9) The task of determining the exact scope of express and implied parental rights and duties has fallen to the judges and, in carrying out this task, it has been inevitable that judges should be influenced by extra-legal ideas about the bases of parental rights. Often these ideas are implicit rather than explicit in judgments. It is worthwhile to begin with a discussion of them. We will find that several different justifications for parental rights are involved which do not always lead to consistent conclusions about the proper scope of parental rights.

2 MORAL, POLITICAL AND SOCIAL JUSTIFICATIONS FOR THE PROTECTION OF PARENTAL RIGHTS

a) Natural law justifications

There are at least two natural law ideas which appear to have influenced judicial attitudes towards parental rights. The first (deriving from an essentially Thomistic view of natural law) posits that the exercise by parents of authority over their children is sanctioned by natural law, which itself is part of the divine order.(10) Other aspects of that natural law help to define the boundaries of parental rights. For example the principle that marriage should be the fulcrum of family life (reflected in Article 41 of the Constitution)(11) suggests a lower status for the rights of unmarried parents. Thus, Irish judges have consistently interpreted Article 42 as conferring a protected parental status only on married parents.(12) The unmarried father has no special status,(13) and such parental status as the unmarried mother enjoys derives from Article 40.3. Under that article her rights are implied and are of a lesser order than those accorded under Article 42.

A second and related natural law argument in support of parental authority is not so much that God ordained it so, but rather that nature displays it so.(15) Parental authority is said to derive from the biological and physical realities of the human condition, and in particular from the relationship of dependency which nature creates between biological parents and their offspring. The use of this kind of reason to support a doctrine of parental rights has been criticised as

an example of the naturalistic fallacy.(16) It has nevertheless been influential in shaping constitutional principles. Thus the ascription of rights to the unmarried mother has been justified by the close biological relationship between a mother and her child.(17) Conversely the natural father, not having the same biological importance in the child's life, does not have rights.(18) His status is further undermined by perceived social differences between his position and that of a married father. Because the father's relationship with the mother may only have been casual it does not give rise to the same claim as that of a married father in relation to the child's upbringing.(19)

Another product of this approach to parental rights is the idea that a social parent may not assume the same significance in the child's life, or develop the same attachment, as a biological parent.(20) With developments in our knowledge relating to bonding and attachment, this is a view which is now seldom expressed, and yet it has helped to shape the doctrine of parental rights in Irish law by according stronger rights to biological rather than to social parents. Although the rights of adoptive parents are recognised, foster parents, no matter how strong their attachment to a child, have no constitutional status as parents. Any constitutional claim they may make in, for example, a custody dispute with biological parents, can derive only from the rights and interests of the child. And in any case the courts act on the presumption (rebuttable only by compelling evidence) that the child's interest are best protected by being brought up by the married biological parents.(21)

A further problem with the natural law approach is that it offers a

stage on which judges may project personal preferences about parenting in the guise of objective truth or justice. This becomes particularly apparent where disagreement arises as to the scope of parental rights.

The Irish case law has, for example, revealed differences of judicial opinion as to whether an unmarried mother has a natural right of custody of her child.(22) There has even been one dissent from the view that the married parent has a natural right to custody.(23) There have also been shifts in judicial opinion on the relative weight to be attached to parents' rights and the welfare of the child.(24) That there should have been differences of judicial opinion on these matters is not remarkable. However, whether natural law doctrine has been a helpful background against which to discuss and develop fundamental principles governing the parent-child relationship is questionable. Natural law ideas have offered neither precision nor objectivity in this difficult task; they may also have served to frustrate analysis of the complex issues of social policy which are involved.(25)

b) The principle of family autonomy

The protection of parental rights is a central element in the political doctrine which suggests that the State should play only a limited or subsidiary role in family life and the socialisation of children. According to this theory, which is an important aspect of inter alia Roman Catholic social teaching, the family unit should enjoy a high degree of autonomy, and parents should within reasonable limits enjoy freedom to bring up their children according to their own pref-

erences and values.(26) Excessive state intervention is viewed as a threat to social diversity as well as individual freedom, and as leading to the imposition of a state orthodoxy in the manner in which children are reared. There is nothing wrong - indeed in a free society it is healthy - that within different families the parent-child relationship should express itself in different ways.(27)

The doctrine of subsidiarity has played a particularly strong role in the development in Ireland, not only of constitutional principles, but of social policy, generally towards the family.(28) Articles 41 and 42 of the Constitution of 1937, which were strongly influenced by the social thinking of the Roman Catholic Church, embody the doctrine by recognising the family as 'the natural primary and fundamental unit group of Society', and as 'he primary and natural educator of the child'. The effect has been a strong bias in the law against state control of the parenting function. The courts have emphasised parental choice (subject to minimum standards) in relation to the education of children, even at primary level. (29) The role of the State in protecting abused or neglected children is recognised, but it may only be exercised in exceptional circumstances where parents have failed in their duty towards their children, or where other 'compelling' reasons exist based on the child's welfare. (30) Also the State's intervention should be the minimum necessary to protect the child.(31) The introduction of legal adoption in 1952 had been delayed partly because of concern that the termination of a natural parent's rights went beyond the permissible limits of state intervention.(32) Even now, it is only in very exceptional circumstances that the (non-orphaned) child of a married couple may be freed for adoption.(33)

The current balance in favour of parental autonomy has not been without its critics. Child protection laws, which are currently undergoing change,(34) have been criticised on the one hand for not imposing on Health Boards sufficiently clear obligations in this area,(35) and on the other hand for not providing adequate intervention procedures.(36) It has to be said, however, that factors other than constitutional principles have been chiefly responsible for delays in reform. Legislative inertia and a desire to maintain strict controls over government spending have played their part. Child protection services have developed, relative to some other West European countries, comparatively recently in Ireland. The constitutional bias in favour of family autonomy has to some extent made a moral virtue out of a situation which in the past may have resulted from economic necessity, but which increasingly nowadays is the product of economic choice.

Another objection to the autonomy principle is that state reluctance to intervene in family life leaves the way open for other dominant forces within and without the family, to shape or preserve a particular concept of family relations. This argument is usually addressed to the dominant position of men and their ability to exercise control over subordinate or dependent women and children within the family. This matter has been discussed elsewhere.(37) The problem seems to be essentially that of achieving a legal balance which will offer security and a measure of equality to individual family members in a manner which does not devalue or endanger the family as an institution. In Ireland, one of the more significant consequences of the autonomy doctrine is that the Roman Catholic Church has indirectly been

enabled to exercise a powerful influence on the education of children. The idea that parents should have freedom to choose for their children the religion in which they are to be brought up, and the moral and religious ethos of the school which they are to attend, has been firmly defended by the courts.(38) Parental liberty to determine the manner in which a child is to be educated is, however, circumscribed by economic, geographic, and other realities. Not least of these is the dominant position which the churches have held within the Irish educational system. One writer has suggested that, as a result, parents and taxpayers have been 'systematically excluded from any significant influence in education at primary or secondary level'.(39) The emphasis is now shifting towards greater parental involvement in the education system, but historically it is fair to say that Article 42, with its emphasis on parental rights in matters of education, has indirectly consolidated the power of the churches within the educational system.

(part two HEN egroup email starts here)

It would be wrong to suggest that the relatively strong doctrine of family autonomy which operates in Ireland is unpopular or out of tune with the traditional emphasis in Ireland on the centrality of family life. Indeed there is a common perception that the constitutional emphasis on the subsidiary character of the state's role in relation to children may have helped Ireland to avoid some of the worst extravagances of state welfarism or paternalism. Some of the procedures adopted in the past in neighbouring jurisdictions in the name of child protection, such as the power of an English local authority to order

by resolution and without judicial process the retention of a child in care,(40) would undoubtedly not have survived constitutional scrutiny in Ireland.(41) On the other hand, there have been some occasions on which the constitutional balance has appeared perverse in its effects. The parental (married) right to educate the child under Article 42, is described as 'inalienable' and this for many years has cast a shadow over attempts to reform adoption law so as to render the non-orphaned child of married parents eligible to be adopted. The law has now been changed in a limited way, and the Supreme Court has sanctioned the change by a somewhat strained interpretation of Article 42 holding in effect that the 'inalienable' rights may in certain circumstances be 'abandoned'.

c) The interests of the child

It has become increasingly popular to define the parental role as one of trusteeship.(42) The parent has certain immunities and powers exercisable in the best interests of the child. In so far as the parent has rights these derive from the overriding principle of the child's best interests,(45) and the child's interests are generally advanced by leaving parents to exercise authority over the child with a high degree of security and freedom from interference. The writings of such authors as Goldstein, Freud and Solnit have reinforced this view by emphasising the importance of continuity and security in a child's upbringing.

When family integrity is broken or weakened by State intrusion... (the younger child's) needs are thwarted and his belief that his parents are

omniscient and all powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental. The child's needs for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to State intrusion upon parental autonomy in child rearing.(44)

There is a good deal of evidence in recent case law that judges are placing more emphasis on children's interests as a justification for upholding parental claims. And, as has been explained, the rights of parents may be set aside in the interests of children in cases of parental failure. But does it follow that the interests of the child are the exclusive source of parental claims? Despite one attempt by a High Court judge to give constitutional priority to the welfare principle (namely that in all decisions concerning a child's custody or upbringing the welfare of the child should be the paramount consideration(45)), this is not the position that has been taken by the Supreme Court.(46)

If parental rights truly derive from consideration of the child's best interests, it should follow that in cases of conflict the interests of the child should prevail. Is this necessarily the case? It is certainly not the case in Irish law, nor is it entirely the case in many other legal systems.

There are some jurisdictions in which parents may have their rights, including custody, restricted in favour of a third party on a balance of interests or risks standard, that is to say on the basis that considera-

tions relating to the child's welfare on balance favour a denial of custody. This is not the standard adopted in Ireland, where a custody dispute between a married parent and a third party such as a foster parent, only parental failure or a 'compelling' case based on the child's interests will justify denial of the parental right.(47) But, in how many jurisdictions will a complete termination of parental rights be permitted on the basis that it is on balance in the interests of the child that this should occur? For example, the general tendency seems to be to avoid a situation in which adoption may be ordered against the wishes of biological parents solely on the basis that on balance the child's welfare is likely to be better promoted in the adoptive than in the biological family.(48) There are few who would be prepared to argue for the compulsory transfer of a child from a socially or economically disadvantaged family to parents who may be ideally placed to care for that child simply on the basis that the child will have better chances if a transfer occurs. Reluctance to accept such a proposition suggests that children's interests do not necessarily enjoy a paramount position, but may be displaced by other values, including considerations of social justice in relation to poor or otherwise socially disadvantaged groups within society. Similarly in the context of intercountry adoption, a principle applies of giving priority to placement of a child in his or her own country.(49) This principle is based in part on the child's interests, but it also has broader political and social justifications.

This is not to imply that material benefits are the only ones relevant in assessing the child's best interests, nor that the love and affection which deprived parents may show towards their children are not of

outstanding importance in terms of the children's welfare. There nevertheless remain situations in which a balanced judgment may suggest that a child's welfare would in the broadest sense be better promoted in a substitute family, but where considerations which are not strictly relevant to the child's interests suggest that this would not be socially desirable. It is relevant to observe that within Article 20 of the UN Convention on the Rights of the Child, the circumstances in which a state must ensure alternative care for a child are described in language which allows and perhaps suggests a much stricter test than a balance of interests test. Article 20.1 in effect provides that a child should not be removed from an existing home environment except where in his or her own best interests he or she 'cannot be allowed to remain in that environment'.(50)

Perhaps because it has become unpopular to employ the language of parental rights in determining disputes over child custody, the judges have sometimes engaged in strained, if not contorted, reasoning in attempts to reconcile parental rights with children's interests.(51) The result has been nothing if not confusing. A particular example is In re JH, an Infant(52) in which the Irish Supreme Court invested the doctrine of parental authority with new clothes by asserting that a child has a fundamental right to be brought up in, and educated by, his or her constitutionally-protected (namely marriage-based) family.(53) In one sense this is no more than a strong statement of the view that children's interests are usually best promoted by leaving them in the undisturbed care of their parents. But in its effect it creates a strong bias in favour of parental custody against third parties. Only where there has been demonstrated parental failure, or where there are

clear and substantial risks for the child in awarding custody to the parents, can parental custody be denied. One of the perverse consequences of dressing parental authority in the clothing of children's rights is that in third party/parent custody disputes, the balance to be drawn is not between parental rights and the child's interests but between two opposing rights of the child, namely the right of membership in a constitutionally protected family and the right to have his/her welfare regarded in custody dispositions. Because the constitutional bias favours the first right, it follows that the welfare of the child does not operate as the paramount principle.

There is a further problem in Irish law with the identification of parental rights with children's interests. The justification for parental autonomy deriving from children's interests, and in particular from the need for security and continuity in the child's upbringing, is broad enough to encompass social as well as biological parentage. It is the child's relationship with his/her psychological, not necessarily biological, parent which should enjoy a high degree of immunity from interference by the State. This position is not reflected in Irish constitutional jurisprudence, according to which constitutionally protected parental rights can only be enjoyed by natural married parents, by adoptive parents (the one category of social parents recognised), or by the unmarried natural mother. The long-term foster parent, no matter how important he or she may have become in the life of the child, enjoys no special constitutional status as a parent. This is so even where the child's long-term caretaker is the natural but unmarried father. The lesson to be drawn is that restrictive constitutional definitions of parenthood cannot easily be reconciled with the

view that children's interests should be the principal determinant of the scope of parental authority.(54)

d) Parental interests

With the emphasis on the primacy of children's rights, and the portrayal of the parental role as a trust to be exercised in the interests of the child, it has become the vogue to decry the view that parents too have interests and needs which deserve protection. The tendency is to dismiss such an idea as based on an outmoded view of the child as the parent's property. Certainly, when carried to an extreme, the idea is distasteful; parents who have children (or adopt children) solely to satisfy their own needs for love, for self image or for a sense of immortality do not evoke much sympathy.

Yet it is difficult to dispense altogether with parental interests. There is still a sense in which the laws in most jurisdictions confer property interests on parents in respect of their children. Of course the state sets out parameters within which parental rights may be exercised. The child must receive a minimum education, standards for health care are set, and the child is protected from exploitation or neglect. But within these limits parents are allowed considerable freedom to determine the manner of a child's upbringing, the religious and moral values with which the child will be inculcated, the type of education that the child will receive, etc. Despite the intervention of the state and the mass media, parents still have the capacity to control much of the environment which helps to shape their children. In so doing parents do not act as neutral trustees applying an objective standard

of the child's best interests. To a significant extent parents still have the right to define what those interests should be. In part this is a necessary corollary of the political doctrine which favours family autonomy and opposes the imposition of state orthodoxy; but it also reflects a view that parents have a legitimate personal interest in projecting their own values and attitudes on their children. In this admittedly limited way the concept of parental rights in the proprietary sense lives on. Indeed, if it is ignored, a somewhat distorted position of the legal relationship between parent and child may be painted. Parents do have rights; it is not sufficient to describe the powers which they exercise in respect of their children solely in terms of duties or responsibilities.(55)

3 CONSTITUTIONAL LIMITS ON THE EXERCISE OF PARENTAL RIGHTS AND DUTIES

Constitutional limits on the exercise of parental rights and duties have already been mentioned on several occasions. It is useful to try to draw them together and clarify them. There are at least three sources.

a) The duty of the State to ensure that the fundamental needs of the child are met. This duty, under the Irish Constitution, extends to the provision of basic health care services and minimum education, and to protection of the child from abuse or neglect. State authority in these areas is sometimes justified in terms of the need to protect or promote children's rights. The invocation of children's rights has in this sense become a powerful antidote to the doctrine of family or

parental autonomy. It is important to recognise, however, that here the doctrine of children's rights is not so much as recognition of children's autonomy as an expression of community values about what is essential and what is impermissible in the rearing of children. In Ireland, where the principle that the state's role is subsidiary to that of the parent is constitutionally protected, the balance favours parental autonomy. Though, as has been pointed out, in certain areas, particularly that of education, parental autonomy contains an element of myth.

b) The autonomous rights of the child. The idea that parents' rights necessarily diminish in scope and strength as the child grows older and moves towards independence has not been much explored in Irish constitutional law. The potential for development of such a doctrine exists but has been little exploited.(56) It is ironic that the very powerlessness of children (including, for example, the absence of a structured system of independent representation for children) has deprived them of the means to assert in the courts any independent constitutional status.

c) Other constitutional norms. Other constitutional norms have occasionally impacted on the parent/child relationship. Nearly forty years ago the Irish Supreme Court held that the principle of equality between the rights of a (married) mother and father was implicit in Article 42.1 of the Constitution.(57) The express principle of equality before the law contained in Article 40.1 has also been used to strike down a law which discriminated between widows and widowers in the context of eligibility to adopt a child.(58) On the other hand 'dif-

ferences in capacity, physical and moral, and of social function' have been accepted as justifying a difference in the constitutional and legal treatment of married and unmarried natural fathers.(59)

The constitutional emphasis on marriage as the proper basis for family life has reinforced the ostracism of the natural unmarried father, and has resulted in the conferral on the unmarried mother of a weaker constitutional position than that of her married counterpart. The refusal of the Irish Supreme Court to recognise a constitutional status for families other than those based on marriage is at odds with the approach of the European Court of Human Rights to the definition of the family within Article 8 of the Convention. In the Johnston case(60) Irish law was found to be in breach of the Convention in not providing any means of establishing a legal relationship between an unmarried natural father and his daughter. It has to be said, however, that the European Court of Human Rights itself has not accepted a doctrine of full equality between married and unmarried fathers. Moreover the court has confirmed that a state may properly take measures to promote marriage-based family life, with the implication that other inequalities may necessarily be justified.

4 CONCLUSION THE BALANCE OF ADVANTAGE

What have been the advantages and disadvantages of according a fundamental status in law to parental rights and duties? It is important first to recall that the embodiment of such rights and duties into a basic charter may have two distinct influences on the ordinary law.

First they may influence the shape of legislation. How this influence will operate depends not only on the interpretation by government advisers (in Ireland, the Attorney General) of the constitutional provisions, but also their attitude to risk-taking. The Irish experience is that preparation of legislation such as adoption and child protection has been heavily influenced by concern over the possibility of infringing parental rights. In adoption law in particular, because of the potentially serious consequences for the status of children of a finding that the law is invalid there has been a tendency towards extreme caution in the drafting of legislation. It would be fair to say that the same concern has not been exercised over the possibility of legislation infringing children;s rights, partly no doubt because there has been less experience of constitutional challenges to legislation on this basis. The relative powerlessness of children to mount constitutional actions has, therefore, indirectly influenced a bias in legislation towards parental autonomy.

Secondly, the constitutional principles may be applied by judges in the context of individual cases, either as an aid to interpretation or as a basis for decision, where necessary overriding statutory provisions. Because the principles relating to parental rights and duties are necessarily expressed in broad terms, their successful employment in individual cases depends on whether they can be suitably fined down. The ability of judges to engage rationally in this process depends in turn on their capacity to identify and weigh the policies underlying the broad statements of principle. Undoubtedly in this context employment of natural law concepts has not contributed to clarity, and has inhibited the admittedly difficult task of policy analysis.

Rational analysis of parental rights and duties at a constitutional level requires consideration of the justification for those rights and duties, whether deriving from the political doctrine of state subsidiarity, from children's interests, or from independent parental interests.

Constitutional provisions relating to parents may have been more valuable in some contexts than in others. In the author's opinion the provisions of the Irish Constitution have on balance played a valuable role in curbing excessive state intervention in the name of child protection. At the very least the constitutional protection of parental rights and family autonomy has prompted the legislature and the courts towards explicit justifications for state action. The dangers, however, should not be underestimated. Strong constitutional support for family autonomy can provide an excuse for the under-funding of child-protection (and sometimes even family-support) services. It is important that respect for parental rights should not be allowed to degenerate into a lack of vigilance on behalf of children who are genuinely in need of protection.

In the separate context of balancing the claims of different sets of parents, the constitutional provisions have tended to introduce rigidity where flexibility and nuance are called for. Only in one area, that of custody disputes between married parents, has the welfare principle been able to operate without condition, because the constitutional rights of the two parents are of equal standing. The constitutional divide between the rights of unmarried mothers and fathers remains extreme, bolstered by the courts' insistence on a narrow marriage-based definition of the constitutionally recognised family. Although

the institution of full legal adoption is constitutionally secure, as are the rights of adoptive parents, social parentage short of adoption receives no constitutional recognition. Only compelling arguments based on the child's welfare can displace the biological (and married) parent's right of custody against a long-term foster parent. In short, the narrow constitutional definition of parentage has been based on a stereotype of the ideal family, rooted in the social thinking of the 1930's, but increasingly out of tune with the complex realities of modern family life.

It is worth stressing finally the limitations of constitutional norms in supporting parental autonomy. Even where such support is uncontroversial the Constitution alone cannot always guarantee the effective protection of parental rights. It is trite, but necessary, to say that without economic support the existence of some abstract rights may have limited value. For example, the absence of a proper system of legal aid for many years frustrated the assertion by poor parents of their rights within child-care and protection proceedings.

Also the right of the single mother to decide whether to rear her own child or place the child for adoption, although constitutionally protected, took on meaning for many mothers only with the introduction (in 1973) of social welfare support, making a real choice possible. These examples point to one of the hidden dangers in the constitutional protection of rights within the family, that is, the potential for creating the appearance without the reality of protection.

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(1) The full text in English of Article 42 is as follows:

1) The State acknowledges that the primary and natural educator of the child is the Family and guarantees 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

2) Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State

3.1°) The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State

3.2°) The State shall, however, as guardian of the common good, require in view of actual conditions, that the children receive a certain minimum education, moral, intellectual and social

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 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

(2) For example, the interpretation of section 3 of the Guardianship of Infants Act 1964, according to which the welfare of the child shall be the first and paramount consideration in all proceedings concerning, inter alia, the custody of an infant. In the context of custody disputes between the parents and third parties, this principle has avoided being struck down (see In re J, an Infant [1966] IR 295) (High Court), but has been interpreted as involving a presumption that the welfare of the infant is to be found within the family (see In re JH, an Infant [1985] IR 375) (Supreme Court)

(3) For example, the common law principle supporting parental supremacy in matters of education, including religious upbringing, was set aside in favour of a principle of a joint power and duty as between married parents, in In re Tilson, Infants [1951] IR 1 (Supreme Court) (setting aside the earlier Supreme Court decision in In re Frost, Infants [1947] IR 3)

(4) For example, In re Doyle, an Infant [1956] IR 217 (High Court) 21 December 1955, unreported, Supreme Court, in which section 10 of the Children Act 1941 was struck down because it might allow a child found destitute to be placed by court order in institutional care

and to be kept there for a time not limited by the parents' inability to provide for the child

(5) See especially the Adoption Act, 1976, section 5(1) in which a provision requiring a court not to declare invalid an adoption order where it would not be in the best interests of the child is made subject 'to the rights under the Constitution of all persons concerned'. The 1988 Adoption Act, which allows for the adoption of legitimate children in limited circumstances, incorporates the phraseology of Article 42.5

(6) See the Task Force on Child Care Services Final report (Prl 9345, 1980) para 2.53, and Duncan, W, 'Child Parent and State: the Balance of Power', in Law and Social Policy, W Duncan (ed), DULJ 1987

(7) Id

(8) Article 40

1) All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

(9) For example, the unmarried mother's prima facie right to care for

and have custody of her child has been recognised as one of the unspecified 'personal rights of the citizen' under Article 40.3 The State (Nicolau) v An Bord Uchtála [1966] IR 567, G v An Bord Uchtála [1980] IR 32

(10) Some of the strongest statements attributing rights under the Irish Constitution to a natural law source have been made in cases involving parental rights. See, for example, the judgment of Walsh J in G v An Bord Uchtála [1980] IR 32

(11) Confirmed in a series of Supreme Court decisions beginning with The State (Nicolau) v An Bord Uchtála, supra

(12) Id

(13) Id

(14) Id, and G v An Bord Uchtála, supra. For example, her rights are not 'inalienable'

(15) The two different senses in which the law of nature is used are not clearly distinguished in the case law, except in Kenny J's judgment in G v An Bord Uchtála, supra. He claims that, in the older Irish and English cases, where the 'natural' right of a mother to the custody of her illegitimate child is recognised it refers to 'the tie by blood which exists between mother and child'

(16) D Clarke, 'The Role of Natural Law in Irish Constitutional Law',

Irish Jurist, vol 17 (ns) (1982), 187

(17) See the judgment of Parke J in G v An Bord Uchtála, supra: 'The emotional and physical bonds between a woman and the child she has borne give to her rights which spring from the law of nature and which have been recognised at common law long antecedent to the adoption of the Constitution'

(18) By contrast, in the USA, it has been the social as well as the biological relationship between the child and his or her father which has tended to justify constitutional protection. See, for example, Lehr v Robertson 463 US 248 1983

(19) In (Nicolau) v An Bord Uchtála, supra: Walsh J refers to the variety of circumstances in which an illegitimate child may be begotten (including an act of rape, a callous seduction and an act of casual commerce) and the lack of interest which most such fathers take in their offspring (save in cases of cohabitation) as justifying the conclusion that the father of an illegitimate child has a sufficiently different moral capacity and social function to warrant inferior treatment in law

(20) It has even been suggested that the ties of blood are such that they cannot be replicated in an adoptive relationship. See judgment of Kenny J in G v An Bord Uchtála [1980] IR 32, at 98

(21) In re JH, an Infant [1985] IR 375

(22) In G v An Bord Uchtála, supra, the Supreme Court divided 3/2 on this issue, the majority favouring the existence of the right

(23) Kenny J in J v D, 22 June 1977, unreported, Supreme Court

(24) In re J [1966] IR 295 (High Court) and M v An Bord Uchtála [1977] IR 287 (Supreme Court) are cases in which emphasis was placed on the custody rights of married parents in the face of competing claims based on the child's welfare. Contrast PW and AW v LM and the AG, 21 April 1980, unreported, High Court, in which Ellis J asserted a constitutional right in the child to have his welfare regarded as paramount in decisions affecting his custody

(25) See further Clarke, D, Church and State, 1984.

(26) See further Whyte, JH, Church and State in Modern Ireland, 1st edn, 1971, ch 5

(27) This has been an important theme in the North American literature. '[T]he parental right of control serves the interests of all citizens in preserving a society in which the State cannot dictate that children be reared in a particular way. If the State could control the upbringing of children, it could impose an orthodoxy by indoctrinating individuals during the formative period of their lives.' 'Developments in the Law - The Constitution and the Family', 93 Harv L Rev 1156, 1213-1221 (1980), at 1354. See also Meyer v Nebraska 262 US 390 (1923) and Pierce v Society of Sisters 268 US 510 (1925) in which a similar principle is used to support parental choice in the education of

their children. However the limits of parental choice are referred to by Chief Justice Burger in Wisconsin v Yoder 406 US 205 (1972). '[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct on which society as a whole has important interests.' (at 215)

(28) See Duncan, W, 'Child Parent and State: the Balance of Power', above, note 6

(29) See, for example, In re Article 26 and the School Attendance Bill 1942 [1943] IR 334

(30) In re JH, an infant [1985] IR 375

(31) See In re Doyle, an Infant, above note 4. In The State (MC) v Eastern Health Board, 29 July 1986, unreported, High Court, Barron J regarded the State's power to take a child into care on the basis of ex parte proceedings as a 'serious abridgment' of parental rights which should be exercised so as to keep to a minimum the time between the removal of a child and a full court hearing. The provisions of the Child Care Act 1991 are based on a model of minimum intervention. See also O'Cinneide, S and O'Daly, N, Supplementary Report to the First Report of the Task Force on Child Care Services (Prl 9345, 1980)

(32) See Whyte, J, Church and State in Modern Ireland, above, footnote 26

(33) Adoption Act 1988

(34) The Child Care Act 1981 comprehensively reforms child protection procedures, but at the time of writing (June 1992) the Ministerial order necessary to implement the new procedures has not been made. The provisions of Children Act 1908 therefore continue to apply

(35) See Law Reform Commission, Consultation Paper (August 1989) and Report (LRC 32-1900) on Child Sexual Abuse

(36) See Final Report of Task Force on Child Care Services (Prl 9345, 1980) at para 18.8.1

(37) See O'Donovan, K, Sexual Divisions in the Law, 1985, ch 1

(38) See note 29, above

(39) Clarke, D, Church and State, 1984, at 196

(40) Now abolished by the Children Act 1989

(41) In the light of cases such as The State (MC) v Eastern Health Board, above, footnote 31

(42) See Eekelaar, JM, Dingwall, R and Murray, T, 'Victims of Threats? Children in Care Proceedings', (1982) Journal of Social Welfare Law 68

(43) The child-centred view of the parent-child relationship has been particularly influential in England. In Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112, the House of Lords took the view that parental powers to control and make decisions for children are simply a necessary concomitant of their parental duties. See also Law Commission Working Paper No 96, para 7. 16

(44) Goldstein, J, Freud, A and Solnit, AJ, Before the Best Interests of the Child 1979, at 9

(45) PW and AW v LM and the AG, 21 April 1980, unreported, High Court

(46) In re JH, an Infant [1985] IR 375

(47) Id

(48) In Ireland the court may terminate parental rights only where there has been a waiver (see G v An Bord Uchtála [1980] IR 32) or an abandonment (see Adoption Act 1988) and In re the Adoption (No 2) Bill 1987 [1987] IR 656) of constitutional rights by the parent. Also where an adoption order is found to be invalid the ensuing question of custody will not be decided solely, or even primarily, on the welfare principle. M v An Bord Uchtála [1977] IR 287. For a similar approach see the judgment of the Supreme Court of Israel Re Return of Adopted Child to Brazil, 16 June 1988

(49) See Article 21(d) of the UN Convention on the Rights of the

Child

(50) It is of note also that Article 3.1 of the UN Convention on the Rights of the Child makes the best interests of the child 'a' not 'the' primary consideration in all actions concerning children by public and other bodies

(51) The disguising of parental rights in the clothing of children's interests has not been peculiar to Ireland. See, for example, the English case R v Hampshire CC ex pK [1990] 2 All ER 129, where Watkins LJ said that 'every child has an interest, as part and parcel of its general welfare, not only in having its own voice sympathetically heard... but also in ensuring that its parents are given proper opportunity of having the evidence fairly tested'

(52) [1985] IR 375

(53) The child's rights, deriving from family membership, include the right to belong to a unit group possessing inalienable and imprescriptible rights, to protection by the State of the family to which it belongs, and to be provided by its parents with religious, moral, intellectual, physical and social education. Per Finlay CJ in In re JH, an infant [1985] IR 375. For a critique of the case, see Duncan, W, 'The Child's Right to a Family. Parental Rights in Disguise', DULJ (1986)

(54) Cf the approach of the United States Supreme Court which, in defining parental rights, has not relied exclusively on the biological connection but has also paid some attention to the social relationship

between the child and the parent. See, for example, Justice Stevens' judgment in Lehr v Robertson 463 US 248 (1983). (Though the case did concern the rights of the biological father of an illegitimate child). There appears still to be some doubt as to whether the foster parent/child relationship enjoys constitutional protection. See McCarthy, B, 'The Confused Constitutional Status and Meaning of Parental Rights', Georgia Law Review (1988) 975, at 1006

(55) The idea that parents have rights has been increasingly questioned by academic writers. Brenda Hoggett, referring to English law prior to the Children Act 1989, states:

In substance... it is difficult to say that parents have 'rights', although they undoubtedly have responsibilities and these give rise to a prior claim and, in everyday life, a considerable amount of power and authority. Parents amd children: the Law of Parental Responsibility, 3rd edition, 1987, at 17.

It has also been suggested that, while parents may have 'powers' in respect of their children, they may not have rights in the strict Hohfeldian sense of legal claims against third parties enforceable in the courts. (See Dickens, BM, 'The Modern Function and Limits of Parental Rights'. (1981) 97 Law Quarterly Review 462)

This may point to an important difference between those legal systems which do, and those which do not, offer protection to funda-