THE UNCONSTITUTIONAL FAMILY;

The role of natural law as a basis for developing rights for the Unmarried Family under the Irish Constitution

by

Laura Gleeson, LLB

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Thesis Supervisor: Una Woods, BCL LLM

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Introduction

The development of family rights under the 1937 Irish Constitution has, in the document’s lengthy tenure as the definitive source of law in the State, yielded an abundant wealth of jurisprudence and debate. Significantly, the Irish Constitution recognises one form of family only, that based exclusively on marriage and accordingly the text bestows a considerably elevated position within its constitutional order to the married family. This explicit prioritisation has had far-reaching effects which continue to this day to impact on the legislature, the judiciary and significantly the daily reality of the many Irish people who attempt to invoke their constitutional and legal family rights.

In the intervening seventy or so years since the enactment of its Constitution, the Irish State has witnessed unprecedented political, economic and social change. In few areas is this change as obvious as the metamorphosis which has taken place in relation to the ‘Irish family’. While it is widely accepted that the values embodied by the concept of ‘family’ change from generation to generation and greatly differ between one society and another, the increase in the number of births outside marriage in the Irish State has nonetheless been quite remarkable, rising from under 2,000 per annum in the 1930s to over 19,000 in 2009, or, in other words from 3 per cent. to 32.4 per cent. of total births.\(^1\)

One would expect these sizeable demographic changes to have been adequately reflected and accommodated within the Constitution, however as will be seen throughout this dissertation, this unfortunately has not been the Irish experience. Instead, the changing conception of what is meant by the term “family” and the ever growing need to re-evaluate the boundaries surrounding the structure and

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development of this unit group are repeatedly hampered by the narrow confines of the written text, with the result that the development of family rights in the State has effectively been paralysed by the Constitution’s specific protection of the married family. As will be seen in the chapters to follow, the constitutional preference for the marriage based family means that both parental rights, and the rights of children, in this jurisdiction are inextricably linked to whether the ‘family’ involved comes within, or outside of, the umbrella of family protections guaranteed by the Constitution.²

In an attempt to overcome the rigidity of the defined text, judicial interpretation of the Constitution’s family provisions has somewhat uniquely been shaped by the concurrent emergence of a natural law discourse, with the result that both of these highly complex areas have over the years, become intricately intertwined. As will be discussed over the course of this thesis, natural law has been used almost exclusively to establish constitutional rights for unmarried mothers and children born to unmarried parents. Notably however, natural law has not been used by the courts as a means of developing rights for unmarried fathers.

The purpose of this thesis is to explore the role of natural law in the context of the rights of the unmarried family under the Irish Constitution and to examine the viability of natural law as a basis for the future declaration of family rights. Chapter one begins this journey by setting the background to the drafting and development of the Irish Constitution and, in particular, the constitutional provisions relating to the family. In this regard, various historical, political and religious influences will be considered in an attempt to understand the purpose and intention behind the constitutional drafters’ decision to provide exclusively for the marriage based family.

² This practice is not applied in all jurisdictions, for example in Canada there is no link between parental rights and responsibilities and marital or non-marital status. For further discussion see Bailey, M., Marriage and marriage-like relationships, (2000), Law Commission of Canada available at http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/marriage_marriage-like-e/index.html as accessed on 10/07/2008.
The impact of the recent ratification of the European Convention on Human Rights in this jurisdiction and its potential to effect constitutional change in area of family rights will also be discussed.

Chapter two charts the emergence of a legislative framework in the Irish State in respect the custody and guardianship of children. This chapter also considers the legal concept of illegitimacy and the development of a statutory system for the adoption of children in the Irish State. As will be discussed, the law relating to custody and guardianship in this jurisdiction has undergone a significant transformation over the last century and a half, evolving from a traditional common law position of patriarchal supremacy towards one of equality between married parents and, conversely, matriarchal supremacy in the context of unmarried parents. As will be seen, Articles 41 and 42 of the Constitution have played a pivotal role in the development of a statutory framework for custody and guardianship and continue, to this day, to impact significantly on the drafting of legislation in the area.

Chapter three considers the doctrine of natural law in the context of the Irish Constitution. As will be discussed, the Irish courts have, somewhat resourcefully, employed the theory of natural law in order to develop an unwritten charter of fundamental rights under Article 40 of the constitutional text. Chapter 3 considers several of the landmark cases in which the Irish judiciary accepted and developed unspecified constitutional rights and looks to the justification posited by the courts in respect of their enunciation of natural rights under the Constitution. This chapter also sets the scene for the following chapters, by looking at the constitutional nexus between natural law and the family.

Chapters four, five and six discuss how the indoctrination of natural law as a basis for constitutional rights, coupled with its status as a powerful “weapon in constitutional
argument”,3 provided the Irish courts with a convenient means of developing rights for individual family members who fall outside of the Constitution’s marriage-based protection. As will be examined in chapters four and five, natural law has proven particularly successful in the articulation of constitutional rights for unmarried mothers and has played a somewhat more limited role in articulating and developing constitutional rights for non-marital children. However, as will be considered in chapter 5, in contrast to unmarried mothers and the children of unmarried parents, the Irish courts have consistently and quite definitely refused to use natural law as a basis for developing any form of constitutional existence for unmarried fathers.

Chapter seven discusses the recent decline of natural law in the Irish jurisdiction. In an attempt to explain the Irish judiciary’s “pulling back” from the doctrine, the chapter considers some of the criticisms which have traditionally been advanced in respect of natural law. On this basis, the chapter also considers the reliability of natural law as a foundation for family rights and argues that the natural law approach is no longer a viable or realistic source for the future expansion and development of family rights under the Irish Constitution.

Finally, this thesis concludes that natural law has brought the ‘non-traditional’ family as far is it can in terms of its constitutional status and instead a more stable means of equalising the balance between the ‘constitutional family’ and those outside its ambit must now be sought. As will be considered at various stages of this thesis, the natural law approach has not been without its difficulties and while natural law has undoubtedly provided an invaluable platform for the development of constitutional rights for certain members of the unmarried family, it is submitted that, in many respects, the use of natural law has served to complicate this already complex and highly sensitive area.

Given the elevated position of the marriage based family under the Irish Constitution, it is felt that explicit constitutional recognition for the unmarried family is improbable in the near future and, in any case, would not provide sufficient guidance in cases of conflict between individual members of an unmarried family and individual members of a married family. This thesis instead favours a child-focused approach to family rights and concludes that explicit constitutional protection for children, irrespective of whether they are born within or outside marriage, as suggested by a recent All Party Oireachtas Committee, is the only pragmatic solution to remedy the inequality between married and unmarried families. This thesis concludes that if the rights of all children born in the State were to be explicitly recognised and protected under the Irish Constitution regardless of the circumstances of their birth, this, if accompanied by appropriate legislative reform, would most definitely serve to improve the position of unmarried families and in particular, unmarried fathers, where appropriate and justified.
Chapter I

Constitutionalism in Ireland

The 1937 Constitution of Ireland, Bunreacht na hÉireann, is the principal source of law and fundamental human rights in the Irish State. It is the definitive legal benchmark, against which any incompatible laws are declared null and void. The purpose of this chapter is to outline the background to the Irish Constitution and, in particular, to set out the various religious, cultural and political influences which have shaped the development of the Constitution’s family articles.

In order to properly evaluate the Irish Constitution and its crucial fundamental rights provisions, it is proposed to chart the development of the text by considering the political, social and cultural condition of the Irish State at the time of its enactment in 1937 and further the various ideological stimuli cited as influential upon the text. However, before reflecting upon the content, context and relevant judicial interpretation of this vital document it is necessary to first consider exactly what is meant by ‘constitutional governance’.

1.1 What is a constitution?

According to Black’s Law Dictionary, a constitution is

A charter of government deriving its whole authority from the governed. [It is] the organic and fundamental law of a nation or state... establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed...prescribing the extent and manner
of the exercise of sovereign powers... which must control until it shall be changed by the authority that established it.⁴

A constitution, in its most simplistic form, is a public bond compounding legal, social and political objectives. Often referred to as a ‘social contract’, a constitution can be either written or unwritten.⁵ It is entered into between the people of a particular State and their government, setting out absolutely the rules by which they agree to be governed and accepting that these rules shall regulate relations between the populace itself and between citizens and the state.⁶

The attraction of constitutionalism as a blueprint for governance can be attributed to a variety of factors. Early constitution framers, for example those in France and America, developed their respective charters in an attempt to curtail the control of those in power⁷ by declaring the inalienable rights of the individual supreme to all external authority.⁸

A constitution ought, at least in theory, to empower rather than disable individuals and reduce the potential for vulnerable groups to be polarised. While a written constitution cannot alone absolutely guarantee democracy or fairness to all, a democratic and equal constitution should nonetheless, considerably improve the likelihood of attaining such social goals and eliminate the possibility for systematic discrimination between citizens. According to Garrett Barden a written constitution

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⁵ For example, Great Britain has an unwritten constitution. The Irish tradition has however, preferred a written instrument.
⁷ In these instances the aftermath of the eighteenth century American and French Revolutions.
“brings about in imagination a specious unanimity that negates and forgets the differences that existed before its establishment.”

The notion of constitutionalism can itself be traced as far back as classical Greece and Rome, however it is the Americans that are generally credited with pioneering what we know as the modern version of the written constitution. Often referred to as ‘the great experiment’, the Constitution of the United States of America reserved itself a place in legal and political history when it was signed into being in 1787. The opening words of the Preamble alone, “We the People of the United States”, signified profound change to the pre-existing legal and political culture. For the first time it was the people, rather than the government or state authorities that were empowered with the right and responsibility to decide upon the direction of their country, thus creating an entirely novel “government of laws and not of men.”

Advocating this notion of popular sovereignty, Abraham Lincoln proclaimed, “Government of the people, by the people and for the people shall not perish.”

Whilst in recent times, the allure of a formal constitutional framework has waned in other jurisdictions, Bunreacht na hÉireann remains one of the oldest written constitutions in existence in Europe. The uniqueness of Ireland’s constitutional experience is further reinforced by the fact that the State in its short life since independence has had no less than three constitutional documents, each of which will now be considered.

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11 19 November 1863, www.encyclopedia.com
12 Namely, the Provisional Constitution of the First Dáil Éireann 1919, the Irish Free State Constitution 1922 and Bunreacht na hÉireann 1937.
1.2 **Historical development of the 1937 Constitution**

1.2.1 **The ‘First Dáil Constitution’ of 1919**

The Provisional Constitution of the First Dáil Éireann was signed into law on the 21st of January 1919. It comprised five concise, uncomplicated articles which declared, in the main, that all legislative power for the island of Ireland was to be vested in Dáil Éireann. Whilst this frequently overlooked document pales in comparison to the detail and complexity of subsequent texts, it is nonetheless of considerable importance in establishing the background to the existing constitutional structure. According to Brian Farrell it formed “the seed-bed” in which Bunreacht na hÉireann was later rooted.

Although not nearly as proficient or far-reaching as its American counterpart, the 1919 document was the first real assertion of Irish sovereignty. As articulated by the first Chief Justice of the Free State, Hugh Kennedy, the Provisional Constitution established the fundamental principle that ‘all legislative, executive, administrative and judicial power had its source in and was derived from the sovereign people’. This basic framework was to remain in place until the enactment of the Free State Constitution in 1922.

1.2.2 **The Free State Constitution of 1922**

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13 First Section reads: “Dáil Éireann shall possess full powers to legislate and shall be composed of Delegates (Teachtaí) chosen by the people of Ireland from the present constituencies of the country.”


The adoption of a formal written Constitution following the signing of the Anglo-Irish Treaty in 1922,\(^\text{16}\) signified another cautious departure from the prevailing British legal and political tradition. The negotiated settlement, enacted in an effort to re-establish stability following the Irish Civil War, marked the “first step on the road towards the enactment of an indigenous instrument, purged of any lingering vestiges of the old regime.”\(^\text{17}\)

Dr. Leo Kohn, a German legal scholar, described the 1922 document as:

a most comprehensive and, in spirit, essentially republican Constitution on continental lines...it postulated fundamental rights...The monarchical forms paled into insignificance in the light of the formal enunciation of the principle of the people as the fundamental and the exclusive source of all political authority.\(^\text{18}\)

Articles 6-9 of the 1922 Constitution made explicit provision for the guarantee and protection of the fundamental rights of the citizen and it is this ‘postulation’ of fundamental rights, which is particularly relevant to later constitutional development.\(^\text{19}\) The schedule of rights set out therein: for example, freedom of expression, freedom of religion, right to liberty etc. largely resembles those subsequently detailed in Bunreacht na hÉireann. James Casey however, notes that in contrast to the latter text the fundamental rights provisions detailed in the 1922 Constitution failed to generate a large amount of case law.\(^\text{20}\) This is due, in part, to the conservatism of many judges trained under the British tradition of parliamentary sovereignty but more significantly to the fact that the 1922

\(^\text{16}\) *Constitution of the Irish Free State (Saorstát Eireann) Act 1922.*


\(^\text{19}\) It should be noted that many people felt that there was a significant absence in protection for basic human rights in the pre-1922 administration. The schedule of fundamental rights set out in the 1922 Constitution was most probably influenced by the Bill of Rights and the Declaration of the Rights of Man, following 18th century revolutionary movements in the United States and France. For further discussion see Byrne R. & McCutcheon J.P., *The Irish Legal System*, 5th ed., (2009), Bloomsbury Professional at p.48.

Constitution was much easier to amend than its successor. Accordingly development and discussion of fundamental rights in the Irish courts did not begin in earnest until after 1937.

1.3 *Bunreacht na hÉireann, 1937*

Prior to 1937, the constitutional basis of the Irish State was far from clear. Following multiple amendments the 1922 text was effectively rendered a patchwork document, bearing little resemblance to its original form. This, coupled with the document’s much-resented restrictions upon Irish sovereignty and references to the British Crown, fuelled the public’s need for a new constitutional structure. Following ratification of the Draft Constitution by a plebiscite of the electorate in July 1937, the full text of *Bunreacht na hÉireann* came into legal force on the 29th of December 1937. Although the degree of continuity between this and the 1922 constitutional document is in many respects quite high with few changes made to the institutional structure, Casey notes that in contrast to its predecessor, the underlying tone of *Bunreacht na hÉireann*, is much more ambitious, aspirational and in places “markedly declamatory.”

1.3.1 The drafting process

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21 Article 14 provided that any Bill to amend the Constitution must be first passed by the Oireachtas, before being submitted for approval by means of a referendum. However, Article 50 stipulated that in the eight years after its enactment the 1922 Constitution could be amended by ‘ordinary’ legislation, without any need for a referendum. In 1929, this period was extended by a further eight years: *Constitution (Amendment No 16) Act 1929*.

22 In total, 27 Acts to amend the Free State Constitution were passed between 1923 and 1936.


24 The *Plebiscite (Draft Constitution) Act*, 1937. The Act was passed by a relatively narrow majority of 685,105 to 526,945 voters.

The 1937 Constitution was drafted in accordance with what Michael Forde terms a semi-authoritarian method. Eamon de Valera was the Constitution’s exclusive architect and advocate, and as early as his inaugural address to the Fianna Fáil party, the new Taoiseach had pledged to enact a fresh and original constitution for the people of Ireland. According to Professor Chubb “the extent to which Bunreacht na hÉireann was the brain child of de Valera can have few parallels in the history of constitution making.”

Patrick Hanafin claims that enacting a constitution operates to create a collective identity for a community and marks the “beginning of an unending dialectic between text and people.” The need for a ‘common identity’ in order to unite and focus Irish society represented one of the driving forces behind the impetus to establish a constitutional framework for Ireland. The emerging republic was desperate to ground its democratic existence firmly in realistic and trustworthy roots and the Fianna Fáil government viewed the Constitution as its passport to establishing a truly independent personality for the newly established Free State. Indeed, the decision not to further amend the 1922 Constitution, but rather to replace it with an entirely new and independent framework demonstrates the desire of the people to break all links with the Commonwealth and conclusively establish the Irish State as an autonomous, sovereign entity.

While the drafting process of the 1922 Free State Constitution was relatively open, the cabinet minutes during the time of drafting of the 1937 document are

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26 This is where one individual or a very small group of persons decide what the Constitution ought to contain, before putting the text to the public in a referendum. See Forde, M., Constitutional Law, 2nd ed., (2004), First Law.
30 The Constitutional Court of South Africa, stated the following in relation to constitutional enactment; “The Constitution…represents a radical and decisive break from that part of the past which is unacceptable… It constitutes a decisive break… to a universally protected culture of openness and democracy and universal human rights for all…” Shabalalala and Others v. Attorney General of the Transvaal and Another, 1996 South Africa 725 (C.C).
31 The Committee prepared for presentation to Dáil Éireann a collection of contemporary Constitutions under the title “Select Constitutions of the World.” (published by the Irish Provisional Government Dublin, 1922).
by contrast, markedly guarded and consequentially very little is known about the planning and formulation of the text.\textsuperscript{32} De Valera’s delicate and purposive selection of the drafting committee is indicative of the Taoiseach’s conscious determination to retain as much personal control as possible over the constitutional process.\textsuperscript{33}

Ronan Fanning refers to the ‘rule of deference’, adhered to by ministers and civil servants in response to de Valera’s dominant style of drafting.\textsuperscript{34} Certainly, it is difficult to dispute the contention that the 1937 combination of “law and manifesto”\textsuperscript{35} did quite accurately reflect the morals and values of the people of Ireland, as is demonstrated by the lack of any public objection to the Constitution at the time.\textsuperscript{36} De Valera personally presented the text to the People, via the national airwaves,\textsuperscript{37} and piloted the Constitution through the Oireachtas, explaining and defending every individual article. As observed by Farrell “one man’s document [became] a political community’s common charter.”\textsuperscript{38}

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\textsuperscript{33} Interestingly, the committee comprised no government ministers but consisted solely of civil servants, all but one of whom worked directly under de Valera.
\textsuperscript{37} See de Valera’s radio broadcast on the Constitution: http://www.rte.ie/laweb/11/11_t09b.html.
**Church and State**

Thomas Jefferson, referring to the role of divinity in the United States Constitution, once said:

> Religion is a matter which lies solely between Man and his God...he owes account to none other for his faith or his worship...the legitimate powers of government reach actions only, and not opinions.\textsuperscript{39}

The perpetual debate surrounding the appropriate relationship between Church and State is of particular significance in the Irish context, where demarcation of the boundary between both institutions has historically been somewhat blurred. The complex and often intimate relationship which exists between these two imposing monoliths, remains highly contentious to this day and one that merits considerably more discussion than is feasible within this paper. Nonetheless, one cannot attempt to analyse Bunreacht na hÉireann, in particular its fundamental rights protections without acknowledging the enormous influence of the Catholic Church upon the document’s drafting and interpretation.

Whilst the presence of Christian ideology is visible at various intervals throughout the 1937 Constitution, Bunreacht na hÉireann is by no means the first formal acknowledgement of the affinity between Church and State authorities in Ireland. There is a notable trend in Irish juridical documents, even those that predate the founding of the State, to combine God and ‘the people’, as the dual sources of power and authority.\textsuperscript{40} This prominent partnership is consistently maintained in subsequent constitutional and legislative instruments.

Although the Free State Constitution of 1922 which guaranteed freedom of “conscience” to all citizens\textsuperscript{41} was formally non-sectarian in character, framers of

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\textsuperscript{39} Letter written in 1802. The First Amendment of the US constitution guarantees freedom of religion stating that Congress ‘shall make no law respecting an establishment of religion or prohibiting the free exercise thereof’.

\textsuperscript{40} For example see the opening to the Proclamation of the Irish Republic in 1916 which reads; “In the name of God and of the dead generations from which she receives her old tradition of nationhood, Ireland, through us, summons her children to her flag and strikes for her freedom.”

\textsuperscript{41} Article 8 of the 1922 Constitution reads “Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”
the text were all too aware that the nationalist movement responsible for ensuring Irish independence from Britain “owed much, both ideologically and organisationally” to the Catholic Church.42 Similar to their 1937 successors, drafters of the Free State document were conscious of the Church’s powerful role in ‘redefining’ Irish identity,43 as is evidenced in their partnership of God and the people as ultimate sources of control in the Foreword to the text.

Gerard Hogan notes that during the inter-Constitutional period, 1922-1937, there was a remarkable consensus amongst the population on religious and social issues, and “any movement to enshrine Catholic principles as part of the law of the land… [met with] no serious resistance.”44 Drafters of the 1937 document, determined not to repeat the mistakes of their 1922 predecessors, were acutely aware of this fact and of the newly established State’s need to emphasise its inherent differences specifically its Catholic and Gaelic culture as a means of asserting its distinctiveness from Britain. In the words of Hogan, “the sense of Irishness and Catholicism were equated.”45

The Preamble to the 1937 Constitution further advances the previous trend of coupling reference to two separate but mutually dependent sources of power – sacred authority and the will of the people:

We, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial…do hereby adopt, enact and give to ourselves this Constitution.46

Described by one cleric as “[a] great Christian document…a splendid charter – a broad and solid foundation on which to build up a nation that will be, at once,

45 Ibid. at. p.49.
46 A question which remains unanswered is precisely to whose fathers is the preamble referring? Whyte (Church and State, p.48) and Lee, J.J., Ireland 1912-1985 Politics and Society, (1990), Cambridge University Press at p.204.
John Charles McQuaid, a powerful, vociferous cleric and later Archbishop of Dublin, was an unofficial advisor to de Valera in the drafting of the Constitution. It is alleged that the Preamble and certain fundamental rights provisions, are largely products of joint collaboration between the two men. This surviving cluster of articles remains to this day, according to Dermot Keogh “a petrified image of positions particular to a certain current of Irish Catholicism.”

Following partition of North and South in 1921, the population of the Irish Free State was overwhelmingly Catholic. In order to secure a majority of the people, de Valera needed a ‘coping stone’ with which to reconcile the growing tension between republican rhetoric and Catholic reality. In contrast to the British secular structure based upon parliamentary sovereignty de Valera himself, a deeply religious and spiritual man, viewed the arsenal of the Church as the most capable if not the only means of reinforcing the divide between Ireland and their former ruler. He recognised the great power of the Church and its ability to aid his mission to unite the people of Ireland and address prevailing social

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53 Ibid. at p.41.
55 De Valera himself had a life-long association with several religious orders and there have been various theories advanced as to whether his ‘catholicisation’ of the state was also motivated by personal desire. See Keogh, D. “Church, State and Society”, as featured in Farrell, B. (ed.), DeValera’s Constitution and Ours – The Thomas Davis Lectures, (1988), Gill and Macmillan at p.103.
problems.\textsuperscript{56} To borrow the words of John H. Whyte “the Catholic hierarchy has a weapon which no other interest group possesses: its authority over men’s consciences.”\textsuperscript{57}

The ethical composition of the electorate was similarly reflected in their chosen representatives and the Dáil Éireann of 1937 itself comprised mainly Catholic devotees. The following statement was included in a document prepared on de Valera’s behalf for a Department of Foreign Affairs envoy to the Vatican:

Under our democratic Constitution the vast majority of the Ministers of State are certain to be Catholic, who will profess their religion openly and will attend religious functions in a Catholic Church on all occasions in which a manifestation of religious belief is called for.\textsuperscript{58}

Despite various pledges given in Article 44 to guarantee freedom of conscience to every citizen,\textsuperscript{59} directing that the State can in no way ‘endow’ one form of religion over another,\textsuperscript{60} nor discriminate against citizens on the ground of religious belief,\textsuperscript{61} the Christian focus of the 1937 text and the “firm conviction [that] we are a religious people”\textsuperscript{62} has been embraced and further advanced by the Courts on a number of occasions.\textsuperscript{63} On this note, Whyte is critical of the inclusion of religious elements into the 1937 Constitution compared “with the

\textsuperscript{56} Sean MacEntee explained the predicament of the Fianna Fail party as follows “we had to get a majority of the people...we felt, and it was true, that we wouldn’t get it if we gave the Bishops any chance to attack us.” Interview with Dermot Keogh, cited in Litton F., (ed.) The Constitution of Ireland 1937-1987, (1988), Institute of Public Administration at p.58.

\textsuperscript{57} Whyte J.H., Church and State in Modern Ireland 1923-1979, (1980) Gill and Macmillan at p.368


\textsuperscript{59} Article 44.2.1° provides; “Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”

\textsuperscript{60} Article 44.2.2°.

\textsuperscript{61} Article 44.2.3° provides; “The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.”

\textsuperscript{62} As per Walsh J in Quinns Supermarkets v Attorney General [1972] IR 1 at p.23.

\textsuperscript{63} See also judgment of Gavan Duffy P in Re Tilson, where he referred to the influence of the “great papal Encyclicals” upon Articles 41 and 42. [1951] IR 1 at p.14. For further discussion of this case, see Chapter 2.
liberal-democratic document [of 1922] which would have suited a country of any religious complexion.\textsuperscript{64}

1.5 The ‘Family Articles’

The impetus to incorporate and protect within the constitutional order, a set of basic human rights, commenced in Ireland with the signing of the 1922 Free State Constitution. Bunreacht na hÉireann carries on this tradition by tabling, in Articles 40-44, a list of fundamental rights which are deemed enforceable by all Irish citizens.\textsuperscript{65} According to Costello J in \textit{P.H. and Others (Infants) v John Murphy and Sons Ltd},\textsuperscript{66} the primary purpose of the Constitution in the field of fundamental rights is “to protect [the citizens] from unjust laws enacted by the legislature and from arbitrary acts committed by State officials.”\textsuperscript{67}

It should be noted that there exists more than a coincidental resemblance between the 1937 cluster of rights and those guaranteed in the earlier constitutional text of 1922, leading Professor Kelly to cite the later provisions as “a re-bottling of wine most of which was by then quite old and of familiar vintage.”\textsuperscript{68} Bunreacht na hÉireann nonetheless, contains a number of novel provisions which have no equivalent in the Free State Constitution nor indeed in any of the texts referenced as influential upon the 1937 drafters. The most notable of these are Articles 41 and 42 which together set out the fundamental constitutional rights of the family.


\textsuperscript{65} Referring to the Constitution’s fundamental rights provisions, in \textit{The State (Quinn) v. Ryan} [1965] IR 70 O’Dalaigh CJ stated: “It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary, it follows 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.” at p. 122.

\textsuperscript{66} [1987] IR 621.

\textsuperscript{67} \textit{Ibid.} at p. 626.

These articles which are set out below, have been described as the only “original and unusual” feature of the 1937 Constitution’s fundamental rights declarations.

1.5.1 Article 41

Article 41 which is entitled “The Family” reads as follows:

41.1.1° The State recognises the Family 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.

41.1.2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

41.3.1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded and to protect it against attack.

1.5.2 Article 42

Although Article 42 is formally headed ‘Education’ a number of its provisions have been deemed relevant to the rights of ‘the family’. The most frequently cited are subsections 1 and 5, which read:

42.1 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, moral, intellectual, physical and social education of their children.

42.5.1° 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

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place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Article 42 is generally given a broad interpretation and is not strictly confined to the common understanding of its ‘education’ mandate. The umbrella of protection guaranteed under the provision has, particularly in relation to parental rights and the upbringing of children, been extended to overlap with its immediate predecessor. As such, both in practice and interpretation, the duo of Articles 41 & 42 are generally read collectively, with the latter viewed as an “accompaniment and subordinate to Article 41.”

Whilst in the global context, protection of family rights within the constitutional order is unusual it is by no means unique and the ‘family’ has been accorded constitutional recognition and protection in a number of other jurisdictions. The Irish constitutional provisions relating to family, as will be explored in detail, are nonetheless noteworthy for a number of reasons. First, in contrast to the rest of the constitutional text which save a few exceptions is succinct in its mission to set out the institutional and governmental competence of the State, the fundamental rights provisions are most definitely a place within which the creative zest of the drafters was allowed to shine, with the resultant provisions representing the fruits of a collaborative labour drawing from various influences and ideologies.

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70 In *Re The Adoption (No 2) Bill, 1987* [1989] IR 656 the court states “Article 42, s5 of the Constitution should not, in the view of the Court, be construed as being confined, in its reference to the duty of parents towards their children, to the duty of providing education for them…” at p. 663.

71 In *Sinnott v Minister for Education* [2001] IESC 63 Denham J describes Article 42 “an article redolent of the family, where children are addressed as part of a family, where the primary educator is acknowledged as the family. It paints a picture of a family of two parents, mother and father, and children learning from their parents.”


73 See for example; Article 6 of the Basic Law of the Federal Republic of Germany, 1949 which provides: “Marriage and family shall enjoy the special protection of the State. The care and upbringing of children are a natural right of, and the duty primarily incumbent on, the parents; the national community shall watch over their endeavours in this respect.” Similarly Article 29 of the Italian Constitution, 1948 provides: “The State recognises the family as a natural association founded on marriage. Marriage is based on the moral and legal equality of husband and wife within the limits laid down by the laws for ensuring family unity.” The foregoing provisions have however been distinguished from the Irish constitutional articles in that they do not accord due recognition to the family as the “fundamental unit of society.” See Supreme Court judgment in *Murphy v The Attorney General* [1982] IR 241.
The decision to provide specifically and exclusively for ‘the family’ is even more exceptional by reason of the fact that the United States Constitution, whose influence was so heavily relied upon in relation to other provisions, contains no similar protection for the social group.\textsuperscript{74} This raises questions as to the reasons behind the drafter’s insistence upon devoting such definite and detailed provisions to this social group.

One possible answer is that the novel family focus may represent another manifestation of the perceived need to firmly ‘ground’ the Constitution, after all what better example than the core root of all community, the family. According to the historian John Lee “de Valera clung to an ideal-type image of the Irish family as a loving haven of selfless accord”\textsuperscript{75} and the family provisions provided a perfect forum upon which the Constitution’s chief draftsman could convey his own personal morality and declare his future aspirations for the Irish nation and Her people. Addressing Dáil Éireann, he once stated “whenever I wanted to know what the Irish people wanted, I had only to examine my own heart and it told me straight off…..”\textsuperscript{76}

Arguably the most absolute in the entire constitutional text the idealistic Article 41 is especially singled out for bearing the hallmark of Catholic social teaching. In particular, Article 41.1.1’s depiction of the family as a “moral institution”, possessed of rights superior to “positive law” has led to comparisons with a number of Papal Encyclicals, prominent at the period of its enactment.\textsuperscript{77} The ‘moral’ focus of this provision has had, and continues to have, huge implications upon the development of family rights, as will be discussed further in relation to the case-law setting out the individual rights of family members.\textsuperscript{78}

\textsuperscript{74} It is worth noting that the 1919 Weimar Constitution contained a declaration according special status to marriage, motherhood, parental duties and the family and further pledges to give them special State protection.


\textsuperscript{76} Dáil Éireann, Treaty Debates, 6 Jan 1922, 274.

\textsuperscript{77} Two encyclicals of Pope Pius XI, in particular, are cited as influential on the constitutional text \textit{Divini Illius Magistri} (1929) and \textit{Casti Connubii} (1930). For further discussion see Kelly, J.M., \textit{Fundamental Rights in the Irish Law and Constitution}, 2\textsuperscript{nd} ed., (1967), Butterworths Allen Figgis & Co. Ltd. at Chapter One.. See also Hogan, G.W., ‘Law and Religion: Church-State Relations in Ireland from Independence to the Present Day’, in \textit{American Journal of Comparative Law}, vol. 35 (1987) p.53.

\textsuperscript{78} As articulated by former Chief Justice Keane “the emphatic language used by the Constitution in Article 41 reflects the Christian belief that the greatest of human virtues is love which, in its
It is important to note that though there were several contentious and disputed aspects of the 1937 Constitution, particularly those which related to Ireland’s relationship with the Commonwealth, it would be futile to assert that the hand of the Irish people was in any way twisted in their approval of the family provisions. Redolent as they are of Catholic social teaching, Articles 41 and 42 surprisingly met with little opposition either within or outside of the Oireachtas. Both Irish voters and their elected representatives appeared accustomed to accepting unquestionably, the rules and values of the Catholic Church already integrated into the community. As noted by Conor Cruise O’Brien “all the indications are that this degree of deference existed with the support of the people.”

1.6 Defining ‘the family’

The legal maxim: *expressio unius personae vel rei est exclusio alterius*, roughly provides that to define one thing is to exclude another. Perhaps this is the reason why in spite of the clarity and confidence implied by the concrete language used to refer to ‘the family’ and ‘parents’ in Articles 41 and 42, nowhere in the entire text is either of these complex terms defined.

The absence of constitutional definition in the expanse of the 1937 text for either ‘family’ or ‘parents’, has since the document’s inception presented the judiciary with the exclusive duty of moulding the appropriate meaning for each reference. Whilst, in the modern-day Irish State of social, religious and cultural diversity, this task would seem virtually impossible, the courts initially appeared unfazed by their mission. This was mainly due to the prevailing influence of Roman Catholic teachings at the time, and further the judiciary’s reluctance to stray far

necessarily imperfect human form, reflects the divine love of the Creator for all his creation. Of the various forms which human love can take, the love of parents for their children is the purest and most protective” [2001] 3 IR 622 at pp. 705-706.

from the conservative homogeneity characterising social life in the 1930s. Although employment of the definite article ‘the’ to refer to family would seem to suggest a commonly understood notion of the term, “embodying a certain set of norms” this ideal is far from reality. Consequently, it is their judicial interpretation rather than the black letter of Articles 41 and 42 which have shaped the development and direction of family rights in the State.

The Irish judiciary, in their role as ultimate interpreter of the constitutional text, have made it unmistakeably clear that Bunreacht na hÉireann recognises one form of family only:

It is quite clear from the provisions of Article 41, and in particular section 3 thereof, that the family referred to in this Article is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State.81

The importance of the marriage-based family to society as a whole has long been emphasised by the Catholic Church.82 The Irish courts, ever loyal to the Church’s teachings, have consistently reiterated the significance of religion in the constitutional construction of marriage:

the Constitution makes clear that the concept and nature of marriage which it enshrines are derived from the Christian notion of a partnership

82 For example, the Ecclesiastical Courts were established in the 13th Century to regulate the institution of marriage. See also statements made in Vatican II Decree on the Apostolate of the Laity, Article 11 and Pastoral Constitution on the Church in the Modern World, chapter 1. As cited in Duncan, W.R., Supporting the Institution of Marriage in Ireland, (1978) Irish Jurist 215 at p 221.
83 There have however been a number of attempts made by the courts to distance themselves from a purely religious construction of marriage. For example In N. v K. [1985] IR 321 the Supreme Court refer to marriage in a more objective legalistic sense as a “civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole. The contract is unique in that it enjoys, as an institution, a pledge by the State to guard it with special care and to protect it against attack...” at p 333. Later in the High Court judgment of T.F. v Ireland [1995] 1 IR 321 Murphy J states ‘It may well be that ‘marriage’ as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of the parties in relation to marriage are now contained in the Constitution and our laws...’ at p 616.
based on an irrevocable personal consent given by both spouses which establishes a unique and very special life long relationship.  

This emphasis upon a devout, hetero-normative interpretation of marriage is illustrated in the common law definition of the term, which is accepted and applied in this jurisdiction. In Hyde v Hyde & Woodmansee Lord Penzance lays down his notoriously traditional classification stating: “marriage, as understood in Christendom, is the voluntary union for life of one man and one woman, to the exclusion of all others.”

Ross Aylward notes the discrimination invariably caused as a result of the State’s insistence upon regulating marriage as a religious institution:

The main problem with the State defining marriage in a manner akin to that of the Catholic Church is that the Church is entitled to promote its teachings in a constant manner irrespective of social developments, but the State cannot take such an approach.

The institution of marriage continues undoubtedly to be an extremely important and viable institution. It is, in many respects seen as a sort of shield, which operates to protect all within its cocoon from the external forces of immorality and corruption and retains significant power in terms of its ability to provide cohesion and security both within the confines of the family and society as a whole. Speaking for the majority in the Canadian Supreme Court decision

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85 (1866) I P. & D 130.

86 Per Lord Penzance (1866) I P. & D 130 at 133. Applied in this jurisdiction by Costello J in B v R [1996] 3 IR 549 wherein he described marriage as “the voluntary and permanent union of one man and one woman to the exclusion of all others for life” at 554. See also Murphy v Attorney General [1982] IR 241 where Kenny J, described the institution of marriage as “a permanent, indissoluble union of man and woman” at p 286. The Hyde definition was cited with approval in the recent case Foy v An t-Ard Chláraitheoir, [2007] IEHC.


88 It is worth noting in the Irish language version of Bunreacht na hEireann, which according to Article 8.1 is the first official language of the State the word “teachlach” is used. This literally translates as ‘household’, rather than married couple and children. Article 25.5.4” further provides “In the case of conflict between the texts of any copy of this Constitution enrolled under this section, the text in the national language shall prevail.”

89 In its second edition, the Oxford English Dictionary devotes a number of pages towards attempting to define the word “family.” Some of the descriptions advanced include:; “the group
Egan v Canada Justice La Forest declared the following in relation to State protection of marriage:

The legal institution of marriage exists both for the protection of the relationship and for defining the obligations that flow from entering into a legal marriage. Because of its importance, legal marriage may properly be viewed as fundamental to the stability and well-being of the family.

As cited earlier, in Article 41.3.1, the State undertakes to “guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.” What precisely constitutes an ‘attack’ is not specified under the provision, but has however been discussed by the courts on a number of occasions. In their interpretation of the section, the judiciary have vigorously defended and undeniably buttressed the Constitution’s marital preoccupation, rigorously upholding the State’s preference for the ‘nuclear family’.

The of persons consisting of the parents and their children, whether actually living together or not; in the wider sense, the unity formed by those who are nearly connected by blood or affinity”, similarly “The body of persons who live in one house, or under one head including servants” – rather than broadening the definition to meet changing societal needs interpretation of the term would appear to have narrowed over the years. The words “household”, “kindred”, “connection” “lineage” are commonly featured amongst the various depictions. The word “marriage” is not.

91 Ibid. at p 536.
92 The personal unenumerated right to marry under 40.3 was suggested in both Ryan v Attorney General [1965] IR 294 and in McGee v Attorney General [1974] IR 284.
93 The courts have similarly recognised a number of qualified constitutional rights flowing from the superior position of marriage within Article 41. For example; the right to marital privacy, see McGee v Attorney General [1974] IR 284 and Supreme Court judgment of Finlay CJ in Murray & Murray v Ireland [1985] ILRM 465. “The fact that the Constitution so clearly protects the institution of marriage necessarily involves a constitutional protection of certain marriage rights. They include the right of cohabitation, the right to take responsibility for and actively participate in the education of any children born of the marriage, the right to beget children or further children of the marriage and the right to privacy within the marriage: privacy of communication and of association”, at p 470.
94 See for example the seminal case Murphy v The Attorney General, [1982] IR 241 wherein the Supreme Court was called upon to consider the constitutionality of sections 192-198 of the Income Tax Act 1967. The plaintiffs, a married couple argued that such differential treatment of married and cohabiting couples failed to fulfil the constitutional promise to protect the institution of marriage as set out in Article 41.3.1. The court proceeded to strike down the impugned legislation solely on the basis of Article 41. See also the ‘inducement not to marry’ test laid down in Muckley v Ireland [1985] IR 472; [1986] ILRM 364. Similarly in Mhic Mhathúna v Ireland [1989] IR 504 [1995] ILRM 69, Hyland v Minister for Social Welfare [1989] IR 624; [1990] ILRM 213 and Greene v Minister for Agriculture [1990] 2 IR 17 the courts extended the previous line of reasoning regarding the State’s pledge to guard with special care and protect against attack the institution of marriage, to social legislation and a compensatory administration scheme. One of the highpoints in the State’s protection of the institution of marriage came in Re. Matrimonial Home Bill, 1993, [1994] 1 IR 305 wherein the Supreme Court held that a Bill providing for automatic joint ownership by spouses of the beneficial interest in family homes purchased before the legislation would come into force was repugnant to the Constitution,
steadfast refusal by the courts to extend the privileged constitutional protection beyond the traditional concept of a married family was defended quite recently in the High Court by Kelly J:

The special place of marriage in the family under the Irish Constitution...[and] the public policy of the State [which] ordains that non-marital cohabitation does not and cannot have the same Constitutional status as marriage. 95

As is noted by Eoin Carolan case law to date has provided little basis for the purposes of gauging a definite impression of the boundaries of Article 41.3.1. He queries as to whether the constitutional protection of marriage obliges the State to specifically promote and prioritise marriage as a life-choice for couples or rather merely prohibits state authorities from directly or indirectly ‘penalising’ the institution. 96

1.7 Misguided?

As earlier noted, inclusion of the 1937 Constitution’s fundamental rights provisions met with “virtual consensus” amongst the Irish people. 97 JJ McElligott, former Secretary of the Department of Finance, was one of the only public figures, at the time of drafting, to openly criticise the text’s social provisions. He objected, in particular, to various “declaratory phrases” due to what he termed their:

“having regard to the extreme importance of the authority of the family...including its right to make decisions within its own authority”, at p.326. For further discussion see Whyte, G., “Constitutional Protection for the Married Family”, (1989) ILT 115 at p 5.
95 As per Kelly J (obiter) in Ennis v Butterfly [1997] ILRM 28 (HC).
97 See Chubb, B., The Politics of the Irish Constitution, (1991), Institute of Public Administration. There were some exceptions, see for example statements made in the Dáil by Mr Coburn “Take charge of the families, take charge of the mothers and with that done, of course, to use the words of the President, this little country of ours is going to be a paradise. I totally object to these sections being put into the Constitution” Dáil Debates, vol. 67 col 1872, cited in Martin F., The Family in the Constitution – Principle and Practice, featured in Murphy, T. and P. Twomey, (eds.) Ireland’s Evolving Constitution, 1937-97: Collected Essays, (1998) Hart Publishing at p 88.
idealistic tendency which, individually unobjectionable as a statement of social policy, may, if launched out into the void in the draft Constitution, recoil like a boomerang on the Government of some future day in circumstances not anticipated by the originators.98

These fears were not unfounded and in many respects have proven themselves somewhat prophetic given the trend development of the social and family provisions since the enactment of the Constitution. It is arguable and indeed there is some indication that the Family Articles in particular, were not intended by the drafters to have the binding force which subsequent judicial interpretation has deemed them to possess. Most notably, de Valera when addressing the Dáil is cited describing the provisions as mere ‘headlines’ intended to provide guidance to other organs of government, “All we can do is to set headlines for the Legislature...headlines with regard to the things the Legislature should aim at.”99

Further evidence that the ‘family’ provisions were envisaged as merely aspirational may be imputed by the reference made within Article 41 to the role of women in the context of the family home. The relevant subsection Article 41.2, reads:

the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved...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.”

99 68 Dáil Debates 216-7 as cited in Kelly, J.M, The Irish Constitution, Second edition, (1984), Jurist at p 427. In a number of subsequent exchanges between Dáil deputies, the juridical significance of Article 41 was further called into question, “There is nothing in the Article [Article 41]...it means nothing legislatively...It may as a piece of guidance have some effect...it accomplishes nothing and compels the State to do nothing” Dáil Debates As per speeches from Professor O’Sullivan, Mr MacDermot and John A Costello Vol 67 cols 1850-9, 4 June 1937, cited in Martin F., The Family in the Constitution – Principle and Practice, featured in Murphy, T. and P. Twomey, (eds.) Ireland’s Evolving Constitution, 1937-97: Collected Essays, (1998) Hart Publishing at p 80.
The relevance and enforceability of this subsection, diplomatically described by the Constitution Review Group as “dated”, has given rise to much discussion and criticism in the years since the Constitution’s enactment. Although the provision has conferred “recognition” upon women in their capacity as homemakers it has ultimately given them little by way of practical support and has failed to afford them any monetary or proprietary worth.

On a number of occasions, the courts have been called upon to consider whether the provisions of Article 41.2 impose any enforceable obligation upon the State. For example in *J.F. v B.F.*, the applicant, a married mother, relied upon Article 41.2, in order to claim a beneficial proprietary interest in the family home. Lardner J disagreed that her status as a homemaker gave her any such entitlement, on the basis that the provision provided the State with no direction as to how it may recognise and reward the work of women in the home. He was of the belief that the intentions of Article 41.2 were too vague and, as such the subsection could not be given legal recognition.

In the controversial *L v L* decision, the Supreme Court, rejected the approach taken by the trial judge Barr J where he approved, with reference to Article 41.2, the contention that a married woman is entitled to recognition for her contribution as a homemaker. The Supreme Court held that to grant the applicant a 50% beneficial interest in the family home purely by reason of her contribution as a homemaker would amount to “a quantum leap in constitutional law.”

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101 See judgment of Denham J in *Simons v Minister for Education* [2001] IESC 63.
103 Unreported, High Court, July 1989. Whilst women who make a financial contribution towards the acquisition of property may receive a proportionate interest, this does not apply to work done within the home.
105 *Ibid.* See in particular the judgment of Barr J wherein he stated “In my view, the judiciary has a positive obligation to interpret and develop the law in a way which is in harmony with the philosophy or Article 41 as to the status of women in the home...That concept can be achieved, at least in part, by recognising that as her role as full time wife and mother precludes her from contributing...from direct employment...towards the acquisition by her husband of the family home and contents, her work as home-maker and in caring for the family should be taken into account in calculating her contribution towards that acquisition – particularly as such work is of real monetary value” at pp 98-99.
In *Sinnott v Minister for Education*,\(^{106}\) Denham J emphasised the need for Article 41 to be read in light of modern social change. Considering the issue of Article 41.2 she held that while the provision ‘recognises’ the significant role played by wives and mothers in the home “(T)his work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles falls to be analysed.”\(^{107}\)

Both the Constitution Review Group (the “CRG”)\(^{108}\) and the All Party Oireachtas Committee on the Constitution\(^{109}\) have recommended amending subsection 2 of Article 41. In their 1996 report the CRG, advocate replacing the existing Article with a single gender-neutral provision as follows:

> The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home.\(^{110}\)

Although the practical significance of Article 41.2 is questionable, the subsection remains a part of our Constitution despite years of criticism and repeated calls for its removal. As earlier noted the significance of the subsection from the point of view present discussion is that its inclusion in Article 41 arguably serves as evidence of the aspirational nature of the 1937 Constitution’s Family provisions.

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\(^{106}\) [2001] IR 545.

\(^{107}\) *Ibid.*


**The European Convention on Human Rights**

The *European Convention on Human Rights Act 2003*, incorporating the European Convention on Human Rights (“ECHR”) into Irish law came into force on the 31st of December 2003. Prior to this date, the Convention’s role was confined solely to assist in the interpretation of the Constitution and legislation.\(^{111}\) Appellants seeking to enforce rights under the Convention could apply directly to the European Court of Human Rights for relief only provided all domestic remedies had been exhausted. Importantly, the Convention could not, by itself, be relied upon to challenge the constitutionality of legislation.

Legislative acceptance of the European Convention had been heralded by many as the ‘white knight’ capable of transcending the stringent boundaries of the constitutional articles in order to remedy the inequities inherent in the Irish ‘family law’ framework. The Convention contains a number of provisions of relevance to family, most notable of which, Article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society.\(^{112}\)

While the document does not explicitly define what it deems as a ‘family’, its reference to ‘family life’ is markedly more purposive than that of the Irish Constitution. Most significantly there is no distinction within the text between marital and non-marital unions.\(^{113}\) The Convention’s approach can thus be summarised as looking to the form and substance of the relationship in question,

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\(^{111}\) See for example the case of *re Ó Laighleis* [1960] IR 93 wherein the Supreme Court declined to apply the ECHR by reason of the fact that the Irish legislature had yet to ratify the Convention as part of the domestic law.

\(^{112}\) Article 8 (2) catalogues possible justifications for the interference with family rights, these are; “in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

\(^{113}\) Article 12 of the ECHR states “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise this right”
rather than the existence or otherwise of a certificate of marriage.\textsuperscript{114} In contrast to Irish constitutional jurisprudence, Article 8 and the written protections contained therein have been held to apply to cohabiting heterosexual couples,\textsuperscript{115} to an unmarried mother and her child\textsuperscript{116} and most notably, as will be outlined below, to an unmarried father and his child. Discrimination on any grounds is not permissible under the Convention and on this basis Article 14 stipulates as follows:

The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion.\textsuperscript{117}

Crucially, section 2 of the 2003 Act requires Irish courts to interpret domestic law, “in so far as is possible” in a manner compatible with the State’s obligations under the Convention. Under section 4, Irish courts are now obliged to take ‘judicial notice’ of both the provisions of the Convention and also decisions of the Strasbourg institutions including the European Court.

However due to Ireland’s ‘dualist’ approach to international legislation, and the ECHR’s assimilation into our legal framework by statutory means rather than constitutional amendment the Convention’s impact both generally and more specifically in relation to the family has been significantly diminished. The provisions of the European instrument are enforceable on a ‘sub-constitutional’ level only,\textsuperscript{118} as this ‘interpretive mode’ of incorporation preserves the supremacy of the Constitution.\textsuperscript{119}

\textsuperscript{114}It is important to note nonetheless that whilst the court considers relationships other than those based upon marriage, the fact of marriage will always give rise to Article 8 protection, even if the marriage has since ended. See Berrehab v Netherlands (1988) 11 EHRR 322.

\textsuperscript{115}Johnston v Ireland (1987) 9 EHRR 203.

\textsuperscript{116}Marckx v Belgium (1979-1980) 2 EHRR 330.

\textsuperscript{117}The full text of Article 14 states “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

\textsuperscript{118}In M.J.F. v Minister for Justice, Unreported, High Court 30 April 2004, Laffoy J hinted that the European Convention holds no further enforceable value than ordinary legislation.

\textsuperscript{119}See Shannon, G., Age of Innocents, (April 2004), Law Society of Ireland Gazette.
The Irish Law Reform Commission views the 2003 Act as implying that there now exists, “two complementary systems in place in Ireland for the protection of rights, with the Constitution taking precedence.” In short, whilst it is possible for Irish citizens to invoke provisions contained within the ECHR and equally to seek remedy for a breach of such rights, the courts are obliged to apply the provisions only to the extent of their compatibility with the Constitution. In the event of a conflict between domestic law and the Convention and where no other legal remedy is adequate or available, the High Court or Supreme Court may issue a ‘declaration of incompatibility’ accompanied by an award of damages. Importantly however in the event of such a declaration of conflict, the impugned domestic law is not automatically declared invalid rather it can continue to remain in force unless separately declared unconstitutional.

As earlier noted, Article 14 of the Convention, prohibits party states from discriminating between citizens on the grounds of sex or gender. Importantly however this protection will not be enforced by the Strasbourg court if the State can show that the distinction at issue pursues a legitimate aim and the means used are proportionate to that aim. Another factor operating to weaken the impact of the European Convention in terms of family rights in Ireland is the ‘margin of appreciation’ doctrine, which is applied by the Strasbourg court to areas of particular national controversy.

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121 Section 5 of the 2003 Act. Section 3 (2) of the Act provides as follows “A person who has suffered injury, loss or damage as a result of a contravention...may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention...and the Court may award to the person such damages (if any) as it considers appropriate.”
123 For application of the ‘margin of appreciation’ test see Handyside v UK (1976) 1 EHRR 737. In Johansen v Norway (1996) 23 EHRR 33, 67-68 the court referred to the ‘margin of appreciation’ in family matters as follows; “the appropriateness of intervention by public authorities in the care of children vary from one State to another, depending on such factors as traditions relating to the role of the family...the Court’s task...is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation...The margin of appreciation so to be accorded to the competent national authorities will vary in light of the nature of the issues and the seriousness of the interests at stake” at para. 64.
The doctrine provides that where moral or culturally sensitive issues are concerned the European Court may defer to the domestic courts to resolve the alleged infringement, in their own discretion.\textsuperscript{124}

The European Court has interpreted Article 8 as comprising a right to the “mutual enjoyment of parent and child of each others’ company.”\textsuperscript{125} It is somewhat ironic that many of the central cases responsible for the development of the Convention’s Article 8 by the Strasbourg court have emanated from applications made by Irish citizens.\textsuperscript{126}

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\textsuperscript{125} \textit{Andersson v Sweden} 26/06/1989 Series A no 226 14 EHRR 615, par 72.

\textsuperscript{126} Interestingly, prior to 2003 Ireland was only found to have breached the Convention eight times; two of these related to ‘family cases’ \textit{Johnston v Ireland} (1987) 9 EHRR 203 and \textit{Keegan v Ireland} (1994) 18 EHRR 342. See Kirrane, E., Human Rights in the Irish Constitution and in the European Convention on Human Rights – A Comparative Study (2003) \textit{ILT} 7.
Conclusions

As illustrated in this chapter, the decision to ground the Irish political and legal structure upon a written constitution was a carefully calculated and well planned resolution, aimed to shield the Irish people from external forces while at the same time to unite them through a common focus. As documented by the historical development of the 1937 Constitution, the Catholic Church has played a weighty and lasting role upon the drafting of the constitutional text. The novel Christian focused protection of the family was arguably a similar attempt to reassure and unify the Irish people by pledging to protect their fundamental social and moral ideals.

One would have expected that the ratification of the European Convention on Human Rights in 2003, would have represented a forceful challenge to several provisions of the Irish Constitution and, in particular, the exclusive constitutional protection of the marriage-based family. However, as has been considered above, the sub-constitutional status of the Convention together with the ‘margin of appreciation doctrine’ has operated to significantly weaken its operation and effectiveness in this jurisdiction. The Convention is consequential deprived of any real substance in terms of fundamental and family rights and is essentially rendered all bark, with very little bite.

As noted, it has been suggested that the constitutional provisions relating to the family were intended by the constitutional drafters merely as guidelines for policy makers and legislators rather than a set of rigidly binding inflexible rules. However, as will be shown in further discussion, unfortunately this is not the interpretation which has been aff orded to the Constitution’s family provisions since their inception in 1937. The next chapter which sets out the development of the State’s legislative framework in respect of the family demonstrates that, rather than uniting the Irish populous the Constitution’s protection of the family has instead proven a divisive and unyielding barrier in the drafting and development of family legislation.
Chapter II
The law relating to guardianship and custody in Ireland

The purpose of the present chapter is to discuss the development of a statutory framework for the regulation of custody and guardianship in the Irish State. It is first proposed to examine the legal concepts of custody and guardianship of children and show how these developed under the Common Law. It is then proposed to show how the interpretation of custody and guardianship has developed in the Irish State, in particular following the legalisation of the adoption of children. As will be seen, regulation of custody and guardianship of children in Ireland has evolved from a position of patriarchal supremacy to one of equality for married parents and maternal supremacy in the case of unmarried parents. Articles 41 and 42 of the Constitution have played a pivotal role throughout this transition and, to this day, legislation relating to guardianship and custody of children continues to be framed with regard to the Constitution’s protection of the family.

In order to properly secure its tenure as supreme source of law in the Irish State, the Constitution of 1937 expressly forbids the Oireachtas from enacting any laws which are “in any respect repugnant to [the] Constitution or any provision thereof.” 127 The document further reinforces this principle by providing that in the event of a conflict between statute and Constitution, the impugned legislation shall be void to the extent of its inconsistency with the constitutional text. 128

Accordingly, interpretation and application of the constitutional articles particularly the fundamental rights provisions are of crucial importance and continue to remain vital to all law making and enforcement in Ireland. The evolution of family legislation has therefore inevitably been shaped by the

127 Article 15.4.1º
128 Article 15.4.2º
constitutional construction of the social group. Whilst neither Article 41 nor 42
deal explicitly with parental rights, both articles have, and continue to have, a
significant impact upon the legal regulation of family relationships and are
frequently cited by the legislature in response to allegations of their “unduly
lethargic”\textsuperscript{129} approach to the drafting of legislation in the area.

2.1 Defining guardianship and custody

The term ‘guardian’ is used in common parlance to denote an individual that is
possessed of legal rights and responsibilities in respect of another person, who is
deemed incapable of managing own affairs.\textsuperscript{130} The guardian of a child is said to
have a ‘legal voice’ which enables them to make decisions on any matter relating
to the child’s education, religious upbringing, health or general welfare. On a
practical level, a guardian has the right to be consulted on a number of important
administrative and juristic matters relating to the child including: his or her place
of residence, passport and visa applications, legal representation, consent to
medical treatment, adoption or care of the child in the event of the death of
another parent/guardian.

Arguably the most meaningful legal right to flow from the right to guardianship
is that of custody.\textsuperscript{131} Custody is defined as the ability to “exercise physical care
and control in respect of the upbringing of [a] child on a day-to-day basis.”\textsuperscript{132} A
child’s custodian, unlike a guardian, is not legally entitled to make any long-term
decisions relating to his or her schooling, place of residence or physical welfare.

\textsuperscript{129} Taken from the speech of Deputy Alan Shatter during the Parliamentary Debates regarding the
\textsuperscript{130} Although a guardian may be appointed to persons of unsound mind or an individual who is
medically incapacitated, current discussion of the concept will be limited to guardianship of
children.
\textsuperscript{131} In \textit{G. v An Bord Uchtála} [1980] IR 32 Henchy J held “custody will normally be necessary for
the effectuation of the parents’ constitutional right and duty to provide for the religious and
moral, intellectual, physical and social education of their children” at p 85. In the same case
Walsh J stated “Custody orders, of their nature, are temporary only” [1980] IR 32 at p 76. See
also judgment of Finlay Geoghegan J in \textit{R.C. v I.S.} [2003] 4 IR 431 wherein she stated that
custody of a child essentially means the right to physical control of that child (at p. 439).
Despite these limitations the right to custody is nonetheless of considerable practical significance and value particularly in terms of developing relations between a child and his or her guardian.\textsuperscript{133}

The law, as it currently pertains to custody and guardianship matters in Ireland is regulated by \textit{The Guardianship of Infants Act 1964} as amended by \textit{the Status of Children Act 1987, the Judicial Separation and Family Law Reform Act 1989, the Family Law (Divorce) Act 1996} and \textit{the Children Act 1997}. Before considering the practical significance of the foregoing legislative enactments it is first necessary to examine the background to the modern regulation of custody and guardianship matters under the law of the State.

\textbf{2.2}

Common law development of parental guardianship and custody rights

Prior to the establishment of the Free State Government, the Westminster Parliament represented the exclusive and absolute law-making body for Ireland. The Anglo common law traditionally tended to draw a very distinct and definite line between the guardianship and custodial rights of parents based upon their marital status and as such, it is proposed to discuss the development of laws in the area accordingly.

2.2.1 Married parents and the ‘Doctrine of Unity’

Historically a man and woman, upon their marriage, were said to become one single, autonomous entity. This symbolic ‘fusion’ was however, far from balanced and essentially operated to terminate a wife’s independent legal personality by subsuming it with that of her husband in his capacity as ‘head of the household’. As a result, a married woman could not sue or be sued, nor could she legally hold any property in her own right.

Consequentially, regulation of guardianship and custody initially developed upon the premise of near absolute paternal rights, referred to by William Blackstone as “the empire of the father.” As a corollary of his status as breadwinner and provider, the right to the custody and control of an infant was said to belong ultimately, and against all other persons, to its father. The common law rigidly followed this assumption, based on the Roman family law principle patria potestas which deemed the male head of the family to be in possession of private

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136 This bar remained in place until the Married Women’s Property Act, 1882.
law rights of control over the persons and property of his children. In keeping with this idea of a child being a form of possession or ‘chattel’, Aquinas once likened the relationship between father and child to that of a master and his slave:

A son, as such, belongs to his father, and a slave, as such, belongs to his master...there are certain laws regulating the relations of a father to his son and of a master to his slave, but in so far as each is something belonging to another, the perfect idea of right or just is wanting to them.”

The Tenures Abolition Act, 1660 empowered fathers with a further means by which they could assert their paternal supremacy, even after death. The Act provided a mechanism whereby a father could by his will, appoint a person to act as guardian to his infant heirs in the event of his death. In such a case the appointed guardian was to acquire the father’s complete bundle of guardianship and custodial rights even to the exclusion of the child’s mother. Whilst the 1660 Act, which remained in force for over two hundred years, was enacted in order to strengthen fathers’ rights in respect of their children, Sarah Abramowicz notes that the Act paradoxically presented the courts with novel jurisdiction for judicial intervention in custody and guardianship matters.

During this period, married women had no tangible or enforceable custody rights in respect of their children. As noted by Blackstone, “The mother, as such, is entitled to no [legal] power, but only to reverence and respect.” Any rights, which a mother was deemed to possess, were completely derivative and dependant upon the corresponding loss of rights by the father or his appointed testamentary guardian. The courts were reluctant to intervene against the wishes of the father and would do so only in the most extreme circumstances in which

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140 Deemed as any infant less than 21 years of age. Section 8 of the Tenures Abolition Act, 1660.
case the onus fell upon the mother to prove the father had breached his duties by reason of misbehaviour or immorality.143

The nineteenth century marked the beginning of a period of increasing social and legal change. The ground-roots were being laid for the feminist movement which led to calls for greater recognition and protection of women in the public and private spheres. This social insurgency coincided with the gradual legal recognition of marital dissolution, albeit in limited circumstances.144 The courts were thus coming under increasing pressure to revise their outdated paternal idealism and consider the appropriate balance between competing parental rights.

*The Custody of Infants Act, 1839* represented the first signal of a possible rebalancing of the scales between parents in relation to their children. Known as “Talfourds Act” the 1839 Act permitted the courts, for the first time, to use their discretion to award to an applicant mother custody or visitation rights in respect of infants less than seven years of age, providing that she was not guilty of adultery.145

The next major breakthrough for women did not come for almost another fifty years. Referred to as “the Mother’s Act”,146 *the Guardianship of Infants Act 1886*, represented a highpoint in the movement to equate parental rights between married parents and a notable dent in the established patriarchal scheme. Crucially, the Act operated to place both parents on an even footing as regards the custody of their children.

As well as extending the mother’s right to petition the court for access to, or guardianship of, any child less than twenty-one years of age, the Statute importantly stipulated that the infant’s mother was to acquire guardianship upon

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144 *The Divorce Act 1857*.
145 The age limit was extended to children under sixteen years of age in *The Custody of Infants Act, 1873* which repealed and replaced the 1839 Act.
146 See judgment of Lindley LJ in *Re A & B (Infants)* 1897 1 Ch 786, 790 (CA). This was also referred to in Seanad Eireann Debates – Volume 57 – 04 March, 1964.
the death of the father. The Act also extended the posthumous rights of married mothers, providing that the mother could also appoint a testamentary guardian for her infant children to act after her death. However this came with a caveat, should an infant’s father survive his spouse, the mother’s guardian could act only if the court was satisfied that the father was unfit to be the sole guardian.

The dominating patriarchal bias was however, still far from extinct as evidenced by preservation of the theory of religio sequitur patrem in the Custody of Children Act 1891. The principle was explained in the Irish decision Re Grey, Infants as the notion that the law “adopts for children the religion of the father, and requires that they be safeguarded in that religion.” Accordingly under the 1891 Act a father, regardless of his fitness to act as a guardian or custodian, was empowered with the right to require and insist that his child be brought up in accordance with his own religion.

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147 The mother could act as guardian, either alone or jointly with the father’s appointed testamentary guardian.
The Free State Constitution of 1922 provided that all Commonwealth legislation enacted prior to Ireland’s independence, would continue to remain in force provided that such was not repugnant to the newly enacted text. Bunreacht na hÉireann later followed suit, stating that all pre-existing common law Statutes would retain their binding status provided they were compatible with the new constitutional regime.

In the formative years of the 1937 Constitution, the Irish judiciary appeared somewhat unsure as to whether certain common law principles relating to family legislation had survived in light of the Constitution’s novel protection of the family. In one of the earliest cases to consider the application of these newfound constitutional safeguards the court held that “the provisions of Articles 41 and 42 of the Constitution constitute the fundamental law of this State and must be taken as overriding any pre-existing law inconsistent therewith.”

The judiciary found particular difficulty in attempting to reach the correct balance between competing parental rights, which must now be considered not only with reference to the common-law and Statute but also Articles 41 and 42. In one of the first cases dealing with this issue, Re Frost (Infants) Sullivan CJ stated that the control and management of the family is “vested in both parents.” However the Supreme Court ultimately upheld the common law paternal bias that it is the father’s right to decide the religion of his children and concluded further that such a principle was unaffected by the enactment of the Constitution.

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150 Article 73 of the Free State Constitution 1922 provided “Subject to this Constitution, and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State, at the date of the coming into operation of this Constitution, shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas...”

151 Article 50 of Bunreacht na hÉireann, 1937 provides as follows; “Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.”

152 Per O’Byrne J in Re O’Brien [1954] IR 1 at p. 11.

153 [1947] IR 3
A number of years later in the controversial decision *re Tilson Infants* the judiciary backtracked reversing its original stance in its interpretation of the family provisions in the context of the wider legal order. The courts agreed with the notion earlier presented in the *Frost* decision that married parents possess the same constitutional rights in respect of their children, however ultimately held that the common law principle of paternal supremacy had in fact, been overridden by the 1937 text. The court referred in particular to Article 42.1, which requires that both parents are to be vested with a joint duty and power in respect of the religious education of their children.

Then president of the High Court, Gavan Duffy P, considered the position of pre-existing English statute in light of the constitutional articles and delivered an emphatic endorsement of the family articles’ superiority. Referring to the newly enacted constitutional provisions, he states with an unmistakable air of confidence:

> Article 41 and 42, redolent as they are of the great papal Encyclicals *in pari materia*, formulate first principles with conspicuous power and clarity...Thus for religion, for marriage, for the family and the children, we have laid our own foundations.\(^{155}\)

It is submitted that the learned High Court president’s choice of phrase is, to say the least, remarkable. Precisely how he could use the word “clarity” to describe the family provisions outlined in the first chapter of this paper, is somewhat ironic as will be demonstrated in the various attempts to apply them since the Constitution’s enactment.

\(^{154}\) [1951] IR 1

\(^{155}\) *Ibid.* at p.14. The High Court judgment was subsequently upheld by a 4-1 majority of the Supreme Court.
2.3.1 The Guardianship of Infants Act 1964

Despite the novelty of the 1937 Constitution’s provisions on the family it was some time before the Oireachtas took up the mantle of legislating for this ‘unit group’ and its constituent members. The long anticipated *Guardianship of Infants Act 1964* marked the first attempt since the founding of the State, to legislate for the guardianship and custodial rights of parents in the jurisdiction. The Act reformed and consolidated the pre-existing laws relating to custody, guardianship and testamentary guardianship and expressly repealed all residual English Statutes.

Section 6(1), broadly stipulates that each parent is to have joint and equal guardianship rights in respect of his or her child.\(^{156}\) It has been submitted on various occasions before the courts that this provision, which echoes the earlier *Frost\(^{157}\) and *Tilson\(^{158}\) judgments is merely a “statutory expression of the rights already guaranteed in the Constitution.”\(^{159}\)

In relation to custody, the 1964 Act provides that the guardian of a child is *prima facie* entitled to his or her custody and as such, is entitled to take proceedings for the restoration of custody of the child against any person who wrongfully takes away or detains the infant.\(^{160}\) However, in subsequent interpretations of the legislation, the courts have emphasised the distinction between guardianship and custody rights. Whilst, in certain circumstances a parent may be deprived, completely or partially, of custodial rights, his or her status as a guardian and the rights arising therefrom remain intact.\(^{161}\)

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\(^{156}\) A “child” for the purposes of the legislation is defined as a person under the age of 18 years. See section 2 of the 1964 Act, as amended by the *Age of Majority Act*, 1985.

\(^{157}\) [1947] IR 3.

\(^{158}\) [1951] IR 1.

\(^{159}\) Per Walsh J in *B. v B.* [1975] IR 54 at p 61. See also statements by MacMenamin J in *N. v The Health Service Executive* 23rd June 2006 “The statutory provisions must be interpreted as reflecting the constitutional position thus set out” at p 60 of judgment.

\(^{160}\) Section 10

\(^{161}\) See judgment of Walsh J in *B. v B.* [1975] IR 54 “It is, in my view, quite clear from the provisions of s. 11 (not merely from their own content but when taken in context with the other sections of the Act and the relevant constitutional provisions upon which the Act is founded) that if one parent is given custody of an infant to the exclusion...of the other parent, that does not mean that the parent who loses the custody is deprived of the other rights which accrue to him (or her) as guardian of the infant. A parent so deprived of custody can continue to exercise the rights
Section 11 provides the court with the relevant armour to tackle contentious situations whereby parents are in disagreement as to the appropriate upbringing of their child. Under subsection 2, the court is permitted to give any direction, which it deems proper regarding the custody of the child and the right of access to the child.

At first glance, the 1964 Act would appear to go against the grain of the previous common law gender prioritisation of parents and generously evens the balance between parents as regards their respective custody and guardianship rights. The Act is however, all too quick to limit this benevolence and maintains the legislative tradition of differentiating between the rights of each parent by virtue of their marital status.

2.4 What a difference an ‘il’ makes – the conceptualisation of Illegitimacy

Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as unjust – way of deterring the parent.

United States decision *Weber v Aetna Casualty and Surety Co*\(^\text{162}\)

For centuries the Irish legal, social and political frameworks repeatedly declined to observe the basic and fundamental concept outlined in the above quote, that legal burdens should bear some relation to individual responsibility or culpability. Before embarking on a discussion of the lamentable treatment of the ‘illegitimate child’ and his or her parents it is first necessary to consider the meaning of this deprecating and debilitating tag.

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\(^\text{162}\) 406 US 164 (1972) p.175

of a guardian and, in my view, must be consulted on all matters affecting the “welfare” of the child” at p 61.
The Irish Law Reform Commission (LRC) describes illegitimacy as a “negative concept” which conditions and categorises a person in terms of their ‘legitimacy’, as opposed to any status of ‘illegitimacy’. Under the common law, a child was traditionally considered to be illegitimate if its natural parents were unmarried at the time of his/her conception. For centuries, these ‘bastard’ children were tossed to the edge of society, shunned by the general populace, social and legal systems which looked upon them as filius nullius, the child and heir of no one.

The birth of children outside marital union judicially portrayed as “the unfortunate offspring of the failing of a man and woman” was viewed as an affront to public morals, a threat to the hallowed institution of marriage and evidence of a sinful act. The mere existence of such children was seen by political and church leaders as a threat to the proper underpinnings of the ‘ideal’ family. Illegitimate children and their parents were thus stigmatised and subjected to humiliating, hostile and generally “unchristian” treatment by society.

In Ireland, the treatment of non-marital children operated to indirectly punish them for the family situation into which they were born. On a practical level, illegitimate children were issued with a ‘short’ form birth certificate, which, in contrast to that of a child born to married parents, allowed no space for a father’s name. Accordingly the circumstance of a non-marital child’s conception was a matter of public record, freely displayed whenever required for school registration, passport or even job applications.

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164 See O’Driscoll, H., Rights of Unmarried Fathers, [1999] 2 IJFL
The Legitimacy Act 1931 provided for the first time, a means by which an Irish child born out of wedlock could be 'legitimated'. Such an infant would be ‘rendered legitimate’ only however upon the subsequent marriage of their natural parents, with the additional proviso that the parents must have been legally capable of marriage to one another both at the time of birth and in the preceding ten months. According to the Act the child was deemed ‘legitimated’ from the date of the parents’ marriage and accordingly his or her birth could be re-registered.

The discriminatory treatment of illegitimate children was most apparent and arguably most debilitating in the realm of inheritance law. The Irish judiciary interpreted the word ‘children’ in testamentary dispositions to refer solely and unequivocally to legitimate children. Consequentially children born outside of marriage were completely deprived of any financial entitlement or security from their deceased parents.

In the landmark case O’Brien v S, the Supreme Court paradoxically employed the constitutional protection of the married family in order to defend legislation which adversely distinguished between the succession rights of children based exclusively upon the marital status of their parents.

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169 The Supreme Court in K.C. & A.C. v An Bord Uchtála & Ors [1985] ILRM 302 (SC) ruled that there is no difference in the constitutional rights accorded to a ‘legitimate’ or ‘legitimated’ child.

170 Section 1(2) Legitimacy Act 1931.

171 This provision was most likely influenced by Canon Law which traditionally subdivided the notion of ‘illegitimacy’ into categories based on whether a child was ‘natural’ or ‘spurious’, the latter category included children conceived in adulterous, incestuous or nefarious unions. For further discussion see Seanad debate between Senator M. Higgins and Senator Robinson in Seanad Éireann – Volume 113 – 09 July, 1986.

172 For discussion of the ‘legitimation’ of children and statutory declarations of legitimacy under the comparative English legislation Legitimacy Act 1926, see C. v C. [1947] 2 All ER.

173 Section 1(4) of the Legitimacy Act 1931.


175 Ibid.

176 [1984] IR 316 “...to place members of a family based upon marriage in a more favourable position than other persons in relation to succession to property...Having regard to the constitutional guarantees relating to the family, the Court cannot find that the differences created by the Act of 1965 are necessarily unreasonable, unjust or arbitrary.”
The facts of the case concerned the distribution of the estate of an unmarried man who had died intestate, leaving a daughter, sisters and a brother. The daughter argued that sections 67 and 69 of the *Succession Act 1965* which specifically excluded illegitimate children from comprising the “issue” of a person who died intestate, should be interpreted to permit an illegitimate child to succeed the estate of a deceased parent.  

Walsh J, in an apparent endorsement of the legislative bias against illegitimate children promulgated the view that one of the aims of the 1965 Act was to fortify the protection of the family under the Constitution. As such, by virtue of the married family’s elevated constitutional status, the learned justice felt obliged to place members of such constitutional units in a more favourable position than other persons, whether by way of testamentary disposition or intestate succession. The majority concluded accordingly that by acting to protect the inheritance rights of the ‘legitimate’ family the Oireachtas, was acting appropriately and differences created therein between legitimate and illegitimate children were neither arbitrary, unreasonable nor unjust.

### 2.5 The statutory rights of ‘Illegitimate parents’

Addressing Seanad Eireann, Senator Haughey once said

> It is our bounden duty to safeguard...children who have no will, no control over the circumstances in which they were conceived and born. My outlook has always been...that there are no illegitimate children...there are only illegitimate parents

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177 The Plaintiff based her claim on the guarantee of equality under Article 40.1 of the Constitution. Article 40.1 pledges equality before the law to all citizens and provides that the State shall not discriminate between citizens discriminating on arbitrary, unreasonable or unjust grounds. In a number of other jurisdictions, including the United States, the fundamental guarantee of equality has been successfully employed as a means of overcoming discriminatory treatment of members of ‘non-traditional’ family forms.

178 [1984] IR 316 at p. 317. See also *Wilson v Attorney General* Unreported, High Court, 29 May 1979

A sharp contrast can be drawn between the common law principle of patriarchal supremacy, discussed earlier and applied historically in the context of married couples, with the rights and responsibilities granted to the parents of so-called ‘bastard’ illegitimate children. While both situations contain an imbalance, in the instance of illegitimate children unmarried mothers were traditionally given a more definite legal role in respect of their children. It is important nonetheless, to note that this recognition was of little practical assistance and was neither intended to aid or support such women or their children. According to Gillian Douglas, legislation in respect of unmarried mothers was merely aimed at reinforcing the stigma associated with their situation and forcing the mother to “name and shame” the child’s father.\textsuperscript{180}

The ‘Bastardy Clause’ of the \textit{English Poor Laws 1834}, absolved the reputed father of an illegitimate child of any liability in respect of his paternity and instead placed all economic and social responsibility onto the child’s mother.\textsuperscript{181} An unmarried mother was thus expected to solely support and maintain her child until he or she attained the age of sixteen years, and if she was deemed unable to do so, both mother and child were sent to enter the Parish workhouse.\textsuperscript{182}

The \textit{Guardianship of Infants Act 1964} continued the pre-existing trend in relation to the treatment of illegitimate children, providing under Section 6 that the mother of a child born outside of marriage was deemed its sole guardian.\textsuperscript{183} The situation in relation to unmarried fathers is somewhat less clear due to the fact that the Schedule to the 1964 Act narrowly confines its definition of “father” to exclude completely and unequivocally “the natural father of an illegitimate child.” The Act, in its original form, neglected to make any provision by which the father of an illegitimate child could be appointed as a joint guardian and merely confers upon a natural father the right to petition the courts for access.\textsuperscript{184}

\textsuperscript{181} The Act repealed the Poor Law of 1733 which stipulated that the putative father of an illegitimate child was responsible for the support and maintenance of the infant.
\textsuperscript{183} Section 6 (4) of the 1964 Act.
\textsuperscript{184} Section 11 (4) of the 1964 Act.
2.6 The Status of Children Act 1987

In its 1982 *Report on Illegitimacy*, the Law Reform Commission found that the continued legislative discrimination in respect of illegitimate children in Ireland represented an affront to the “Christian and democratic nature of the State.” The report ultimately concluded that it was unjust for the Irish legal system to differentiate between children on the basis of whether they were born within or outside of marital union and advocated that the legal relationship of parent and child should not be subject to any exceptions or conditions. In short, the commission found that the status of illegitimacy should be completely removed from Irish law.

The LRC’s proposals, coupled with societal evolution and the increasing prevalence of what Suzanne Shanahan refers to as “antifamilies”, led to pressure for the legislature to remedy the common law’s “barbarous approach” towards unmarried parents and their children. The demand for change accelerated even further following the ruling of the European Court of Human Rights in *Johnston v Ireland* that the legislative treatment of ‘illegitimate children’ in Ireland contravenes the European Convention’s protection of ‘family life’.

The government eventually responded to the growing call for reform by introducing in May 1986, a Bill to Seanad Éireann entitled ‘Status of Children’. Section 2 of the Bill, in its original form, proposed to eliminate discrimination based upon the circumstances of a person's birth by replacing all legislative references to ‘illegitimacy’ with the terms ‘marital child’ and ‘non-marital

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188 See judgment of Gavan Duffy J. in *Re. M an Infant* [1946] IR 334.
190 Under Article 8, for further discussion of the ECHR, see Chapter 6.
child’.

This section, described by its drafters as a “distinction between equals”, was heavily criticised in the lower house, with the new terminology described as creating “two obnoxious characters” which merely served to re-classify the offensive label of “illegitimacy”.

This distinction was accordingly dropped in the accepted version of the legislation and the Status of Children Act was formally signed into law on the 14th of December 1987. Section 3 (1) provides that the relationship between child and parent shall be determined without reference to whether the child’s parents are, or ever have been, married to each other. The Act further removes the pre-existing statutory bar preventing the ‘legitimation’ of a child whose parents could not lawfully have been married to each other at the time of birth or conception.

Significantly, Part V of the 1987 Act abolishes all pre-existing discriminations relating to the inheritance rights of non-marital children. Section 27 of the 1987 Act amends Section 3 of the Succession Act 1965 and provides that the terms of the 1965 Act in relation to the inheritance rights of children to the estate of their parent are to apply equally to all children, regardless of the circumstances of his or her conception or birth. Furthermore, the 1987 Act importantly grants children born outside of marriage, equal rights in terms of intestate succession and confirms the equal right of such children to access the Courts for redress under the Succession Act 1965.

Part III of the 1987 Act attempts to address the “thorny problem” of guardianship in respect of non-marital children. Section 12 inserts Section 6A into the 1964 Act providing for the first time, a statutory mechanism by which natural fathers could attempt to assert guardianship rights. This novel provision provides for

194 Section 7(1) amends Section 1(2) of the Legitimacy Act, 1931
195 Section 29 of the 1987 Act.
198 Section 12 of the 1987 Act inserted Section 6A into the Guardianship of Infants Act, 1964.
what it terms a “special” and “informal” procedure whereby an unmarried father may petition the Court to be appointed as a guardian of his child. However, the Article moves swiftly to limit this procedure, applying it only in circumstances where the child’s mother consents, in writing, to appoint the father as guardian and where the father is registered as the infant’s father in accordance with the Births and Deaths Registration Act 1863 to 1987. In the event of an unmarried father failing to meet the qualifying conditions to be appointed as guardian of his child, section 13 of the 1987 Act affords him the “right to make an application” petitioning the Court for custodial status or access but importantly not for guardianship of his child.

The then senator, Mary Robinson expressed her disappointment with the narrowly framed conditions of the 1987 Act in relation to unmarried fathers, describing them as only “halfway to where the [legislature] should wish to see [Ireland] moving in this area.” Whilst Alan Shatter views it as “illogical…peculiar and archaic” to incorporate into a Bill that is designed to place children in a position of legal equality, a system whereby a child born within marriage has the right to an equal legal relationship with both their natural mother and father, while outside marriage the child’s mother is deemed their guardian but the father, unless he brings court proceedings against the mother, is not.

2.7 The Children Act 1997

Ten years later, the legislature made another attempt to simplify the law relating to child custody and guardianship with the Children Act 1997. Section 4(4) of the Act effectively repeals and replaces Section 2 of the 1964 Act thereby

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200 Section 11 of the 1964 Act. This section is considered further below.
removing the obligation for an unmarried father to attend Court in order to acquire guardianship rights.

Under this new “sworn declaratory parenthood procedure”, both a child’s father and mother are required to sign a Statutory Declaration attesting that they are the child’s respective parents, they are not married to each other, they both agree to the appointment of the father as a guardian and that both have entered into custody and access arrangements in relation to the child.

There is an option for the parents to agree access; however, they are not obliged to set out the particulars of the agreed arrangements. The legally binding Statutory Declaration must then be sworn before a Peace Commissioner, a Commissioner for Oaths or a Notary Public. The form indicates that legal advice should be sought before the declaration is formally executed.

Paul Ward suggests that use in the declaration of ‘agreement’ rather than ‘consenting’ terminology represents a move away from the perceived authoritarianism of the natural mother ‘consenting’ to the father’s appointment. He believes that the idea of an agreement between parents “gives the impression of equality.” While the modified system is undoubtedly effective where an unmarried couple are cohabiting and on good terms, the 1997 Act regrettably fails to accommodate less clear-cut circumstances. Frank Martin describes the absence of any procedure for dispensing with the need for the natural mother’s agreement as an “unfortunate lacuna” in the Act, especially in the event of her consent being withheld unreasonably or where the child’s best interests would be served by eliminating the need for her consent.

There are a number of additional practical difficulties with the statutory process set out in the Act. For example, if a father wishes to be appointed as a guardian

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204 S.I. No. 5 of 1998 *Guardianship of Children (Statutory Declaration) Regulations 1998*.
of his child but is not registered on the child’s birth certificate, it is likely that the appointed registrar will require a Court Order before consenting to the appointment. Also, if a cohabiting couple have more than one child a separate Statutory Declaration must be sought in respect of each child.\textsuperscript{207} Unlike mothers, an unmarried father who has been appointed as a joint guardian of his child can be removed if the court is satisfied it is in the child’s best interest.\textsuperscript{208}

2.8 \textbf{Illegitimacy and the legalisation of Adoption}

The practice of children being raised by individuals, who are in no way related to them by blood, is by no means novel and can be traced back as far as Biblical times.\textsuperscript{209} Whilst \textit{de facto} adoptions, often facilitated by private religiously affiliated adoption societies were common in Ireland for some time, the legal regulation of adoption is a relatively recent phenomenon in the jurisdiction.

Traditionally under the common law, it was not permissible for parents, during their lifetime, to legally transfer the guardianship of his or her child to another individual.\textsuperscript{210} Therefore \textit{de facto} adoptive parents who had taken over the care of children from their biological parents, had no binding legal status in relation the child within their care, and as such, lived under the constant (and often quite realistic) prospect of the natural parent or parents returning to assert their rights and reclaim the child. On an international level the adoption of children had become more commonplace following the displacement and destruction of many families in the aftermath of the First World War. Consequentially at this time, legislatures throughout Europe, came under increasing pressure to grant legal recognition and protection to all those involved in the adoption process and Ireland was no exception.

\textsuperscript{208} Section 8 (4) of the \textit{Guardianship of Infants Act} 1964.
\textsuperscript{209} See \textit{Encyclopædia Britannica}, ‘adoption’ Retrieved 19/052008, from Encyclopædia Britannica Online: \url{http://www.search.eb.com/eb/article-9003773}
\textsuperscript{210} \textit{In re Harriet O’Hara, An Infant [1900]} 2IR 232; (1899) 34 ILTR 17 (CA); per Fitzgibbon LJ “English law, does not recognise the power of bindingly abdicating either parental right or parental duty.”
Although legal adoption was formally introduced onto the English Statute book in 1926,\textsuperscript{211} it was, not until the late 1940s that any notable demands for a legislative framework began to manifest themselves in the Irish jurisdiction. In 1948 the Adoption Society (Ireland) was founded and this multi-denominational organisation proved itself an effective means of garnering public support to campaign for the introduction of legislation.\textsuperscript{212} In 1952, the Oireachtas introduced an Adoption Bill, the provisions of which came into legal force under the \textit{Adoption Act} on the 1\textsuperscript{st} of January 1953. The 1952 framework was supplemented with six other Acts enacted in 1964, 1974, 1976, 1988, 1991 and 1998.\textsuperscript{213} The catalogue of Acts is intended to be read as one and together they comprise the law governing adoption in Ireland. Significantly, since the ‘legalisation’ of adoption in 1952 over 43,000 orders for domestic adoption have been made.\textsuperscript{214}

The Catholic Church’s immense influence upon the shaping of social policy in the Irish State raised its head once again regarding the question of legal adoption. One of the strongest objections put forward against the introduction of a legislative framework was the fear that adoption “would facilitate proselytism.”\textsuperscript{215} Accordingly, both prior to and during the drafting of the adoption legislation the Irish government sought the approval of Church authorities in respect of each individual clause.\textsuperscript{216} The Church, despite its initial reluctance, agreed to the legalisation of adoption on the condition that certain limits and safeguards were put in place to protect the “Faith and morals” of children involved in the process.\textsuperscript{217}

Once again, government drafters adhered to the wishes of the Church, as is evidenced by the inclusion of a proviso that prospective adoptive parents must be

\textsuperscript{211} \textit{Adoption of Children Act}, 1926.
\textsuperscript{212} For a discussion on the legal development of adoption legislation in Ireland see Whyte, J.H., \textit{Church and State in Modern Ireland} 1923-1970, (1974), Gill and Macmillan.
\textsuperscript{214} Figures published by the Adoption Authority of Ireland, see various annual reports 2003-2007.
\textsuperscript{216} \textit{Ibid}.
“of good moral character” and further should be “the same religion as the child and his parents, or if the child is illegitimate, his mother.” According to Whyte the adoption debate helped to build upon the impression that “Ireland was some sort of theocratic State, in which a government formally answerable to the Dáil...could in some way be manipulated by the Church behind the scenes.”

One of the main reasons advanced in favour of introducing legal adoption in Ireland was its ability to deal with the perceived ‘problem’ of children born outside of marriage. Adoption was seen as a means by which the unmarried mother could ‘purge’ both herself and her child of the social and legal stigmas associated with illegitimacy. By placing her child for adoption, a mother could thus “recreate” her child enabling him or her to become part of the hallowed constitutional “family unit.” The removal of a child from the responsibility of its unwed mother was viewed as the best solution for both. The archaic and patronising assumption that all unmarried mothers should wish to erase the fact of their child’s birth was nurtured and encouraged by political, religious and educational bodies alike.

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220 In the thirty or so years following the introduction of legal adoption to the Irish statute book there existed a high degree of correlation between figures documenting the number of children born outside marriage and those placed for adoption. In 1967, the number of orders for adoption was almost identical to the figures for non-marital births and the percentage of adoptions arising from non-marital births was as high as 96.95%. See Annual Report of Adoption Board 2006.

221 “Adoption means the re-creation of the child and the completion of a perfect family unit” as per an Information Leaflet issued by the Adoption Society for the Propagation of Legal Adoption. Cited by Natural Parents Network of Ireland submission to the Irish Government Childcare Legislation Unit, Department of Health and Children ‘Adoption Law Reform’ cited on http://www.adoptionloss.ie/submission.htm [accessed on 19/05/2008]


223 Speaking in 1974 at the First Irish Adoption Workers Conference, then Minister for Justice Paddy Cooney stated “I think that we are all agreed that the consensus opinion in our society is to the effect that adoption is better for the illegitimate baby than to be cared for by its mother.” Speech at First Irish Adoption Workers Conference, 1974 as quoted in the Natural Parents Network of Ireland submission to the Irish Government Childcare Legislation Unit, Department of Health and Children ‘Adoption Law Reform’ cited on http://www.adoptionloss.ie/submission.htm [accessed on 19/05/2008]
Campaigning for the introduction of legal adoption in 1949, then vice-chairman of the Adoption Society (Ireland), E. McCabe, described what he perceived as the “emotional revulsion” between an unmarried woman and her child:

Very many of these girls have such bitter and antagonistic feeling for their offspring that they will not have any wish to retain the child, but would prefer to be rid of a troublesome reminder of a fall from grace and social standing.²²⁴

The adoption process and parental rights

Section 24 of the 1952 Adoption Act sets out clearly and unmistakeably the legal effect of adoption upon the rights of parents. It provides that upon the making of an order for adoption, the child at issue shall be considered with regard to the rights and duties of parents and children in relation to each other “as the child of the adopters...born to them in lawful wedlock.” In essence, a child who is the subject of the adoption order becomes subsumed into the family of the adopters and any of his or her future ‘family rights’ are based exclusively on his or her status as a member of this ‘unit’. For this process of conversion to operate correctly the child’s legal existence prior to the adoption order is effectively deleted. Accordingly, the legal bond between natural mother and child is completely and unequivocally severed. As set out in the text of the Act “The mother or guardian shall lose all parental rights and be freed from all parental duties in respect of the child.”

In relation to the natural mother’s consent for adoption, the legislation provided initially for a dual process, whereby she first had to “agree” to place her child for adoption, and, subsequently when the child had reached the age of at least six months, she was then required to execute a formal, written “consent” to adoption.226 The mother’s consent could be withdrawn at any time before the final adoption order was made. This requirement for consent could be waived by the Adoption Board, however only in very narrow and specific circumstances and usually where the mother was mentally incapacitated or could not be found.

The Adoption Act 1974 provided for the first time, an exception to the natural mother’s absolute right to refuse or withdraw her consent to the adoption of her child whereupon no order for adoption could be made. Section 3 provided that where the mother had agreed to the placing of the child for adoption but

225 Section 24(b)
226 Section 14 of the 1952 Act provides that an adoption order shall not be made in respect of a child without the consent of every person being the child’s mother or guardian.
subsequently failed or refused to give her final consent or if she withdrew consent already given then the High Court could order the Adoption Board, in the best interests of the child, to dispense with the need for the mother’s consent.

As already noted, Articles 41 and 42 of the 1937 Constitution provide that parents are possessed of certain ‘inalienable’ and ‘impresscriptible’ constitutional rights. In light of the absolute nature of these provisions, concern was raised initially that the enactment of adoption legislation, which essentially permitted a parent to surrender their parental rights, would be repugnant to the constitutional text. Under Sections 9 and 10 of the 1952 Act the only children legally eligible for adoption were those who were illegitimate or orphaned. The Supreme Court was forced to consider the constitutionality of this aspect of the Adoption Act almost fifteen years after its enactment. The Court upheld the validity of the Act on the basis that the provisions dealing with ‘family’ and ‘parents’ in Articles 41 & 42 apply only to family and parenthood based upon marriage.

Significantly the Adoption Act 1988 provides, in terms notably similar to Article 42.5, that a child born to married parents could now in “exceptional” circumstances be placed for adoption. The Act stipulated, however, that this may take place only under very restrictive circumstances, where the parents in question can be found to have failed in their parental duty for “physical or moral” reasons.

The constitutionality of the 1988 Act was challenged in a reference to the Supreme Court under Article 26 of the Constitution. Delivering judgment on behalf of the court, Finlay CJ set the parameters for the legal adoption of children born to married parents. He stated that the most important element of Section 3 is “the concept of failure which must be construed as being total in character. No

227 Notably Article 41.1° and Article 42.1.
229 Article 26.1° provides that the President may refer any Bill to the Supreme Court for a decision on whether such a Bill or any provisions contained therein are repugnant to the Constitution.
mere inadequacy of standard in the discharge of the parental duty would...suffice to establish this proof.”

The learned Chief Justice added that the failure need not necessarily be blameworthy but must arise for physical or moral reasons.

The court placed particular emphasis upon the requirement of evidence or ‘proof’ of the reputed failure of parental duty in view of the “special regard for the constitutionally protected parental rights.”

Following a decision of the European Court of Human Rights in the mid-1990s on foot of an application by an Irish unmarried father, the Irish government implemented legislation to provide for a process of consultation with natural fathers in the adoption process. The Adoption Act, 1998 stipulates that if an unmarried father is appointed as guardian of his child, the child may not be placed for adoption without his consent. If he is not a guardian, he is given leave to apply within 21 days for guardianship and custody; the application must then be decided by the courts before the child can be placed with an adoption agency. The Act also permits an unmarried father to notify the Adoption Board in writing before or after the birth of his child of his wish to be consulted before the issuing of an adoption order.

2.10 Conclusions

As outlined in this chapter, the legal meaning of the terms guardianship and custody has changed significantly since their early common law roots. In this jurisdiction, statutory rights relating to the custody and guardianship of children must be interpreted and applied in view of the overall constitutional protection of the family. This in turn, has had a significant impact on the development of family rights. The effect of the Constitution’s provisions on the interpretation of guardianship and custody rights is most apparent in the context of the adoption of...
children. The legal and wider constitutional implications of the making of adoption orders and the constitutional consequence for the individual rights of those involved in the process will be considered in further detail in the following chapters.\textsuperscript{235}

\textsuperscript{235} For discussion of the legal consequences of adoption relating to property, succession and financial matters see chapter 9 in Shannon, G., (ed.), \textit{Child Law}, (2005), Thompson Round Hall.
Chapter III
The development of ‘natural rights’ under the Irish Constitution

Brian Doolan describes a constitution as a “legal skeleton upon which must be hung rules and interpretation which give it life.” Article 34 of Bunreacht na hÉireann designates this task of breathing life onto the constitutional provisions to the High Court and Supreme Court, empowering both with the jurisdiction to interpret the provisions of the 1937 text and accordingly decide upon the constitutional validity of legislation.

Issues of construction have arisen in several areas of the Irish Constitution and judges in their role as ultimate exponents of the text have availed of many different interpretive techniques since the document’s inception in 1937. In contrast to many of the Constitution’s articles, there is one obvious and quite dominant interpretative technique employed in relation to the fundamental rights provisions, and in particular, family rights namely the use of natural law theory.

Although the Constitution broadly guarantees to “defend and vindicate the personal rights of the citizen,” the text is deafeningly silent as to what it deems such rights to be. In the locus classicus, Ryan v Attorney General, the Supreme Court accepted into Irish law the principle that Bunreacht na hÉireann guarantees an indeterminate schedule of personal rights in addition to those specified within its written provisions. This momentous finding has had a profound and lasting

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237 See Article 34.3.2° which reads “Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised...in any Court established under this or any other Article other than the High Court or the Supreme Court.” See also Article 34.4.4° which reads “No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions of any law having regard to the provisions of this Constitution.”
239 Article 40.3.1.
effect upon the development of fundamental rights in Ireland and in particular, has substantially shaped the constitutional identity of the unmarried family.

The late Pope Pius XII once described the 1937 Constitution’s fundamental rights provisions as “grounded on the bedrock of the natural law.”241 It is on the basis of this theory of innate natural rights that unenumerated constitutional rights have been incorporated into our jurisprudence. In order to properly assess the role of natural law in Irish constitutionalism it is hoped firstly to identify, as much as is possible, what is meant by this elusive term. It is then proposed to trace the rooting of ‘natural law’ as a basis for declaring rights under the Irish Constitution and finally the usage of the doctrine as a framework for developing rights in relation to the unmarried family.

3.1 **Defining the indefinable - what is natural law?**

By no means a recent phenomenon, the discussion of natural law theory can be traced as far back as ancient Roman and Greek philosophers. In Sophocles’ play *Antigone*, written in 442 B.C., the main character makes reference to the “immutable unwritten laws of Heaven”, explaining them as

> God’s ordinances, unwritten and secure...They were not born today nor yesterday; They die not; and none knoweth whence they sprang...These are the laws whose penalties I would not incur from the gods, through fear of any man’s temper.”242

Natural law theory, in short, is premised upon the belief that certain basic rights inhere in every individual by virtue of human personality and, as such, no authority can deprive a person of those innate human rights. According to one of the doctrines’ main exponents in this jurisdiction, the former Supreme Court

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242 Part of The Oedipus Trilogy written in 442 B.C. See [http://www.gutenberg.org/files/31/31-h/31-h.htm](http://www.gutenberg.org/files/31/31-h/31-h.htm) as accessed on 20/02/2008.
Justice Brian Walsh, it is “the doctrine that man possesses certain rights because he is man and that these rights are not the gift of any positive law or of any state.”

Natural rights theory is generally divided into two distinct categories: theocentric and secular. Secular-based rights are founded exclusively upon human reason, while theocentric are in the main based upon faith and the existence of a divine being. It is alleged that the ideological basis of the 1937 Irish constitution is rooted in a theocentric theory of natural law, based upon the teaching of Christian philosopher St Thomas Aquinas.

Aquinas believed the natural law to be our human understanding of God’s ‘plan’ for us, encompassing “all things to which man has a natural inclination.” He derived from Aristotle the notion of God as the highest ‘good’ and identified four different kinds of law: eternal law, natural law, divine law, and human (positive) law. In respect of the latter, Aquinas argued that all positive law is, in some manner, borne out of natural law.

Interestingly, while the popularity of natural law theory declined in the nineteenth and early twentieth century it continued to flourish within the Catholic Church. Given the proximity between Church and State in Ireland, it is

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248 For further discussion see Chapter 1.
250 Justice Henchy, writing extra-judicially in 1962, surmised as follows “From the point of view of jurisprudence, the most striking change effected by the present Constitution is the break with the positivist character of the common law which had been developed in comparatively modern times...The Irish Constitution rejects such a basis for law. Its Preamble makes clear that the Constitution and the laws which owe their force to the Constitution derive, from God, from the people and are directed to the promotion of the common good.” Henchy S., Precedent in the Irish
unsurprising that the development and discussion of natural law theory in the jurisdiction is inextricably linked to the authority and influence of the Roman Catholic Church, as exemplified in 1879, when Pope Leo XIII instructed the clergy to accept the teachings of Aquinas as the Church’s official theological doctrine.\textsuperscript{251} There exists accordingly, a high degree of overlap between the religious undertones of the 1937 Irish Constitution and the influence of natural law theory upon its text and subsequent interpretation.

3.2 Natural law in the Irish context

The late Professor J.M. Kelly notes that Ireland is the only jurisdiction in the Western world where natural law, in its purely Thomistic sense, has endured the test of time.\textsuperscript{252} Indeed the tendency for Irish judges to derive law from a higher authority can be seen even before the ratification of the 1937 Constitution,\textsuperscript{253} as evidenced in the first clear judicial manifestation of the natural law debate which took place two years prior to its enactment; \textit{The State (Ryan) v Lennon}.\textsuperscript{254}

One of the central aspects of the case involved a challenge to the legislature’s capacity to amend the 1922 Free State Constitution. The applicants, four prisoners, contested the legality of their detention in light of two amendments to

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\textsuperscript{251} See Kelly J.M., \textit{A Short History of Western Legal Theory}, (1992), Oxford University Press.
\textsuperscript{252} \textit{Ibid.} at p. 424.
\textsuperscript{253} By contrast, at no stage of the US Constitution is there any reference to ‘Divine’ law or philosophy. John Hart Ely believes the absence of any reference to Natural Law in the US Constitution to be “no oversight” and rather was the result of a conscious decision by its framers. Ely, J.H. \textit{Democracy and Distrust}, Harvard University Press (1980) at p 49.
\textsuperscript{254} [1935] IR 170.
\end{flushright}
the Constitution: the *Constitution (Amendment No. 16) Act 1929*,\(^{255}\) and the *Constitution (Amendment No. 17) Act 1931*.\(^{256}\)

Counsel for the applicants contended that the impugned amendments represented an infringement to constitutional guarantees which, although unwritten, derived from pre-existing and binding rules of natural law and whose universal existence in no way depended on written declaration in constitutions or charters.\(^{257}\)

The Supreme Court majority,\(^{258}\) employing a positivist approach upheld the High Court’s unanimous rejection of the application. Addressing the issue of whether the 1922 document recognised the existence of such natural ‘unwritten’ rights, Fitzgibbon J, in what has been described as a “withering contemptuous response, full of savage and biting irony”\(^{259}\) emphatically refused the contention that there was some ‘spirit’ embodied in the 1922 Constitution which was “so sacrosanct and immutable that nothing antagonistic to it may be enacted by the Oireachtas.”\(^{260}\)

It is not however, the majority’s forceful rejection of the natural law argument that has proven the most significant and enduring aspect of this ‘desert island case’,\(^{261}\) rather it is the enthusiasm of the dissenting Hugh Kennedy CJ and his willingness to invalidate the impugned constitutional amendments solely by reference to natural law principles. In a much-quoted passage the learned Chief Justice stated with obvious passion and confidence:

\(^{255}\) The 1929 Act effectively amended Article 50, which stipulated the transitional period in which the 1922 Constitution could be amended by ordinary legislation and extended it by a further eight years.

\(^{256}\) The 1931 Act purported to incorporate into the 1922 Constitution Article 2A, a draconian Public Safety martial law measure which allowed for the establishment of a military court.

\(^{257}\) Kelly notes that while this precise argument does not feature in the case reports, the judgments infer that it must have been used. See Kelly, J.M., *Fundamental Rights in the Irish Law and Constitution*, 2nd ed., (1967), Butterworths Allen Figgis & Co. Ltd at p.63.

\(^{258}\) Fitzgibbon and Murnaghan JJ.


\(^{260}\) [1935] IR 170 at p 235-236.

\(^{261}\) Professor John Kelly is quoted describing the Ryan judgment as “a desert island case, so that if one were the proverbial castaway forced to choose a limited selection of cases to read for intellectual stimulation and enjoyment, this certainly would be one of them”, cited in Martin F. And U. De Vries, Leading Cases of the Twentieth Century: A Commentary, (1999) 17 *ILT* 314.
All lawful authority comes from God to the people...It follows that every act, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God... if any legislation of the Oireachtas...were to offend against that acknowledged ultimate Source...for example, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative.262

While the hypothesis presented by the sole dissenter was ultimately rejected by the majority, the decision nonetheless demonstrates the potential for the judiciary to look outside the four corners of the constitutional text, towards a higher source of authority.263 The English constitutional lawyer, O. Hood Phillips, cites Kennedy CJ’s judgment as a “tribute to the continued vitality of natural law theories”,264 while according to Gerard Quinn the passage pre-empts both the “theistic and democratic” elements later featured in the 1937 Constitution.265

3.3

262 [1935] IR 170 pp. 204-205.
263 Michael Forde argues that the judgment in Ryan with its formidable critique of fundamental rights concepts must undoubtedly have inspired the 1937 drafters to provide especially for fundamental rights, which would be protected so as to be unalterable Forde, M., Constitutional Law, 2nd ed., (2004), First Law at p.11.
265 Quinn, G., The Rise and Fall of Natural Law in Irish Constitutional Adjudication, (Fall 2000) Vol. 00, Number 1, The American Philosophical Association Newsletter.
The development of natural rights jurisprudence in Ireland

The assertion that Bunreacht na hÉireann is textually grounded in a natural law perspective can be supported by various references made within the constitutional text itself. Indeed, one need look no further for such ideological ‘evidence’ than the document’s opening lines, which proclaim the “Most Holy Trinity” as the definitive source of all authority in the Irish State. The Preamble continues by further emphasising the indebtedness of the Irish people to “our Divine Lord, Jesus Christ”, decreeing that it is to this ultimate source that “all actions both of men and States must be referred.”

Continuing in this regard, Article 6 of the 1937 text emphatically declares that all organs of government are derived “under God, from the people.” As will be discussed in due course, Articles 41 & 42 contain similar references to the existence of higher spiritual law. Article 43 professes to protect the “natural right” to the private ownership of external goods, which it deems “antecedent to positive law.” On the basis of these constitutional excerpts it would appear

266 Gerard Whyte notes that the Preamble is “not only...explicitly Christian, it is also sectarian in the context of the Christian tradition, in that it implicitly identifies the Irish people with the Roman Catholic tradition.” Whyte, G.F., ‘The Role of Religion in the Constitutional Order’, as featured in Murphy, T. and P. Twomey, (eds.) Ireland’s Evolving Constitution, 1937-97: Collected Essays, (1998) Hart Publishing at p. 60. It should be noted that while the Preamble does not, of itself, possess any power to bind the judiciary it has frequently been employed by the courts as an interpretive guide by which the Constitution ought to be read, and as such remains a powerful reference tool. For further discussion of the legal significance of the Preamble see; McGee v Attorney General [1974] IR 294; The State(Healy) v Donoghue [1976] IR 325; King v Attorney General [1981] IR 233; Norris v Attorney General [1984] IR 36; Attorney General v X [1992] 1 IR 1. See also Report of the Constitution Review Group, (May 1996), Smurfit Print.

267 Referring to the Preamble, Gavan Duffy J in The State (Burke) v Lennon [1940] IR 136 states “With the greatest solemnity, the People, invoking the Most Holy Trinity, gave to themselves ‘Dóchum Glóire Dé agus onóra na hÉireann’: a noble Christian policy; they enshrined the guiding principles in language simple and direct” at p.143. While in Norris v Attorney General [1984] IR 36 O’Higgins CJ states “The Preamble...proudly asserts the existence of God in the Most Holy Trinity and recites the People of Ireland as humbly acknowledging their obligation to ‘Our Divine Lord Jesus Christ’… It cannot be doubted that the people so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and Christian beliefs” at p.64.

268 Writing extra-judicially, Justice Brian Walsh referred to the need to read the overall ethos of the Constitution as a ‘whole’ rather than focusing on individual articles in isolation; “Taken as unity the Constitution reflects certain overarching principles and the fundamental decisions to which the individual provisions must be subordinate… The Constitution has an inner unity and the meaning of any one part must be linked to that of other provisions…” Preface to Michael Forde’s textbook; Forde, M., Constitutional Law, 2nd ed., (2004), First Law at p. x.
implicit that while the people of Ireland are acknowledged as sovereign, this status is bestowed by a higher being to whom all citizens are answerable.\textsuperscript{269}

According to one of the main torchbearers for natural law in the Irish context, former Judge Roderick O Hanlon\textsuperscript{270}, both the Preamble and Article 6 echo the teaching of St Paul in his Epistle to the Romans, which reads:

\begin{quote}
As for the Gentiles, though they have no law to guide them, there are times when they carry out the precepts of the law unbidden, finding in their own natures a rule to guide them, in default of any other rule: and this shows that the obligations of the law are written in their hearts; their conscience utters its own testimony.\textsuperscript{271}
\end{quote}

The motivation for the drafters of the 1937 text to look towards a natural law based constitutional framework may be attributed to a number of factors. For example, the global political climate in which the document was drafted was one marred by the dangers inherent in a purely positivist application of the law, leading to calls for a move from a ‘State focused’ system towards a more human rights oriented framework, centred upon the rights of the individual.\textsuperscript{272} Also, unlike Great Britain, the newly established Irish State had no monarchy upon which to ground its legal and political system. Similar to the inclusion of Catholic ideology, it is possible that a perceived lack of ‘origin’ motivated the Constitution’s drafters to employ natural law as a “sheet-anchor”\textsuperscript{273} thereby endowing the text with a credible and solid foundation. As articulated by former Justice Declan Costello: “where constitutional guarantees can be traced to

\begin{quote}
269 This may be contrasted with opening to 1922 Constitution Article 2 which provides “all powers of government and all authority legislative, executive and judicial in Ireland, are derived from the people of Ireland.” There is notably, no mention of sovereignty being in any way dependant upon divinity, nonetheless the 1922 Act opens with the words “Dáil Éireann, sitting as a Constituent Assembly in this Provisional Parliament, acknowledge[es] that all lawful authority comes from God to the people….”


271 (2.14-15).

272 In McGee v Attorney General [1974] IR 284, Walsh J notes the disasters resulting from positivism in Nazi Germany and South Africa.

\end{quote}
philosophical truths they are not mere empty formulas; they are real safeguards of individual liberty.”

3.3.1 ‘The Honeymoon’ period – Ryan and the ‘Christian and democratic’ basis for recognition

The 1960’s, a period renowned throughout the Western world for social and cultural reformation, marked the beginning of what one could describe as a mild revolution within the Irish judicial system. Having successfully survived its infancy, the Irish State, appeared finally at ease with its political and legal independence. This new-found confidence was reflected in the increasing liberalism of its Supreme Court bench. Following the emergence of a new generation of judges most of whom had been educated in the new tradition of constitutionalism, a more daring and creative approach to constitutional interpretation began to present itself. According to Gerard Quinn this decade marked “the gradual disenchantment with positivism on the part of the judiciary.”

The landmark case Ryan v The Attorney General, marked the crucial starting point of the tempestuous relationship between the Irish judiciary and natural law theory. The plaintiff, a married woman with five children challenged, on three separate grounds, the validity of legislation which provided for mass fluoridation of the public water supply. She argued first, on the basis of Article 41, that provisions of the Statute interfered with the decision-making autonomy of the family, she claimed further infringement of the family’s right to provide for the physical education of its children under Article 42. Most significantly the

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275 Quinn, G., The Rise and Fall of Natural Law in Irish Constitutional Adjudication, (Fall 2000), Vol. 00, American Philosophical Association Newsletter p.11.

276 [1965] IR 294

277 Professor Kelly notes that prior to the Ryan case, this section of Article 40 had received little noteworthy judicial discussion or attention. See Kelly, J.M., Fundamental Rights in the Irish Law and Constitution, 2nd ed., (1967), Butterworths Allen Figgis & Co. Ltd; chapter 1

278 The Health (Fluoridation of Water Supplies) Act 1960 s. 2 sub-ss. 1,2 and 3
plaintiff contended on the basis of Article 40.3.2° that the impugned legislation offended her personal right to bodily integrity, a right which was not listed or specified at any stage of the constitutional text.

Article 40 headed ‘Personal Rights’ is the first of the Constitution’s fundamental rights provisions. Subsection 3 part 2 provides:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. 

The case came before the High Court, wherein Kenny J dismissed the plaintiff’s first two claims and moved on swiftly to deal with what he deemed the substantive issue of the case; namely whether any such right to bodily integrity existed under the Irish Constitution. Crucially the learned trial judge found that, despite its textual absence, such a right did exist by virtue of Article 40.3. Consequently, the High Court approved and affirmed the proposition that the Irish Constitution recognises and protects rights other than those specified within its text. Kenny J stated:

I think that the personal rights which may be invoked to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State.

The learned justice advanced a number of supplementary explanations for reaching this novel and profound conclusion. Upon examining the precise

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279 In a judgment handed down shortly after the enactment of the Constitution, Hanna J explained the section as a guarantee of “fairness” to all citizens. The learned justice interpreted the courts’ role under the provision as “[a] duty…to underline that the words of Article 40, s.3, are not political shibboleths but provide a positive protection for the citizen and his good name.” Hanna J in Pigs Marketing Board v Donnelly [1939] IR 413 at p 418.

280 It should be noted that while the right to bodily integrity was recognised by Kenny J on the basis of personal unwritten rights under Article 40.3.1° he ultimately found against the plaintiff on the grounds that provisions of the ‘fluoridation’ legislation did not unduly offend her constitutional right.


282 Ronan Keane notes that Kenny J’s judgment anticipated developments in the US in terms of ‘judicial lawmaking’ which commenced in earnest with the landmark Griswold v Connecticut
wording of Article 40 he identified the words “in particular” used in the subsection 3.2° as a further basis for extending the Constitution’s fundamental rights protection. Kenny J implied from the phrasing employed, that the schedule of rights laid down in Articles 40-44 of the Constitution was not intended as final.

Continuing in the same vein, the learned High Court judge cited teachings contained in the encyclical letter of Pope John XXIII *Pacem in Terris*, wherein reference is made to the ‘necessary’ rights of man. Hogan is particularly critical of this aspect of Kenny J’s judgment, noting while Papal encyclicals are “doubtless worthy documents...they are scarcely designed to assist in the resolution of complex constitutional issues.”

The judgment of Kenny J was subsequently upheld by the Supreme Court. Although the court fails to expand further on the matter of unspecified natural rights, O Dálaigh J, speaking on behalf of the bench endorsed the trial justice’s earlier location of the doctrine under Article 40:

> The Court agrees with Mr Justice Kenny that the ‘personal rights mentioned in section 3,1° are not exhausted by the enumeration of life, person, good name, and property rights’ in section 3,2°.

The significance of the *Ryan* decision in terms of constitutional jurisprudence and indeed the entire Irish legal structure cannot be overstated. The combined judgments of the highest courts in the State served to firmly open the door to the development of an unwritten charter of fundamental constitutional rights in

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283 *Ryan v The Attorney General* [1965] IR 294 at p. 314. This translates as “Peace on Earth.” In the letter the Pope states “Beginning our discussion of the rights of man, we see that every man has the right to life, to bodily integrity, and to the means which are necessary and suitable for the proper development of life.”


parallel to those enumerated to which all legislative, executive and judicial organs must obey.\footnote{286}

3.3.2 The gradual entrenchment of natural rights within the Irish Constitution - McGee and the promotion of ‘justice’

The groundbreaking ratio of Ryan was quickly embraced by the Irish judiciary and upheld in a number of cases immediately subsequent to the decision.\footnote{287} The next major breakthrough in the development of the doctrine of unenumerated rights did not take place until almost ten years later in the prominent case McGee v The Attorney General.\footnote{288}

The plaintiff in this case was a married woman with four children, who in agreement with her husband, decided for medical reasons, that she wished to avoid another pregnancy. She challenged, on this basis, a legislative prohibition on the importation of contraceptives into the Irish State,\footnote{289} arguing that the embargo infringed her constitutional rights under Article 40.3.1˚ and Article 41.

Counsel for the plaintiff relied heavily upon the United States case of Griswold v Connecticut.\footnote{290} In Griswold, the US Federal Supreme Court recognised and declared the existence of an unspecified constitutional right to privacy. The majority struck down ancient State law which, similar to McGee, criminalised the use of contraceptives. The court held that the provisions of the impugned legislation offended the important realm of marital privacy which although

\footnotesize{\begin{itemize}
\item The courts have repeatedly emphasised that the personal rights recognised and contained within Article 40.3.1 are not to be considered absolute. See for example judgment of Henchy J in Hanrahan v Merck Sharp and Dohme [1988] ILRM 629 wherein he states “[T]he guarantee to respect and defend personal rights given in Article 40.3.1 applies only ‘as far as practicable’ and…is not unqualified or absolute.” at p. 636.
\item In Conroy v Attorney General, [1965] IR 411 Kenny J. referring to natural law principles consulted the evidence of Canon J. McCarthy, a moral theologian, who had considered “the moral gravity which may be derived from and measured by the natural law or natural ethics.” See also judgment of Walsh J The State (Nicolaou) v An Bord Uchtala [1966] IR 567.
\item [1974] IR 284.
\item Under section 42 of the Customs Consolidation Act 1876 and section 17 of the Criminal Law Amendment Act, 1935.
\item (1965) 381 U.S. 479 (S.C.).
\end{itemize}}
unenumerated in the written text, according to the Court, was a right that could be found within “the penumbras, formed by emanations from those guarantees that help give them life and substance.”

McGee’s case was initially dismissed by O’Keeffe P in the High Court, who claimed that the Constitution should be read solely with regard to the morals of those who drafted and adopted it. Whilst the Supreme Court on appeal, by a four to one margin, subsequently overturned the lower court’s earlier ruling, the majority judges differ somewhat in their reasoning. Three of the four superior court judges approved the essential ratio of Kenny J in Ryan and held that the legislative ban on the importation of contraceptives was unconstitutional on the grounds that it offended the previously unrecognised and unspecified right to marital privacy, while one Judge went as far as to recognise a general right to privacy.

Referring to the construction of the relevant constitutional Articles at issue, Walsh J differed from his colleagues in the majority and elected to focus upon the criteria of ‘justice’ as the basis for rejecting a purely positivist approach to interpretation. Notably however, whilst the learned judge explicitly bases his decision upon Article 41 he places considerable relevance throughout his judgment upon the natural law and Article 40.3. He held that the provisions, and in particular Article 40.3, clearly indicate that “justice is not subordinate to the law”, rather he held they “expressly subordinate the law to justice.” In a much-quoted passage, he continues further, stating:

> Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law

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292 According to Budd J “Whilst the ‘personal rights’ are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognised and accepted with possibly the rarest of exceptions, and that the matter of marital relationships must rank as one of the most important matters in the realm of privacy” [1974] 284 at p.322.
293 Ibid. at 310.
but that the Constitution confirms their existence and gives them protection.\textsuperscript{294} [emphasis added]

However, despite the brave move away from Kenny J’s puritanical ‘Christian’ focus towards the need for ‘justice’, the dicta of the Court in \textit{McGee} indicates that the religious significance is not lost and indeed at several intervals it would appear that the court’s interpretation of the concept of ‘justice’ is closely linked to moral and Christian ideals. During the course of the judgments there are various references to God in the context of the constitutional text. Walsh J in particular cites the acknowledgement of Christianity in the Preamble and Article 6 as evidence of the Constitution’s intention to base natural rights upon “God’s law.”\textsuperscript{295}

Whilst the Supreme Court in \textit{McGee} provided welcome development of the doctrine of unenumerated rights beyond the judgment of Kenny J in \textit{Ryan}, it is open to question whether the Court were forced into departing from their earlier rationale in light of the fact that the unspecified right to marital privacy, argued by the plaintiff, directly contradicts the Roman Catholic law doctrine that prohibits the use of contraception. As such, it could at least be argued that the claim put forward by the plaintiff contravenes the “Christian nature of the state.”\textsuperscript{296}

Similar to Kenny J’s dicta in \textit{Ryan}, the Supreme Court bench, despite their novel and highly convincing reliance upon the notion of ‘justice’ as the basis for recognising unenumerated rights fail to define this vague and ambiguous concept thus making it difficult to apply the doctrine to specific issues. Furthermore it is even less clear whether, in describing the law as \textit{subordinate} to justice, Walsh J intended that in cases of conflict this undefined concept of ‘justice’ should take precedence over the written word of the Constitution.

\textsuperscript{294} \textit{Ibid.} at 310.

\textsuperscript{295} \textit{Ibid.} at 318.

\textsuperscript{296} Humane Vitae, 1968, paragraph 11 provides “The Church, calling men back to the observance of the norms of natural law, as interpreted by her constant doctrine, teaches that each and every marriage act must remain open to the transmission of life...”
Despite its arguable ambiguity the ruling of the Court in *McGee* was accepted and indeed embraced by the judiciary. Two years later in *The State (Healy) v Donoghue*, both O’Higgins CJ and Gannon J expanded upon the advancement of ‘justice’ as a basis for the interpretation of natural law under the Constitution, the latter stating, “[a] sense of justice is fundamental in human nature and from it derive essential rights which do not require any positive law for their enunciations.”

Referring to the fundamental rights catalogued in Articles 40-44, *Finn v Attorney General*, Barrington J in the High Court argued that these rights derive from a person’s nature as a human being and cannot be produced by any external force.

The State does not create these rights, it recognises them and promises to protect them...the Constitution accepts that these rights [those recognised in Articles 41, 42 & 43] derive not from the law but from the nature of man and society, and guarantees to protect them accordingly.

### 3.3.3 The high and low point of Irish natural law jurisprudence – *Norris v the Attorney General*

The application of natural law by the Irish Supreme Court in *Norris v the Attorney General* provides an interesting example of the potential for judicial divergence when employing the use of natural law and arguably represents both the high and low point of the doctrine in the Irish context. The plaintiff in *Norris* contested the constitutionality of old common law legislation which criminalised male homosexual conduct. Amongst his submissions was an attempt to extend the unenumerated personal right to marital privacy under Article 40.3.1.

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300 *Ibid.* at p. 160. Barrington J’s judgment was subsequently approved by the Supreme Court.
301 [1984] IR 361.
302 Namely sections 61 and 62 of the *Offences Against the Person Act 1861* and section 11 of the *Criminal Law Amendment Act 1885*. 
recognised earlier by the Supreme Court in McGee, in order to establish that he was similarly entitled to respect for his private sexual conduct.

Delivering judgment on behalf of the majority, O’Higgins CJ refuted the plaintiff’s assertion that the unenumerated right to marital privacy recognised in McGee, extends beyond marital privacy and rather encompasses a general constitutional right to privacy under Article 40.3.1. Another interesting aspect of the case is the degree of emphasis placed by the Chief Justice upon the purported ethical and moral implications of homosexuality. He begins by referring to various Christian teachings, which he uses to demonstrate that the Christian religion has throughout history, consistently condemned homosexuality. Citing, among others, the preambular references to ‘God’ in the Constitution which he interprets as evidence of the 1937 text’s overall ‘religious conviction’, the learned Chief Justice concludes homosexual conduct to be “morally wrong”, “an offence against nature” and potentially “harmful” to the institution of marriage.

O’Higgins CJ concluded that the governing authorities have a legitimate interest in safeguarding the general moral ‘wellbeing’ of the community and this task extends to the discouragement of ‘morally wrong’ conduct, such as homosexuality. By reason of the “Christian nature of our State” outlined earlier as the initial basis for the incorporation of unenumerated rights into the

304 O’Higgins CJ was joined in the majority by Finlay P and Griffin J.
306 This is despite the fact that the State presented no evidence nor called any witnesses in support of the contention that homosexuality constituted a threat to public morals or health. The plaintiff, by contrast, called upon the expert opinion of several eminent psychiatrists, theologians and sociologists in order to attest his claim that homosexuality posed no danger to society. See [1984] IR 36 at pp 72-76.
307 “The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to “our Divine Lord, Jesus Christ.” It cannot be doubted that the people, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with...Christian beliefs.” Ibid. at p. 64.
308 Ibid. at p. 64.
309 Ironically, much of the majority reasoning would appear to contradict the earlier ruling of the court in McGee wherein the court objected to the law “reaching into” the privacy of the plaintiff’s personal life, [1974] IR 284 at 328 similarly Walsh J stated “The private morality of its citizens does not justify intervention by the State into the activities of...citizens unless and until the common good justifies it” [1974] IR 284 at p. 312.
Irish jurisdiction, the court resolved that the plaintiff could not accordingly be deemed possessed of any general right to personal privacy under Article 40.3.1°.

Two of the judges on the Supreme Court bench however, dissented quite compellingly, from their colleagues in the majority.\textsuperscript{310} Henchy J, in similar prose to the Chief Justice, refers to the “purposive Christian ethos” embodied in the 1937 Constitution’s Preamble.\textsuperscript{311} Importantly, he disagrees with the emphasis placed by the majority upon the teaching of the Christian Churches and their respective codes of morality. He opines that the employment of a Christian-based standard of morality in the declaration and interpretation of unenumerated rights, as suggested by Kenny J in \textit{Ryan},\textsuperscript{312} and approved by the present majority of the court, upsets what he terms “the necessary balance which the Constitution posits between the common good and the dignity and freedom of the individual.”\textsuperscript{313} He outlines the danger of using such an obscure and ambiguous yardstick as a basis for declaring or denying the existence of natural rights under Article 40.3.1°. The learned justice notes the potential for error and ethical subjectivity in employing such an approach, stating; “What is deemed necessary to his freedom and dignity by one man may be abhorred by another as an exercise in immorality.”\textsuperscript{314}

Joining his colleague in the minority, McCarthy J also disagrees with Kenny J’s assertion that the charter or unwritten personal rights coming under Article 40 is to be derived solely from the “Christian and democratic nature of the State”. Similarly critical of O’Higgins CJ’s preambular interpretation, he describes the ‘philosophical impossibility’ of ascertaining with any degree of precision the moral codes of 1937 and applying them to the present day. Citing the previous pattern of developing unenumerated rights under Article 40 of the Constitution, McCarthy J rejects the implication that such rights are to be based purely upon Christian ideals. He posits that the schedule of unenumerated personal rights under the 1937 fundamental rights provisions are rooted in human personality


\textsuperscript{311} \cite{312} [1984] IR 36 at 78.

\textsuperscript{312} \textit{Ryan v Attorney General} [1965] IR 294.

\textsuperscript{313} [1984] IR 36 at 78.

\textsuperscript{314} \textit{Ibid.}
and must be derived accordingly with due reference to the overall ethos of the Constitution, as is embodied in the Preamble.\footnote{Ibid at p. 100.}

The judgments of the Supreme Court bench handed down in \textit{Norris} typify the difficulties associated with employing a ‘natural law’ approach as is demonstrated by both the minority and majority of the court employing natural law theory to reach entirely different conclusions. The risks and complexities of the natural law approach will be considered in further detail in chapter 7. In the meantime, it is now proposed to discuss the link between natural law and the rights of individual family members under the Irish Constitution.

3.4
The constitutional connection between natural law and the Family

The novel enactment of the ‘family articles’ in 1937, whilst heralding the dawn of a new era in Irish family law, simultaneously presented the Irish judiciary with a sizeable challenge. Due to the heavily constrained ambit of protection embodied in the Constitution’s written provisions, the courts were now faced with a significant obstacle in terms of assigning the appropriate constitutional protections to individuals falling outside of the texts limited scope.

The legal regulation of adoption fifteen years after the Constitution’s ratification compounded the complexity of the task and placed the courts in the unenviable position of having to reconcile the individual rights of all involved in what are inevitably traumatic, distressing and complex factual scenarios. Somewhat ironically, given that this legal mechanism was not even on the statute-book in 1937, many of the crucial precedents which established and developed fundamental rights for the unmarried family concern applications relating to the adoption of non-marital children.

Shackled both by the narrow scope of the Articles themselves and further by their own rigid textual interpretation the judiciary were forced to look outside of Articles 41 and 42 in order to establish a foundation for the rights of those individuals not deemed capable of invoking the written family protections. The answer to this constitutional conundrum finally presented itself in 1965 with the spectacular entry of unspecified fundamental rights under the Constitution in *Ryan v Attorney General.*316 Since its first inception into the constitutional fold, the doctrine of unenumerated rights under Article 40.3.1 has consistently provided the courts with an invaluable means of declaring rights for individual members of the ‘unmarried family.

Natural law has, since its immersion into the Irish constitutional conscience proven itself a useful tool in the interpretation and expansion of the

Constitution’s fundamental rights provisions. As will be demonstrated in subsequent case-law discussion, the use of natural law as a foundation for declaring unenumerated rights under Article 40.3.1 has established its potential as a potent and powerful ally in relation to the development of an enforceable charter of constitutional rights in respect of individual members of the non-marital family.

Before assessing the use and utility of natural law in relation to individual family members, it is first proposed to analyse exactly why the courts have been so keen to employ it as a basis for declaring ‘family rights’. Accordingly, it is intended to briefly explore the link between the natural law ethos of the 1937 Constitution and its provisions on the family contained within Articles 41 and 42, which according to Kerry O’Halloran, “placed Irish family law...on an ideological basis.”

This, it is then hoped, will lay the foundations for the charting of the development of personal ‘natural-based’ rights for the unmarried family under Article 40.3.1, which will be examined in detail in Chapter 4.

Given the innate human quality of ‘the family’, the connection between natural law and parental rights is a logical and altogether highly credible one. The legal articulation in what can be regarded as ‘natural law terminology’ of family rights in this jurisdiction and the juristic sourcing of parental rights by reference to a higher ‘Divine’ authority is traceable far before the enactment of the Constitution.

In an old common law decision *In re Meades, Minors*, Lord Chancellor O’Hagan refers to the authority to guide and govern a child as “a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law.”

Similarly, in the well-known English case *Re Agar-Ellis*, the court describes the right to custody and control of a child as “one of the most sacred of rights.”

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318 Per Lord O’Hagan LC, (1871) IR 5 Eq 98, 103. See also *Re Plomney* 47 L. T. N. S. 284.
319 Per James LJ in *Re Agar-Ellis* (1883) 24 Ch. D. 317 at 329 “The right of the father to the custody and control of his children is one of the most sacred of rights...No doubt the law may take away from him this right or may interfere with his exercise of it...but it must be for some sufficient cause known to law...It is a legal right with no court a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before the right can
This right was further held by the court not to be conditional upon guardianship but rather arises out of the natural relationship between a parent and their child.\textsuperscript{320}

Writing extra-judicially, Justice Declan Costello described the first of Bunreacht na hEireann’s family provisions, Article 41 as “most efficacious...based on philosophical truths incorporating natural law tenets.”\textsuperscript{321} Professor Francis Beytagh likewise distinguishes the section from the rest of the constitutional text as documentary evidence that a natural rights jurisprudence was intended along with the specific protections spelled out in the 1937 text.\textsuperscript{322}

The Irish judiciary has, on several occasions, attempted to validate their all-embracing acceptance of natural law theory by reference to the script of both Articles 41 and 42, with the former arguably presenting judges with their ‘trump card’ in asserting the natural law basis of the Constitution. Subsection 1 of Article 41, laid out previously in Chapter 1, declares the family to be a “natural” and “moral institution” possessed of “inalienable and imprescriptible rights” of which are deemed “antecedent and superior to all positive law.” It has been suggested that the provision was influenced by John Locke’s description of natural law, advanced in his Second Treatise of Government, in which he refers to: “a Law antecedent and paramount to all positive Laws of men...where there lies no Appeal on Earth....”\textsuperscript{323} The ideological handprint of natural law can also be seen in the text of Article 42 which acknowledges the “natural and imprescriptible” rights of the child and further cites the family their “natural educator.”

\textsuperscript{320} Per Brett MR “The Law of England has recognised the natural rights of a father, not as guardian of his children, but as the father, because he is the father.”


The affinity between the natural law and ‘the family’, which has arguably inspired judges to develop family rights under Article 40.3.1 with such confidence, has been alluded to by the judiciary on numerous occasions and this link continues to be referred to with importance and esteem.

For example in the recent Supreme Court decision in *Lobe and Osayande v Minister for Justice Equality and Law Reform*\(^ {324}\), Fennelly J heavily endorsed the natural law connection in terms of the constitutional protection afforded to the family:

> Article 41 of the Constitution…situates the family on a moral plane reflective of Christian values of natural law. The important point is that the rights of the family are unambiguously founded on its character as a natural and moral institution. As has been frequently said the rights of the family are superior to those of the State itself.\(^ {325}\)

It is now proposed to examine precisely how the Courts have balanced the family rights of individuals under the Constitution and in particular, to evaluate the role played by natural law in judicial interpretation and application of the constitutional protection afforded to the unmarried family. As will be seen in the following chapters, natural law has played a pivotal role in assisting the courts to develop rights for members of the unmarried family who fall outside of the marriage based definition of family set out in the Constitution. With this in mind, the constitutional rights of individual members of the unmarried family and more specifically those under Article 40.3.1 shall now be considered commencing first with the rights of the non-marital child and subsequently the individual rights of unmarried parents.

\(^{324}\) [2003] IESC 3.

\(^{325}\) *Ibid.* Per dissenting judgment of Fennelly J in *Lobe and Osayande v Minister for Justice Equality and Law Reform*. Similarly Hamilton J in the High Court in *Northampton Co Council v ABF* and MBF [1982] ILRM 164, stated; “What Article 41 does is to recognise the Family 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, which rights the State cannot control.” See also the recent judgment of McCracken J in the High Court in *North Western Health Board* wherein he stated “Article 41.1…is indeed probably the provision in the Constitution which comes nearest to accepting that there is a natural law in the theological sense.” *North Western Health Board v HW and CW* [2001] 3 IR 622 at p.633.
Chapter IV

Considering the rights of the non-marital child in Ireland

The Republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and all of its parts, cherishing all of the children of the nation equally

Proclamation of the Irish Republic, 1916

In contrast to unmarried parents, whose legal and constitutional identity has been traditionally and consistently separated from their married counterparts, the Irish courts have long emphasised the parity of each child’s constitutional rights, whether they are born within or outside of wedlock. It is now proposed in this chapter to outline the various safeguards that have been put in place for the protection of children in this jurisdiction, particularly in contests over their custody and guardianship. This chapter will accordingly examine the legislative and constitutional rights of the child and shall look at the significant role of natural law in developing constitutional rights for non-marital children. The cumulative practical effect of these protective measures shall then be examined by discussing the relevant case law.

4.1 The non-marital child and the Irish Constitution

The fact that a child is born out of lawful wedlock is a natural fact. Such a child is just as entitled to be supported and reared by its parent or parents, who are the ones responsible for its birth, as a child born in lawful wedlock

Walsh J in G v An Bord Uchtála

326 Ibid.
As already noted the constrained and inflexible ambit of the Constitution’s ‘family’ protections has seriously shackled the development and drafting of family legislation in Ireland. The constitutional exclusion in respect of the unmarried family has equally impinged upon the constitutional position of children born outside of marriage rendering discussion and development of their fundamental rights markedly complex.

The Irish Supreme Court, in spite of designating a married couple with no children\(^327\) to be a family under Article 41, has on a number of separate occasions,\(^328\) put paid to the contention that a natural mother and her child could, or should, be conferred with the status of ‘family’ in its constitutional sense.\(^329\) Accordingly, a child born out of wedlock, analogous to its parents, is unequivocally excluded from invoking the family protections set out in Article 41 of the Constitution.

The only reference to the ‘rights’ of children, in the entirety of the constitutional text, is contained within Article 42. As noted, the ‘education’ provision operates to reinforce the supremacy, command and autonomy of the married family contained in the preceding article. Couched in language of parental rights, Article 42 describes the ‘family’ as the child’s natural educator and, in view of their authority and dominion, endows parents with the right to choose the appropriate form of teaching for their child, with the important qualification that of course, this applies only when such parents are married.

In the entirety of the fundamental rights provisions, there exists a sole provision that could be objectively deemed as ‘going against the grain’ in terms of the supremacy of the ‘constitutional family’.\(^330\) Subsection 5 of Article 42 attempts

\(^{327}\) *Murphy v Attorney General* [1982] IR 241.


\(^{329}\) “Article 41...is confined to families based upon marriage” *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567 per Walsh J at p. 642.

\(^{330}\) It should be noted in relation to the rights contained within Article 42, that due to the fact the only married parents are recognised by the written articles of the Constitution, accordingly by implication it is only marital children who may benefit from the right to be educated by its natural parents. Whilst there is no case relating directly to this point, it is felt that dicta of the courts
to prioritise the interests of the child, providing that the State, as guardian of the common good in

*exceptional cases*, where the parents for physical or moral reasons *fail* in their duty towards their children...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]

Under the written word of the Constitution, a child is thus recognised to be possessed of ‘natural and imprescriptible rights’. However, in contrast to the absolute language used to refer to the rights of the ‘family’ in Article 41 the attempted endowment of constitutional protection upon the child in subsection 5 of Article 42 comes with stringent conditions. As can be inferred from the textual reference to ‘exceptionality’ and ‘failure’, the constitutional mandate to protect the rights of the child is a very narrow and specific one, which has in turn been given a very constricted and stringent interpretation by the courts.

In light of the common law’s harsh approach to the illegitimate child, once described as “a regrettable blot on our legal system”\(^{331}\), it was initially unclear in the formative years of the Constitution whether the assignment of rights set out in Article 42 would be confined to children born within wedlock or would extend to protect all children regardless of their legal ‘legitimacy’. The issue came to be considered in the fore noted case *In Re M., an Infant*,\(^{332}\) wherein Gavan Duffy P quelled any possible doubts regarding the position of non-marital children within Article 42:

> I regard the innocent little girl as having the same 'natural and imprescriptible rights' [under Article 42] as a child born in wedlock to religious and moral, intellectual, physical and social education.\(^{333}\)


\(^{332}\) [1946] IR 334.

\(^{333}\) *Ibid.* at 344.
The judiciary has on numerous instances, examined the meaning and application of the child’s ‘natural and imprescriptible rights’. Unsurprisingly, given the natural law reference contained in Article 42.5, coupled with the restricted ambit of protection under Article 41, discussion and development of the non-marital child’s constitutional identity, has developed under the umbrella of unspecified personal rights contained within Article 40.3.1. On this basis, Frank Martin notes that the Irish courts have, particularly since the 1980s, become “interpretively creative in order to ‘discover’ unenumerated children’s rights” in the context of the Irish Constitution.  

### 4.1.1 *The State (Nicolaou) v An Bord Uchtála*

It was a further twenty years before the location of the non-marital child within the constitutional order came up for discussion in the Supreme Court. In the monumental *The State (Nicolaou) v An Bord Uchtála* decision, the applicant, an unmarried father, challenged the adoption of his child without consent, on the basis that she was possessed of both written and unwritten constitutional rights by virtue of Article 42 and Article 40.3.1 respectively. In addition to his own submissions, counsel for the applicant contended that by refusing to uphold his purported unenumerated rights in respect of custody, guardianship and access the court was thereby denying the child’s ‘impresscriptible right’ to the knowledge and society of her father. It was submitted that the refusal to protect the child’s ‘natural’ rights under Article 40.3.1 amounted to failure of the State’s constitutional mandate to protect the personal rights of all citizens from “unjust attack” and “vindicate” them in the case of injustice.

In reference to the non-marital child’s entitlements under the written provisions of the Constitution, Walsh J affirmed the earlier position that the ‘natural and imprescriptible’ rights referred to therein are enforceable in respect of all children, regardless of the circumstances of their birth;

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336 For a more detailed discussion of this case see Chapter 6.
[such rights] cannot be said to be acknowledged by the Constitution as residing only in legitimate children...While it is not necessary to explore the full extent of the 'natural and imprescriptible rights of the child' they include the right to 'religious and moral, intellectual, physical and social education'.

The Supreme Court bench were careful however to limit their enthusiasm in aligning the rights of marital and non-marital children. The court vigorously distinguished the position of children born within or out of wedlock, emphasising that whilst the latter may be said to have the same ‘natural’ rights as a child born to married parents, this does not automatically equate their legal entitlements;

An illegitimate child has the same natural rights as a legitimate child though not necessarily the same legal rights. Legal rights as distinct from natural rights are determined by the law for the time being in force in the State. While the law cannot under the Constitution seek to deprive the illegitimate child of those natural rights guaranteed by the Constitution it can, as in the Adoption Act 1952, secure for the illegitimate child legal rights similar to those possessed by legitimate children.

It is submitted that this confusing passage leaves the non-marital child in somewhat of an unsure position in the overall constitutional ‘pecking order’. On the one hand, the judiciary seem to profess quite definitely that all children have the same ‘natural rights’ regardless of their conception, however on the other, the court are claiming to be constrained by these innate unspecified rights noting that whilst ‘the law’ can attempt to improve the situation of illegitimate children legislatively, it cannot alter their position within the natural rights order. The court’s distinction between ‘natural’ and ‘legal’ rights would appear to downplay the significance of the former and casts doubt upon their operation and reliability.

338 Ibid. at 642.
339 The relevance of equating the ‘natural’ rights of children as outlined in Nicolaou is difficult to justify in view of the fact that the non-marital child, at this time (i.e. 1966), was the subject of considerable legislative discrimination in the fields of inheritance and administrative law. For further discussion see Chapter 2.
In response to the submission advanced in *Nicolaou* that the child at issue was possessed of a personal right to the society of her unmarried father under Article 40.3.1”, the Supreme Court, effectively turned the applicant’s argument on its head. Ultimately ‘dodging’ the issue, the court replied that “if” an illegitimate child has the purported natural right to look to his or her father for support this would impose “a duty on the father, but it would not of itself confer any right.”\(^\text{340}\)

### 4.1.2 *G. v An Bord Uchtála*

In its successive mission to elucidate the constitutional position of the unmarried mother, the Supreme Court in *G. v An Bord Uchtála*\(^\text{341}\) availed of the opportunity en route to provide a more detailed analysis of the ‘natural’ rights of children. Acknowledging the birth of children out of lawful wedlock to be a “natural fact” the court confirmed the position adopted in earlier case law as regards the ‘natural and imprescriptible’ rights of the child.

In a welcome expansion of its decision in *Nicolaou*, the court moved to further specify a number of personal rights, which it deemed all children to be entitled by virtue of Article 40.3.1”. O’Higgins CJ in a detailed passage headed “The Child’s Rights”, identified in his judgment what he deemed as the ‘natural’ rights of all children, enforceable irrespective of the status of their parents’ relationship. The Chief Justice held that every child is born possessed of the following rights: to be fed and to live, to be educated, to bodily integrity, to be reared with due regard to religious, moral, intellectual, physical and social welfare and to realise their full personality and dignity as a human being.\(^\text{342}\)

He confirmed that the arm of State protection in respect of fundamental rights must necessarily be extended in favour of children’s constitutional rights, even


\(^\text{341}\) [1980] IR 32

\(^\text{342}\) “The child also has natural rights. Normally, these will be safe under the care and protection of its mother. 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 or her full personality and dignity as a human being” Per O’Higgins CJ [1980] IR 32 at pp 55-56
where these rights are unspecified.\textsuperscript{343} Importantly, it was on this basis that the court recognised the constitutional jurisdiction of the High Court to intervene in order to protect the interests of a minor where his or her personal rights are under threat.\textsuperscript{344}

On the question of sourcing the child’s ‘natural’ unspecified rights under the Constitution, Walsh J stated that they “spring primarily from the natural rights of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion and to follow his or her conscience.”\textsuperscript{345} Significantly however, the learned justice failed to explain exactly how or when such rights ‘spring’ into constitutional existence.

The schedule of personal rights laid down in respect of marital and non-marital children by the Supreme Court in \textit{G v An Bord Uchtála}, was immediately upheld and applied by the judiciary. Speaking in the High Court, a short time after, Murphy J stated

> The illegitimate child has an equal right with legitimate children to the constitutional protection of its personal rights to life, to be fed, to be protected, to be reared and to be educated.\textsuperscript{346}

Finlay CJ, delivering judgment \textit{In Re Article 26 and the Adoption (No.2) Bill 1987}\textsuperscript{347}, likewise confirmed the jurisprudential pattern stating that the child’s personal rights, although unenumerated “derive from the Constitution.”\textsuperscript{348} The Supreme Court further emphasised the State’s obligation under Article 40.3.1’ to protect and vindicate the child’s personal rights.\textsuperscript{349}

\textsuperscript{343} “These rights (and others which I have not enumerated) must equally be protected and vindicated by the State.” \textit{Ibid.} at p 44.
\textsuperscript{344} \textit{Ibid.} at p. 67 “In special circumstances, the State may have an equal obligation in relation to a child born outside the family to protect that child, even against its mother, if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights, in my view this obligation stems from the provisions of Article 40, s.3 of the Constitution.” Per O’Higgins CJ at p 56. Upheld and confirmed in \textit{F.N. v The Minister for Education [1997]} 1 IR 409 and \textit{D.G. v Eastern Health Board [1998]} 1 ILRM 241
\textsuperscript{345} \textit{Ibid.} [emphasis added]
\textsuperscript{346} \textit{M. v M.} Unreported, High Court, 2 December 1982.
\textsuperscript{347} [1989] IR 656.
\textsuperscript{348} The Chief Justice stated that in addition to the rights specified in the family articles children have “other personal rights which though unenumerated, derived from the Constitution” \textit{Ibid.} at p 663.
\textsuperscript{349} \textit{Ibid.} at p 663.
The above judgments all of which give careful consideration to the ‘natural’
rights of the child, would objectively appear to accord such rights significant
importance in the constitutional hierarchy. On this basis, one would be forgiven
in assuming that the schedule of rights judicially laid down in respect of non-
marital children, has only grown in reliability and strength especially in light of
the removal of statutory stigma surrounding the ‘illegitimate’ child. However, as
will be seen from subsequent case law, the ‘natural and imprescriptible’ rights of
children have not developed in quite such a straightforward manner and in many
respects their constitutional position seems to have gone backwards rather than
forwards since the early judicial declarations in Nicolaou and G.

4.1.3  TD v Minister for Education and Science

A relatively recent Supreme Court judgment casts a menacing shadow over
whether the unenumerated rights as formally declared in G v An Bord Uchtála,\(^{350}\)
and developed thereafter have, in fact, any reliable constitutional basis. In TD v
Minister for Education and Science\(^{351}\) Murphy J questioned the very existence of
the constitutional rights laid down in the G case noting that the facts of the case
concern the rights of the unmarried mother rather than the rights of the child and
as such could not be seen to have decided anything unrelated to the issue.

The learned justice advanced a number of credible reasons why the courts’
judgment in G was an unsuitable and unreliable basis for such unenumerated
constitutional rights. Murphy J highlighted the dissenting opinions of O’Higgins
CJ and Parke J in the G case which he believed emphasise the complexity of the
issues raised in the case and the diversity of opinion expressed therein. He
further cites comments made during the course of the judgments of Kenny and
Henchy JJ wherein both express doubt as to the constitutional existence of the
unmarried child’s ‘natural and imprescriptible’ rights under either Article 42.5 or
Article 40.3.1°.\(^{352}\) Murphy J adds further weight to his argument by noting that

\(^{351}\) [2001] 4 IR 259.
\(^{352}\) [1980] IR 32 at pp. 56 and 86.
prior to $G$ no precedent existed to support the conclusion that such rights existed for the benefit of children, yet on appeal the Supreme Court presumed the alleged right to exist.

4.2
‘The welfare principle’

The predominating principle must always be the welfare of the child.

Per O’Byrne J in the Irish Supreme Court *Re Kindersley* 353

Supplementary to judicial development of the non-marital child’s ‘natural and imprescriptible’ constitutional rights, the Irish legislature has adopted a procedural safeguard, known as the ‘welfare principle’, as a means of protecting the interests of children in cases concerning their custody or guardianship.

Developed initially in the English courts of Chancery, the welfare principle has since firmly assured its position as the cornerstone of modern family-law disputes. The equitable maxim indicates that the courts, in considering any question relating to: the custody, guardianship, education of, or access to children, ought to take the place of a “wise parent, acting for the true interests of the child.” 354 Following recognition of equity’s binding authority in the *Judicature (Ireland) Act 1877*, 355 the welfare principle was accorded authoritative precedence over the prevailing common law. 356

Early development of the doctrine, which acknowledged the independent entitlement of a child to individual legal rights rather than merely regarding them as a possession of his/her parents, was indicative of the changing focus of social and legal thinking evident at the time. 357 This acceptance of the child as a separate legal person possessing specific social, emotional and physical needs embodied in the ‘welfare principle’ has impacted upon a wide range of areas relating to the care of children including: consent to medical treatment, 358

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353 *Re Kindersley an Infant* [1944] IR 111 per O’Byrne J.
354 See judgment of Fitzgibbon LJ in *Re Harriet O Hara, an Infant* [1900] IR 232.
355 *Judicature (Ireland) Act in 1877*; section 28 subsection 10.
356 The welfare principle was initially developed on the basis of the *Parens patriae* jurisdiction of the courts of Chancery. This jurisdiction dates back to the royal prerogative which provided that the sovereign ‘knew best’ and could therefore supplant the position of the parents in order to ensure that the child’s best interests were being cared for. See the old Irish case *Morgan v Dillon* (1724) 9 Mod. R 135.
357 See judgment of Lindley J in *In re W. W. v M* “[T]he dominant matter for consideration of the Court is the welfare of the child” [1907] 2 Ch D 557.
wardship, child protection, and host of matters pertaining to the decision-making autonomy of the family. However, in line with the main aim of this thesis, it is proposed to discuss the application of the doctrine to guardianship custody and access disputes only, and its relationship with family rights as protected by the Constitution.

The first piece of ‘parental rights’ legislation to place the equitable principle on a statutory footing was the Guardianship of Infants Act, 1886. This Act provided that in cases of parental conflict, the courts are bound to consider the welfare of the child in question, in addition to the conduct and wishes of each parent. Consequently, it was on the basis of the child’s “best interests” that judges first became statutorily empowered to appoint or remove guardians. Continuing this novel egalitarian and purposive focus, the 1891 Custody of Children Act granted the courts discretion to limit parental rights in disputed custody cases where it was established that the parent in question had “deserted” or “abandoned” his or her child.

4.2.1 Early operation of the welfare principle in Ireland

Pre-dating both the enactment of the Constitution and the subsequent legalisation of adoption, the Irish Court of Appeal at the turn of the twentieth century, was

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359 Section 3 of the Child Care Act 1991 provides “(1) It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection….(2) In the performance of this function, a health board shall…(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise- (i) regard the welfare of the child as the first and paramount consideration, and…(c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.”…Section 27 of the Child Care Act 1991 further applies the welfare principle in relation to care proceedings; “In any proceedings…the court may, of its own motion or on the application of any party to the proceedings…give such directions as it thinks proper to procure a report from such person as it may nominate on any question affecting the welfare of the child.”


361 Section 1 of the Custody of Children Act, 1891. In Mitchell v Wright it was held that the words “abandoned” or “deserted” meant leaving a child “to its fate” 7 F. (Ct. of Sess), 568. In Re O Hara, Holmes LJ held that the terms “abandon” and “desert” imply “a disregard of parental duty and carry with them the idea of moral blame” [1900] 2 IR 232 at p 252.
required to consider whether a widow, who had placed her child in the custody of another couple, had forfeited her parental rights in respect of the child. Fitzgibbon LJ in *Re Harriet O Hara, an Infant,* \(^{362}\) handed down a guarded judgment carefully maintaining the common-law boundaries of parental supremacy, evaluating parental rights in the context of custody as follows:

At law, the parent has an absolute right to the custody of a child...unless he or she has forfeited it by certain sorts of misconduct...in exercising the jurisdiction to control or to ignore the parental right the court must act cautiously...acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded. \(^{363}\)

Focusing predominantly upon the moral quality of the mother’s actions, the court held that her decision to give away custody of her child was motivated solely by the pressure of circumstances and a desire to provide best for her child. The court concluded therefore, that she could not be said to have ‘neglected’ the child for the purposes of the relevant legislation and on this basis custody should be reinstated to the applicant mother. \(^{364}\)

One of the first cases to consider the application of the welfare principle subsequent to the ratification of the Constitution in 1937 was the unusual case of *re Tamburrini.* \(^{365}\) Here, an application was made by a woman who had given birth outside of marriage and subsequently placed the child in the care of her parents. The woman later married another man, not being the child’s father, and together the couple adopted the child under Scottish law. The applicant and her husband subsequently applied for an order of *habeas corpus ad subjiciendum.* \(^{366}\)

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\(^{362}\) [1900] IR 232.

\(^{363}\) Ibid. at p 239.

\(^{364}\) *Custody of Children Act, 1891.*

\(^{365}\) [1944] IR 508.

\(^{366}\) Prior to the enactment of the *Guardianship of Infants Act 1964,* the most common and convenient method of determining child custody matters between private parties was by way of *habeas corpus* proceedings. An application for *habeas corpus* permitted the courts solely to examine the legality of restraints upon the child’s freedom. As such, the court was required to consider the legal entitlements of those contesting rights to custody. See Columbia Law Review Association, *Res Adjudicata in Habeas Corpus Proceedings for Custody of Children,* (1914), *Columbia Law Review,* Vol. 14 No. 1, pp. 77-78.
in the Irish High Court seeking the return of the child, who was by then aged eight years.

Referring to the earlier dicta of Fitzgibbon LJ in Re O’Hara, the court in a highly didactic judgment, found this to be an ‘exceptional’ case where the State’s interference with the parent’s ‘absolute’ rights was warranted and justified. Again, similar to the earlier decision, the bench placed great emphasis upon the moral character of the mother’s actions and the potential implications of her domestic situation upon the religious and spiritual welfare of her child. The court held that the welfare of the child would be better assured by remaining in the care of its grandparents and accordingly refused to enforce the mother’s claim to custody.

In spite of the unfortunate moralistic tone of this decision, it is submitted that the approach taken by the court is not without merit. The judgment of Haugh J in this regard is of particular interest. Whilst he eventually agrees with his colleagues in the majority, the learned justice deviates on whether the mother’s conduct operated to forfeit her “absolute right to the child of tender years.” He felt it was possible that the mother’s rights could remain intact however, on the basis of the facts, her right to custody could be bypassed on the basis of the child’s interests and needs, which he felt must take precedence.

In another judicial endorsement of the ‘welfare principle’ two years later in Re M., an Infant, the court concluded that even in cases of conflict concerning parental claims to custody and guardianship the ultimate deciding factor was always to be the welfare of the child. The court upheld the welfare principle as the ultimate benchmark in relation to the custody of the child and held that in this

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367 [1900] IR 232.
368 This was in view of the fact that the applicant mother had married and was then living with a man who was divorced from his wife, still living at the time. See judgment of Maguire P “It would…be a radical and disturbing change for the boy, at the most formative period of his life, to be removed from the moral atmosphere in which he has been reared to a house in which the conduct of his mother by her own clergy with disapproval. There seems…to be very little doubt that the child would be more than human if his morals were to remain unaffected by the position which exists in the home to which it is sought to send him…” [1944] IR 508.
369 Ibid.
particular instance the natural mother’s claim was not strong enough to defeat it.\footnote{[1946] IR 334.}

### 4.2.2 Legislative grounding of the welfare principle

As outlined previously, *The Guardianship of Infants Act, 1964* represents the key legislative instrument regulating all guardianship, custody and access matters in Ireland.\footnote{For further discussion, see Chapter 2.} Section 3, for the first time in the jurisdiction explicitly accepts and approves the equitable welfare principle as previously applied under the common law.\footnote{According to Choudhry and Fenwick, legislative regard for the welfare principle provides for the establishment of an “exclusive cultural framework” within which all professional decisions concerning children are made. Choudhry, S. And H. Fenwick, Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act, Oxford Journal of Legal Studies, Vol. 25 No. 3 (2005), pp. 453-492 at p 456.}

The legislative interpretation of welfare is outlined in Section 2 of the 1964 Act. The definition pursuant to the section comprises the religious, moral, intellectual, physical and social\footnote{In *O’S v O’S* (1976) 110 ILTR 57 Walsh J at p 61 held that social welfare is to be calculated on the basis of what makes children better members of the society in which they live. See also *McD v McD* (1979) ILTR 60 (SC).} needs of the child in question.\footnote{In *DFOS v CA*, McGuinness J added the supplementary category of the child’s emotional welfare to those listed in the Section 2. Similarly, the Protection for Persons Reporting Child Abuse Act 1998 lists emotional welfare under the general umbrella of “welfare”.} This list is not considered exhaustive and, as such, the courts have tended to employ a purposive method of interpreting what factors are relevant to a child’s welfare, stating:

> [it is] not...the simple method of totting up the marks which may be awarded under each of the five headings...all the ingredients which the Act stipulates...are to be considered globally...It is the totality of the picture presented which must be considered.\footnote{*MBO’S v PO’S* [1974] 110 ILTR (SC) per Walsh J.}

Again, the connection between the Constitution and Statute is immediately visible and the statutory interpretation of welfare, as laid down in the Act is virtually identical to the constitutional terminology employed in Article 42 to
refer to the educational needs of children.\textsuperscript{376} The 1964 Act, permits the guardian of an infant to seek the advice of the court on any matter concerning the welfare of the child, thereby conferring the court with a discretion enabling them to penetrate the family sphere. However similar to the constitutional provisions, judicial interpretation has indicated that the discretion provided for in the legislation will only be invoked in extreme circumstances, particularly where the family concerned is founded upon marriage.\textsuperscript{377}

Section 3 stipulates that in any custody, guardianship or access proceedings brought under the Act, the welfare of the child in question is to be regarded by the court “as the first and paramount consideration.”\textsuperscript{378} This notion of ‘paramountcy’ was first advanced onto the English statute book in the \textit{Guardianship of Infants Act, 1925} and in the much-cited House of Lords decision \textit{J v C},\textsuperscript{379} which was later approved by the Supreme Court,\textsuperscript{380} its application was described as follows:

The child’s welfare is to be treated as the top item in a list of items relevant to the matter in question...that is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed.\textsuperscript{381}

\textsuperscript{376} Article 42.1 provides “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, moral, intellectual and social education of their children.” The similarities between Section 2 of the 1964 Act and Article 42 have been noted on a number of occasions. See for example judgment of Finlay CJ in \textit{Re JH an Infant} [1985] ILRM 302 at p 321.

\textsuperscript{377} The welfare principle has been incorporated in a number of statutory provisions other than legislation relating to custody and guardianship. For example, Section 2 of \textit{the Adoption Act 1974} provides “In any matter, application or proceedings before the Board or any court relating to the arrangements for or the making of an adoption order, the Board or the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration.” Section 47 of the \textit{Family Law Act 1995} provides that reports may be requested and presented to the court on “any question affecting the welfare” of a child. The section applies to all family law proceedings, except for adoption. For further discussion see Chapter 2 of Shatter, A.J., \textit{Family Law}, 4\textsuperscript{th} ed., (1997), Butterworths.

\textsuperscript{378} The United Nations Declaration on the Rights of the Child under Principle 7 states that the “best interests of the child shall be the guiding principle of those responsible for his education and guidance...” Similarly Article 3(1) of the United Nations Convention on the Rights of the Child provides that in all actions concerning children, the welfare of the child is to be taken as the “primary” consideration.

\textsuperscript{379} [1970] AC 668.

\textsuperscript{380} Cited by Henchy J in \textit{MacD v MacD} (1979) ILTR 60 (SC).

\textsuperscript{381} Per Lord MacDermott [1970] AC 668.
The phrase ‘paramount’ used in Section 3 of the 1964 Act would appear to imply that the correct application of the welfare principle necessitates that the ‘best interests’ of the child in question are to be the ultimate and sole deciding factor in guardianship disputes, prevailing over and above any competing claims.

In other jurisdictions the ‘principle of paramountcy’ is applied in a relatively consistent, uniform and concrete manner. For example in England, in any judicial matter concerning custody, guardianship or access, the competing rights of parents or other family members are deemed “subservient to the paramount consideration...[which is] the welfare of the child.”382 The welfare principle has thus proven useful in advancing the argument put forward in certain quarters that guardianship ought to be regarded as the right of the child rather than the parent.383 In furtherance of this idea, the English legislature has amended its legislation by replacing the phraseology of parental ‘rights and duties’384 with the term ‘parental responsibility’.385 The English courts have, on this basis, declared themselves interested in parental rights claims “only so far as they bear on the welfare of the child.”386

The Irish experience differs considerably by reason of the constitutional requirement that all ‘family’ legislation must be read in tandem with the Constitution’s family articles. As previously discussed, Articles 41 and 42 prioritise the married family’s constitutional status and in an effort to protect its “constitution and authority” confer married parents with supreme decision-making competence in respect of the education and care of their children. Usage of the phrase ‘paramount’ in section 3 of the 1964 Act which has been judicially

382 Per Lord Oliver in Re K D (Minor) (Ward: Termination of Access) [1988] 1 All ER 577 at 825.
383 See Senator Hanafin Seanad Debates – Volume 114 – 08 October 1986. See the seminal English case, Gillick v West Norfolk and Wisbech AHA, [1986] AC 112, 170D, HL. Similarly in A v C Ormrod LJ held “So far as access to a child is concerned, there are no rights in the sense in which lawyers understand the word. It is a matter to be decided always entirely on the footing of the best interests of the child.” [1985] FLR 445.
385 Following recommendation from the English Law Commission (1988). This was enacted in Section 3(1) of the Children Act, 1989.
386 Per Sir Thomas Bingham MR in Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124 at 128
interpreted to mean, “overriding” arguably raises potential for the legislative instrument to overthrow the constitutional protections and invariably presented Irish courts with a dilemma regarding the constitutionality of the provision.

Given the capacity for the child’s best interests to ‘trump’ the rights of their married parents and potentially supersede the rights of ‘the family unit’ there exists a somewhat uneasy relationship between the welfare principle’s operation and the provisions of the Irish Constitution. Accordingly whilst judges in this jurisdiction continue to emphasise the importance of the child’s welfare, the notion of paramountcy has received varying degrees of support from members of the judiciary, particularly where the family concerned is founded upon marriage.

Considering the issues of construction posed by the wording of Section 3 of the 1964 Act, the courts have consistently refused to accord any enforceable primacy to the welfare of children in custody or guardianship matters. Instead the judiciary have interpreted the word ‘paramount’ in a manner respectful of the supremacy of the Constitution’s family articles holding firm that the term “by itself is not by any means an indication of exclusivity.” The constitutional hurdle, posed by the operation of the welfare principle, has been neatly sidestepped by the judiciary who have consistently indicated although the child’s welfare is of undeniable importance that it “is not the only consideration…and must be reconciled with the rights of both parents”, particularly where such parents are married.

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387 *McKee v McKee* [1951] AC 352, wherein the court stated, “to this paramount consideration all others must yield.” at p 365.

388 “The word ‘paramount’ by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word ‘paramount’ certainly indicates the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case.” Per Walsh J in the Supreme Court in *G v An Bord Uchtála.* [1980] IR 32 at p76. Referred to by Finlay CJ in *K.C. & A.C. v An Bord Uchtála* [1985] ILRM 30 at p 318 and by Barron J in the High Court in *K. v W.* [1990] ILRM 791 at 798 and by Hamilton CJ in *W’OR v EH and An Bord Uchtála* [1996] 2 IR 248 at p 9 of his judgment.

389 Per Barrington J in *W’OR. v E.H. and An Bord Uchtála* [1996] 2 IR 248 “The clear implication of this phrase is that the welfare of the infant is to be the most important consideration but also that it is not the only consideration. Otherwise the Statute would not choose the adjective ‘first’. The welfare of the infant, while paramount, has to be reconciled so far as practicable with the rights of both parents” at p 22 of judgment.
4.2.3 ‘Welfare’…an unenumerated right?

In a recent case *Southern Health Board v C.H.*\(^{390}\) O’Flaherty J considered the welfare of the child with “grave concern” and solemnity, stating:

We must, as judges, always harken to the constitutional command which mandates, as prime consideration, the interests of the child in any legal proceedings.\(^{391}\)

Despite O’Flaherty J’s passionate judicial endorsement, other members of the judiciary appear noticeably less convinced of the doctrine’s reliability or of its position within the wider constitutional order.\(^{392}\) For example while certain judges have accepted that children have a personal right by virtue of Article 40.3.1° to have their welfare protected in decisions relating to their custody or guardianship,\(^{393}\) the dominating judicial trend would appear to indicate that the safeguard is not overly reliable in cases of conflict between other constitutional rights. Noticeably, as will be outlined in detail below, even in cases where the Court explicitly place import upon the child’s welfare, there appears to be inconsistencies and contradictions concerning its precise application or the appropriate balance between the primacy of children’s rights and the written provisions of the Constitution.


\(^{391}\) *Ibid.* at p. 231. The facts of the case concern the admissibility of a video-taped interview containing allegations of parental abuse.

\(^{392}\) Barrington J *W.O’R v E.H. and An Bord Uchtala [1980]* indicated that whilst the child’s welfare may “be the most important consideration but that is not the only consideration.” See also judgment of Johnston J in *the State (Williams) v Markey [1940]* IR 421 at p 438 “I agree [with the majority decision] – with a certain amount of doubt. Of course in strict law, the parents are entitled to the custody and care of the child; but I have a certain amount of doubt as to whether it would not be better for the child to remain in the good home where it is.”

\(^{393}\) Per Finlay Geoghegan J in *F.B. and E.B. v C.O [2004]* 4 IR 305 at p 323. The case concerned an application pursuant to Section 8 of the Guardianship of Infants Act, 1964 to appoint a new guardian following the death of a parent. In *P.W. v A.W* High Court (unreported); judgment delivered 21st April 1980. Ellis J stated “I take the view also that the child has the personal right to have its welfare regarded as the paramount consideration in any such dispute as to its custody under Article 40.3 and that this right of the infant can additionally arise from the “Christian and democratic nature of the State.” at p.69 This aspect of Ellis’ judgment was cited by Keane CJ in his dissenting judgment in *North Western Health Board* wherein he stated it to be of “general application” subject to qualifications laid down in relation to custody and Article 42.5 in later case-law (to be discussed below) [2001] 3 IR 622 at pp 688-689. However in the same case Hardiman J stated that *PW* was not consistent with subsequent jurisprudence [2001] 3 IR 622 at p 756.
4.3 Growing tension between the principle of ‘paramountcy’ and the 1937 Constitution

The cases outlined below which consider the interpretation and application of the ‘welfare principle’ to cases of custody and guardianship, provide a useful insight into the judiciary’s interpretation of the interplay between written, unwritten constitutional and legislative rights. Although the cases deal, in the main, with married ‘constitutional’ families, they nonetheless provide an interesting contrast between the rights of marital and non-marital children, both of whom are declared to possess the same ‘natural’ rights under Article 40.3.1”. Fundamentally the following cases demonstrate the striking metamorphosis which takes place in relation to the constitutional rights of a child upon the marriage of their previously unmarried parents and the accompanying bar which comes down to inhibit the full application of the ‘welfare’ principle in guardianship and custody matters.

4.3.1 Re J, an Infant

Considering the consequences of the then newly enacted guardianship legislation, the court In Re J, an Infant, took a conspicuously defensive view of the Constitution’s family provisions. The case concerned an application to the High Court for the granting a conditional order of habeas corpus in respect of a child, then aged seventeen months, who had been placed for adoption shortly after birth, by its then unmarried mother. The mother later married the father of the child and contended by reason of the child’s ‘legitimation’ that the child was no longer legally eligible for adoption. It was further submitted that the mother’s consent for the adoption of the child was invalid for the purposes of the relevant statute.

395 Section 1 Legitimacy Act 1931.
396 Under Sections 9 and 10 of the 1952 Adoption Act the only children legally eligible for adoption were those who were illegitimate or orphaned.
Teevan J held that in order for the child’s welfare, as set out in section 3 of the 1964 Act, to be deemed the ultimate deciding factor in guardianship and custody matters, it would first have to be shown that the Act purported to diminish or curtail the absolute constitutional rights of parents as regards their children. Such a change would have altered the pre-existing status quo in the context of the superior position of Articles 41 and 42 and as such would have required constitutional amendment. While accepting the contention that the child’s welfare would be more secure in the future in the adopters’ home, the learned justice nonetheless regarded this line of reasoning as “irrelevant and erroneous” given the written text of the Constitution. Teevan J concluded that due to their marriage the natural parents’ right to custody was an absolute one to be interfered with only if their conduct amounted to ‘abandonment’ or ‘desertion’ within Section 14 of the 1964 Act.

Adopting a similar stance to his colleague Henchy J opined that parental rights in respect of custody are conclusively established in the constitutional articles and thus the need to look outside to legislation is obliterated. In an exacting passage, subsequently cited with approval by the Supreme Court, Henchy J, summarised the ‘welfare principle’ as follows:

I consider that section 3 must be interpreted in one of the following ways: first by regarding it as unconstitutional, or secondly by reading it in conjunction with Articles 41 and 42 as stating in effect that the welfare of the infant...coincides with the parent’s right to custody.

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398 Per Section 14 of the 1964 Act; “Where a parent of an infant applies to the court for an order for the production of the infant and the court is of opinion that that parent has abandoned or deserted the infant or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the infant, the court may in its discretion decline to make the order.”
401 [1966] IR 295 at 308. This particular line of reasoning is evident in the early case Re O’Brien, Infants, which was one of the first cases to consider parental rights following the enactment of the Constitution. Here the court was presented with an application made by a widower in respect of his child, then in the care of its maternal grandmother. Referring to the sanctity of the married family unit, O’Byrne J held “the framers of the Constitution considered, and enacted, that the best interests and happiness of the child would be served by its being a member of the parental household” [1954] IR 1 at p 10.
Henchy J held that the parents in question could not be found to have failed in their duty towards the child, for the purposes of Article 42.5 and therefore their absolute right to custody could not be interfered with. By reason of the fact the couple and their child now represented a ‘constitutional family’ they did not have to rely upon the legislative welfare principle to secure guardianship and custody, and instead could employ the full force of the Constitution’s protection under Articles 41 and 42.

This early interpretation of the ‘welfare principle’ provides a useful example of the grey area marking the boundary between the constitutional elevation of the married family under Articles 41 and 42 and the child’s right to welfare under Section 3 of the 1964 Act. In the context of the rights of a child in custody and guardianship disputes, the Irish judiciary attempted to avoid any potential for conflict by implying a constitutional presumption that best interests of a child to be served within the framework of the marital family.

4.3.2 In the matter of J.H. an Infant; K.C. and A.C. v An Bord Uchtála

The decision of the Supreme Court in Re JH, an Infant\(^{402}\) represents the definitive judicial acceptance of the constitutional presumption in relation to the welfare principle and provides further evidence of the hierarchy of constitutional rights operating in respect of ‘the family’.

The tragic factual circumstances of the case involved the placing into foster care of a week old baby girl, by her natural mother. The mother had initially expressed a desire to keep the baby however felt that as an unmarried woman, to rear the child herself would not be conducive to its best interests. Accordingly, when the child was approximately three months old the mother agreed to present her for adoption with a married couple who already had an adopted son.

The natural mother subsequently married the child’s father and thus sought to re-register the child’s birth as ‘legitimate’ under the provisions of the *Legitimacy Act 1931*. The mother consequently withdrew her consent for the adoption and together with her now husband, both applied for custody as natural parents. The adopting parents, in whose care the child had remained for a period of over two years up to the commencement of proceedings, sought an order pursuant to Section 3 of the *Adoption Act 1974* to dispense with the mother’s consent and affirm their right to custody.

The case came initially for hearing before Lynch J in the High Court, where in a detailed and measured judgment the learned justice held that in relation to the issue of custody the wording of section 3 of the 1964 Act necessitated that the child’s welfare be regarded as “the first and paramount consideration.” On the basis of psychiatric evidence, which indicated a high risk of long-term psychological damage and emotional distress to the child if transferred from the care of the adoptive parents, Lynch J concluded that the child’s welfare considerations tipped the balance in favour of her remaining in the care and custody of the adoptive parents. Focusing upon the wellbeing of the child in question, he expressed uncertainty and apprehension regarding her relocation, concluding; “there is not anything really worthwhile to be gained for the child by transferring her from the adopting parents to the parents.”

Whilst the learned trial judge refused to grant the order to dispense with the natural mothers consent he nonetheless granted custody to the adoptive couple allowing access for the natural parents. Noting the strength of the custodial claims presented by both parties, Lynch J in a commendable and insightful passage stated

> It is so very important in the circumstance of this particular case to look at it through the eyes, or from the point of view, of the child.

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403 For further information see Chapter 2.
The natural parents appealed to the Supreme Court on the grounds that, in view of their subsequent marriage and ‘legitimation’ of the child, the trial judge had failed to apply the appropriate test under section 3 of the 1964 Act. The superior court agreed that given the fact of the parents’ marriage, the child was now a member of a ‘constitutional family’ with all the associated rights and privileges. Referencing the courts earlier judgment in *G v An Bord Uchtála* Finlay CJ indicated that a child born within marital union is entitled to rely upon both their unenumerated personal rights under Article 40.3.1 and further upon the guarantees contained in Articles 41 and 42. He stated that the totality of these written and unwritten constitutional rights includes:

[the right] to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law...to protection by the State of the family to which it belongs...to be educated by the family and to be protected by its parents with religious moral intellectual physical and social education.

Significantly, on the question of the child’s welfare the Supreme Court declined to follow the earlier comments of O’Higgins CJ in the case of *J v D* wherein the Chief Justice suggested that the relevant test to be applied in all child custody disputes was that laid out in Section 3 of the 1964 Act. Emphasising the relevance of the constitutional provisions in relation to the family, the court viewed the earlier authority’s neglect to reference the Articles as a valid basis for departure.

Speaking for the court, Finlay CJ stated that the correct interpretation of Section 3 must if at all possible, be consistent with the provisions of the Constitution. As such, the learned chief justice proposed a two-pronged ‘test’ setting out the

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407 The court held that the power of the court to intervene in the interests of the child was not exclusively confined to cases coming under Article 42.5 but extended to cases where the child’s rights fell to be considered under other constitutional articles. [1985] ILRM 302.
408 Ibid at p 317 and [1985] IR 375 at 394.
409 Supreme Court 22nd June 1977.
410 See *East Donegal Co-Operative v The Attorney General* [1970] IR 317 where the Supreme Court held that the presumption of constitutionality carried with it the presumption that the Oireachtas intended that “proceedings, procedures, discretions and adjudications” provided for by an Act of the Oireachtas are to be conducted in accordance with the principles of ‘constitutional justice’. See also *MacDonald v Bord na gCon* [1965] IR 217.
boundaries for State intervention in order to protect child welfare in custody and guardianship matters; 411

Section 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child...is to be found within the family unless the court is satisfied...that there are compelling reasons why this cannot be achieved or unless...the evidence establishes an exceptional case where the parents have failed...for moral or physical reasons. 412

In essence, the court concluded that in order for the rights possessed by the ‘constitutional family’ to be superseded on the basis of a child’s interests that the court must be first satisfied that there are ‘compelling reasons’ for doing so or secondly that there has been an ‘exceptional’ failure of parental duty. 413 The court, in the instant case, unanimously held that to grant custody of a marital child to persons other than its parents, against their wishes and in circumstances other than those outlined in the aforementioned test, would effectively deny the child it’s constitutional rights under Articles 41 and 42. 414

A number of years later, in Re Article 26 and the Adoption Bill (No.2) 1987 415 Finlay CJ expanded upon the constitutional meaning of ‘failure’ in the context of parental duty and stated that the most important element is that the concept “must be construed as being total in character.” 416 The court held further that the

411 The court held that the power the court to intervene in the interests of the child was not confined to cases coming under Article 42.5 but applied also where the child’s rights fell to be considered under other constitutional Articles.
413 For discussion on the requirement for an ‘exceptional’ failure of duty under Article 42.5 in order to deny or deprive parental rights, see In re Doyle, An Infant: State (Doyle) v Minister for Education and the Attorney General IR 217 (HC); [1989] ILRM 277 (SC) See also the recent case North Western Health Board v H.W. and C.W [2001] 3 IR 622 McCracken J, despite acknowledging that it was in the child’s medical interests, refused the order sought under Article 42.5 basing his observations on the need to avoid a type of ‘nanny state’, “If the State were allowed to intervene in every case where professional opinion differed from that of parents...we would be rapidly stepping towards the Brave New World in which the State always knows best. In my view that would be totally at variance with both the spirit and the word of the Constitution” at p.633.
414 Accordingly the matter was remitted to the High Court who was instructed to apply the ‘test’ in relation to the child’s welfare and custody.
416 Ibid at p 664.
parental ‘failure’ in question must arise for physical or moral reasons and further that “no mere inadequacy of standard...would suffice.”

4.4 Recent endorsement of the constitutional presumption - the case of “Baby Ann”

The distressing factual circumstances of JH were repeated in almost identical form very recently in the controversial Supreme Court case: In the Matter of N. an Infant, N. and N. v The Health Service Executive commonly cited as the “Baby Ann” decision.

The applicants in this emotionally charged case were the natural parents of a child who, at the time of proceedings, was aged two years. The young unmarried couple had been living together towards the end of their third level studies when the woman discovered she was pregnant. After researching their options in relation to the pregnancy and consulting with the relevant organisations, the couple made the joint-decision that it would be in the child’s best interests to have it placed for adoption. When the baby was a week old, she was accordingly admitted to foster care. During this time, the applicant couple visited her frequently and on one occasion brought her to stay in their home for an overnight visit. At approximately four months old, via a registered adoption society the child was placed with the prospective adopters, a married couple. Subsequent to this placement, the natural parents maintained frequent contact with the child to the extent that their level of regular involvement was later described to the court as ‘unique’.

It should be noted that this case is somewhat different to many of the adoption cases previously discussed in that both parents in this instance were well educated, cohabiting in an apparently stable relationship and wholly supportive

417 Ibid.at p 664.
419 N. v The Health Service Executive 23rd June 2006.
420 Ibid. See High Court judgment of MacMenamin J.
of each other. Six weeks prior to initiating proceedings for the return of the child, the couple married and accordingly re-registered the child’s birth. Crucially the applicants were thus transformed into a ‘constitutional family’, a factor that proved highly influential upon the courts consideration of the issues and the respective constitutional rights of all involved.

Considerable emphasis was placed both by counsel and the bench upon the earlier decision of Re JH. Relying upon the constitutional presumption laid down by Supreme Court therein that the welfare of a child is best situated within the constitutional family, the couple challenged the lawfulness of the custody of their child by virtue of a habeas corpus application pursuant to Article 40.4.2 of the Constitution.

Prior to the marriage of the natural parents, the prospective adopters had intended to bring proceedings under Section 3 of the Adoption Act 1974\(^{421}\) for an order to dispense with the consent of the natural mother. Not surprisingly they strongly contested the application for habeas corpus initiated by the now-married natural parents. The respondents argued that the applicant couple, by their conduct, had effectively ‘abandoned or deserted’ their child thereby negating their parental rights under the Constitution and legislation. In response to the invocation of the ‘compelling reasons test’ laid down by the Supreme Court in JH the respondent adopters presented extensive expert evidence regarding the detrimental psychological impact to the child if she were removed from their custody and transferred into the care of her natural parents.\(^{422}\)

On hearing of the application in the High Court, MacMenamin J held that the child in question had acquired the right to have her custody determined in consideration of her welfare and in accordance with her constitutional rights. He concluded that both the constitutional presumption outlined in Article 42.5 coupled with the ‘compelling reasons’ test laid out in JH had been successfully rebutted by counsel for the respondent adopters.

\(^{421}\) For further information see Chapter 2.

\(^{422}\) Counsel for the respondents cited the ‘attachment theory’ as a ‘compelling reason’ for rebutting the constitutional presumption laid down by the Court in Re J.H. an Infant [1985] IR 375 as to why the child should remain in their custody.
Referring to the dicta of Denham J in *Southern Health Board*\(^{423}\) MacMenamin J emphasised that the term ‘abandonment’ in the context of child custody is given a special legal significance. He concluded that although the placing of a child for adoption does not of itself constitute ‘failure’ under the terms of Article 42.5, it could however be considered when taking all relevant factors into account. In a lengthy judgment, wherein the learned justice expressed considerable sympathy with the applicants’ predicament he noted that their decision to present the child for adoption, was neither “culpable” nor “blameworthy.” He concluded nonetheless that the couple had, regardless of their intentions, failed in their parental duties and as such the constitutional presumption set out in *Re JH* was rebutted. Attempting to balance the constitutional issues presented, the learned trial judge held that “Ann’s” welfare required she remain in the custody of the adoptive parents and ultimately refused the order sought under Article 40.4.2.

The applicants appealed the decision to the Supreme Court wherein the ruling of the lower court was unanimously reversed. The bench concluded that the constitutional presumption had not been rebutted and remained intact. Significantly, however whilst the composition of the court ultimately reached the same conclusion their respective judgments indicate considerable divergence and an overall lack of consensus on the issues contested.

In his interpretation of the *Re JH*\(^{424}\) ‘compelling reasons’ test, Hardiman J emphasised the right of the child to the nurture of his or her own natural family. He states, on this basis, that there must be “coercive or strong” reasons for removing a child from the care of its natural parents. The learned justice goes on to describe adoption as the ‘default position’, which is triggered only when the natural family has somehow failed or neglected the child.\(^{425}\) His colleague

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\(^{423}\) *Southern Health Board v An Bord Uchtála* [2000] 1 IR 165 Denham J gave detailed consideration to the meaning of ‘abandonment’ within the context of Section 3 of the Adoption Act 1988. She indicates that the word is used as a "special legal term" and the section does not require an intention to abandon. See discussion of *Re Article 26 and the Adoption Bill* [1989] IR 656 in Chapter 2.

\(^{424}\) [1985] IR 375.

\(^{425}\) See p 5 of judgment. Hardiman J proceeds even further in stressing the importance of the bond between natural parents and their children by referring to the Biblical example where King Solomon in an attempt to discern a dispute between two women as to which was the natural mother of a child, he proposed to cut the child in half.
Geoghegan J goes further stating that the presumption laid down in *JH* could be rebutted only if the evidence indicated that “severe damage” to the child would take place otherwise.

Whilst ultimately concurring with her colleagues in the majority, the impassioned judgment of McGuinness J in the “Baby Ann” case makes for particularly insightful reading. The learned justice refers in considerable detail to statements made at the High Court stages of *Re JH*. In particular, she indicates her approval for trial judge Lynch J’s proposal that in contentious custody cases, whereupon both parties have equally strong claims, the court should look at matters “through the eyes...of the child.”

Whilst expressing approval of submissions made during the course of the High Court hearing, McGuinness J in common with Lynch J, indicates that she too is uncertain and somewhat fearful regarding the child’s “future in general” in the context of the proposed transfer of custody from the adoptive to natural parents. Her sense of powerlessness and frustration is palpable when noting that the ‘compelling reasons’ test laid out by Finlay CJ is so exacting and restrictive in its ambit that it would be difficult to see its terms being met except in the most extreme circumstances. On this basis McGuinness J found herself bound to apply the test laid down in *Re JH* in its ‘full rigour’. Concluding her judgment “With reluctance and some regret” she allowed the appeal and joined her colleagues in ordering the return of the child to her natural parents.

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426 At p 14 of judgment.
427 At p 17 of judgment.
428 For another recent example of the need for an ‘exceptional’ failure of parental duty in order to trigger state intervention under Article 42.5 see the decision of the Supreme Court in *North Western Health Board v H.W. and C.W* [2001] 3 IR 622, in particular the judgment of Murphy J wherein he stated “the subsidiary and supplemented powers of the State in relation to the welfare of children arise only where either the general conduct or circumstances of the parent is such as to constitute a virtual abdication of their responsibilities or alternatively the disastrous consequences of a particular parental decision are so immediate and inevitable as to demand intervention and perhaps call into question either the basic competence or devotion of the parents” at p 733.
429 At p 18 of judgment.
McGuinness J, herself a long-time advocate for children’s rights, did notably avail of the opportunity during the course of her judgment to indicate her dissatisfaction with the unstable position of the child in the greater constitutional order. However, similar to her colleague Geoghegan J, she notes that until such a time as the Constitution is changed the judiciary are bound to decide cases on the basis of the existing statutory and constitutional provisions.

Having considered in this chapter, the course of development of rights for non-marital children in this jurisdiction, under both legislation and the Constitution, the next chapter shall examine the position of the unmarried mother under Irish law. In particular, the following section shall examine the constitutional rights of unmarried women in respect of the care and custody of their children and show using case discussion how the unmarried mother’s “natural rights” under the Constitution have evolved since the document’s inception.

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430 In 1993 Mrs Justice McGuinness chaired the Kilkenny Incest Investigation Committee which called for the government to consider amending “Articles 41 and 42…so as to include a statement of the constitutional rights of children” See Report of the Kilkenny Incest Investigation Committee, (1993), The Stationary Office.

431 The United Nations Committee on the Rights of the Child was ratified by Ireland in 1992. Article 3 of the Convention provides that “in all actions concerning children” […] “the best interests of the child shall be a primary consideration.” In 1998 the UN expressed concern regarding Ireland’s absence of a national strategy on children, see Shannon, G., Seen but not Heard, (2006), Law Society of Ireland Gazette.
Chapter V

Development of ‘natural rights’ for the unmarried mother

Our esteem for marriage must never lead us to adopt a harsh and rejecting attitude towards the unmarried mother. To the unmarried mother, Christians must always show the compassion, the kindness and support which she and her child need.

Passage from the Archbishops and Bishops of Ireland, Pastoral Letter 432

5.1 Early discussion of the rights of the unmarried mother in Ireland

In the early decision Re M., an Infant,433 the courts were called upon to consider whether the newly adopted constitutional framework had altered the legal position of the unmarried mother, in relation to her child. Taking place a number of years prior to the introduction of legal adoption in the State, the factual circumstances of this case concerned the informal relinquishing of custody of a newborn child by its mother, who was at the time unmarried. Following placement of the child, along with a sum of money into the care of a married couple, the child was baptised and its birth subsequently registered as legitimate under the names of both adoptive parents. Approximately one year later, the mother approached the couple seeking the return and accompanying full custody of the child. The adopters refused and the woman accordingly applied to the court for an order of habeas corpus on the basis that their continued custody of the child was unlawful for the purposes of Article 40.4.2˚ of the Constitution.

Gavan Duffy P, speaking in the High Court stated categorically that the constitutional provisions relating to the family are employable solely by members of a constitutionally recognised married family. As such, he expressed

some doubt as to whether the mother of an illegitimate child could rely upon the explicit guarantees contained in Articles 41 or 42.434 Whilst hesitant about her protection under the written text the learned President and his colleagues in the High Court435 appeared confident in acknowledging the existence of a mother’s claim to custody of her child as deriving “by nature.” 436

I think that the Court should go a long way towards recognising the force of the natural claim of a mother to her child born out of wedlock, even though her legal right be less coercive.437

Despite recognition of the mother’s ‘natural right’ the court failed to expand upon the exact source of such a claim, nor did it clarify how the existence of this right may be applied in practice. Significantly in this instance, the mother’s ‘natural’ claim was not deemed strong enough to justify the granting of the order sought and as such, did not amount to any tangible right to custody or guardianship. In short, the unmarried mother’s position within the greater constitutional and statutory orders remained, as it had previously, in a form of ‘legal limbo’.

Whilst reference to the somewhat mystifying ‘natural’ rights of parents persisted in subsequent case-law438 it was not until the seminal case: The State (Nicolaou) v An Bord Uchtála439 that the courts engaged in any meaningful discussion as to the precise source of such parental rights. Coming before the Supreme Court less than a year after their dramatic opening of the constitutional gates to extra textual rights in Ryan v Attorney General, the case arguably heralded the ideal opportunity for the establishment of a natural rights framework in the context of parental entitlements to care and custody.

434 Ibid. “Under Irish law...I do not think that the constitutional guarantee for the family (Article 41)...avails the mother of an illegitimate child” at p. 344.
435 Ibid. Davitt J The mother “doubtlessly has the natural right to the custody of this child unless she has in some way forfeited” at p. 356. Interestingly Haugh J stated that he was prepared to consider the case as if the child in question was legitimate.
436 Ibid.
437 Ibid.at p. 344.
438 See, for example, The State (Williams) v Markey [1940] IR 421 per Black J p. 431. There is earlier evidence of reference to the ‘natural’ nature of parental rights. See, for example’, the dicta of Lord Justice O’Connor (dissenting) in In Re Connor, [1919] IR 1 wherein he argued that the nature and foundation of parental rights springs from the natural right of the parent, “Parents have a power over their children by the laws of nature and the Divine law.”
Though *Nicolaou*,

concerned an application by an unmarried father, the Supreme Court nonetheless seized the opportunity to elucidate the position of the unmarried mother within the wider constitutional and legal order. Significantly, the court held by reason of the ‘marriage-focus’ of Articles 41 and 42 that an unmarried mother and her child could not represent a ‘family’ within its constitutional meaning, nor does the mother come under the ambit of “parent” in its purely constitutional sense.

Despite the court’s emphatic banishment of the unmarried mother from the family articles, the court reviewed her personal rights in a considerably more positive manner. Whereas earlier judgments had skirted around the constitutional basis for these parental rights, the Supreme Court confidently asserted:

> the mother of an illegitimate child does not come within the ambit of Articles 41 and 42 of the Constitution. Her natural right to the custody and care of her child, and such other natural personal rights as she may have...fall to be protected under Article 40 section 3, and are not affected by Article 41 and 42 of the Constitution.

In spite of this new-found judicial enthusiasm towards the personal rights of the non-marital mother in *Nicolaou*, due to the fact that the case related specifically to the claim of an unmarried father, it failed to provide the stable foundation so desperately needed in the area. It was not until a number of years later, in the landmark decision *G v An Bord Uchtála* that the non-marital mother’s right to the care and custody of her child were discussed in appropriate depth by the Supreme Court.

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441 “It is the opinion of the Court that the parent referred to in Article 42.1 is a parent of a family founded upon marriage” Per Walsh J *Ibid.* at p. 644.
442 Per Walsh J, he continued further “These inherent rights of the individual impose on everyone an obligation to respect them” *Ibid.* at p. 644.
443 In *S. v Eastern Health Board*, Unreported High Court 28 February 1979, Finlay P expressed the view that an unmarried mother’s rights in respect of her child are protected by the Constitution rather than merely conferred by Statute.
5.2 *G v An Bord Uchtála*

The facts of this case are as follows; the applicant, a twenty-one year old unmarried woman became pregnant following a brief relationship. Having concealed the pregnancy from her family, friends and the baby’s father, she placed the child, immediately after its birth, into a nursery. It was later accepted by the court that the plaintiff had at this time, been urged by nursing staff to believe that it was in the child’s best interests to have her placed for adoption rather than raised outside of marriage. A short time later, after consulting the defendant adoption society and attending a number of interviews with a medical social worker and a director of the society, the applicant signed the relevant forms agreeing to the adoption.

A number of weeks later, the applicant informed her parents of the child’s birth and expressed to them a desire to keep the baby. To her surprise, the woman’s parents indicated their support and accordingly she set about seeking the return of the child. The applicant immediately wrote to the defendant society seeking to invalidate the adoption process. The child had since been placed in the home of the prospective adopters, who refused to relinquish custody prompting the mother to institute legal proceedings.

The woman challenged the constitutional validity of the *Adoption Act 1952* under which the order was made, on the basis that it allows an unmarried mother, by consenting to the legal adoption of her child, to lose all associated parental rights and duties including those that are guaranteed by the Constitution.\(^{445}\) The adoptive parents, by response, sought an order under section 3 of the *Adoption Act 1974*. This section provides that in situations where an unmarried mother agrees to the placing of her child for adoption but subsequently “fails, neglects or refuses” to consent to the making of the order that the High Court may, on application, instruct the Adoption Board to dispense with her consent.

\(^{445}\) Section 24(b) of the *Adoption Act 1952*. 
The case was referred to the Supreme Court where, continuing the pattern established in earlier case law, the bench unanimously concluded that an unmarried mother was constitutionally barred from invoking Articles 41 and 42.446 However, what the court took away with one hand they gave with the other in placing considerable emphasis, upon the ‘innate’ character of certain maternal rights of which a mother could not be denied purely by reason of her marital status.447

Significantly, in contrast to earlier judgments, the judges availed of the opportunity to dispel any doubts as to the precise source of the mother’s constitutional right to custody and guardianship, stating: “The natural or human rights...referred [to] earlier in this judgment are part of what is generally called the natural law.”448

Citing its earlier decision in Nicolaou, the Supreme Court held that unlike the constitutional position of a married mother, the rights of an unmarried mother are located not within the ambit of the written constitutional articles but rather exist exclusively on the basis of the unspecified rights doctrine. Referencing his earlier judgment in McGee v Attorney General Walsh J held:

Articles 41, 42...of the Constitution...acknowledged that natural rights or human rights are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority.449

The court thus proceeded on this basis, referring at various intervals to the ‘natural rights’ of which a mother is possessed in respect of her child and the corresponding ‘natural rights’ which a child has in respect of its mother. In view of her maternal status and the natural relationship of mother and child the court

446 “The mother is not the mother of a family, in the sense in which the term is used in the Constitution” Per O’Higgins CJ [1980] IR 32 at p 54.
447 Ibid. “So far as these particular natural rights are concerned, it is immaterial as between the mother and her child whether the mother is or is not married to the father of the child” Per O’Higgins CJ.
448 Ibid at p. 69.
held that a mother is vested with the right to protect, to care for and to the
custody of her child.

Putting beyond question that such ‘natural rights’ are to be found outside of the
Constitution’s written text, Walsh J specifies their constitutional co-ordinates as
Article 40 subsection 3.\textsuperscript{450} On the issue of how exactly such maternal rights came
into existence, the learned justice adopts a similar approach to that taken
previously in relation to the non-marital child and Walsh J fails to provide a
concrete answer; “These fundamental rights \textit{spring} from the natural relationship
of the mother and the child.”\textsuperscript{451}

The court then moved to consider the standing of such naturally derived parental
rights within the constitutional and legal hierarchy. The bench concluded that
sourcing such rights within the unspecified personal rights framework of Article
40, presented no constitutional barrier to women from surrendering, abdicating or
transferring their rights. In marked contrast to the explicitly articulated schedule
of written parental rights contained in Articles 41 and 42 the rights of the
unmarried mother under Article 40 are therefore deemed neither inalienable nor
impresscriptible, and these rights may, in fact, be transferred or abandoned.

In an important passage of his judgment headed “The Mother’s Rights”
O’Higgins CJ explains the position of the unmarried mother as follows:

\begin{quote}
In the first place it should be noted that the mother is not the mother of a
family, in the sense in which the term is used in the Constitution...But the
plaintiff is a mother and, as such, she has rights which derive from the
fact of motherhood and from nature itself. These rights are among her
personal rights as a human being and they are rights which, under Article
40, s.3, sub-s. 1, the State is bound to respect, defend and
vindicate...Suffice it to say that this plaintiff, as a mother, had a natural
right to the custody of her child...and that this natural right of hers is
recognised and protected by Article 40 s.3 of the Constitution.\textsuperscript{452}
\end{quote}

\begin{flushright}
\textsuperscript{450} \textit{Ibid.} at pp. 66 and 67.
\textsuperscript{451} [emphasis added] \textit{Ibid.} at p. 67.
\textsuperscript{452} \textit{Ibid.} at pp. 54-55.
\end{flushright}
Despite the Supreme Court’s confident endorsement of tracing the unmarried mother’s rights to the ‘laws of nature’, there are a number of cracks and inconsistencies evident upon closer reading of the court’s judgment. Most conspicuously, the presiding panel of judges were divided on the issue of whether the ‘natural’ rights they had already identified could be fully classified as ‘constitutional’ or ‘legal’.

The comments of Henchy J are of particular interest and the tone of his judgment is markedly more reserved than that of his colleagues. Although he agrees that the mother’s rights in respect of her child “derive from the ties of nature” he crucially states that these rights are “given a constitutional footing only to the extent that they are founded on the constitutionally guaranteed rights of the child.”

The learned justice was notably doubtful as to the existence of the mother’s independent claim under Article 40.3.1 and he was suitably careful to distance himself from comments made by his colleagues on the bench to this effect. He stated emphatically: “Insofar as opinions or observations on wider and unargued topics emanate from this case, I do not wish my silence on those obiter dicta to be taken as concurrence.”

The judgment of Kenny J similarly places somewhat of a slant over the constitutional reliability and credibility of the mother’s natural rights. The eminent proponent of natural rights expressed considerable difficulty with the apparent equation of “natural” and “constitutional” rights. He moved to refute any correlation of the two, stating:

I do not accept that there is such a connection, particularly as the word ‘natural’ is so ambiguous. When used in connection with the relationship of a mother and child, it may mean the link between them formed by the facts that she has conceived the child, that is issues from her body and is fostered and nurtured by her; or it may mean that the theory of natural

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453 Ibid. at p. 88.
454 Ibid. at p. 83.
law, on which so much of that part of the Constitution dealing with fundamental rights is based, recognises such a right.\textsuperscript{455}

5.3 \textbf{Classifying the unmarried mother’s rights}

Further reading of the various judgments handed down by the Supreme Court in \textit{G. v An Bord Uchtála} would appear to indicate some confusion on the bench as to whether the unmarried mothers ‘natural’ rights in respect of her child under Article 40.3.1 are invariably extinguished by an order for adoption or whether they prevail in a ‘suspended’ form.\textsuperscript{456}

This confusion evidently arises in light of the distinction between locating an unmarried mother’s rights under the Constitution’s protection of ‘personal rights’ for which there is no specific textual guidance, in contrast to the married mother’s rights which are located under Articles 41 and 42, and described therein as “inalienable” and “imprescriptible.”\textsuperscript{457} On the same issue, in \textit{Ryan v Attorney General} the previously discussed \textit{locus classicus} regarding natural law in the Irish context,\textsuperscript{458} Kenny J himself expressed difficulty in ascertaining the meaning of the inalienable and imprescriptible rights, referenced in the Family Articles as follows:

\begin{quote}
 as the Constitution gives little help on this, I am in some difficulty in dealing with this argument. Inalienable means that which cannot be transferred or given away while imprescriptible means that which cannot be lost by the passage of time or abandoned by non-exercise.\textsuperscript{459}
\end{quote}

\textsuperscript{455} \textit{Ibid.} at p. 97.
\textsuperscript{456} See judgment of Finlay P wherein he appears to indicate that the mother’s rights in respect of her child continue to exist after the making of an order for adoption. \textit{Ibid.} at p. 60.
\textsuperscript{457} Comments made by Costello J during the course of his judgment in \textit{Murray v Ireland} [1985] IR 532 are of interest in this regard. He stated therein “It does not follow...that because the Constitution ascribes only some human rights, characteristics of inalienability and imprescriptibility, the Constitution should be construed as implying that other fundamental human rights lack these qualities, or that only those rights are superior to the positive law which are so expressly described in the Constitution.” at p. 539.
\textsuperscript{458} [1965] IR 294.
\textsuperscript{459} \textit{Ibid.}
Considering the character of the unmarried mother’s constitutional rights under Article 40.3.1”, Finlay CJ held that her personal rights, unlike those set out in Articles 41 and 42 .”..can be alienated or transferred in whole or in part and either subject to conditions or absolutely.” 460 He continued further noting that the constitutionally recognised right to custody may alter as the child grows up 461 or may potentially be ‘abrogated’ by the mother. 462

Writing extra-judicially, Justice Brian Walsh once described an inalienable right as “one that man cannot be deprived of, even by his own act.” 463 Confusingly, however, speaking during the course of his judgment in G he adopts a somewhat different position stating that certain rights are “absolutely inalienable”, whilst others are merely “relatively inalienable.” 464 He concurs with the Chief Justice in his proposition that the unmarried mother’s ‘natural’ constitutional rights could be freely given away, explaining that the consent to place her child for adoption amounts to a “fully informed, free and willing surrender” or rather “abandonment” of a mother’s constitutional rights. 465

5.4 MO’C v Sacred Heart Adoption Society

The constitutional position of the unmarried mother and more significantly the precise character of her parental rights were again considered by the Supreme Court, more recently, in MO’C v Sacred Heart Adoption Society. 466

The factual circumstances of the case, similar to those in the afore-cited G v An Bord Uchtála, concerned an unmarried mother who, subsequent to giving birth, placed her child for adoption with the defendant agency. After experiencing a

461 “How far and to what extent [the mother’s right] survives as the child grows up is not a matter of concern in the present case” [Ibid. at p. 55.
462 Ibid. at p 59. See also judgment of Supreme Court in O.G. v An Bord Uchtála [1991] ILRM 514
465 Ibid.Per Walsh J at p. 74.
466 Cited as; M.O’C. v Sacred Heart Adoption Society and An Bord Uchtála [1996] 1 ILRM 297.
change of mind the plaintiff attempted to invalidate the relevant order thereby seeking the return of the child. She argued that her previous consent had not been ‘fully formed’ as required for the purposes of the legislation and was, as such, void. The woman claimed when agreeing to the adoption she had not been informed that her maternal rights were constitutionally guaranteed and protected. The proposed adopters, in reply, sought an order pursuant to Section 3(2) of the Adoption Act 1974 authorising the adoption board to dispense with the need for the mother’s consent and proceed with the order for adoption.

It was submitted that by placing her child for adoption, the mother was effectively surrendering both her constitutional and legal entitlements. In the High Court, Morris J accepted that the right which a mother possesses in respect of her child is a constitutional right and could only be surrendered if there was a full, free and informed consent to its abandonment.\textsuperscript{467} The trial judge held accordingly, that in order for the consent to be ‘fully informed’ the mother must be made aware that she is giving over her rights indefinitely and absolutely. He concluded however, that this does not require specific usage of the phrase ‘constitutional right’ by the adoption authorities in advising the mother.\textsuperscript{468}

The Supreme Court agreed with sentiments expressed in the lower court that the ‘classification’ of maternal rights, for the purposes of consent, is unimportant providing that the woman in question is made aware of the practical implications of the adoption process.\textsuperscript{469} Whilst acknowledging that the mother’s constitutional rights will undergo a ‘modification’, the court held that the correct approach is to

\textsuperscript{467} [1995] ILRM 298.
\textsuperscript{468} ”...the mother should be aware that the right she has, and the right that she is choosing to surrender, is an absolute right to the child which cannot be taken away from her against her will.” Per Morris J [1996] 1 ILRM 297 at p. 303. See earlier reference to the mother’s ‘absolute’ right was; \textit{In Re M} [1946] IR 334 wherein the court held that the mother’s right was not an absolute one and further deemed that even if the court had not the option of “refuse to enforce her natural right” her ‘abandonment’ of the child had done so at p. 257.
\textsuperscript{469} In the case \textit{C.A. v St Patrick’s Guild Adoption Society}, unreported, High Court, July 31 1995, Flood J stated in relation to maternal consent for adoption “The true test is whether in the circumstances which prevail at the time she makes her decision, that decision reflects her will or the will of somebody else.”
continue to view such rights as “subsisting” up to and until the making of an order for adoption.\textsuperscript{471}

Referring to Walsh J’s judgment in \textit{G v An Bord Uchtála}, the majority held that although a mother’s right is “constitutional in nature”,\textsuperscript{472} such a right is capable of extinguishment by reason of a consensual order for the adoption of the child. The court stated explicitly a mother’s parental rights could only be terminated by the actual making of an order of adoption and not anytime before. They held that the mere consenting, by a woman, to place her child for adoption can “never amount, in itself, to an extinguishment of her rights.”\textsuperscript{473}

Significantly however, the court appeared to diverge from the majority approach in \textit{G}. They held that an agreement for adoption does not necessitate a complete surrender or termination of the mother’s constitutional rights but rather puts them into “temporary abeyance.”\textsuperscript{474} Curiously the Supreme Court borrowed from the dicta of the critical Henchy J in his judgment in the earlier case, stating that rather than abandoning her constitutional right to custody, a woman’s consent to place her child for adoption caused her rights to be “temporarily derogated” or “suspended.”\textsuperscript{475} It is only the making of the order for adoption that these rights are “destroyed.”\textsuperscript{476}

The approach taken by the Supreme Court in \textit{M.O’C} was approved shortly after in \textit{EF & FF v An Bord Uchtála},\textsuperscript{477} wherein Keane J held that when consenting to place her child for adoption it was immaterial whether the woman in question was made aware of the fact that her rights were constitutionally guaranteed.

\textsuperscript{470} Per Hamilton CJ [1996] 1 ILRM 297 at p. 306.
\textsuperscript{471} The court here employ to their advantage, the equality ‘proviso’ under Article 40.1 in order to defend their rationale for differentiating between the rights of a married mother and those of an unmarried mother. The court held that there is no exception of moral capacity or social function, which would justify according the same natural imprescriptible rights to natural unmarried parents as the members of the married family.
\textsuperscript{472} [1996] 1 ILRM 297 at p.299.
\textsuperscript{473} \textit{Ibid.}
\textsuperscript{474} \textit{Ibid.} Per Hamilton CJ at p. 303.
\textsuperscript{475} [1980] IR 32 at p. 86 Judgment of O’Flaherty J.
\textsuperscript{476} \textit{Ibid.}
\textsuperscript{477} [1997] IFLR 6 (SC).
Rather the learned justice concluded that “what was important was that she understood what the consequences were.”

The present chapter, similar to previous discussion in relation to the non-marital child, has demonstrated how the constrained remit of Articles 41 and 42 of the Constitution has forced the courts to employ the assistance of natural law in order to develop constitutional rights for the unmarried mother. The merits or otherwise of this approach shall be considered in due course, however the next chapter shall examine the rights of the unmarried father in respect of the guardianship or custody of his child. In particular, the next section shall consider the position of the unmarried father in the overall legislative and constitutional order and examine the approach taken by the judiciary in assessing the existence and application of his parental rights.

478 Ibid. at p. 31.
Chapter VI

The constitutional position of the unmarried father

The position of the unmarried father in the Irish Constitution has been the subject of considerable debate, particularly in recent years. The present chapter proposes to examine how the unmarried father has been viewed by the Irish courts and whether natural law has proven as influential in developing constitutional rights for unmarried fathers as it has for non-marital children and mothers. This section shall also look at how developments at a European level have influenced the domestic position of the unmarried father.

While the 1937 Constitution expressly refers on two occasions to mothers, nowhere in the entire breadth of the document is there even mention of the word ‘father’. It is alleged that this textual absence is no oversight and a recent Supreme Court judge went as far as to say that one of the intentions of the 1937 drafters, when opting to ground the ‘constitutional family’ solely upon marriage was to “exclude natural fathers from that institution.”

Historically men who fathered children outside of marriage, although often less visible than the illegitimate child and unmarried mother, were not excepted from the slur of ‘illegitimacy’ and were traditionally perceived by society in a very negative manner. These men were viewed as “seducers and deserters” and were deemed unequivocally blameworthy for the corruption of young women.

As will be seen from discussion of case-law charting the development of rights for unmarried fathers, there is a considerable division in the way in which the courts have approached the legal and constitutional position of the unmarried father vis-à-vis, unmarried mothers and non-marital children. This distinction is

479 Article 40.3.3’ and Article 41.2.2’.
480 While the Constitution does mention “parents” in Article 42, these references have been held to refer solely to the parents of a legitimate child conceived within a marital union. See, for example, discussion of the case The State (Nicolaou) v. An Bord Uchtála [1966] IR 567.
particularly evident in the context of natural rights under Article 40.3.1”. As will be seen below, the courts have and continue to, demonstrate considerable reluctance in allowing natural fathers any form of constitutional recognition, written or unwritten.

6.1 **Slamming shut the constitutional door - The State (Nicolaou) v An Bord Uchtála**

In an article published in 1952, shortly after the establishment of a regulatory framework for adoption, Donal Barrington later justice of the Supreme Court, evaluated what he considered to be the constitutional position of the father of an ‘illegitimate’ child;

He is not recognised as being a “parent” within the meaning of the [Adoption] Act, but he probably is a “parent” within the meaning of Article 42 of the Constitution.

Any potential for speculation regarding the status of the unmarried father’s rights within the constitutional order following the formal legalisation of adoption was safely put to bed by the Supreme Court in the authoritative case concerning father’s rights: *The State (Nicolaou) v An Bord Uchtála.*

The factual circumstances of this tragic case concerned an application made by a Cypriot national, who had been involved in a steady relationship with an Irish woman whilst both were living in London. The couple’s relationship ran into difficulty and the woman returned to live in Ireland whereupon a short time later she found she was pregnant. The applicant subsequently offered to marry the woman, to which her parents consented on the condition that he would convert to Catholicism. Determined to support both mother and child he agreed and, on this basis, began taking religious instruction. The woman accordingly returned to

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486 On this point, it was held that the constitutional issues raised in the case ought to be considered “without reference to the father’s non-citizenship” *Ibid* at p. 600.
London where she continued to reside with the applicant until the birth of their daughter.

The applicant, mother and child lived together as a ‘unit’ for a number of months following the child’s birth. However, the mother became unsettled and subsequently moved back to her parent’s home in Ireland, taking the child with her. On her return, she placed the then seven month old baby for adoption with the Catholic Protection and Rescue Society. This was done without the consent or knowledge of the applicant father and in spite of the respondent’s awareness of his desire to provide and care for the infant.

Upon learning that his daughter was in the process of being adopted, the applicant indicated his extreme opposition to the child’s mother and registered a formal complaint with the Adoption Board. The latter, nonetheless, declined to hear him and following appropriate effectuation of the mother’s consent, the child was formally adopted.

Mr Nicolaou subsequently instituted legal proceedings, seeking first a conditional order of habeas corpus in respect of the child’s custody. This order was however, refused prompting the applicant to issue High Court proceedings requesting that the adoption order, granted pursuant to the Adoption Act, 1952 be struck out on the basis of it’s repugnancy to Articles 40 and 42 of the Constitution.

Counsel for the applicant argued that by refusing to hear his submissions, the Adoption Society was in breach of Mr Nicolaou’s legal and constitutional rights as a natural father. Counsel referred, in particular, to section 16 of the 1952 Act which specifies a schedule of persons whom it deems entitled to be heard in relation to an application for adoption. Amongst those listed were: the natural mother, the child’s guardian(s), a person having charge of or control over the child, a relative of the child, the applicants for the order, representatives of a registered adoption society concerned with the child, an officer of the Adoption Board, a priest or minister of a religion recognised by the Constitution and “any
other person whom the Board, in its discretion, decides to hear.” Illogically, the Act excluded from its own definition of ‘relative of the child’ the father of a child born out of wedlock.

In his initial High Court challenge, the applicant contested the validity of the Adoption Act on a number of separate grounds; He first submitted that the 1952 Act violated the constitutional guarantee of equality under Article 40.1 by discriminating unfairly against the natural father, purely on the grounds of his paternity. He further submitted that the Act deprives a natural father of his status as a parent under Article 42, violates the rights of the family under Article 41 and ultimately denies a natural father his personal constitutional rights.

In relation to the rights of the child, Henchy J in the High Court rejected the applicants’ submission that the 1952 Act denies the illegitimate child an imprescriptible right in that it allows him or her to be deprived of the knowledge and support of a willing parent. The learned justice held on the basis of section 3 of the 1964 Act that he was bound to prioritise the welfare of the child. He concluded that in the present case her ‘best interests’ would be better served with the prospective adopters with whom she would become ‘legitimised’ and thus able to benefit from the “legal and social advantages of a legally adopted child.” Conversely, if the adoption were reversed the child would be ‘reduced’ to the status of illegitimate. The court thus applauded itself for helping to avoid such a situation.

Alluding to the section 3 ‘welfare’ principle, the court concluded that if a father were to be awarded custody of the child it would be on the basis that it is in the child’s best interests rather than any inherent right on the part of the father. However, paradoxically, despite its reference to the ‘welfare principle’ the court continued to evaluate the issues exclusively by reference to the father’s poor constitutional standing. Although acknowledging the distinction between

487 See the Adoption Act 1952 - section 16 subsection 1 (a) – (i).
488 Section 3 of the Adoption Act 1952.
489 For further discussion, see reference to the Article 40.1 equality guarantee in Chapter 2.
491 See discussion of the welfare principle in Chapter 4.
“willing” parents and those who are indifferent to their offspring, the High Court nonetheless proceeded to categorise the legal position of the applicant in relation to his child in the same context as other “common blood relations and strangers.”

The court moved quickly to dismiss the applicant’s case under the explicit provisions of Articles 41 and 42 stating that any interpretation to incorporate members of the unmarried family under the protection of the constitution would be “inconsistent with the letter and spirit of the Constitution.” Henchy J in deference to the elevated position of ‘marriage’ under Article 41.3.1 held that to extend the written ambit of the family articles to unmarried individuals, such as the applicant, would have the effect of disregarding “the pledge which the State gives…to guard with special care the institution of marriage.”

The applicant appealed his case to the Supreme Court who responded with their now historic ruling. In an altogether contradictory judgment the court explicitly recognised the existence of de-facto family units having “many, if not all, of the outward appearances of a family.” Despite the generosity of the language the acknowledgment proved itself purely superficial due to the judiciary’s subsequent failure to extend to such groups any form of constitutional protection.

Concurring with the High Court, the majority firmly denied the assertion that excluding natural father from the list of those entitled to participate in the adoption process was a violation of the equality guarantee. Walsh J rejected the applicant’s submission in relation to Article 40.1 by holding that those persons listed as having rights within the Adoption Act could be regarded as “having or capable of having...a moral capacity or social function which differentiates [them] from persons who are not given such rights.”

Demonstrating the

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492 [1966] IR 567 per Teevan J at p. 598.
493 Ibid. See judgment of Henchy J at p. 620.
494 Ibid. Per Henchy J at p. 622.
495 Ibid. at p. 622.
496 Ibid.at p.643.
497 Walsh J stated “[i]f [the natural father] is in fact excluded it is because in common with others he happens not to come within [the Act’s] description, so that [t]here is no discrimination against the natural father as such” Ibid.at p. 641.
inherent weakness of the equality guarantee the court concluded that the adoption of a child without the consent of its natural father, despite his “manifest” interest in caring for her and the further denial to the father of the company and society of his child did not constitute discrimination for the purposes of Article 40.1.

In arguably one of the most illogical and capricious judicial passages ever handed down by the State’s highest court, Walsh J proceeded to explain what he perceived as the rationale for distinguishing between a non-marital father and those persons listed in the Act. In a much-quoted passage the eminent justice stated:

> When it is considered that the illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man and a woman, as well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those or married life...it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons listed [in the Act].

It is respectfully submitted, that the foregoing justification advanced by the learned Walsh J is unreasonable, unconvincing, wholly subjective and in many respects quite bizarre. It is difficult to appreciate what precise relevance the coupling of such a detailed ‘catalogue of conception’ together with the learned justice’s own views on the perceived role of men as fathers, could possibly have in a case such as this. The alleged justification for the Supreme Court’s emphatic exclusion of the unmarried father is thus based upon the notion that it is rare for a father to take any interest in his child. The court deems itself ‘off the hook’ for making such a blatant and unfair generalisation by distinguishing the moral capacity and social function of fathers in general.

This position is wholly untenable and one need look no further than the present case in order to demonstrate how the application of such a narrow presumption

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498 Ibid. at p.641.
499 Ibid. at p. 641.
can produce such a grossly unfair and unjust result. Here the applicant, presented a patent interest in looking after the needs of his child, in marrying the child’s mother and went as far as to propose changing his religion so as not to jeopardise the spiritual welfare of his child. However, despite all his efforts he was bracketed in the same context as rapists and men who are unwilling to shoulder the responsibilities of fatherhood.\footnote{500}

The Supreme Court bench was similarly emphatic and absolute in their banishment of the natural father from the constitutional ‘family’ as set out in the written provisions of the text. Leaving no avenue exposed the court held that the applicant, as an unmarried father cannot rely upon the protection of Article 41,\footnote{501} is not a ‘parent’ within the constitutional sense and accordingly is disbarred from invoking any rights under Article 42.\footnote{502} In short the Supreme Court concluded that the written provisions of the Constitution “avail him nothing.”\footnote{503}

Mr Nicolaou, in addition to the submissions based upon the Constitution’s specified ‘family’ rights challenged the 1952 Act on the basis of its infringement of his personal rights guaranteed under Article 40.3.1. The applicant contended that the Act’s implicit denial of his guardianship and custodial entitlements, failed to protect his natural rights from unjust attack or vindicate them in the case of injustice, as mandated by Article 40.\footnote{504} In sharp contrast to the unmarried mother, whose ‘natural’ right to the care and custody of her child was successfully located within Article 40 by the court in the same case, the applicant’s personal rights were viewed to in an altogether less positive manner.

\footnote{500}{For further analysis of the decision see Connelly, A. “The Constitution” featured in Connelly, A., (ed.), Gender and the Law in Ireland, (1993), Oak Tree Press.}
\footnote{501}{“[i]t is quite clear from the provisions of [Article 41.3] that the family referred to in this Article is the family which is founded on the institution of marriage” [1966] IR 567 at p. 643.}
\footnote{502}{The court held that any parental rights under Article 42 apply only to “a parent of a family founded upon marriage” \textit{Ibid.} at p.644.}
\footnote{503}{\textit{Ibid.} at p.644.}
\footnote{504}{Counsel for the applicant referred to Lord Justice O’Connor’s dicta in \textit{In Re Connor}, [1919] IR 1 cited earlier wherein the dissenting judge speaking regarding the rights of the father of a legitimate child argued that the nature and foundation of parental rights springs from the natural right of the parent, “Parents have a power over their children by the laws of nature and the Divine law.” See also Reference to judgment of Lord Campbell in \textit{R v Clarke} 7 E & B 195 as quoted by O’Connor LJ at p 408.}
Teevan J in the earlier High Court hearing of the case, made a number of quite profound observations regarding the legal status of the father of an illegitimate child, and in particular the innate personal rights of a father in respect of his parenthood. He stated that a father’s ‘natural right’ to his child is no less, whether the child is born out of or in wedlock, and his duty to one is “no less sacred than to the other.”\(^{505}\) He continued, in an insightful passage:

Thus...if...a man has been permanently deprived of his child, albeit illegitimate, whom he has taken to him and cherishes as his child, such a man will indeed have suffered a cruel injustice.\(^{506}\)

The Supreme Court however took an altogether different view. In response to the applicant’s submission that he was guaranteed protection under the auspices of the Constitution’s unspecified rights doctrine, the Supreme Court categorically held that a natural father has no personal right under Article 40.3 in respect of his parenthood. Distinguishing between ‘constitutional’ and ‘legal’ rights the majority emphasised that a natural father is, in relation to his child, possessed only of the latter. Considering the character of such rights in the overall juridical hierarchy, the court highlighted their inferiority and instability as follows: “legal rights, unless guaranteed by the Constitution, may be adversely affected or completely taken away by legislation.”\(^{507}\)

Delivering judgment on behalf of the majority Walsh J, closed another potential opportunity for the insertion of constitutional rights for natural fathers. He justified the courts outright refusal to entertain the natural law line of reasoning as follows:

It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights, to either the custody or society of that child and the Court has not been satisfied that any such right has ever been recognised as part of the natural law.\(^{508}\)

\(^{505}\) [1966] IR 567 at p. 600.
\(^{506}\) Ibid.
\(^{507}\) Ibid. at p. 640.
\(^{508}\) Ibid. at p. 643.
The decision in *Nicolaou* is unreasonable and disappointing on a multiplicity of levels. Amongst these are the courts outright refusal to entertain the natural law line of reasoning, also their ‘dodging’ of the equality issue under Article 40.1 in stating that the natural father’s absence from the terms of the Adoption Act was not ‘excluding’ him but rather that he fails to ‘make the list’. The effect of the foregoing together with the courts refusal to promote social acceptance of increasingly realistic family patterns and establish a workable constitutional framework in respect of the unmarried family combine to represent a very unfortunate missed opportunity.

Writing in the aftermath of the decision, Professor Kelly is highly critical of the stance adopted by the Supreme Court. Whilst he concedes that it may not, in certain circumstances be in the interests of the child to permit his father to interfere with his upbringing or future, the court is “wrong to close the door on principle against the natural father.”

6.2 *Re S.W., an Infant, J.K. v V.W.*

Writing shortly after the *Nicolaou* decision, Professor Kelly points out a potential scenario rendered possible as a result of the Supreme Court’s outright rejection of the father’s natural rights;

Suppose a case in which the custody of a child is disputed between its natural father...and an outsider, in circumstances where the child’s welfare would be equally assured with either...What judge would not prefer the father’s claim? And if he were asked why he preferred it, would he not refer his judgment to ‘nature’ in one guise or another? And would not such a judgment or a series of such judgments, amount to a recognition of a “right”?  

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In the forty years or so since it was first made, Professor Kelly’s hypothesis has unfortunately been realised on more than one occasion. One of the most notable examples of the problems posed by the Supreme Court’s steadfast refusal to entertain the ‘natural law’ line of reasoning in the context of unmarried fathers is evidenced in the dissenting judgment in the decision Re S.W., an Infant, JK. v VW.\textsuperscript{511}

In JK, the judiciary was required to consider the scope of a natural father’s constitutional rights in light of legislative development namely The Status of Children Act, 1987.\textsuperscript{512} Section 12 of the 1987 Act amends the Guardianship of Infants Act 1964 by inserting Section 6A(1) into its provisions. This newly incorporated subsection gives the judiciary additional powers of discretion in relation the appointment of guardians, providing that where the father and mother of an infant are not married to each other, the court may, on the application of the father appoint him as guardian of the infant. According to Seamus Woulfe\textsuperscript{513} the purpose of the new legislation was to establish a procedure whereby undeserving fathers could be sifted out from what he terms “meritorious” fathers namely those who show continuing love, affection and concern for their children.\textsuperscript{514}

The factual background to this complex case is as follows: the applicant and first respondent had been involved a steady relationship, living together “as man and wife”\textsuperscript{515} for over a year, when they made the decision to have a baby. A short time later, the woman found she was pregnant and the couple became engaged. The first respondent however broke the engagement, shortly after, and returned to live with her parents.

Almost immediately after giving birth, the woman consented to have her child adopted whereupon it was placed with the prospective adoptive parents, a

\textsuperscript{511} [1990] 2 IR 437.
\textsuperscript{512} For further discussion see Chapter 2.
\textsuperscript{514} This procedure was deemed more appropriate by the government than the Law Reform Commission’s call for joint guardianship. LRC Report on Illegitimacy, 1982 (LRC-4-1982).
\textsuperscript{515} As referred to by Barron J [1990] ILRM 791.
married couple. The placement was made entirely without the knowledge or consent of the applicant, who had been encouraged at all times to believe that the child would be kept by the mother and that he would be allowed visitation and access.

As soon as he became aware of the proposed adoption, the applicant commenced Circuit Court proceedings seeking to be appointed as a guardian and custodian of the child pursuant to Section 6A(1) of the 1964 Act. The plaintiff’s claim initially succeeded in the lower court and the appropriate orders for guardianship and custody were granted in his favour. The respondent mother and prospective adopters accordingly appealed the decision to the High Court.

A pivotal aspect of the case involved a submission made by the applicant that as the father of a non-marital child, he possessed a natural constitutional right to custody and guardianship. He further argued that the insertion of Section 6A into the Guardianship of Infants Act 1964 represented legislative declaration of the existence of such a personal constitutional right. Counsel for the applicant contended that the intention behind this new statutory mechanism was to create a “legal nexus” between father and child whereby a father’s application for appointment as a guardian, would be defeated only where factors concerning the child’s welfare so necessitated.516

Considering the natural father’s entitlement to guardianship, Barron J in the High Court, concluded that section 6A of the 1964 Act required him to apply a twofold test. The court was required to ascertain first; “whether the natural father is a fit person to be appointed guardian” and second “if so whether there are circumstances involving the welfare of the child which require that notwithstanding he is a fit person he should not be so appointed?”

On the basis of the legislative improvements contained in the 1987 Status of Children Act and what he perceived to be the ‘purpose’ behind its enactment Barron J held, that; “the rights of the father should not be denied by

considerations of the welfare of the child alone, but only where...there are good reasons for so doing.” 517 The learned trial judge proceeded to state a case to the Supreme Court as to whether this interpretation of the applicable statutory provisions was accurate and further if it was not, what alternative principles are to be applied in cases of this nature. 518

The Supreme Court, in a judgment which has since been described as the “genesis” of section 6(A) of the 1964 Act, 519 cast off the standard laid down earlier in the High Court. Significantly the majority swiftly and indubitably rejected the natural law aspect of the plaintiff’s case. The court held that, in contrast to his married counterpart, an unmarried father has no constitutional right, natural or otherwise, to either guardianship or custody and consequently must rely only upon statutory provisions. 520 Delivering judgment on behalf of the court, Finlay CJ referred to the father’s legislative rights under the newly enacted provisions as follows:

Section 6A gives a right to the natural father to apply to be appointed guardian. It does not give him a right to be guardian, and it does not equate his position vis-à-vis the infant as a matter of law with the position of a father who is married to the mother of the infant. 521

In response to the attempted invocation of the applicant father’s natural right to custody by virtue of Article 40.3.1, the Chief Justice considered the credence to be given to the paternal blood link. 522 In relation to this novel line of reasoning, he accepted that “varying rights of interest or concern” might potentially arise

517 Ibid.
518 Ibid.at p. 125.
520 [1990] 2 IR 437 Finlay CJ stated in relation to a non-marital father’s ‘right to apply’ for guardianship rights “The right to apply to be appointed guardian of the infant under s 6A of the Act of 1964 (as inserted by the Act of 1987) is a right to apply pursuant to a statute which specifically provides that the court in deciding upon such application shall regard the welfare of the infant as the first and paramount consideration.” At pp 442-443.
521 Ibid.
522 Ibid. “The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of the many factors which may be viewed by the court as relevant to the welfare of the child.”
from the father’s biological connection, depending on his relationship with the child and the manner in which the child was conceived.\(^{523}\) Finlay CJ explains that where a child is born as the result of a stable and established relationship in a situation approaching that of a constitutionally protected family, compared with a child who is conceived during the course of casual sexual intercourse, the rights of a father “would be very extensive indeed.”\(^{524}\) Nonetheless the Chief Justice was careful to emphasise that despite any arguable biological “rights of interest” this was not a basis for establishing any constitutional entitlement to guardianship based on natural law principles.\(^{525}\)

As with many cases concerning parental rights and the Constitution, it is the dicta of the dissenting judge that provides the most useful insight into the complex interplay between the competing constitutional and legislative issues. Departing from the majority, McCarthy J in a forceful dissenting judgment, found little objection with the earlier test proposed by Barron J in the High Court. Considering the welfare of the child, the lone dissenter disagreed with the proposition of Finlay CJ that, in contested cases of guardianship or custody, the ‘paramountcy’ test ought to be the sole factor regarded by the Court.\(^{526}\)

Interpreting the test as laid down in the 1964 Act\(^{527}\) he outlines whilst the welfare of children must always be regarded as first and paramount, that this “presupposes a second consideration.”\(^{528}\) He questions what weight ought to be accorded to the father’s interests if it is established that the adoptive home is more affluent and desirable and one which could potentially provide a marginally higher standard of living.\(^{529}\) The learned judge expresses intense dissatisfaction with the Supreme Court’s position on the matter maintaining, “happiness is not a monopoly of the better off.”\(^{530}\)

\(^{523}\) Ibid. at p.447.

\(^{524}\) Ibid.

\(^{525}\) [1990] ILRM 121 at p.127.

\(^{526}\) [1990] 2 IR 437 at p.449.

\(^{527}\) s.3. of the Guardianship of Infants Act, 1964.

\(^{528}\) K. v W. [1990] 2 IR 437 at p.448.

\(^{529}\) Ibid. at p. 449.

\(^{530}\) Ibid. at p. 449.
In contrast to his colleagues ‘glossing over’ of the applicant’s natural law entitlements McCarthy J affords the constitutional issues a more careful and detailed consideration. Similar to Barron J’s earlier reference to the background behind the 1987 Act, he opines that one of the Act’s main objectives was to promote the notion of unmarried fathers as having rights. As such he found this difficult to reconcile with their outright refutation of constitutional protection; “I find it difficult to accept that a loving father, who with the mother wanted to have a child, has no natural right to the society of the child.”

McCarthy J refers to both of the Supreme Court’s earlier decisions in Nicolaou and G v An Bord Uchtála. Referring in particular to the majority judgment in Nicolaou, McCarthy J asserts that “the wording of [Walsh J’s] judgment...seems to leave it open to establishing that...the father of an illegitimate child has a natural right to either custody or society of the child.”

The learned justice goes on to illustrate a potentially extreme scenario, rendered possible by the majority’s judgment, whereby a mother, out of malevolence seeks to have her child adopted. In this instance he questions whether the father has any say in the future of his child. He states that if this is held to be legally permissible, the way is left open for “a spiteful mother (to) wilfully defeat any father’s claim by setting an adoption in motion.”

Nonetheless despite his best efforts, the dissenting judge fails to shed much light upon the natural father’s constitutional position nor does he provide future guidance in the area. Whilst apparently confident of the existence of a father’s ‘natural right’ under Article 40.3 and further of the fact that earlier judgments

531 Ibid at p. 449.
532 The State (Nicolaou) v An Bord Uchtála [1966] IR 567. It should be noted that the Supreme Court majority in reaching it’s decision neglects to mention the Nicolaou decision.
534 [1990] 2 IR 437 at p.449.
535 Ibid. at p.449.
536 Ibid at p.449.
537 Ibid. “Where the child is the fruit of a loving relationship between a man and woman who wished to have a child, then it seems to me that the father… is entitled to an order under section 6 A”, at p. 449.
had failed to absolutely deny the existence of such rights McCarthy J added that he knew not how to definitively establish such a personal right.\(^{538}\)

The Supreme Court majority referred their responses back to Barron J in the High Court. Applying the test laid out in relation to the child’s welfare\(^{539}\) the trial judge noted that he had been instructed by the superior court not to take into account material or economic differences between the two parties. He acknowledged that whilst there were differences in this respect the child would be “equally well looked after” in both homes.\(^{540}\) Ironically however, by referring to the “quality of welfare”\(^{541}\) in each situation it would appear that he implicitly prioritised the marginally higher standard of living of the adoptive parents over the father’s domestic circumstances.

Barron J ultimately refused the orders for guardianship and custody sought by the applicant. Amongst the reasons for his decision to effectively terminate the relationship between father and child, the learned trial judge cited the fact that if the adoption were completed the child would become legitimised and thus a member of a constitutionally recognised ‘family’ rather than a mere proxy ‘\textit{de facto} unit’;

The security of knowing herself to be a member of a loving and caring family would be lost. If moved, she will I am sure be a member of a loving and caring unit equivalent to a family in her eyes. Nevertheless the security will be lost...\(^{542}\)

Despite its failure to award any constitutional recognition to natural fathers, the decision in \textit{JK. v V.W.}\(^{543}\) has been viewed as by a number of commentators as a positive indicator of progress in the area, arguably due to the courts distancing

\(^{538}\) [1990] 2 IR 437 at p. 449.
\(^{539}\) \textit{Ibid.} The welfare principle was applied by the court as follows; “[r]egard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the court has first concluded that the quality of welfare which would probably be achieved... is not to an important extent better” at p.447.
\(^{540}\) \textit{K. v W.} [1990] ILRM 791 at p. 797.
\(^{541}\) \textit{Ibid.} at p. 802
\(^{542}\) \textit{Ibid.} at p. 803. The decision in \textit{J.K. v V.W.} may be contrasted with that in \textit{K.C. and A.C. v An Bord Uchtala} (1985) in this case the natural parents had subsequently married, resulting in the child being legitimatized and thereby part of a ‘constitutional family’.
\(^{543}\) [1990] 2 IR 437.
themselves from archaic reasoning in Nicolaou, towards a more subjective approach based on the facts of individual cases.\textsuperscript{544} It is submitted however that the courts’ temporary muteness regarding the older precedent is not necessarily indicative of their disapproval. Instead, it is felt that the decision in JK v VW all too similar to Nicolaou represents a missed opportunity by the Supreme Court to protect natural fathers who wish to participate in the rearing of their children or to clarify definitively their position in light of constitutional and statutory provisions.

It is further submitted that the court’s sweeping categorisation of natural fathers is unnecessarily harsh and unfortunately indicates that twenty five years after Nicolaou, the same narrow and unfair prejudice remains in respect of unmarried men and their offspring. Nuala Jackson cites the courts decision in JK as reinforcing the unreasonable presumption that all unmarried fathers are “worldly, cynical rakes [who] can never be, or want to be, a good father.”\textsuperscript{545}

The Chief Justice’s reference to the “blood link” in relation to father’s natural rights is also in many respects regrettable. None of the cases which have, to date, come before the courts have focused upon a pure biological connection on the basis of paternity. Instead, they have advanced the emotional and social bonds between fathers and children.\textsuperscript{546} The majority’s careful reference to the father’s ‘interests’ rather than ‘rights’ in respect of his child would appear to put beyond question the idea of natural fathers having any constitutional claim.\textsuperscript{547}


\textsuperscript{547} The judgment of the court was subsequently upheld in JW v D.G Unreported, High Court, 1st May 1992.
It is proposed that the approach taken by the minority judge McCarthy J is entirely more suitable than that of his Supreme Court colleagues. While the importance and validity of the welfare principle is not contested, there seems no justifiable reason as to why the wishes of a natural father to be involved in the upbringing of his child cannot even be considered by the Court.

In his analysis of the *JK. v VW.* judgment Woulfe criticises the majority’s narrow appraisal of the test under section 6(A) stating that this construction may have potential for confusion. He favours instead a wider interpretation of what constitutes the welfare of the child and sees nothing wrong with “subsuming… the fitness of the father…under its rubric.” Woulfe states that the approach taken by the Supreme Court instead upholds the common judicial tendency to treat the “meritorious father as a constitutional outcast.”

Following the Supreme Court’s dismissal of his claim, the applicant father in *JK. v VW,* instituted proceedings to the European Court of Human Rights, on the basis that his rights under the European Convention had been violated. Before discussing the European Court’s treatment of the case, it is proposed by way of background to first outline briefly how the European Convention applies under Irish law.

### 6.3 *Keegan v Ireland*

The applicant father in *JK. v VW,* instituted proceedings to the European Court of Human Rights, on the basis that his rights under Articles 6 and Article 8 of the ECHR had been violated. The Irish government contested this application to the Strasbourg court on the basis that the extra-martial relationship which had

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549 Ibid.
550 Ibid.
551 [1990] 2 IR 437.
552 [1990] 2 IR 437. The facts of the case are set out above.
553 Article 6 of the Convention provides; “in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....”
554 (1994) 18 EHRR 342.
existed between the applicant and respondent lacked sufficient levels of depth, seriousness or commitment to meet the threshold of “family life” under the terms of Article 8.

Considering the matter in *Keegan v Ireland*, the European court once again restated that the Convention’s interpretation of “family” is not based solely upon marriage;

The Court recalls that the notion of the ‘family’ in this provision is not confined solely to marriage-based relationships and may encompass other de facto ‘family’ ties.

Adopting a purposive approach, the Court indicated that the rights of unmarried fathers shall warrant the protection of Article 8 only where the parties are, or have at one point of their relationship, lived together. However, providing these circumstances are satisfied the European Court held:

A child born out of such a relationship is *ipso jure* part of that ‘family’ unit… thus there exists between the child and his parents a bond amounting to family life, even if at the time of his birth the parents are no longer cohabiting or if their relationship has then ended.

In a decision that would not appear to sit well with previous dicta of the Irish Supreme Court, the Strasbourg bench held that in circumstances where a family bond has formed, even where it has since ended, the State must act in a manner to encourage and legally safeguard the relationship, with a view to integrating the child with its family.

Laying down judgment in favour of the applicant the court held that the Irish adoption framework which legally permitted the

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555 *Ibid.* at paragraph 44.
556 The Court stated further that “where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child’s integration in his family” *Ibid.* at p 16 of judgment. For further discussion see Ward, P., *The Family outside Marriage and the European Convention on Human Rights – Keegan v Ireland*, (1994) 12 I.L.T. 168.
557 See also *Kroon v Netherlands* (1994) 9 EHRR 263.
558 *Keegan v Ireland* (1994) 18 EHRR 342 at paragraph 44.
559 The applicant was awarded £12,000 in pecuniary and non-pecuniary loss and a further £38,000 in respect of legal fees. The Court did not however, rule whether Ireland was in breach of Article 8 of the ECHR by reason of its failure to grant the applicant the right to the guardianship of his child.
permanent placement of a child without the knowledge or consent of its father represented a violation to Article 8 of the Convention:

[t]he fact that Irish law permitted the secret placement of the child for adoption without the applicant’s knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order amounted to an interference with his right to respect for family life.  

The court held further that the pre-existing relationship between the couple had, at the time of the child’s conception, the requisite ‘hallmark’ of family life for the purpose of Article 8. The reality that the relationship subsequently broke down does not by itself, alter this fact, any more than it would in the case of marital breakdown.

Following the decision, the Irish government immediately implemented legislation to statutorily effect the findings of the Strasbourg Court. The Adoption Act, 1998 now provides a process of consultation with natural fathers in the adoption process. The Act stipulates that if an unmarried father is appointed as guardian of his child, the child may not be placed for adoption without his consent. If he is not a guardian, he is given leave to apply within 21 days for guardianship and custody; the application must then be decided by the courts before the child can be placed with an adoption agency. The Act also permits an unmarried father to notify the Adoption Board in writing before or after the birth of his child of his wish to be consulted before the issuing of an adoption order.

6.4 *W.’OR. v E.H and An Bord Uchtála*

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561 Speaking shortly after the European Court’s decision Peter Ward stated that the “government must act quickly on foot of this decision [Keegan] and avoid the political, legal and social wrangles which have accompanied previous delays on this country’s part in fulfilling its international legal obligations” Ward, P., The Family outside Marriage and the European Convention on Human Rights – Keegan v Ireland, (1994) 12 I.L.T. 168 at p. 174.
562 See Chapter 2.
563 Guardianship of Infants Act, 1964 s.7(3)(b).
564 Adoption Act, 1998, s.5.
In the more recent case *W’OR v EH and An Bord Uchtála*, the Supreme Court again upheld the judgment of Finlay CJ in *JK. v VW* that the mere existence of a blood relationship between father and child is not by itself sufficient to grant an order for guardianship or custody and that a father under statute has merely a right to apply for guardianship, which must be decided by the court with regard to the child’s welfare.

The applicant and respondent in this somewhat unusual case had been involved in a long-term relationship, lasting for a total of eleven years. The couple lived together for six years as ‘man and wife’ and had considered the prospect of marriage. The union produced two children and the parties resided together as a ‘family’ during this period. When the second child was approximately 11 months old the relationship ended and the couple separated permanently, however relations between them remained amicable.

The respondent subsequently entered into a relationship with another man, culminating in their marriage. A short time later, the mother and her now husband applied to the Adoption Board seeking to adopt the two children from her former relationship. The natural father who subsequent to the separation had been exercising frequent access to his children, as well as supporting them both financially and emotionally, indicated his immediate intention to oppose the adoption. He accordingly applied to the District Court to be appointed as guardian of his children pursuant to Section 6(A) of *the Guardianship of Infants Act 1964*. His application was refused and instead he was granted an order for liberal access under Section 11 of the 1964 Act. The applicant sought leave to appeal the decision to the Circuit Family Court.

The Adoption Board, in response to the application made by the natural mother and her husband, indicated that it would not make the Adoption Order in their favour unless the access order granted in the District Court was vacated. This

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order would essentially operate to ‘wipe out’ completely the father’s existing and future legal entitlements in respect of his children.

A consultative case imploring guidance from the Supreme Court on a number of separate issues was stated by Moran J in the Circuit Family Court. These included; the character and extent of an unmarried father’s rights in the context of guardianship, the factors to be considered relevant by the court when granting orders under s.6 A of the 1964 Act and whether such matters are within the sole discretion of the trial judge. The applicant also relied on the decision in Keegan\textsuperscript{566} to argue that his relationship with the mother of his children met the European Convention’s interpretation of ‘de facto family ties’ and as such he was entitled recognition under the Irish Constitution.

Hamilton CJ expressing judgment on behalf of the majority rejected the submission that the applicant father had either “rights or concerns” which were constitutional in nature. He reaffirmed the previous judgment of the Supreme Court in JK. v VW, echoing Finlay CJ’s submission regarding the rights and duties of the unmarried father as varying in nature. He held that, in guardianship applications, the basic issue for the trial judge to consider is the welfare of the child. The chief justice stated that other ‘factors’ such as the relationship between the father and child may also be considered relevant, however these will always remain subordinate to the welfare of the child. Significantly, the precise weight to be given to such factors failed to be clarified by the court.

Counsel for the applicant father submitted that there were no circumstances involving the welfare of his children which required that he should not be appointed as their guardian. In a confusing response, the court stated whilst an unmarried father can claim no constitutional right to the guardianship of his children, that there nonetheless may be ‘considerations’ appropriate to their welfare that would “make it desirable for the child to enjoy the society, protection and guardianship of its father even though its father and mother are

\textsuperscript{566} Keegan v Ireland (1994) 18 EHRR 342.
not married.” The court concluded that this is one of the factors which may be viewed by the Court as relevant to its welfare.\textsuperscript{567}

The Supreme Court categorically rejected the applicant’s submission that the relationship which existed between himself and the mother of his children came within the meaning of ‘\textit{de facto} family ties’ under Article 8 of the European Convention on the basis that at the time of his application, neither the Convention nor the European Court were part of Irish domestic law and as such the concept of the ‘\textit{de facto}’ family was irrelevant in the Irish constitutional context.\textsuperscript{568}

Similar to the unfortunate comments of Finlay J in \textit{JK v VW}, Murphy J places particular emphasis in the present case upon the blood link between a father and his child. He commences a somewhat paradoxical judicial passage, by first acknowledging the changes in society which have taken place since the judgment of the court in \textit{Nicolaou}. He opines that relationships which would have been the cause of “grave embarrassment a generation ago are now widely accepted.”\textsuperscript{569} Despite this recognition of the changes which have taken place in Irish society, the learned justice moves quickly to endorse the conclusions of the Supreme Court in the earlier decision.

In the style of his predecessor Mr Justice Walsh, Murphy J defends the courts’ denial of natural or constitutional rights to ‘illegitimate fathers’ noting that they “may comprise a list of males extending from loving and caring fathers… to the psychopathic rapist whose only purpose was to do violence and bring humiliation to the mother.”\textsuperscript{570} Murphy J tags another insightful ‘justification’ for the refutation of the natural father’s constitutional existence, notably irrelevant to the present circumstances, by expressing concern regarding the position of parents in


\textsuperscript{568} \textit{Ibid.} See judgment of Hamilton CJ at p 270.

\textsuperscript{569} \textit{Ibid.} at p.286.

\textsuperscript{570} \textit{Ibid.} at p.286.
light of scientific advances and the potential reality of men falling within the category of what he terms ‘biological parenthood’. 571

Referring the matter back to the lower court, the Supreme Court directed that the natural father is entitled to absolutely no legal recognition by virtue of his parenthood unless this is deemed in the interests of his children’s welfare. As such, the natural father retained his position as a non-entity in terms of the Irish Constitution. The court further confirmed that an unmarried father’s right to apply for an order for guardianship under Section 6 (A) or any existing orders in respect of access would be extinguished upon the making of an order for adoption in favour of the respondents.

Again, it is the dissenting judgment in this case which arguably makes for the most compelling and insightful reading. Although ultimately concurring with the response of his colleagues to the questions of law posed by the Circuit Court, Barrington J arrives at his decision in a somewhat different manner. In a passionate and emphatic passage he approves the proposal of Finlay CJ outlined in *JK. v VW* 572 that the rights of the natural father should vary according to the individual case. However Barrington J views that the correct test to be applied under section 3 of the 1964 Act regarding the welfare of the child in guardianship and custody proceedings ought to be the same as that applied in the event of a dispute between married parents.

Barrington J felt that the time had now come for the Court to reconsider its previous decision in *Nicolaou*. In a forceful rejection of the *ratio* of the Supreme Court the learned judge stated the reasoning employed regarding the purported existence of the ‘natural’ rights of the applicant father in the case was, in his opinion, “inadequate” and “fundamentally flawed.” He was remarkably critical of the approach taken by the Court emphasising that so long as this decision stands it is impossible to “create a coherent code of rights in relation to non-

571 O’Driscoll is critical of this aspect of Murphy J’s judgment she insists that no group currently calling for the extension of rights to natural fathers is in support of either sperm donors or perpetrators of sexual assault being awarded privileges or recognition on any level. O’Driscoll, H., Rights of Unmarried Fathers [1999] 2 IJFL at p.22.
572 [1990] 2 IR 437 at p. 447.
marital children and their parents.”

Barrington J condemned the judgment of the majority in Nicolaou and in particular what he perceives as the inadequate reasoning of Walsh J.

In his bid to underline the various defects in the argument proposed by the Supreme Court, the learned justice reduced their reasoning to a ‘syllogism’ reading as follows:

(1) Many natural fathers show no interest in their offspring and the State may properly exclude them from all say in their children’s welfare.
(2) The [applicant] is a natural father.
(3) Therefore the State may properly exclude him from all say in his child’s welfare.

In relation to the unmarried father’s personal rights under Article 40.3.1” he stated that once it had been established that the father in question was a concerned and caring parent it was illogical and indeed discriminatory to justify his constitutional exclusion purely by reference to fathers who had no interest in the welfare of their children.

He opined that a natural father has a duty to support his child and should he observe this duty, he is, as far as practicable, entitled to recognition relating to the child on the basis of his personal rights under Article 40.3.

Barrington J had considerable difficulty in accepting that a modern court could regard the non-consultation of Mr. Nicolaou in the process of placing his child for adoption as “merely impolitic.” In an emphatic and passionate judicial passage, in which he paraphrases the earlier High Court judgment of Teevan J in Nicolaou he states

To say that the child has rights protected by Article 40.3 and that the mother, who has stood by the child, has rights under Article 40.3 but that the father, who has stood by the child has no rights under Article 40.3 is

574 At p. 21 of judgment.
576 Ibid.
illogical, denies the relationship of parent and child and may, upon occasion, work a cruel injustice.\textsuperscript{578}

Following the ruling of the Supreme Court majority the applicant father in this case was stripped of all guardianship, custody and access rights in respect of his children. By implication, the applicant could have no say as regards to his children’s schooling, place of residence, medical health and welfare in general. This is in spite of the fact that at all stages the applicant father, had cooperated with all parties involved and prioritised the welfare of his children as evidenced by his stated intention not to oppose the existing custodial arrangements. The majority’s refusal to acknowledge or identify any constitutional existence for the natural father under Article 40.3 essentially wiped all of his prior legal entitlements leaving him at the mercy his former partner and her husband for all future access to the children.

It is difficult to fathom that thirty years after the controversy and difficulty posed by the Supreme Court’s rationale in \textit{Nicolaou} the courts remain so incredibly loyal to the outdated rhetoric. It is submitted that the courts continued insistence on the existence of a stable relationship in which the child was conceived seems somewhat elusive and contradictory considering that several of the later cases discussed above relate to exactly that. In light of the above one must wonder under precisely what circumstances, or to use the terms of Finlay CJ. what “factors”\textsuperscript{579} exactly would render an applicant father constitutionally entitled to an order for the guardianship or custody of his children.

In the case of \textit{WOR} both natural parents had been involved in a long-term and committed relationship, indeed longer and more stable than many marriages and the applicant father had considerable influence over the care of his children providing for them on every level required of him. However, from the natural father’s point of view their relationship lacked one crucial element, a marriage certificate.

\textsuperscript{578} [1996] 2 IR 277 at p.284.
\textsuperscript{579} \textit{Ibid.} at p.447.
6.5 Recent discussion of the unmarried father

The last number of years has seen a number of notable cases coming before the Irish courts concerning the rights of unmarried fathers in the State. These decisions and the issues considered in the respective High Court and Supreme Court judgments have once again brought the precarious legal position of the unmarried father and more particularly the continued banishment of the natural father from the protection of Irish Constitution back onto the political, media and public agenda.

6.6.1 Considering “Mr G.”

The first of these recent judgments, *G.T. v K.A.O.*\(^{580}\) tagged by journalists simply as the “Mr G” case is noteworthy alone for the considerable media and political coverage which the decision attracted. From the point of view of present discussion the case is significant due to the High Court’s detailed synopsis of the position of unmarried fathers under the Irish Constitution in light of existing legislation, parental rights jurisprudence and recent European and International developments.

In this instance, the applicant and respondent had been involved in a serious relationship, when both were living in the United Kingdom. Early-on in their relationship the couple discussed the prospect of marriage and children and it was during this period, living as ‘man and wife’, that the respondent became pregnant. After giving birth to twin boys, the couple became engaged and moved as a ‘family unit’ to live in Ireland.

Difficulties arose in relations between the couple and just over three years into the relationship, without the knowledge, consent or approval of her partner, the respondent removed the children from the jurisdiction to her parents’ home in

England. At some point thereafter, the respondent made the decision not to return to the family home in Ireland.

In early 2007 in light of these developments, the applicant instituted a trio of proceedings in the District Court pursuant to the Guardianship of Infants Act 1964. He applied under Section 6 (A)\textsuperscript{581} to be appointed a guardian of his children, he further applied for joint custody of the children pursuant to Section 11(1)\textsuperscript{582} and finally under the same section he sought the direction of the court in relation to access arrangements. On the scheduled return date for the proceedings, the presiding District Court judge expressed some doubt regarding his jurisdiction to deal with the applications and accordingly adjourned the matter.

In addition to his domestic applications, the applicant petitioned the High Court in England seeking, on the basis of international child abduction legislation, orders for the return of his children.\textsuperscript{583} The English court subsequently adjourned proceedings,\textsuperscript{584} on the basis that in order to employ the international legislative provisions the applicant must first obtain a declaration that the removal and retention of the children in the United Kingdom was in breach of his custody rights under Irish domestic law.\textsuperscript{585}

The case was referred back to the Irish High Court, whereupon McKechnie J in a lengthy judgment provided an up-to-date review of the domestic jurisprudence concerning the legal and constitutional rights of unmarried fathers. In contrast to

\begin{itemize}
  \item \textsuperscript{581} See discussion of legislation in Chapter 2.
  \item \textsuperscript{582} Ibid.
  \item \textsuperscript{583} Specifically; the Hague Convention on Child Abduction and European Council Regulation No 2201/2003 (EC) 'Brussels II bis' The stated object of the Hague Convention on the Civil Aspects of Child Abduction, signed on the 25\textsuperscript{th} of October 1980, is to secure the prompt return of children wrongfully removed and retained in any contracting state and further to ensure that rights of custody and access are respected throughout the relevant jurisdictions. The Convention was incorporated at legislative level in Ireland by the Child Abduction and Enforcement of Custody Orders Act, 1991.
  \item \textsuperscript{584} Pursuant to Article 15 of the Hague Convention.
  \item \textsuperscript{585} As set out in Article 3 of the Convention and Article 2 of the Irish Regulation. Article 3 of the Convention provides as follows “The removal or retention of a child is considered to be wrongful where: (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”
\end{itemize}
much of the earlier case-law, especially the position taken by the courts in Nicolaou,586 JK v VW587 and W'OR588 there is a detectable shift in the tone of the High Court judge. Despite emphasising that he was bound by earlier Supreme Court judgments, McKechnie J evaluates the couple’s relationship, and more significantly the father’s relationship with his children, in a markedly purposive and comprehensive manner.589 The learned judge’s overall focus is upon the substance rather than the form of the relationship and it is felt that his judgment is as subtly critical of the constitutional and legislative ineptitudes in this area as the bounds of precedence would allow.

It was submitted, on evidence, that the applicant in this case was the children’s primary carer, assuming much of the responsibility for their every-day care and wellbeing.590 In a pragmatic perspective apparently cognitive of the proportionality between rights and responsibilities McKechnie J seems to indicate that if fathers assume active role in the upbringing of their children then their rights should be recognised accordingly.

During his extensive judgment McKechnie J, in language similar to that used by dissenting Justice Barrington in W'OR,591 expressed difficulty in accepting that “a caring and devoted father has only, in respect of his child, a right to apply [for custody and guardianship].”592 The learned justice refers the Constitution’s Preamble which he notes declares that our society to be governed by the principles “of prudence, justice and charity and human dignity.” He opines on this basis that at the very minimum “should there not be a means readily available so that a father, whose children have been removed without

587 [1990] 2 IR 437.
589 Due to its status as a community instrument McKechnie J employed his entitlement to refer to the ECHR in interpreting the provisions of the Brussels II regulation holding that the pre-existing family situation in this case met the ECHR definition of ‘family life’ set out in Article 8.
590 Testimony was presented from a number of independent witnesses that it was he who got the children up every morning, collected and dropped them to the crèche, brought them to the doctors when needed and liaised with local schools regarding their enrolment. Further evidence was adduced that the applicant in order to give him maximum flexibility with regard to the children’s care had made arrangements in relation to his work commitments.
592 At paragraph 51 of his judgment.
forewarning...can assert and vindicate his rights?.” Already anticipating the purported ‘justification’ for refusing such paternal rights he concludes that institution of marriage would have ‘nothing to fear’ by the promotion of rights for natural fathers.

Counsel for the respondent countered that, as the children’s sole legal custodian, she was absolutely entitled to decide upon their place of residence and in view of the fact the applicant was not an appointed guardian the case could not be determined on the basis of the child abduction legislation. It was accepted by the court that, at the time of the application the father could not be said to possess any tangible rights in respect of the custody or guardianship of his children, nonetheless the learned High Court judge overcame this hurdle by holding the retention of the children outside the jurisdiction was in breach of custody rights vested in the court, for the purposes of determining the father’s pending custody and guardianship rights in view of his earlier applications.

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At paragraph 50 of his judgment.

Both the High Court and Supreme Court’s discussion of the meaning of ‘rights of custody’ under the Hague Convention can be contrasted with the Supreme Court decision In the matter of H.I. (A Minor); H.I. v M.G. [2000] 1 IR 110 [1999] 2 ILR M 1. In very similar factual circumstances to the ‘Mr G’ decision, the plaintiff was an unmarried father who, had engaged in a seven-year relationship with an Irish citizen whilst both were living in New York. The couple subsequently had a child and lived together as a family for a period of five and a half years. The relationship broke down and both the plaintiff and the defendant issued proceedings in the Family Court in the State of New York relating to custody and visitation. The defendant mother removed the child in question to Ireland from the United States. The applicant contested the removal of his child from the jurisdiction as “wrongful” and the Irish courts were called upon to determine whether the plaintiff was entitled to invoke the Hague Convention. In the High Court Laffoy J concluded that although he had failed to establish any actual rights of custody, the applicant was by virtue of his carrying out duties of a parental character possessed of ‘inchoate’ rights of custody and had the defendant not absented herself from the jurisdiction these would almost inevitably have crystallised into established rights upon consideration by a court, with regard to the best interests of the child. On this basis she held that the plaintiff was entitled to pursue his claim under Section 12 of the Hague Convention. The Supreme Court, on appeal, disagreed with the findings of the trial judge and overturned the High Court decision. A four to one majority of the court held that ‘inchoate rights’ are not recognised in this jurisdiction.

The idea of the court ‘holding’ custody rights was also discussed by the Supreme Court in H.I. v M.G. [2000] IR 110 cited above. Keane J giving judgment for the majority focused upon the legal proceedings rather than any purported claim on behalf of the father, stating that if legal proceedings had been issued then the removal of children from the jurisdiction would constitute a breach of the court’s rights rather than the father’s entitlements as the court had seisin of the case so as to decide the issues of custody in relation to the child. Rejecting the English Court of Appeal decision in In Re B. (a Minor) (Abduction) [1997] 2 FLR 593 he stated that the term “rights of custody” did not embrace “an undefined hinterland of inchoate rights of custody not attributed in any sense by the law of the requesting state to any party asserting them of to the court itself” [1999] 2 ILRM 1 at p. 46.
It is interesting to note that there is a considerable ‘natural law’ tone evident at various intervals of McKechnie J’s extensive High Court judgment that may indicate a possible resurgence of natural rights discussion in relation to family rights.\textsuperscript{596} One passage is particularly redolent of earlier discussion of natural rights in relation to the unmarried mother and child. The learned trial judge, when criticising the ‘right to apply’ which unmarried fathers are consigned to employ, states that this discretionary legislative procedure:

\begin{quote}
…gives the impression that the court seised, is the creator of whatever rights the father might ultimately obtain...That, in my view, is not correct. Any rights which a father may have…are alive and present before any court hearing and do not merely \textit{spring} into existence on the application date. In my view, what the court does is to \textit{declare} such rights rather than even confirming them, much less creating them.\textsuperscript{597}
\end{quote}

McKechnie J’s reference to the ‘declaration’ of rights which are already existent or implicit within the Constitution is consistent and comparable to the method of reasoning used in some of the seminal case-law developing our current natural rights jurisprudence.\textsuperscript{598} He notes the anomaly created by the courts ‘declaring’ these rights,

\begin{quote}
Admittedly it is the declaration which presently renders such rights lawfully enforceable, but as a matter of fact their existence has been created prior to any court hearing...Whether such rights may also be described as ‘inchoate rights’ is a matter of choice.”\textsuperscript{599}
\end{quote}

Another interesting aspect of the High Court judges choice of phrase is his reference to the applicant’s rights ‘\textit{springing}’ into existence on the commencement of guardianship proceedings. Similar to earlier judgments, when

\textsuperscript{596} See comments made by Oran Doyle wherein he stated “McKechnie J adopts a form of natural law reasoning favoured by the courts 30 years previously” Doyle, O., The Constitutional and Broader Implications, paper delivered on 27/11/2007 at School of Law conference, \textit{The G Case: Implications for Irish Family Law}, in Trinity College Dublin.

\textsuperscript{597} [Emphasis added] at paragraph 51 of his judgment.

\textsuperscript{598} Walsh J in McGee v Attorney General [1974] 284 “natural rights, or human rights, are not created by law but...the Constitution confirms their existence and gives them protection.” at p 310.

\textsuperscript{599} at paragraph 51 of his judgment.
questioned as to the source of the non-marital mother and indeed the illegitimate child’s unenumerated rights under the Constitution McKechnie J emphasised that these rights ‘spring’ from the natural relationship between parent and child.\textsuperscript{600}

The respondent subsequently appealed the decision to the Supreme Court, wherein it was held that the trial judge had correctly and consistently interpreted the terms of the international legislation and ultimately applied the correct legal principles to the issues at hand.\textsuperscript{601} The court, however, claiming to be restrained by the requirements of “promptness” and “urgency” opted to approach the case from an entirely different and markedly more conservative basis than that employed by McKechnie in the High Court. The superior bench decided the case purely on the basis of the Hague Convention thereby conveniently avoiding a detailed consideration of the constitutional rights and domestic legislative rights of the unmarried father.

In short, what the Supreme Court in ‘Mr G’ ultimately decided was not that the applicant father had any legal or constitutional entitlements rather that his initiation of legal proceedings was sufficient to vest ‘rights of custody’ in the court to which applications had been made for the purposes of international child abduction legislation and as such rendered the removal of the children “wrongful.”

Much of the media reportage at the time of the ‘Mr G’ case cited the decision as a ‘historic’ ‘landmark boost’ implying that the court declared, the existence of custody rights for unmarried fathers,\textsuperscript{602} and buoyantly prompting the government to call a constitutional referendum. Although the decisions of the High Court

\textsuperscript{600} [Emphasis added]. When considering the location of the unmarried mother’s personal rights in respect of the guardianship and custody of her child Walsh J in G v An Bord Uchtála [1980] IR 32 stated “These fundamental rights spring from the natural relationship of the mother and the child,” at p. 67. On the question of sourcing the non-marital child’s ‘natural’ unspecified rights, Walsh J adopted a similar approach to that taken regarding the unmarried mother. He stated “the child’s natural rights spring primarily from the natural rights of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion and to follow his or her conscience” [1980] IR 32 at p. 69.

\textsuperscript{601} Specifically the terms “wrongful retention” and “wrongful removal” under the Hague Convention and Brussels Regulation.

and Supreme Court in this case are most definitely to be welcomed, it should be noted that the circumstances of the ‘Mr G’ case are rather unique and turned very specifically upon a “series of interesting semantic manoeuvres” \(^{603}\) particularly relating to the commencement of proceedings before specific dates.

In reality the \( G \) case has provided very little in the line of substantive guidance and is confined very much to its own facts. Furthermore, the Supreme Court’s categorical and consistent emphasis that it was not deciding any issue relating to custody, guardianship or access coupled with their restricted application of the relevant law without reference to many of the issues considered by McKechnie J, means that much of his insightful dicta has been rendered *obiter*.

### 6.6.2 \( \textit{W.S. v The Adoption Board \\ & Others}^{604} \)

The facts of this complex case are as follows; the applicant W.S. is the unmarried father of a child known as “S.” The child’s mother N.L. and her husband P.L. were named in proceedings respectively, as first and second notice parties.

W.S. and N.L. entered into a relationship in September 1999 when they were aged 19 years and 15 years respectively. The child at the centre of proceedings was born in January 2001 and the applicant was named as father on the child’s birth certificate. The couple and the child resided together for a period after the child’s birth, however difficulties arose and NL left the couple’s home to return to live with her mother.

The facts of the case presented to the court indicate that the relationship between W.S. and N.L. was a difficult and tempestuous one fraught with allegations of abusive behaviour. One such incident culminated in the applicant leaving for the United Kingdom following an argument between the couple which resulted in an allegation of arson being made against the applicant.

N.L. later entered into a relationship with P.L. and the couple subsequently married. Shortly after their marriage, the couple commenced the process of seeking to adopt S. An Order for Adoption was granted by the Adoption Board and the child’s birth certificate was changed to show P.L. as her father.

In July 2006, W.S. returned to Ireland and contacted the Gardaí. He was accordingly charged with arson and received a suspended sentence. W.S. applied to the District Court for access to his child pursuant to section 11 of the Guardianship of Infants Act 1964. The application was struck out by the District Court on the basis that the adoption of S by N.L. and P.L. deprived W.S. of any locus standi under the 1964 Act. W.S. subsequently issued proceedings seeking a number of orders including an order of certiorari quashing the adoption order relating to S and a declaration that the Adoption Board had acted ultra vires and in breach of his constitutional and natural rights by failing to notify him of the proposed adoption of his child.

The case came before Mr Justice O’Neill in the High Court. In a lengthy and detailed judgment the learned trial judge considered the relevant statutory provisions relating to adoption orders in this jurisdiction and the pre-existing jurisprudence relating to the rights of natural fathers under the Adoption Acts. The court also considered the approach taken by the European Court of Human Rights regarding the right of a natural father to be consulted in relation to the placement of his child for adoption.

Mr Justice O’Neill stated that he believed the issue to be determined in the present proceedings was the scope of the natural father’s right to be heard and notified under the Adoption Act 1952 and further the nature and extent of the Adoption Board’s discretion not to notify him. Noting the applicant’s assertion that prior to his leaving the jurisdiction, he was very involved in his child’s life and had daily contact with her, the court held that a “balancing exercise” must be undertaken in respect of the rights of the various parties at issue. The court

605 Under Section 16(1) and 19A(3).
further held that although the applicant could not claim “family rights” under the Article 41 and 42 of the Constitution he could nonetheless invoke his constitutional right to fair procedure and his right to natural and constitutional justice.

In view of all the facts, the court held that the Adoption Board had acted in breach of its statutory powers. The court granted the orders of certiorari sought by the applicant, thereby quashing the decision of the Adoption Board to proceed without consulting the applicant. The Court also quashed the final adoption order made by the Adoption Board in respect of S. O’Neill J remitted the case from the High Court back to the Adoption Board in order for them to hear and determine the application for adoption of S on the basis of their obligation to consult the applicant and the entitlement of the applicant to be heard by the Board accordingly.606

Although the facts of this case concern the procedural aspects of the adoption process, it is submitted that it is nonetheless of importance to the present discussion. The case demonstrates that the courts at least appear to be more willing to consider the rights of unmarried fathers even in complex and difficult factual circumstances. The judgment of Mr Justice O’Neill is to be welcomed also for its purposive approach focusing on the welfare of the child in question and attempting to balance the rights of all of the individuals concerned, even in circumstances where a constitutional family “unit” is at issue.

However it should be highlighted this case is very much confined to the technical and procedural elements of the adoption process and is therefore of limited assistance in custody, guardianship or access disputes. Furthermore it should be noted that the Adoption Board in hearing the matter may still, similar to earlier cases such as W‘OR,607 order the adoption of the child in the question in spite of any objection by the natural father.

606 Section 19A(2) of the Adoption Act 1998.
6.6.3  *McD v L & Another*

The somewhat unusual facts of the case *McD v L & Another*, arise from an application by a male sperm donor who had assisted the respondents to conceive a child. The respondents, a lesbian couple involved in a long-term relationship, met the applicant at a party and began a friendship. The couple raised the possibility of him becoming a sperm donor for them soon after their initial meeting. The child in question was conceived by artificial insemination and born in May 2006.

In advance of the child’s birth an agreement was entered into by the applicant and the respondents in respect of matters relating to the child’s upbringing. It had apparently been agreed by the respondent couple and the applicant, that the applicant would not be anonymous donor and rather would be known to the child as a “favourite uncle.” It was also agreed that the applicant father would be free to visit the child at mutually agreed and convenient times, however would not have any direct responsibility, financial or otherwise, with regard to the upbringing of the child.

Soon after the birth of the child, the respondents became concerned that the father’s contact was becoming intrusive and the relationship between the parties quickly deteriorated. In early 2007, the respondent couple decided to move with the child to Australia for one year. The couple informed the father who subsequently applied to the court for orders of guardianship, custody and access to the child.

The father further sought, *ex parte*, an interim order from the High Court restraining the couple from removing the child from the jurisdiction. Abbot J granted an order permitting the respondents to take the child for a vacation only between certain dates and on the respondents’ return ordered that they should be

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restrained from removing the child from the jurisdiction pending the hearing of the action.\textsuperscript{609}

The case came before Mr Justice Hedigan in the High Court. In a detailed judgment Hedigan J held that the mother of the child enjoys a personal constitutional right to the custody of the child and it should therefore be presumed that the mother will act in the child’s best interests.\textsuperscript{610} The court further held that the father, as a sperm donor, has no right to be appointed as guardian and that in assessing the extent of the father’s rights the court should look beyond the “blood link” between the father and the child.

Crucially the learned justice held that the lesbian couple and the child constituted a ‘de facto’ family within the meaning of Article 8 of the European Convention.\textsuperscript{611} Accordingly, the High Court dismissed the father’s application for guardianship and custody and held that no court ordered access should be granted to the father.\textsuperscript{612}

The applicant father appealed the decision to the Supreme Court. He contended that the High Court had been erroneous in its interpretation of the meaning of a ‘de facto’ family under Irish law. In his submissions to the court, the applicant further clarified that he was not seeking custody of the child however wished to be appointed as guardian solely in order to secure a right of access to the child.

The Supreme Court held that the applicant came under the status of a father under Section 6A of the Guardianship of Infants Act 1964 and therefore had the right to apply to the Court to be appointed as guardian of his child. The Court

\textsuperscript{609} The respondents subsequently appealed the order of Abbot J to the Supreme Court. The appeal was dismissed by the Supreme Court on 19 July 2007.

\textsuperscript{610} Hedigan J referring to the unmarried mother’s personal rights under the Constitution cited the judgment of O’Higgins CJ \textit{G v An Bord Uchtala} [1980] IR 32 at p.55.

\textsuperscript{611} Although Hedigan J himself noted that there is no case to date in which a lesbian couple living together enjoy the status of a ‘de facto’ family relationship he felt it possible to extend the decision of the European Court in \textit{X,Y and Z v the United Kingdom} [1997] EHRR 143 which he viewed as a “substantial movement” towards finding that a same-sex couple could constitute a family under the European Convention.

\textsuperscript{612} Hedigan J noted that in view of his finding that the respondents and the child are a ‘de facto’ family within the meaning of Article 8 of the Convention “this is a factor which must come into play in determining the central question in this case which is whether [the father] should be granted guardianship rights such as would ensure he had access to the child.”
stated that their decision whether to make an order for guardianship must be
decided by viewing the welfare of the child as the first and paramount
consideration.

Importantly, the Supreme Court held that the High Court had not given sufficient
weight to the position of the natural father and his rights as provided for in
section 6A of the 1964 Act. The court noted that the father had formed a bond
with his child when she was born and noted that the High Court had given
insufficient weight to the benefit to a child in knowing his or her father.613
Although finding that the donor father should not be appointed as guardian of the
child the court nonetheless held on the basis of the legislative welfare principle
that he should be granted access rights.614

In relation to the High Court’s application of the European Convention, the Chief
Justice noted that the ECHR was not directly applicable under Irish law and
therefore the Convention could not be directly interpreted by the Irish Courts.
On this basis, the majority of the Supreme Court bench forcefully rejected the
notion put forward by the trial judge that ‘de facto’ families had any legal status
under Irish law.615 The court noted that the primary function of interpreting the
convention lay with the Strasbourg court and domestic courts have no role in this
regard.

The McD decision is of importance for a number of reasons. First the case
provides further evidence of the need to provide constitutional and legal
guidance for non-traditional family forms living in this State. Secondly the
combined judgments of the Supreme Court provide affirmation that the judicial
position in respect of the family has not changed in recent years and the only
family recognised under the Constitution remains that based on heterosexual
marriage.616

613 See, in particular, the judgment of Denham J [2009] IEHC 81 at par. 81.
614 In assessing the appropriate test to be applied under Section 6A of the Guardianship of Infants
615 The Court referred to the judgment of Henchy J in The State (Nicolaou) v An Bord Uchtala[1966] IR 567 with regard to the interpretation of family under the Constitution.
Nonetheless, the purposive approach of the Supreme Court considering all of the various factors relevant to the child’s welfare including the existence of the biological link between father and child and the benefit to the child in knowing her father is to be commended. Similarly the fact that the Supreme Court considered separately the issues of custody, guardianship and access is also to be welcomed as a positive development in the context of family rights.
6.6 Conclusions

The “continued constitutional ostracism”\(^{617}\) of natural fathers has, in the years since the Irish Constitution’s enactment, been the subject of much judicial, academic and public debate. Reading the various anachronistic references in some of the seminal case law set out throughout this chapter, which vary from describing the unmarried father as “psychopathic rapist”\(^{618}\) to a “callous seducer” or party to an act of “casual commerce”,\(^{619}\) one would be forgiven in assuming that this out-dated juridical reasoning has long been consigned to the annals of legal history.

Unfortunately this has not been the case and in relation to the rights of the unmarried father, the courts continue to adopt an abnormally harsh and rigid approach. Although recent case law such as the \(G\)\(^{620}\) and \(W.S.\)\(^{621}\) and \(McD\)\(^{622}\) decisions indicate a new-found willingness on behalf of the courts to consider the position of the unmarried father in a more positive and purposive fashion, these cases all come with the important caveat that they are very much confined to their own facts and their use as precedents in terms of guardianship, custody and access disputes is as yet, unclear.

In spite of the judiciary’s increasingly purposive approach together with developments at a European level, practically little or nothing has changed for unmarried fathers in the Irish State. The courts position essentially remains unchanged and they continue to refuse to extend to unmarried fathers, as they have done with unmarried mothers and non-marital children, the constitutional protection of the unenumerated rights doctrine, regardless of the nature of their relationship with their child’s mother. As it stands, men who have fathered children outside of marriage in the Irish State continue to face extensive legal

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\(^{618}\) See comments made by Murphy J in his judgment in \(W’OR v EH and An Bord Uchtála\) [1996] 2 IR 248 at p.286.

\(^{619}\) See the judgment of Walsh J in \(The State (Nicolaou) v An Bord Uchtála\) [1966] IR 567 at p.641.


\(^{621}\) \(W.S. v the Adoption Board & Others\) [2009] IEHC 429.

and constitutional barriers in respect of their parental guardianship and custody rights.
Chapter VII
The future of natural law as a basis for articulating constitutional rights for individual members of the Unmarried Family

Thomas Jefferson is quoted as once saying: a “Constitution should be amended by each generation in order to ensure that the dead past would not constrain the living present.”

Despite the longevity of its existence, it has been repeatedly emphasised that Bunreacht na hÉireann is to be regarded as a “living document” capable of absorbing and adapting to change. As discussed in previous chapters, natural law has provided the Irish judiciary with a valuable means of ‘breathing life’ onto the constitutional text and over the past seventy years the courts have employed this interpretative tool in order to develop a veritable “cornucopia” of constitutional rights.

Natural law has in particular, demonstrated its merit as a means of assisting the judiciary to overcome the restricted ambit of the Irish Constitution’s ‘family’ articles. As discussed in chapters 4 and 5, the constitutional identity of both

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624 See judgment of McCarthy J (dissenting) in Norris v Attorney General [1984] IR 36. “..The Constitution is a living document, its life depends not merely upon itself but upon the people from whom it came and to whom it gives varying rights and duties.” at p. 96. See also The State (Healy) v Donoghue [1976] IR 325 at p.347.


626 The Irish judiciary have deemed a wide spectrum of claims worthy of constitutional protection under Article 40.3.1. Amongst this catalogue are; the right to individual privacy, see Kennedy and Arnold v Ireland [1987] IR 587; [1988] ILMR 472, the right to communicate see Attorney General v Paperlink Ltd. [1984] ILMR 373 the right to die a natural death see Re a Ward of Court (No. 2) [1996] 2 IR 79 and the right to marry see for example; Foy v An t-Ard Chláraitheoir & Others [2007] IEHC 470 and Zappone and Gilligan v The Revenue Commissioners, (HC), Dunne J, 14 December 2006. Some of the other unenumerated rights recognised by the courts include; the right not to be tortured; The State (C) v Frawley [1976] IR 365, the right to travel outside the State; The State (M) v Attorney General [1979] IR 73, the right to procreate; Murray v. Ireland [1985] ILMR 533 and the right to fair procedure Re Haughey [1971] IR 217.

627 Referring to the potency of natural law as a vehicle for constitutional change, Walsh J speaking in the Supreme Court, stated “Judges must...interpret these [natural] rights in
unmarried mothers and non-marital children has, in this jurisdiction, been shaped almost exclusively by reference to the doctrine of unenumerated rights under Article 40.3.1°. Unfortunately however, employment of natural law as a basis for fundamental rights has over time, become somewhat stagnated and entangled with the result that its development in this jurisdiction has diminished considerably in recent years.

With this in mind, it is now proposed to briefly examine the reliability of natural law as a theoretical foundation for constitutional rights. It is hoped to evaluate whether judicial declaration of unspecified constitutional rights under Article 40.3.1° has done all it can in terms of family rights under the Irish Constitution or whether as intimated in the recent High Court judgment of McKechnie J in the Mr G case Article 40 may in the future, prove successful in closing the gap between the ‘constitutional family’ and those who continue to remain outside its ambit, in particular the unmarried father.

7.1 Criticisms of natural law

As illustrated by the numerous inconsistencies seen throughout case law discussion in Chapters 4, 5 and 6, the use of natural law as a basis for declaring constitutional rights in this jurisdiction has not been without its problems. The doctrine’s reliance upon elusive and undefined concepts has unsurprisingly posed a myriad of difficulties, the most obvious being inconsistency, ambiguity and confusion. Particular issues have arisen in the Irish context as a result of the interpretative equation of natural law almost exclusively with a Christian

accordance with the ideas of prudence, justice and charity...no interpretation of the Constitution is intended to be final for all time. It is given in light of the prevailing ideas and concepts.” McGee v Attorney General [1974] IR 284 at p. 319.

628 See comments made by Oran Doyle wherein he stated “McKechnie J adopts a form of natural law reasoning favoured by the courts 30 years previously” Doyle, O., The Constitutional and Broader Implications, paper delivered on 27/11/2007 at School of Law conference, The G Case: Implications for Irish Family Law, in Trinity College Dublin.

theocratic version of the doctrine which has in turn provoked controversy and contention.

This section shall look at some of the many criticisms advanced in respect of natural law and on this basis shall consider the doctrine’s potential in terms of future development of constitutional rights for the unmarried family in this jurisdiction.

### 7.1.1 ‘The many voices of nature’

According to Garret Barden “to claim that something is naturally just is not to invite dialogue but speciously to clinch an argument that has never been made.”630 This statement points to one of the most notorious and frequent criticisms advanced in respect of natural law namely, the difficulty in defining the “amorphous concept”631 with the result there is little agreement among even jurists as to the specific application of natural law to complex legal or moral issues.

This lack of concurrence is similarly reflected in the writings of academics and philosophers. Lauren Berlant, for example, views natural law as a ‘birthright’, which affects each citizen’s “subjective experience of political rights, civil life, private life [and] the life of the body itself.”632 In sharp contrast to this perspective, the English utilitarian Jeremy Bentham refers to natural law, in a much-quoted passage, as “nonsense on stilts”,633 whilst the American jurist

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631 Jeffers J., *Dead or Alive? The Fate of Natural Law in Irish Constitutional Jurisprudence*, (2003), Galway Student Law Review.
Oliver Wendall Holmes describes the concept as: a “brooding omnipresence in the sky.”

The extensive problems involved in assessing the character and ambit of natural law together with the many descriptions as to its perceived status, arguably serve to demonstrate the unreliability of the theory as a basis for the declaration of family rights or indeed constitutional rights of any nature. For example, one of the doctrines main exponents in this jurisdiction, the Honourable Justice Brian Walsh himself alluded to the vague and uncertain nature of natural rights: what exactly natural law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not fully agreed. While the Constitution speaks of certain rights as being imprescriptible or being antecedent and superior to all positive law, it does not specify them.

It is this lack of ‘agreement’, which has arguably proven the most problematic aspect of applying natural law and unenumerated rights in the Irish context. Whilst judges in this jurisdiction speak at liberty about ‘natural law’ as a source of constitutional rights they fail to define the concept or, more importantly, specify its boundaries. Various judgments, discussed earlier as advancing the theory under the umbrella of Article 40.3.1˚ appear to indicate that the term has been given an absolute and unequivocal acceptance by the judiciary who, in turn, treat it as a readily identifiable standard.

Closer reading of the judicial development of unwritten constitutional rights under Article 40.3.1˚, particularly in relation to family rights would however indicate that quite the reverse is true with the case-law providing ample evidence

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636 Criticising the Supreme Court’s application of natural law in Nicolaou, Professor Kelly states “Natural law is mentioned as though it were a well-established set of concrete norms...instead of an aspect of the human conscience trying to do right by reference to God-implanted reason.” Kelly, J.M., Fundamental Rights in the Irish Law and Constitution, 2nd ed., (1967), Butterworths Allen Figgis & Co. Ltd., at p 244.

7.2 \textbf{Classifying natural rights...‘constitutional’ or ‘constitutional in nature’?}

The Constitution cannot be both subject to the natural law and the legal justification for that subjection. One or other the natural law or the Constitution must finally have priority over the other as the ultimate source of legal validity in any potential area of conflict.\footnote{Duncan, Can Natural Law be used in Constitutional interpretation? Doctrine and life, vol. 45, (1995), p125 as quoted in Whyte, Natural Law and the Constitution (1996), ILT 8 at pg. 9.}

William Duncan herein raises one of the most pertinent questions presented by the analysis of Irish natural law jurisprudence and one which repeatedly arises in case-law relating to the development of family rights, namely; what position is natural law to have in the greater constitutional order and more precisely how exactly are unenumerated rights situated in this constitutional hierarchy \textit{vis-à-vis} written fundamental rights?

This question can be approached from a multiplicity of angles, all vastly different from each other. The first line of reasoning emphasises the superiority of the
‘Divine’ natural law as the “ultimate standard of fitness of all positive law.”

This idea is traceable to the teachings of St Thomas Aquinas, earlier noted for his immense ideological influence upon the drafting of the Irish Constitution. Focusing particularly upon the notions of reason and righteousness, Aquinas is credited with the maxim *lex iniusta non est lex*, summarised as follows:

Human law has the quality of law only in so far as it proceeds according to right reason; and in this respect it is clear that it derives from the eternal law. In so far as it deviates from reason it is called an unjust law, and has the quality not of law but of violence.

It is on the basis of this theory that a number of jurists have put forward arguments that should the positive law and ‘Divine law’ conflict *i.e.* where a law is deemed “unjust”, then it is the man-made law which is deemed unenforceable and “has not the character of the law.”

In one of the earliest affirmations of natural law in the newly independent Irish State, the earlier cited dissenting judgment of Kennedy CJ in *The State (Ryan) v Lennon* there appears evidence of an acceptance of Aquinas’ maxim. Therein the Chief Justice stated defiantly that should any Act of the Oireachtas offend the natural law “such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative.” In relation to the ‘primacy’ of natural law principles under the Irish Constitution,

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642 Henchy S., in *Precedent in the Irish Supreme Court*, (1962) 35 MLR 544 at 550 as cited in Kelly, J.M., *A Short History of Western Legal Theory*, (1992), Oxford University Press at p 424. Henchy added “This idea is no strange addition to the common law. It is as old as coke.”


644 *Ibid.* This idea of the ‘invalidity’ laws incompatible with the natural order can be further seen in the wording of Article 40.3.2 which sets out the States constitutional duty to ‘vindicate’ the personal rights of its citizens. Accordingly should the courts deem an Act of the Oireachtas as failing to respect these personal rights, even where these rights are unspecifed, impugned legislation may be declared invalid and void. See for example statements made by Kenny J in *Ryan v The Attorney General* [1965] IR 294.

645 Several commentators believe that the idea of the supremacy of natural law is misleading and has lead to a miscomprehension of natural law theory and philosophy. Raymond Wacks is of the view that the intended contention of Aquinas was that laws which conflict with the requirements of natural law, lose their power to bind morally rather than them being rendered legally unenforceable. Wacks, R., *Understanding Jurisprudence*, (2005), Oxford University Press.
Desmond Clarke notes that natural rights “seem to be granted a constitutional status in Irish law which is superior even to the legal instrument which is the basis of their constitutional validity.”

On the basis of the above, one would be forgiven for presuming that natural rights, in the context of the overall constitutional hierarchy, would be situated in a somewhat elevated position. However as has been seen from discussion of the jurisprudence relating to the development of family rights in previous chapters, this clearly is not the case.

Reviewing the early development of unenumerated rights under Article 40.3.1 in particular under Ryan and McGee it would appear that the courts were initially prepared to accept the supremacy of natural law in order to uphold the rights of citizens, even where such rights conflicted with written legislative instruments. This acceptance was however, short-lived, and if one is to even look at the rights of the unmarried mother as set out in Chapter 5, there is a notable divergence in the various judicial dicta developing these ‘natural rights’ wherein the mother’s rights are variously referred to as ‘constitutional’, ‘constitutional in nature’ and on ‘a constitutional footing’. Similar confusion is evident in respect of judicial treatment of the non-marital child’s rights in Nicolaou wherein the bench alternated between describing the non-marital child’s rights as ‘natural’ and ‘legal’.

In the aforementioned TD v Minister for Education and Science Murphy J is notably critical of previous declarations made by the Supreme Court regarding

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Stephen Hall reaches a similar conclusion stating any positive law which is deemed ‘incompatible’ with the natural law fails to impose an unqualified moral obligation, however is not otherwise deprived of its juridical status. Hall, S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, (2001) 12 (269) European Journal of International at p. 3.


the designation of the ‘natural’ rights of children, particularly those made in G v An Bord Uchtála. The learned justice criticises the manner in which subsequent judgments have latched onto certain aspects of what he terms “far-reaching observations” made in the G case, in the context of natural rights, and employed them as an entire basis for subsequent judicial decisions. Murphy J concludes that whilst he agrees with the court describing such rights as “natural” he is doubtful as to whether it is accurate to declare them as “constitutional.”

7.3 ‘Discovering’ natural rights and the Separation of Powers

Writing extra-judicially, Justice Kenny once referred to the power of the courts to recognise unwritten constitutional rights as follows:

To most people this would seem to be a function of the legislature only, and, in many ways, this exciting feature is the most unusual aspect of the Constitution. Judges have become legislators and have the advantage that they do not have to face an opposition.

This endorsement of the courts role in relation to natural rights, made by the eminent pioneer of unspecified constitutional rights in the Irish jurisdiction, points to another criticism which is frequently levelled in respect of the unspecified rights doctrine, namely that the declaration of constitutional rights under Article 40.3.1” oversteps the boundary of judicial function.

In his much-quoted dictum, the English historian Lord Acton commented that: “Power tends to corrupt and absolute power corrupts absolutely.” At several

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655 He refers in particular to the judgment of Geoghegan J in FN v Minister for Education [1995] 1 IR 409.
intervals, Bunreacht na hÉireann clearly acknowledges this hypothesis and accordingly the constitutional text provides for three separate arms of government; legislative, executive and judicial, each of which is to be individually autonomous, and their respective functions are to be carried out independently.\textsuperscript{658}

Article 15.2.1\*, in keeping with the Constitution’s tripartite division of governmental power, provides clearly and unmistakeably that the Oireachtas is alone to be vested with “the sole and exclusive power of making laws for the State.”\textsuperscript{659} In light of this provision the proclamation of unenumerated constitutional rights by an unelected, unaccountable judiciary outside of those listed in Articles 40-45 of the 1937 text would appear neither legally, nor politically feasible.\textsuperscript{660}

One could similarly argue that in contrast to the ambiguity surrounding Article 40.3.1\*, the direction given by the constitutional drafters in Article 15.2.1\* is abundantly clear and succinct.\textsuperscript{661} Accordingly it is no surprise that the power of judges to ‘make’ constitutional rights in accordance with the unenumerated rights

\begin{itemize}
\item \textsuperscript{658} According to Article 6 of the 1937 Constitution, these three powers; “legislative, executive and judicial derive under God from the people.”
\item \textsuperscript{659} In \textit{Sinnott v Minister for Education}, Hardiman J described the significance of the Separation of Powers doctrine as follows; “The constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution. It 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” [2001] 2 IR 545. See also T.D. \textit{v Minister for Education and Science O’Donoghue v Minister for Health} [1996] 2 IR 20, DB \textit{v Minister for Justice} [1999] 1 IR 29; [1999] 1 ILRM 93.
\item \textsuperscript{660} Kenny J in \textit{Ryan v The Attorney General} [1965] IR 294 apparently aware of the potential scepticism surrounding the power of the High Court and Supreme Court to ascertain and declare constitutional rights for citizens stated as follows;“In modern times, this would seem to be a function of the legislative rather than of the judicial power but it was done in the formative period of the Common Law and there is no reason why they should not do it now” at p. 313.
\item \textsuperscript{661} It has been argued that were the courts to forcefully adopt the natural law approach this would effectively ‘sidestep’ the will of the majority and result in a “usurpation of the democratic process by constitutional interpretation.” See Murphy, T. and P Twomey, (eds.) \textit{Ireland’s Evolving Constitution, 1937-97: Collected Essays}, (1998) Hart Publishing at p. 2. See also Walsh, I., \textit{Between Scylla and Charybdis. The Supreme Court and the Regulation of Information Bill}, (1995), Cork Online Law Review p41. John Hart Ely once stated the following in respect of natural law; “The advantage...is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that.” Ely Hart, J., \textit{Democracy and Distrust: A Theory of Judicial Review}, (1980), Harvard University Press p 50 In a similar but somewhat cruder observation the Danish jurist, Alf Ross, likens natural law to “a harlot...at the disposal of everyone.” “On Law and Justice”, 1958 London p261. As quoted in Wacks, R., \textit{Understanding Jurisprudence}, (2005), Oxford University Press p. 16.
\end{itemize}
doctrine has provoked considerable debate as to whether in adopting such a role, the judiciary are overstepping the boundaries of their constitutional mandate and assuming a more legislative function, neither anticipated nor intended by the Constitution’s drafters.\footnote{John Hart Ely notes that in spite of the employment of objective, non-personal terminology, what judges are most likely to be ‘discovering’ in the context of fundamental rights “whether or not he is fully aware of it, are his own values.” Ely Hart, J., Democracy and Distrust: A Theory of Judicial Review, (1980), Harvard University Press at p. 44.}

7.4 The basis of natural law… theocratic or secular?

The English philosopher, Thomas Hobbes referring to the “seed of religion” is critical of those who attempt to “nourish, dress and form it into laws.”\footnote{Hobbes, T., Leviathan, E Curley (ed), (1994), Indianapolis and Cambridge: Hackett, p 63 as cited in Pryor, J., Constitutions: Writing Nations, Reading Difference, (2008), Birbeck Law Press, at p. 27.} In their condemnation of natural law, a number of commentators have similarly used the religious undertones associated with the theory in order to downplay its overall significance and worth. One academic goes further to describe the doctrine as “an ancient and exploded fallacy kept alive only as the theological dogmatics of an authoritarian church was rescued from a whole complex of misunderstandings and misrepresentations.”\footnote{MacCormick N., Natural Law and the Separation of Law and Morals, as featured in George, R.P., Natural Law Theory: Contemporary Essays, (1992) Oxford University Press at p. 105.}

The Honourable Justice Brian Walsh, noted at various intervals of the present text for his contribution to the Irish development of unenumerated rights defers to this argument noting that the development of personal rights under Article 40.3.1 is often criticised “because it is alleged that they smack of a uniquely Catholic concept of fundamental rights being based upon natural law.”\footnote{The Honourable Justice Brian Walsh in the foreword to Casey, J., Constitutional Law in Ireland, (1987), Roundhall Sweet & Maxwell.}

The immense influence of the Catholic Church on both the drafting and subsequent interpretation of the 1937 Constitution has been noted at various intervals of this thesis. As has also been discussed in Chapter 3, the Irish ‘version’ of natural law has been moulded in close proximity to Christian
influence and authority. Judges continue to refer to the religious significance of the doctrine in this jurisdiction leaving no doubt that “the Constitution of Ireland has opted for the theological origin of natural law.” Whilst the affinity between the Irish interpretation of natural law and organised religion is unsurprising in itself, given the dominant role of the Catholic Church upon the drafting of the Constitution, the virtual equation of ‘natural’ law with ‘Christian’ law has posed significant problems in its application and development as an independent theoretical framework.

Significantly, a number of recent judgments have offered an alternative basis for the grounding of natural law theory, employing the use of ‘reason’ rather than God. This approach was adopted by Walsh J in reference to the idea of ‘justice’ in McGee and similarly by the dissenting McCarthy J in Norris whereupon he referred to ‘human personality’ as an appropriate basis for the implication of natural rights. However as demonstrated in McGee, even where the judiciary explicitly state that they wish to move away from the “Christian and Democratic” basis of natural law, as seen in previous chapters the various judgments handed down by the Supreme Court in respect of unenumerated rights are nonetheless littered with references to ‘God’ and religion.

666 In McGee v Attorney General [1974] IR 284 the Court stated, “In view of the acknowledgement of Christianity in the preamble and in view of the reference to God in Article 6 of the constitution, it must be accepted that the constitution intended the natural human rights I have mentioned as [a theological concept] rather than simply an acknowledgement of the ethical content of law in its ideal of justice.” In a recent High Court judgment McCracken J referred to the ‘theological’ nature of natural law in the Irish context, stating “Article 41.1…is indeed probably the provision in the Constitution which comes nearest to accepting that there is a natural law in the theological sense.” North Western Health Board v HW and CW [2001] 3 IR 622 at p. 633.

667 See the dissenting judgment of Murphy J in DPP v Christine Best [2000] 2 ILRM 1. Referencing both the Preamble and the Family Articles he stated; “Whilst the language of the Constitution evokes the rhetoric of the political reformers of the 18th century and the ‘fundamental rights’ provisions, in particular, repeat many of the phrases contained in the ‘Declaration of the Rights of Man’ passed by the National Assembly of France…the political philosophy of our Constitution owes infinitely more to Thomas Aquinas than Thomas Paine” at p 36.

7.5 The end of the affair...? The recent decline of natural law

Almost thirty years after uncharted personal rights were accepted into the constitutional arena, there occurred somewhat of a shift in the Irish natural law debate. This movement commenced in the early 1990s, less than ten years after Norris,670 the case which was previously cited as marking both the high and low point of Irish natural law jurisprudence, with the controversial ‘right to life’ case Attorney General v X.671

One of the most notable features of the majority judgments in the X case is the ‘secular’ style of reasoning employed by the bench, which is rendered all the more noteworthy given the huge catalogue of religious dialogue on the issue. The Supreme Court’s discussion of the competing constitutional rights of the mother and child in the X case represented a break from the previous tradition inherent in Irish natural law jurisprudence in that rather than engaging in moral debate the judges determined the issues by relying purely upon a discussion of the rights of the individuals involved.672 According to Lewis the decision “seemed to indicate the end of the Irish experiment with natural law jurisprudence.”673

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670 [1984] IR 361. See chapter 3 for further discussion.
671 [1992] 1 IR 1; [1992] ILRM 401; [1992] CML. The Attorney General in the X case sought a number of injunctive orders restraining the alleged victim of a violent sexual assault, a fourteen year old girl, from leaving the jurisdiction for the purposes of procuring an abortion in the United Kingdom. The injunctions were sought on the basis of the unborn child’s constitutional right to life guaranteed under Article 40.3.3. Prior to the ‘X case’ there was considerable concern that the doctrine of unenumerated rights under Article 40.3.1 would be used as a basis for recognising, as a corollary of her unspecified right to privacy, a woman’s right to abortion as had unfolded in the United States in Roe v Wade (1973) 410 US 113. In order to abate the growing public concern the Irish government proposed the Eighth Amendment to the Constitution which was ratified by referendum in 1983. The amendment inserted a new Article 40.3.3 into the Constitution which provides: “The State acknowledges the right to life of the unborn child 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.”
Shortly after, in *re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995*, the Supreme Court was again called upon to consider the position of natural rights under the Irish Constitution. Speaking for the court Hamilton CJ categorically held that:

the courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State, to which all organs of the State were subject, and at no stage recognised the provisions of natural law as superior to the Constitution.675

Reviewing earlier case law involved in the development of constitutional rights under Article 40.3.1˚, the bench propose a two-tiered approach in respect of future unenumerated rights declarations. They state that before affirming the existence of natural rights the court must first be satisfied:

that such personal right [is] one which could be reasonably implied from and...guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity.676

On the basis of the foregoing dicta, it would appear that pronouncement of natural rights under Article 40.3.1˚ may be made by the courts only when the asserted right can be objectively justified by reference to an explicit provision of the Constitution’s written text and, further, if the purported claim can be said to accord with the spirit and letter of the Constitution’s Preamble.

The apparent ‘pulling back’ of the judiciary from natural law theory and their growing reluctance to invoke the doctrine of unenumerated rights is further exemplified in a number of judgments delivered towards the end of the 1990s. One such case has already been discussed in chapter 6 in the context of the unmarried father’s right to the care and guardianship of his children; *W. ’O’R. v E.H. and An Bord Uchtála*.677

676 Ibid.
The applicant father in *W.*OR claimed that he was possessed of ‘natural’ constitutional rights in respect of his children. In dismissing the unmarried father’s assertion Murphy J took a similar approach to that adopted a year earlier by the Supreme Court, stating:

> Natural rights...may be invoked only insofar as they are expressly or implicitly recognised by the Constitution; comprised in the Common Law...or expressly conferred by an Act of the Oireachtas or other positive human law made under or taken over by, and not inconsistent with, the Constitution.

Less than two years later, former Chief Justice Ronan Keane, then a judge in the High Court, was particularly vocal in advocating caution in respect of natural rights. In [*I O’T v B*](#), Keane J warned against over-employment of the doctrine in its current form and called for ‘restraint’ in respect of declaring the existence of unenumerated rights;

> Save where such an unenumerated right has been unequivocally established by precedent, as 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.  

Similarly in [*T.D. v Minister for Education and Science*](#), a case which was already discussed in Chapter 4 in the context of children’s rights, Keane CJ, speaking in the minority again availed of the opportunity to voice his concern regarding the development of natural rights under Article 40.3.1. Drawing attention to the fact that the lasting implications of the unspecified personal rights doctrine have yet to be fully explored by the Irish courts, Keane CJ urged control to be exercised in the declaration of rights under Article 40. He identifies a number of

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678 *In re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] ILRM 81.
680 [1998] 2 IR 321, see p 16 of Keane CJ’s judgment.
682 [2001] IR 259 at p. 282
683 Speaking extra-judicially, Keane CJ cites the persisting “unease” in relation to the underlying basis of Kenny J’s decision in *Ryan* as the cause behind the recession in the “tide of judicial lawmaking.” See Keane, R., ‘Judges as Lawmakers – The Irish Experience’, Paper delivered at National University of Ireland Galway Law Society, October 1st 2003.
outstanding issues which he believed must be definitively resolved if the doctrine is to develop further in future.

Two questions, in particular, merit further consideration. The first is…the criteria by which the unenumerated rights are to be identified...Secondly, there was no discussion in the judgment of this court as to whether the duty of declaring the unenumerated rights, assuming them to exist, should be the function of the courts rather than the Oireachtas. 684

The learned Chief Justice refers to the landmark judgment of Kenny J in Ryan 685 and notably the focus therein upon “the Christian and democratic nature of the State” as a basis for declaring unspecified rights under the Constitution. 686 On this basis Keane CJ expresses uncertainty as to the reliability of the reasoning used to justify the incorporation of unspecified constitutional rights in the case;

Whether the formulation adopted by Kenny J is an altogether satisfactory guide to the identification of such rights is at least debatable. 687

684 [2001] IR 259. Murphy J similarly expressed the view during his judgment that the legislature was the appropriate body to regulate the extent and operation of such rights.
686 Keane CJ’s second ‘question’ draws attention to the fact that the Attorney General in the Supreme Court appeal of Ryan conceded the existence of the unenumerated constitutional right to bodily integrity. Therefore there was no explicit endorsement by the Supreme Court in relation to this aspect of the trial judge’s findings.
7.6 The future of ‘Article 40 rights’

The development of an unwritten charter of fundamental constitutional rights in this jurisdiction was indeed a brave and inventive move by the judiciary and is arguably “one of the most innovative features of our constitutional law.”688 As seen throughout this thesis in the context of ‘family’ rights, natural law has in many respects proven a viable and worthy means of mitigating against the harshness and rigidity of the Constitution. As noted by Brian Farrell “The courts have often been forced to intervene to fill a vacuum left yawning by the failure of those constitutionally responsible for law-making to fulfil their role.”689

However as set out above, recent case-law would appear to indicate a marked reluctance of the current Supreme Court bench to further develop the doctrine of unenumerated rights preferring instead to stick to the black letter of the text. It is submitted that unless and until a coherent and workable framework for the foundation and application of personal rights under Article 40.3.1” is set out conclusively, the modern judicial trend will continue to dominate and the doctrine will not provide a means of rectifying the constitutional imbalance in respect of the unmarried family. As stated by Barrington J in his dissenting judgment in W’OR v EH and An Bord Uchtála,690 if natural rights are to be “anything more than a pious platitude”691 then it must be established “in respect of whom do these rights exist and from where are they derived.”692

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690 [1996] 2 IR 248
691 Barrington J referred to the dicta of Gavan Duffy P in Re M whereupon the court spoke of the child’s ‘natural’ constitutional rights. [1946] IR 334.
Conclusions
The ‘unconstitutional’ family...what next?

Articles 40-44 of the Irish Constitution emphasise and articulate the importance of ‘rights’. As set out in Chapter 1, this cluster of articles was at the time of the Constitution’s enactment, intended to both protect and empower the people of the State. Paradoxically however, Bunreacht na hÉireann’s prioritisation of the marriage-based family has, despite judicial dicta to the contrary, invariably resulted in the creation of a hierarchy of constitutional rights which has since 1937 served to both paralyse and polarise a significant number of Irish citizens.

The long-awaited removal of the status of illegitimacy from the Irish Statute book as discussed in Chapter 2, should have copper-fastened the movement to completely equate the position of all children in the State whether born to married or unmarried parents. Closer examination of the jurisprudence as set out in Chapters 4, 5 and 6 however indicates that although the courts freely claim all children of the State to be born possessed of the same fundamental constitutional rights, there exists to this day, a considerable disparity in the judicial treatment of children based exclusively upon the status of their parents’ relationship. 693

Similarly, the incorporation of the European Convention on Human Rights in 2003, with its expansive and flexible approach to ‘family life’ as discussed in Chapter 1, should have likewise represented a major breakthrough in terms of family rights and the movement to equalise the rights of unmarried parents and non-marital children in Ireland. 694 However, the Convention’s ‘sub constitutional’ status coupled with various weaknesses inherent in its application and enforceability mean that unless and until its status under the Constitution is

694 See statements made by Michael McDowell in Coulter, C. “McDowell says fathers’ rights can be sought under EU law”, The Irish Times, 25/02/2008 wherein former the Attorney General and Tánaiste queried as to whether decisions regarding the rights of the unmarried father under Irish law such as The State (Nicolaou) v An Bord Uchtala [1966] IR 567 could be regarded as “good constitutional law” given the European Convention and other European developments.
amended, the potential of the Convention to act as a catalyst for change in this area is severely limited.\textsuperscript{695}

The extensive developments which have taken place in the context of family rights in this jurisdiction as a result of the courts creative use of Article 40.3.1\textdegree, particularly with regard to unmarried mothers and children born to unmarried parents, have formed a sizeable part of the present thesis. Although the continued reliance by the courts on judgments such as Nicolaou\textsuperscript{696} and G. v An Bord Uchtala\textsuperscript{697} indicate that natural law remains a significant consideration in the interpretation of constitutional family rights, the numerous criticisms of the doctrine, as set out in Chapter 7, together with the Supreme Court’s increasing lack of enthusiasm in respect of ‘Article 40’ rights, nonetheless indicate that basing constitutional family rights in natural law theory is both unreliable and unsatisfactory. It must be concluded therefore that natural law has brought the ‘non-traditional’ family as far as it can in terms of its constitutional status and instead a more stable means of equalising the balance between the ‘constitutional family’ and those outside its ambit must now be sought.\textsuperscript{698}

It is submitted that State recognition and support of alternative family forms is not such a radical proposal and indeed is one which has been acknowledged by the State on a number of occasions over recent years, as evidenced for example, by the long awaited introduction of divorce legislation in this jurisdiction.\textsuperscript{699}

\textsuperscript{695} Although the Irish Courts have called upon the ECHR to aid in their interpretation of constitutional issues the judiciary have nonetheless distinguished judgments handed down in other jurisdictions in the context of parental rights due to their lacking the “specific social and cultural context which has led Ireland to protect the rights of the family by express constitutional provision.” Per Hardiman J in N. v The Health Service Executive 23\textsuperscript{rd} June 2006, at p 4 of his judgment

\textsuperscript{696} [1966] IR 567.

\textsuperscript{697} [1980] IR 32.

\textsuperscript{698} See comments made by Oran Doyle wherein he stated “McKechnie J adopts a form of natural law reasoning favoured by the courts 30 years previously” Doyle, O., The Constitutional and Broader Implications, paper delivered on 27/11/2007 at School of Law conference, The G Case: Implications for Irish Family Law, in Trinity College Dublin.

\textsuperscript{699} The Fifteenth Amendment of the Constitution Act, 1995 was signed into law on the 17 June 1996. The amendment inserted Article 41.3.2 into the Constitution thereby permitting the legislator to enact a framework for the dissolution of marriage, in certain circumstances. This culminated in the Family Law (Divorce) Act, 1996. Custody and access matters relating to marital children are governed by the Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995 and the Family Law (Divorce) Act 1996. Section 10 of the Act stipulates
Similarly the recent signing into law of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 which, in addition to providing a statutory mechanism for the legal registration of same-sex relationships, will also give greater rights to cohabiting heterosexual couples, further indicates that the Irish government and indeed the Irish people are more and more willing to accept that the ideal of the ‘family’ is not one which can be defined so rigidly on the marriage-based unit alone.\textsuperscript{700}

In the modern world where ‘choice’ is seen as a basic right, it is submitted that the Irish State must protect not only those who choose to marry but also those who choose not to.\textsuperscript{704} Although it cannot be denied that the constitutional provisions are clear in their protection of the institution of marriage as the preferred basis of family formation, nowhere does it mandate an outright denial of protection to other family types.\textsuperscript{702} While it is not disputed that the State has a legitimate interest in promoting the marriage based family as a stabilising foundation for society in general,\textsuperscript{703} providing protection to other family forms

clearly that the granting of a divorce does not in any way affect the right of parents to be joint guardians of the children of their marriage.\textsuperscript{700} The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was signed into law by the President on the 19\textsuperscript{th} of July 2010. At the time of writing, the Act is awaiting Ministerial Order and has yet to be commenced. Although the Act fails to provide a workable legislative framework for guardianship and custody matters in the context of the children of cohabiting unmarried couples it may still prove helpful in the context of parental rights and duties. Importantly the Act defines ‘qualified cohabitants’ and those who meet this definition are entitled to certain statutory protections notwithstanding the absence of any formal registration of their relationship or cohabitation agreement. For further discussion on the concept of ‘qualified cohabitees’ see also the Law Reform Commission Consultation Paper. Consultation Paper on the Rights and Duties of Cohabitees, (2004), The Law Reform Commission, LRC CP 32-2004 at p 11.

The Constitution Review Group of 1996 was in favour of retaining constitutional protection of the family based upon marriage. The group, however, advocated a removal of the words “on which the family is founded” on the basis that this proviso had “led to an exclusively marriage-based definition of the family which no longer accords with the social structure in Ireland.” See Report of the Constitution Review Group, (May 1996), Smurfit Print at p 332.

See Eardly, J., The Constitution and Marriage – The Scope of Protection, (2006) 24 ILT 167.\textsuperscript{703} See judgment of Justice La Forest, in Egan v Canada wherein he stated in relation to marriage ‘...it’s ultimate raison d’être...is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. [1995] 2 SCR 513 at p 536. Martha Bailey identifies a number of “objectives” underlying the promotion of marriage as the State’s preferred relationship form. These are; to promote procreation, to provide stable and nurturing environments for children, to provide a social support system for family members and to promote social cohesion. Bailey, M., Marriage and marriage-like relationships, (2000), Law Commission of Canada.
will not necessarily threaten the privileged position of marriage within the Constitution.

It seems contradictory given the huge emphasis upon family in the Irish Constitution and the role of parents in the lives, wellbeing and education of their children that so many of the seminal decisions interpreting the constitutional rights of the unmarried family proceed on the basis of severing the parent/child relationship. With increasing rights being given to same-sex couples, it is felt that this area will prove further and further problematic and in addition to heterosexual couples, the Irish courts will in future have to consider the rights of individual parties to same-sex relationships in the context of the guardianship and custody of children.

It is hoped that the proposals published by a recent Joint Oireachtas Committee may at last bring some much needed progress into this otherwise stagnant area. The Committee has called for a constitutional referendum on children’s rights to be held in order to clarify the position of the child under the Irish Constitution. The Committee propose in this regard to completely overhaul Article 42 of the Constitution in order to recognise, protect and guarantee the equal rights of children, independent of the nature of the relationship of their parents.

Significantly, from the point of view of the present discussion, the novel Article 42 entitled “Children” purports to provide that the welfare and best interests of a child shall be the first and paramount consideration, in the resolution of all disputes concerning their guardianship, adoption, custody, care or upbringing.

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705 See proposed Article 42.1.3’.

706 See also the report of the All-Party Oireachtas Committee on the Constitution: Tenth Progress Report – The Family, (2006), The Stationary Office at p. 122. The 2006 Committee propose that the majority of current inequities in relation to the Constitution’s ‘family’ provisions can be remedied by legislative means. Interestingly, the report is quite definite in its rejection of the idea of a referendum to the Constitution in relation to the family demonstrating the desire of the committee members to maintain the status quo stating that an amendment to the constitutional
It remains to be seen whether granting constitutional status to the welfare principle, as set out above, will provide the clarity so badly needed in assessing the appropriate hierarchy of constitutional and statutory rights, in cases concerning the guardianship or custody of non-marital children. There can however, be no doubt that the proposed amendments would definitely assist the courts in realigning the scales in terms of the delicate balancing of competing family rights.707

The Law Reform Commission (“LRC”) recently published a consultation paper considering the rights and duties of unmarried fathers in relation to guardianship, custody and access to their children.708 The paper examines the current legal structure relating to unmarried fathers in Ireland and the statutory procedures available to unmarried fathers in order to secure guardianship rights in respect of their children. The LRC make a number of recommendations for improvement to the present system, however notably the LRC do not discuss the possibility of a constitutional referendum to provide for the rights of unmarried fathers.

In their concluding recommendations, the Commission suggest introducing a statutory presumption that all unmarried fathers should be granted an order for guardianship unless to do so would be contrary to the best interests of the child. The Commission also discuss the possibility of extending automatic guardianship rights to non-marital fathers. In this regard the LRC discuss their previous recommendations in their Report on Illegitimacy in which it was recommended that both parents of children should be joint guardians of their child, whether the
definition of family would cause “anguish, uncertainty…[and] deep and long-standing division in our society.” The conservatism of the Committee’s approach to the ‘family’ has been criticized by a number of authors. See, for example; Mee, J., Cohabitation, civil partnership and the Constitution, pp.181-214 and Ryan, F., From stonewall(s) to picket fences: the mainstreaming of same-sex couples in contemporary legal discourses, pp. 1-61, both are featured in Doyle O. and W. Binchy (eds), Committed Relationships and the Law, (2007), Four Courts Press.

707 Ursula Kilkelly notes that the use of the wording of the Convention on the Rights of the Child which is replicated throughout the Joint Oireachtas Committee’s report is particularly important as it will enable Ireland to refer to widely accepted international principles in the context of children’s rights. See Kilkelly, U., Constitutional Amendment on Children, Centre for Criminal Justice and Human Rights blog at www.ucc.ie/law/blogs/ccjhr/2010/02/constitutional-amendment-on-children.html as accessed on 17 June 2010.

child is born within or outside marriage.\textsuperscript{709} Nonetheless the recent consultation paper, in somewhat of a volte-face on the issue, falls short of recommending the extension of automatic guardianship rights to unmarried fathers.\textsuperscript{710}

While the sentiments of the recent consultation paper are most definitely to be welcomed, it is submitted that the proposals contained therein, if implemented would do little to progress the rights of unmarried fathers, or indeed the rights of non-marital children. It is felt that the statutory basis of the Commission’s proposals is not definitive enough to resolve this issue and will not guarantee equality of treatment for unmarried fathers or non-marital children, whose rights are still capable of being superceded by the superior constitutional position of the married family unit. All too similar to the Commission’s 1982 report, it is felt that the proposals for legislative reform in the context of unmarried father’s rights will once again fall on deaf ears. Again, it is submitted that a constitutional amendment to explicitly provide for the rights of the child under the Constitution, as suggested by the All Party Oireachtas Committee, is in reality more likely to be a more effective means of improving the rights of the unmarried father.

It has already been noted that the Irish Constitution is to be regarded as a “living document”, unfortunately however the interpretation and application of the constitutional text in respect of the “family articles” has failed to bring the Constitution in line with the striking social and demographic changes which have taken place in Irish society since 1937. It is hoped that the desire of the legislature to move forward as evidenced in the recent Civil Partnership Act and the proposals of the LRC and Joint Oireachtas Committee may indicate that that the time has finally come to allow the Constitution to live and breathe, as it was intended to do.

Finally it is submitted that if, in line with recent proposals by the Joint Party Oireachtas Committee, disputes involving children were viewed from the

\textsuperscript{709} Report on Illegitimacy, the Law Reform Commission, LRC 4-1982 at p.147.
\textsuperscript{710} Ibid at p.66.
perspective of the child themselves,\textsuperscript{711} the issue of whether the family involved is based upon marriage would be irrelevant.\textsuperscript{712} It is hoped that by giving explicit and concrete constitutional rights to children regardless of the circumstances of their birth, or the relationship between their parents, we will at last, give them a voice to be heard by the courts and thereby avoid cases in future where the constitutional rights of the married family unit can “trump” all competing individual rights, most often those of the unmarried father, even where such is to the detriment of the child at issue.

\textsuperscript{711} As is articulated in Article 9(3) of the United Nations Convention of the Rights of the Child
\textsuperscript{712} The proposed constitutional amendment also provides that where the parents of any child fail in their responsibility towards the child, the State as guardian of the common good shall endeavour to supply the place of the parents, regardless of their marital status. See proposed Article 42.4. See also proposed Article 42.2 “The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including...the right of the child’s voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child’s age and maturity.”
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