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THE CONSTITUTIONAL PROTECTION OF CHILDREN IN IRELAND – AN ANALYSIS OF THE STATUS QUO AND PROPOSALS FOR REFORM

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Submitted May 2008

CONTENTS

Abstract ii
Declaration Page iii
Preface iv

Chapter One – The Constitutional Status Quo
Section A – Introduction 4
Section B – The Constitutional Provisions 5
Constitutional Provisions on the Family 5
Constitutional Provisions on Education 7
Other Provisions 8
Conclusion 9
Section C – Unenumerated Constitutional Rights 10
Introduction 10
Issues of Jurisdiction 10
Restrictive Interpretation of Article 42.5 12
Expanding the Scope of Article 42.5 15
Arguments for a More Child-Centred Interpretation of the Constitution 16
Judicial Re-Assertion of the Pro-Parent Approach – North Western Health Board v HW and CW 21
Confirmation of the Pro-Parent Approach – Baby Ann Decision 25
The Consequences of the Constitutional Status Quo 26
Section D – Conclusion 27

Chapter Two – Constitutional Principles
Section A – Introduction 29
Section B – Framing and Underlying Principles 31
Introduction 31
The Framing of the Constitution 33
Political Debate on the Constitution 34
Academic Opinion 35
Judicial Interpretation 36
Religious Inspirations 37
Conclusion 38
Section C – Societal Change in Ireland 40
Introduction 40
Early Change and Change in the Roman Catholic Church 40
Modern Society 42
International Obligations 44
Conclusion 44
Section D – Natural Law 45
Introduction 45
Vagueness 46
Subjectivity 48
Democratic Deficit 48
Conclusion 49
Section E – Liberal and Secular Principles 50
Introduction 50

Liberal and Secular Principles 51
Advantages of a Liberal and Secular Approach 52
Section F - Conclusion 54

Chapter Three – Alternative Models
Section A – Introduction 55
Section B – Domestic Proposals 57
Introduction 57
The Constitutional Review Group 57
The All Party Oireachtas Committee on the Constitution 59
The Twenty-Eighth Amendment of the Constitution Bill, 2007 60
Section C – The Best Interests Standard 63
Introduction 63
Indeterminacy 64
Subjectivity 65
Maintenance of the Rights Rhetoric 65
Self-Defeating Standard 66
Ignorance of Public Policy 67
Encouraging Intervention 68
Criticisms in an Irish Context 69
Section D – Rights Based Approaches 70
Introduction 70
Children's Rights Models 71
Rhetoric of Rights 72
Overvaluing Rights 73
Undervaluing the Family 73
Abdication of Communal and Societal Responsibilities 74
The Adversarial Process 75
Conceptual Difficulties 76
Conclusion 76
Section E – Limited Intervention Models 77
Introduction 77
Beyond the Best Interests of the Child 77
The Advantages of the 'Least Detrimental Alternative' Standard 80
Children's Interests and Limited Intervention 82
Conclusion 83
Section F – Focusing on the Family 84
Introduction 84
Problem-Solving Models 84
The Values of Focusing on the Family and Case Conferencing 86
Maintaining Rights 87
Dispensing with the Adversarial System 87
Addressing the Role of Poverty 88
Case Conferencing and Problem Solving Models in Ireland 89
Conclusion 90
Section G - Conclusion 90

Chapter Four – A New Model for the Constitutional Protection of Children in Ireland
Section A - Introduction 92

Section B – Considerations 93
The Need for Constitutional Provisions 93
The Definition of the Family 94
The Need for a Compromise Solution 95
The Applications of the Provisions 95
Section C – Supporting the Family 97
Introduction 97
Parents' Right to Rights 98
Advantages of Granting Parents Rights 99
Limiting Parental Rights 101
Preserving the Traditional Family 101
Preserving Diversity 102
Fearing the State 103
Abandoning the Family 106
Section D – Protecting the Rights of the Child 108
Introduction 108
A Rights Approach 109
Burdening the State 110
The United Nations Convention on the Rights of the Child 111
Procedural Rights 114
Child Representation 114
Section E – State Intervention 116
Introduction 116
Voluntary Intervention 117
Permanent Coercive Intervention 118
Conclusion 121
Section F – A New Model 121
Introduction 121
Supporting the Family 122
The Rights of the Child 122
Protecting the Interests of the Child 123
Summary 124
Section G – Applications 125
Introduction 125
The *North Western Health Board v HW and CW*/*Baby Janice* Situation 125
The *Baby Ann* Situation 128
Section H - Conclusion 131

Bibliography 134

CHAPTER ONE – THE CONSTITUTIONAL STATUS QUO

A. Introduction

The report of Justice Catherine McGuinness following the Kilkenny Incest Inquiry in 1993[1] represented the first of a series of authoritative appeals for constitutional change to more effectively protect the rights of children. Subsequent examples include the report of the Constitutional Review Group[2] and several 'concluding observations' produced by the UN Committee on the Rights of the Child[3]. These reports have been accompanied by calls constitutional change from academia[4], interest groups[5] and members of the judicial branch[6]. These appeals are predicated on the idea that the constitution is failing to protect children and must be amended to allow it to properly do so. To assess these claims, it is necessary to examine the current state of constitutional law in this area. Chapter one will be devoted to this exercise.

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[1] Kilkenny Incest Investigation: Report presented to Mr. Brendan Howlin TD, Minister for Health by South Eastern Health Board (1993) Dublin: Stationery Office.
[2] Report of the Constitution Review Group (1996) Dublin Stationery Office
[3] See, for example, Concluding Observations of the Committee on the Rights of the Child, Ireland, U.N. Doc. CRC/C/15/Add.85 (1998)
[4] Examples include Report of the Constitutional Review Group, Stationary Office, Dublin (1996); Shannon, *Child Law*, Thompson RoundHall, Dublin, 2005 at p 45; Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance* Irish Journal of Family Law, (2004) 7(3) IJFL 3; Fergus W. Ryan, Recognising Family Diversity: Children, One-Parent Families and the Law, (2006) 9(1) IJFL 3.
[5] Examples include The Children's Rights Alliance, *Small Voices, Vital Rights*, Submission to the UN Committee on the Rights of the Child (1997); Children's Rights Alliance, Submission to the Joint Committee on Child Protection, August 2006; submissions by Aim Family Services [at p A21], Barnardos [at p A 36] and the Church of Ireland [at p A 42] to the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006..
[6] See, in particular, the judgment of Mrs Justice McGuinness in *Baby Ann* [2006] 4 IR 374 at 498. See also, *DPP v JT* [1988] 3 Frewen 141; *Southern Health Board v CH* [1996] 1 IR 231; *DPP v Best* [2000] 2 IR 17.

The concept of child protection has not been overly influential in constitutional law due, at least in part, to the lack of any special emphasis on children in the Constitution. Moreover, the constitutional status of the marital child has been further obscured by the virtually unique[7] and wide ranging deference the Constitution affords to the marital family.

This chapter will assess the current state of the law primarily through an examination, firstly, of the constitutional provisions and secondly, of unenumerated children's rights and the academic opinion thereon. The aim is to illustrate that, far from providing adequate protections for children, the Constitution is fundamentally incapable of adequately protecting children in its current formulation. Furthermore, it will be argued that the courts have not erred in their interpretation of the law and have merely presented the constitutional status of the child as it was meant to be interpreted. The wording of the relevant provisions made and makes it unlikely for any other conclusion to be occasioned.

B. The Constitutional Provisions

Constitutional Provisions on the The Family

[7] As the authors of *JM Kelly: The Irish Constitution* comment, the articles were among the most innovatory in the Constitution and there were no similar provisions in the 1922 Constitution. They do, however note that there was a similar provision in the German Constitution of 1919. See JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at pp 1827-1828. They are innovatory too in the sense that such provisions are comparatively rare, as Beytagh comments: "Only a limited number of modern constitutions of consequence contain specific provisions dealing with the protection of he family, and none contain language as a sweeping as that in Article 41" [Francis X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective*, RoundHall Sweet & Maxwell, Dublin, 1997 at p 37.]. Therefore the protections are referred to as "virtually unique".

The Constitution of Ireland, adopted in 1937, guaranteed a novel degree of legal protection for the family. It was promised that the State would recognise "the family as the natural primary and fundamental unit group of society"[8]. Crucially, Article 41.3.1° provides that 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." The rights that are afforded to the marital family are said to be "inalienable and imprescriptible"[9] which has been held to mean that they cannot be surrendered, given away, lost or forfeited over time[10]. It is now widely accepted that the Constitution refers to is the marital family in accordance with *State (Nicolaou) v An Bord Uchtála*[11] and Costello J's decision in *Murray v Ireland*[12], subsequently approved by the Supreme Court in *TF v Ireland*[13].

The aforementioned Article 41 rights accorded to the family are to be understood as vesting in the family unit itself rather than the individuals members of the family[14]. Therefore, the Constitution can be seen to afford the marital family such a degree of deference that Shannon felt that the Constitution establishes the family "as a sort of Independent republic"[15], albeit within certain exceptional limits[16]. Such a formulation inevitably has the potential of limiting the protection of children as it restricts the State from interfering with potentially damaging acts done by marital parents towards their children.

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[8] Article 41.1.1°
[9] Article 41.1.1°
[10] Per Barrington J in *Fajujonu v Minister for Justice* [1990] IR 151 at 157.
[11] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567.
[12] *Murray v Ireland* [1982] IR 532.
[13] *TF v Ireland* [1995] 1 IR 321.
[14] Per Costello J in *Murray v Ireland* [1985] IR 532.
[15] Shannon, *Child Law*, Thomson RoundHall, Dublin, 2005 at p 2.
[16] Limits including, inter alia, the Article 42.5 limits (see below) and in exceptional cases such as in the case of *Baby Janice* (unreported, High Court, August 5, 2004) (see below at p 7).

Constitutional Provisions on Education

The Constitution makes its most explicit references to children in Article 42 which is entitled "Education". Article 42.4 guarantees the child free primary education and makes a promise on the part of the State to aid "educational initiative" and to provide facilities where the public good requires it. However these promises are made "with due regard… to the rights of the parents…" Indeed, the general language of Article 42 suggests that the Article should be read more as a consolidation of parents' rights (albeit in relation to their children) than as affording special rights and protections to children.

Only Article 42.5 deviates from the rest of the Article's parental autonomy focus in that it provides that the state will supply the place of the parents "for exceptional reasons, where the parents for physical or moral reasons fail in their duty towards their children". This would appear to be a vital provision as regards the protection of children. Nevertheless, the superior courts appear to have settled on a restrictive reading of this subsection. This development will be addressed in more detail in section C of this chapter.

As already mentioned, the Constitution regards 'the family' as the marital family only. Consequently, many of the aforementioned ostensible protections afforded to marital children are not likely apply to non-marital children. It appears that natural parents have no rights in respect of their non-marital children under

Articles 41 and 42[17]. As such, there is no barrier to state intrusion similar to Article 42.5 and the child's best interests takes precedence in such cases[18]. However, Hogan and Whyte argue that it is "scarcely possible that the Constitution affords less protection to the autonomy of a stable non-marital family than it does to that of its marital counterpart." They argue that in such circumstances the state would surely be limited by Article 42.5. Nevertheless, for authority, the authors can only draw on "an echo of this sentiment"[19] drawn from the case of *Eastern Health Board v MK*[20]. At best, the Constitution is unclear as regards to the protections available for non-marital children.

Other Provisions

The rights of the child are explicitly mentioned in two other provisions, neither of which warrant serious attention in the current context. Article 44.2.4° provides that a child has a right not to receive religious instruction at a school if it receives public funds. This provision is of limited importance in several respects. Firstly, this merely protects the child from direct *instruction* rather than from influence from the religious ethos of the school[21]. Secondly, it might be seen as effectively a further parental right to control their child's religious instruction. Even if Article 44.2.4° was to be seen as providing a child's right, it is hardly a

[17] Per gavan Duffy J in *Re M, an Infant* [1946] IR 334 at 334. However the natural mother does have rights pursuant to Article 40.3 as laid down in *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 at 664. The position of the natural father is less secure and less legally certain, see JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 1910.
[18] Shannon, *Child Law*, Thomson RoundHall, Dublin, 2005 at pp 5-69.
[19] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 1916.
[20] *Eastern Health Board v MK* [1999] 2 IR 99 at 117-118.
[21] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 2068.

substantial one. Furthermore, it has only been invoked in one case[22] to date according to the author's of Kelly's *The Irish Constitution*[23]. Moreover, in that case, it was invoked by a parent rather than a child.

The child is also mentioned in Article 45 where the state pledges to protect children from abuse and from being forced to enter into avocations unsuited to their sex, age or strength[24]. The Article explicitly states that the provisions are to be of "general guidance" to the Oireachtas and to be not cognisable by any court. The Supreme Court and the courts in general are undecided as to whether these provisions can be referenced in courts[25]. Furthermore, the rights afforded would seem to be self-evident and the protections are better provided elsewhere in the Constitution. It should perhaps be noted that the directive principles of social policy were influential in upholding the constitutionality of child labour laws[26].

Conclusion

Therefore, explicit children's rights or protections do not appear in any substantial way in the Constitution. The mentions of explicit non-marital children's rights are even less noticeable. However, the caselaw holds that the constitution provides unenumerated children's rights for marital and non-marital children and, therefore, it is to this jurisprudence that we now turn.

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[22] *Campaign to Separate Church and State v Minister for Education* [1998] 2 ILRM 81.
[23] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 2068.
[24] Article 45.4.2°
[25] Compare, for example, the different approaches in *Attorney General v Paperlink* [1984] ILRM 373 and *Kerry Co-op Creameries Ltd v An Bord Bainne* [1990] ILRM 664.
[26] See *Landers v Attorney General* [1973] 109 ILTR at 6.

C. Unenumerated Constitutional Protections

Introduction

As already mentioned, Article 40 of the Constitution does not explicitly reference the child. However, it is now settled law that the child has certain unenumerated rights emanating from Article 40.3 of the Constitution. While these rights have been espoused by the superior courts on numerous occasions, the most authoritative statement comes from *G v Bord Uchtála*[27] and especially O'Higgins CJ's dissent in that case. The then Chief Justice stated that: "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."[28] This statement of the law was approved by the Supreme Court in *North Western Health Board v HW and CW*[29] and, in *M v M*[30], Murphy J confirmed that such rights extended to non-marital children.

Issues of Jurisdiction

However the fact that children are recognised as having rights is not enough to ensure the enforcement of their rights. The problem is that in many cases the child will be too young to enforce his own rights. Moreover, in many cases the child's rights can only be exercised by third parties or their parents who may be the parties who are infringing the child's rights. Consequently, the area of child

[27] *G v Bord Uchtála* [1980] IR 32.
[28] Ibid at 55-56. Walsh and Parke JJ also made statements to similar effect.
[29] *North Western Health Board v HW and CW* [2001] IR 622. For example, the judgment of Mrs Justice Denham at 719.
[30] *M v M* (unreported, 2 December 1982, High Court).

protection is plagued by issues of jurisdiction and potentially further complicated by separation of powers concerns.

Crucially, it seems that the Constitution is not structured to overcome this problem. As Hardiman J cogently argued in *North Western Health Board v HW and CW*[31], the state may only intervene to vindicate Article 40.3 rights "by its laws"[32]. He cited[33] the following quote from Kenny J in *Crowley v Ireland*[34] with approval: "It is not a general obligation to defend and vindicate the personal rights of the citizen. It is a duty to do so by its laws, for it is through laws and by laws that the State expresses the will of the people who are the ultimate authority"[35]. Therefore, in many cases, children's Article 40.3 rights will go unenforced, absent any law providing for their enforcement. While state actors might have general statutory obligations to protect children[36], absent specific legislation, their ability to carry this obligation through legally may be inhibited by the constitutional deference given to the marital family[37].

In *HW and CW*[38], Mrs Justice Denham suggested – obiter – that such judicial intervention might occur in the case of a medical or surgical procedure in relation to a threat to life or serious injury[39]. This suggests that the courts can intervene in

[31] *North Western Health Board v HW and CW* [2001] IR 622.
[32] Ibid at 759.
[33] Ibid at 759.
[34] *Crowley v Ireland* [1980] IR 102.
[35] Ibid at 130.
[36] Such as under the s. 3(1) of the Child Care Act, 1991: "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."
[37] As, for example in *North Western Health Board v HW and CW* [2001] IR 622 where the fact that the law did not make the PKU test compulsory meant that the Health Board had no cognisance to supplant the judgment of the parents.
[38] *North Western Health Board v HW and CW* [2001] IR 622.
[39] Ibid at 727.

such a way in exceptional circumstances. This has now been established by the case of *Baby Janice*[40] which illustrates that the courts can intervene in such a way in exceptional circumstances. However it is notable that the intervention in that case involved making the child a ward of court[41]. The fact that the court felt compelled to use this procedure rather than any constitutional norm suggests the impotence of the latter. Furthermore the judgment was ex tempore and is the only judicial authority in the form of a ratio decidendi that we can rely on for this proposition. Consequently, the circumstances in which the courts *will* intervene remain somewhat unclear.

Restrictive Interpretation of Article 42.5

It has been argued[42] that authorities such as *G*[43] represented a constitutional order in which the rights of children could be adequately protected and that the courts have subsequently retreated from this position unnecessarily. However it should be noted that O'Higgins CJ's judgment was a minority one. Indeed, in *TD v Minister for Education*[44], Chief Justice Keane referred to this fact and was noticeably reluctant to explicitly approve the dicta[45]. Moreover, the majority in

[40] *Baby Janice* (unreported, High Court, August 5, 2004). In that case the mother had signed a consent for the unqualified use of blood and blood products but following an intervention from her Jehovah's Witness community she had had withdrawn it. An urgent application was brought before High Court where President Mr Justice Finnegan ordered that Janice be made a ward of court and authorised the hospital to provide medical treatment as it deemed appropriate. As a result of the court's intervention Janice had undergone major heart surgery on March 19th. Although given a 50:50 chance of survival she had recovered well. [*'Court Extends Order for Heart Surgery Baby',* Irish Times, Friday 6 August 2004].
[41] '*Court Extends Order for Heart Surgery Baby',* Irish Times, Friday 6 August 2004.
[42] See, for example, Shannon, *Child Law*, Thomson RoundHall, Dublin, 2005 at p. 6, and, Dr Ursula Kilkelly and Dr Conor O'Mahony, *The Proposed Children's Rights Amendment: Running to Stand Still?,* (2007) 10(2) IJFL 19.
[43] *G v Bord Uchtála* [1980] IR 32.
[44] *TD v Minister for Education* [2001] 4 IR 259.
[45] "In his judgment, Murphy J points out that the proposition there laid down by the learned Chief Justice was not expressly assented to by a majority of the court. It is also clear that the passage in

G[46] have not subsequently been overruled and it would seem that the best interpretation might be that, in essence, the courts have implicitly accepted the dicta of O'Higgins CJ while not doubting the majority's ratio decidendi in *G*[47]. In any event, in *Re JH, an infant*[48], the Supreme Court adopted what can only be interpreted as a restrictive approach to the interpretation of Article 42.5 and child protection generally.

Re JH, an infant[49] concerned an adoption process where the full final consent had not been given by the natural mother. The parents had married so, unlike *G*[50], the applicants could not obtain an order under s.3 of the Adoption Act, 1974 to dispense with the refusal to consent. The adoptive parents were successful in defending the claim in the High Court but the Supreme Court found for the natural parents. The child had been with the adoptive parents for two years by the time the case reached the Supreme Court. Finlay CJ delivered the judgment of the court and what has been accepted as the authoritative statement of the law[51]. He argued that there was a constitutional presumption that the best interests of the child would be best secured in the marital family. Therefore, the Chief Justice concluded, statutes like the Guardianship of Infants Act, 1964 would have to be read in light of this presumption.

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question is an application to the particular case of children of the doctrine of unenumerated rights first laid down by the High Court and endorsed by this court in *Ryan v Attorney General*… Whether the formulation adopted by Kenny J is an altogether satisfactory guide to the identification of such rights is at least debatable." Per Keane CJ in *TD v Minister for Education* [2001] 4 IR 259 at 281.

[46] *G v Bord Uchtála* [1980] IR 32.

[47] Ibid.

[48] *Re JH, an infant* [1985] IR 375.

[49] Ibid.

[50] *G v Bord Uchtála* [1980] IR 32.

[51] Statement of the law accepted by the Supreme Court in *Baby Ann* [2006] 4 IR 374.

This presumption could only be rebutted in two situations, namely where "there are compelling reasons why this cannot be achieved, or unless the court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons."[52] The latter situation is effectively the Article 42.5 situation where the state takes the place of parents where they have failed in their parental obligations. The former represented a new situation where the state could supply the place of the parents, namely where there were compelling reasons that this should be done. It was not entirely clear from the judgment what this new situation amounted to but subsequent judgments have expanded upon it.

This "compelling reasons" exception potentially represented the adoption of a more flexible approach to child protection. As Casey noted, "Presumably it [the constitutional basis for the exception] springs from an acceptance that a child has constitutional rights just as parents do… and that in a case of conflict there is no rule giving parental rights primacy."[53] Casey suggested that there was subsequent authority for this proposition[54]. However the "compelling reasons" test has been interpreted as being applicable only "in the most extreme circumstances"[55] and the authors of Kelly conclude that "the actual outcome reaffirms the adult-

[52] *Re JH, an infant* [1985] IR 375 at 395.
[53] James Casey, *Constitutional Law in Ireland*, RoundHall Sweet & Maxwell, Third Edition, Dublin, 2000 at p 632.
[54] For example, Walsh J in *G v Bord Uchtála* [1980] IR 32 at 78.
[55] "Yet the test set by Finlay C.J. in his judgment – compelling reasons why the child's welfare could not be achieved within the natural family – is so exacting that it would be difficult to see it being met other than *in the most extreme circumstances*. This is particularly so when the test is given the added weight of being set in the context of the constitutional declaration of the rights of the family and of parents, and the related constitutional presumption that the welfare of the child is to be found within the family [emphasis added]." Per McGuinness J in *Baby Ann* [2006] 4 IR 374 at 496.

orientated approach of earlier cases."[56] This conclusion is corroborated by the restrictive reading of Article 42.5 by the Supreme Court in *State (Doyle) v Minister for Education*[57].

In his excellent analysis of the decision[58], William Duncan has suggested that *Re JH, an infant*[59] represented judicial re-assertion of the focus on parental autonomy following controversy over the development of an ostensibly child-centred jurisprudence[60] in the late 1970s and early 1980s started by the case of *M v Bord Uchtála*[61][62]. He claims that it was never clear how much judicial support the jurisprudence had and that *Re JH*[63] confirmed that it had little support in the Supreme Court[64].

<u>Expanding the Scope of Article 42.5</u>

However, despite *Re JH, an infant*[65], it has been argued[66] that there is still scope for a more child-centred reading of Article 42.5. The most authoritative locus for this argument is the Supreme Court case of *In Re 26 and the Adoption (No. 2)*

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[56] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at pp 1925.
[57] *State (Doyle) v Minister for Education* [1989] ILRM 277.
[58] In WR Duncan, *The Child's Right to a Family – Parental Rights in Disguise*, (1986) 8 DULJ
[59] *Re JH, an infant* [1985] IR 375
[60] Including the cases of *J v D SC* (unreported, 22 June 1977) and *PW v AW* (Unreported, High Court, 21 April 1980).
[61] *M v Bord Uchtála* [1977] IR 287.
[62] WR Duncan, *The Child's Right to a Family – Parental Rights in Disguise*, (1986) 8 DULJ at p 76.
[63] *Re JH, an infant* [1985] IR 375.
[64] WR Duncan, *The Child's Right to a Family – Parental Rights in Disguise*, (1986) 8 DULJ at p 76.
[65] *Re JH, an infant* [1985] IR 375.
[66] See JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at pp 1926-1927.

Bill, 1987[67]. Here, Finlay CJ – giving the judgment of the court – held that Article 42.5 did not merely oblige the State to supply the place of the parents in regard to education but also compelled the State to satisfy "the parental duty to cater for the other personal rights of the child."[68] The court also deviated from the previous decision of *Doyle*[69] in that it accepted that Article 42.5 allowed for legislation that would work on the basis of a permanent surrender of parents' rights[70].

It is now settled law that Article 42.5 covers more than simply the education rights of children. However, the decision is also cited in support of arguments that the Constitution can support a more child centred rights approach than the current one, a proposition that will now be assessed. Shannon also highlights the Supreme Court case of *Southern Health Board v CH*[71] to highlight a more child-centred jurisprudence emerging however the author accepts that this was rolled back in *HW v CW*[72].

<u>Arguments for a More Child-Centred Interpretation of the Constitution</u>

Both Conor O'Mahony[73] and Hogan & Whyte[74] cite the case of *PW v AW*[75]. In that case, Ellis J. refused to grant custody of a child to a mother with psychiatric

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[67] *In Re Article 26 and the Adoption (No. 2) Bill 1987* [1989] ILRM 266.
[68] Ibid at 272.
[69] *State (Doyle) v Minister for Education* [1989] ILRM 277.
[70] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 1926
[71] *Southern Health Board v CH* [1996] IR 219 .
[72] *North Western Health Board v HW and CW* [2001] IR 622.
[73] Conor O'Mahony, Children, *Parents and Education Rights: A Constitutional Imbalance* Irish Journal of Family Law, (2004) 7(3) IJFL 3.
[74] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at pp 1928.

problems, finding that the child had natural rights by virtue of Article 41 that were inalienable and imprescriptible. He felt that one of those rights was the right to have his welfare regarded as the paramount consideration in disputes as to his custody. Viewed in the wider context of the jurisprudence on the matter, *PW v AW*[76], which predates *Re JH*[77] now seems of little authority. Furthermore, the reasoning behind Ellis J's decision was explicitly criticised by Hardiman J. in *North Western Health Board v HW and CW*[78]. He felt the decision was both conceptually questionable and inconsistent with the law laid down in *Re JH*[79][80].

Regardless, Hogan and Whyte[81] somewhat ambitiously argue that "the principal value of Ellis J's decision in the present context is that it indicates how a more balanced approach to the more complex area of custody disputes… can be achieved without re-evaluating the constitutional principles involved and without the necessity of a constitutional amendment"[82]. They also cite the disagreement, in *North Western Health Board v HW and CW*[83], between Keane CJ and Hardiman J as to "the state of the law in the aftermath of *Re JH,*" presumably to support their previous claim[84].

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[75] *PW v AW* (unreported, 21 April 1980, High Court).
[76] Ibid.
[77] *Re JH, an infant* [1985] IR 375.
[78] *North Western Health Board v HW and CW* [2001] IR 622 at 756.
[79] *Re JH, an infant* [1985] IR 375.
[80] *North Western Health Board v HW and CW* [2001] IR 622 at 756.
[81] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution,* Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003.
[82] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution,* Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 1298.
[83] *North Western Health Board v HW and CW* [2001] IR 622.
[84] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution,* Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 1298.

This is a highly questionable assertion. Firstly, Keane CJ's dictum would appear to be of limited authority given the fact that his was the sole dissenting judgment in that case. Secondly, and as O'Mahony pointed out[85], the decision in *PW v AW*[86] sits very uncomfortably with the pre-existing and subsequent caselaw. It was directly criticised by Hardiman J in *North Western Health Board v HW and CW*[87] and not even mentioned in the recent case of *N v the Health Service Executive*[88] which was also a custody dispute. These limitations in authority are only amplified by the fact that *PW v AW*[89] was a High Court decision. Consequently, it is unlikely that *PW v AW*[90] could be used as reliable authority for the argument that the courts could yet mould the Constitution into a more child-centred approach. As O'Mahony put it, "Ellis J.'s statement in isolation fails to elevate this aspect of the principle [the welfare principle] to the constitutional plane."[91]

O'Mahony[92] presents the argument that common law authority could be used to support a more child-centred jurisprudence. He cites the English case of *Humphrys v Polack*[93] where it was held that rights given to parents regarding their children are entirely to be used for the benefit of the relevant children and

[85] Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance* Irish Journal of Family Law, (2004) 7(3) IJFL 3 at p 4.
[86] *PW v AW* (Unreported, High Court, 21 April 1980).
[87] *North Western Health Board v HW and CW* [2001] IR 622 at 756.
[88] *N. & anor. v Health Service Executive & ors.* [2006] 4 IR 374, hereafter the '*Baby Ann*' case.
[89] *PW v AW* (Unreported, High Court, 21 April 1980).
[90] Ibid.
[91] Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance,* Irish Journal of Family Law, (2004) 7(3) IJFL 3 at p 4.
[92] Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance,* Irish Journal of Family Law, (2004) 7(3) IJFL 3.
[93] *Humphrys v Polack* [1901] 2 KB 385 at 389-390.

not the parents[94]. He notes that the statement was cited with approval by Gavan Duffy J in *Re M (an infant)*[95] and Teevan J in *State (Nicolau) v An Bord Uchtála*[96][97]. He then makes the tentative conclusion that the principle can "therefore reasonably be assumed to be part of Irish law"[98].

While this may be the case in England, it seems unlikely that the principle is compatible with the Constitution's protections of the family. Moreover, it is notable that both *Re M (an infant)*[99] and *Nicolaou*[100] concerned cases of non-marital children. One cannot presume that the statements would have been made in the context of the constitutional institution of marriage. Even if they were, two judicial mentions in isolation – that, in any event, predate *Re JH, an infant* – hardly provide an authoritative basis for O'Mahony's argument.

O'Mahony also seeks to argue that the Supreme Court's finding in *Re JH*[101] is conceptually flawed on what he calls a "technical point"[102]. He points to the now accepted principle[103] that Article 41 creates rights for the family as a unit and does not create any rights for the individual within it. He then proposes that *Re JH*[104] was flawed in that it attempted to give the child rights[105] by virtue of

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[94] Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance,* Irish Journal of Family Law, (2004) 7(3) IJFL 3 at p 4.
[95] *Re M (an infant)* [1946] IR 334 at 345.
[96] *State (Nicolaou) v An Bord Uchtála,* [1966] IR 567 at 601.
[97] Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance,* Irish Journal of Family Law, (2004) 7(3) IJFL 3 at p 4.
[98] Ibid.
[99] *Re M (an infant)* [1946] IR 334.
[100] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567.
[101] *Re JH, an infant* [1985] IR 375.
[102] Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance* Irish Journal of Family Law, (2004) 7(3) IJFL 3 at p 5.
[103] Per Finlay C.J in *L v L* [1992] 2 IR 77 at pp 108.
[104] *Re JH, an infant* [1985] IR 375.
[105] Ie. The right to be a member of a constitutionally protected family.

Article 41[106]. However this argument would misrepresent the Supreme Court's argument.

It was not proposed that the child was availing of any *Article 41* rights as an individual. Rather, the relevant Article 41 right was the right of the family – of which the child was a member – not to be interfered with by the state. But this was not the only right accruing. Crucially, as Duncan has observed, the only right the child was afforded as an individual was his *Article 42* right to be educated by the family[107]. There was no such technical problem with Article 42 rights being afforded to individuals and it was on this basis that the court concluded that the child had a right to be part of a marital family absent 'compelling reasons' or the circumstances outlined in Article 42.5[108].

Duncan concluded that the judgment "hoisted the advocates of children's rights on their own petard."[109] It couched what were, to all intents and purposes, parental rights in the language of children's rights. While Duncan accepted that the *Re JH*[110] standard did give some status to the welfare principle, he concluded that "it does not afford it either priority or equal standing with the parental right to custody"[111] Ultimately, any parties to such actions who were not the marital parents would have to resort to the 'compelling reasons' test, one which Duncan argued "places a burden of proof on third parties which, given the uncertainty

[106] Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance* Irish Journal of Family Law, (2004) 7(3) IJFL 3 at p 5.
[107] WR Duncan, *The Child's Right to a Family – Parental Rights in Disguise*, (1986) 8 DULJ at p 78.
[108] Ibid.
[109] Ibid at p 76.
[110] *Re JH, an infant* [1985] IR 375
[111] WR Duncan, *The Child's Right to a Family – Parental Rights in Disguise*, (1986) 8 DULJ at p 81.

inherent in predicting the effects on a child of a custody charge, is extremely difficult to discharge."[112]

Judicial Re-Assertion of the Pro-Parent Approach – North Western Health Board v HW and CW

Much of these arguments and the previous caselaw came up for consideration in *North Western Health Board v HW and CW*[113] and a more detailed analysis of the case is of value. In the case, the Supreme Court was asked to consider the case of a newly born baby, whose parents had refused consent for a free, standard but non-compulsory (at least in statutory terms) PKU test which could test for a range of disorders which could be very damaging unless treated early. The risk associated with the test was accepted as being minimal to nil and the parent's objections were accepted as being irrational in the non-pejorative sense. The High Court had refused the application of the health board to obtain an order permitting them to carry out the test.

Arguments that the Constitution might support a pro-child approach often draw on the dissent of Keane CJ in that case. The then Chief Justice cited *PW v AW* with seeming approval and was satisfied that Ellis J's application of the welfare principle was of general application and therefore was not limited to custody disputes[114]. Despite this, he felt that the constitutional presumption outlined by

[112] Ibid at p 80.
[113] *North Western Health Board v HW and CW* [2001] IR 622.
[114] *North Western Health Board v HW and CW* [2001] IR 622 at 687-688.

Finlay CJ in *Re JH*[115] was limited to custody cases and therefore was not applicable in *HW and CW*[116].

It is curious that Keane CJ felt that Ellis J's statement of the law was of general application while Finlay CJ's statement in *Re JH*[117] was not, despite the fact that both cases were custody disputes. This is especially questionable since the Guardianship of Infants Act, 1964 (at issue in *Re JH*[118]) is explicitly stated to be of general application. Nevertheless, there is at least a strong argument that Finlay CJ's statement in *Re JH*[119] only applies in cases where Article 42.5 is being used to completely replace the parents and that it is not relevant to a case such as *HW and CW*[120]. Having set out this base, the Chief Justice went on to outline the basis of children's rights under Article 40.3 and felt that there was an inherent jurisdiction in the courts to vindicate those rights[121].

However this was where the rest of the Supreme Court disagreed and case was effectively decided on jurisdiction and on the doctrine of the separation of powers to a certain extent. Denham J argued that the effect of Article 40.3 was not to create a roving jurisdiction. Rather, it existed to guarantee that the state vindicate those rights *through its laws* and *as far as practicable.* She felt that "the State has not chosen to use its laws – by enacting legislation –to protect Paul in the manner envisaged by Article 40.3.2"[122]. Absent any jurisdiction under

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[115] *Re JH, an infant* [1985] IR 375.
[116] *North Western Health Board v HW and CW* [2001] IR 622 at 689.
[117] *Re JH, an infant* [1985] IR 375.
[118] Ibid.
[119] Ibid.
[120] *North Western Health Board v HW and CW* [2001] IR 622.
[121] Ibid at 690, "That such a jurisdiction exists, I think is clear".
[122] Ibid at 713.

Article 40.3, the appellants could only be successful under Article 42.5 and Denham J felt this was not an "exceptional case".[123]

Furthermore, she argued that the state was the default parent, not the super parent[124]. The learned judge felt that to order the test to be taken would be to effectively make the test compulsory and that the court "…without the benefit of the kind of analysis and preliminary work which would precede legislation, would be making a policy decision for all children that this test be compulsory."[125]As such, Denham J hinted at a potential infringement of the separation of powers, even if it was not explicitly stated.

Murphy J agreed that this case did not fall into the exceptional category[126], and although he was frustrated with the attitude of the parents, he felt compelled to apply the law as it was[127]. Murray J (as he then was) also concurred, feeling that to come to any other decision would be to engage the courts "in a sort of micro-management of the family."[128]

Mr Justice Hardiman also argued that the appellants' case was inhibited, inter alia, by jurisdiction problems. He confirmed the previous statements that Article 40.3 guarantees that the state will vindicate personal rights *through its laws*[129] and stated: "there is no legislation on this topic, other than that referred to above [the Health Act, 1954] whose effect is to enshrine voluntarism and parental

[123] Ibid at 728.
[124] Ibid at 719.
[125] Ibid at 724.
[126] Ibid at 732.
[127] Ibid at 731.
[128] Ibid at 740.
[129] Ibid at 759.

responsibility."[130] Like Denham J, he concludes that state intervention could therefore only be by way of Article 42.5.

However, he further argued that Article 42.5 could not be used in the way the applicants intended and would not be applicable in this case since that Article was only intended to be used to fully replace the family, not to momentarily allow the state to take its place. He stated: "I do not accept that the authority of the family or role of the parents is capable of subdivision in this fashion."[131] He also mentioned the potential influence of the doctrine of separation of powers[132].

It is submitted that the case was correctly decided. It seems evident that Article 40.3 only pledges the state to intervene through its laws. In cases, such as the present one, where the legislative and executive branches have not enacted laws, the courts cannot assume that it is within their power to vindicate rights. Such an approach could lead to a potentially limitless expansion of judicial jurisdiction in all areas of personal rights. While one might argue that the legislature would be prevented from making such procedures compulsory by the constitutional protections of the family, this is not a justification for massively increasing the ability of the courts to enforce personal rights.

Moreover, the factual consequences of the judgment are not as egregious as are sometimes presented. As Denham J argued, the argument that the child's rights were being seriously infringed is at least questionable: "There was no particular reason why this child should be tested for PKU. There was no relevant family

[130] Ibid at 753.
[131] Ibid at 758.
[132] Ibid at 761.

history. There were no circumstances which made it particularly apt for the child to have the test. The only form of the test offered was by way of taking blood from the heel of the child by way of a heel prick."[133] Nevertheless, the result highlights how invisible children's rights can be under the current constitutional order, even when the case solely concerns children's rights.

Confirmation of the Parent-Centred Approach – Baby Ann Decision

Any belief that the Supreme Court might adopt a more child-centred approach was surely ended by the recent *Baby Ann*[134] decision. The case concerned an adoption dispute with facts virtually identical to *Re JH*[135]. In the High Court, McMenamin J granted custody of the child to the adoptive parents who had been in custody of the child for most of its life (the child was 2 years old at the time of the Supreme Court proceedings). However the Supreme Court unanimously overturned the High Court's decision and awarded custody to the natural parents who had married since putting the child up for adoption.

Hardiman J admitted that the appearance of the constitutional family in the case significantly altered the legal context[136]. Consequently, he reiterated the law as laid down in *Re JH*[137] and concluded that there was a constitutional presumption that the child's welfare was best preserved in the family[138]. Despite her personal

[133] Ibid at 717.
[134] *Baby Ann* [2006] 4 IR 374.
[135] *Re JH, an infant* [1985] IR 375.
[136] *Baby Ann* [2006] 4 IR 374 at 535.
[137] *Re JH, an infant* [1985] IR 375.
[138] *Baby Ann* [2006] 4 IR 374 at 511.

reluctance[139] to award custody to the natural parents, McGuinness J felt that *Re JH* test had to be employed[140]. All the Supreme Court justices held that the case did not warrant the state taking the place of the natural parents either according to Article 42.5 or the "compelling reasons test". Essentially, the court could not find any physical failure on the part of the parents.

The Consequences of the Constitutional Status Quo

The Supreme Court decision in *Baby Ann*[141] confirms the pro-parent approach. It highlights a presumption, at least in custody disputes relating to marital children, that the child's welfare is best secured in the marital family. This iron-cast presumption would only be rebutted in the exceptional situations detailed in *Re JH*[142]. Outside these exceptional situations, the courts would be restrained from basing their decision on any other consideration than the sanctity of the constitutional marriage. As Dr Ursula Kilkelly and Dr Conor O'Mahony put it: "The striking feature of this case was not just its outcome, but rather the fact that the terms of reference available to the court to make its decision did not include what was in the interests of Baby Ann or what would best protect or promote her rights."[143]

Therefore, adoption proceedings, where the subject is the child, may proceed without any consideration of the child's well being at least in terms of the

[139] Elucidated at p 498.
[140] Ibid.
[141] *Baby Ann* [2006] 4 IR 374.
[142] *Re JH, an infant* [1985] IR 375.
[143] Dr Ursula Kilkelly and Dr Conor O'Mahony, *The Proposed Children's Rights Amendment: Running to Stand Still?* (2007) 10(2) IJFL 19 at pp19-20.

ultimate decision. This may result in the courts making decisions that are manifestly to the child's disadvantage. In *Baby Ann*[144], the psychological damage the child could suffer was held to be a legally subsidiary issue in the context of the marital family.

Outside cases such as custody disputes – where the courts are implicitly expected to consider children's rights – the constitutional protection of children is stunted by justiciability issues. The courts are not endowed with a jurisdiction to ensure constitutional rights are upheld. Rather, they have interpreted that the state only guarantees to vindicate constitutional rights through its laws and the courts have no role in making such laws. Furthermore, per Finlay CJ in *Re Article 26 and the Adoption (No 2) Bill 1987*[145], the rights of children pursuant to Article 40.3 must be read in conjunction with Article 42.5. Essentially, any personal rights vested in the child can only be vindicated with due regard for the child's natural and imprescriptible 'right' to belong to a constitutional family.

Therefore, the rights afforded to children are often of little use, since children lack the legal ability to enforce their rights, and the state is often unable to displace the parent's authority. Therefore, while the Constitution guarantees children rights, in many cases it will offer no effective mechanism to enforce them. The state may, by legislation, provide for their enforcement but such legislation will inevitably run the risk of being repugnant to the constitution's protection of the marital family and therefore be useless.

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[144] *Baby Ann* [2006] 4 IR 374.
[145] *Re Article 26 and the Adoption (No. 2) Bill 1987* [1989] ILRM 266 at 272.

Section D – Conclusion

In the grand constitutional scheme, children are effectively relegated to a sort of second class citizen. The primary legal consideration is the balance between the state and the family. Child protections are limited by the dual barriers of a constitutional presumption that the child's welfare is best secured in the family and a constitutional limitation that means that children's rights will often not be enforced.

Children's rights, whether they exist or not, are ultimately of little legal concern in many cases. Ryan argues that the caselaw has produced "a legal framework that in its most fundamental form views children simply as an adjunct of the family, the object of an ideological struggle between the family, on the one hand, and the State on the other."[146] As Shannon argues, "It is only with difficulty that the law has advanced from its position as regarding children as possessions."[147] It would seem ludicrous that cases concerning the welfare of children should have the balance between family and state as their primary concern and the interests of the child are at the same time relegated to a secondary importance. Surely the correct constitutional approach should not be about balancing state and family rights, but about protecting children.

[146] Fergus W. Ryan, *Recognising Family Diversity: Children, One-Parent Families and the Law*, (2006) 9(1) IJFL 3 at pp 5-6.
[147] Shannon, *Child Law*, Thomson RoundHall, Dublin, 2005 at p 1.

CHAPTER TWO – CONSTITUTIONAL PRINCIPLES

A. Introduction

The conclusions reached in chapter one were that the constitutional status quo represents a correct interpretation of the law – at least in the technical sense – and that the superior courts are not going to advocate a more child-centred approach, at least until there is some substantial change in its composition. While the former conclusion might be challenged, one could not reasonably argue with the latter. Furthermore, even if the Supreme Court was to take on a more activist and socially liberal form, it would still be required to overrule or disregard decades of Supreme Court authority if it was to advocate a more child-centred approach. Therefore, even a more liberal Supreme Court would be unlikely to adopt child-centred jurisprudence.

Given this reality, the discussion must now turn to the Constitution itself and framing and philosophical inspirations. It must be considered why the Constitution was framed in the way that it was and what principles lie behind it. Furthermore, it must be questioned whether these principles are compatible with and appropriate in modern Irish society and if the Constitution is framed in a way that will allow it to act for a developing liberal democracy. The controversy

surrounding recent decisions[1] and the numerous calls from academia[2], political actors[3], and members of the judiciary[4] would suggest that the Constitution is not wholly appropriate to deal with child protection in the modern age. Therefore, the question is: whether the Constitution should be changed and, if it should, how it should be amended and according to what principles?

This chapter will begin by examining the context and circumstances surrounding the framing of the relevant provisions in the Constitution in 1937 and the inspirations behind them. It will then address the impact of societal change on the provisions and their underlying principles. It will be argued that certain constitutional provisions and their underlying philosophies are inappropriate in the context of modern society. The aim is to show that any improvement in child protection will require complete reform of the constitutional provisions on the family as a whole. It will be proposed that liberal and secular principles would offer a more appropriate base for constitutional provisions on the child and family, and one more capable of generating a Constitution that is effective in modern society and in the future.

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[1] Most notably *Baby Ann* [2006] 4 IR 374 and *North Western Health Board v HW and CW* [2001] IR 622.

[2] Examples include Report of the Constitutional Review Group, Stationary Office, Dublin (1996); Shannon, *Child Law*, Thompson RoundHall, Dublin, 2005 at p 45; Conor O'Mahony, *Children, Parents and Education Rights: A Constitutional Imbalance* Irish Journal of Family Law, (2004) 7(3) IJFL 3; Fergus W. Ryan, Recognising Family Diversity: Children, One-Parent Families and the Law, (2006) 9(1) IJFL 3.

[3] Examples include The Children's Rights Alliance, *Small Voices, Vital Rights*, Submission to the UN Committee on the Rights of the Child (1997); Children's Rights Alliance, Submission to the Joint Committee on Child Protection, August 2006; submissions by Aim Family Services [at p A21], Barnardos [at p A 36] and the Church of Ireland [at p A 42] to the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006.

[4] See, in particular, the judgment of Mrs Justice McGuinness in *Baby Ann* [2006] 4 IR 374 at 498. See also, *DPP v JT* [1988] 3 Frewen 141; *Southern Health Board v CH* [1996] 1 IR 231; *DPP v Best* [2000] 2 IR 17.

It is important to illustrate that, while focus should be limited to child protection, such a chapter will inevitably be forced to consider wider constitutional themes and issues. However, these themes cannot be considered in great detail and will only be dealt with in as much as is necessary to address the central issue of children's rights.

B. Framing and Underlying Principles

Introduction

An analysis of the framing of the Constitution and the underlying principles involved is a necessary precursor to considering any change in the philosophy behind constitutional provisions.

As will be seen, the family and education provisions of the Constitution are heavily influenced by the principles of natural law. Since natural law will be dealt with in a more detailed way later on in the chapter, it should suffice for this section to consider natural law as consistent with a general Christian philosophy, and that its invocation signifies the influence of Christian ideology. As Hogan and Whyte observe, "the reference to the nature of the state as 'Christian and democratic' [in *Ryan v Attorney General*[5]] unmistakeably suggests a 'higher law' approach."[6] Furthermore, the invocation of natural law in the courts has generally produced rationes decidendi that are at least consistent with Christian

[5] *Ryan v Attorney General* [1965] IR 294.
[6] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 1251.

teaching[7]. It should be no surprise that, in this jurisdiction, natural law has manifested itself in a way that is particularly consistent with Catholic teaching[8]. This is evidenced by the fact that the Church of Ireland has recommended the removal of natural law references from the provisions on the family and described them as "unhelpful and outdated in today's constitutional context."[9]

The arguments of Mr Justice Hardiman[10] and of the respondents in *North Western Health Board v HW and CW*[11] provide an illustration of why a historical examination is necessary. Hardiman J agreed with the respondents' proposition that the general perception that Articles 41 and 42 were grounded in papal

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[7] For example, per Murphy J in *North Western Health Board v HW and CW* [2001] 2 IR 622 at para 208, "The Thomistic philosophy - the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Mr Justice Walsh - confers an autonomy on parents which is clearly reflected in these express terms of the Constitution which relegate the State to a subordinate and subsidiary role."

[8] See, for example, the judgment of Chief Justice O'Higgins in *Norris v Attorney General* [1984] IR 36 at 64: "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 with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting *unnatural* sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult of acceptance." [emphasis added]

[9] Church of Ireland submission to the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006 at A41.

[10] "It has been observed that Article 41 and 42 of the Constitution "are generally thought to have been inspired by papal encyclicals and by Catholic teaching". (Kelly, The Irish Constitution, third edition page 991). Counsel for the Respondents in this case have submitted, in my view convincingly, that the same approach can be grounded otherwise and have referred us to an American academic authority, Professor Joseph Goldstein. [Joseph Goldstein, *Medical care for the Child at risk: on State Supervention of Parental Autonomy* , The Yale Law Journal, Vol. 86, No. 4, Mar, 1977, pp 645-670.
] The latter suggests that the common law "reflecting Bentham's [this mention of Bentham is strange considering Bentham deplored the concept of natural law] view, has a strong presumption in favour of parental authority free of coercive intrusions by agents of the State". I would endorse this as a description of the Irish constitutional dispensation, even if any reflection of the views of Jeremy Bentham is coincidental. I do not regard the approach to the issue in the present case mandated by Articles 41 and 42 of the Constitution as reflecting uniquely any confessional view." Per Hardiman J in *North Western Health Board v HW and CW* [2001] 2 IR 622 at para 302.

[11] *North Western Health Board v HW and CW* [2001] IR 622.

encyclicals and catholic teaching is questionable[12]. It was argued that the Articles could have been based on alternative inspirations[13]. This section will illustrate that such opinions are at variance with the vast majority of academic and judicial opinion and most of the historical evidence and that they misrepresent the philosophical origin of the Articles.

The Framing of the Constitution

The framing process of Bunreacht na hÉireann was famously clandestine[14] but it is widely accepted that the document was largely the creation of President de Valera and his small group of chosen civil servants. While we know relatively little about the process we can be confident that "… it [the Constitution] was clearly very much Mr de Valera's own creation…"[15] However, de Valera himself was certainly in substantial consultation with members of the clergy[16] during the drafting process. In particular John Charles McQuaid was in constant contact and has been described as "…the single most important clerical influence on De Valera."[17]

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[12] Ibid.
[13] Such as Professor Goldstein's.
[14] See, for example, the account in Dermot Keogh, 'The Irish Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988.
[15] JH Whyte, *Church and State in Modern Ireland 1923-1979*, Second Edition, Gill & McMillan, Dublin, 1980 at p 51.
[16] Keogh, for example, notes correspondence with John Charles McQuaid (at p 28, for example), the papal nuncio at p 29, with Archbishop MacRory of Armagh at p 30 and with Archbishop Edward Byrne at p 31 in Dermot Keogh, 'The Irish Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988.
[17] Keogh, ibid, at p 11.

It has been argued, however, that individuals such as McQuaid were not as influential as they are often made out to be. McDonagh[18] questions the influence of John Charles McQuaid and argues that the draft was largely De Valera's work. He cites an interview in which he "…took De Valera to suggest…" that McQuaid's influence was limited to Article 45.[19] It has also been proposed, naturally, that the President was primarily motivated by an intention to avoid the wrath of the Church and to produce a Constitution that would stand up to ratification[20]. However de Valera was a devout Catholic, if not an especially conservative one, and John Charles McQuaid was a close family and personal friend[21]. The President's substantial correspondence with McQuaid and other members of the clergy would seem to have been motivated by more than mere political expediency.

Political Debate on the Constitution

There was unusually little debate on the family provisions of the Constitution. Keogh notes that Fine Gael did not seriously challenge Articles 40 to 45 and were chiefly concerned with the presidential powers given the contemporary

[18] Enda McDonagh, 'Philosophical-Theological Reflections on the Constitution' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988.
[19] Ibid at p 192.
[20] Garret FitzGerald, 'The Irish Constitution in its Historical Context' in Patrick Twomey and Jim Murphy, *Ireland's Evolving Constitution 1937 – 1997: Collected Essays*, Hart Publishing, Oxford, 1998 at p 37.
[21] De Valera had attended Blackrock College (where McQuaid had taught) and had maintained contact with Blackrock while his children attended the school. Dermot Keogh, 'The Irish Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988 at p 19.

political climate in Europe.[22] When the Articles were discussed, children's interests were ignored and there was more concern about women's rights and about the impact on north-south relations[23]. Whyte argues that there would not have been much of a debate in any event. "There was [in 1923-1937] overwhelming agreement that traditional Catholic values should be maintained... There is no evidence that pressure from the hierarchy [on the politicians] was needed to bring this about: it appears to have been spontaneous. The two major parties… were at one on this."[24]

Academic Opinion

The academic literature is largely in agreement that Articles 41 and 42 were heavily influenced by Catholic teaching. Garret Fitzgerald notes that the relevant ideology was "…a particular form of Catholic teaching prevalent in the 1930's." He further argues: "over and above this [the divorce prohibition, special position of the church etc]… [catholic teaching] is visible in tenor and tone of the preamble and of the formulation of fundamental rights *in relation to the Family,* Private Property *and Education*[emphasis added]" .[25] Fuller argues similarly: "It is in Articles 41 to 44 that the constitution of 1937 becomes particularly Catholic

[22] Dermot Keogh, 'The Irish Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988 at p 63.
[23] Dáil Éireann - Volume 67 - 11 May, 1937. Bunreacht na hEireann (Dréacht)—Dara Céim
[24] JH Whyte, *Church and State in Modern Ireland 1923-1979*, Second Edition, Gill & McMillan, Dublin, 1980 at p 60.
[25] Garret FitzGerald, 'The Irish Constitution in its Historical Context' in Patrick Twomey and Jim Murphy, *Ireland's Evolving Constitution 1937 – 1997: Collected Essays*, Hart Publishing, Oxford, 1998 at p 37

its thrust."[26] The conclusions of Hogan[27], Beytagh[28], Walsh[29], Browne[30] and Hogan & Whyte[31], amongst others, are further evidence of this consensus.

Judicial Interpretation

Judicial opinion reflects the academic position. In *Re Tilson*[32] it was stated in the High Court that "Our fundamental law deliberately establishes a Christian Constitution"[33]. Similarly, Gavan Duffy J stated in *Heffernan v Heffernan*[34] that Articles 41 and 42 were "…redolent… of the great papal encyclicals in pare materia…" In *North Western Health Board v HW & CW*[35], Murphy J opined that parents were conferred a special autonomy by the Thomistic philosophy, "the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Mr Justice Walsh."[36] These statements are not in isolation. The recognition of the Constitution as a Christian document has been a consistent and dominant theme in Irish constitutional law[37].

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[26] Louise Fuller, *Irish Catholicism Since 1950: The Undoing of a Culture*, Gill & McMillan, Dublin, 2004 at p 7.
[27] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution*, Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at pp 1827 – 1828.
[28] Francis X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective*, RoundHall Sweet & Maxwell, Dublin, 1997 at p 113.
[29] Brian Walsh, 'The Constitution and Constitutional Rights', Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988 at pp 94-95.
[30] Noel Browne, 'Church and State in Modern Ireland' in Patrick Twomey and Jim Murphy, *Ireland's Evolving Constitution 1937 – 1997: Collected Essays*, Hart Publishing, Oxford, 1998 at p 218.
[31] JH Whyte, *Church and State in Modern Ireland 1923-1979*, Second Edition, Gill & McMillan, Dublin, 1980 at p.51 and at p 58.
[32] *Re Tilson* [1951] IR 1.
[33] Ibid at 13.
[34] *Heffernan v Heffernan* (1955, unreported).
[35] *North Western Health Board v HW and CW* [2001] IR 622.
[36] Per Murphy J in *North Western Health Board v HW & CW* [2001] 2 IR 622 at 732.
[37] See, for example, *Norris v Attorney General* [1984] IR 36, *McGee v Attorney General* [1974] IR 254 and *Quinn's Supermarket v Attorney General* [1972] IR 1.

The constitutional Articles on the family have also been particularly influential in their support of a natural rights theory in the Constitution. As Beytagh observes, Article 41.1.1, "…more so than any other provision of the Constitution, provides textual support to the Irish judiciary's view that a natural rights jurisprudence was intended along with the specific protections outlined in the document…"[38]

Religious Inspirations

The influence of papal encyclicals on the Constitution has also been widely observed. Quadragesimo Anno in particular, is often cited as here for example: "The dominant social thinking of the time, pre-eminently as expressed in the papal encyclical *Quadragesimo Anno*… favoured 'subsidiarity' – that the state should offer support or help smaller groups, including the family, but should not supplant them."[39] Published just a few years before the drafting of the Constitution, Whyte saw the encyclical as inspiring a re-assertion of the previously dormant Catholic social movement, "It would restore the state… to its rightful place, which is not to do anything itself, but to direct, watch, urge and restrain subsidiary organisations…"[40]

While Quadragesimo Anno seems to have been influential, the encyclical Divini Illius Magistri[41] seems to reflect the constitutional provisions of the family more obviously. Certain sections of the encyclical are notable in their similarity to the

[38] Francis X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective*, RoundHall Sweet & Maxwell, Dublin, 1997 at p 37.
[39] Report of the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006 at p 34.
[40] JH Whyte, *Church and State in Modern Ireland 1923-1979*, Second Edition, Gill & McMillan, Dublin, 1980 at p 67.
[41] *Divini Illius Magistri*, Encyclical of Pope Pius XI, 31 December 1929.

provisions of the Irish Constitution. At paragraph 32 it is stated that the family has "a right inalienable because inseparably joined to the strict obligation, a right anterior to any right whatever of civil society and of the State, and therefore inviolable on the part of any power on earth." Furthermore, at paragraph 33: "it would be contrary to natural justice if the child, before the use of reason, were removed from the care of its parents, or if any disposition were made concerning him against the will of the parents." These statements bear more than a passing resemblance to Article 41 provisions. Paragraph 45 of the encyclical is remarkably similar to Article 42.5 of the Constitution: "It also belongs to the State to protect the rights of the child itself when the parents are found wanting either physically or morally in this respect, whether by default, incapacity or misconduct."

Conclusion

The Roman Catholic elements of the constitution are obvious in the explicit provisions and in many of the seminal judgments handed down since 1937. This influence has, perhaps, been most noticeable in the area of family law and child protection. The presence and judicial invocation of a natural law element to the Constitution has further bolstered the Roman Catholic slant to the Constitution.

However, the confessional influence is more nuanced than a simple reading of the Constitution and constitutional caselaw would suggest. It has been amplified by the heavy Christian orientation and substantial Catholic Church control of education and healthcare organisations. Indeed, as Kelly argued, "…there is

equally no doubt that their [Articles 41 and 42] effectiveness owes something also to the Christian educational background and instinctively Christian disposition of the judges."[42]

Therefore, families who could not be interfered with by the State, took their guidance from the Catholic Church. Consequently, the primacy of the family is intrinsically tied to the education provisions – this may be why they are linked in the Constitution – the ultimate aim of which is to ensure that the children of the nation were indoctrinated, through their education, as Catholics. Noel Browne, perhaps overstating the point, described the situation thusly: "Inevitably, then, our teachers, historians, politicians, and journalists, our Cabinets, the electorate and, as a consequence, all our laws, have reflected fundamentalist, anti-Republican, anti-democratic, anti-pluralist, and reactionary attitudes fed to us by Rome"[43].

It should, of course, be noted that the effect of the provisions was not solely to endow the Catholic Church with influence. The Catholic Church, and indeed other churches and religious organisations and obviously parents could benefit from the substantial deference given to families and the limitations on the state. This does not affect the central point however, namely that the constitutional provisions on the family were largely drafted to avail the Catholic Church and to forward Christian values.

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[42] JM Kelly, *Fundamental Rights in the Irish Law and Constitution*, Second Edition, Allen Figgis & Co Ltd, Dublin, 1967 at p 58

[43] Noel Browne, 'Church and State in Modern Ireland' in Patrick Twomey and Jim Murphy, *Ireland's Evolving Constitution 1937 – 1997: Collected Essays*, Hart Publishing, Oxford, 1998 at p 45.

C. Societal Change in Ireland

Introduction

It has been shown that the Constitution, and the family and education provisions in particular, was heavily influenced by Catholic teaching. Moreover, this Catholic teaching was of the more conservative variety, generated by the siege mentality evoked by the fear of communism and the general will to set the nation apart from Britain and its perceived 'immoral' influences. In this sense, certain aspects of 1930s Catholicism represented an exercise in nation building. This Constitution *may* have represented a legitimate base for Irish society in the 1930's, however, Irish society changed noticeably in the subsequent 70 years. Despite the fact that the idea that there has been a substantial change in Irish society is widely accepted, and that this paper is a constitutional law thesis and not a sociological one, it is necessary for the purposes of clarity and completion, to examine this change to some degree.

Early Change and Change in the Roman Catholic Church

This social change, despite a common perception, was not limited to the 1990s and the beginning of the 21st century. Ireland also experienced considerable, if not groundbreaking, changes between 1950 and 1989. The proliferation of the media challenged the monopoly on moral formulation, previously held by the Church hierarchy in Ireland. Television, in particular, had a profoundly

liberalising effect. The arrival of television also heralded the end of the age of censorship, if not initially then at least in the long term.[44]

In every decade between 1920 and 1960 there was a substantial level of emigration. While this was to fluctuate during the 1960s and 1970s, it would resume in the 1980s[45]. This phenomenon exposed Irish men and women to cultural and social mores that were completely different to the Ireland they left. The employment opportunities of the British war economy exposed many Irish Catholics to the post-war liberalisation that their native land largely skipped. Obviously this effect was primarily experienced by the migrants who were no longer part of Irish society, at least in the short term, however the experience represented a further dilution of the isolationism. This is illustrated by the fact that Bishops in the 1950s lamented the "leakage of faith" caused my migration[46]. Rural migration to Dublin also had a similar effect. Rural conservative attitudes were diluted with the more pluralist attitudes of the city[47].

However this change was not restricted to the public at large. As Fuller notes, even in the 1950s, members of the Roman Catholic clergy were beginning to think that change in doctrine was needed[48] and this change was eventually manifested at a papal level with the advent of Pope John XXIII[49]. Pope John XXIII's 1961 encyclical *Mater et Magistra* is highlighted as signalling a shift in

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[44] Louise Fuller, *Irish Catholicism Since 1950: The Undoing of a Culture,* Gill & McMillan, Dublin, 2004 at p 128.
[45] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006 at p 19.
[46] Louise Fuller, *Irish Catholicism Since 1950: The Undoing of a Culture,* Gill & McMillan, Dublin, 2004 at p 44.
[47] Ibid at p 42.
[48] Ibid at p 86.
[49] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006 at p 37.

policy from restricting the state to emphasising social justice. "Whereas previous popes had railed against state intervention in the economy and any development that smacked of a welfare state system, John XIII laid much more emphasis on the practical need for public authority 'to intervene to remedy the lack of balance [in economies, parts of countries and even peoples of the of the world]".[50] Consequently, it might reasonably be argued that the current Constitutional provisions on the family are at variance even with modern Church thinking.

This change in Roman Catholic Church thinking has arguably been mirrored politically. The decline in the influence of mediating structures in society – such as the extended family, the community and churches – has corresponded with an increase in the importance of the state[51]. This experience is indicative of a general phenomenon in western society as recognised by Edward Shorter[52]. This steady increase in the State's 'parenting'[53] role is also noticeable in the area of education. Most notably, it can be seen in the extension of free secondary education in the 1960s and of free third level education in the 1990s.

Modern Society

[50] Louise Fuller, *Irish Catholicism Since 1950: The Undoing of a Culture,* Gill & McMillan, Dublin, 2004 at p. 214. This change in Church thinking was notably accompanied by political changes in Ireland.
[51] See William Duncan, 'The Child, the Parent and the State: The Balance of Power' in *Law & Social Policy, Some Current Problems in Irish Law,* William Duncan (ed.), Dublin University Law Journal, 1987 at p. 20. Duncan describes how the large extended family has largely given way to the nuclear family and that his has been accompanied by several changes, namely increased state involvement in socialisation, education and protection of children, limits on parents rights and recognition of children's right and protections (which have nevertheless, he acknowledges, been few in number,).
[52] Shorter, *The Making of the Modern Family,* , Basic Books, New York, 1975.
[53] For want of a better word.

Therefore, even before the era of the 'Celtic Tiger', Irish society had changed substantially. So much so, that Keogh observed: "By 1987, the Ireland of the 'age of de Valera' was little more than a yellowed photograph to the country with the youngest population in Europe. In the year of Bono, the Constitution appears dated, with provisions at variance with values held in sections of the community"[54]. The societal change since 1990 has been so conspicuous and widely observed, it hardly needs commenting on. A brief summary should suffice.

The general profile of the Irish family is now far more diverse and varied[55]. The economic structure of the country has also shifted since 1990 and seriously since 1937. From an economy dominated by agriculture in 1937, the vast majority of the population now work in industry or services with only 6% involved in agriculture[56]. While identification with the Catholic religion has remained high[57], mass attendance has been dropping precipitously since 1990, with studies reporting that attendance dropped from 85% in 1990 to 66% in 1996[58] and to 48% in 2006[59]. The substantial increase in inward migration[60] has also diversified Irish society and promises to continue to do so[61]. While immigration

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[54] Dermot Keogh, 'The Irish Constitutional Revolution: An Analysis of the Making of the Constitution' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988 at p 4.
[55] For a summary of the varied forms of family structure now present in Ireland, see Ryan, *Recognising Family Diversity: Children, One-Parent Families and the Law*, (2006) 9(1) IJFL 3.
[56] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006 at p 19.
[57] Census 2006.
[58] Irish Times, 16 December 1996.
[59] Catholic World News (cwnews.com) June 1, 2006.
[60] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006 at p 19.
[61] Several estimates have suggested that the current immigration rate will more or less persist, for example: "The report [a report by NCB Stockbrokers] also suggests this influx of immigrants to Ireland's shores is not a short term phenomenon. It is predicted that by 2020 the population of Ireland will have grown from 4.1 million to 5.3 million. The number of immigrants will have

does not in itself necessarily produce a more liberal society – although it might – it most likely increases the diversity of the host population. Consequently, immigration might magnify the need for a more secular Constitution[62].

International Obligations

Ireland's ability to isolate itself morally and socially has also diminished since 1937. Most obviously, this is because of the range of international obligations the state has undertaken and had imposed. Beytagh has suggested that a number of the fundamental constitutional rights appear in serious need of re-writing in light of societal change and EU and international human rights law[63]. Specifically, it is widely believed that Ireland is failing in its international obligations in the area of child protection[64]. Indeed, Shannon argues that ratifying such international agreements, without any intention to live up to them, may do children more harm than good by raising false expectations of progression in the wider public[65].

Conclusion

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risen from 400,000 to 1 million and will account for 19% of the country's population. The NCB expects on average 53,000 overseas workers each year to come and work in Ireland over the next five years.
http://www.workpermit.com/news/2006_04_04/uk/immigrants_to_ireland_continue.html

[62] "The sustained high level of immigration over the past decade or so means that perhaps 10% of our population is accounted for now by non-Irish nationals. This is high by international standards, even for countries with a long tradition of immigration… This change has contributed to a much more complex and diverse population that places more exacting demands on our policy development and service provision." Speech by the Taoiseach, Mr Bertie Ahern, TD at the Launch of the 2006 Census of Population in Government Buildings.

[63] Francis X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective,* RoundHall Sweet & Maxwell, Dublin, 1997 at p 152.

[64] See for example, Vital Rights, The Children's Rights Alliance, Submission to the UN Committee on the Rights of the Child (1997) at p 10; Ryan, *Recognising Family Diversity: Children, One-Parent Families and the Law,* (2006) 9(1) IJFL 3 at p 8; Geoffrey Shannon, *Child Law,* Thompson Round Hall, Dublin, 2005 at p 2.

[65] Geoffrey Shannon, *Child Law,* Thompson Round Hall, Dublin, 2005 at p 2.

We have seen above how the Constitution and the family provisions in particular were especially influenced by Catholic teaching in the 1930s. It is widely accepted that Irish society has changed substantially since that decade and it is arguable that "nowhere have the changes been more striking than in family life."[66] As the All Party Oireachtas Committee on the Constitution concluded, "Public opinion moved [between 1937 and 2006] in a more liberal direction, reflecting the growing liberalism of ordinary Catholics whose behaviour drifted steadily away from strict observance of Catholic tenets"[67].

D. Natural Law

Introduction

'Natural law' is a broad theory or combination of theories which propose that there is "a natural law of divine origin [which] is above human law, however positively expressed".[68] Debate over the legitimacy, applicability and consistency of the theory has raged for centuries and one could not attempt to exhaustively deal with the subject in this context. Nevertheless, the theory must be assessed insofar as it informs a constitutional stance on the balance between parent, child and state. A discussion of natural law is further warranted by the fact that the doctrine is, arguably, implicitly invoked in the wording of Articles 41 and 42. Three of the five constitutional references to "nature" or "natural" are in Articles

[66] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006 at p 52.
[67] Ibid at p 38.
[68] JM Hogan & GF Whyte, *JM Kelly: The Irish Constitution,* Lexis Nexis Butterworths, Fourth Edition, Dublin, 2003 at p 1249.

41 and 42. This section will assess the value of a natural law base to constitutional provisions on the family in modern society.

It should be of little surprise therefore that the concept of natural rights has been influential in the context of child protection[69]. As Martin notes, the interpretation of natural and imprescriptible rights has helped to "tilt the legal balance in favour of the autonomy of the family unit to the possible detriment of individual members."[70]

However, the legitimacy of the theory is questionable and it might be challenged as a unsuitable base for a Constitution in a modern liberal democracy. This is especially so in light of the changes in Irish society since 1937. Jeremy Bentham famously described the theory as "nonsense on stilts"[71]. HLA Hart summed up Bentham's position, "Bentham both despised it [the concept of natural rights] as intellectually disreputable and feared when it was used in political controversy or embodied in public documents, regarding it as a threat to all government and to the stability of society."[72] As will be seen, the theory can be challenged on a number of grounds.

<u>Vagueness</u>

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[69] See, for example, *North Western Health Board v HW & CW* [2001] 2 IR 622, *Re JH, an infant* [1985] IR 375, and *Baby Ann* [2006] 4 IR 374.
[70] Frank Martin, 'The Family in the Constitution – Principle and Practice' in Patrick Twomey and Jim Murphy, *Ireland's Evolving Constitution 1937 – 1997: Collected Essays*, Hart Publishing, Oxford, 1998 at p 89.
[71] Jeremy Bentham, Works II 501.
[72] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Clarendon Press, Oxford, 1982 at p 79.

In making a half-hearted attempt to define natural law, Ronald Dworkin offered the following: "though the various theories grouped under that title are remarkably different from one another, and the name suits none of them"[73]. This quote illustrates a central limitation of natural law; it is often entirely unclear exactly what the natural law commands and its proponents rarely specify what school of natural law they refer to. This experience has been repeated in Ireland and the Constitutional Review Group concluded that "no clear meaning of these terms [the references to natural law in Articles 41 and 42] has emerged from the judicial consideration of them"[74]. While highlighting the lack of precision redolent in superior court judges' usage of the theory[75], Clarke nevertheless, proceeds to assume what theory superior court judges are referring to and he summarises it as "…a hybrid scholastic theory, partly derived from Aquinas and partly inherited from later scholastics through the intermediary of early twentieth century Catholic theology."[76]

However even this assumed theory would not be satisfying. For a start, the teachings of thinkers like Aquinas are hopelessly outdated. His beliefs in slavery as natural and the subjugation of women could not be accepted in modern society[77]. Absent this base, natural law, in the Irish context, arguably amounts to nothing more the imposition of modern Church thinking. It should not be a surprise then that the application of the theory has resulted in judges delivering

[73] Ronald Dworkin, *Law's Empire,* Harvard University Press, 1993 at p 35.
[74] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 at p 330.
[75] Clarke, *The Role of Natural Law in the Irish Constitution*, (1982) 17 Irish Jurist 187.
[76] Ibid at p 191.
[77] Kretzmann and Eleonore Stump (Ed), *The Cambridge Companion to Aquinas,* Cambridge University Press, 1993 at p 221.

conflicting judgments in the same cases ostensibly based on the same natural law[78].

Subjectivity

The vagueness of the theory also diminishes the legitimacy of constitutional law in that decisions can be seen as merely the result of the subjective opinions of judges. Given that natural law can provide little specific guidance on important issues, it is left to judges to construe what the natural law would say. As Hogan comments: "If the legitimacy of judicial review is to continue to be accepted, decisions in major constitutional cases must be seen to represent more than the personal opinions of individual judges."[79] The Constitutional Review Group, considering natural law as a source of rights in general, concluded: "The overall result is that reference to the principles of natural law, in the absence of a text establishing its principles, lacks the objectivity and precision which might reasonably be expected."[80]

Democratic Deficit

[78] See, for example, Gerard Hogan, 'Constitutional Interpretation' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988 at p. 177. See also *Norris v Attorney General* [1984] IR 36. Professor William Duncan highlighted *G v Bord Uchtála* [1980] IR 32 as the "most startling example" where, invoking natural law, judges were divided 3-2 on the issue of whether a mother should have a right to custody of her illegitimate child, William Duncan, 'The Child, the Parent and the State: The Balance of Power' in *Law & Social Policy, Some Current Problems in Irish Law*, William Duncan (ed.), Dublin University Law Journal, 1987 at p 28.
[79] Gerard Hogan, 'Constitutional Interpretation' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988 at p 187.
[80] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996, at p 251.

Another objection is that if one accepts that the Constitution is infused with a natural law theory, this would represent a highly undemocratic system of law making. Laws and decisions are plucked, not from a law passed by the people or its representatives, but from a vague and ill-defined theory based largely on Christian teaching. Clarke argues that natural law has "in principle, almost unlimited scope for frustrating the "democratically" enacted laws of the Oireachtas."[81] One would have to also question what authority has endowed judges with the ability to interpret natural law.

While the references to natural law may be obvious to lawyers and legal academics, it is not certain that average citizen (in either 1937 or 2008) would appreciate the presence of this largely unseen influence. One would have to seriously question – if it was widely appreciated that the Constitution was influenced significantly by natural law – whether this situation would be acceptable to the populace at large today; indeed, one would have to ask if the people of 1937 would have accepted it[82].

Conclusion

It could reasonably be argued that 'natural law' merely represents a legal and philosophical smokescreen to disguise permanent Catholic Church influence on the laws of the state, an influence which, absent a referendum, the people are

[81] Clarke, 'The Role of Natural Law in the Irish Constitution', (1982) 17 Irish Jurist 187 at p 188.
[82] It should be noted that in *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 the Supreme Court stated that natural law could not invalidate a constitutional amendment not could it invalidate an explicit constitutional provision. In a sense the case affirmed the democratic power of the People however this does not negate the fact that natural law can have a substantial influence on constitutional law in the way outlined above.

powerless to control. Even if this were to overstate the situation, there would still be sufficient grounds to limit the continuing use of the theory in Irish constitutional jurisprudence on the basis that it is, inter alia, too vague, too subjective and too undemocratic. Indeed, Keane CJ seemed to doubt its legitimacy in *TD v Minister for Education*[83]**.** It is submitted that Ireland should adopt the Constitutional Review Group's recommendations[84] and remove all references to 'natural law' (such as 'natural' and 'imprescriptible') from the Constitutional provisions on the family. The presence and substantial influence of natural law on the provisions of the constitution is another illustration of how complete restructuring of the constitutional provisions on the family are needed.

E. Liberal and Secular Principles

Introduction

It has been illustrated then that the Constitution was drafted with a Christian philosophy in mind. It has also been shown that there has been a substantial change in Irish society, especially during the last 10 to 15 years. Subsequently, it was argued that natural law theories have been hugely unhelpful in Irish constitutional jurisprudence and that they are particularly inappropriate in the context of the family in modern Irish society. Mr Justice Walsh argued that so long as the constitution reflects the politics and social culture of the majority of

[83] "Whether the formulation adopted by Kenny J is an altogether satisfactory guide to the identification of such rights is at least debatable." Per Keane CJ in *TD v Minister for Education* [2001] 4 IR 259 at 281.
[84] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 at p 336.

the people, "…it is difficult to justify claims that a drastic overhaul is needed."[85] It is submitted that the time for a drastic overhaul of the constitutional provisions on the family has now arrived. The numerous calls for change in the last 15 years[86] lend support to this view. It will be argued that a liberal and secular approach to constitutional framing would be more representative of modern Irish society and would be more proficient at protecting children.

This is not to say – at least not at this stage – that a more interventionist model is needed in the area of child protection. Rather, it will be argued that the guiding philosophy of the Constitution should permit such an approach if it was considered necessary by, and in the interests of, modern society[87]. While liberal and secular principles would form the basis of the new model, the model might well be child-centred or parent-centred, state-centred or family-centred, interventionist or non-interventionist. All that is proposed at this stage is that the constitutional provisions should not be governed by a somewhat anachronistic Christian philosophy and further limited by an ill-defined and unspecified natural law.

Liberal and Secular Principles

It is perhaps ironic that liberalism should be championed to provide a more child centred constitutional order, given the fact that liberalism is broadly based on the principle of limiting state interference. However, even John Stewart Mill –

[85] Anthony Coughlan, 'The Constitution and Social Policy' in Frank Litton (ed), *The Constitution of Ireland 1937-1987*, Public Institute of Education, Dublin, 1988 at p 159.
[86] See supra at notes 148, 148, 150 and 151.
[87] An issue which chapter 3 will assess.

arguably the founding father of classical liberalism – recognised that, within liberalism, the issue of child protection was an exception to the rule. Indeed, his 'harm principle' obliged the state to protect children from injuries to themselves and by others, potentially including their parents[88]. Obviously, it is not proposed that classical liberalism should be the basis of the Irish Constitution, however modern social liberalism theory might provide a more suitable approach than the current one. A more secular approach might also avail the Constitution, especially in its ability to promote a more flexible constitutional order, one that is more suited to dealing with a multi-cultural and increasingly secular society.

Advantages of a Liberal and Secular Approach

The most obvious justification for adopting such an approach is that it conforms to the mores of Irish society in the present day. It also might be argued that a liberal and secular approach would be better able to adapt to societal changes in the future, changes which seem likely in light of continued immigration[89]. The shift in society from a more conservative, religious one in 1937 to a more liberal and secular one today has been observed above. This analysis is surely incontrovertible. The fact that some might argue[90] that a change in the constitutional order might damage society should be of little relevance. The Constitution is intended to be a political document that reflects the will of the

[88] John Stewart Mill, *On Liberty*, 1859 in John Stewart Mill, *On Liberty and other Essays*, Oxford University Press, 1991 at p 14.
[89]See supra at note 208.
[90] See, for example, the submissions of Amen, Brethren and Comhar Chriosti to the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006.

people. It is not designed to be a moral code set by the religious hierarchy, family rights advocates and natural law proponents.

Moreover, in principle, it is undesirable to have a constitution that does not reflect the will of the people. This undermines the legitimacy of the democracy and the people's belief in it and in its judicial branch. If decisions are seen to be drawn from natural law theories and a seemingly unalterable constitution, the people may become politically apathetic and disillusioned and generally sceptical about the administration of justice.

It might also be argued that a constitution should avoid religious language as a rule. Gerard Whyte has advanced this argument[91]. While he believes that there is nothing wrong with using religious language as a frame –such as in the preamble – he thinks it is inappropriate to use it in provisions which will involve coercion. The family provisions, for example, inevitably will. Firstly, Whyte argues that if there is a secular argument for a constitutional provision, it makes sense that this should be the only one used since a religious argument might antagonise other religious groups and the non-religious[92]. Secondly, he argues that religious belief should not be used to coerce conscientious beliefs because "…the proper role for religious beliefs in social and political discourse is prophetic, rather than coercive."[93]

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[91] See, Gerard Whyte, 'Some Reflections on the Role of Religion in the Constitutional Order' in Patrick Twomey and Jim Murphy, *Ireland's Evolving Constitution 1937 – 1997: Collected Essays*, Hart Publishing, Oxford, 1998.
[92] Gerard Whyte, 'Some Reflections on the Role of Religion in the Constitutional Order' in Patrick Twomey and Jim Murphy, *Ireland's Evolving Constitution 1937 – 1997: Collected Essays*, Hart Publishing, Oxford, 1998 at p 58.
[93] Ibid.

F. Conclusion

This chapter has proposed that not only is there a need to change the Constitution to properly defend the interests of the child, but it is also necessary to alter the constitutional provisions on the family in general. This is not to say that the state should be a more interventionist in its dealings with the family – the next chapter will assess that issue. Rather, it is submitted that it should not be assumed that the family is entitled to the constitutional protections it currently receives and that such deference must be objectively justified.

CHAPTER THREE – ALTERNATIVE MODELS

Section A – Introduction

This chapter will analyse the academic literature on how a balance between state and family, parent and child might best be struck. This is a substantial task as there has been a long-running and largely inconclusive debate on this topic in many jurisdictions. The aim is to draw principles and philosophies that could be used to ground a new constitutional order in Ireland as regards the constitutional provisions on the family. Some provisional points must first be addressed.

This chapter will not be limited to assessing Irish literature. Given that the exercise will involve proposing a *new* constitutional model, foreign academic and judicial opinion can be as influential as domestic points of view. Indeed, they might be more valuable. This is because much of the debate in Ireland has concerned *whether* the Constitution should be changed in this area, rather than *how* it should be changed[1]. Nevertheless, the aim will be to concentrate on literature from jurisdictions with similar legal contexts, namely common law jurisdictions and constitutional democracies. Therefore, American academic literature – emanating, as it does, from a constitutional democracy largely

[1] See, for example, the submissions to the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006.The submission process was largely dominated by a debate between children's rights groups and religious, conservative and family groups over whether Constitution should be changed or not.

composed of common law jurisdictions – emerges as an especially valuable source of ideas.

In addition to this, consideration of American literature has several other advantages. Firstly, the United States Constitution is silent as to the issue of the family and the child and, as a result, different models have been applied at a federal and state level. Furthermore, this has been accompanied by a wealth of empirical and other studies which has added a great deal to the academic discourse.

Nonetheless, for obvious reasons, American studies cannot be entirely conclusive and the value of the American literature will be in its philosophical persuasion. This chapter will attempt to present these and other arguments, in the context of Irish legal, political and constitutional norms.

This exercise should not be inhibited by the variety of applications that a constitutional change will have nor should it be obfuscated by the plethora of legislative labels and legal standards that exist[2]. It should be remembered that constitutional change will affect, inter alia, adoption cases, so-called 'upbringing cases'[3] and welfare proceedings. The fact that some works concentrate on certain types of case in particular is not important as there is a central philosophical question to be addressed, namely; how should the balance between parent, state and child be set?

[2] For example, 'abandonment' in Ireland or 'neglect' in the United States.
[3] Such as in the case of *North Western Health Board v HW and CW* [2001] IR 622.

Section B – Domestic Proposals

Introduction

As already mentioned, the Report of the Kilkenny Incest Investigation in 1993[4] marked the beginning of a period which has seen a plethora of authoritative calls for amendment of the family provisions of the Constitution. The task of examining all the proposals would be too lengthy and in any event it would be largely pointless in that they rarely differ greatly and most have fallen by the political wayside. However two proposals in particular warrant detailed attention, namely, the amendments proposed by the Constitutional Review Group in 1996[5] and the 2006 recommendations of the All Party Oireachtas Committee on the Constitution's tenth report on the family[6] and the resulting Twenty-Eighth Amendment of the Constitution Bill, 2007.

The Constitutional Review Group

In the context of the time in which it was published[7], the 1996 Constitutional Review Group's proposals were especially innovative. Firstly, as noted in chapter two, the Review Group advised the removal of references to natural law in the family provisions[8]. Secondly – in light of a fear that the Constitution

[4] Kilkenny Incest Investigation: Report Presented to Mr Brendan Howlin TD, Minister for Health by South Easter Health Board, The Stationary Office, Dublin, May 1993.
[5] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996.
[6] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006.
[7] The Report of the Kilkenny Incest Inquiry notwithstanding, this was before there had been any widespread calls for or campaign to amend the family provisions of the Constitution.
[8] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 at p 336.

stressed too greatly the rights of the family unit, to the detriment of its individual members – the Review Group also called for the unenumerated rights of the child to be expressly enumerated in Article 41[9]. Their proposals were especially progressive in this area as they included a recommendation that a provision be added to require the state to intervene to protect certain rights of the child.[10] It was also proposed that the Constitution should be brought more into line with the European Convention on Human Rights and the United Nations Convention on the Rights of the Child[11]. The Review Group also proposed adoption of the best interests standard as a constitutional norm[12].

These proposals represented a novel and progressive revaluation of the constitutional provisions on the family. The value of removing the natural law references has already been commented on and the advantages of providing a positive obligation on the state to vindicate expressly provided children's rights will be highlighted in the next chapter. The introduction of a best interests standard at a constitutional level might also be seen as a progressive development although, as will be seen, the standard has certain potentially crucial weaknesses. While the proposals of the Constitutional Review Group were effectively ignored at a political level and remain unimplemented, the report continues to be referred

[9] Ibid.
[10] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 at p 330: "If a decision is made to amend Article 41 so as to grant express rights to children and also maintain an express guarantee of parents' rights and duties, it would appear necessary to expand the circumstances referred to in Article 42.5 so as to include a situation where the protection of the constitutionally guaranteed rights of children require intervention. A re-wording of the State's duty to the child under this Article is necessary in the light of the Review Group's proposed amendments to guarantee expressly certain rights of the child and elsewhere remove adjectives and phrases which appear to refer to natural law which have been a source of some difficulties"
[11] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 at p 328-329.
[12] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 at p 337: "The Review Group considers that, notwithstanding the above legislative provisions [and Re JH], it is desirable to put into the Constitution an express obligation to treat the best interests of the child as a paramount consideration in any actions relating to children."

to as an authoritative source. However, arguably, the Report of the All Party Oireachtas Committee on the Constitution and the resulting Twenty-Eighth Amendment of the Constitution Bill, 2007 have effectively overruled the Review Group's findings.

The All Party Oireachtas Committee on the Constitution

The tenth report of the All Party Oireachtas Committee on the Constitution on the subject of the family[13] represented the first attempt, at a legislative level, to reform the constitutional provisions on the family. Unfortunately however, the report offered little to improve family law provisions to protect children. This is not surprising. The Committee spent most of its time examining submissions from a range of interest groups, most of which opposed any amendment whatsoever[14].

Such an investigation will inevitably be dominated by unsophisticated polemics and is likely to result in a compromise proposal that attempts to please all sides. An illustration of the limits of such an approach is the inclusion, in the final report, of a substantial quote from the Irish Catholics Bishops Conference[15]. The quote invokes the judgment of Ellis J in *PW v AW*[16] to illustrate that the Constitution need not be amended. The use of this highly questionable authority

[13] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006.
[14] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006 at p 17. It is regrettable that the new Joint Committee on the Constitutional Amendment on Children has also adopted this approach.
[15] Ibid at pp 90-92.
[16] *PW v AW* (Unreported, High Court, 21 April 1980).

in the final report of the Committee illustrates the limitations of a process that gives centre stage, and most of its consideration, to interest groups.

Furthermore, unlike the 1996 Constitutional Review Group that was composed mostly of jurists, civil servants and academics, the 2006 Group was a parliamentary committee composed of politicians from various political backgrounds[17]. Moreover, the Committee reported just months before the 2007 general election. The influence of political agendas and election concerns was always likely to be an obstacle to the Committee proposing any innovative reforms. Regardless of the cause, the Report provided little of note.

The following was the Committee's conclusion on child protection: "A new section should be inserted in Article 41 dealing with the rights of children as follows: All children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interests of that child."[18] This is a hopelessly limited proposal. It promises only that *regard* will be given to the interests of the child. This guarantee is so weak that it would be very unlikely to play any substantial role in court proceedings. This is all the more true given that the Committee recommended the retention of the protections of marital parents and of the family[19].

Twenty-Eighth Amendment of the Constitution Bill, 2007

[17] Again, regrettably, the new Joint Committee on the Constitutional Amendment on Children is no different.
[18] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006 at p 124.
[19] Ibid at p 123.

The Twenty-Eighth Amendment of the Constitution Bill 2007 roughly followed on the recommendations of the Committee. The 2007 Bill was also limited in several respects. It retained references to natural law; indeed, it added some new ones[20]. The Article was to be inserted in Article 42 and therefore had no effect on the rights conferred on parents in Articles 41 and 42. As such, the amendment provisions are constantly overshadowed by the provisions on the family and are probably subject to them. In any case, there were other limitations.

Kilkelly and O'Mahony[21] point out the potentially crucial effect of the use of the phrase "provision may be made by law" in four subsections[22]. They argue that legislation enacted under these provisions would surely be subject to general constitutional principles and rights[23]. This seems likely because, conversely, the potential alternative applications of the provisions are unlikely. Kilkelly and O'Mahony point out that if the provisions are intended to render legislation immune from constitutional challenge, this would surely have been explicitly stated[24]. They suggest that any argument that the resulting legislation would form part of the Constitution would render the legislation in contravention of Article 46[25] in that it would amount to the legislature to amending the Constitution.

[20] Articles 42A.1 and 42A.2 both refer to the "natural and imprescriptible" rights of the child.
[21] Dr Ursula Kilkelly and Dr Conor O'Mahony, The Proposed Children's Rights Amendment: Running to Stand Still?, (2007) 10(2) IJFL 19.
[22] Namely, Article 42A.2, Article 42A.3, Article 42A.4 and Article 42A.5.1°
[23] Including the various protections of the family. Dr Ursula Kilkelly and Dr Conor O'Mahony, *The Proposed Children's Rights Amendment: Running to Stand Still?*, (2007) 10(2) IJFL 19 at p 21.
[24] Ibid.
[25] Ibid.

Article 42A.1 proposed to acknowledge the natural and imprescriptible rights of the child. Kilkelly and O'Mahony pointed out that "the provision almost certainly refers to the same rights of the child that had been found in Article 42.5 in *G v Bord Uchtála*[26], given the similarity of wording between this provision and Article 42.5."[27] Obviously this would add little to Constitutional jurisprudence. It could also be argued that this provision would not change the position in *Re JH*[28] where the child was considered to have a natural and imprescriptible right to be a member of the marital family. This could be seen as a continuation of the jurisprudence highlighted by Duncan[29], whereby parental rights are disguised in the form of children's rights.

Article 42A.2.1° does little to improve things; in fact, it could be argued that it makes matters worse for non-marital children. The Article retains the narrow state intervention standard of Article 42.5. However, as it is not limited to the context of the marital family, the provision draws non-marital children under the same schedule as marital children. Consequently, state intervention to protect non-marital children – who had been previously unaffected by the narrow limits of state intervention in the marital family – is effectively limited by Article 42.5. Eoin Carolan calls this a "…classic case of levelling-down, rather than levelling-up."[30]

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[26] *G v Bord Uchtála* [1980] IR 32.
[27] Dr Ursula Kilkelly and Dr Conor O'Mahony, *The Proposed Children's Rights Amendment: Running to Stand Still*?, (2007) 10(2) IJFL 19 at p 22.
[28] *Re JH, an infant* [1985] IR 375.
[29] WR Duncan, *The Child's Right to a Family – Parental Rights in Disguise*, (1986) 8 DULJ.
[30] Eoin Carolan, *The Constitutional Consequences of Reform: Best Interests after the Amendment*, (2007) 10(3) IJFL 9 at p 14.

While Article 42A.4 makes provision to allow the best interests of the child to be a consideration in court proceedings concerning adoption, guardianship, custody or access, it only allowed provision to be made for this by law. In any event, the wording in the provision is weaker than in the similar provision in the Guardianship of Infants Act, 1964. The state is only entitled to legislate to provide that a court will *endeavour* to secure to secure the best interests of the child. It is notable that the list of proceedings to which the standard applies is exhaustive and as such education and healthcare proceedings would not consider the best interests of the child in any way.

All told, the Bill represents a mish-mash of policies, espousing none in particular. As Carolan has argued: "[the Bill] does not evince a consistent policy on the family. It strives to be all things to all people, affirming and supporting the discrete rights and interests of children, parents and the family unit."[31] Carolan goes on to point out that the problems that have arisen in this area have not been due to a failure to recognise the rights of the child, but due to the weakness of those rights in comparison with other interests. The Bill does not redress this imbalance in any substantial way.

Section C – The Best Interests Standard

Introduction

[31] Eoin Carolan, *The Constitutional Consequences of Reform: Best Interests after the Amendmen*t, (2007) 10(3) IJFL 9 at p 15.

The Constitutional Review Group[32], the All Party Oireachtas Committee on the Constitution[33] and the Twenty-Eighth Amendment to the Constitution Bill, 2007 all made reference to the best interests standard[34]. The standard is consistently advocated by children's rights groups and family law specialists[35] and is used in Article 3 of the United Nations Convention on the Rights of the Child. Therefore, it is distinctly possible that the concept might form the basis of a future amendment. However the best interest's standard is not universally accepted in the international literature. This section will assess the academic criticism and evaluate the potential benefits of the best interests standard.

Indeterminacy

In the first place, it is argued that the best interests of the child cannot always, or even regularly, be determined. The argument goes that the courts and expert professionals are simply unable to make accurate predictions about how their decision will affect the child or what the child would want. This is in part because of the obvious difficulties in making predictions of the future. It is also caused by the limitations in our ability to measure the psychological implications of particular decisions. John Elster argues that the best interests standard simply doesn't produce results in many cases.[36]

[32] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996.
[33] All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006.
[34] The 'best interests' standard generally holds that the best interests of the child will be the or a paramount consideration in legal proceedings concerning children.
[35] See for example Geoffrey Shannon, *Child Law,* Thompson Round Hall, Dublin, 2005 at 45.
[36] Elster, *Solomnic Judgments, Against the Best Interests of the Child,* University of Chicago Law Review, 1987, 54 U. Chi. L. Rev. at p 11.

Subjectivity

A logical corollary of the argument that the standard is indeterminate is the contention that that it is also subjective. While highlighting the advantages of the standard, James G. Dwyer accepted that judges could use the theory to impose their own subjective viewpoints[37]. Bartlett went further: "…the best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for children are… the result of political and social judgments about what kind of society we prefer".[38] It is not difficult for Irish observers to envision an example of how the best interests standard can represent different things to different people. The current interpretation of the Guardianship of Infants Act, 1964 in light of the constitutional preference for the family represents just such an example[39].

Maintenance of the Rhetoric of Rights

Many commentators[40] have been critical of a so-called rhetoric of rights in the area of children's rights where the rights of individual parties are given undue concern at the expense of more holistic concerns. This concept will be examined in greater detail later in the chapter. For now, it should suffice to say that it is alleged that the best interests standard bolsters this flaw by attempting to give primacy to rights of the child at the expense of the rights of others.

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[37] James, G Dwyer, Symposium, *Children's Interests in a Family Context – A Cautionary Note,* Santa Clara Law Review, 39 Santa Clara L. Rev. 1053.
[38] Katharine T. Bartlett, *Re-Expressing Parenthood,* Yale Law Journal, 1988, 98 Yale L.J. 293 at p 303.
[39] For example in the cases of *Re JH, an infant* [1985] IR 375 and in *Baby Ann* [2006] 4 IR 374.
[40] For example, Katharine T. Bartlett, *Re-Expressing Parenthood,* Yale Law Journal, 1988, 98 Yale L.J. 293.

John Elster argues that it is unjust in this respect in that it fails to adequately protect parents' rights[41]. Over-concentration on the 'best interests' of the child can prejudice parents who may have put in a great deal of commitment and effort into their parenting. Elster accepts that the child needs protection but qualifies it thusly: "That protection should not, however, extend to small gains in the child's welfare achieved at the expense of large losses in parental welfare"[42] He also warns against making decisions on purely utilitarian bases.

Self-Defeating Standard

Elster argues that the standard would be self-defeating in that it would damage the relationships between children and parents. His argument is as follows: "the best interests principle would create so much uncertainty among parents, with subsequent lack of emotional attachment to their children that the net effect would be to harm children in general. In addition there would be a strong disincentive to having children at all."[43] He also argues that the standard would damage children by protracting and proliferating litigation, firstly, because the standard would be uncertain and, secondly, because courts would need more time to assess the more complicated best interests standard.[44]

The first contention is admittedly somewhat stretched in that it is unlikely that the vast majority of families would consider it a possibility that the state would

[41] Elster, *Solomnic Judgments, Against the Best Interests of the Child,* University of Chicago Law Review, 1987, 54 U. Chi. L. Rev. at p 17.
[42] Ibid at p 20.
[43] Ibid at p 22.
[44] Ibid at p 24.

intervene in their family, regardless of the legal standard. If they did, one can presume change in the law would be brought about. Nevertheless the standard represents a lack of trust in families and is likely to be seen as depreciating the role of families in general. From a parental perspective, it is anything but reassuring. It also hints at a utilitarian approach which is likely to be unnerving for many parents. The potential for increased and prolonged legal proceedings is a reasonable practical concern and one worth bearing in mind in an appraisal of the best interests standard.

Goldstein, Freud and Solnit also point out that the best interests standard promotes excessive concern for the child's *physical* best interests[45]. This, they argue, sometimes comes at the expense of the child's psychological well-being which is subordinated. The psychological interests of the child can often be an equally important consideration if not the most important[46].

Ignorance of Public Policy

It is also alleged[47] that the best interests standard can act against the interests of public policy. Specifically, public policy might demand that incidental characteristics of parents – for example, the sexual persuasion, financial resources (beyond a minimum level) or religious affiliation[48] – should have little

[45] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child,* The Free Press, New York, 1973. at p 4.
[46] This weakness seems to have been appreciated in this jurisdiction given the range of factors stated to be of relevance in s.2 of the Guardianship of Infants act, 1964.
[47] For example by John Eslter in *Solomnic Judgments, Against the Best Interests of the Child,* University of Chicago Law Review, 1987, 54 U. Chi. L. Rev.
[48] One could imagine how, in a *Re Tilson* [1951] IR 1 situation, the best interests standard could have, somewhat unfairly, tilted the balance in favour of the parent with the more socially

or no legal significance. Elster summarises the issue well: "A society committed to the value of equality must often treat its citizens as if they were equal when in fact they are not."[49] On a purely utilitarian analysis, the aforementioned incidental characteristics could achieve an unnerving importance. Elster cites the English case of *S v S*[50] - where a mother was denied custody of her child because she was a lesbian – as an example of the extremes of utilitarianism in this context[51]. It is surely desirable that the sexual persuasion of the parent should be of little importance in custody cases.

Encouraging Intervention

Goldstein, Freud and Solnit argue that the best interests standard mitigates against the child's best interests by overly encouraging intervention. They argue that the standard "often mistakenly leads them [courts and state agencies] into believing that they have greater power for doing "good" than "bad".[52] They argue that intervention is often psychologically damaging to the child – even if it is sometimes needed to prevent more serious harm – and therefore should be restricted. The limitations of intervention alleged by the authors will be addressed later in the chapter but it is only common sense the state taking the place of families is not an ideal outcome.

'acceptable' religion. While it might be alleged that this is exactly what happened in this case, the case was not decided on the basis of the best interests of the child.

[49] Elster, *Solomnic Judgments, Against the Best Interests of the Child,* University of Chicago Law Review, 1987, 54 U. Chi. L. Rev. at p 28.

[50] *S v S,* 1 Fam. L. Rep. 143 (1980).

[51] Note that this is cited as an example of the extremes of the standard; it is accepted that UK law has moved on in this respect.

[52] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child,* The Free Press, New York, 1973 at p 63.

Criticisms in an Irish Context

Obviously, many of the above criticisms would be moderated by the fact that a best interests standard in the Irish Constitution would be subject to the substantial deference and protections given to the constitutional family. However, herein lies another criticism. If the family protections and references to the child's inalienable and imprescriptible rights are retained, what effect would a best interests standard be capable of having? It is submitted that, in a *Re JH, an infant*[53]/*Baby Ann*[54] situation, the presumption that a child's best interests are found in the marital family and the child's inalienable right to be a member of the family would take precedence over the child's best interests, even if the best interests standard was given constitutional status. This would be all the more likely if the standard was provided for by way of ordinary legislation, as was proposed in the 2007 Bill.

In a case similar to *HW and CW*[55], the best interests standard would have no application whatsoever. The standard would not overcome the jurisdictional concerns that the majority felt were the primary issue in that case. Moreover, as already mentioned, it was implicit that the best interests standard proposed by the 2007 Bill was to be limited to custody, guardianship, adoption and access and not to have any application to such 'upbringing' disputes.

One could argue that the best interests standard could be effective if a new balance between state, family and child was adopted. However it is hard to see

[53] *Re JH, an infant* [1985] IR 375.
[54] *Baby Ann* [2006] 4 IR 374.
[55] *North Western Health Board v HW and CW* [2001] IR 622.

how this could be achieved. If the family protections were removed, all the above criticisms would come into play. If they were retained, it is hard to see how the best interests standard could play anything more than a subsidiary role – to the family protections, the presumption that the child's best interests are found in the family and the child's natural right to be a member of the family – in the constitutional hierarchy of rights. Given the 'natural' legitimacy and primacy ascribed to the family in the Irish Constitution it is unlikely that a best interests standard could co-exist in any sort of balance. Without it, the best interests standard can be reasonably criticised as being indeterminate and subjective, overly concentrated on competing rights, unjust, self-defeating and overly disposed towards intervention. One might reasonably contend that the best interests standard and natural law are in fact mutually exclusive.

Section D – Rights Based Approaches

Introduction

Despite concerns over the suitability of the best interest standard, there is an increasing body of opinion that holds that constitutional provisions and family legislation should be more concentrated on the children's interests[56]. Even proponents of limited state intervention sometimes argue that the law is too concerned with disputes between parents and the state.[57] The concept of children's rights is often posed as a resolution. The aim of this section is to

[56] See for example the Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 or Shannon, *Child Law*, Thomson RoundHall, Dublin, 2005.
[57] See, for example, Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1975 at p 1001.

critique the suitability of rights based approaches in general however a particular emphasis will be laid on children's rights models. This focus is justified because parental rights are already enshrined in the constitutional order and children's rights are often held up as an answer to constitutional child protection[58].

Children's Rights Models

Some argue that children are best protected by tilting the rights balance in favour of children. These models give children the operative rights and relegate parents to parties of secondary concern. James G. Dwyer has proposed such a model[59]. He argues that the concentration on children's rights is justified by the fact that parents undertook their duties voluntarily and because the children's interests concerned are of more importance than the alleged parental interests[60].

Dwyer rejects traditional arguments that parents' rights are justifiably based on children's interests. He contends that it is not self-evident that there should be a connection between parents' beliefs and their children's beliefs[61]. Furthermore, he argues that models based on parents' rights encourage legal tendencies that ignore and forget the child and its interests[62]. Dwyer also asserts that parental rights are "conceptually awkward"[63]. This is because rights generally exist to protect a right-holder's self determination and personal integrity and do not

[58] See, for example, the submissions of AIM Family Services (at A21), the Church of Ireland (at A41-A42), and Barnardos (at A36) to the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006.
[59] In James G. Dwyer, Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 California L. Rev. 1371 (1994).
[60] Ibid at 1422.
[61] James G. Dwyer, Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 California L. Rev. 1371 (1994) at p 1427.
[62] Ibid at p 1435.
[63] Ibid at p 1430.

generally give power over another individual, the primary feature of parental rights in this context[64].

Dwyer is equally critical of arguments that parents are entitled to the rights based on their own interest, namely their interest in protecting their sense of enjoyment of parenthood. Three criticisms of this position are provided. Firstly, he proposes that the intensity of parental urges is not in itself a justification and, secondly, it fails to explain the anomaly of the existence of rights of control over other individuals. Moreover, he argues, talking of rights is unnecessary and privileges could be just as effective[65]. Essentially, his position is that parental rights "ultimately rest on nothing more than the ability of the politically more powerful class of persons to enshrine in the law their domination of a politically less powerful class, and on an outmoded view that members of the subordinated group are not persons in their own right."[66]

Rhetoric of Rights

While Dwyer raises some valuable criticisms of parental rights, his general contention that these flaws can be rectified by providing children with substantial rights should be questioned. This over-concentration on rights has been widely criticised and the idea that children's rights can adequately protect children is challengeable on several grounds, as shall be seen. It is argued that such models fail to escape the rhetoric or cult of rights. As Wardle puts it: "They [children's rights proponents] see law as a secular Messiah, a cure-all for every social ill, a

[64] Ibid at at p 1406.
[65] Ibid at pp 1429-1440.
[66] Ibid at pp 1373-1374.

big yellow social bulldozer that can shove away the old problems and build new temples of goodness."[67] It should be noted that this is not to contend that rights are useless – indeed, they will be highly important in any model – but rather that they cannot provide the answer on their own.

Overvaluing Rights

The most common criticism is that children's rights approaches overvalue rights, ignore their flaws and the ways of thinking that they produce. There exists a perfect example of the limitations of rights in this jurisdiction in the case of *North Western Health Board v HW and CW*[68]. In that case the court held that even if the relevant right did exist, the court did not have the constitutional jurisdiction to enforce the right. Wardle points out that rights are often subjective and unstable and can be abused. Again, the Irish experience produces a case in point in *Re JH*[69] where a right that ostensibly belonged to the child – the right to be part of a marital family – worked very much in the favour of its parents, and arguably against the child. In addition, as Carl Schneider argues, rights talk encourages us to think of what we are not constrained from doing rather than what we ought to do.[70]

Undervaluing the Family

[67] Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 Loy U. Chi. L.J. 321, Winter 1996 at p 332.
[68] *North Western Health Board v HW and CW* [2001] IR 622.
[69] *Re JH, an infant* [1985] IR 375.
[70] Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CALIF. L. REV. 151, 162-64 (1988) at p 37.

Wardle proposes that, in addition to overvaluing the power and effectiveness of rights, children's rights advocates undervalue the importance of the family[71]. He suggests that with reports of child abuse, premarital sex, family failures etc. "…constantly in the background… some children's rights advocates not surprisingly think that marriage is a failed institution and that parenting is untrustworthy."[72] He argues that this is an inaccurate conclusion and that it ignores the majority of successful families that go unreported. The net effect of such conclusions and the resulting concentration on children's rights is, according to Woodhouse, that we "…encourage families in trouble to atomize into units with independent claims of right, rather than coalescing around children's concrete needs."[73]

Abdication of Communal and Societal Responsibility

A further criticism of rights approaches in general is that they encourage isolation and ostensibly relieve the community of its obligation to protect children either by portraying children as having the necessary rights to protect themselves or by providing families with rights that protect against community or state interference. Woodhouse summarises this phenomenon: "It keeps neighbours and even family at arm's length, excuses the community from accepting real responsibility for the plight of "other people's children," and, as Mary Ann Glendon asserts, "it robs us of a political language for expressing our

[71] Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 Loy U. Chi. L.J. 321, Winter 1996 at p 326.
[72] Ibid at p 327.
[73] Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747, 1755 (1993) at p 1812.

collective stake in children's welfare."[74] Insofar as it isolates families or allows them to become isolated, this leaves children more vulnerable to abuse[75].

Moreover, rights approaches obfuscate the role poverty plays in damaging family life. Huntington asserts that they fail to address the support families often need and "foster conflict, rather than collaboration, between the state and families."[76] She concludes as follows: "No amount of more careful calibration of those rights will solve the problems facing families in the child welfare system."[77]

The Adversarial Process

The allocation of rights to individuals within in a family promotes an adversarial process which has been particularly persistent in this jurisdiction. This process would seem to be totally inappropriate to dealing with many family law issues and this has been continuously highlighted by children's rights and family groups in Ireland. Ryan laments how it "rewards vigorous debate, mud-slinging and point-scoring."[78] Huntington felt that the over-emphasis had caused "…the wrong kind of involvement in the lives of troubled families, resulting in over-

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[74] Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747, 1755 (1993) at p 1842.

[75] "Steele and Pollock [Brandt F. Steele & Carl B. Pollock, 'A Psychiatric Study of Parents Who Abuse Infants and Small Children', in *The Battered Child* 103, 119 (Ray E. Helfer & C. Henry Kempe eds., 1968)] pioneers in the study of child maltreatment, concluded that, in general, "the abusing parent tends to lead a life which is described as alienated, asocial, or isolated…. Steele and Pollock added: "We have jokingly remarked that if one goes down the street and sees a house with the blinds drawn in broad daylight, with two unrepaired cars in the driveway, and finds the people have an unlisted phone number, the chances are high that the inhabitants abuse their children." [quoted from Judith G. McMulle, *Privacy, Family Autonomy and the Maltreated Child*, Marquette Law Review (1992) at pp 589-598.]

[76] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 637

[77] Ibid at p 697

[78] Fergus W. Ryan, *Recognising Family Diversity: Children, One-Parent Families and the Law, Irish Journal of Family Law*, (2006) 9(1) IJFL 3 at p 7.

and underprotection of everyone's rights and a serious misallocation of resources."[79]

Conceptual Difficulties

There is also a concern that rights approaches in family contexts can be misleading and confusing. An example would be claims such as rights to family autonomy. This can be misleading and conceptually questionable in that the claimed right essentially relates to self-determination of the family, but this right will often be used to elevate the rights of certain individuals within the family over others. In the UK, the notion of 'parental rights' has been abandoned precisely because of the conceptual flaws inherent. In 1982 the Law Commission contended that the term was "not only inaccurate as a matter of juristic analysis but also misleading as a use of ordinary language."[80]

Conclusion

The foregoing should not be taken to suggest that rights – parental, state or children's – can be of no use in an alternative constitutional order. The aim was to illustrate that they can never be the sole answer. An Irish observer should not need to be reminded of the limitations of rights; they are well illustrated by the relative invisibility of the child in the Irish constitutional order, despite the

[79] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 640.
[80] Law Commission, *Report on Illegitimacy*, 1982, at 4.18 to 4.19.

extensive Article 40.1 rights afforded to children on the basis of *G v Bord Uchtála*[81] and other cases.

Section E – Limited Intervention Models

Introduction

Another potential model for a reformed constitutional provision could be inspired by the so-called limited intervention models. These models generally maintain that the child is "…at risk, dependent and without capacity to or authority to decide what is "best" [for itself]".[82] They draw on statistics that support the view that state intervention generally has a negative effect on the child and that, consequently, it should be limited. It should be noted that many of these models are substantially more liberal than the model presided over by the Constitution of Ireland. They are also far more focused on the needs of the child and draw their conclusions from objective utilitarian analyses rather than the somewhat unsubstantiated faith in the family that persists in this jurisdiction.

Beyond the Best Interests of the Child

Goldstein, Freud and Solnit's 1973 work 'Beyond the Best Interests of the Child' represents arguably the most influential and renowned limited intervention model. While their model is often classified as a limited intervention model,

[81] *G v Bord Uchtála* [1980] IR 32.
[82] Joseph Goldstein, *Medical care for the Child at risk: on State Supervention of Parental Autonomy* , The Yale Law Journal, Vol. 86, No. 4, Mar, 1977, pp 645-670 at p 645.

many of their premises and conclusions would appear liberal to a degree that would be incompatible with Bunreacht na h'Éireann.

The authors enunciate several basic principles. Firstly, they portend to concentrate on the child's best psychological interest which, they argue, is often subordinated[83]. They also undertake to make the child's best interests paramount[84]. Despite this regard for the child's interests, the authors maintain that they have a preference for privacy and for minimum state intervention[85]. They state that this preference, "is reinforced by our recognition that law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between a parent and a child."[86] The crux of their theory is contained in three guidelines which will be assessed in turn.

The first is that placement decisions should safeguard the child's need for continuity[87]. The authors present a series of potential negative impacts that can be made on the child due to a failure to maintain the child's continuity of relationships, routine and environment[88]. To this end, they recommend that foster placements should be "as permanent as the placement of a newborn with biological parents."[89] The authors recognise the potential value of adoption in this respect but they are critical of waiting periods, probation periods and

[83] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child*, The Free Press, New York, 1973 at p 4.
[84] Ibid at p 7.
[85] Ibid at p 8.
[86] Ibid at p 8.
[87] Ibid at p 31.
[88] Ibid at pp 32-40.
[89] Ibid at p 35.

protracted processes in general[90]. They also criticise the potential delaying impact of appeals and unduly slow legal proceedings in the context of adoption[91].

The authors would doubtless be unimpressed with Ireland's adoption procedure. Shannon has described it as a "rigorous assessment procedure"[92]. The protracted, two-stage consent system is virtually destined to give rise to legal disputes[93]. Furthermore, the system espouses the arbitrary distinction between the standards applied to the adoption of marital and non-marital children illustrated by *Baby Ann*[94] and *Re JH, an infant*[95].

Goldstein, Freud and Solnit's second guideline is that proceedings and placements should reflect the child's sense of time[96]. They allege that children tend to find parental absence extremely overwhelming[97]. Consequently, judicial delay can be very damaging to the child. Noting the speed with which proceedings regarding blood transfusions[98] can be effected, they propose that all decisions regarding child placement should be made "with all deliberate speed"[99]. To this end, they propose that, in adoption, infants should be legally placed with adoptive parents before birth and in general, before availability[100]. They also argue that the time necessary for a finding of abandonment/neglect

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[90] Ibid at p 36.
[91] Ibid at p 37.
[92] Shannon, *Child Law*, Thompson RoundHall, Dublin, 2005, at p 288.
[93] *Baby Ann* [2006] 4 IR 374and *Re JH, an infant* [1985] IR 375 are cases in point.
[94] *Baby Ann* [2006] 4 IR 374.
[95] *Re JH, an infant* [1985] IR 375.
[96] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child*, The Free Press, New York, 1973 at p 40.
[97] Ibid at p 40.
[98] The case of *Baby Janice* (Unreported, High Court, August 5, 2004) being an apt example in this jurisdiction.
[99] Ibid at p 42.
[100] Ibid at p 45.

should be the time which would be relevant to the child and its perception of the need for outside interference[101].

Their final guideline holds that decisions should take into account the law's inability to make long term predictions[102]. They argue that the law may claim to establish relationships whereas, in fact, all it can do is give recognition to existing ones[103]. Citing Bentham's 'crude instrument' truism, they summarise their position thusly: "It [the law] may be able to destroy human relationships; but it does not have the power to compel them to develop."[104]

Incorporating their three primary guidelines, they propose the following standard to be used by courts in all proceedings as to the placement of a child: "the least detrimental available alternative for safeguarding the child's growth and development"[105]. They argue that this standard avoids the drawbacks of the best interests standard and conveys the fact that the child has already been a victim and should not suffer any further. The 'least detrimental alternative' is to "remind decision-makers that their task is to salvage as much as possible out of an unsatisfactory situation."[106]

<u>The Advantages of the 'Least Detrimental Alternative' Standard</u>

[101] Ibid at pp 47-49.
[102] Ibid at p 49.
[103] Ibid at p 50.
[104] Ibid.
[105] Ibid at p 53.
[106] Ibid at p 63.

The advantages cited by Goldstein, Freud and Solnit in their principles and guidelines are convincing in themselves. Their preference for limiting state intervention as much as possible is a laudable ideal. It is surely preferable to have families conduct the majority of parenting and reserve the State's power to intervene in the majority of cases. However this preference is counter-balanced by an intention to keep the child's interests paramount. It is submitted that this is the most sensible approach. It balances the need for the state to respect the family and the need for the state to protect the child when necessary.

The authors' guidelines also espouse ideals that would surely be beneficial in a constitutional order. The authors make good cases for the protection of a child's continuity and for the recognition of the child's sense of time. The relative weakness of the law in making long term predictions and dealing with the complex area of the family has long been recognised. These principles are drawn together well in the 'least detrimental alternative' standard. However the comparative value of the standard is perhaps best illustrated by a comparison with the best interests standard and with rights based approaches.

In the first place, the fact that the 'least detrimental alternative' standard is more specific as to its essence and intent means that it is less likely than the more interpretive best interests standard to be indeterminate and therefore subjective. While the 'least detrimental alternative' standard does place an emphasis on the interests of the child, it does so while retaining a preference for family privacy and limiting intervention. In this sense it obviates many of the disadvantages of

the best interests standard such as the rhetoric of rights, the overvaluing of intervention and the undervaluing of the family.

The standard also holds certain advantages over rights-based models. Again, the value of the family is emphasised and, by definition, the 'least detrimental alternative' standard does not overvalue itself as a remedy. The relative weakness of the law to remedy familial situations is accepted. At the same time the 'least detrimental alternative' standard does not abdicate its responsibility to protect children nor to support the family and the paramountcy of children's interests is espoused. Finally, in highlighting the need to provide the least detrimental alternative, the standard relaxes the emphasis on rights and, by extension, the emphasis on the adversarial process.

Children's Interests and Limited Intervention

Despite the fact that many subsequent limited intervention models have nominally claimed to be in search of 'the least detrimental alternative'[107], few have held the interests of children in the same regard as Goldstein, Freud and Solnit. Michael Wald, for example, claims society's political commitment to diversity of views and religion as a justification for limited intervention[108]. In setting his (restrictive) intervention standard, Wald, accepts that it might prohibit intervention in some cases where it would be beneficial to the child in the name

[107] See, for example, Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1762-66 (1987)
[108] Michael Wald, *State Intervention on Behalf of "Neglected" Children A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1975 at p 992.

of the greater good of limiting state intervention[109]. To anyone concerned with child protection, this would seem to be an unacceptable concession. His agenda also becomes clear as he refers to anecdotal reports of state agencies coercing families into placing children in welfare voluntarily.[110]

Conclusion

It is submitted that adoption of the 'least detrimental alternative' standard would afford the constitutional order many advantages. It would be a more appropriate standard to govern the area of child placement under the Constitution than the current best interests standard (in the case of non-marital children) or the presumption that the best interests are found in the family (in the case marital children). The precise applications of the standard will be assessed in greater detail in chapter four.

However it is important to be cautious when grouping limited intervention advocates together. Dwyer points out that it is common for limited intervention advocates to couch their language in terms of 'family autonomy' and 'family rights'[111]. In reality, their agenda is often the protection of parents and their ability to control their children. Limited intervention models may well provide the best basis for a constitutional amendment however one should distinguish between those that seek to best serve children in addition to parents, families and

[109] Ibid at p 1005.
[110] Ibid at p 1006.
[111] James, G Dwyer, Symposium, *Children's Interests in a Family Context – A Cautionary Note*, Santa Clara Law Review, 39 Santa Clara L. Rev. 1053. at p1062-1063.

society and those whose primary goal is to preserve religious and cultural practices under the guise of family autonomy.

Section F – Focusing on the Family

Introduction

It is noticeable that many of the above models adopt individualistic approaches, stressing the rights of certain parties over others. An alternative approach is the supportive theory which attempts to focus on helping families as a whole. This is not to be confused with limited intervention models that seek to prevent the state from interfering with families. Rather, this model encourages intervention where necessary, not to take children away from families, but to help families to provide for and protect their children. The focus is on helping families survive and prosper in spite of their problems. Consequently, state intervention is seen as a potentially valuable asset for parents.

Problem Solving Models

In her 2006 paper 'Rights Myopia in Children's Welfare', Clare Huntington proposes a shift from rights-based approaches to a problem-solving approach[112]. She bases her argument on the widely accepted idea that foster care and

[112] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006).

intervention is not the ideal result for authorities dealing with child welfare[113]. Her answer is to argue for a shift in focus from rights based models and court proceedings to a procedure aimed at helping families to solve their problems.

Huntington's primary argument is that since poverty can often be the cause of parental failings and since the state is not doing enough to alleviate the poverty; the state has no right to intervene to take the children away from the parents. It is surely the case that parents, children and the state have an interest in preventing state intervention. Huntington argues that helping families is the best way to secure this.

Central to her theory of problem solving and family aid is the concept of case conferencing, a process in which social workers, family members community members, professionals and in many cases parents and children convene in a conference to draft a plan as to how the child is to be provided for[114]. Case

[113] Ibid at p 661.

[114] The specifics of the procedure vary. Huntington provides a typical example of how case conferences work: "In a typical family group conferencing case, after receiving a report, a social worker conducts an initial investigation to determine if there has been abuse or neglect. If the social worker concludes there is evidence of abuse or neglect, she refers the case to a coordinator, who has the authority to convene a family group conference. The coordinator contacts the parents, the child, extended family members, and significant community members who know the family. Before the conference, each potential conference participant meets separately with the coordinator to learn about the process. In these meetings, the coordinator screens for potentially complicating factors, such as a history of domestic violence, to determine whether the case is appropriate for family group conferencing and, if so, what additional supports may be needed for the participants. There are three stages of the conference. In the first stage, the coordinator and any professionals involved with the family, such as therapists, teachers, and the investigating social worker, explain the case to the family. In the second stage, the coordinator and professionals leave the room while the family and community members engage in private deliberation. During the private deliberation, the participants acknowledge that the child was abused or neglected and develop a plan to protect the child and help the parents. After the participants reach an agreement, they present the plan to the social worker and coordinator, who likely have questions for the participants. Parents, custodians, social workers, and coordinators can veto the plan produced by the conference and refer the case to court. In practice, this rarely occurs: The participants come to a decision, and the social worker and coordinator accept the plan (perhaps

conferencing, she argues, encompasses several important principles, namely, that a child is best raised in its own family, that families have that responsibility and should be supported, that families are capable of making quick decisions in response to changing circumstances and that they are experts on the solutions needed[115].

The Values of Focusing on the Family and Case Conferencing

The value of the family in raising children is widely accepted[116]. Huntington cites many recent positive international studies of case conferencing systems. She shows that studies have suggested that case conferencing reduces subsequent abuse[117]. It has also been demonstrated that conferences produces plans in the vast majority of cases[118] and that these plans often require more of a parent than an agency typically would[119] and that participants report "satisfaction with the process and result."[120] The placement of the child, if necessary, would most often

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with a few changes) if it meets predetermined criteria. The coordinator writes up the plan, sends it to all participants, and then sets a time for a subsequent conference to assess developments in the case.
The plan typically includes a decision about the safety of the child, including whether the child should be placed outside of the home for a certain period of time, and, if so, with whom. If the child is placed outside the home, she is almost invariably placed with a relative or other conference participant. The plan also identifies the services and supports needed by the parents. Finally, the plan determines which participants will both help the family and also check in on a regular basis to ensure the child
is safe and the parents are complying with the plan." Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 676.

[115] Ibid at p 676.

[116] See, for example, the discussion in James, G Dwyer, Symposium, *Children's Interests in a Family Context – A Cautionary Note*, Santa Clara Law Review, 39 Santa Clara L. Rev. 1053 at p 1054.

[117] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 681.

[118] Ibid.

[119] Ibid at p 682.

[120] Ibid.

be with a relative. The process would also bring about substantial savings for the state[121].

Chandler and Giovanucci also give a very favourable review of case conferencing. They highlight the reduction in court caseload, the inclusion of parents and family members, the increases in transparency and humaneness of proceedings, the increase in the speed of cases and improvements in family-agency communication[122]. However case conferencing provides further advantages.

Maintaining Rights

Insofar as case conferencing seeks to limit the influence of competing rights, it does not dispense with them completely. Generally, parties maintain the right to veto the conference and go to court[123]. Nevertheless, Huntington points out that in 95% of cases in the jurisdictions in which the model has been tried, there has been no need for court enforcement[124]. Therefore, while there is de jure retention of rights, they are effectively absent from the majority of cases.

Dispensing with the Adversarial System

[121] Ibid at pp 683-684.
[122] Susan M. Chandler & Marilou Giovannucci, *Transforming Traditional Child Welfare Policy and Practice*, Family Court Review, 42.Fam. Ct. Rev. 216, 2004 at p 218.
[123] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 697.
[124] Ibid at pp 697-698.

The logical extension of the fact that there are fewer court proceedings is that there is less use of the adversarial system. As already mentioned, this has been consistently highlighted as a problem in Ireland[125]. The child is not forced to be the subject of confusing and overbearing court proceedings and is instead the subject of conciliatory, solution orientated conference proceedings. Indeed, the child might not need to be involved. This also aids the child in that proceedings are speeded up as court time is no longer a requirement.

Addressing the Role of Poverty

It is consistently pointed out that rights-based approaches fail to appreciate the role of poverty and other external factors in inhibiting the growth of healthy families[126]. A recent study showed that 14% of Irish children live in consistent poverty[127]. Garrison argues that poverty could completely inhibit the state's ability to solve family issues: "Unless we reduce poverty and its related stresses, the least drastic alternative will remain an elusive goal."[128] Focusing on the family and case conferencing could go some way towards addressing this imbalance. Huntington points out that even the change in rhetoric could have a positive effect: "Changing the frame for the child welfare case could help reorient society's views of abuse and neglect away from the view that abuse and neglect are products of parental pathology, and toward a view of social

[125] See, for example, Geoffrey Shannon**,** *Child Law***,** Thompson Round Hall, Dublin, 2005 at p 246.
[126] See, for example, Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006).
[127] Central Statistics Office, EU Survey on Income and Living Conditions 2005 (EU-SILC) (Central Statistics Office, Cork, 2005.
[128] Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1762-66 (1987) at 1828.

responsibility, where a broader group—both the immediate community and the state—claims responsibility for the larger circumstances that led to the abuse or neglect."[129]

Case Conferencing and Problem Solving Models in Ireland

The values of case conferencing and a generally more supportive model have been accepted in Ireland. Indeed, part 2 of the Children Act, 2001 provides for the procedure. Shannon observed how the process brings the focus on to family in that it represents "a significant transfer of power from the State, exercised principally by the courts, to the community."[130] He felt that the attendance of children was one of the most progressive elements[131]. The concept was introduced in New Zealand largely to respect diverse cultural approaches to family organization. In this respect it could prove especially valuable in a more culturally diverse Ireland[132]. While the decision as to whether a right to a case conference should be guaranteed to all children in the Constitution – as it is by legislation in New Zealand – is beyond the remit of this thesis, the procedure would might well be inherent in any constitutional order that focused on helping families.

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[129] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 693.
[130] Geoffrey Shannon**,** *Child Law***,** Thompson Round Hall, Dublin, 2005 at p 421.
[131] Shannon, *Child Law*, Thomson RoundHall, Dublin, 2005 at p 395.
[132] The substantial immigration in the last 20 years is predicted to continue. Several estimates have suggested that the current immigration rate will more or less persist. For example: "The report [a report by NCB Stockbrokers] also suggests this influx of immigrants to Ireland's shores is not a short term phenomenon. It is predicted that by 2020 the population of Ireland will have grown from 4.1 million to 5.3 million. The number of immigrants will have risen from 400,000 to 1 million and will account for 19% of the country's population. The NCB expects on average 53,000 overseas workers each year to come and work in Ireland over the next five years. http://www.workpermit.com/news/2006_04_04/uk/immigrants_to_ireland_continue.html

Conclusion

It is noticeable from the foregoing that much of the focus is on cases of child neglect and abandonment. This is likely to be the legal area in which the problem-solving model (elevated to a constitutional norm) would have most influence. Nevertheless, it should not be concluded that the problem-solving model would be entirely limited to such cases. It is possible to theorise how the model could affect adoption disputes and even cases of temporary state intervention such as the *North Western Health Board v HW and CW*[133] situation.

Section G – Conclusion

Sections B and C illustrated how the majority of the recent proposals for the amendment of the family provisions of the Constitution have been underwhelming and would most likely prove incapable of delivering on the goal of child protection. In particular, the best interests standards is too often invoked as a reliable replacement for the current order. Section D also criticised rights-based approaches as not having a sufficient degree of sophistication to be the ultimate answer to the problems of constitutional child protection. Therefore, the stated aim should not be to produce a constitutional order that protects the best interests of the child or children's rights. Rather, child protection should be the goal. To this end, sections D, E and F presented several models that might provide certain advantages. Chapter four will attempt to combine these models with the aim of producing a more equitable constitutional order.

[133] *North Western Health Board v HW and CW* [2001] IR 622.

CHAPTER FOUR – A NEW MODEL FOR THE CONSTITUTIONAL PROTECTION OF CHILDREN IN IRELAND

Section A – Introduction

Chapter one illustrated how Bunreacht na hÉireann prescribes a jurisprudence that obscures the interests of the child and stresses the rights and privileges of parents first and foremost. It was also shown that this balance can be very damaging to children and that it can inhibit the state in attempts it makes to protect children. Chapter two presented the argument that our current constitutional provisions were influenced by a philosophy that is anachronistic and inappropriate in the context of modern society and will continue to be so in the future, perhaps more so. Chapter three assessed a range of alternative philosophies on which a new constitutional order could be based. This chapter will combine the efforts of the previous three by suggesting an alternative model for the constitutional protection of the child. In this respect, chapter four will be closely linked to chapter three. The aim is to draw from the philosophies examined in chapter three and draw their best elements into a combined model.

Initially, several guiding considerations will have to be elucidated and addressed and these will be dealt with in section B. The suggested model will be dealt with in four sections. Firstly, the justifications for guaranteeing and limiting parental

rights will be assessed in section C. Secondly, section D will address how a new order could properly protect the rights of the child. Section E will examine how the limits of state intervention might be set. Finally, section F will draw together the arguments made in the previous three sections with the conclusions made in chapter three and attempt to draw them into a combined model. The potential applications of this model will be briefly assessed in section G.

Section B - Considerations

The Need for Constitutional Provisions

It has already been demonstrated that there is a need to reassess the constitutional provisions on the family as a whole to properly protect children. This could be achieved by deleting the family provisions in the Constitution and delegating a full power to legislate in the area to the Oireachtas. The vast majority of jurisdictions broadly employ such an approach[1]. However, given the fact that the Constitution already deals with the family and the child, it is unlikely that such an approach would be popular. Citizens would most likely want a direct say in the formation of any new jurisprudence, if it was decided to do away with the old one[2]. Furthermore, there are several advantages to having constitutional provisions in the area and reasons why this would particularly practicable in an Irish context.

[1] For example, the US Constitution has nothing to say on the family or the child. Jurisdictions (such as the UK) that do not have a codified constitution do not have to consider the issue at all at a constitutional (in the conventional meaning of the word) level.
[2] The 1996 divorce amendment supports this contention. In that case, the divorce prohibition was replaced by a specific set of provisions governing the conditions in which divorce could be permitted.

Firstly, the Irish Constitution has generally[3] proved especially flexible and capable of adapting to new times and contexts. It would be regrettable not to take advantage of this. Secondly, if any change was made to make the family more vulnerable to state intervention, it is surely desirable to have the express approval of the people. Furthermore, Ireland is a relatively small constitutional democracy and consequently the national constitution is arguably more capable of dealing with such issues than in larger, more socially and politically diverse jurisdictions. It should be noted at this point that the aim here is to propose a general philosophy and not to exhaustively set out every element of a new provision.

The Definition of the Family

It is not intended for this chapter to deal with other issues regarding the family and the constitution in any great detail. However one issue merits some attention at this point. There has been substantial debate as to the definition of the family in the Constitution[4]. The courts have held[5], and it is largely accepted, that the Constitution only refers to the family based on a heterosexual marriage[6]. Arguably, this fact can be damaging to children whose parents are in

[3] The word 'generally' is included because, while the Constitution has been considered flexible as regards society and law generally, one might argue that the Constitution has not been very flexible in the area of family law.
[4] See, for example, the submissions to the All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family,* Stationary Office, Dublin, 2006.
[5] See Chapter 1.
[6] In light of this, the section 2(2)(e) of the Civil Registration Act 2004 specifically precludes recognition of a same sex marriage. This was recently confirmed in *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404.

relationships outside this definition[7]. However, a full discussion of this nebulous and controversial topic would be outside the ambit of this dissertation. It should suffice to say that this paper will attempt to suggest constitutional provisions that prescribe that the family – however it is defined – is the ideal institution in which parents can raise their children and in which children can be protected.

The Need for a Compromise Solution

The American literature illustrates how new models are contentious and rarely universally popular[8]. However they are at least based on cost-benefit analyses, and not on a naturally divined belief in the ultimate authority of the family. Properly protecting families and children and the rights of parents demands a more sophisticated approach than the current one. As Dwyer puts it: "The child's situation calls for tailor-made solutions, not a one-size-fits-all approach"[9]. The most obvious conclusion, given the extensive academic debate, is that a single philosophy will not provide the answer.

The Applications of the Provision

Perhaps the biggest limitation of the current provisions on the family is the failure to clearly distinguish between the range of situations to which the provisions can apply.

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[7] For a discussion of the damages done to children due to the lack of recognition of 'psychological parents' see Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747, 1755 (1993).
[8] See Chapter 3, pp 9-33.
[9] James, G Dwyer, Symposium, *Children's Interests in a Family Context – A Cautionary Note*, Santa Clara Law Review, 39 Santa Clara L. Rev. 1053 at pp 1054-1055.

Evidently, the cases of *Baby Ann*[10] and *North Western Health Board v HW and CW*[11] presented very different considerations. Yet Article 42.5 was invoked and held to be relevant in both cases. From a simple reading of the Article, it appears to be specifically drafted to deal with permanent state intervention to replace unfit parents. In this respect, it is not designed to deal with conflicts between adoptive and natural parents nor to mandate short-term interventions such as the one sought in *HW and CW*[12]. The specific applications and extent of Article 42.5 have been matters of judicial debate and disagreement throughout the development of the jurisprudence in the area. These issues still remains unclear to a certain extent.

Therefore, it should be remembered that any new model will have to apply effectively to a number of different and diverse situations. Firstly, the state may have to make a temporary intervention, involving a short lived removal of the child from its parents' custody while not affecting the long term guardianship rights of the parent. Typically, this will be where a court orders something to be performed in the child's interests despite parental objections. This is what occurred in the recent case of *Baby Janice*[13]. Secondly, the state may have to make a temporary intervention to remove the child from parental custody and guardianship, potentially for an extended period of time. This will be the case where a child is put into medium or long term foster care.

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[10] *Baby Ann* [2006] 4 IR 374.
[11] *North Western Health Board v HW and CW* [2001] IR 622.
[12] Ibid.
[13] *Baby Janice*, Unreported, High Court, August 5, 2004.

Thirdly, the state may have to make a permanent intervention, terminating the parents' guardianship and custody rights. An example of this under the current order is where a legitimate adoption has occurred or where a parent loses custody of their child under the grounds set down in Article 42.5. A further situation would be in the case of divorce or separation where the state has to choose which parent should have custody of the child[14]. While these applications will be dealt with in some detail as regards a proposed model, it should be remembered that the aim of this paper is to propose a general model. A detailed analysis of the application of the model to specific areas of family law would be beyond the remit of the thesis.

Section C – Supporting the Family

Introduction

A necessary pre-cursor to proposing a new constitutional model for child protection is the task of establishing what role and what status parents and families are to be afforded. This section will analyse the extent and limits to the rights, duties and obligations of these important actors. The presented argument will be that while parents should be afforded some prima facie rights, the overall aim must be to support the family. Therefore, the state should not be limited by an over concentration on individual rights.

Parents' Right to Rights

[14] Where there is no parental agreement.

It is submitted that approaches such as those of Dwyer[15] go too far. Without advocating parental hegemony, surely biological parents deserve some prima facie rights to custody and guardianship of their children. These rights are not as anomalous and unjustifiable as Dwyer suggests[16]. Firstly, parents have had a uniquely influential role in the creation and formation of the child. They will almost certainly have gone to great effort to raise the child, even if it is very young. Parents have an intimate biological and social relationship with the child, one that the state can hardly hope to replicate. Also, as Wardle has pointed out, despite the unrepresentative and misleading media coverage, the vast majority of families are caring, effective and indeed ideal units for children to be brought up in[17]. The state should recognise these facts in the form of legal protections.

Dwyer contends that the intensity of the parental relationship is not itself a justification for parental rights[18] and that, in any event, privileges would be more appropriate than rights[19]. He compares the parent attempting to assert legal rights over their child with other legal situations and concludes that there is something conceptually flawed about the idea of holding rights over another individual[20].

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[15] James G. Dwyer, *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 California L. Rev. 1371 (1994). A similar model is proposed by Elizabeth Bartholet in *Nobody's Children: Abuse, Neglect, Foster Drift and the Adoption Alternative* (1999).
[16] For example, James G. Dwyer, *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 California L. Rev. 1371 (1994) at p 1435.
[17] Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 Loy U. Chi. L.J. 321, Winter 1996 at p 327.
[18] James G. Dwyer, *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 California L. Rev. 1371 (1994) at p 1349.
[19] Ibid at p 1440.
[20] Ibid at p 1407.

However, this fails to appreciate the degree of effort that parents have put into the relationship and the unique and irreplaceable role they have played. The relationship of the biological parent to its child cannot be made analogous to any other legal position. It is, quite simply, unique. When this is appreciated, it can be understood why parents' rights seem "…inconsistent with certain principles underlying all other individual rights recognized in our society."[21] Attempts to atomize or control the relationship in any serious way will inevitably face problems.

Advantages of Granting Parents Rights

However, beyond parental entitlements, there are other justifications and advantages to guaranteeing parental rights in a Constitution. In the first place, on a symbolic level, it is important that the family is recognised as the primary unit in society. The state should enunciate its support of the family to illustrate value of the institution. It is also important to prevent parents believing that the state can easily intervene and remove their children. Parents must be able to form a bond with their children on some presumption of permanence, within reason. The law must provide a context in which parents are not apprehensive about procreating and in which they can assess their future with their child with a degree of certainty.

Dwyer rejects the argument that limiting parental rights would weaken the bond between parents and children. He argues that such a claim is questionable and

[21] James G. Dwyer, *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 California L. Rev. 1371 (1994) at p 1371.

lacking in supporting evidence[22]. However, Dwyer himself recognised the effect that rhetoric can have in the context of rights when he warned of the general effect that over-emphasising parental rights can have[23]. Equally, one can presume that failing to provide adequate protections for the family could undermine society's impressions of families and parent-child relationships in some way. It would send a message that the state does not hold the family or family relationships in any great esteem and it would undermine the perceived respectability of families.

Huntington – despite arguing that an over-emphasis on rights can be damaging and counter productive – maintained that rights, including parental rights, would remain an essential part of any model: "The basic interests underlying rights – that the state should not intervene in a family absent a showing of parental unfitness, and that children should be safe in their homes – should be retained in any legal model."[24] This point notwithstanding, while parental rights can be accepted as being important, they should not be considered limitless or even worthy of special protection when children are at risk.

Limiting Parental Rights

A constitutional guarantee that the family represents the primary unit group of society, deserving of respect, does not necessarily require the wide ranging protections the family currently gets in Ireland. The constitution can promote and

[22] Ibid at p 1347.
[23] At 1435 where he felt that this limited and isolated the interests of children
[24] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 687.

respect the family while at the same time providing for state intervention when families fail to live up to minimum societal standards of parenting. However many would assert that the family is entitled to some primordial right to freedom from intervention and that the state should be restrained from intervening in all but the most exceptional cases[25]. These arguments will now be assessed.

Preserving the Traditional Family

Francis Beytagh has argued that Article 41 is "uniquely appropriate" in the modern world. He justified this position in the following way: "Concern about the deterioration of the family as an essential unit in a society's structure has never been greater, and yet it remains more unusual than commonplace for the topic to be addressed in a nation's fundamental legal instrument. Ireland is thus to be commended."[26] This argument is regularly invoked by conservatives and pro-family groups[27]. The argument is, essentially, that the current constitutional protections afforded to the family can act as a means of preserving the family, an institution that is widely accepted as being vital to society.

However, one must question exactly what sort of effect such constitutional protections, and their legislative and judicial manifestations, actually have. As already mentioned, the rhetoric and aspirations provided in a constitution can be important. One could not deny that such provisions permit and in some cases

[25] Given the wording of Article 41 and the multiple natural law references therein, this is surely the position that the current constitutional order seeks to maintain.
[26] Francis X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective*, RoundHall Sweet & Maxwell, Dublin, 1997 at p. 118.
[27] See, for example, the submission of Comhar Chriosti (at A50) to All Party Oireachtas Committee on the Constitution, *Tenth Report – The Family*, Stationary Office, Dublin, 2006.

oblige the law to comply with the constitutional norm. The now nonextant divorce prohibition was a stark example of this. However, in this respect all they do is frustrate individual citizens, preventing them from attaining legal acceptance of what will in any case be a practical reality. This may diminish the perceived legitimacy of the Constitution. Furthermore, a constitutional provision has only a limited ability to frame societal consciousness, even more so if it is out of touch with societal norms. As Ryan has illustrated, the constitutional support of the family in this jurisdiction has not to dissuade people from forming alternative family types[28].

In the context of the family, over-emphasising family autonomy and parental rights potentially leaves children vulnerable to abuse and harm. Wardle summarised the limits of this argument: "Nostalgia (usually fostered by highly selective memories) does not qualify as a legal theory of merit. Society needs to meet the challenges of the modern era, which is the greatest, most exhilarating, fulfilling, and wonderful time for families, as well as the most challenging, dangerous, and potentially disastrous time for families."[29] Undoubtedly, a constitution should contain some societal aspirations. However, it should not attempt to reflect a society that does not exist nor to establish one that is not possible.

Preserving Diversity

[28] Fergus W. Ryan, *Recognising Family Diversity: Children, One-Parent Families and the Law*, (2006) 9(1) IJFL 3.
[29] Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 Loy U. Chi. L.J. 321, Winter 1996 at pp 323-324.

An argument often posed is that protecting parental autonomy and parental rights promotes diversity in a pluralist society[30]. Undoubtedly, the state does not want to extend its reach so as to ignore the existence of cultures within it. However, the law must always set limits. The law must insist on protection of certain standards regardless of cultural norms that may contradict the standards. Liberal democracies accept that their societies will not be entirely uniform, but they do not grant a carte blanche. Essentially, societal diversity and child protection are not mutually exclusive and surely the latter is a more pressing concern than the former.

Fearing the State

Parental rights proponents often evoke fears of an over-active Platonic state, taking the place of parents and attempting to impose itself as a parent on a national scale. Indeed, it is consistently claimed that the constitutional protections of the family have prevented many abuses of state power in this jurisdiction[31]. Evidence is rarely raised to substantiate these claims. One must ask why the modern, neo-liberal State would be so eager to take the place of parents? The neo-liberal state values the role played by the family in removing a complex and costly area from the State's remit and only seeks to intervene when

[30] Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1975 at p 992.
[31] See, for example, Duncan, *The Constitutional Protection of Parental Rights*, in The Report of the Constitutional Review Group, Stationary Office, Dublin, 1996, Appendix 22, at p 625.

it feels the family has failed. To a substantial extent, the Orwellian fears of the twentieth century have receded in the twenty first[32].

Goldstein argues that family autonomy and parental rights prevent judges or doctors from imposing their preferences on parents. He says that "… a prime function of law is to prevent one person's truth… from becoming another person's tyranny."[33] However, laws regularly act in this way. The majority of citizens often set standards that minorities, sometimes very large minorities[34], may disagree with. Surely, in the same way, minimum standards can be democratically set for parenting.

This is not to say, however, that the State will completely govern parenting but, rather, it will step in when parenting is falling below acceptable standards. In this respect, it is worth remembering that intervention will only occur in a small minority of families. Almost by definition, democratically set minimum standards will be inferior to the standards most parents set. Moreover, intervention does not have to be in the form of removing children. The state can act[35] to protect the child without removing the child from the long or medium term custody of the parent. The idea is not that the state should take over; it is that it should force parents to do their job according to democratically set minimum standards, either by actual intervention or threat thereof.

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[32] 'See for example, the recent efforts at a government level to limit the amount of elderly people seeking state residential care: 'Old-age pension likely to increase to €208', Miriam Donohoe, *The Irish Times*, Thursday, November 30, 2006.
[33] Joseph Goldstein, *Medical care for the Child at risk: on State Supervention of Parental Autonomy* , The Yale Law Journal, Vol. 86, No. 4, Mar, 1977, pp 645-670 at p 664.
[34] The 1995 divorce referendum in Ireland represents a good example where the margin of victory in a national referendum was just 9,098 votes.
[35] For example, by ordering that certain medical procedures be carried out or not.

The state and its laws have been consistently described as 'too crude an instrument'[36] to deal with family life. Goldstein believes this is because the legal system "does not have the capacity to deal on an individual basis with the consequences of its decisions or to act with the deliberate speed required by a child's sense of time and essential to his well being."[37] This would appear to be a fair criticism. The state will surely never be as flexible or adaptable as the family as regards parenting on a regular basis. However this criticism does not extend to impugning the state's ability to make one-off short term interferences such as ordering beneficial medical treatment. Here, the law can be quite refined and effective. At the end of the interference, the child is returned to its parents.

In his judgment in *North Western Health Board v HW and CW*[38], Hardiman J referred to the United States case of *Buck v Bell*[39] to highlight the dangers of the state assuming that it is scientifically and morally right and imposing these assumed norms on others. While he accepted that there was no real comparison to the case at issue, he concluded: "The lesson of it [Buck v Bell] to my mind is that it is better to hesitate at the threshold of compulsion, even in its most benevolent form, than to adopt an easy but reductionist utilitarianism whose consequences may be unpredictable."[40]

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[36] For example in Joseph Goldstein, *Medical care for the Child at risk: on State Supervention of Parental Autonomy* , The Yale Law Journal, Vol. 86, No. 4, Mar, 1977, pp 645-670.
[37] Ibid at p 650.
[38] *North Western Health Board v HW and CW* [2001] IR 622.
[39] *Buck v Bell 274* US 200. This was the attempt of Carrie Buck, an inmate of a State institution for the "feeble minded" to avoid compulsory sterilisation on the basis, inter alia, of the equal protection clause and the due process clause of the 14th amendment to the United States Constitution. She failed in her application and the following dicta of Mr Justice Oliver Holmes is especially notorious: "Three generations of imbeciles are enough".
[40] *North Western Health Board v HW and CW* [2001] IR 622 at 747.

This would be a powerful argument but for his admitted existence of a crucial distinction between cases such as *Buck v Bell*[41] and *HW and CW*[42]. The distinction is that in *Buck v Bell*[43] the state was attempting compel a party to the proceedings to do something. In *HW and CW*[44], the subject, a child, was not a party to the proceedings nor was it capable of making its own decision as to the legal decision pertaining. In *Buck v Bell*, the decision was whether to compel *or not* to compel the individual involved. In *HW and CW*[45], the decision was whether parents would compel the child not to take the PKU test, or whether the state would compel it to take it. Essentially, it was impossible for the state to 'hesitate at the threshold of compulsion' in *HW and CW*[46]. Again we are faced with the reality that the child presents a unique dilemma for the law.

Abandoning the Family

These examples illustrate a crucial point. Often, in the context of child protection, the state cannot be neutral, it cannot abstain. In many cases the state will have to choose between parental autonomy and child protection, implicitly or explicitly. From a philosophical perspective, the state acts whether it intervenes or does not intervene. As Judith G. McMulle put it, state inaction is a misnomer. When the state chooses not to intervene it implicitly chooses to

[41] *Buck v Bell 274* US 200.
[42] *North Western Health Board v HW and CW* [2001] IR 622.
[43] *Buck v Bell 274* US 200.
[44] *North Western Health Board v HW and CW* [2001] IR 622.
[45] Ibid.
[46] Ibid.

preserve the status quo and parental rights[47]. Non-intervention is a policy choice in exactly the same way that the decision to adopt an interventionist policy is.

It could also be argued that this choice – to leave parenting to parents in all but the most extreme cases – represents an abandonment by the state of its duties to support the family. In effect, this decision absolves the state of any duty to support families by making sure that families are operating within social norms. It might also be argued that, by leaving the family to its own devices, the state abandons the family and inhibits its ability to function properly by not effectively protecting it from poverty. McMulle highlights this problem: "There is a fine line between autonomy, which implies independence from outside meddling and destructive interference, and isolation, which implies a lack of social supports and a lack of accountability to community norms for behaviour. Isolation from the community has been shown to have a negative impact on families."[48]

This concept is crucial. One cannot afford to restrict the state to the degree that it cannot help families. Disadvantaged families will often need state support to survive. The state should not be afraid to give it. Independence should not be equated with capacity. James G. Dwyer makes a valuable addition to this argument. He points out that it is still common for judges and commentators to presume that non-intervention is always in the parent's interests and concludes: "I am going to go out on a limb and suggest that parents do not benefit from

[47] Judith G. McMulle, *Privacy, Family Autonomy and the Maltreated Child*, Marquette Law Review (1992) at p 589.
[48] Ibid.

being able to abuse their children."[49] He points out that state intervention, even permanent intervention, can be beneficial for the child, the family *and for the parent*, in the long term in that it prevents the family from destroying itself and preserves the potential for reconciliation in the future. This point does not have to be limited to child abuse. Familial relationships will surely suffer when a family is forced to live in disadvantaged circumstances due to a lack of state support.

As Dwyer points out, we should refrain from seeing intervention as being 'for' a child or 'against' a parent and start framing it in what is best for the family[50]. Furthermore, it must be recognised that the state has an interest in children being raised properly and the family is widely accepted as the best model. Therefore, the most effective model should not be concerned with vindicating or limiting the rights of states, families, parents or children. It must be concerned with supporting families and allowing them to do their job properly. Ultimately though, the fact parents will err must be accepted and the law must be capable of rectifying those mistakes.

Section D – Protecting the Rights of the Child

Introduction

It has been accepted that parents should be afforded rights and that the family should be legally protected. However, these considerations cannot justify the

[49] James, G Dwyer, Symposium, *Children's Interests in a Family Context – A Cautionary Note,* Santa Clara Law Review, 39 Santa Clara L. Rev. 1053 at p 1071.
[50] James G. Dwyer, *Parents Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 California L. Rev. 1371 (1994) at p 1072.

surrendering of the aim of child protection. It is submitted that certain basic children's rights should be explicitly guaranteed in the Constitution. These rights are included to guarantee children that parents, or anybody, must treat children according to certain minimum standards established by society. It is further submitted that this guarantee should be less qualified than the Article 40.3 provision[51]; indeed, it should involve a positive constitutional obligation on the state to make sure that children's rights are being vindicated.

These rights exist not to allow the state to take the place of the parent – although in practice this may be necessary in some situations – but to allow the state to impose its minimum standards on parents in certain situations when essentially children's rights are being impaired. The elements of this proposal will now be assessed and the specific rights that might be included will be briefly examined. It should be remembered however that the goal of this paper is to promote a general model and not to explore the extensive task of exhaustively enumerating the rights needed in new model. Insofar as an examination of specific rights goes beyond the aforementioned delimits, this is a necessary tangent as the decisions as to which rights are chosen might be as significant as deciding whether or not to afford children specific rights at all.

A Rights Approach

As was discussed in chapter three, rights based approaches have been widely criticised for having a variety of inherent flaws. Nevertheless, the rights based

[51] Ie it should not be limited by the proviso that the state should act "by its laws"

model is appropriate here for several reasons. Firstly, it is accepted that children's rights will only form a part of the solution. Other mechanisms will be needed to endow a constitution with the capability of adequately governing law in a range of family situations. Even the harshest critics of rights approaches recognise the importance of rights as long as they are not held out as the ultimate answer[52].

Secondly, as Lynn Wardle has argued[53], rights can be especially important in the context of modern society. In a period when states are potentially more powerful than they have ever been, it is recognised that certain rights should be extended to all humans. In a more complex world, people require more to be self-supporting. Perhaps most importantly of all in this context, Wardle points out that many of the mediating structures in society – such as large nuclear families, churches etc. – have disappeared or are in the process of disappearing[54]. Consequently – in the absence of the protections of such institutions – positive legal rights assume a greater importance.

Burdening the State

[52] Clare Huntington, *Rights Myopia in Children's Welfare*, Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 687.
[53] Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 Loy U. Chi. L.J. 321, Winter 1996.
[54] See William Duncan, 'The Child, the Parent and the State: The Balance of Power' in *Law & Social Policy, Some Current Problems in Irish Law*, William Duncan (ed.), Dublin University Law Journal, 1987 at p. 20. Duncan describes how the large extended family has largely given way to the nuclear family and that his has been accompanied by several changes, namely increased state involvement in socialisation, education and protection of children, limits on parents rights and recognition of children's right and protections (which have nevertheless, he acknowledges, been few in number). See also [54] Shorter, *The Making of the Modern Family*, Basic Books, New York, 1975 for an observation of this phenomenon in western society in general.

As already mentioned, any children's rights guarantee should oblige the state to actively endeavour to vindicate the rights guaranteed. This is necessary because children, unlike most rights holders, may not have the mental capacity or physical ability to vindicate their rights. Huntington summarised this difficulty: "This [the common conception[55]] conception of rights does not advance the interests of children in the child welfare system because children simply do not benefit from this sort of autonomy… They are not autonomous legally or practically."[56] It appears that the Constitutional Review Group appreciated this problem when they advocated a "…re-wording of the State's duty to the child".[57]

While the case of *Baby Janice*[58] shows that the courts will step in when it is absolutely necessary, surely the limits of, and justifications for, such actions should be clearly laid out. This is further warranted by the fact that the courts are likely to be faced with more complex and problematic cases in the future[59]. It is submitted that these rights should be exhaustively and explicitly set out because of the extra obligation imposed on the state in regard to them. Rights not protected under this schedule would be protected by Article 40.3 where relevant.

<u>The United Nations Convention on the Rights of the Child</u>

[55] Essentially, the conception that rights-bearers are "separate, autonomous, and responsible individuals entitled to exercise rights and obliged to bear liabilities for their actions." In Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at 664 (footnotes).
[56] Clare Huntington, *Rights Myopia in Children's Welfare,* Legal Studies Research Paper Series, Working Paper Number 06-08, 55 UCLA Law Review 637 (2006) at p 664.
[57] Report of the Constitutional Review Group, Stationary Office, Dublin, 1996 at p 330.
[58] *Baby Janice*, Unreported, High Court, August 5, 2004.
[59] This possibility will be discussed later in the chapter.

The United Nations Convention on the Rights of the Child has been consistently mooted as a valuable basis for children's rights and protections[60]. Additionally, Ireland is a signatory to the convention and therefore morally, if not legally, bound to comply with its aspirations. The state has been criticised for failing to do so[61]. Consequently, the Convention is posited as an ideal basis for children's rights. The Convention is an extensive schedule aimed at addressing a wide variety of child related issues and applying to 195 United Nations member states. Additionally, many of the rights proposed are already protected by Irish constitutional law and otherwise. Therefore, much of the rights in the convention are superfluous or irrelevant in this context. However if these surplus provisions are stripped away, a number of valuable provisions can be identified.

Article 2 portends to extend the Convention rights to the children of all signatory states without discrimination on any arbitrary grounds[62]. It would appear that Ireland is not respecting this Article at least in that it affords ostensibly[63] greater protections to marital children than to non-marital ones. This should be remedied in any new order of rights and it appears that this has been appreciated. The Twenty-Eighth Amendment of the Constitution Bill 2007 seemed to endeavour to provide for more equal treatment between marital and non-marital children. However, it is important that other protections are properly afforded and that the

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[60] See the *Kilkenny Incest Investigation: Report Presented to Mr Brendan Howlin TD, Minister for Health by South Easter Health Board*, The Stationary Office, Dublin, May 1993 at p 96.
[61] Concluding Observations of the Committee on the Rights of the Child, Ireland, U.N. Doc. CRC/C/15/Add.85 (1998).
[62] "…irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."
[63] The word 'ostensibly' is included because, as was argued in chapter 1, constitutional protections ostensibly held out to avail the child are often in practice more valuable to its parents and can seriously diminish the law's ability to protect children. Consequently, non-marital children can be better protected by the law in practice.

exercise represents a levelling up rather than the levelling down that Carolan accused the 2007 Bill of proposing[64].

As regards substantive rights beyond the superfluous, Article 7.1 provided that the child has "a right to be registered immediately after birth, acquire a nationality, a name and as far as possible to know and be cared for by his or her parents." Other rights provided in the Convention include a general right to health[65] and to an adequate standard of living[66].

The Convention also affords some procedural rights. Most noticeably, Article 3 provides that the best interests of the child should be "a paramount consideration" in any legal action concerning children. The fact that it will be *a* paramount consideration rather than *the* paramount consideration illustrates that this is a watering down of what, as previously discussed, is already a somewhat flawed standard.

The convention also provides that in "matters" concerning the child, the child's opinions should be heard and given due weight[67]. Article 12.2 provides that the child should be "heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body". These articles are representative of a general tone in the Convention that suggests

[64] Eoin Carolan, *The Constitutional Consequences of Reform: Best Interests after the Amendment*, (2007) 10(3) IJFL 9 at p 14.
[65] Article 24.1 provided that states should "recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."
[66] Article 27.1 provided for a right "of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."
[67] Article 12.1: States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

that children should have a greater role in judicial and administrative decisions concerning them. This is consistent with many calls from academics and specialists[68] for children to be given a greater say in the decision-making process.

Procedural Rights

In their 1973 work *Beyond the Best Interests of the Child*[69], Goldstein Freud and Solnit made a somewhat novel suggestion in calling for children to be given a right to a speedy hearing in court in cases regarding their placement or removal from family. This is due to their core principle that the law should respect the child's sense of time[70]. They note how delay in such proceedings can be very damaging to children in such cases as children demand security and can find parental absence overwhelming[71]. This problem is well illustrated by the damage done by administrative and legal delay in *Baby Ann*[72] and *Re JH, an infant*[73]. Goldstein, Freud and Solnit recommend that proceedings as to placements of children should be completed "with all deliberate speed"[74]. This right would seem to provide several crucial advantages to child protection while only mildly inconveniencing the justice system generally.

Child Representation

[68] See, for example, Shannon, *Child Law*, Thomson RoundHall, Dublin, 2005 and the One Family Conference, February 2007.
[69] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child*, The Free Press, New York, 1973
[70] Ibid at p 40.
[71] Ibid at p 40.
[72] *Baby Ann* [2006] 4 IR 374
[73] *Re JH, an infant* [1985] IR 375.
[74] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child*, The Free Press, New York, 1973 at p 42.

As regards children appearing in court, the prevailing wisdom in Ireland is that the benefit of the child's participation is outweighed by the disadvantage of the child being traumatised by the adversarial and uncompassionate nature of the adversarial system[75]. As Geoffrey Shannon has observed, this has left the child unrepresented or unheard in many cases[76]. Shannon argues that the best means of obviating this shortcoming is the provision of separate legal representation of children, a facility now provided for in this state in the form of a guardian ad litem[77].

While the appointment of a guardian ad litem and the installation of the child as a party to the proceedings are provided for in the Children Act 2001, there are some deficiencies. Most notably, when the child is made a party to proceedings, a guardian ad litem cannot be appointed. Shannon calls this a "key lacuna" since "a lawyer, while talented in the advocacy of law, may not necessarily be the best equipped to identify and advocate the social and emotional needs of a child."[78] Many commentators[79] have realised that the right to representation is a crucial one and this position is visible in the United Nations Convention on the Rights of the Child. A constitutional right guaranteeing children representation in legal proceedings concerning them might well be justified.

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[75] Geoffrey Shannon**,** *Child Law***,** Thompson Round Hall, Dublin, 2005 at p 324.
[76] Shannon, *Child Law,* Thomson RoundHall, Dublin, 2005 at p 234.
[77] Ibid at p 246.
[78] Ibid at p 235.
[79] "*The child in any contested placement should have full party representation and the right to be represented by counsel".* Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child,* The Free Press, New York, 1973 at p 65. See also James, G Dwyer, Symposium, *Children's Interests in a Family Context – A Cautionary Note,* Santa Clara Law Review, 39 Santa Clara L. Rev. 1053 at p 1071.

Section E – State Intervention

Introduction

The point has been consistently made in this paper that no amount of parental or children's rights can effectively protect and provide for children. As was discussed, the state must take an active role, within reason, in supporting families to allow them to function properly. Nevertheless, regardless of the rights afforded or the welfare support provided, the state will inevitably be called on to take the place of some unworthy parents. Even the 1937 Constitution recognised this fact[80]. Consequently, the boundaries of this action should be set.

It seems especially appropriate that the justifications for such intervention and the limitations of it should be constitutionally provided. In part, this is because such limits are currently provided for by Article 42.5. Moreover, it is surely desirable that the highest legal authority should have something to say on such a serious issue, namely: the situations in which children can be removed from families. Again, a full examination of these bounds is beyond the scope of this thesis as it strays into the realms of specific legislating. Nevertheless, a brief examination might prove useful by illustrating how a more equitable balance could be adopted.

Voluntary Intervention

[80] Most noticeably in Article 42.5.

Marsha Garrison argues that it is important to distinguish between occasions when the state intervenes coercively and when it intervenes on the voluntary invitation of the parents[81]. She proposes that more parents actually seek welfare than are coerced into the system. In this context, she criticises some limited intervention models[82] for failing to take voluntary care into account when limiting intervention to cases of serious harm[83]. The argument is that, firstly, the state should not be limited by standards largely set to apply to the unfortunate context of coercive intervention. Secondly, and more importantly, different standards *should* apply since the law cannot allow parents to use the state as a substitute parent when it suits them and regain the custody of their children at their pleasure. This may be possible because under limited intervention models there may be a requirement that parents have abused or hurt their children for the state to deny them custody.

This situation would be clearly unfair on children and on the state. Garrison proposes that the concepts of child protection and public assistance should be distinguished[84]. In the case of the latter, a delicate balance will have to be struck and standards "must be sensitive to both the minimum intervention philosophy in regard to child protection and the state's interests in regard to cost control and administrative efficiency."[85] Consequently she advocates biological parents

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[81] Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1762-66 (1987) at p 1807.
[82] Notably, Goldstein, Freud and Solnit's.
[83] Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1762-66 (1987) at p 1764.
Ibid at p 1813.
[85] Ibid at pp 1814-1815.

retaining a substantial say in the upbringing of the child although not having custody and guardianship rights[86].

Permanent Coercive Intervention

Article 42.5 of the Constitution authorizes, and arguably obliges, the state to take the place of parents in exceptional cases where "the parents for physical or moral reasons fail in their duty to their children". This provision is obviously focused on parental failure. In that respect it is not focused on child protection nor is it focused on supporting or helping families. In effect, it espouses a doctrine of parental rights. These rights will be paramount under the Article 42.5 order unless parents fail in an exceptional way. Michael Wald has observed that this focus on parental fault is common[87]. He argues that this focus is undesirable.

Firstly, he points out that such a focus limits judicial consideration of the child's concerns[88]. The knock-on effect is that statutes that adopt a parental focus are unsophisticated and unable to deal with the complex subject that is family law. Wald illustrates why this is: "…all available evidence indicates that it is extremely difficult to correlate parental behaviour or home conditions with specific harms to a child, especially if the predicted harm involves long-term, rather than immediate, effects of the environment. Even in very "bad" homes, the impact of the home environment will vary depending upon the age of a child, the

[86] Ibid at p 1819.
[87] Michael Wald, *State Intervention on Behalf of "Neglected" Children A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1975 at p 1000. Garrison has also commented on this phenomenon in Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1762-66 (1987) at p 1821.
[88] Ibid at p 1001.

nature of family interactions, developmental differences among children, and many other factors."[89]

Consequently, courts may make interventions on the basis of parental fault where the child's needs may not warrant it. Equally, and as Wald points out, a lack of parental fault may render courts unwilling to intervene in a situation in which it is necessary for child protection[90]. However Wald proceeds to prescribe a very restrictive model limiting intervention to cases where the harm to the child is "serious"[91]. He accepts that this standard will leave children unprotected in certain exceptional cases.[92] Surely, such a surrender is not acceptable.

Garrison provides a less compromising approach[93]. However, Garrison concedes that ultimately, "courts will thus be forced to confront the question of when parental rights to obtain the child's return should be terminated."[94] She argues that custody rights should not be permanently terminated until three years of care but that an application should then be lodged automatically. This time period is due to "the low risk of instability during the early years of placement and the fact that many parents regain their children during this time"[95].

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[89] Ibid at pp 1002-1003.
[90] Ibid at p 1003.
[91] Ibid at p 1005.
[92] "These criteria reflect the judgment that certain categories of harm to children should not constitute a basis for intervention, even though in some individual cases intervention might be beneficial, because in the majority of cases intervention will do more harm than good." Michael Wald, *State Intervention on Behalf of "Neglected" Children A Search for Realistic Standards,* 27 Stan. L. Rev. 985, 1975 at p 1005.
[93] Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1762-66 (1987).
[94] Ibid at p 1821.
[95] Ibid at p 1825.

It should be noted that termination will not be automatic and the application's success will be subject to certain conditions. Firstly, there must be conditions that require continued foster care[96]. Secondly, Garrison argues that there must be evidence that the parent has failed to make substantial progress toward achieving reunification, despite meaningful assistance from the foster care agency[97]. This achieves Garrison's stated aims of protecting children, giving parents adequate time to resolve issues and affording child welfare agencies adequate incentives to ensure that parents receive services needed to achieve reunification.

Such an approach would appear to be more satisfactory. Many commentators have lamented the many years children have to spend in care because constitutional protections prevent them being adopted[98]. As Garrison points out, children become less and less likely to return to their parents the longer they spend in foster care[99]. Termination and adoption would provide the permanency and stability they need.

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[96] Ibid at p 1826.
[97] Ibid.
[98] See Fergus W. Ryan, *Recognising Family Diversity: Children, One-Parent Families and the Law, Irish Journal of Family Law*, (2006) 9(1) IJFL 3 at p 6: "The constitutional protection afforded exclusively to marital parents and the concern to avoid state intervention in the operation of the family is best exemplified by the treatment of marital children in the specific context of adoption law. Adoption involves the irrevocable termination of parental rights and duties in respect of a child. Yet Arts 41 and 42 denote that the rights and duties of marital parents are "inalienable and imprescriptible", in other words that these are rights that cannot be given away, lost or taken by the State. This effectively means that, unlike non-marital parents, marital parents cannot voluntarily place their child for adoption, even if this course of action might be in the best interests of the child… The Adoption Act 1988 affords the State a right to arrange adoptions in exceptional cases where the parents have comprehensively failed in their duty towards the child for at least 12 months before the application, but only where such failure is likely to last until the child is aged 18 at least, and where the parents can be shown demonstrably to have abandoned all rights and duties in respect of the child. These are in practice extremely exacting requirements, illustrating the dangers of placing parental rights and duties over the best interests of the child."
[99] Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1762-66 (1987) at p 1824.

She further argues that termination should be available without 3 years placement in certain exceptional cases[100]. These largely correspond to the cases outlined in Article 42.5. in cases of "abandonment or if, due to mental or physical illness, mental retardation, or long-term imprisonment, the parent is incapable of providing adequate child care in the foreseeable future."

Conclusion

This brief examination of the bounds of intervention illustrates one crucial conclusion. It is essential that intervention standards are set according to the requirements of child protection and not according to parental fault and the result of rights balancing. While much of the specifics will have to be dealt with in legislation, this principle can be applied to a general constitutional model.

Section F – A New Model

Introduction

The primary assertion of this thesis is that no one constitutional model will be able to achieve the goal of child protection on its own. This is because of the varying weaknesses and strengths of the various models and the range of legal situations to which a constitutional norm will have to apply. Rather, any new model must represent a compromise, a conglomeration of the various models. This section will aim to draw together the advantages of various models into one

[100] Ibid at p 1826.

combined model. The guiding considerations will first be briefly recapped. Thereafter, the proposed combined model will be summarised.

Supporting the Family

It has been observed that the best way to protect children is to support their families and give them the opportunities to thrive. Any constitutional order should respect the family as the primary unit group in society. The social policy advantages of this emphasis are obvious and have been dealt with above. The Constitution should pledge the state to support the family and protect it from attack. Likewise, in individual cases, courts should be compelled to consider the welfare and survival of the family as a primary consideration, subject only to the interests of its individual members. Parents too must be afforded rights.

However these guarantees and rights should not extend to guaranteeing parents or the family natural and imprescriptible rights superior and anterior to positive law. Such guarantees afford parents and families a level of legal protection that is unhelpfully difficult to mitigate. As has been illustrated, this level of protection has absolutely no reasonable justification. It does however cause many serious problems.

The Rights of the Child

In the first place, parental and family protections should be subordinated when certain fundamental children's rights have been infringed or are likely to be

infringed. An exhaustive discussion of the rights that should be afforded would be beyond the scope of this paper. However, certain fundamental rights can be proposed. These rights would fall under two primary categories, namely substantive and procedural rights.

Obviously, the choice of rights and the wording of their provision will be crucial. However much of this legislating would be pointless unless the state's obligation towards the vindication of these rights is altered. It must be remembered that a significant body of unenumerated rights were afforded to children under the 1937 Constitution. Therefore, the state must be given a positive obligation and an active jurisdiction to enforce these rights. The vindication of these rights may require short term action such as a court order to enforce a necessary operation. However, they may also require permanent action such as where a child's right to life or health is under threat. As already discussed, because of the unusual power of enforcement imposed on the state in respect of these rights, they should probably be provided for by way of an explicit and exhaustive schedule.

Protecting the Interests of the Child

However, regardless of attempts to make the law more concerned with problem solving and supporting families, it must be accepted that the courts will, in some cases, be called on to make a definitive ruling in matters concerning the child. Consequently, a standard should be set to protect children in legal proceedings. It is proposed that the most effective standard is that proposed by Goldstein, Freud and Solnit. Namely, in any legal proceedings regarding the placement of the

child the court should attempt to implement "the least detrimental available alternative for safeguarding the child's growth and development"[101]. The advantages of the standard were discussed in detail in chapter three[102]. This standard most effectively reconciles the potentially conflicting policies of protecting children from harm and preventing unnecessary removals from families. It is also appropriate for dealing with situations such as custody proceedings involving both parents.

Summary

As a starting point, the Constitution should stress the importance of the family and its role as the primary unit group in society, deserving of protection. This must be ameliorated by a promise on the part of the state to support families. This represents an attempt to produce a model more concerned with problem solving. The state should also recognise certain conditional parental rights to the custody of their children. However, these rights should be without prejudice to certain indefeasible minimum standards of parenting, protected by children's rights. These children's rights should be coupled with a burden on the state to ensure their enforcement. In this way, a shift in concentration on the protection of children instead of on parental fault is achieved. Finally, the Constitution should guarantee that in any placement decisions regarding children, the court will attempt to secure the least detrimental available alternative for safeguarding the child's growth and development.

[101] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child*, The Free Press, New York, 1973 at p 53.
[102] See pages 23-28.

The aims of this model are, broadly, four fold. Firstly, the model enunciates the state's respect of the family and of parents. Secondly, the model aims to make the state more active in its support of the family and to be more holistic and less adversarial in its organisation of legal proceedings relating to the family. Thirdly, the state guarantees its protection of certain indefeasible children's rights and its obligation to defend them. Finally, the model aims to set a broad standard to govern legal proceedings relating to children, namely the 'least detrimental alternative' standard.

Section G – Applications of a New Model

Introduction

This thesis began in chapter one by outlining the current state of the constitutional law and by highlighting some of the weaknesses of the current order. Consequently, having proposed an alternative model, the applications of that model of this new model should be assessed. Two distinct applications will be assessed in turn.

The *North Western Health Board v HW and CW*/*Baby Janice* Situation

The judgment of *North Western Health Board v HW and CW*[103] provoked considerable disquiet in the legal academic community in Ireland[104]. The court's

[103] *North Western Health Board v HW and CW* [2001] IR 622.
[104] See, for example, Raymond Arthur, North Western Health Board v HW and CW – *Reformulating Irish Family Law*, Irish Law Times, (2002) 20 ILT 39; Dr Ursula Kilkelly and Dr

decision was seen as unreasonably subjugating the rights of the child. However it is submitted that concerns over the factual result were somewhat misplaced. In a sense, the result of the case is not as galling as it is often described. Denham J highlighted the weaknesses of the state's position: "There was no particular reason why this child should be tested for PKU. There was no relevant family history. There were no circumstances which made it particularly apt for the child to have the test."[105] Furthermore, only one form of testing was made available and the test was not made compulsory by the legislature, in this country or in any country[106].

It could be argued that even if the Supreme Court considered itself capable of considering the rights of the child – as it surely would under the proposed model – they would still have found in favour of the parents. This is because it is not obvious that any serious right of the child is being substantially infringed.

Ultimately however, reform of the procedure would be welcome and for many reasons. Firstly, it would make cases like *HW and CW*[107] less objectionable and ostensibly more equitable by properly taking account of the rights and interests of children. Secondly, it would expressly provide for situations such as the one in *Baby Janice*[108] where the courts feel obliged to take action. This form of extraordinary court enforcement on the basis of constitutional protections should surely be laid out in as explicit a fashion as is possible.

Conor O'Mahony, *The Proposed Children's Rights Amendment: Running to Stand Still?,* (2007) 10(2) IJFL 19; Geoffrey Shannon**,** *Child Law***,** Thompson Round Hall, Dublin, 2005.
[105] *North Western Health Board v HW and CW* [2001] IR 622 at 717.
[106] Ibid.
[107] *North Western Health Board v HW and CW* [2001] IR 622.
[108] *Baby Janice,* Unreported, High Court, August 5, 2004.

Finally, and perhaps most importantly, the new order would allow the courts to deal effectively with more complex, unforeseen cases due to the fact that it would deal more specifically and explicitly with rights. We might expect to see more complicated cases involving children's rights because Ireland's recent immigration experience is likely to produce a far more culturally diverse society. Within such a society, minority ethnic and religious groups may enforce practices on children that might be considered harmful and contrary to societal norms. This phenomenon in the United Kingdom – a country with a longer and more extensive experience of immigration - is well described by Caroline Bridge[109].

However a more subtle application of the model might be the use of the problem-solving model and case conferencing. A conference could be convened including the parents, healthcare professionals and social workers. This conference could then propose a plan of action to deal with the issue at hand. A potential result in the *HW and CW* case is that another form of testing could have been proposed. In any event, the procedure seems far more suited to the process of complex medical decision-making than the zero-sum nature of court proceedings.

[109] See Bridge Religion, *Culture and Conviction - the Medical Treatment of Young Children*, Child and Family Law Quarterly, CFam 11.1(1), March 1999. Several examples of complex legal dilemmas are cited. In *Re S (A Minor) (Medical Treatment)* [1993] 1 FLR 376, doctors tried several procedures which increased the child's suffering – due to parental objection to a blood transfusion – before resorting to getting a High Court order to force the transfusion. In *Re C (Medical Treatment)* [1998] 1 FLR 384 Jewish parents sought to direct doctors to resuscitate their dying infant despite the futility of doing so and the highly distressing nature of the procedure. In the case *of T (Wardship: Medical Treatment)* [1997] 1 FLR 502 a mother refused a liver transplant for her infant cause it would cause undue suffering even though medical opinion was unanimous that this was in the child's best interests. In *Re B [1981] 1 WLR 1421* the parents of a baby born with Down's syndrome and an intestinal obstruction refused consent to relatively straightforward surgery believing that it would be kinder to let their baby die. Bridge cites numerous other highly controversial and legally trying cases.

The *Baby Ann* Situation

The deficiencies of the law as it stands relating to custody disputes in the *Baby Ann*[110] mould[111] have been assessed in chapter one. In a similar manner to the above situation, it is as much the judicial decision-making method as the actual result occasioned that was of concern. Considerations of the child's welfare were largely subjugated to the rights and privileges of the marital parent. Moreover, the process creates a zero-sum mentality and a winner-take-all result. This is a wholly inappropriate to deal with families and the upbringing of children. The new model would rectify these flaws.

In the first place, the new constitutional model would mandate that the courts take a more holistic, problem-solving approach. The courts' sole role should not be solely to decide which party's rights are superior. Rather, the courts should attempt to implement a policy that most helps all parties and supports the families. This creates a problem, of course, in this type of case because the whole issue at hand in such cases is that the relevant family is not easily established[112]. However it is submitted that in such cases the courts can, by relaxing the importance of rights and attempting to promote the family structures in which the child has an interest, produce results that recognise the value and accord importance to all competing parties, even if the privileges afforded in the

[110] *Baby Ann* [2006] 4 IR 374.
[111] Namely, a case where natural parents seek to regain custody from adoptive parents after the child has spent substantial time with the adoptive parents following a failed or incomplete adoption procedure.
[112] The fact that this thesis will not address the definition of the family was addressed at page 3 of this chapter.

judgment fall short of what certain parties had hoped for. This could be done by giving extensive visiting and participation rights to the parents who fail in the proceedings. The case conference could be especially useful in this respect.

However, ultimately a decision will have to be made as to custody in such cases. One cannot precisely predict what the effect of any constitutional model might be on complicated custody cases such as the ones in question. These cases involve idiosyncratic factual issues and only a court can definitively produce a legal conclusion. One can, however, speculate as to the way in which a new constitutional order might frame the case.

The first and most crucial difference is that the courts would not impose any presumption that the child's best interests are found in the marital family. The court would acknowledge the importance of the family and the conditional rights of the biological parent and retain them as factors for consideration. The courts should also consider the relevant rights of the child.

However, the ultimate decision must be made according to some accepted standard. It is submitted that such a case should not be considered under the context of some state intervention standard. While the adoptive parents may have come into the child's custody through state aid, they are clearly separate actors to the state. As mentioned above, the proposed measure for dealing with any child

placement proceedings is the Goldstein, Freud and Solnit standard[113]. The flexibility of this standard is well illustrated in this context.

In the final pages of *Beyond the Best Interests of the Child*[114], the authors considered the application of this standard to such disputes. They quote extensively from their fictitious 'Judge Baltimore' espousing a dispassionate and laudable approach to such cases. The Judge begins by pointing out that whatever the judicial result, there will be hardship[115]. His approach is to try to limit that hardship as much as possible. He says that a judge should ignore his own emotions and experiences because, "these feelings should compel me to place child with its biological parents, as compensation for their suffering".[116] Adopting a utilitarian approach, he concludes the lesser harm is done by awarding custody to the psychological parent as this harms only the biological parent while the alternative will often harm the child and the psychological parent. The judge espouses a social policy of increasing the number of adequate parents and concludes: "Only in the implementation of this policy does there lie a real opportunity for beginning to break the cycle of sickness and hardship bequeathed from one generation to the next by adults who as children were denied the least detrimental alternative."[117]

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[113] Namely, in any legal proceedings regarding the placement of the child the court should attempt to implement "the least detrimental available alternative for safeguarding the child's growth and development".
[114] Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child,* The Free Press, New York, 1973.
[115] Ibid at p 108.
[116] Ibid at p 109
[117] Ibid at p 111.

However even after this seemingly decisive result, the holistic, pro-family focus could have an influence. This is because while custody has been granted, it has been granted in the child's interests and not because any set of rights have been deemed superior. A hypothetical application could be where a court orders a case conference to decide on the degree and organization of the unsuccessful parents' access to the child. This might result in increased access for the parents who are not granted custody. While one might argue that this would be unlikely to be successful, it should be remembered that failure to come to a consensus would result further legal proceedings as to the issue.

Section H – Conclusion

The central argument of this thesis should be briefly summarised at this point. Chapter one proposed that the Constitution is in need of amendment. This was due to the fact that it is incapable of adequately protecting children and unsuited to judicial reform. The current constitutional provisions on the child and the family have lead to controversial and somewhat perverse logical judgments in courts[118]. Chapter two continued this argument by proposing that underlying constitutional philosophy should be re-assessed and replaced. The 1930s Roman Catholic philosophy that grounds the Constitution is anachronistic and is inappropriate in today's Ireland. Equally, if natural law was ever an appropriate basis of constitutional law in any state at any time, it is no longer so in this state.

[118] Even where the actual legal result was not necessarily perverse such as the conclusion in *North Western Health Board v HW and CW* [2001] IR 622 that the courts had no jurisdiction to enforce the child's right if it existed. Likewise, in *Baby Ann*[2006] 4 IR 374 – due to the legally advised marriage of the parents – the court was forced to consider the welfare of the child of secondary importance despite the Guardianship of Infants Act, 1964 due to the constitutional protection of the marital family.

These changes would make it possible for a new constitutional schedule to be adopted and to be adopted democratically and on the basis of objective criteria. Chapter three set out a range of alternative models. The central argument of the chapter was that many of the models held up as potentially providing the answer in the area of constitutional child protection are flawed. They might, if adopted, make matters worse for some children in some cases. The obvious synthesis of this dialectic is that any new constitutional model should involve a combination of models, attempting to draw on the best aspects of each.

Chapter four sought to illustrate how this could be achieved. It was emphasised that we must recognise the advantages *and* limitations of each model proposed. Specifically, it was proposed that the new constitutional order should retain its recognition and its guarantee to protect the family, at least to a certain extent. However it was argued that the state should place more of an emphasis on supporting and helping families and the judicial system should focus more on holistic approaches to family legal disputes than to zero-sum, winner-take-all proceedings. Nevertheless, the new constitutional order should recognise and guarantee certain parental and children's rights in the area. The latter should be accompanied by a special obligation on the state to guarantee their enforcement. Finally the 'least detrimental alternative' standard was proposed as the guiding constitutional standard. While it is accepted that one might reasonably conclude that a different model would be more effective, it is surely incorrect to suggest that the central argument is not valid. Ultimately, the adoption of any model must

be based on objective criteria and not on any belief in the primordial supremacy of parents or the family.

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