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Are there Unenumerated Rights in the Irish Constitution?

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Sometimes, it is difficult to know what someone means. Sometimes, it merely appears to be difficult. Consider this masterpiece of philosophical hermeneutics from a P. G. Wodehouse short story:

“Jeeves,” I said. “A rummy communication has arrived. From Mr. Glossop.”
“Indeed, sir?”
“I will read it to you. Handed in at Upper Bleaching. Message runs as follows:

‘When you come tomorrow, bring my football boots. Also, if humanly possible, Irish water-spaniel. Urgent. Regards, Tuppy.’

“What do you make of that, Jeeves?”
“As I interpret the document, sir, Mr. Glossop wishes you when you come tomorrow, to bring his football boots. Also, if humanly possible, an Irish water-spaniel. He hints that the matter is urgent, and sends his regards.”
“Yes, that’s how I read it too…”¹

The ‘rumminess’ of Tuppy’s telegram is to be found not in what he demands—football boots and an Irish water-spaniel—but in why he should demand such things. The meaning of the telegram is, as Jeeves dryly demonstrates, perfectly clear; what is obscure is its purpose. Matters are often more complicated than this when it comes to legal texts, such as statutes and cases; not only are their purposes opaque but their very meanings are obscure; and when it comes to trying to understand a constitution,

the foundational document of a legal and political order, matters can become extremely complicated.

A lively debate on constitutional interpretation is currently taking place in the United States. Chief among the topics under discussion is the necessity or desirability of interpreting the United States Constitution according to the original intent of its framers. This leads immediately to a consideration of the notion of intention, who is intending and what it is that is supposed to be intended, how that intention is to be ascertained and why, even were such intentions to be ascertainable, they should have normative force in contemporary constitutional interpretation. A similarly lively if understandably somewhat more restricted debate has been taking place on the Irish Constitution. In the context of these discussions it might be worthwhile to consider

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certain aspects of the Irish constitutional experience and, in particular, to take a look at what some regard as the Irish equivalent to the IXth amendment to the US Constitution, namely the doctrine of unenumerated rights enunciated in *Ryan v. The Attorney General*.4

The United States’ Constitution explicitly acknowledges the existence of unenumerated rights. Amendment IX reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Bunreacht na hÉireann*, which patterns itself in so many respects upon the US Constitution, has no such explicit provision5 which is presumably why *Ryan* is notorious for its claim by Kenny J that there are unenumerated rights in the Constitution: “I think that the personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State.”6

This claim is noted in the relevant secondary literature, sometimes with acclaim, sometimes matter-of-factly, occasionally with some reservations. Representative of the more rhapsodic reception which the discovery of unenumerated rights in the Constitution sometimes generates is Brian Doolan’s comment that “The courts have been inventive and flexible by interpreting the Constitution in such a way as to acknowledge the existence of other constitutional rights which are not expressly

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5 On the other hand, *Bunreacht na hÉireann* makes explicit provision for judicial review whereas the defenders of judicial review in the USA are left to infer it from other Constitutional provisions.
enumerated” which “paved the way for one of the most innovative features of our constitutional law.” Doolan’s description of this up-to-then-unsuspected power of the courts to ascertain and declare rights not specifically enumerated in the text as “innovative” echoes Mr Justice Kenny’s own extra-curial description of this power as “exciting” and “creative.” Michael Forde, on the other hand, notes simply “The existence of those [unspecified or unenumerated] rights was first acknowledged by Kenny J. in the ‘Fluoridation Case’ …[and]…endorsed by Ó Dalaigh C.J” in the Supreme Court” while Professor James Casey remarks that “It would be difficult to exaggerate the importance of [Ryan’s] doctrine of ‘unenumerated rights’.”

Somewhat less enthusiastic, however, are Gerard Hogan and Gerry Whyte who, while conceding that the discovery in Bunreacht na hÉireann of what they describe as “ancillary or corollary” or “latent” rights has had “many positive results”, go on, in a truly memorable passage, to express their concern that “from the point of view of one attempting a systematic exposition of an organic law” this development has, resulted in “a certain blurring of definition, a certain bursting of conceptual banks, rather as though legal rivers finding their confluence in the estuary of liberty and justice, had had their courses confused by flooding further upstream, leaving a somewhat trackless delta for the constitutional geographer.”

I have argued elsewhere that what has been referred to by J. M. Kelly as the ‘logically faultless’ argument for unenumerated rights in Ryan is, in fact, logically

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7 Brian Doolan, Constitutional Law and Constitutional Right in Ireland (Dublin, 1994), 156.
10 James Casey, Constitutional Law in Ireland, 3rd ed. (Dublin, 2000), 386.
12 Gerard Casey, ‘The “Logically Faultless” Argument for Unenumerated Rights in the Constitution,’ ILT Vol. 22 (N.S.) No. 16 (2004), 246. (The authorial attribution to Gearóid Carey is incorrect; the correct attribution is made in ILT, Vol. 22 (N.S.) No. 18, at 273.)
flawed. Whether or not my argument is conceded, there is another aspect of Kenny J’s judgement which, to the best of my knowledge, has not been much commented upon or discussed and that is his claim that the task of discovering and enunciating these unenumerated rights is a function of the courts. “If… [the general guarantee in Article 40, section 3]… relates to personal rights other than those specified in Article 40, the High Court and the Supreme Court have the difficult and responsible duty of ascertaining and declaring what are the personal rights of the citizen which are guaranteed by the Constitution.”

If we assume for the sake of the present discussion that Article 40.3 does in fact extend to rights not specifically enumerated in Article 40, and if we assume further that the task of ascertaining and declaring these rights must fall to some body or other, it is not immediately evident that that task belongs to the Courts. The subject and agent referred to in the appropriate sections of Article 40 is the State that, variously, is assigned the task of respecting, defending, vindicating and protecting various rights. But the State exercises all the powers of government—legislative, executive and judicial—through the appropriate organs and so it would appear to be an open question as to which of these three organs of government, alone or in combination, shoulders the designated duty of ascertaining and declaring the personal rights of the citizen. Anticipating, perhaps, an objection to his claim that the courts have duty of ascertaining and declaring the personal rights of the citizen, Mr Justice Kenny continues: “In modern times this would seem to be a function of the legislative rather

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13 “Mr Justice Kenny’s view, based on the wording of Article 40 itself, that the citizens’ personal rights are not exhausted by the specific guarantees contained in the Article is logically faultless.” J. M. Kelly, *Fundamental Rights in the Irish Law and Constitution*, 2nd ed. (Dublin 1967), 42.

14 *Ryan v. Attorney General* [1965] IR 294, 313. [Emphasis added] Earlier, at 311, this idea was expressed by Kenny J somewhat differently: “…in my opinion this general guarantee relates not only to the personal rights specified in Article 40 but to those specified rights and other personal rights of the citizen which have to be formulated and defended by the High Court.” [Emphasis on ‘and’ in the original; other emphasis added].

15 *Bunreacht na hÉireann*, article 40.3.
than of the judicial power but it was done by the Courts in the formative period of the Common Law and there is no reason why they should not do it now.”

John Kelly is unusual among Constitutional commentators in questioning the propriety of the Ryan principle. He is not impressed by Kenny J’s appeal to what he terms ‘a doubtful historical argument’ to justify it:

It is perfectly true that in the ‘Formative period of the Common law’ much more law was made and many more remedies developed by the judges than by the legislature, but this period, whenever it may be thought to have ended (scarcely later than 1600) was a totally different one from our own, which is characterised by a constitutional system resting on a then unknown democratic concept and process, and in which the popularly elected legislature has evolved a status and functions which might be thought to put it in an entirely different position vis-à-vis the Courts. To say this is of course not to deny that the legislature is bound by the Constitution and that its acts are subject to judicial review within the limits which the Constitution imposes; but Mr Justice Kenny’s words might seem to assign to the legislature a somewhat humbler role vis-à-vis the Courts than the general tenor of the Constitution (not to speak of the intentions of those who framed it) envisages: and to do this by a doubtful historical argument.

It is difficult to see how the cogency of Kelly’s point can be denied. At the formative period of the Common Law there was, by and large, no legislature or, at least, nothing that we would now recognise as such—a law-making body clearly distinct from the executive and judicial. The last two hundred years has seen the emergence of such legislatures in almost every country with a common-law tradition and their legislative enactments have significantly affected the position and status of the common law both in terms of the sheer volume of legislative enactments and in the fact the statute

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17 In the secondary literature very little appears to have been made of Mr Justice Kenny’s pre-emptive allocation of this duty to the courts. Brian Doolan significantly seems to contemplate a kind of dual mandate. He accepts that the courts have such a function but, denying that it is exclusive to them, recommends that the Oireachtas shoulder responsibility for this duty as well. “This function [of declaring the existence of constitutional rights] is not exclusive to the courts: it can and should be exercised by the Oireachtas.” Brian Doolan, Constitutional Law and Constitutional Right in Ireland (Dublin, 1994), 156.
trumps common law. The simple reason, then, why our courts should not now arrogate to themselves the function of ascertaining and declaring the personal rights of the citizen is very simply because we have a legislature whose function, among other things, it is to do just that.

According to Kelly, a significant problem with allocating to the courts the responsibility for ascertaining and declaring the unenumerated constitutional rights is that it introduces uncertainty into our law, an uncertainty that he describes as being “repugnant to the central value of the very concept of law itself” and, he continues, “the result of the judgements in Ryan v A.-G. is to place the Oireachtas in the position of not knowing just what personal rights it must respect, and how far it can go in delimiting or abridging them.”

In summary, Kelly lists what he regards as the two interconnected disadvantages of Ryan—first, the introduction of uncertainty into the law and, second, “the practical approximation of the principle recognised in the case to the notion that the Courts can test legislation on their own criteria of wisdom and policy.” Kelly’s second disadvantage is the political corollary of the uncertainty that he correctly takes to be legally disadvantageous. When someone is deemed to have a right, that right invariably entails an obligation on the part of another—either a (positive) obligation to do something or a (negative) obligation to refrain from doing something.

Negative rights, so-called, are relatively uncontentious, even if their scope is a matter

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19 The US Supreme Court Justice, Antonin Scalia, remarks on the “uncomfortable relationship of common-law lawmakering to democracy”, noting that law students, in playing the common-law judge are “playing king—devising, out of the brilliance of [their] own mind[s], those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges!” Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law, (Princeton: Princeton University Press, 1997) ed. Amy Gutmann, 10, 7.


22 For a sophisticated exposition of the legal aspects of rights, see Wesley Newcomb Hohfeld’s justly famous typography of rights, powers, privileges and immunities in Fundamental Legal Conceptions as applied in Judicial Reasoning (New Haven, Connecticut: 1919).
of some debate: it is not unreasonable, for example, to recognise that my right to life entails an obligation upon all others to refrain from killing me. Positive rights, so-called because they impose active obligations upon others, are invariably contentious. A right to housing or to social welfare assistance, for example, imposes obligations on someone else to supply that housing or that assistance. For this reason, such rights would appear to be suitable material for legislative deliberation rather than for judicial action.

Noting that Kenny J makes an express disclaimer of any intention to encroach upon the proper sphere of the legislature Kelly remarks,

_Ryan v A.-G._ has, in spite of this sincere disclaimer, produced the following situation: Acts of the Oireachtas may be reviewed in the light of as yet undefined personal rights. (The very fact that these personal rights are _left_ undefined might be thought to raise the presumption that their recognition was intended to remain with the Oireachtas)….the subjection of its [the Oireachtas’s] Acts to review on unspecified grounds…represents a position scarcely at all distinguishable when boiled down into practical concrete cases, from the position of the Courts acting as a ‘third House of the legislature’ and taking upon themselves what is, _in effect_, the power of adjudicating on the wisdom or desirability of legislation.\(^{23}\)

Kelly’s comment is given added pertinence when one considers that what he characterises as Mr Justice Kenny’s ‘sincere disclaimer’ of having no intention to encroach upon the proper sphere of the legislature is severely compromised by what he wrote some fourteen years after his judgement in _Ryan_, reflecting on its impact:

“…this exciting feature [the power to recognise and enforce constitutional rights not expressly stated in the Constitution] is the most unusual aspect of the Constitution. Judges have become legislators and have the advantage that they do not have to face an opposition.”\(^{24}\) As I remarked in an earlier article,\(^{25}\) whether or not it is exciting for


judges to recognise and enforce extra-textual Constitutional rights, it is another matter altogether whether their doing so is legally and politically appropriate. Furthermore, it is difficult to square the prospect of legislating judges with Article 15.2.1o which states that “The sole and exclusive power of making laws for the State is hereby invested in the Oireachtas”. [emphasis added]

Not everyone is bothered by the prospect of a judge’s being drawn into making contentious value choices. Adrian Hunt goes so far as to say, “The notion that judges ought not to be making decisions of this sort is based upon a peculiarly formalist view of what ‘law’ is.” The problem, as far as he is concerned, is not judges’ making such choices which, he seems to believe, they can hardly avoid but rather their making such choices in a concealed fashion: “…judges, in an attempt to maintain the façade of some form of peculiar legal objectivity (as a way of maintaining the distinction between law and politics) express their decisions, and the reasons for their decisions, by reference to artificial legal constructions, without acknowledging the value basis for their reasoning.”26

There is a perfectly legitimate process of construction that can elicit from a document that which is implied in it but not explicitly stated. In the Constitution there is a right to found a family. Given this right, and the Constitutional definition of the family as being based on marriage, then it necessarily follows that there has to be a corresponding Constitutional right to marry. It is open to the courts to discover by such analysis of the Constitution rights logically implicit in its text. It is more or less inevitable that documents possessed of any semantic richness will have such implications; in a foundational legal document such as a constitution it is only to be expected that reason operating on the text will be able to draw out various

implications. As James Casey points out “Article 38.1’s declaration that ‘No person shall be tried on any criminal charge save in due course of law’ is a fount of rights in the sphere of criminal procedure…” 27

Implicit rights are, of necessity, unenumerated and the process of making them explicit is perfectly legitimate. However, it is one thing for the courts to render the implicit explicit; it is quite another thing for them to reserve the right to discover rights not only not enumerated in the text but also not logically necessitated by the text save by the exercise of hermeneutical somersaults. The right to privacy, which was discovered 28 in an Irish context in McGee v Attorney General 29 and in the US context in Griswold v Connecticut 30 is a spectacular example of what has appeared to many commentators as a textually ungrounded right.

Whether or not my previous remarks carry conviction, there is one circumstantial argument that seems to me to be virtually unanswerable and it is this: if the framers of Bunreacht na hÉireann had really wanted to embed unenumerated rights in its text and give permission to the Courts to pronounce upon them, why did they not say so explicitly, especially as they had the example of Amendment IX of the US Constitution to guide them? Arguments from silence are notoriously unreliable but, given that the US Constitution is the oldest such document, given its role as a model for much that is found in Bunreacht na hÉireann, and given that it contains an amendment dealing explicitly with unenumerated rights, it is, I believe, significant, that there is no explicit advertence to them in Bunreacht na hÉireann. That inadvertence, together with the lack of textual evidence for such rights and the obvious political problems to which they give rise, constitutes a presumption that,

27 James Casey, Constitutional Law in Ireland 3rd ed. (Dublin, 2000), 386.
28 or invented if you adopt a conservative jurisprudential attitude to constitutional interpretation.
pace Mr Kenny’s judgement, and the concurrence of the legal establishment, unenumerated rights, except when logically necessitated by the Constitutional text, are not to be found in *Bunreacht na hÉireann*. Whatever (if any) may be the rights that follow from what Kenny J calls “the Christian and democratic nature of the state”—whether and to what extent the state is or was either Christian or democratic is a moot point—they will have to derive their legal force from a source other than *Bunreacht na hÉireann*. 