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<td>Authors(s)</td>
<td>Casey, Gerard</td>
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<tr>
<td>Publication date</td>
<td>2004-10</td>
</tr>
<tr>
<td>Publication information</td>
<td>Irish Law Times, 22 (16): 246-248</td>
</tr>
<tr>
<td>Publisher</td>
<td>Thomson Reuters - Round Hall</td>
</tr>
<tr>
<td>Item record/more information</td>
<td><a href="http://hdl.handle.net/10197/5353">http://hdl.handle.net/10197/5353</a></td>
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The ‘Logically Faultless’ Argument

for

Unenumerated Rights in the Constitution

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October 2004
The ‘Logically Faultless’ Argument
for Unenumerated Rights in the Constitution

It is generally accepted that the *locus classicus* for the doctrine of unenumerated rights in the Irish Constitution is *Ryan v. The Attorney General*. Commenting on the following sub-sections of Article 40.3

1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Mr Justice Kenny held that

The words ‘in particular’ show that sub-s. 2° is a detailed statement of something which is already contained in the general guarantee. But sub-s. 2° refers to rights in connection with life and good name and there are no rights in connection with these two matters specified in Article 40. It follows, I think, that the general guarantee in sub-s. 1° must extend to rights not specified in Article 40.

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1 I should like to thank Mícheal Ó Searcóid and Eoghan Casey for stimulating discussion on the topics treated in this paper.
3 [1965] IR 294, at 313.
In his seminal paper on this case, G. W. Hogan\(^4\) comments: “This analysis of Article 40.3.1 is, as Professor Kelly\(^5\) pointed out, ‘logically faultless’ and really leaves no room for any other construction of this provision.” In contrast to Hogan and Kelly, I submit that Kenny J’s analysis of Article 40.3 sub-ss. 1\(^o\) and 2\(^o\) is fundamentally flawed.

The Textual Argument for Unenumerated Rights

Here is a reformulation of Kenny J’s analysis of Article 40.3:

Premise 1. Sub-s. 1\(^o\) provides a general guarantee of the personal rights of the citizen

Premise 2. Sub-s. 2\(^o\), by virtue of the words ‘in particular’ give a detailed statement of that general guarantee

Premise 3. But sub-s. 2\(^o\) refers specifically to rights in connection with life and good name and there are no such rights specified in Article 40

Conclusion. Therefore, the general guarantee in sub-s. 1\(^o\) must extend to rights not specified in Article 40

For the purposes of the present paper let the validity of this argument be granted so that the conclusion follows logically from the premises. Granted its validity, if the premises of the argument are true, its conclusion must also be true. Are the premises true?


\(^5\) “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.
Premise 1 is broadly acceptable except that to describe the guarantee as ‘general’, importing a contrast with ‘in particular’ in the next sub-section is, perhaps, to prejudge the issue. It might be better simply to say that sub-s. 1° provides a guarantee to respect, defend and vindicate personal rights without further specification of what those rights might be.

In premise 2 a lot rests on the phrase ‘in particular’. In normal English usage, the employment of such a phrase can often be taken to specify a non-exhaustive proper subset of a larger set and therefore, by what has been called ‘conversational implication’ can be understood to point indirectly to other not-yet-specified members of that set. Suppose I say “John has attractive personal qualities. He has, in particular, a friendly disposition and a generous spirit.” In saying this, do I necessarily commit myself to holding that there are other attractive personal qualities that John has besides the two listed? It certainly would be consistent with the ‘in particular’ sentence if John should turn out to have other attractive qualities. On the other hand, it might turn out that the two attractive qualities listed are in fact the only ones that John possesses. Reading premises 1 and 2 in this unusual but not impossible way would have the effect of forcing a modification of the conclusion of the textual argument so that it should now read not that “the general guarantee must extend to rights not specified in Article 40” but that “the general guarantee may/could/might extend to rights not specified in Article 40.” Whatever the value of these reflections, for the purposes of the present paper let the truth of premises 1 and 2 be granted; the fatal flaw in the argument is located elsewhere.
Critique of the Textual Argument

The basic problem with the textual argument is that premise 3 is false. Mr Justice Kenny claims that “sub-s. 2° refers to rights in connection with life and good name” but sub-s. 2° refers only to one set of rights, namely the property rights of every citizen. What it undertakes to protect (against unjust attack) and vindicate (in the case of injustice done) are simply every citizen’s life, person and good name, not the right to life, the right to good name, still less the right to person—whatever that may mean. One grammatically possible way to attach ‘rights’ to ‘person’ would be to use the phrase ‘personal rights’ or some other phrase effectively equivalent to it such as ‘rights of the person’; but if this were how one were obliged to read sub-s. 2° it would make nonsense of premise 2 of the textual argument (which holds that sub-s. 2° is a detailed statement of the general guarantee in sub-s. 1°) since ‘personal rights’ would be no less general in sub-s. 2° than in sub-s. 1°.

On its face, then, sub-s. 2° therefore does not refer to rights that are not mentioned in Article 40 and it is improper to conclude on the basis of the textual argument that the guarantee in sub-s. 1° must extend to rights not specified in Article 40.

Possible Responses

I can envisage two possible responses to this critique of the textual argument: one drafting-related, the other substantive.

Drafting-related response

The drafting-related response might contend that in sub-s. 2° the drafter employed a telescoped mode of expression and that the term ‘rights’ is implied after ‘life’,
‘person’ and ‘good name’ just as it occurs explicitly after ‘property’. The passage should then be read “…the life rights, person rights, good name rights and property rights….”

This response is implausible. If the drafter of this sub-section had wanted to use some form of contraction a phrase such as “…the rights to life, person, good name and property…” might have achieved the desired aim though even in this phrasing it would be difficult to make sense of the term ‘person rights’ and, as indicated above, if the phrase ‘personal rights’ or its equivalent were to be read into the passage it would compromise the claim in premise 2 of the textual argument that sub-s. 2° is a detailed statement of the general guarantee in sub-s. 1°.

A reference to the Irish text of the Constitution shows the drafting-related response to be fundamentally ill-conceived. The Irish text reads “…beatha agus pearsa agus deachlú agus maoinchearta…” which, literally translated, reads “…life and person and good name and property rights…”. The four terms are separated by ‘agus’ (and) which clearly shows that they are to be taken as co-ordinate to each other, and ‘cearta’ (rights) occurs as part of a composite word and not as a detachable element that could be appended to the first three terms.\(^6\)

If the word ‘rights’ had not appeared after ‘property’ (or together with it, as in the Irish text) it might perhaps have been possible to take all four terms as being specific instances of the so-called general guarantee in sub. s. 1°. However, like it or not, the term ‘rights’ is explicitly attached to ‘property’ and is not explicitly attached to ‘life’,

\(^6\) “[T]he courts have in recent years often looked at the Irish text of the Constitution…in order to elucidate the meaning of the corresponding English expression.” Gerard Hogan and Gerry Whyte, *J. M. Kelly’s The Irish Constitution*, 3rd ed. (Dublin 1994), 205.
‘person’ and ‘good name’. I submit, therefore, that the natural and unstrained reading of sub-s. 2° is subsumed under the principle *expressio unius personae vel rei est exclusio alterius*.

**Substantive response**

The substantive response to the critique of the textual argument might be that even if rights are not mentioned explicitly in connection with ‘life’, ‘person’ and ‘good name’ the protection and vindication of these items that is envisaged in sub-s. 2° is to be undertaken by the State “by its laws”, and so the protection and vindication of the life, good name and person of every citizen *by law* necessarily implies (if it is not equivalent to) the protection and vindication of the *right* of all citizens to their lives, good names and persons.⁷

To defeat this response one would have to be able to distinguish both conceptually and factually between the protection and vindication of the lives, good names and persons of all citizens and the protection and vindication of the *right* of all citizens to their lives, good names and persons. It may be difficult, even impossible, to make such distinctions; fortunately, it is not necessary. The substantive response, if correct, proves too much. It remedies the defects of the drafting-related response but at a cost, for now premise 3 turns out to be false yet again. The second sentence in that premise claims that “there are no such rights [namely, life and good name] specified in Article 40” but, if the substantive response is correct, these rights *are* specified in Article 40; they are specified precisely, if implicitly, in 40.3.2°. They may not be specified

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⁷ It should be noted that even on this reading the problem adverted to above remains, namely, that a reference to ‘personal rights’ or its equivalent in sub-s. 2° makes nonsense of the claim in premise 2 of the textual argument that sub-s. 2° is a detailed statement of the general guarantee contained in sub-s. 1°.
elsewhere in Article 40 but why should that be problematic, just as the mention of personal rights in both sub-s. 1º and sub-s. 2º, on this reading, would have to be unproblematic. In this context the phrase ‘in particular’ could attach to the verbs ‘protect’ and ‘vindicate’ and would commit the State to protect the (implied) rights in sub-s. 2º from unjust attack and to vindicate them in the case of injustice done, as distinct, perhaps, from other rights in Article 40, such as those mentioned in 40.6.

A nice dilemma we have here: either the rights relevant to the textual argument are not referred to in sub-s. 2º, in which case the textual argument collapses; or they are referred to in sub.s. 2º, in which case they are, ex hypothesi, specified in Article 40 and so the textual argument again collapses.

What Now?

If the textual argument must be rejected, as I believe it must, where does this leave the doctrine of unenumerated rights and the collection of such rights delineated by the courts in the almost 40 years since Ryan? Exactly where they are—except that they now have to hop around somewhat uncomfortably on one leg rather than standing solidly on two. In Ryan, Kenny J presented two reasons why he believed that the guarantee in Article 40.3.1º was not confined to the rights specified in Article 40. The first of these was the textual argument just analysed and rejected; the second was the assertion that “there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all…[which] leads to the conclusion that the general guarantee extends to rights not specified in Article 40.”

8 [1965] IR 294, at 313.
on sub-ss. 1° and 2° of Article 40.3 that is the real source of the judicial inclination to discover unenumerated rights in the Constitution.

As for the propriety of maintaining a doctrine of unenumerated rights in the Constitution of a democratic society, I leave the last word to Mr Justice Kenny himself, writing extra-judicially:

They [the judges of the High Court and, on appeal, the judges of the Supreme Court] have the power to recognise and enforce constitutional rights which are not expressly stated in the Constitution. To many people this would seem to be a function of the legislature only and, in many ways, this exciting feature is the most unusual aspect of the Constitution. Judges have become legislators and have the advantage that they do not have to face an opposition.⁹