Reflections On The Limits To The Law's Ambitions

There is probably no vantage point from which to gain a better perspective on the relationship between the legal system and the world of politics in Ireland than the position occupied by the Attorney General. The constitutional office created by Article 30 of Bunreacht na h-Éireann places its holder at the very centre of the set of relationships that exist between Government and the legal system in general and, in particular, the judicial function.

Like all other holders of that office, Rory Brady was hour by hour and day by day concerned with the constitutional order, including what is termed the "separation of powers", as it shaped and constrained the affairs of the Irish State.

Separation of Powers

The words used in Article 6 of the Constitution - "*All powers of government, legislative, executive and judicial…*" - suggests on a superficial basis that powers of government can be neatly divided into three categories and that every power can be analysed and categorised as falling cleanly into one of those categories. But as Casey and others have pointed out, it is not true to say that the Constitution *"accepts the separation doctrine in anything like its purest form"*. [1]

For one thing, the legislature and the executive are inextricably joined in the Irish constitutional order. Another lesser difference lies in the power of the Supreme Court, on an Article 26 reference, to prevent the enactment of unconstitutional statutes by intervening in the parliamentary process in which legislation passed by the two Houses of Oireachtas remains un-signed and un-promulgated by the third element of the Oireachtas, the President. Moreover, as Article 37 makes clear, "*limited functions and powers of a judicial nature"* can be exercised by bodies authorised by law even though such bodies are not courts or judges established it as such under the Constitution.

In Eoin Carolan's *"The New Separation of Powers",*[2] a case is made for developing a new theory of the separation of powers based on the implementation of values through a variety of processes and relationships between the various arms of the modern administrative state.

The Supreme Court has held that *"the Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government"*[3]*,* but, as Lavery J stated in relation to Article 2 of the Irish Free State Constitution, the separation of powers was *"imperfect"* as far as the executive and legislative

[1] *Casey Constitutional Law in Ireland* 3rd Edn p 221

[2] Oxford University Press (2009)

[3] *Re Haughey* [1971] IR 217

powers were concerned and *"definite"* only in respect of the judicial power[4]. The Supreme Court found in *Abbey Films Ltd v The Attorney General* that *"the framers of the Constitution did not adopt a rigid separation between the legislative, executive and judicial powers".*[5]

Suffice it to say that the Constitution recognises in substance a broadly tripartite distribution of governmental power but acknowledges that this distribution does not amount to a clinical, categorical separation of powers in practice.

Good Fences Make Good Neighbours?

If Lavery J was correct in categorising the separation of executive and legislative powers between government and parliament as *"imperfect"* and, by implication that these powers were in some senses *"shared"* by those organs while the separation of the judicial power under the old constitution was *"definite",* the question which arises is as to whether it can be stated that the judiciary are, by that token, *"definitely"* excluded in our constitutional order from determining issues of socio-economic controversy by reference to un-enumerated social and economic constitutional rights.

As the law of human rights has burgeoned as an area of academic legal research and international legal discourse, there has been increasing emphasis in that debate on a claimed desirability of extending the scope of the judicial function, heretofore confined largely speaking in common law countries to the area of civil and political rights, to what are now described as social and economic rights.

The Supreme Court, in *Sinnott v Minister for Education*[6], in *Mhic Mathuna v The Attorney General*[7], and in *TD v Minister for Education*[8], came to deal with these issues head on. As the authors of J.M. Kelly *The Irish Constitution* put it in 2004, the Supreme Court in these cases

> "*has recently sent a very strong signal that the resolution of social and economic problems having implications for public finances is not a matter for the courts, clarifying at the same time, that it is only in exceptional circumstances that a court could grant a mandatory order, as opposed to declaratory relief, against another organ of State".*

These decisions have disappointed some lawyers on the claimed basis that they were a set-back for the development of human rights law. But should we really be disappointed?

As the authors of *Kelly* point out, the Supreme Court adopted and approved in large measure the analysis of Costello J in *O'Reilly v Limerick Corporation*[9] to the effect that the dividing line between the judicial and legislative spheres of operation was marked out by the Aristotelian distinction between commutative and distributive justice, but it has been said that in his retirement Costello J regretted taking the approach that was subsequently favoured by the Supreme Court.

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[4] *O'Byrne v. Minister for Finance* [1959] IR 1
[5] [1981] IR 158
[6] [2001] 2 IR 545
[7] [1989] IR 504
[8] [2001] 4 IR 259
[9] [1989] 181

Change for Better or Worse?

In Ireland, advocates of the justiciability of cultural social and economic rights speak and write about the possibility of an enlightened future Supreme Court taking the view that the un-enumerated rights should extend far beyond what is now implied by the administration of commutative justice and should comprehend the adjudication by the courts of matters falling within the sphere of distributive justice.

It seems clear that at least some, if not many, academic lawyers view development of constitutional law as an entirely open-ended process to which no one should write a *"ne plus ultra*" in virtually any respect.

The corollary is that anyone who advocates a limitation on the scope of justiciability in such matters runs the risk of being charged with narrow-mindedness and conservatism, and can easily be portrayed in superficial terms as a jurisprudential reactionary.

A problem with seeing law as the potential embodiment of justice in every matter is that an almost unlimited moral appetite for justice can be easily morphed into a demand for an almost unlimited scope for the application of law and for the enforcement of such law by the judiciary.

Article 45: Directive Principles of Social Policy

The deliberate exclusion from justiciability of the Article 45 Directive Principles can be seen in the *"travaux preparatoires"* of the Constitution as is demonstrated in Hogan's *"The Origin of the Irish Constitution 1928 – 1941"* at pp. 513 *et seq*.

Social justice, as a concept, invariably involves "distributive justice". The preamble to the Constitution speaks of a *"true social order*" as something which the people, in enacting the Constitution, are seeking to attain. The idea of a "*social order in which justice and charity shall inform all the institutions of national life"* is also to be found in Article 45.

And yet the authors of the 1937 Constitution clearly understood that great swathes of social policy could be enunciated at the level of principle for the general guidance of the Oireachtas without making them justiciable by the courts established by the Constitution. Article 45 expressly excludes its provisions from being directly enforceable as part of the administration of justice by the courts.

While the State, as such, is required by Article 45 to direct its policy towards securing the aims set out in Article 45.2, the preamble to the article makes it clear that the application of Article 45 principles in the making of laws should be the care of the Oireachtas "exclusively" and not cognisable in litigation.

The same stricture applies to the State's express "pledge" in Article 45.4.1° to safeguard the economic interests of the weaker sections of the community and to contribute to them by programs in the areas of health, protecting the elderly, vulnerable children, and those in dependency.

It is of course quite conventional for large swathes of statutory protection for social and economic rights to fall under the ambit of the judicial power. Acts of parliament dealing with social welfare, health, education and housing, once enacted, give rise to very significant scope for judicial review.

Such Acts, by the same token, are subject to statutory amendment, and resulting obligations of the executive arm of the State are, in the last analysis, frequently made dependent on the provision of resources by the budgetary process jointly controlled by the executive and legislature.

The live issue is as to whether social and economic rights should now be elevated to constitutional status thereby giving the judiciary a constitutional (as opposed to statutory) jurisdiction to define, protect and vindicate such rights.

For those who see justiciable social and economic rights as desirable, the terms of Article 45 may come as a disappointment. To those who view any constraint on the judicial power as a limitation on the notion of implementing justice in its widest sense, Article 45 may appear as an outdated and unwanted obstacle to the development of constitutional human rights in their widest sense.

However, others take the view that the justiciability of social and economic rights at a constitutional is deeply problematical and, perhaps, potentially deeply damaging not merely to our constitutional order but to democratic politics in the widest sense of that term.

The Scope of the Judicial Power

At the very heart of the common law system, which historically has been the most robust legal system in terms of the development and sustenance of civil and political rights, is the notion of a powerful, independent arbitral judiciary, drawn from the ranks of practitioners outside the institutions of government and legislature, possessing the great power of judicial review extending even to the validity of acts of the legislature and the executive, together with the role of independent arbitrator of differences between the citizen and other citizens and between the citizen and the state itself.

But the very scope of that immense judicial power, including the right in certain circumstances to annul any legislative or executive act by reference to a higher law - the Constitution - is itself so far reaching as to require those who truly care about it to be circumspect about any doctrine or proposal that would inevitably bring those who exercise that power into direct and sustained conflict with the democratically elected organs of legislature and executive.

Put bluntly, extension of justiciability to social and economic rights carries with it potentially the seeds of destruction for the strength and scope of justiciability and the judicial power as we know it.

Saving Judicial Power From Open Plan Constitutional Design Theory

Vesting the judiciary with any constitutional supervisory power in the allocation of state resources in

pursuit of distributive justice would inevitably alter radically the basis (and probably the methodology)

of the appointment of judges, greatly increasing the political implications of individual appointments

and affecting the motivation for politicians in such circumstances to appoint judges whose social and economic outlooks and beliefs corresponded closely to those of the political class in power for the time being.

Because of the importance for the day-to-day running of democratic politics, the political system could not remain agnostic in relation to the politics of appointees to the judiciary where that judiciary could radically effect the implementation of socio-economic policy by its decisions.

It is argued that socio-economic rights could initially be made justiciable as "soft rights". Precisely what the distinction is between "hard rights" and "soft rights" has never been made clear. Some have spoken[10] about "soft rights" as akin to a ratchet of irreversibility preventing the state from diminishing the allocation of resources from their present levels in certain areas of expenditure. But such a doctrine, even if realistic, is likely to disappoint its adherents or else to confound its own purpose.

If, as in South Africa, the right to health is elevated to constitutional status and made justiciable, even if made expressly subject to the availability of resources, the very obvious questions that arises is as to whether the idea of "available resources" was to be a closed category, and whether, for instance, resources spent on administration of the health service or preventative health programmes could be diverted by judicial decision to the treatment of individual patients. South African jurisprudence in this area has been patchy[11], and, I would argue, inevitably so. To refuse an injunction, as was done[12], to a dying man for the provision of life-saving dialysis on the basis of the limited resources allocated for dialysis and the rationality of the existing distribution of those resources, is to reduce the "right to health" to a right not to be improperly discriminated against in the allocation of fixed resources by a statutory health service, a right which might well be accorded to a similar patient in Ireland by way of judicial review based on the Health Acts and *Wednesbury* [13]principles of reasonableness without any express constitutional underpinning at all.

Irish society, like any society, decides through the political process that it will ration scarce resources between such life-saving health expenditures and other arguably less urgent expenditure programmes such as patronage of the arts. The judiciary has no credible function or expertise in that decision-making process; that process is properly the exclusive care of elected politicians who, unlike the judiciary, are subject to removal by the electorate either summarily from government or in time from elected office as a public representative.

[10] See for instance the Limburg Principles and the Maastricht Guidelines 2002(5) SA 721
[11] See also *Minister for Health –v- Treatment Action Campaign (No 2)* in respect of policy on retroviral HIV drug treatment
[12] *Soobramoney –v- Minister for Health Kwazulu Natal* 1998 1 SA 765CC
[13] (1948) 1KB 223

The Irish constitutional mechanism for determining socio-economic policy and for allocating resources is a parliamentary and executive function entrusted exclusively to the Oireachtas and to the Government, which are chosen, maintained by, and answerable to the people whose right it is to "in final appeal, to decide all questions of national policy".[14]

Confusing Related Concepts

Deep seated intellectual confusion between the pursuit of *"social justice"* - a normative concept concerned with values and outcomes of socio-economic policy - and the *"administration of justice"* by arbitral, inter partes adjudication, lies at the heart of the drive by rights activists to equate all "rights" – be they civil and political rights, on the one hand, or social and economic rights, on the other – in terms of justiciability.

It is perhaps understandable that the use of a single term such as *"justice"* or *"human rights"* to describe very different concepts in political terms should lead to such confusion.

Law and justice are in one sense very closely related. The one is supposedly built on the other. If the purpose of law is to achieve justice, it is but a small leap to conclude that the legal system is in some sense the backstop mechanism for delivering justice in every sense and in every case.

Moreover, it is quite plausible to argue that a lawyer, whether academic, practitioner or judge, should strive to use the law and to develop the law to achieve what they consider to be outcomes required by social justice.

Thus, a moral imperative is argued to lie at the heart of the drive to equate social and economic rights with civil and political rights and to make both sets of rights justiciable as part of the administration of justice by the courts as provided for in Article 34 of the Constitution.

The International Covenant on Economic Social and Cultural Rights

Nowhere is there greater scope for confusion than in the relationship between national and international law as it affects human rights. Ireland is a signatory and has ratified the International Convention on Economic Social and Cultural Rights, which is an international treaty with treaty status in Irish and international law. But this does not mean that the Covenant itself has the force of law in Ireland.

Two fundamental points must be grasped.

[14] Article 6.

Firstly, Ireland could only become party to the Covenant because adhering to the Covenant was consistent with the Irish Constitution *as it stands*. Thus the Covenant must be seen, in Irish Constitutional terms, as being consistent with the existing terms of the Constitution. It did not, and does not, require amendment of our Constitution.

Secondly the Covenant does not become part of Irish law and cannot have legal effect in Ireland *"save as may be determined by the Oireachtas"* by statute or statutes enacted by the Oireachtas, as is made clear by Article 29.

Indeed, the Covenant itself provides and envisages that each State Party undertakes to *"progressively realise"* the rights recognised in it by all appropriate means *"including particularly the adoption of legislative measures"*.

There is no national or international obligation to realise the Convention rights by constitutional incorporation and if the Covenant had imposed any such obligation on State Parties, Ireland could not have ratified it without constitutional amendment in that behalf.

All of the foregoing means that the Covenant is not of itself part of Irish law and that the Covenant rights are not rights of the Irish citizen as a matter of Irish law save in the manner and to the extent that the Oireachtas determines in legislation. The Limburg Principles and Maastricht Guidelines are not part of domestic law in Ireland but amount to suasive criteria by which the Irish state has bound itself to act on foot of the Covenant.

International law and national law are simply not equivalents in Irish law and do not form separate parts of one seamless corpus of Irish law. In the Irish legal firmament, the Constitution comes first and statute law second. International treaties must be understood in that hierarchical scheme.

Understanding Before Changing

Is it not the first duty of lawyers to form an understanding of the purpose and design of the system of laws, including the fundamental constitutional law, in which they work and by which they, like everyone else, are bound?

In making express provision to exclude the courts from exercising jurisdiction in respect of the Directive Principles of Social Policy, the 1937 Constitution clearly had two aims.

The first was to uphold the dignity and worth of the democratically elected parliament and government and to accord to democratic politics its rightful function of permitting the people, through their representatives, to determine all questions of national policy, including all questions to do with socio-economic issues.

The second aim was to was to protect that most powerful and beneficial remedy, constitutional judicial review, from being brought into damaging conflict with the principle that the people through their public representatives are the final judges or arbiters of what social justice is and requires.

Far from being an obstacle to the achievement of social justice, the principle that all matters of social and economic policy are determined exclusively through the ballot box and by the political process provided for in the Constitution is better understood as a guarantee of the supremacy of democratic politics, on the one hand, and of the independence and integrity of the judicial function, on the other.

So it is not a case of the courts being held away from vindicating certain rights of the citizen; it is a question of upholding the rights of citizens collectively to determine the content of socio-economic justice without interference by judges, who for their own protection have been made independent of the wishes of a majority of citizens when carrying out their constitutional functions.

Understood in this way, the architecture and values of the Constitution are attractive and sensible. Breathless ambition for the dismantling of the boundaries of the judicial power, for an *"open plan"* judicial power, and for its gradual limitless extension is, arguably, ambition for its diminution and ultimately its endangerment.

Respecting A Working Constitutional Model

Appreciation of the Constitution and of the subtleties of its architecture should, I think, inform all public debate, especially learned legal academic commentary.

There is a tendency to regard our constitutional order as in some sense a lower element of a pyramid of constitutional rights, the pinnacle of which is the corpus of international law relating to human rights embodied in inter-state treaties, conventions and declarations.

Apart from being unhistorical, this view of the source of human rights is, I believe, misconceived in terms of logic. The only reason that treaties, conventions and international declarations have been made is that the parties to them, the various states, have created them and adhered to them. Organically, they are the emanations of their state parties.

The peoples of the various States Parties are not themselves parties to such agreements. Ireland as a state, for instance, can only subscribe and adhere to the ECHR or to the Universal Declaration precisely because they are fully compatible with the Irish constitution.

It seems desirable to me that lawyers – whether judges, academics or practitioners – should reflect on the constitutional distribution of powers of government, and appreciate both the strength and the boundaries of the judicial power within that context.

Honouring The Process of Politics

In an era when most of the media and much public discourse regard those in whom the legislative and executive functions of our democracy are vested as very imperfect actors on the public stage, for whom no amount of judicial review or public obloquy is excessive, one would hope that the constitutional function of elected public representatives to make social and economic choices on our behalf in terms of legislation and budgetary policy, to hold the executive to account through the system of parliamentary accountability provided for in the Constitution, as well as the function of considering and passing legislation, would be respected.

It cannot be overemphasised that the constitutional role of an elected TD is not simply that of legislator. He or she is also a constitutional officer entrusted under our Constitution with the function of conferring and withdrawing the executive power on members of the Government and of holding that Government immediately accountable for the discharge of the executive power of the Irish state.

There is a danger that lawyers may blindly advance the primacy and ambitions of law while there is no one present to advance or protect the primacy of politics. Each must enjoy primacy in its own proper sphere. In our constitutional order, Dáil Éireann is meant to be the central organ of accountability in respect of the executive powers and the financial resources of the State. Obvious deficiencies in the manner in which Dáil Éireann now performs its constitutional role of exacting democratic accountability ought not to be used as an excuse for inviting other constitutional organs to undermine or usurp that role.

Judicial activism is no substitute for according primacy in our democracy to democratic politics. Law is not a substitute for politics, and the legal system cannot become the primary means of achieving accountability in the exercise of the other powers of government or a rival pathway to achieving social and economic policy goals for those dissatisfied with the outcome of the representative politics chosen by the people.