SOCIAL AND ECONOMIC RIGHTS IN THE IRISH CONSTITUTIONAL ORDER

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The publication of *"The Making of the Irish Constitution of 1937"* last year, a sourcebook on the background to the publication of the 1937 Constitution by Dermot Keogh and Andrew McCarthy marked the first real step in examining the preparatory documentation and policy-making which lay behind the 1937 Constitution insofar as it is an entire book. Undoubtedly, there were many learned articles and studies published on the same general area prior to 2007, not least of which is the article by Dr. Gerard Hogan in the Irish Jurist entitled *"De Valera, the Constitution and Historians"*.

An entirely new field of study has been opened up by this work for public consideration and, as far as academic research is concerned, Dermot Keogh and Andrew McCarthy have certainly laid out the roadmap for what should be a very rich vein of research endeavour.

Using primary sources from the National Archives and from other places, including the archives of this university, the authors have assembled and analysed material which must change our way of viewing the 1937 Constitution in its entirety.

In the National Archive of Ireland the authors found an attached preliminary draft of the Constitution which was circulated privately by the then President of the Executive Council, Eamon de Valera. This draft was circulated on the 16th of March, 1937.

Interestingly, Articles 38 to 41 of the first draft correspond in large measure to a combination of the Fundamental Rights chapter of the Constitution as enacted (Articles 40 to 44) and the contents of Article 45 of the Constitution which was placed in a separate part entitled *"Directive Principles of Social Policy"*.

As will be seen from Article 41 of the first draft, Sections 1, 2 and 3 of the proposed Article 41 correspond to the current provisions of Article 43, Sections 1 and 2. Sections 4, 5, 6, 7, 8, 9 and 10 of the proposed Article 41 form the basis of what is now Article 45 of the Constitution an article which, when the Constitution was enacted, was placed in a separate part of the Constitution from the Fundamental Rights chapter.

The division of a chapter entitled *"Personal Rights and Social Policy"* into two chapters, namely, *"Fundamental Rights"* and *"Directive Principles of Social Policy"*, is a

conscious step in the drafting process which led to the Constitution which has attracted little or no analytic attention.

On the face of it, what was to be a *"mixed bag"* of *"personal rights and social policy*" was deliberately divided up and, as we shall see, deliberately divided into two categories of justiciable and non-justiciable content.

Article 45 was generally believed by many lawyers, politicians and commentators to amount to constitutional *"window dressing"* designed to bring into the 1937 Constitution a good measure of Catholic social thinking and doctrine and, *inter alia*, to enshrine at a constitutional level policy aspirations which were set out in the political programme of the Fianna Fáil party in the social and economic sphere.

However, in the context of new access to archival material which shows the development of the 1937 Constitution, it can hardly be doubted but that the division of the original *"Personal Rights and Social Policy"* chapter into two chapters, *"Fundamental Rights"* and *"Directive Principles of Social Policy"* was a highly deliberative transformation of the constitutional proposals under consideration. Dividing provisions relating to private property into justiciable and non-justiciable parts cannot be said to be the result of some unconscious historical or drafting accident.

The preamble of the present Article 45 which reads as follows:

> *"The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this Constitution."*

make it very clear that a conscious and deliberate choice was made to create two classes of constitutional provisions in relation to social and economic matters, one of which, the *"Fundamental Rights"* category would be justiciable and the other, the *"Directive Principles of Social Policy"* category would be non-justiciable.

Reverting to the preamble to Article 45, it is very clear that a *"separation of powers"* principle was explicitly provided in our constitutional order in relation to the function of the Oireachtas, when making laws, and the function of the courts.

In **J. M. Kelly's Irish Constitution** (4th end) the authors analyse the nature and influence of Article 45. In dealing with the philosophy of Article 45, they say as follows:

> *"Article 45 is influenced by Roman Catholic social teaching which espouses a communitarian view of society. While communitarianism is, like liberalism, a broad church embracing many different view points, its common thread is an emphasis on the social aspect of life, on the common good and on the relationship between the individual and the community. Unlike some variants of liberalism which seek to be neutral as between different understandings of the common*

good, communitarianism seeks to promote the common good (though inevitably there may be differing views as to what the common good requires). The implications of having both liberal and communitarian elements in the Constitution have yet to be addressed by the courts."

Walsh J. in *Byrne v. Ireland*, expressly noted that Article 5 of the Constitution contained an implication for the remainder of the Constitution. Dealing with the Preamble, he stated:

"This express exclusion from cognisance by the court of these particular provisions reinforces the view that the provisions of the Constitution obliging the State to act in a particular manner may be enforced in the courts against the State as such."

Kings-Mill Moore J. had stated in *Comyn v. The Attorney General* in relation to Article 45:

"[Its] importance … for the lawyer, lies in the implication that the duties referred to in Articles 40 to (44) are real duties enforceable by the courts at least to the extent that any law which neglects or nullifies them can be declared invalid – as has been done."

The Preamble contained in Article 45 has been the subject of judicial consideration. I advance for your consideration here today the proposition that the article is not off limits for the judiciary in considering or construing the remainder of the Constitution but is, rather, off limits as far as adjudicating on whether the State, by its laws, is or is not applying the principles set out in Article 45. It is *"the application of [the] principles which is the care of the Oireachtas exclusively. Likewise it is the application of the principles which is made non-cognisable by any court."* That does not, in my view, amount to making the article itself incapable of consideration, construction, or of use in interpreting the other provisions of the Constitution.

In the Irish text, as has been pointed out, it is very clear that it is adjudication on the question as to whether the principles are or are not being implemented that is declared off limits as far as the judiciary and the courts are concerned.

It seems to follow, in my view, that Article 45 can be called in aid by the judiciary in at least two respects:

(a) In determining what the other articles of the Constitution actually mean (it being fairly obvious that if the Constitution is construed as a whole, the State cannot be authorised, in the shape of the Oireachtas, to pursue objectives or to employ measures which are inconsistent with the other provisions of the Constitution), and

(b) The very fact that the implementation of the social policy principles set out in Article 45 is explicitly stated by the Constitution not to be a cognisable issue for any court under any provision of the Constitution, means that the courts can have regard to Article 45 in determining both that there is an express doctrine of separation of powers in relation to *"social and economic rights"* and as to what lies on one side or the other of that dividing line.

If that analysis is correct, the content of Sections 1, 2, 3 and 4 of Article 45 require examination in the context of any comprehensive debate on the *"separation of powers"* issue. Turning to Section 2 of Article 45, it is clear that the provision in parenthesis *"(all of whom, men and women equally, have the right to an adequate means of livelihood)"* is a recital of equality and not a principle of social policy. The remainder of Section 2, paragraph (i), directs the State to adopt policies to ensure that occupational wages are such that they provide *"the means of making reasonable provision for domestic needs"*.

Paragraph (ii) of Article 45(2) makes it clear that the State has a function in regulating ownership and control of the material resources of the community and in distributing those resources among individuals and groups to subserve the common good. Paragraph (iii) makes it clear that there is a constitutional mandate for competition law or restrictive practices law, or anti-trust law.

Paragraph (iv) undoubtedly makes it clear that the State has a legitimate role in credit policy in the interests of the community as a whole.

Paragraph (v) provides a clear constitutional basis for a State policy for sub-division of agricultural holdings.

Section 3 of Article 45 makes it clear that the Irish State favours private enterprise but is entitled *"where necessary"* to supplement it in the areas of industry and commerce.

Likewise, Section 3 allows for extensive regulation of private enterprise, both in relation to the production and distribution of goods and for the protection of the public against unjust exploitation.

Section 4 of Article 45 is particularly relevant to the social and economic rights issue. It clearly mandates the Irish State to safeguard the *"economic interests"* of the weaker sections of society which is a clear mandate for programmes of social welfare, protection from economic exploitation, and redistribution of resources. The section goes on to provide that *"where necessary"* the State should support *"the infirm"* which is clearly a mandate for a health service and for a programme to assist the disabled.

Likewise, widows, orphans and the aged are singled out as categories which the State is pledge to assist and to protect in economic terms and to contribute to their support.

Article 45, Section 2, while sometimes criticized on equality grounds, makes it clear that health and safety of workers, both men and women, and the protection of children from

the necessity to engage in child labour and the protection of all citizens by reference to gender, age or strength from being obliged to carry out work for which they are *"unsuited"* is also a constitutional value.

Surveying Article 45 in its entirety, it seems to me that there is a very strong case for seeing in it not merely a strong mandate for social justice measures and a radical licence for the legislature *"in the making of laws"* to bring about social justice, but also a clear statement of freedom from judicial interference or from the concept of court based justiciability in the application of those principles.

That, by any standard, is a very clear and explicit statement in relation to the principle of separation of powers in the area of social and economic policy and in respect of the justiciability of *"social and economic rights"*.

Of course, none of the foregoing means that the courts have no function in the area of social welfare law, health and safety, competition law, or the like. What is declared *"off limits"* for the courts is consideration of the question as to whether the laws enacted by the Oireachtas are or are not valid having regard to the provisions of Article 45, and also the question as to whether the application of the principles (as distinct from the principles themselves) is or is not open to challenge under any of the provisions of the Constitution.

Thus, it is clearly stated that the judicial power of the courts under the Irish Constitution does not extend to consideration of questions as to whether or not the principles enunciated in Article 45 of the Constitution are or are not being implemented. Article 45 cannot be made *"justiciable"* so far as conferring on the courts the right to direct the other organs of the State, legislative or executive, to apply the principles in any particular way.

Accordingly, it seems to me that there is a very strong case that on a re-evaluation of Article 45, it becomes very clear that issues covered by the article such as *"social welfare"*, *"health policy"*, *"employment rights"*, *"protection from economic or employment exploitation"* and policies of redistribution aimed at social justice are areas in which it cannot be seriously contended that unenumerated rights, yet to be declared, can be developed by the courts in a manner which gives rise to justiciable obligations by the legislature or the executive, or both, and which are capable of being implemented by mandatory orders of the court or, for that matter, by reference to restraining injunctions based on an articulation of the same rights.

Viewed in that way, Article 45 is a strongly arguable basis for believing that development of *"social and economic constitutional rights"* as *"unenumerated rights arising under Article 40 of the Constitution"* is severely circumscribed. I have to say that it is striking that this analysis has not surfaced in mainstream debate on the question of justiciable social and economic rights or, indeed, in the legal analysis of the separation of powers by the courts in the *Synnott* case and in the *TD* case.

I am particularly struck by the silence of the estimable and cogent author, Dr. David Wynne-Morgan, on the negative implication of Article 45 in his authoritative work on the separation of powers in the Irish Constitution. I have no doubt that in the aftermath of *Synnott*, the *TD* case and the publication of the first draft of the Constitution which makes it clear that the provisions of Article 45 were segregated as a deliberate decision into a separate and special chapter of the Constitution which was heavily circumscribed by the preamble to Article 45, that he will look to this issue again, when, he publishes the badly needed second edition of his work.

This analysis may be seen by some as emphasising the negative. However, I only advance it in the context of making what I consider to be a deeply positive argument about democratic politics.

It seems to me that in this particular era of social and economic and legal commentary, there is a constant tendency to talk down the value of democratic politics and the role of government and the legislature as two arms of the State in dealing with questions of social and economic justice. To say that the means of resolving differences relating to such matters is not to be found in the courts is not to relegate social and economic issues to a level of unimportance. On the contrary, it is to make them the central issues to be addressed by the non-judicial arms of government, namely the legislature and the executive. It is to accord to elected representative politics a grave and challenging responsibility of bringing about social and economic change. It is to emphasise the importance of the ballot box, the parliament and the government, and the organs of public debate which, to use the terms of the Constitution, *"educate public opinion"* in the areas of social and economic policy.

There is an unspoken assumption in some of the analysis that all issues of social and economic policy can be reduced to issues of *"justiciable rights"* and that by doing so, they can be resolved in the same way as issues of civil rights and political rights.

To elevate issues of social and economic policy to the exclusive domain of the Oireachtas and the Government that is accountable to it, is not to down-grade those issues simply because they are outside the ambit of the judicial power.

There are limits to the judicial power in any dynamic society. An unrestrained judicial power or a nominally competent judicial power is simply inconsistent with the concept of separation of powers. Moreover, the judiciary, which are accorded extraordinary powers in the Irish constitutional order, are granted that central role in relation to their sphere of competence precisely because it is a limited sphere. If the articulation and enforcement of unenumerated social and economic constitutional rights under Article 40 of the Constitution became the business of the judiciary, power would tilt from the legislature and the executive towards the judicial arm of the State.

Given that Ireland is the only state in the European Union in which any citizen may ask a single Judge sitting alone, as a matter of right provided that he has *"locus standi"*, to invalidate any Act, legislative or executive, by reference to the provisions of a written

Constitution, the interpretation of which is a matter for the same single Judge and whose content can only be changed by a referendum of the people, it has to be conceded that the Irish judiciary have a role and power which is very exceptional, very strong, and deeply influential in the affairs of our society. It should be remembered that the primary organ for interpreting the Constitution and the primary forum for judicial review, is the High Court, a court of full and original jurisdiction open in principle to every citizen of the State as a matter of right. It is not a selected constitutional court accessible in a limited way. Nor is it a mere conduit to the Supreme Court. The Supreme Court's jurisdiction is, with the exception of Article 26 references, solely an appellate jurisdiction from a power vested in the High Court in constitutional matters.

These arrangements are unique in the European Union. It follows that the justiciable constitutional right of the citizen under the Irish Constitution is also qualitatively unique within the European Union. Likewise, the obligation of the legislature and the executive to directly comply with the orders of a High Court Judge at the instance of an individual citizen are not to be found elsewhere in the European Union with the same degree of absoluteness and comprehensiveness as they are in the Irish legal and political order.

These considerations raise questions of fundamental importance as current legal issues which I hope to deal with in this series of four lectures.