

Children's Constitutional Rights: Past, Present and Yet to Come

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1. The entry into force of Article 42A of the Constitution on 28 April 2015¹ was a significant event. However, the nature of that significance has yet to be fully understood. Article 42A is, in constitutional terms, an extremely new provision and so its role will only become clear as it is interpreted and applied by the Superior Courts. This is true of all constitutional provisions, but most of the Fundamental Rights provisions in the 1937 Constitution have been in place for eight decades and so there has been more opportunity to ascertain their meaning.
2. This paper examines the constitutional rights enjoyed by children *as children*. It does so in four parts. The first part explores the way in which children's rights were developed as unenumerated rights prior to the entry into force of Article 42A. The second part examines some of the initial developments under Article 42A. The third part examines the potential impact of Article 42A in the specific area of homelessness and housing. The fourth part raises some preliminary questions about children's rights in the constitutional order, particularly as they relate to socio-economic rights.

I. Children's Constitutional Rights Past – Unenumerated Rights

3. It is axiomatic that children already enjoy many of the constitutional rights enjoyed by adults. Children as persons enjoy the same right to life as adults. However, their rights *as children* are a separate and distinct question. Generally, the constitutional presumption has been that children's rights are best vindicated through their family by their parents and that State intervention should be very limited.² That is not to suggest that no State intervention was possible and in serious cases, it was permitted.³

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¹ Thirty First Amendment of the Constitution (Children) Act 2012. The delay in the amendment entering into force arose from the case of *Jordan v Minister for Children and Youth Affairs* [2015] 4 IR 232.

² See *Re JH* [1985] IR 375; *Northwestern Health Board v HW* [2001] 3 IR 635.

³ See eg *Temple Street (Children's University Hospital Temple Street) v D* [2011] IEHC 1, in which Hogan J found that the parents' right to raise their child according to their religious beliefs was not absolute and

4. Prior to Article 42A, a body of unenumerated children's rights was recognised by the Superior Courts. In *G v An Bord Uchtála* [1980] 1 IR 32, O'Higgins C.J. held pp.55-56):

The child also has natural rights. Normally, these will be safe under the care and protection of its mother. 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. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State.

5. The initial potential of the unenumerated rights set out in *G* was perceived as limited in its effects by the high level of deference to the family and, in particular, the marital family. Much of the impetus for change in the constitutional order came from a concern about the way in which these rights were deemed to be subsumed within the family except in extreme cases. That critique has been well made elsewhere and will not be repeated here.⁴ Clearly, cases such as *Baby Ann*⁵ gave rise to a genuine concern that children's unenumerated constitutional rights concerning their welfare and best interests were being made subservient to the rights of the marital family under Article 41, although that view is not universal.⁶
6. However, the unenumerated rights in *G* did have a separate legacy in the case of children with severe behavioural problems. In *DG v Eastern Health Board*,⁷ the Supreme Court found that the detention of a child with behavioural problems in a penal institution was constitutionally permissible. The *express* reason given for this justification was the need to protect the child's welfare rights as set out in *G*. Hamilton CJ held that it was not possible to vindicate both the child's welfare rights and the child's right to liberty and where the rights could not be harmonised, they must be balanced. He concluded that the 'welfare of the applicant took precedence over the right to liberty of the applicant. There is ample evidence to support his finding in that regard.'⁸
7. *DG* cited the earlier High Court decision in *FN v Minister for Education*,⁹ in which Geoghegan J held that the vindication of the child's welfare rights could require the provision of accommodation and services subject to practicality

could be outweighed by the child's right to life where the parents were seeking to prevent a blood transfusion for a three-month old child.

⁴ See Kilkelly and O'Mahony 'The Proposed Children's Rights Amendment: Running to Stand Still?' (2007) 10(2) *Irish Journal of Family Law* 19.

⁵ *N v Health Service Executive* [2006] 4 IR 374.

⁶ See Keane 'The Constitution and the Family: the Case for a New Approach' in Doyle and Carolan (eds.) *The Irish Constitution: Governance and Values* (Dublin: Round Hall, 2008).

⁷ [1997] 3 IR 511.

⁸ [1997] 3 IR 511 (SC) 523–24. See Brady 'The Vindication of Constitutional Welfare Rights: Beyond the Deprivation of Liberty?' (2017) 40(2) *Dublin University Law Journal* 127. It should be noted that *DG* was subsequently challenged before the European Court of Human Rights which held that the detention must be for the purposes of educational supervision to be Convention compliant. See *DG v Ireland* (2002) 35 EHRR 33.

⁹ [1995] 1 IR 409.

limitations. Geoghegan J expressly cited the unenumerated welfare rights set out by O'Higgins CJ in *G* and subsequent citations of same by the Supreme Court. He held:

*Having regard to the principles enunciated in these cases, I would take the view that where there is a child with very special needs which cannot be provided by the parents or guardian there is a constitutional obligation on the State under Article 42, s. 5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child. It is not necessary for me to determine how absolute that duty is; conceivably there may be very exceptional circumstances where there is some quite exceptional need of the child which the State cannot be expected even under the Constitution to provide. In this connection *The State (C.) v. Frawley* [1976] I.R. 365 was relied on by counsel for the State. But it would seem to me that on the balance of probabilities the provision of such necessary accommodation, arrangements and services by the State as might meet the necessary requirements of this applicant is not so impractical or so prohibitively expensive as would come within any notional limit on the State's constitutional obligations.¹⁰*

8. In both *DG* and *FN* the court engaged in the language of positive obligations on the state to take steps to vindicate the welfare rights of children. This is done in the limited context of children with extreme behavioural difficulties. It is also done in the context of the unenumerated welfare rights being deemed to be so powerful as to outweigh the children's express constitutional right to liberty.
9. Although these are limited cases, they must be understood within the broader constitutional order. The unenumerated welfare rights were presumed to be protected within the family and so did not give rise to the sort of seismic shift that the famous *dictum* of O'Higgins CJ in *G* potentially signalled. However, these unenumerated rights were powerful enough to override the express constitutional right to liberty and to place obligations on the State in respect of the provision of services. In principle, this seemed to suggest that if the High Court had the power to order that a child be locked up in order to vindicate their unenumerated constitutional welfare rights, then the High Court should also have the power to order everything short of locking up the child for the same purpose.
10. The extent of those powers was called into question in *TD v Minister for Education*¹¹ in which a High Court order directing the Minister for Education to implement a plan to build a specialist secure treatment unit for children. The Supreme Court overturned the order, primarily on the basis that it was a breach of the separation of powers. Keane CJ did not reject the rights identified in *G* or *FN*; in fact he expressly endorsed them as follows:

*For the purposes of this case, it is sufficient to say that, assuming that the passage from the judgment of O'Higgins C.J. in *G. v. An Bord Uchtála* [1980] I.R. 32 correctly states the law, Geoghegan J. was clearly correct in holding that*

¹⁰ [1995] 1 IR 409 (HC) 416.

¹¹ [2001] 4 IR 259 (SC).

the right claimed on behalf of the applicant in that case was one of the unenumerated rights of children which parents were obliged to protect and uphold.

It should, however, be pointed out that the right thus identified, and which I have endeavoured to formulate with as much precision as possible, is one which arises from the special position of children. They are dependent in their childhood for the nurture, care and education, which is essential for their physical, intellectual and emotional growth, on their parents. In the great majority of cases, those needs are met by the parents, making use, obviously, in modern conditions of the great range of educational facilities now provided by the State, directly or indirectly. It is clear that the applicants in these and similar cases, because of behavioural problems deriving from various causes, require special treatment in secure units and, in the result, they clearly constitute exceptional cases in which the State is under a duty to ensure that their right to such treatment is upheld.¹²

11. He went on to note that the reliefs granted in *FN* were limited and the court had refrained from issuing any declarations pending the State having an opportunity to make suitable arrangements for accommodation. As the issue in *TD* was so closely wrapped up in the reliefs granted, it is probably accurate to classify *TD* as a case which continues the previous line of jurisprudence concerning children's unenumerated constitutional welfare rights, but subject to two strong caveats: a firm presumption against mandatory orders against the State enforcing unenumerated children's welfare rights; and a general query as to whether unenumerated socio-economic rights are constitutionally permissible.¹³
12. In summary, it seems that the position of children prior to the entry into force of Article 42A was as follows:
 - a. Children had unenumerated rights to the protection of their welfare;
 - b. Those rights were ordinarily presumed to be best protected in the family;
 - c. Those rights were strong enough to outweigh the child's right to liberty and lead to orders for their detention in exceptional cases;
 - d. Mandatory relief against the State for vindication of those rights was not ordinarily available;
 - e. The extent to which those unenumerated rights include socio-economic rights was not definitively determined.
13. Children's welfare rights are clearly not new and pre-date Article 42A. This raises the possibility (discussed further in Part 3) of Article 42A being a driver for further development of those rights.

¹² [2001] 4 IR 259 (SC) 282.

¹³ It is of note that Keane CJ expressly declined to answer this latter question, [2001] 4 IR 259 (SC) 282.

II Children's Constitutional Rights Present – initial impact of Article 42A

14. Article 42A provides as follows:

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings –
i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

15. The initial impact of Article 42A has been slow, but largely in keeping with expectations. After the referendum, Corbett noted the legislative requirements for implementing the Article:

The new article employs a novel, though not unprecedented, approach to a number of the rights provided therein. Some provisions are not constitutional directives but enabling provisions, placing a mandatory obligation on the State to legislate on aspects of adoption (Articles 42A.2.2 and 42A.3), best interests of the child (Article 42A.4.1) and hearing the views of the child (Article 42A.4.2). The wording adopts the imperative "shall" in terms of provision being made in law for these rights. The Alliance will be lobbying for the timely

*enactment of such legislation and for the strongest legislative provision to be made in these areas.*¹⁴

16. The significant reforms contained in the Children and Family Relationship Act 2015 can be seen in this context as putting some meat on the bones of Article 42A. For example, the insertion of a new Part V into the Guardianship of Infants Act 1964 sets out clear criteria for the determination of a child's best interests. Similarly, the amendments to sections 31 and 54 of the Adoption Act 2010 brought about by the Adoption (Amendment) Act 2017 give practical implementation to Article 42A.2 by making express provision for children to be adopted out of the care system against the wishes of their birth parents.
17. In addition to this, there have been Superior Court decisions identifying the rights of children to care and company of their parents, regardless of marital status. In *PH v Child and Family Agency*¹⁵ Humphreys J addressed the impact of Art.42A of the Constitution on the taking of children into care. He held (at para.44):

*Article 42A of the Constitution, with its emphasis on the rights of the child and the paramountcy of best interests, does not take away from (indeed it enhances) the right of the child to the society of both of its parents, and the presumption that the best interests of the child lie in the child's enjoying such society.*¹⁶

18. In *Chigaru v Minister for Justice*,¹⁷ Hogan J (giving judgment for the Court of Appeal) held (at para. 29) that:

It is clear that the right of children to the care and company of their parents is a core constitutional value which is inherent in the entire structure of Article 41, Article 42 and Article 42A of the Constitution.

19. Insofar as Article 42A moves beyond the marital family and identifies a right of the child to its relationship with its parents, there is some harmonisation occurring with Article 8 of the ECHR.
20. Prior to Article 42A, it was already the case that children's voices could be recognised in proceedings concerning their welfare. For example, in proceedings under the Guardianship of Infants Act 1964, there was a requirement of constitutional justice that a child have his or her wishes taken into account. This was accepted by Finlay Geoghegan J in the High Court in the case of *In Re EO and MOA (Minors)*.¹⁸ Since the entry into force of Article 42A, the High Court has identified this right as being strengthened in the case of *AO'D v Judge O'Leary*.¹⁹ In that case, Baker J held:

That decision was given before the amendment to the Constitution which has resulted in Article 42A which puts the welfare and interests of the child clearly within the sphere of constitutional, and not merely common law or statutory

¹⁴ Corbett 'After the Referendum: What next for children's rights in Ireland?' 2012 17(6) *Bar Review* 141.

¹⁵ [2016] IEHC 106.

¹⁶ [2016] IEHC 106, para.44.

¹⁷ [2015] IECA 167.

¹⁸ See *In Re EO and MOA (Minors)* [2004] 4 IR 311.

¹⁹ [2016] IEHC 555.

*rights. That new Article must be seen as enhancing the rights of the child, and add more weight to the approach described by Finlay Geoghegan J.*²⁰

21. The operation of the Child Care Act 1991, which allows for children, including children of married parents, to be taken into State care, has been considered in light of Article 42A. In the High Court case of *SMcG v Child and Family Agency*²¹ Baker J directed the release of children in care on foot of an interim care order that had been made in breach of fair procedures. Baker J did not expressly link the children's fair procedures rights to Article 42A, but rather the children's constitutional rights more broadly. She held:

*I am of the view that a court in determining whether to deprive a mother of the custody and company of her children will fully recognise and respect the interests and rights of those children only by fully respecting the procedural and substantive rights of the mother in the course of that litigation.*²²

22. She also found that the blunt instrument of immediate release pursuant to an inquiry into the lawfulness of detention under Article 40.4.2 of the Constitution was now tempered by Article 42A. She held:

*The engagement of the court with the immediate interest or welfare of the children following the making of an order for release has been shown to be jurisdictionally possible, and indeed must now be regarded as constitutionally mandated by virtue of the provisions of the new Art.42A of the Constitution.*²³

23. The Supreme Court upheld the decision of Baker J²⁴ and confirmed that Article 40.4.2 is available in cases concerning children in State custody. MacMenamin J expressly endorsed the proposition that the effects of an immediate release could be tempered having regard to s.23 of the Child Care Act 1991 as interpreted in line with Article 42A. He held:

*where a child is the subject matter of an order under Article 40, a court which has made an order of invalidity, after ordering the release of the child, may lawfully then, and only then, invoke or rely on the provisions of s. 23 of the 1991 Act. The provisions of that section now find their constitutional basis in the provisions of Article 42A of the Constitution, maintaining the best interests of the child as the paramount consideration. Thus, s. 23 allows for a situation where, on a finding of invalidity, the High Court may, as it were, in the legal sense, "step into the shoes" of the District Court, and make such order as may be permissible under the section for the vindication of the welfare rights of the child or children in question.*²⁵

24. In *A v Child and Family Agency*²⁶ the High Court quashed an emergency care order taking a new-born child into care on the grounds that the means of

²⁰ [2016] IEHC 555, para.90.

²¹ [2016] 1 ILRM 105.

²² [2016] 1 ILRM 106, para.41.

²³ [2016] 1 ILRM 106, para.28.

²⁴ *SMcG v Child and Family Agency* [2017] 1 IR 1.

²⁵ *SMcG v Child and Family Agency* [2017] 1 IR 1, para.46.

²⁶ Unreported, High Court, Noonan J, 27 November 2018.

implementation were disproportionate. This finding was expressly linked to Article 42A and grounded in the jurisprudence of the European Court of Human Rights. Noonan J held:

*The Strasbourg jurisprudence makes clear that it is incumbent on State authorities in this situation to consider all possible alternatives to the removal of the child from its family. The action taken has to be proportionate. The Constitution demands no less.*²⁷

25. Noonan J then cited Article 42A.2.1 emphasising the use of the term 'by proportionate means' in the text. He also recognised that proportionality was an aspect of the operation of the Child Care Act 1991 before Article 42A came into force. This is apparent from the written decisions of the District Court on the issue in cases such as *Child and Family Agency v CG and JB*²⁸ and *Child and Family Agency v AC and TK*.²⁹ It appears that the effect of Article 42A has been to constitutionalise an existing practice.
26. This paper does not purport to set out a comprehensive account of the Article 42A jurisprudence. However, this preliminary account of some notable cases indicate that the impact of Article 42A has been broadly in line with what might have been expected. Legislation providing for more detailed analysis of best interests in custody disputes has been enacted, as has legislation allowing for adoption of children over the objections of birth parents. The Superior Courts have recognised that Article 42A strengthens the child's rights to their parents, the child's right to have their voice heard in proceedings and the requirement of proportionality in proceedings to take children into care.

III. Children's Constitutional Rights Yet to Come – potential impact of Article 42A on housing and homelessness

27. It is sometimes the case that the most significant developments in constitutional rights jurisprudence are unexpected. It is doubtful that the drafters of Article 41 would have anticipated that it would, in due course, lead to a constitutional right to use contraception;³⁰ or that the advocates of the adoption of the Eighth Amendment would have anticipated that it would give rise to a constitutional right to end a pregnancy where the pregnant woman was at risk of suicide.³¹ In that vein, it is arguable that Article 42A.1 carries within it the seed of a jurisprudence on children's socio-economic rights, including rights in respect of homelessness and housing.
28. Article 42A.1 is extremely broad in its terms. It asserts that children have natural and imprescriptible rights and, more importantly, charges the State with protecting and vindicating those rights in as far as practicable. The language of Article 42A.1 is much like Article 40.3.1^o which suggests that it is

²⁷ Unreported, High Court, Noonan J, 27 November 2018, para.69.

²⁸ [2014] IEDC 6.

²⁹ [2014] IEDC 17.

³⁰ *McGee v Attorney General* [1974] IR 284.

³¹ *Attorney General v X* [1992] 1 IR 1.

an unenumerated rights clause for children. Just as *Ryan v Attorney General* [1965] IR 294 opened the door to the development of unenumerated rights jurisprudence for constitutional rights generally, Article 42A.1 carries within it the potential to do the same for children's rights specifically.

29. The Joint Oireachtas Committee on the Constitutional Amendment on Children in its final report proposed that a list of enumerated rights be included in the draft text to be put to referendum.³² These included '*the right of the child to such protection and care as is necessary for his or her safety and welfare*'.³³
30. The enumerated rights were removed from the text that was ultimately put to the electorate and Article 42A.1 in its final form was developed after the 2010 Joint Committee Report.³⁴ However, it was expressly acknowledged by the Referendum Commission that the meaning of the rights would have to be developed by the Courts. Its booklet stated that it was '*a matter for the Courts, on a case by case basis, to identify the rights protected by this provision*'.³⁵ This indicates that the electorate were informed, in advance of the vote, that the Courts would have significant powers to develop the law on children's rights if the referendum were passed.
31. It is notoriously difficult to pin down what any group of people 'intended' when enacting a constitution or constitutional provisions.³⁶ Nor is it necessarily appropriate for constitutional interpretation to be limited by a slavish attempt to identify that meaning, which is inevitably coloured by a court's own views.³⁷ However, certain propositions are worth making in respect of Article 42A.1.
32. First, it seems unlikely that Article 42A.1 is merely a confirmatory and preliminary re-statement of the rights set out in Article 42A.2-4. It is hard to sustain any argument that is based on the assumption that Article 42A.1 is some sort of prologue to the rest of the Article with no meaningful effects. Whatever Article 42A.1 might mean, it must mean something. The electorate cannot be presumed to have voted in favour of a provision that needlessly repeats the rest of the article.
33. Secondly, Article 42A.1 must mean something more than the unenumerated rights which came before. One of the main criticisms of the draft children's rights article put forward in 2007 was that by recognising children's rights it did no more than re-state the position identified by O'Higgins CJ in *G*.³⁸ The

³² Joint Committee on the Constitutional Amendment on Children *Third Report: Proposal for a Constitutional Amendment to Strengthen Children's Rights* (Dublin, Oireachtas, 2010).

³³ Joint Committee on the Constitutional Amendment on Children *Third Report: Proposal for a Constitutional Amendment to Strengthen Children's Rights* (Dublin, Oireachtas, 2010), 108.

³⁴ See O'Mahony 'Falling short of expectations: the 2012 children amendment, from drafting to referendum' (2016) 31(2) *Irish Political Studies* 252.

³⁵ Cited in O'Mahony 'The Promises and Pitfalls of Constitutionalising Children's Rights' in Dwyer (ed), *The Oxford Handbook of Children and the Law* (Oxford, Oxford University Press, 2019 (Forthcoming))

³⁶ See Dworkin 'The Forum of Principle' (1981) 56 *New York University Law Review* 469.

³⁷ See Siegel 'Dead or Alive: Originalism as Popular Constitutionalism in *Heller*' (2008) 122 *Harvard Law Review* 191.

³⁸ See Kilkelly and O'Mahony 'The Proposed Children's Rights Amendment: Running to Stand Still?' (2007) 10(2) *Irish Journal of Family Law* 19.

significant difference between that text and the text actually adopted is that Article 42A.1 also contains a requirement that the State vindicate and protect those rights. It may be that the change brought about by Article 42A is that the rights require firmer vindication than before but that the content of the rights is the same, but it does indicate some change.

34. Thirdly, and perhaps most obviously, the rights arising under Article 42A.1 must be rights relating to children and childhood, as opposed to being more general. Although this may seem obvious, it must be understood in the context of children already enjoying most of the constitutional rights of adults. The right to life, right to liberty etc. are already recognised.
35. Establishing the parameters of the changes brought about by Article 42A.1 must also be seen in light of recent indications of a willingness on the part of the Supreme Court to look to Ireland's public international law treaty obligations when interpreting the contours of constitutional rights provisions. In *NHV v Minister for Justice*³⁹ the Supreme Court was informed by the findings of the UN Committee on Economic Social and Cultural Rights in its interpretation of the unenumerated constitutional right to seek work.⁴⁰ Similarly, in *DPP v Raymond Gormley*⁴¹ Clarke J (as he then was) recognised the value of European Court of Human Rights jurisprudence in interpreting the Constitution:

*In considering the proper approach to the interpretation of Bunreacht na hÉireann, it is, in accordance with the jurisprudence of this court, of course, appropriate to consider the case law of the ECtHR and also the constitutional jurisprudence of the superior courts of other jurisdictions which have a similar constitutional regime to ourselves.*⁴²

Clarke J reiterated this position later in the judgment.⁴³

36. In that vein, the provisions of the UN Convention on the Rights of the Child (UNCRC) are clearly relevant to the development of Article 42A.1. What makes this particularly significant is the extent to which the UNCRC recognises socio-economic rights. Article 27 of the UN Convention on the Rights of the Child provides inter alia:

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

³⁹ [2018] 1 IR 246.

⁴⁰ [2018] 1 IR 246 paras.16-17.

⁴¹ [2014] 2 IR 591.

⁴² [2014] 2 IR 591, para.37.

⁴³ [2014] 2 IR 591, para.52.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

37. If Article 42A.1 is to be interpreted in light of the provisions of Article 42A.1, then it has clear and obvious implications for housing and homelessness, which is an increasingly widespread issue for a growing cohort of children in Ireland. In General Comment No 7: Implementing child rights in early childhood,⁴⁴ the UN Committee on the Rights of the Child considered the particular vulnerabilities of very young children. The Committee found (at paragraph 20):

States parties are required to render appropriate assistance to parents, legal guardians and extended families in the performance of their child rearing responsibilities (arts. 18.2 and 18.3), including assisting parents in providing living conditions necessary for the child's development (art. 27.2) and ensuring that children receive necessary protection and care (art. 3.2). The Committee is concerned that insufficient account is taken of the resources, skills and personal commitment required of parents and others responsible for young children, especially in societies where early marriage and parenthood is still sanctioned as well as in societies with a high incidence of young, single parents. Early childhood is the period of most extensive (and intensive) parental responsibilities related to all aspects of children's well being covered by the Convention: their survival, health, physical safety and emotional security, standards of living and care, opportunities for play and learning, and freedom of expression. Accordingly, realizing children's rights is in large measure dependent on the well being and resources available to those with responsibility for their care. Recognizing these interdependencies is a sound starting point for planning assistance and services to parents, legal guardians and other caregivers.⁴⁵

38. The Committee continued (at paragraph 26):

Young children are entitled to a standard of living adequate for their physical, mental, spiritual, moral and social development (art. 27). The Committee notes with concern that even the most basic standard of living is not assured for millions of young children, despite widespread recognition of the adverse consequences of deprivation. Growing up in relative poverty undermines children's well being, social inclusion and self-esteem and reduces opportunities for learning and development. ... States parties are urged to implement systematic strategies to reduce poverty in early childhood as well as combat its negative effects on children's well being. All possible means should be employed, including "material assistance and support programmes" for children and families (art. 27.3), in order to assure to young children a basic standard of living consistent with rights. Implementing children's right to

⁴⁴ CRC/C/GC/7/Rev.1, 26 September 2005.

⁴⁵ CRC/C/GC/7/Rev.1, 26 September 2005, para.20.

*benefit from social security, including social insurance, is an important element of any strategy (art. 26).*⁴⁶

39. If Article 42A.1 is read in light of these observations, then it has the potential to go well beyond issues relating to families, adoption, child care and related proceedings.
40. The implications of Article 42A.1 for homelessness and children have yet to be determined by the Superior Courts. In *Tee v Wicklow County Council*,⁴⁷ Noonan J declined to decide whether Article 42A.1 included a right to shelter and decided the case on other grounds.
41. Article 42A was considered in the context of a costs application in *Gill v Kildare County Council*⁴⁸. The applicant had brought judicial review proceedings arguing that the respondent had *inter alia* failed to exercise its statutory power to provide homeless accommodation in a manner compatible with Article 42A by leaving her children at risk of rough sleeping. The applicant was housed shortly after leave to apply for judicial review was granted. The respondent argued that the applicant had been housed in the ordinary course and that it had been planning to fight the case. Eagar J accepted that the Council had prepared to contest the case, but said that this did not mean they would have succeeded '*particularly having regard to Article 42A*'⁴⁹ (para.17). In that regard, he noted the correspondence prior to the case and

*The references to the Article 42A of the Constitution of Ireland requires the Council to vindicate the rights of the children in the exercise of its statutory powers pursuant to the Housing Act 1988.*⁵⁰

42. Although this finding is limited to a costs decision, it does show some initial openness on the part of the Superior Courts to have regard to Article 42A in considering the exercise by housing authorities of their powers in respect of homelessness under the Housing Acts 1966 to 2015. It is also of note that the possibility of a constitutional right to housing, outside of the context of children, has been identified by the High Court.⁵¹
43. A finding that children have a right to housing or to basic shelter under Article 42A.1 would, unquestionably, be a significant development in Article 42A jurisprudence. However, it is entirely consistent with the tenor of Article 42A and with recent developments in constitutional interpretation. When people voted by a significant majority in favour of Article 42A, it is fair to assume they were voting based on disparate assumptions as to its meaning. However, it seems unlikely that many people were consciously voting in favour of endorsing a system that leaves children homeless for years; it seems likely that if the average voter had been asked whether they were voting in favour of

⁴⁶ CRC/C/GC/7/Rev.1, 26 September 2005, para.26.

⁴⁷ [2017] IEHC 194.

⁴⁸ [2017] IEHC 51.

⁴⁹ [2017] IEHC 51, para 17.

⁵⁰ [2017] IEHC 51, para 17.

⁵¹ *Duniyva v Residential Tenancies Board* [2017] IEHC 578, para.10.

homelessness for children on their way into the Polling Station, the answer would have been no.

44. The primary argument against an interpretation of Article 42A.1 that includes a right to housing is unlikely to be substantive. Few would contend that it is inconceivable or inappropriate that housing is something that arises under the 'natural and imprescriptible' rights of children. The objection is likely to be primarily one of institutional responsibility and the separation of powers. This is addressed in the next section.

IV. Children, Socio-Economic Rights and the Constitutional Order

45. The most immediate objection to a right to housing under Article 42A.1 is *TD v Minister for Education*, which, as was set out above, questioned the possibility of socio-economic rights under the constitution. There are two good reasons to reject this objection.
46. First, Article 42A post-dates *TD*. It is a conscious change to the text of the constitution that comes after that decision. If the Constitution can be amended by referendum and the people are sovereign, then it is open to the people to include socio-economic rights in the constitution. There is already a socio-economic right in the Constitution in the Article 42 guarantee of primary education.
47. The second reason is that *TD* is not a case which rejects the possibility of socio-economic rights in the Irish constitution. It questions that possibility as regards unenumerated rights under Article 40.3, but it does not definitively dispose of the issue. *TD* is primarily a case about remedies and the effect of a specific mandatory remedy on the development of policy.
48. Conflating the question of the existence of socio-economic rights and remedies arising on foot of those rights should be avoided. The presence or absence of a right is not necessarily determined by the availability of a specific remedy. Since the entry into force of Article 42A it may well be that mandatory remedies are available for breaches of children's socio-economic rights. However, even if they are not, it is easy to envisage circumstances where declaratory relief can be effective and so the two issues of rights and remedies must be considered separately.
49. It is tempting to understand rights as only existing where there are corresponding mandatory remedies to enforce them. In private law disputes between individuals or companies, this makes perfect sense. An individual's rights under a contract or in tort cannot meaningfully be protected without the possibility of orders such as specific performance or injunctions. Where a contract-breaker or a tortfeasor has already breached a party's rights in violation of the law, there is no reason to assume that they will address that violation voluntarily without being forced to. However, State bodies are not private individual tortfeasors, nor should they act like them. Private individuals may do as they please subject to the limitations of the law. State

bodies do not exist in this paradigm. State bodies are not merely limited by the constitution with some area of free space within which they are unconstrained. State bodies do not exist without the constitution and the laws made under it. They have no existence outside of the machinery of a constituted state. The analogy between violations of the law by private individuals and violations of the law by public bodies is therefore of limited assistance in understanding public bodies. In addition to this, the types of issues that arise in constitutional rights cases go to the heart of the development of the machinery of a constituted state. Developments in constitutional rights jurisprudence can have far reaching effects even in the absence of a hard mandatory remedy.

50. Raz contends that entrenching human rights into a constitution makes them '*a second channel of political action, parallel to parliamentary politics*'.⁵² He identifies constitutional rights as political decisions which are given to the Courts instead of the other branches of government. He identifies three features of the politics of constitutional rights which justify this:

First, individuals whose rights were allegedly violated have the initiative in starting the legal process. In congressional politics, political processes are, of course, often initiated and controlled by interested organisations. But even so, they do, while the initiators of action in the politics of constitutional rights do not, need to mobilise support in the country at large, or among the major political organisations, or the main political pressure groups of the country. The politics of constitutional rights allows small groups easier access to the centres of power, including groups which are not part of the mainstream in society. Second, while the process is not free from unexplained decisions, characteristically it is conducted by the clash of arguments rather than through coalition-forming among powerful groups, and the outcome of litigation is meant to be justified by reference to the supposedly generally accepted principles of the constitution. Third, legal changes, once introduced by the courts, are normally less likely to alter with shifts in the climate of political opinion in the country.

51. Seen in this context, the importance of constitutional rights goes far beyond the individual remedy provided to an individual litigant. Constitutional rights understood in this vein are a mechanism by which reasoned decisions on complex political issues can be given outside of the demands of electoral politics in a process that can be initiated by anyone.
52. In addition to this, declaratory relief is, and often has been, a significant aspect of constitutional rights and human rights cases. The *FN* decision on detention of minors discussed above did not involve mandatory relief but is a very significant moment in the development of the constitutional rights of children. Without that judgment it seems unlikely that the current system of special care under Part IVA of the Child Care Act 1991 (as amended) would be possible.
53. At the time of the entry into force of the European Convention on Human Rights Act 2003, much ink was spilled on how the lack of a mechanism for

⁵² Raz *Rights and Politics* (1995-1996) 71 *Indiana Law Journal* 27, 41.

striking down legislation rendered it impotent.⁵³ However, the declarations of incompatibility that have been made under s.5 of the Act have been addressed by the Oireachtas in due course. *Foy v an tArd Chláraitheoir*⁵⁴ led to the Gender Recognition Act 2015. *Donegan v Dublin City Council*⁵⁵ led to the Housing (Miscellaneous Provisions) Act 2014. The means by which these decisions fed into the development of the legislation that remedied the human rights breaches was different to if the legislation had simply been struck down, but that is not to say it was less effective. For example, the haste with which the Criminal Law (Sexual Offences) Act 2006 had to be adopted after the *CC v Ireland*⁵⁶ case struck down its 1935 predecessor was in all likelihood not conducive to good policy development or legislative drafting. Similarly, many very significant constitutional cases have had long wait times before the problems identified were remedied (e.g. the *X case*, *McGee v Attorney General*).

54. In the specific context of socio-economic rights, Tushnet argues that such rights are best protected by having strong substantive rights with weak remedies.⁵⁷ This has much to recommend it as an approach. By allowing the courts to be specific about the ends to be achieved, the other organs of State are left to determine the means of achievement through development of the policy process. An approach to socio-economic rights of this type would not inhibit or prevent the protection of socio-economic rights; or at least it would not inhibit or prevent them any more than the current post-*TD* approach does. It would also have the beneficial effect of allowing socio-economic rights to be part of the constitutional balancing which arises whenever other civil and political rights affect policy development, most notably the right to property.
55. In the context of housing, the *Blake v Attorney General*⁵⁸ decision which struck down a specific system of rent control as being arbitrary has cast a long shadow. At a time when public discourse has become weary of the phrase 'housing crisis' and the fact of thousands of homeless children is now just part of our national life, a means by which the effects of cases such as *Blake* could be tempered would be welcome. There are some examples of constitutional housing rights being balanced against property rights in determining disputes in the jurisprudence of the South African Constitutional Court.⁵⁹
56. This raises the issue of the effect that developments on constitutional rights have on the legal world around them. It is easy for common lawyers, used to

⁵³ Egan 'The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation' (2003) 10 *Dublin University Law Journal* 230; Hogan 'Incorporation of the ECHR: Some Issues of Methodology and Process' in Kilkelly, (ed.) *The ECHR and Irish Law* (Bristol: Jordans, 2004).

⁵⁴ [2012] 2 IR 1.

⁵⁵ [2012] 3 IR 600.

⁵⁶ [2006] 4 IR 1.

⁵⁷ Tushnet 'Social Welfare Rights and the Forms of Judicial Review' (2004) 82 *Texas Law Review* 1895; Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton NJ: Princeton University Press, 2008).

⁵⁸ [1982] IR 117.

⁵⁹ *Minister of Public Works v Kyalami Ridge Environmental Association* (2001) 7 BCLR 652.

adversarial proceedings and having an aversion to advisory opinions, to structure all analysis around a binary dispute with an aggrieved individual requiring relief. But such an understanding consciously denies the effects of constitutional jurisprudence not only on subsequent case law, but on the operation of public bodies and their interactions with individuals. O'Donnell has convincingly argued that private property rights under the Irish Constitution are not actually that strong,⁶⁰ but it does not stop them being central to any consideration of policy changes.⁶¹ The effect that property rights and the separation of powers has on the development of homelessness policy and the role of the courts in addressing the needs of specific children has to be understood in terms of the broader constitutional order.

57. In a famous essay entitled 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics'⁶² Tribe argues that lawyers think of constitutional rights as Newton thought of gravity – individual objects pulling on one another. He contends that it is more like how Einstein understood gravity – that objects change the shape of the space around them. Understood in this way, *Blake* is not a case that decides the property entitlements of Ms Blake, just as *TD* is not a case that decides whether a specific mandatory order made by the High Court is valid. Both shift the landscape around them so that future public decision-making is altered.
58. The way in which *TD* changed the space around it is difficult to measure exclusively by reference to case law. The types of change that arise from a major constitutional case are not always immediately visible from within the lens of further case law. However, there are indications that its effects were significant and that it was used to argue that any constitutional right claim on resources would be suspect. In *VQ v Horgan*⁶³ the High Court held that the District Court has the power to make a direction pursuant to section 47 of the Child Care Act that involves the expenditure of money by the Child and Family Agency (CFA), provided that there is a welfare issue involved. Section 47 is a specific mechanism adopted by the Oireachtas to give the District Court supervisory jurisdiction over the welfare of any child in care.⁶⁴ In *VQ* foster carers had sought a direction in the District Court that orthodontic treatment for a child in their care would be funded by the CFA. The CFA argued successfully in the District Court that the District Court did not have the power to make such an order. That argument was expressly based on *TD*. This finding was overturned by the High Court. Baker J held:

⁶⁰ O'Donnell 'Property Rights in the Irish Constitution: Rights for Rich People or a Pillar of Free Society?' in Doyle and Carolan (eds.) *The Irish Constitution: Governance and Values* (Dublin: Round Hall, 2008).

⁶¹ See e.g. All Party Oireachtas Committee on the Constitution *Ninth Report- Property Rights* (Dublin, Oireachtas, 2004).

⁶² Tribe 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics' (1989) 103 Harvard Law Review 1.

⁶³ [2016] IEHC 631.

⁶⁴ See generally *Eastern Health Board v McDonnell* [1997] 1 IR 174; *Western Health Board v KM* [2002] 2 IR 493.

*A distinction is to be drawn between a decision which directs policy in general, and the decision in an individual case the practical effect whereof is that the financial resources of the State are impacted.*⁶⁵

59. What is most significant about this case is not that the High Court found that section 47 could involve the expenditure of monies. What is significant is the argument made by a State agency, operating a statutory scheme, provided for by the Oireachtas which placed the District Court in an express supervisory role. The CFA used a case about a mandatory order under the original jurisdiction of the High Court made directly against a government minister. This indicates that the view taken by the CFA was that it was not subject to court direction on any question of the expenditure of funds. That is not the *ratio* of *TD*, but it is clearly an aspect of the gravitational shift that arose from *TD*.
60. Understood in this way, a finding that Article 42A.1 includes a right to shelter or housing for children would not be significant because of the orders made in favour of a specific child in a specific case. Even if declaratory relief were all that was granted, such a finding would be significant because of the gravitational force it would have on the rest of the constitutional order. It would re-balance *Blake*; it would channel policy goals without directing specific means of achieving those goals. It is difficult to see how that was not exactly what people were voting for when they adopted Article 42A.

Conclusion

61. Article 42A did not arrive into a blank landscape. Children already enjoyed most other constitutional rights and there were specific unenumerated rights for children recognised prior to Article 42A. The status of those rights relative to the constitutional family was unclear, but they were the basis upon which children were deprived of their liberty and they formed the basis of the State's constitutional obligation to provide appropriate services to children with severe behavioural problems. *TD v Minister for Education* raised the question of a limit on the socio-economic aspects of those rights and also restricted some forms of remedy.
62. Since it entered into force Article 42A has permitted developments in legislation and has led to predictable developments on the rights of children to the company of parents; the voice of the child in proceedings and the proportionality of care orders. Article 42A.1 contains significant potential for development as an unenumerated rights clause, although it is too early to tell whether this will occur. If it does, and if recent developments in constitutional interpretation from cases like *NHV* are followed, Article 42A.1 has the potential to develop in line with certain aspects of the UNCRC. This opens the door to a potential constitutional right to housing for children.
63. A constitutional right for children may prove difficult in terms of remedies, but this is not a reason to oppose its development. It is entirely possible for

⁶⁵ [2016] IEHC 631, para.48.

significant human rights cases not to entail mandatory remedies and the effects of those cases can still be considerable. The development of constitutional rights changes the shape of the public law landscape beyond the individual case. Understood in this way, a constitutional right to housing for children would be a welcome and appropriate development of Article 42A.1.

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