

CHAPTER ONE

Constitutional Interpretation

Introduction:

[1:01] The Constitution is a short, broadly-phrased text. By necessity, its wording is inherently vague. Nonetheless, enjoying the legal status that it does, the Courts are required to interpret that wording when deciding the extent, if any, of a breach of the Constitution. What we must address is the variety of ways in which the Courts can approach that wording and thereby interpret the Constitution. The approach the Courts take to the wording has obvious and immense ramifications for the outcome of the Constitutional challenge.

Exam Focus:

Question 6, March 2015 – Essay question on the presence of Catholic teaching in the Constitution. This connotes Natural Law

Question 5, March 2013, Essay question on the Historical Method of Constitutional Interpretation

[1:02] There are essentially three ways by which your current examiner tends to require (or allow) you to show your knowledge of Constitutional Interpretation:

- (1) By expressly asking you to address the issue (Question 1 October 2006)
- (2) By addressing the question to a particular phrase in particular article(s) of the Constitution and requiring you to discuss the manner in which the Courts have interpreted these phrases, for example:
 - a. Articles 41 and 42. Family and Education (Question 4, October 2007 and Question 1 April 2009), or
 - b. Article 40.3/43, Property Rights, (Question 6, April 2009)
 - c. References to Article 45 and the Principles of Social Policy (Question 4, October 2008 and Question 6, October 2010)
 - d. References to Natural Law jurisprudence (Question 3, October 2008), or
- (3) A problem question turning on the interpretation of the Courts of a given Constitutional right, which allows you to show which of the approaches to Constitutional Interpretation might be most favourable to your client.

Unfortunately, it is unlikely that you will be expressly asked to discuss the various methods of Constitutional interpretation currently open to the Courts. Instead, what is normally required is that you address the main case-law that applies to a specific Constitutional right (e.g. property, family etc) and then go on to show that you are aware that there are various interpretive ways that the Courts could approach the wording of that right. In essence, you are 'adding on' your knowledge of Constitutional interpretation to the specific case law you have learned on the specific Constitutional right. Thankfully, your job is not really to justify or vindicate any of the various ways the Courts interpret the Constitution: your role is simply to describe the variety of ways the Courts have done so over the years, and to draw attention to any inconsistencies that have appeared.

Principles of Constitutional Interpretation:

[1:03] It is important to note that the interpretive approaches below do not represent any historical progression of jurisprudential thought: the Courts have not rejected one view in favour of another, progressing down the line from the Literal method to, for example, Natural law. As we shall see, all interpretive methods are – to varying extents – still available to the Courts to interpret the wording of the Constitution.

- (1) The Literal Method
- (2) The Purposive Method
- (3) The Historical Method
- (4) The Harmonious Method
- (5) Natural Law

(1) The Literal Method

[1:04] In one way, this might be seen as the most democratic and least judicially activist of the interpretive methods. It essentially says that the exact wording of the Constitution should be applied literally as written in the text of the Constitution itself. No reference should be made by the Court to any other consideration exact that exact text. After all, that is the text which the people have ratified by referendum. You can draw attention to this advantage of the literal method: it does not invite or allow the Court's subjective view of what the Constitution "should" mean or "really" means to colour their interpretation.

The difficulty with this approach is obvious: a broadly-phrased and vaguely worded document such as the Constitution does not lend itself towards literal interpretation. The only occasion when it might is when the wording is unequivocal.

[1:05] In *The People (DPP) v O'Shea* [1982] 384, the Supreme Court used the literal approach to say that there was no ban on an appeal by the prosecution against an acquittal in the Central Criminal Court. Article 34.4.3 provides that the Supreme Court has the power to hear appeals on "all decisions" of the High Court. However, it has always been the case that, because of the principle of double jeopardy, if an individual was acquitted in the Central Criminal Court, there would be no appeal to the Supreme Court. O'Higgins, CJ noted that there was no express qualification of the phrase "all decisions" in the Constitution, and there had been no statute passed since to limit that unfettered right of appeal.

"The Constitution as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be construed as a whole and not merely in parts and, where doubts or ambiguity exist, regard may be had to other provisions of the Constitution and to the situation, which obtained and the laws, which were in force when it was enacted. Plain words must, however be given their plain meaning unless qualified or restricted by the Constitution itself."

[1:06] Even here, however, the Court is acknowledging that 'doubts or ambiguity' may exist in the wording of the constitution, and that only when 'the meaning is plain and unambiguous' should the literal approach apply. As Professor Casey¹ has noted, 'unambiguous' wording is not all that easy to identify. A phrase may seem unequivocal enough when viewed in isolation, but when viewed in conjunction with other phrases in the constitution ambiguity can then arise. A telling, and now topical, example of this is in *O'Byrne v Minister for Finance* [1959] IR 1, where only a bare majority (3:2) of the Supreme Court held that taxing a Judge's salary was not

¹ Constitutional Law in Ireland, 3rd Edition (2000), page 377

unconstitutional. The Court so held on the basis of an apparent ‘literal’ reading of Article 35.5. However, the dissenting minority held the contrary view, again on the basis of their own ‘literal’ meaning of the Constitution.

(2) The Purposive Method

[1:07] With such obvious difficulties in the application of the Literal method, the Court has often adopted a more intuitive and broadly-based approach to the wording of the Constitution. The purposive approach essentially asks what the basic ‘purpose’ behind the Constitutional provision in question? What did that Article or sub-Article seek to achieve? By asking these questions, the Court can then conclude what the meaning of the actual words are. As Gavan Duffy, J stated in *NUR v Sullivan* [1947] IR 77

“The text of a Constitution ought to attempt no more than to mark its great outlines.”

And as was stated in *AG v Paperlink* [1984] ILRM 373

“The Constitution is a political instrument as well as a legal document and in its interpretation the courts should not place the same significance on differences of language used in two succeeding sub-paragraphs as would, for example be placed on differently drafted sub-sections of a Finance Act. A purposive, rather than a strictly literal approach to the interpretation ... is appropriate”

[1:08] Again, although it is understandable that the Courts might move away from the Literal method, the flaws in this purposive approach are obvious: what, exactly, is the ‘purpose’ of any phrase in the Constitution, and how is a Court qualified to divine that purpose? Might not one Courts’ view of the purpose of a given provision differ radically from that of a differently-constituted Court? Nonetheless, a fairly defensible application of this method is evident in *Murray v Ireland* [1985] IR 532, where a married couple, jailed for life for capital murder (of a policeman) claimed that their Article 41 family rights (including the right to procreate) were not subject to any express limitation in the wording of Article 41. That is, most express rights in the Constitution have, as their second clause, an express limitation on that right. For example, the right to Private Property is expressly subject to ‘social justice’ and ‘the common good.’ Article 41 contains no such limiting clause. Nonetheless, the Court held that Article 41 was not intended to be unlimited, and discerned an underlying purpose that there be such a limit.

(3) The Historical Method and the Constitution as a “living document”

[1:09] Sometimes known as Originalism, this approach questions the state of popular thought at the time of the passing of the Constitution and/or the Constitutional provision in question. By using extra-Constitutional materials, we can – with some degree of accuracy – determine the state of mind of those who passed the Constitution by referendum. This, in turn, can assist the Court in determining the true meaning of the phrases contained therein. *In re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470, the Supreme Court had to determine whether certain, fairly draconian, detention provisions might or might not be constitutional. In answering the question in the negative, the Court held that at the time of the ratification of the Constitution – very similar detention statutes were already in force. Furthermore, the framers of the Constitution did not expressly prohibit such detention statutes from being passed, even though the Constitution does prohibit other types of legislation from being passed. Thus, the state of the law, and consequently of the mind of the people, in 1937 had a strong bearing on how the Court interpreted the Constitution.

[1:10] Of course, the above example refers to a case that occurred within a few short years of the Constitution having been passed, and historical thought for 1937 was still relatively easy to

discern. Nowadays, with legislation 80 years after the passing of the Constitution, it is questionable how much stock should be placed in the historical meaning of certain phrases in that Constitution. In *Norris v AG* [1984] IR 26, McCarthy, J expressly drew attention to the difficulties in ascertaining the state of mind of the people of Ireland as long ago as 1937. This is particularly so in circumstances where the Constitution is regularly praised for being a “living document” that flexibly reflects the changing mores and values of society (see below). Nonetheless, *Sinnott v Minister for Education* [2001] 2 IR 545 represents a recent re-iteration of the continuing relevance of the historical method of interpretation. In that case, the Supreme Court were charged with interpreting whether or not the phrase “primary education” under Article 42 covered those persons older than the traditional age when such primary education usually ceased. Hardiman, J stated:

“If the term “primary education” is construed on a historic basis it is clear that what was in the mind of the drafters of the Constitution was the ordinary, scholastically oriented primary education represented by the ministerially prescribed National School curriculum. The contrary was not submitted. The highly specialised services which, according to the witnesses called on behalf of the Plaintiff at the trial he stands in need seem quite different from the ordinary content of “primary education” either in 1937 or today.”

A “living document”?

[1:11] Famously, in *McGee v AG* [1974] IR 284, Walsh, J drew attention to the flexible nature of the Constitution and its ability to reflect and adapt to the changing values of Irish society:

“According to the preamble the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured.

.....The judges must therefore as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues must be conditioned by the passage of time.”

See also O’Higgins CJ in *The State (Healy) v Donoghue* [1976] IR 325, who held:

“The rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes or develops, and which fall to be interpreted from time to time in accordance with prevailing ideas.... The Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment.”

This obviously raises the question as which issues or constitutional phrases might be considered rooted to a particular historical viewpoint (the historical method) and which might be considered as subject to the changing values of society?

Sinnott v Minister for Education attempts, first of all, to state that both approaches can co-exist. Murray, J held thus:

“Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been so suggested, that it can be divorced from its historical context.”

[1:12] An interesting, and inventive, resolution of these apparently contradictory approaches is evident in *Zappone v Revenue Commissioners* [2006] IEHC 404. The applicant argued that “marriage” and the right to marry could extend to same-sex couples. This was on the basis that

nowhere in the wording of the Constitution is the word “marriage” or its cognates expressly limited to heterosexual couples. Thus, if the constitution is indeed a *‘living document’* which may *‘gradually change or develop as society changes or develops’*, then perhaps ‘marriage’ has evolved to cover such same-sex couples as that applying to the applicant.

Dunne, J accepted that certain concepts and phrases were susceptible to changing values and interpretations. The question was whether ‘marriage’ was such a concept. The applicant had argued that there was a ‘changing consensus’ on what marriage meant by 2005. Dunne, J referred to the Civil Registration Act 2004 which excluded same sex couples from marriage. Despite being enacted as recently as 2004, it clearly re-iterated the interpretation of marriage as remaining a heterosexual marriage only.

(4) The Harmonious Method

[1:13] We saw in the *People (DPP) v O’Shea* that, even in endorsing the literal method, the Court drew attention to the possibility of using other provisions of the Constitution when interpreting the provision before the Court. This limit of a given Constitutional provision not only within the four walls of that provision alone, but also by references to other, relevant provisions in the Constitution. In fact, Henchy, J’s dissent in *O’Shea* expressly refers to the requirement for harmonious interpretation of Constitutional provisions.

“Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously to the general constitutional order.”

[1:14] The most obvious example would be that of Freedom of Expression. Although Article 40.6.1.(i) provides its own limitations on freedom of expression (subject to “*public order or morality or the authority of the State*”), clearly the Court must have regard to the existence under Article 40.3 to the citizen’s right to a “good name”. The right to a good name obviously tempers the right to freedom of expression.

[1:15] Again, in the context of Property rights, there are two express provisions contained in the Constitution in this regard. Article 40.3 protects the private property rights of the individual citizen from “unjust attack”, whereas Article 43 protects the general institution of private property, subject to social justice and the common good. *Dreher v Irish Land Commission* [1984] ILRM 94 takes a harmonious approach to these separate provisions by holding that it is only if the attack on the citizen’s property has not been for reasons of social justice and the common good (Article 43) that it could constitute an unjust attack (Article 40.3).

[1:16] In *O’ B v S* [1984] I.R. 316, differing treatment (legitimate discrimination) as between legitimate and illegitimate children was justified on the basis of Article 41, and the special position of the marital family. However, if the Court were to examine discrimination purely within the ‘four walls’ of the Equality provision, such discrimination could only be allowed if it were for differences of physical or moral capacity, or of social function. It is only by recourse to harmonious interpretation and reference to Article 41 that the Court could allow the discrimination of the illegitimate child.

(5) Natural Law

[1:17] Natural law refers to the (spurious) idea that there is a set of inviolate, unchanging and absolute values of right and wrong which both inform, and are superior to, the text of the Constitution. Natural Law, then, is not simply a method of interpretation; it is an approach that

holds that certain inalienable and imprescriptible rights which cannot be changed by popular democratic will. Thus, it is superior to the Constitution.

The first point to note in this regard is that, although there have been many landmark judgements since 1937 where Natural Law has retained a crucial place in the reasoning of the Court, since 1995 this interpretive tool has waned significantly.

Authorities for the existence of, and pre-eminence of, Natural Law:

In *Ryan v AG* [1965] IR 294, Kenny J said:

“Natural law is both anterior and superior to positive law or man made law. There are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Art 40 at all.”

In *McGee*, Walsh J acknowledged that natural rights or human rights are not created by law but that the Constitution confirms their existence and gives them protection. The Constitution itself concedes their existence:

“Articles 41, 42 and 43 emphatically reject the theory there are no rights without laws, no rights contrary to the law and no rights anterior to the law.”

This view was adopted and expanded in *State (Healy) v Donoghue* where Gannon J noted, the existence of rights:

“Which are anterior to and do not merely derive from the Constitution.”

[1:18] The problem with the Natural Law doctrine is immediately obvious: whose Natural Law are we applying? Which religion, or set of religious values should be brought to bear when interpreting the words of the Constitution. Invocations of Natural Law can lead to contradictory results. For example, in *Norris v AG*, the Preamble to the Constitution and its mention of the Holy Trinity and Jesus Christ was used by the Court as authority for the proposition that Natural Law was equivalent to the teachings of the Church on the issue of homosexuality. Thus, Natural Law involved what we might now consider a very conservative and catholic interpretation of the Constitution. However, in *McGee v AG*, Natural Law was invoked by the Court to vindicate the right to marital privacy, up to and including the right to purchase contraceptives: an interpretation that might be considered ideologically at odds with that of Norris.

Re Article 26 and the Regulation of Information and the decline of Natural Law

[1:19] In *Re Article 26 and the Regulation of Information (Services out of the State for Termination of Pregnancies) Bill 1995* [1995], the Supreme Court asked whether or not - by popular referendum - the will of people could 'trump' the provisions of natural law with regard to information on, and travel to, abortion services. The answer was yes: Natural Law can no longer be invoked by the Court to outweigh the democratically expressed will of the people.

“It is fundamental to this argument (that of Natural Law) that, what is described as the natural law is the fundamental law of this State and as such is antecedent and superior to all positive law, including the Constitution and that it is impermissible for the People to exercise the power of amendment of the Constitution by way of variation, addition or repeal, as permitted by Art 46 of the Constitution unless such amendment is compatible with the natural law and existing provisions of the Constitution and, if they purport to do so, such amendment had no effect. The Court does not accept this argument.”

[1:20] A further nail in the coffin of Natural Law interpretation is evident in the judgement of Keane, CJ in *TD v Minister for Education* [2001] 4IR 259, a crucial case which we will encounter again in the context of the uncertain scope of unenumerated rights and of socio-economic rights. Keane, CJ held as follows with regard to *Ryan v AG* [1965] IR 294 the “Christian and Democratic” nature of the State as a basis for enumerating and/or interpreting rights in the Constitution:

“In the High Court in that case, Kenny J stated that there were many personal rights of the citizen which flow from “the Christian and democratic nature of the state” which are not mentioned in Article 40. There was no explicit endorsement of that view in this court, perhaps because the rights under discussion in that case was conceded on behalf of the Attorney General to be such unenumerated right. Whether the formulation adopted by Kenny J is an altogether satisfactory guide to the identification of such rights is at least debatable. Secondly, there was no discussion in the judgement of this court as to whether the duty of declaring the unenumerated rights, assuming them to exist, should be the function of the courts, rather than the Oireachtas.”