

# Interpreting natural rights: *Gorry* and “the family” under Article 41

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While the Irish Constitution is not untypical among world constitutions in robustly protecting the family against external interference, it does so in untypically strident terms. The opening subsection of Art 41 reads:

The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

The words do not specify particular rights that “the Family” enjoys but do indicate that, whatever those rights might be, they enjoy an extraordinarily high degree of protection. Taken in isolation, the phrase “inalienable and imprescriptible...” suggests the family’s rights cannot be taken or given away, nor lost by the passage of time. The phrase “antecedent and superior to all positive law” suggests recognition of a range of rights that pre-existed the political state, which are now beyond the reach of the State’s authority.

Over the past decade, Irish judges have begun to articulate what had been an unarticulated interpretive approach to these radical natural law phrases. In a 2013 judgment, Hogan J – a noted constitutional historian – suggested that the drafters of the Constitution had not intended these terms to be read “absolutely literally,” but rather, to convey that the rights of the family would enjoy “the highest possible level of legal protection which might realistically be afforded in a modern society” (*FH v Staunton* [2013] IEHC 533).

In *Gorry v Minister for Justice* [2020] IESC 55, this “seriously but not literally” approach was at the heart of a fervent disagreement between two senior judges as to the meaning and implications of Ireland’s constitutional clause on the family. In O’Donnell J’s view, *Gorry* stood “at a junction in the development of the caselaw on Article 41” and the “route chosen” – whether his own or that preferred by McKechnie J – would be of “longer-term significance” (para. 9). The latter’s route would mean a potentially very broad range of rights falling under Art 41, identified over time by individual judges. The former’s route would keep the provision on a tighter rein: any new right identified would have to be firmly rooted in the constitutional text.

Ifeyinwa Gorry arrived in Ireland from Nigeria in 2005 and was unsuccessful in her application for asylum. She was later the subject of a deportation order, which she evaded for a number of years. In 2006, she met Joseph Gorry, an Irish citizen. They

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married in 2009, prompting Mrs Gorry to apply to the Minister for Justice for revocation of the deportation order (s. 3(11) of the Immigration Act 1999). After considering the matter, the minister declined to revoke the order. He relayed the decision to Mrs Gorry in a letter setting out reasons.

Mrs Gorry challenged the minister's decision by way of judicial review. She was successful before the High Court and later, following appeals by the State, before both the Court of Appeal and the Supreme Court. All judges at all levels agreed that the minister had erred in law in the manner in which he reached his decision. The letter suggested that the minister, when making his decision, had conflated Art 8 of the European Convention on Human Rights with Art 41 of the Constitution, when he should have considered those provisions "separately and distinctly" (para. 27). The distinctiveness of the language of the two provisions was significant in this regard. But it would be too simple to say that this alone was decisive. Rather, it was this distinctiveness in language combined with the distinctive histories of the documents, and in particular their distinctive status and functions in domestic Irish law, that meant that the minister was legally obliged to consider them separately.

What then of the judicial disagreement in the case? On the surface, it was about whether two particular rights fell under the protection of Art 41: the right of a married couple to cohabit, and their right to decide to live together in the jurisdiction. McKechnie J thought those rights did fall under Art 41 (paras. 169, 175-7, 225). O'Donnell J thought that they did not (para. 75).

Drilling deeper, the difference between them as to the *range* of rights covered by Art 41 in my view follows from a prior disagreement as to the *scope or degree of protection* afforded by the clause to whatever rights it is thought to cover. Elsewhere, I have used the image of a shoebox to illustrate the contrasting approaches (Hickey, 2021). McKechnie J approves Hogan J's "seriously but not literally" approach to the radical language, and this appears to liberate him in respect of the range of rights question. His is thus a broad and not-so-deep understanding of Art 41: picture a shoebox sitting flat, in the normal way (paras. 132-3).

O'Donnell J is not satisfied that judges can legitimately suppose that the drafters, when drafting the clause, "had their metaphorical fingers crossed behind their backs..." (para. 38). They cannot assume the drafters to have intended them to read more realistic, proportionality-oriented language into Art 41. And this, I suggest, makes him more cautious with respect to the range of rights. His is thus a narrow-and-deep understanding of Art 41: picture a shoebox sitting tall on its end.

O'Donnell J's finding that a right to cohabit does not flow from Art 41 could be argued either way, but I suggest that his reasoning on the point is likely to prove influential in the interpretation of the clause into the future. The key part of that reasoning is his "signpost-not-springboard" metaphor. Art 41, he says, is "not a springboard to speculation as to the rights in respect of the Family, which future generations of judges might consider should be deemed worthy of protection in a modern society..." Rather, it is "a signpost directed to the terms of the Constitution itself and what they imply" (para. 46).

The first station to which he is signposted is the clause that immediately follows that opening subsection of the article pertaining to the Family in the Irish Constitution. Art 41.1.2 begins:

The State, therefore, guarantees to protect the Family in its constitution and authority...

O'Donnell J takes this to mean that whatever rights qualify for this extraordinarily deep protection must have to do, specifically, with either the family's *constitution* or with its *authority*. And he takes the former to pertain to the family's composition or structure – a view he sees as supported by, among other things, the emphasis on divorce and adoption in Articles 41 and 42. He is not satisfied that a right to cohabit would follow. Cohabitation, in his view, relates to “the *type* of married...life an individual couple may have, and not to whether they are married or *constitute* a family” (para. 49, italics added).

As for the latter, if there is a decision-making domain that is presumptively within the family's “authority,” there must be another that is presumptively without (para. 52). The question facing any judge then is as to which domain the subject matter of a given case pertains.

This time O'Donnell J is signposted to the provisions that follow in turn: Art 41.2 (Ireland's anachronistic but – for now – still existing “woman in the home” clause) and Art 42 (a provision on education that refers extensively to “the Family”). These imply that the *authority*-related rights of the family pertain to the domestic and educational spheres, or with “what might be termed home/life decisions.” The corollary is that non-domestic decision-making, or decision-making that has significant public implications, tends to fall outside. O'Donnell J borrows the rather blunt analysis of a former colleague to determine the domain into which the matter at issue falls: “a decision on education or a child's medical treatment is *prima facie* within the Family's authority but ‘a decision about an alien parent's desire to live in the State is not.’” (para. 53).

Pulling back from the particulars, O'Donnell J seems to me to get it right on the matter of the interpretative approach to be taken to Art 41 in general. Understandable as it is that contemporary judges want to water down this misconceived constitutional clause, the “seriously but not literally” strategy seems to me to be in intolerable tension with the judicial obligation to text in constitutional interpretation. O'Donnell J's apparently reluctant recognition of its binding status thus seems the more legitimate and sensible interpretive route (for instance, see para. 40). It is not a necessarily conservative route, nor is it a strict textualist one. But if the provision is to survive over time, then O'Donnell J's “shoebox-standing-on-its-end approach” could eventually come at the cost of families being denied some particular right that would be afforded to them under a more sensibly drafted constitutional clause. If so, it is the drafters that will be to blame, I suggest, or the people themselves. Not the judges.

More broadly still – on the matter of constitutional interpretation generally – O'Donnell J's judgment is in keeping with a trend towards a modest, restrained form of innovation on the part of Irish judges over the past half-decade. His academic writing suggests grave misgivings about the “freewheeling” approach of judges from

the “activist era” (roughly 1960-1990), in which Irish judges looked into the ether to identify rights that *ought* to, and that therefore did, enjoy constitutional status (O’Donnell, 2017). Here in *Gorry* he urges his colleagues and successors against conceiving of vague constitutional clauses – in this instance Art 41 – as “self-contained provision[s] bequeathed by the People in 1937 to later generations of judges who could be trusted to identify a constellation of pre-eminent rights to be given super-added protection” (para. 44). But this is not to reach for unthinking textualism. O’Donnell J is under no illusions as to the inescapably interpretive nature of constitutional interpretation. He simply insists that judges be guided by the interpretive signposts to which they are subject: signposts that are rooted firmly in the constitutional text.

In any good constitutional system, these signposts will have been put – *or left* – in place by the people themselves. And by “left in place” I mean to suggest that the contemporary people must have had meaningful opportunity to decide otherwise.

Hickey, T. 2021. *Part 2 on Gorry: O'Donnell's 'Shoebox theory' of Article 41* [Online]. Available from: <https://www.youtube.com/watch?v=X20tHztejOw&t=614s>

O’Donnell, D., 2017. Sleep of reason. *The Dublin University Law Journal*, 40 (2) 191.