

Family Autonomy and Children's Best Interests:

Ireland, Bentham and the Natural Law

Oran Doyle¹

Introduction

All polities struggle with establishing the correct balance between family autonomy and state intervention. In a liberal world, the family is often seen as being in some ways analogous to the individual, possessed of a zone of freedom in which it is inappropriate for the State to intervene. However, the family is obviously different from an individual insofar as it comprises several individuals - a parent or parents and a child or children. Deference to family autonomy, therefore, amounts to deference to those who are powerful within the family, allowing parents to make decisions on behalf of their children. Nevertheless, there remain good reasons to allow parents make decisions on behalf of their children. At least in the case of young children, they do not have the capacity to make decisions on their own behalf. Most people would accept that - in general - parents are better placed than the State to make decisions for their children. Conversely, most people would also accept that parents' authority over their children cannot be absolute. The State retains a residual concern for children who are abused, neglected or failed by their parents, whether through misconduct or personal inadequacy. The difficult question lies in establishing the threshold for state intervention.

In Ireland, these issues have played out in recent years in the realm of political philosophy, high constitutional law and, occasionally, low practice. This paper examines the provisions of the Irish Constitution, places them in their philosophical context and explores how they have been interpreted by the courts. In this light, it considers current proposals for reform of the Constitution but suggests that reform of child protection services might be a more appropriate first step.

The Irish Constitution

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Article 41.1 of the Constitution of Ireland protects family rights in the following terms:

1° 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.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.²

Article 41.2 recognises, somewhat controversially, the value of work done by woman in the home. Article 41.3 pledges the State to guard with special care the institution of marriage, on which the constitutional family is said to be founded: divorce is only allowed in certain, constitutionally defined circumstances. Article 42 provides for education rights in a manner that reflects the notion of the family as a natural institution, antecedent to positive law. Article 42.1 recognises the family as the natural and primary educator of the child, Article 42.2 allowing families to provide this education in the home, in private schools or in State-supported schools. Article 42.3 attempts a balance between parents' rights and a residual State concern for the welfare of children: parents cannot be forced to send their children to State schools or any school designated by the State; however, the State can require that children receive a certain minimum education. Article 42.4 imposes an obligation on the State to provide for free primary education, to assist "private and corporate educational initiative" and to provide "other educational . . . institutions" where the public good requires it. However, this must all be done with due regard for the rights of parents. Finally, Article 42.5 provides as follows:

In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

These constitutional provisions clearly recognise or establish an order in which parents have the primary role in relation to decisions about their children. The State has a supporting role but must be careful not to allow that support unduly to interfere with parental authority. However, the State has a residual role to protect children from parents who have (or who might) fail them.

The intellectual lineage of Articles 41 and 42 is Roman Catholic Natural Law Theory. The Constitution, adopted in 1937, can be seen as the culmination of a constitutional moment, going back to Independence in 1922, and possibly earlier. The State established immediately post-

² See http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf .

Independence was governed by the Constitution of the Irish Free State 1922. However, this document was considered by many to be too English in character. It was also too easy to amend, rendering it ineffective as a basic law. From 1935 to 1937, a new Constitution was drafted, largely in secret. Among its major differences from the 1922 Constitution were the provisions on family and education. The principal author was Éamon de Valera. He was assisted by a small number of civil servants but also received many suggestions from a number of religious figures, most prominently Fr John Charles McQuaid, later Archbishop of Dublin. The documentary evidence clearly establishes a link from the natural law, through the teachings of the Roman Catholic Church, into the provisions of Articles 41 and 42 of the Constitution.

The provisions of Article 41 were similar to those in the Portuguese Constitution of 1933. They also reflected provisions of Roman Catholic teaching, principally Pope Pius XI's Encyclical on Christian Marriage, *Casti Connubii* (1930).³ The provisions of Article 42 owe more to Pope Pius's earlier encyclical, *Divini Illius Magistri*.⁴ In this work, Pope Pius, drawing heavily on Aquinas, viewed humans as being drawn into three societies: the family, civil society and the Church. Education belongs pre-eminently to the Church,⁵ but the family comes before civil society:

43. Now this end and object, the common welfare in the temporal order, consists in that peace and security in which families and individual citizens have the free exercise of their rights, and at the same time enjoy the greatest spiritual and temporal prosperity possible in this life, by the mutual union and co-ordination of the work of all. The function therefore of the civil authority residing in the State is twofold, to protect and to foster, but by no means to absorb the family and the individual, or to substitute itself for them.

44. Accordingly in the matter of education, it is the right, or to speak more correctly, it is the duty of the State to protect in its legislation, the prior rights, already described, of the family as regards the Christian education of its offspring, and consequently also to respect the supernatural rights of the Church in this same realm of Christian education.

45. It also belongs to the State to protect the rights of the child itself when the parents are found wanting either physically or morally in this respect, whether by default, incapacity or misconduct, since, as has been shown, their right to educate is not an absolute and despotic one, but dependent on the natural and divine law, and therefore subject alike to the authority and jurisdiction of the Church, and to the vigilance and

³ The English text is available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

⁴ (1929). The English text is available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121929_divini-illius-magistri_en.html.

⁵ *Id.* ¶¶ 11-15.

administrative care of the State in view of the common good. Besides, the family is not a perfect society, that is, it has not in itself all the means necessary for its full development. In such cases, exceptional no doubt, the State does not put itself in the place of the family, but merely supplies deficiencies, and provides suitable means, always in conformity with the natural rights of the child and the supernatural rights of the Church.

46. In general then it is the right and duty of the State to protect, according to the rules of right reason and faith, the moral and religious education of youth, by removing public impediments that stand in the way. In the first place it pertains to the State, in view of the common good, to promote in various ways the education and instruction of youth. It should begin by encouraging and assisting, of its own accord, the initiative and activity of the Church and the family, whose successes in this field have been clearly demonstrated by history and experience. It should moreover supplement their work whenever this falls short of what is necessary, even by means of its own schools and institutions. For the State more than any other society is provided with the means put at its disposal for the needs of all, and it is only right that it use these means to the advantage of those who have contributed them.

47. Over and above this, the State can exact and take measures to secure that all its citizens have the necessary knowledge of their civic and political duties, and a certain degree of physical, intellectual and moral culture, which, considering the conditions of our times, is really necessary for the common good.

48. However it is clear that in all these ways of promoting education and instruction, both public and private, the State should respect the inherent rights of the Church and of the family concerning Christian education, and moreover have regard for distributive justice. Accordingly, unjust and unlawful is any monopoly, educational or scholastic, which, physically or morally, forces families to make use of government schools, contrary to the dictates of their Christian conscience, or contrary even to their legitimate preferences.⁶

Application of the principle of parental autonomy by the Irish courts

The courts have addressed the implications of Articles 41 and 42 of the Constitution for parental autonomy in three main contexts: health decisions, custody decisions and education decisions. The issue of parental autonomy in health decisions came sharply into focus in *North Western*

⁶ *Id.* (note omitted).

Health Board v HW [2001] 3 IR 622.⁷ Since 1979, health boards have carried out PKU tests on newly born children. This tests whether the child has a number of diseases. The prevalence of these diseases in Ireland is quite high; if diagnosed early, the diseases can be controlled by a combination of diet and medication; if undiagnosed, the diseases can lead to severe mental handicap or life-threatening illness. The test consists of slightly puncturing the skin of the infant, usually in its heel, so as to procure a few drops of blood. This blood is then sent for analysis. In *NWHB*, the parents of an infant child refused their consent for the carrying out of this test. The Health Board applied to court for orders empowering it to carry out the test. In the High Court, McCracken J refused the orders sought, a position that was upheld by a majority of the Supreme Court on appeal.

The approach of the majority is perhaps best captured by Murphy J:

The Thomistic philosophy - the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Walsh J. - confers an autonomy on parents which is clearly reflected in these express terms of the Constitution which relegate the State to a subordinate and subsidiary role. The failure of the parental duty which would justify and compel intervention by the State must be exceptional indeed. It is possible to envisage misbehaviour or other activity on the part of parents which involves such a degree of neglect as to constitute abandonment of the child and all rights in respect of it. At the other extreme, lies the particular decision, made in good faith which could have disastrous results. In the present case the parents did not present a refusal to the proposed P.K.U. test. Indeed, they positively agreed to the test provided it could be carried out on hair or urine samples. The objection of the parents centres exclusively upon the invasion or puncture - as they see it - of the blood cells of the child. No reasoning based on any scientific view or any religious doctrine or practice was cited in support of this firmly stated objection. Nevertheless, I do not accept that a particular ill advised decision made by parents (whose care and devotion generally to their child was not disputed) could be properly categorised as such a default by the parents of their moral and constitutional duty so as to bring into operation the supportive role of the State. [2001] 3 IR 622, at 732-733 (paragraph 207).

This reasoning was followed in *McK v The Information Commissioner* [2006] IESC 2. Mr McK was the father and joint guardian of a child who had been admitted to hospital. Mr McK had separated from his wife in 1992. During family law proceedings, an allegation was made that he had sexually abused his daughter. The police subsequently decided that there was no evidence

⁷ The Supreme Court judgments in this case can be viewed at <http://www.bailii.org/ie/cases/IESC/2001/90.html>. The High Court judgment can be viewed at <http://www.bailii.org/ie/cases/IEHC/2000/199.html>. This case is hereinafter sometimes referred to as “NWHB”.

to warrant a prosecution. In 1993, the Court ordered supervised access to his children. In 1996, he and his wife agreed to strive towards bringing about unsupervised access. However, his wife died in 1998. By agreement, the children lived with his late wife's brother and sister-in-law. All three were appointed joint guardians of the children. The case arose when Mr McK requested access to his daughter's hospital records but was refused by the hospital. He appealed to the Information Commissioner, a statutory official who determines appeals in relation to the application of the Freedom of Information Act 1997, as amended. The Information Commissioner upheld the refusal to provide the information, applying a test that Mr McK would have to demonstrate that it was in the child's best interests for the information to be released to him. By way of appeal on a point of law, the High Court and subsequently the Supreme Court held that the Information Commissioner had erred in law. Denham J, with whom all other members of the Supreme Court agreed, reasoned as follows:

21 The Act of 1997 and the Regulations fall to be interpreted in accordance with the Constitution. A parent, the appellant, has rights and duties in relation to a child. It is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental. The respondent took an incorrect approach in requiring tangible evidence of the parent rather than applying the presumption that a parent was acting in the child's interests. The "tangible evidence" test of the respondent reversed the onus of proof.

22 The relationship between parent and child has a special status in Ireland. Under the Constitution the family is the primary and fundamental unit group in our society: Article 41.1.1. The State has guaranteed to protect the family in its constitution and authority: Article 41.1.2. The State encompasses the judicial branch of government which has a consequent duty to protect the family and its authority. While the family unit has its rights, so too each member of the unit has rights. Thus while the parents have duties and rights in relation to a child, and a child has rights to parental care, the child also has personal rights which the State is required to vindicate if the parent fails in his or her duty.

23 A parent's rights and duties include the care of a child who is ill. As a consequence a parent is entitled to information about the medical care a child is receiving so that he or she may make appropriate decisions for the child, as his or her guardian. The presumption is that a parent is entitled to access such information. That position is not absolute. The circumstances may be such that the presumption may be rebutted. But the primary position is that the presumption exists. Consequently, the approach of the respondent was in error when he required "tangible evidence" that the release of such

information would serve the best interests of the minor. The obverse is the correct approach. The presumption is that the release of such medical information would best serve the interests of the minor. However, evidence may be produced that it would not serve her interests, and in considering the circumstances, her welfare is paramount. That issue did not arise in this case because of the erroneous approach of the respondent.

24 The respondent should have approached the request by acknowledging that a parent is presumed to be entitled to access the information. However, the respondent may then proceed to consider any evidence which exists addressing the issue that it would not be in the minor's best interests that the parent should be furnished with such information.

In custody cases, the courts have taken a similar approach. The issue has arisen in contexts where an unmarried mother has put her child up for adoption. She subsequently marries the father of the child before the adoption process is completed, but some time after the child has been placed with the prospective adoptive family and commenced bonding with them. In *N v HSE* [2006] IEHC 278, the applicants sought the return to them of their daughter. Their daughter had been born to them in July 2004 while they were unmarried. She had been placed for adoption and since November 2004 had been in the care of the proposed adoptive parents. The applicants got married in January 2006 and six weeks later instituted habeas corpus proceedings to secure the return of their daughter. The High Court gave its judgment in June 2006, holding that the adoptive parents should retain custody of the child. This decision was quickly appealed to the Supreme Court, which unanimously reversed the High Court's decision.

Hardiman J provided a cogent justification for the primacy given to parental rights by the Constitution. He emphasised that there was a constitutional presumption that the welfare of the child is to be found within the family; accordingly, state intervention can only be justified if it is established that there are compelling reasons why the welfare of the child cannot be secured in the custody of the parents. Responding to the general public debate on the issue of parental authority, he offered the following defence of this constitutional position:

I do not regard the constitutional provisions summarised above, or the jurisprudence to which they have given rise, as in any sense constituting an adult centred dispensation or as preferring the interests of marital parents to those of the child. In the case of a child of very tender years, as here, the decisions to be taken and the work to be done, daily and hourly, for the securing of her welfare through nurturing and education, must of necessity be taken and performed by a person or persons other than the child herself. Both according to the natural order, and according to the constitutional order, the rights and duties necessary for those purposes are vested in the child's parents. Though selflessness and devotion towards children may easily be found in other persons, it is the

experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict the interest of the child will usually be preferred....

There are certain misapprehensions on which repeated and unchallenged public airings have conferred undeserved currency. One of these relates to the position of children in the Constitution. It would be quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the “natural and imprescriptible rights” and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child’s rights. This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child.

If the prerogatives of the parents in enabling and protecting the rights of the child were to be diluted, the question would immediately arise: to whom and on what conditions are the powers removed from the parents to be transferred? And why?

Applying the “compelling reasons” test and having reviewed the evidence, Hardiman J held that a phased and gradual transfer of custody from the adoptive parents to the natural, married parents would mitigate any concerns as to long-term psychological damage to the child. The Court could not take into account any inability on the part of the adoptive parents to participate in such a process. There were, therefore, no compelling reasons why the welfare of the child could not be achieved with the married parents. Applying the “failure of duty” test, Hardiman J held that participation in the adoption process (i.e. the taking of steps that could lead to a child’s adoption) could not constitute a failure of duty.

Finally, the courts have taken a roughly similar approach in the context of education, although in the most recent case of *DPP v Best* [2000] 2 IR 17, all five members of the Supreme Court offered subtly different interpretations of the phrase “certain minimum education, moral, intellectual and social,” making it difficult to identify what precisely is allowed.

Taken in the round, this case law is fully consistent with Roman Catholic natural law teaching, as set out in the papal encyclicals quoted above. The role of the State is recognised, but it is secondary and supportive to the role of parents. When faced with any suggestion that the test

should be the best interests of the child, the courts recognise that, were they to make their own assessment of the child's best interests, they would be displacing the role of parents. Accordingly, in both *McK* and *N v HSE*, we see the courts develop a presumption that the best interests of the child lie with its parents.

The Irish Constitution and Bentham

Notwithstanding the clear natural law origins of Articles 41 and 42, one prominent member of the Supreme Court has suggested that the Irish constitutional position is equally consistent with the writings of Bentham. In *N v HSE*, Hardiman J commented as follows:

105 There is, of course, no doubt that the form and content of our constitutional dispensation in regard to the family and children was significantly influenced by Christian, and specifically Catholic, teaching on those subjects. But that is not to say that the preference for the natural parents as carers for a child is exclusively referable to those sources. In my judgment in *North Western Health Board v HW* [2001] 3 I.R. 622, I expressed the view that this preference for the parents as the natural and primary guardians was equally consistent with quite different strands of thought, even a Benthamite one. I reiterate that view here, without repeating what was said in the judgment referred to. A presumptive view that children should be nurtured by their parents is, in my view, itself a child centred one and the alternative view, calling itself "child centred" because it is prepared more easily to dispense with the rights and duties of parents must guard against the possibility that in real individual cases it may become merely a proxy for the views of social workers or other third parties. That is not for a moment to belittle the need for State intervention in the nurturing of children in appropriate cases, but to emphasise that the presumption mandated by our Constitution is a presumption that the welfare of *the child* is presumptively best secured in his or her natural family.⁸

In *NWHB*, Hardiman J had expressed the point as follows:

Counsel for the defendants in this case have submitted, in my view convincingly, that the same approach can be grounded otherwise and have referred us to an American academic authority, Prof. Goldstein. The latter suggests that the common law "reflecting Bentham's view, has a strong presumption in favour of parental authority free of coercive intrusions by agents of the State". I would endorse this as a description of the Irish constitutional dispensation, even if any reflection of the views of Jeremy Bentham is coincidental. I do

⁸ [2006] IESC 60, at [105]. This judgment can be viewed at <http://www.bailii.org/ie/cases/IESC/2006/S60.html>.

not regard the approach to the issue in the present case mandated by Articles 41 and 42 of the Constitution as reflecting uniquely any confessional view.⁹

The reference to Goldstein would appear to be a reference to the article Joseph Goldstein, “Medical Care for the Child at Risk: On State Supervention of Parental Autonomy” 86 *Yale Law Journal* 645 (1977). Goldstein expresses the following view:

“The law is designed to assure for each child an opportunity to meet and master the developmental crises on the way to adulthood—to that critical age when he or she is presumed by the state to be qualified to determine what is “best” for oneself. As Jeremy Bentham observed not so long ago in 1840:

The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws

That “more immediate” authority is parental authority. Thus, society's law, in accord with nature's law, seeks to assure for each child permanent membership in a family with at least one and preferably two caretaking adults. The law, reflecting Bentham's view, has a strong presumption in favor of parental authority free of coercive intrusion by agents of the state. Indeed, it is a function of law to protect family privacy as a means of safeguarding parental autonomy in child rearing. At the same time the law attempts to safeguard each child's entitlement to autonomous parents who care and who feel responsible and who can be held accountable for continually meeting the child's ever-changing physical and psychological needs.”¹⁰

Bentham's thoughts on these issues are contained in chapters 27 and 28 of his *Theory of Legislation*.¹¹ In Chapter 27, titled “Of Guardian and Ward”, among his other comments are the

⁹ Page 757, Paragraph 302.

¹⁰ Joseph Goldstein, “Medical Care for the Child at Risk: On State Supervention of Parental Autonomy” 86 *Yale Law Journal* 645, at 645-647 (1977), citing J BENTHAM, *THEORY OF LEGISLATION* 248 (Boston, 1840). Of course, Bentham was writing around the turn of the nineteenth century not in 1840, as suggested by Goldstein. Goldstein's source is an 1840 retranslation into English of an earlier French translation of Bentham's original work.

¹¹ My source is different from that relied on by Goldstein *et al.* I rely on the Charles Milner Atkinson re-translation from 1914 of Etienne Dumont's translation of Bentham's original work: BENTHAM'S *THEORY OF LEGISLATION* (Charles Milner Atkinson, trans., 1914). This work is a translation of *Principes de Législation* and *Traité de Législation, Civile et Pénale* (Étienne Dumont, trans. & ed., 1802), which is itself a translation into French, after extensive editing, of manuscripts by Bentham. The quotations from the Atkinson translation here quoted are from the Volume I (PRINCIPLES OF LEGISLATION): the portion thereof entitled “Principles of a Civil Code.”

following:

This power of protection and control over individuals deemed incapable of protecting and controlling themselves constitutes 'Guardianship': a kind of domestic magistracy founded on the manifest need of those made subject to it, and one which ought to be invested with all the authority necessary to attain its end, but no more.... * * *

Guardianship being an office altogether burthensome, its duties are cast upon those who are most inclined to discharge them and enjoy the greatest facilities for doing so. The father and the mother, of course, occupy this position before all other persons. Natural affection would dispose them to the office with even greater force than the law; but the law which imposes it upon them is by no means useless. It is because children have been found abandoned by the authors of their being that such abandonment has been made a punishable offence.... * * *

Wardship, being a condition of dependence, is an evil to which we should put an end so soon as there is no danger of its cessation producing a greater evil. But what age ought we to fix for emancipation? [Bentham concludes that the age of 21, fixed by English law, is far more reasonable than the Roman law age of 25.]¹²

In Chapter 28, headed "Of Father and Child", he makes the following comments:

It has already been pointed out that a father is in some respects the master, in others the guardian, of his child. In his quality of master he will have a right to impose tasks on his children, and to make use of their labour for his own benefit, until the age at which the law confers on them a status of independence.... * * *

It might seem, at the first blush, that the legislator need not interpose at all between a father and his children, that he might safely rely on the tenderness of the parent and the gratitude of the offspring. But this view is superficial and mistaken. It is absolutely necessary on the one hand to limit the paternal power, and on the other to assure and sustain filial respect by legal enactment.... [Bentham then advances a number of arguments as to why the State ought not to raise all children in common. He considers that parents are best placed to make good decisions for their children. He then continues.] As a last argument, I will add that the natural arrangement, which leaves with the parent the choice, the mode, and the burden of education, may be likened to a series of experiments, having as their object the perfecting of a general system of education. In every direction progress is advanced and developed through the emulation of individual parents, by the differences in their minds and notions - in a word, by the

¹² 277-281.

variety of particular impulses promoting the general movement. But if all were cast in the same mould, and instruction were imparted everywhere under State authority, errors would be stereotyped, and no progress would be made.

Given the comments of Hardiman J, it is instructive to contrast Bentham's position on family autonomy with that of natural law teaching, as reflected in the Constitution of Ireland. At first blush, Bentham's account of children may appear a little jarring - they appear almost exclusively as instruments - what they can earn for their master or what they can turn into when they reach their majority. However, it must be recalled that Bentham was writing *Legislation* at the turn of the nineteenth century, some 130 years before the papal encyclicals that were subsequently reflected in Articles 41 and 42. Indeed, it may be fairer to note not the way in which Bentham speaks of children but rather the fact that he speaks of children at all. In particular, it is noteworthy that Bentham speaks of the need for the law to protect children from their parents. John Eekelaar has written of the discovery and rediscovery of domestic violence and child abuse:

The absolute power of parents over their children was integral to the social structure. The normal protective reach of the criminal law would stop at the family's threshold. No compelling social interest existed to justify, let alone compel, its intrusion. Violence towards children within the home, if visible at all, simply did not register in the social consciousness as worth remarking. Indeed, it may not even be considered *violence* at all, but looked on as necessary discipline and correction; as natural a part of childhood as illness, learning and labour and, in some societies, ritual humiliation.¹³

Eekelaar then traces how, through the nineteenth century, voices of concern were raised both about domestic abuse of women and child neglect. However, even as late as the second half of the nineteenth century, Eekelaar reports Lord Shaftesbury's view that the enormous and indisputable abuse of children by parents was of "so private, internal and domestic a character as to be beyond the reach of legislation...."¹⁴ In this light, Bentham's recognition of the child as a legal subject potentially needing protection from its parents is probably more significant than the generally instrumental manner in which he presents children. Nevertheless, the Benthamite view, envisaging that the law may intervene to protect children from violence, is somewhat less sympathetic to children than the natural law view as captured in Pope Pius's encyclical, as quoted above:

It also belongs to the State to protect the rights of the child itself when the parents are

¹³ JOHN EEKELAAR, *FAMILY LAW AND SOCIAL POLICY 156* (2nd ed, Weidenfeld and Nicholson, 1984).

¹⁴ *Id.* citing Pinchbeck and Hewitt, *Children in English Society* (1973), at 622. Lord Shaftesbury was responding to a letter seeking his support for legislation dealing with parental child abuse. Pinchbeck and Hewitt do not provide a source for Shaftesbury's comment. They do, however, note that Parliament intervened to protect animals from abuse more than three quarters of a century before it extended statutory protection to the young child.

found wanting either physically or morally in this respect, whether by default, incapacity or misconduct, since, as has been shown, their right to educate is not an absolute and despotic one, but dependent on the natural and divine law, and therefore subject alike to the authority and jurisdiction of the Church, and to the vigilance and administrative care of the State in view of the common good.¹⁵

Here, there is greater recognition of other ways in which the State may need to protect children from their parents. The State may intervene, not simply for reasons of misconduct, but also because of default or incapacity on the part of parents.

Although these differences may be explicable by reference to generally changing social attitudes to children, there do seem to be more fundamental and diachronic ways in which the natural law approach differs from the Benthamite approach. First, the natural law approach pays more attention to how the role of the State interacts with the role of the family. In essence, this is the notion of subsidiarity. John Finnis describes subsidiarity as the idea that “it is unjust for more extensive associations to assume functions which can be performed efficiently by individuals or by less extensive associations, since the proper function of instrumental associations is to help their members help themselves.”¹⁶ Finnis finds this notion immanent in Aquinas's treatment of the common good:

Public good is a part or aspect of the all-inclusive common good. It is the part which provides an indispensable context and support for those parts or aspects of the common good which are private (especially individual and familial good). It thus supplements, subserves, and supervises those private aspects, but without superseding them, and without taking overall charge of, or responsibility for, them. 'Neither in one's whole being nor in all one's belongings is one subordinate to the political community.' And here we may add Aquinas' partial anticipation of the principle of subsidiarity: 'it is contrary to the proper character of the state's governance to impede people from acting to their own responsibilities - except in emergencies'.¹⁷

This notion of subsidiarity appears in Pope Pius's encyclical, as quoted above - the notion that the family is not a perfect society as it does not have in itself the means necessary for its full development. “In such cases, exceptional no doubt, the State does not put itself in the place of the family, but merely supplies deficiencies, and provides suitable means, always in conformity with the natural rights of the child and the supernatural rights of the Church.”¹⁸ A fuller elaboration of the concept of subsidiarity is provided in another of Pope Pius's encyclicals,

¹⁵ Pius XI, *Divini Illius Magistri* ¶ 45 (1929).

¹⁶ JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 237 n. 82 (Oxford, 1998).

¹⁷ *Id.* at 237 (citations and original Latin omitted).

¹⁸ Pius XI, *Divini Illius Magistri*, *supra*, ¶ 45.

Quadragesimo Anno (1931):

78. When we speak of the reform of institutions, the State comes chiefly to mind, not as if universal well-being were to be expected from its activity, but because things have come to such a pass through the evil of what we have termed "individualism" that, following upon the overthrow and near extinction of that rich social life which was once highly developed through associations of various kinds, there remain virtually only individuals and the State. This is to the great harm of the State itself; for, with a structure of social governance lost, and with the taking over of all the burdens which the wrecked associations once bore, the State has been overwhelmed and crushed by almost infinite tasks and duties.

79. As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

80. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.

In Bentham's work, at least where he focuses on the family, there is far less explanation of the role of the State. To the extent that the State appears at all, it is almost as if the family is instrumental to the State (rather than the other way round as it appears in natural law theory): the family performs an authoritative role for unruly youngsters that cannot be well fulfilled by the State. Family experimentation in different forms of education helps the overall betterment

of society. Of course, these differences are scarcely surprising. Bentham's utilitarian notion of the common good could not be further from the natural law conception of the common good.

It is appropriate to reconsider the parallels between the Irish constitutional position, the Natural Law and Bentham's thinking. As pointed out above, while accepting that it was coincidence, in *NWHB* Hardiman J considered that the Irish constitutional dispensation, like the common law, reflected Bentham's view and had "a strong presumption in favour of parental authority free of coercive intrusions by agents of the State". Returning to the theme in *N v HSE*, he reiterated that the Constitution's "preference for the parents as the natural and primary guardians was equally consistent with quite different strands of thought, even a Benthamite one." To the extent that Hardiman J was making a narrow point about the bare preference for parents over the State, he was correct to observe that Benthamite philosophy and the Natural Law were to like effect. However, it is clear that differences quickly emerge between the two philosophies. The natural law approach does not view the agents of the State as "coercively intrusive." The State has a role to play in supporting parents; it should not exceed that role. But the notion that the State and the family stand in some form of antagonistic opposition, where the former is always an intruder on the autonomy of the latter, is not a natural law view. Nor is it the view of the Irish Constitution.

Although this may just be a difference of language and tone in these cases, it translates into something more significant in other cases. In this regard, it is worth noting that within 12 months of his judgment in *NWHB*, Hardiman J was the leading judge in two other seminal constitutional cases concerning the family. In *Sinnott v Minister for Education*, he trenchantly held that the constitutional right to free primary education for autistic people ceased once they reached 18, regardless of their continuing need for such education.¹⁹ In *TD v Minister for Education*, he held that the courts (in effect) could not grant a mandatory order compelling the State to provide secure detention centres for disturbed children (in fulfilment of the State's obligation under Article 42.5 to care for children whose parents have failed in their duty).²⁰ Each of these judgments has its own justifications and must be assessed in that light. For present purposes, however, it can be observed that Hardiman J's judgments are more consistent with a Benthamite view of a coercively intrusive State than with a natural law view of a subsidiary and supporting State.

Proposals for Reform

¹⁹ [2001] 2 IR 545.

²⁰ [2001] 4 IR 259.

The Constitution's preference for parental autonomy has caused considerable controversy and calls for reform. As far back as 1996, the Constitution Review Group - in a comprehensive review of the entire Constitution - recommended that Article 42 be amended to include “an express requirement that in all actions concerning children, whether by legislative, judicial or administrative authorities, the best interests of the child shall be the paramount consideration.”²¹ Since then, there has been a succession of reports and suggestions. Most recently in February 2010, a joint committee of both Houses of the Oireachtas reviewed all previous reports and suggested a number of amendments to Article 42.²² The Committee expressed its intentions in relation to reform as follows, criticising a previous reform proposal put forward by the Government in 2007:

The Committee recognises and endorses the view that the family is best placed to bring up a child, and that in the vast majority of cases parents know best how to promote their children's best interests. However, the Committee noted that there are cases where this is not so, and it is in those cases that the law must be sufficiently robust to enable the State to protect children. The Committee was concerned that in those cases, the provisions of the [Government's previously] proposed amendment would not make it any easier for the State to intervene as appropriate to vindicate the welfare of the child.

It therefore appears that the Committee wished to see the Constitution amended in a manner that both protects parental autonomy and ensures that the State can intervene where necessary to vindicate the welfare of the child. The major criticism of the Committee's reform proposal is that it attempts to perform both these tasks without providing any meaningful guidance as to when parental autonomy can give way to a third party's assessment of a child's best interests.

The Committee's proposed Article 42.1.2 pledges the State to protect the rights of all children to have their welfare regarded as a primary consideration. This is amplified by Article 42.1.3:

In the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration.

This provision means that the existence of a dispute is the trigger for an application of the “welfare and best interests of the child” standard. The Article does not identify who it is directed to (parents, social workers, courts), but it would have to be taken into account by the courts. This was an issue strongly raised by a number of people who made submissions to the

²¹ Report of the Constitution Review Group, Recommendation 4 vii (Stationary Office, 1996), at 337. This report is available at <http://www.constitution.ie/reports/ConstitutionReviewGroupReport.pdf>.

²² Joint Committee on the Constitutional Amendment on Children, “Third Report” (2010). This report is available at http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/20100218.pdf.

Committee, notably Dr Gerard Hogan Senior Counsel, one of Ireland's foremost constitutional lawyers. He put the issue as follows, in a passage extracted at 97 of the Committee's Report:

The *HW* case sums up the dilemma at the heart of this issue. It is all very well to say that children's best interests must be safeguarded. But who is to decide and what does it mean?²³

Unfortunately, the Committee concludes that the concerns raised in this respect were unfounded, but does not explain why. In the absence of any indication to the contrary, it appears that all persons and institutions called on to give effect to the new Article 42.1.3 would have to apply their own understanding of a child's best interests. Ultimately, the courts would have to apply their conception of the welfare and best interests of the child and, given the position of the courts in the polity, this view would win out. Whereas under the existing Article 42.5, the courts impose their own view of best interests only where the parents have failed, here the courts would impose their own view of best interests based on the happenstance of having seisin of a dispute. Although our first reaction may be to think of the sorts of disputes that currently come before the courts (such as in *NWHB v HW* and *N v HSE*), the new Article 42.1.3 would not be limited to such matters. Indeed, if taken to its logical conclusion, Article 42.1.3 could lead to a form of competence creep. As the courts applied their conception of best interests in more and more circumstances, there would be greater incentive for people to bring more and more disputes to court, leading to a further application of the courts' conception of best interests, and so on. Thus, while the new Article 42.1.3 would not directly address the question that the current Article 42.5 squarely answers, it produces a *de facto* answer to the question: one of greatly expanded state power and greatly reduced parental autonomy.

This would be tempered somewhat by the proposed Article 42.3, which provides:

The State acknowledges that the primary and natural carers, educators and protectors of the welfare of a child are the child's parents and guarantees to respect the right and responsibility of parents to provide according to their means for the physical, emotional, intellectual, religious, moral and social education and welfare of their children.

This strongly asserts the primary role of parents in a manner which undercuts the natural meaning of the proposed Article 42.1.3. However, again the proposed Article 42.3 does not provide any answer to the crucial question of the circumstances in which the State may intervene and take over the parents' role. A high rhetorical value is being placed on the primary role of parents, but no guidance is provided to the courts on how they are to balance this with

²³ Gerard Hogan, "Submission to the Joint Oireachtas Committee on the Constitutional Amendment on Children", at 3. This submission can be viewed at http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/submissions/list_of_submissions/68Hogan.pdf.

the other direction that, whenever seised of a dispute, they must act in accordance with what they perceive to be the best interests of the child.

The proposed Article 42.4 seeks to perform this role and is closest to the current Article 42.5:

Where the parents of any child fail in their responsibility towards such child, the State as guardian of the common good shall, by proportionate means, as shall be regulated by law, endeavour to supply or supplement the place of the parents, regardless of their marital status.

The differences between this and the current Article 42.5 are (a) that the explicit reference to exceptional cases are removed; (b) the trigger for intervention is a failure in responsibility, not a failure in duty; (c) rather than intervening by “appropriate means”, the State can now intervene by proportionate means, regulated by law; (d) there is a reference to supplementing as well as supplying the place of parents; (e) it is clarified that this State power applies in respect of children whose parents are not married to each other. The clarification of the position of non-marital children and the reference to supplementing as well as supplying the place of parents are welcome. However, it is plain that the substantive differences here from the current Article 42.5 in terms of setting the threshold for state intervention are minimal. It is questionable whether changing the trigger from failure of duty to failure of responsibility changes anything. Similarly, allowing *proportionate* means as distinct from *appropriate* means does not seem to allow for any greater level of intervention. At most, the removal of the “exceptional cases” proviso may encourage the courts to take a more interventionist approach.

To confuse matters further, the proposed Article 42 retains the old provisions relating to education, on the basis that it was not within the remit of the Committee to address or consider the provisions relating to education set out in Articles 42.2 to 42.4. However, while some of these provisions relate to discrete matters (such as the provision of free primary education), others are closely related to the balance between parental and state roles that have been addressed elsewhere in the Article. Under the proposed Article 42, therefore, the old provisions continue in relation to parents being free to educate their children at home and the State only having a role to ensure that children receive a certain minimum education.

Consider therefore a situation in which a court is asked to reconsider a dispute over the PKU test. The Court must simultaneously apply the following principles:

- regard the child's welfare as a primary consideration;
- treat the welfare and best interests of the child (presumably as perceived by the court) as the first and paramount consideration;

- treat the parents as the primary and natural carers;
- only intervene proportionately if the parents have failed in their responsibility.

These principles are inconsistent. It is of course possible that the courts could reconcile these principles to provide themselves with a test for determining when they should intervene in disputes concerning the welfare of children. However, if they were to do so, it is difficult to see how different this would be from the current approach. Moreover, if it does transpire to be different, it would not be the new textual wording that has produced the difference, but rather the courts' choice of how to balance the competing provisions. Under either scenario, the amendment would have achieved little. At best, it amounts to a giant nudge to the courts to do things differently, without specifying how.

The proposal is currently being considered by the Government. Having initially committed itself to holding a referendum on the issue before the end of 2010, the Government has now indicated that the proposed wording raises unanticipated difficulties. A referendum in some form is expected in 2011, although it now looks less likely that the proposal advanced by the Oireachtas Committee will be retained in its entirety. Any amendment would first have to pass both Houses of the Oireachtas before being put to the people.

Practical implications

Any legal regulation (or non-regulation) in this area is fraught with difficulty. The ideal legal position would not only produce the right results in cases that come before the courts but would also encourage and facilitate the resolution of cases in the correct manner outside the courts. Put another way, the perceived legal position will have wide-ranging ramifications in situations that may never be subject to legal scrutiny. Of course, the ideal legal position is probably unattainable. Even if there were no epistemic problems with identifying a child's best interests, it is difficult to imagine any system that will strike the correct balance all the time. That said, proponents and opponents of reform must also be aware of the manner in which a legal position may produce sub-optimal results away from the public gaze. Two recent and disturbing Irish stories illustrate the pitfalls on both sides.

One case involves a family of two parents and six children.²⁴ The Health Board became aware of the family in the early 1990s. There were reports of serious drunkenness on the part of both parents. Anonymous letters alleged neglect. The children's school also expressed concerns: the children had head lice crawling down their faces, were wearing shoes that were too small,

²⁴ "Litany of Questions over Children Left to Years of Abuse" *The Irish Times*, 16 February 2010.

urinating on the walls and defecating in their underwear. A number of case conferences were held and the Health Board sought to provide assistance. However, in 2000 with the help of an unspecified right-wing organisation, the children's mother successfully applied to the High Court for an interim, *ex parte* Order restraining the Health Board from taking the children into care. The Health Board did not apply to have the Order vacated for seven months. Even after the Order was vacated, there was no effective intervention in the family. These details came to light when the mother was convicted in January 2009 of the offence of incest with one of her sons and the abuse of her other children. In February 2010, the father was convicted of 47 charges of rape and sexual assault of his eldest son over a period of three years, between the ages of 12 and 15. That son in turn admitted, during cross-examination at his father's trial, to raping one of his younger sisters over a period of a number of years.

Over the same period, there has been an increasing focus on children who have died while in the care of the State. Most recently, on 13 May 2010 the body of 17 year old Daniel McAnaspie was found dumped in a drain on a farm in Meath, some 80km from where he was last seen in the Dublin suburb in which he lived. Mr McAnaspie had been in State care since the age of 10. Several people are being questioned in relation to his murder. This death reactivated a continuing public concern. A number of disturbing details have emerged in the public controversy, both through the media and in the Oireachtas. Most troubling, the Health Service Executive (HSE) was for some time unable to put a figure on the number of children who had died in its care since 2000. In April 2010, the Ombudsman for Children published her report on the national implementation of the Government's "Children First" policy on child protection. As part of this report, she reviewed an audit carried out in the Cork/Kerry region based on data from 2004 and 2005. The Ombudsman considered that this was a region that was proactive in its attempts to implement the Children First policies. Nevertheless, there were disturbing findings. One of the problems was that many social workers were not seeing and interviewing children during their investigations. 75% of files had no record of the outcome of an assessment, despite a requirement that all outcomes be recorded. The standard times for screening and initial assessment were long. 1.3% of cases did not record the child's name. 33% of cases did not record the child's date of birth.²⁵

These two stories illustrate the problems that can arise both from parental autonomy and state intervention. On the one hand, the ease with which the abusive mother secured a Court Order to prevent her children being taken into care makes one wonder about how the principles from cases such as *NWHB v HW* may be applied. That said, there are surely questions for the care services about why they responded in such a supine way to an interim, *ex parte* Order. On the

²⁵ Ombudsman for Children, "A Report Based on an Investigation into Children First: National Guidelines for the Protection and Welfare of Children" (2010), at 30-31.

other hand, the record of the care services in relation to child deaths is profoundly shocking. At best, it seems that children are lost in a woefully inefficient bureaucracy. However, this is the bureaucracy that would be first to apply any new “best interests” test and to take over caring for children where their parents are deemed to have failed. At the very least, these examples from the real world suggest that reforming the child care services is a more urgent priority than reforming the law, and might allow for a more measured consideration of what legal reform is appropriate.

Conclusions

The Irish constitutional case law well illustrates the difficulty of striking the right balance between parental autonomy and the residual role of the State in protecting a child's best interests. A recognition that the Constitution is more consistent with Natural Law theory than with Bentham may be helpful in providing a more fully worked out conception of how to fashion a State that can support families and children. It would also help to avoid the false analogy between individual autonomy and family autonomy. However, even with such a conception of the State, serious practical difficulties remain in setting the threshold for State intervention. The modest suggestion of this Article is that it might be better to focus, for now, on the practicalities of how we manage the interventions that we do make before deciding if we need to make them more often.