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# Human Rights, Constitutions and Non-Citizens

*Derechos humanos, constituciones y extranjeros*

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RECIBIDO: 2014-12-10 / ACEPTADO: 2014-02-05

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**Resumen:** Las constituciones contemporáneas contemplan la protección de los derechos fundamentales no solo de sus ciudadanos sino de cualquiera que se encuentre en su territorio. En este trabajo se analiza normativa y sobre todo jurisprudencia comparada en relación con esta cuestión. Concretamente en mecanismos internacionales de protección de derechos humanos y en los sistemas constitucionales de Estados Unidos, Canadá, Sudáfrica e Irlanda.

**Palabras clave:** Derechos humanos, universalidad, extranjeros, Comité de Derechos Humanos, Sistema constitucional de Estados Unidos, Sistema constitucional de Sudáfrica, Sistema constitucional de Canadá, Sistema constitucional de Irlanda.

**Abstract:** Contemporary constitutions provide for the protection of fundamental rights not only for citizens but for anyone in its territory. This paper discusses legislation and comparative jurisprudence on this issue. Specifically that in international mechanisms for the protection of human rights and the constitutional systems of the United States, Canada, South Africa and Ireland.

**Keywords:** Human Rights, universality, non-citizens, Human Rights Committee, Constitutional system of the United States, Constitutional System of Canada, Constitutional System of South Africa, Constitutional System of Ireland.

The topic of the following pages is the rights of non-citizens from the standpoint of human rights and constitutional law. It is a fascinating subject which is very much in a stage of rapid and radical transition, doubtless affected by the process of globalization of people, enterprises and law, therefore I will start with a couple of reflexions about public and private International Law.

Public international law was formerly largely concerned with positivist questions relating to such matters as sovereignty, state succession and international treaties<sup>1</sup>. Over the past few decades it has increasingly absorbed a rich normative repertoire, notably in respect of human rights, with the great

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<sup>1</sup> Public international law was also saturated with racist and imperialist assumptions which facilitated the seizure of the land and assets of colonized countries: see GOZZI, G., *History of International Law and Western Civilization* (2007).

international human rights instruments of the United Nations, and the development of international criminal justice.

Many modern constitutions incorporate within their framework principles of international law and international human rights.

A similar process is apparent in relation to private international law. The traditional approach was to downplay human rights concerns. The public policy (*order public*) principle enabled courts to distance themselves from particularly egregious human rights violations but the private international law themes of jurisdiction, choice of law and recognition of foreign judgments did not contain any developed sense of respect to international human rights norms. Recently, important changes have occurred. Foreign state immunity is contracting when confronted by claims for serious violations of human rights<sup>2</sup>. The U.S. Alien Torts Claims Act of 1789 has yielded a rich jurisprudence on compensation for egregious human rights violations throughout the world and offers a useful model for other countries to follow. International conventions on private international law, such as the Hague Convention on International Child Abduction of 1980, display sensitivity to human rights concerns. Moreover, the gradual increase in emphasis on habitual residence rather than nationality or domicile as a connecting factor in private international law has, in its result if not its intent, improved the position of non-citizens.

Let us turn to the subject of international human rights. Over the past six decades we have witnessed the phenomenon of human rights becoming an integral element in the global political order. Beginning with the Universal Declaration of Human Rights in 1948, international human rights instruments, at global and regional levels, shape the contours of international law and, increasingly, as I have mentioned, national constitutions. The process is far from complete: it has a dynamic character which promises further radical change in coming years.

Two central aspects of human rights theory are the concept of human dignity and the universality of human rights. Both of these concepts challenge notions of legal positivism and require a revision of traditional thinking in relation to state sovereignty, territoriality and lack of concern for non-citizens. Human rights theory does not tear down national boundaries or require a form of world government that extinguishes the sovereignty of states; it does,

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<sup>2</sup> See FOCARELLI, «Denying Foreign State Immunity for Commission of International Crimes: The *Ferrini* Decision», 54 Int. & Comp. L. Q. 951 (2005).

however, force us to reassess old attitudes and to reconsider the question of the rights of non-citizens.

Human dignity involves the notion of the inherent value and equal worth of every human being. This is a radical and transformative concept, which forces us to recognise in the stranger a creature of inestimable value. It breaks down the sense of «them and us» which can attach to notions of citizenship and alienage.

Let us look a little more closely at international human rights requirements in relation to non-citizens. The first, and most important, of these requirements is that of equal treatment.

The Universal Declaration of Human Rights (1948) defines the fundamental rights of all people. Article 14 (1) states that «everyone has the right to seek and to enjoy in other countries asylum from persecution». Article 15 stipulates that «everyone has the right to a nationality» and that «no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality».

Under Article 2 (1) of the International Covenant of Civil and Political Rights (1976) every state party undertakes to grant «all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status». These rights include the right to fair procedure, freedom of expression, and protection from tyranny and injustice. This Covenant also prohibits the expulsion of lawful aliens from a nation without fair procedures, except when national security does not permit. The alien must also be provided with representation.

In its General Comment No. 15. *The Position of Aliens under the Covenant*, the Human Rights Committee explains that: «the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant...

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.

«Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3. Since such restrictions must, *inter alia*, be consistent with the other rights recognized in the Covenant, a State party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country (art. 12, para. 4)»<sup>3</sup>.

The UN General Assembly's *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*<sup>4</sup> is also worth nothing. The Declaration contains provisions that are designed to assuage concerns that it offers improper assistance to law breakers. Article 2 (1) provides that:

«Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate Laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights».

Moreover, Article 4 requires that:

«Aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State».

Article 5 provides as follows:

«1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

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<sup>3</sup> Paras 2, 5-8

<sup>4</sup> A/RES/40/144 (13 December 1985).

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

(d) The right to retain their own language, culture and tradition;

(e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;

(f) The right to retain their own language, culture and tradition;

(g) The right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations.

2. Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights:

(a) The right to leave the country;

(b) The right to freedom of expression;

(c) The right to peaceful assembly;

(d) The right to own property alone as well as in association with others, subject to domestic law.

3. Subject to the provisions referred to in paragraph 2, aliens lawfully in the territory of a State shall enjoy the right to liberty of movement and freedom to choose their residence within the borders of the State.

4. Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien».

Article 6 provides that no alien is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and that; in particular, no alien shall be subjected without his or her free consent to medical or scientific experimentation.

Article 7 provides that an alien lawfully in the territory of a State may be expelled from it only in pursuance of a decision reached in accordance with law and, except where compelling reasons of national security otherwise require, should be allowed to submit the reasons why he or she should not

be expelled. It goes on to prohibit individual or collective expulsion of such aliens on grounds of race, color, religion, culture, descent or national or ethnic origin.

Article 8 provides as follows:

«1. Aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights, subject to their obligations under article 4:

(a) The right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(b) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others;

(c) The right to health protection, medical care, social security, social services, education, rest and leisure, provided that they fulfil the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State.

2. With a view to protecting the rights of aliens carrying on lawful paid activities in the country in which they are present, such rights may be specified by the Governments concerned in multilateral or bilateral conventions».

Under Article 9, an alien is to be arbitrarily deprived of his or her lawfully acquired assets.

Under Article 10, any alien is to be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national.

The *International Convention on the Elimination of All Forms of Racial Discrimination* of 1969 is also relevant. Article 1 (3) provides that nothing in the Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. This proviso is important: statutory provisions that appear to be based on citizenship status may sometimes disguise a discrimination based on nationality.

If we look at what is happening in international human rights today, we see an expansion of obligations beyond States Parties to non State actors, commercial or personal. We also see a very slow movement towards a theory of human responsibilities as well as rights. 60th of these developments are likely to have an effect on rights and responsibilities of non-citizens in coming years.

### NATIONAL CONSTITUTIONS

Let us now turn to consider the position of non-citizens under national constitutions. Some constitutions expressly limit their protection to citizens. Others, including Spain's, contain generous provisions in relation to the rights of non-citizens. Still others are unclear on the position of non-citizens. I will refer briefly to some of these approaches.

### THE UNITED STATES OF AMERICA

The Constitution of the United States of America does not contain clear provisions relating to non-citizens. It has been necessary for the Supreme Court to provide authoritative interpretation.

Very briefly, the position is that non-citizens present in the United States may be able to invoke particular provisions of the Constitution but whether they can claim the same protection as citizens depends very much on the particular right in question and the context in which it has allegedly been violated.

*In Plyler v Doe*<sup>5</sup>, the United States Supreme Court, by a 5 to 4 majority held that children who had not been «legally admitted» to the United States were nonetheless entitled to claim the benefit of the Equal Protection Clause of the Fourteenth amendment when successfully challenging a Texas statute withholding from local school districts funds for their education. The Court considered it clear from the record of the Congressional Debates of 1866 that it had been like intent of the framers of the Amendment to extend its protection to all those present within the jurisdiction of any of the States.

Brennan J observed:

«That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the

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<sup>5</sup> 457 U.S. 202 (1982).

State's civil and criminal laws. And until he leaves the jurisdiction –either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States– he is entitled to the equal protection of the laws that a State may choose to establish».

The Court acknowledged that the appropriate test to apply to the legislation was its «rational relationship» to a legitimate public purpose. The Court considered that the legislation failed this test:

«Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial «shadow population» of illegal migrants –numbering in the millions– within our borders. This situation raises the specter of a permanent [457 U.S. 202, 219] caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But, the children of those illegal entrants are not comparably situated. Their «parents have the ability to conform their conduct to societal norms», and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases «can affect neither their parents' conduct nor their own status». *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

«[V]isiting... condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible

for his birth and penalizing the... child is an ineffectual –as well as unjust– way of deterring the parent». *Weber V. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But the legislation is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of [the legislation]».

Brennan J went on to observe:

«Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a «constitutional irrelevancy.» Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. See *San Antonio Independent School Dist. v. Rodriguez*, supra, at 28-39. But more is involved in these cases than the abstract question whether 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in 21.031 can hardly be considered rational unless it furthers some substantial goal of the State».

*The Court could identify no such goal*

What about the position where an alleged violation of the Constitution occurs outside the territory of the United States, to a non-citizen? In *Boumediene v Bush*<sup>6</sup>, the United States Supreme Court last June has given the answer, at

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<sup>6</sup> U.S. Supreme Ct, 12 June 2008.

all events in the context of habeas corpus. The majority of the Court, against a strong dissent from Scalia J, held that no «formalistic sovereignty-based test» applied but rather that the answer would be found by assessing in the particular circumstances whether judicial enforcement would be «impracticable and anomalous».

### SOUTH AFRICA

As you know the post-apartheid Constitution of South Africa is a very liberal document placing emphasis on dignity and equality.

In *Khosa v Minister of Social Development*<sup>7</sup>, the Constitutional Court of South Africa held that permanent residents who were not citizens had a constitutional right to social security and that legislation which deprived them of this right violated their dignity and equality.

The Minister had argued that citizenship was a requirement for social benefits in almost all developed countries<sup>8</sup>. Mokgoro J responded: «That may be so in respect of certain benefits. But unlike ours, those countries do not have constitutions that entitle ‘everyone’ to have access to social security, nor are their immigration and welfare laws necessarily the same as ours<sup>9</sup>.

«It may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country. The position of permanent residents is, however, quite different to that of temporary or illegal residents. They reside legally in the country and may have done so for a considerable length of time. Like citizens, they have made South Africa their home. While citizens may leave the country indefinitely without forfeiting their citizenship, permanent residents are compelled to return to the country (except in certain circumstances) at least once every three years. While they do not have the rights tied to citizenship, such as political rights and the right to a South African passport, they are, for all other purposes mentioned above, in much the same position as citizens. Once admitted as permanent residents they can enter and leave

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<sup>7</sup> 2004 (6) BCLR 569 (CC), analyzed by Williams, «Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States / South African Analysis», 21 S. Af. J. on Human Rts 450 (2005), OLIVIER, M. and VONK, G. (eds.), *Comparative Review of the Position of Non-citizen Migrants in Social Security* (Report for the South African Treasury, 2004).

<sup>8</sup> The Minister referred to the position in the United States, Canada and the United Kingdom.

<sup>9</sup> Para. 54.

the country. Their homes and no doubt in most cases their families too, are in South Africa. Some will have children born in South Africa. They have the right to work in South Africa, and even owe a duty of allegiance to the state. For these reasons, I exclude temporary residents...»<sup>10</sup>.

The Minister sought to rely on the decision of a United States appellate court in *City of Chicago v Sbalala*<sup>11</sup>, holding that the exclusion of non-citizen permanent residents from participation in a legislative welfare scheme was not inconsistent with the equal protection clause of the US Constitution. The American Court had applied a rational basis standard of review, holding that there was a rational connection between the federal government's immigration policy and its welfare policy of encouraging the self-sufficiency of immigrants. Under section 27 (2) of the South African Constitution, however, a higher standard, of reasonableness, was applied. This set the bar far higher than the rational basis test.

The Court went on to hold that the exclusion of permanent residents from benefits constituted discrimination. Mokgoro J observed:

«There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance»<sup>12</sup>.

The denial of the welfare benefits impacted not only on permanent residents without other means of support, but also on the families, friends and communities with whom they had contact. Apart from the undue burden that this placed on those who took on this responsibility, it was «likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants»<sup>13</sup>.

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<sup>10</sup> Para. 59.

<sup>11</sup> 189 F.3d 598 (7<sup>th</sup> Cir 1999).

<sup>12</sup> Para. 74.

<sup>13</sup> Para. 76.

Mokgoro J concluded her analysis as follows:

«The Constitution vests the right to social security in ‘everyone’. By excluding permanent residents from the scheme for social security, the legislation limits their rights in a manner that affects their dignity and equality in material respects. Dignity and equality are founding values of the Constitution and lie at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents has not been established. The exclusion of permanent residents is therefore inconsistent with section 27 of the Constitution»<sup>14</sup>.

The *Kbosa* decision is of interest to comparative lawyers in its invocation of universalist norms of dignity and equality, albeit based on an analysis of the specific provisions of the South African Constitution. The willingness of the Constitutional Court, however, to restrict the constitutional entitlement to permanent residents is hard to reconcile with these norms, since the needs of temporary residents may in some cases be very pressing. The decision may be contrasted with the Court’s high sensitivity to the needs of the destitute in the famous *Grootboom*<sup>15</sup> decision.

#### CANADÁ

There has been some interesting jurisprudence on the rights of non-citizens. The Supreme Court of Canada regards discrimination based on citizenship as an analogous ground of discrimination under section 15 (1) of the Canadian Charter of Rights and Freedoms.

This does not inevitably mean that there is a violation of the Charter<sup>16</sup>. In *Lavoie v The Queen in Right of Canada*<sup>17</sup>, the exclusion of non-citizen permanent residents from access to public service employment was held defensible as it was considered to act as a legitimate incentive to permanent residents to become citizens of Canada, which relies so much on its policy of encouraging immigration. In *Charkaoui v Canada*<sup>18</sup>, the Supreme Court of Canada rejected a claim that section 15 had been violated where permanent residents and foreign nationals deemed a threat to national security were detained; section

<sup>14</sup> Para. 85.

<sup>15</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

<sup>16</sup> [1999] 1 SCR 497.

<sup>17</sup> 2002 SCC 23.

<sup>18</sup> 2007 SCC 9.

6 of the Charter specifically permitted differential treatment of citizens and non-citizens in deportation matters. In other respects, however, the detentions were held to violate the Charter.

## IRELAND

Let me turn to consider the position in Ireland. It is, of course, the country with whose legal system I am most familiar; but it also has a rich jurisprudence on the subject which may be of interest to comparative lawyers.

The task on identifying who are rights-holders under the Constitution has been complicated by two decisions over three decades ago: *Byrne v Ireland*<sup>19</sup> and *Mestell v Coras Iompair Eireann*<sup>20</sup> While taking strong and welcome position on two specific issues –state immunity and horizontality of enforcement of rights– they failed to provide any considered analysis of the scope of a right under the Constitution, the criteria for being a rights-holder or the question whether the scope of a right against the State is necessarily co-extensive with that of a right against a non-State actor.

In *Byrne*, the Supreme Court, by a majority, held that the State was not immune from being sued in tort. Much of Walsh J's analysis related to the question whether the British royal prerogative of sovereign immunity (that «the King can do no wrong») had survived the coming into force of the 1922 Constitution. That issue is not our present concern. What is of more relevance is Walsh J's concept of «the state» and its relationship with «the people». In the High Court, Murnaghan J had grounded the State's immunity from suit on Article 5 of the Constitution, wherein it is asserted that «Ireland is a sovereign... state». Murnaghan J considered that «th[is] simple statement... is completely inconsistent with the propositions that the State is subject to one of the organs of the State, the judicial organ, and can be sued as such in its own courts». Walsh J could not accept that interpretation:

«It seems to one to assume that, even if the State is the sovereign authority and not simply the creation of the acknowledged sovereign authority, the people, the concept of being sued in court is necessarily inconsistent with the theory of sovereignty».

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<sup>19</sup> [1972] IR 241. For analysis see KELLY, J., *The Irish Constitution* (4<sup>th</sup> ed. By G. Hogan & G. Whyte, 2003), Hogan, G. & Morgan, D. G., *A Constitutional Law in Ireland* (3<sup>rd</sup> ed., 1998), Chapter 17.

<sup>20</sup> [1973] IR 121.

Walsh J went on to note that:

«[i]n several parts of the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation. The Oireachtas cannot prevent or restrict the citizen from pursuing his remedy against the state in order to obtain or defend the very rights guaranteed by the Constitution in the form of obligation imposed upon the State; nor can the Oireachtas delegate to any organ of state the implementation of these rights so as to exonerate the state itself from its obligation under the Constitution»<sup>21</sup>.

Later in his judgment, Walsh J said:

«Where the people by the Constitution create rights against the State or impose duties upon the State, a remedy must be deemed to be available. It is as much the duty of the State to render justice against itself in favour of citizens as it is to administer the same between private individuals».

What emerges from Walsh J's analysis is a perception of the State, not at the apex of constitutional authority, but rather as the agent of the people, obliged to discharge its responsibilities to citizens no less than one citizen is obliged to discharge his or her responsibilities to other citizens<sup>22</sup>. This does not, of course, mean that the *actual or content* of the State's responsibilities to citizens is identical to that of the responsibilities owed by one citizen to another.

It is interesting to note that Walsh J interprets the State's various guarantees to citizens in the Constitution as representing the imposition by the Con-

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<sup>21</sup> The reference to the facts that Constitution bestows «rights upon the citizens» and that the Oireachtas cannot «prevent or restrict the citizen from pursuing his remedy against the state in order to obtain or defend the rights guaranteed by the Constitution...» do not appear to be premised on any developed theory of a nexus between citizenship and the state but rather on the simple fact that «[I]n several parts of the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State...».

<sup>22</sup> I will use the words «citizens» here merely to echo Walsh J's language rather than to prejudge the question of who is a rights-holder.

stitution on the State of the duty to «make certain provision, for the benefit of the citizens». This does not amount to a theory of citizenship guaranteeing a relationship of rights and duties between the citizen and the State but rather a constitutional theory in which «the people» are sovereign and in which the rights and duties as between citizens and State are those which happen to have been prescribed by the people in their constitutional document.

In *Meskeel v Caras Iompair Eireann*<sup>23</sup>, Walsh J stated that a right guaranteed or granted by the Constitution «can be protected... or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and... the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the... persons who have infringed that right».

The effect of this holding is significant. If constitutional rights are rights enforceable simply against the State then it is relatively easy to handle the question of the international remit of constitutional protection. In such a juridical order, a person cannot complain that his or her constitutional rights have been infringed by some non-state actor or by a foreign state. If, however, as is the case in Irish constitutional theory, constitutional rights are enforceable, not merely against the State but against non-state actors, it no longer is conceptually impossible to envisage the infringement of these rights by such non-state actors, whether within the state or abroad, or by a foreign state. Good reasons, of principle or practical policy, may be found for limiting or excluding the remedy for infringements of this character where they lack a nexus –personal, political or territorial– sufficient to warrant granting such a remedy, but courts cannot simply have resort to the sheer axiomatic impossibility of recognizing the entitlement to a remedy in such circumstances.

It seems that a combination of factors –territoriality, including place of acting and place of infringement of the right, the degree of connectedness of the transgressor with Ireland– is involved. This seems to be different in the case of the relationship between the victim and the Irish State. Here, courts may be less concerned with the particular intensity of connectedness between the victim and the State. It is hard to articulate the grounds for making such a distinction but one can be reasonably confident that courts, in spite of the

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<sup>23</sup> [1973] IR, at 132-33.

easy equiparation in *Meskill* between the position of the state and non-state actors, will be more circumspect about imposing liability on the latter where there is some degree of disconnectedness between the victim or transgressor within Ireland.

*Articles 40 to 44 of the Constitution: Preliminary Observations*

Articles 40 to 44 of the Constitution are the fundamental rights provisions. Of course other provisions in the Constitution protect rights that are surely also fundamental such as the right to vote or the right to be tried on a criminal charge in due course of law. The extent of the entitlement of non-citizens to vote is clear and unambiguous and therefore need not detain us. Later I shall refer to the jurisprudence on trial in due course of law. Anticipating that discussion, I can mention here that non-citizenship does not appear to be problematic in that context.

Our present concern relates to the selective limitation of certain rights to citizens. The crucial provision relating to equality –Article 40.1– provides that:

«[a]ll citizens shall, as human persons, be held equal before the law...».

Under Article 40.3.1 the State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen. And Article 40.3.2 provides that the State:

«shall in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen».

The persistent emphasis on the citizen in these provisions is striking.

Article 40.4 contains a dissonance between subsection 1 and subsection 2, in that the former prohibits the deprivation of personal liberty of citizens, save in accordance with the law, whereas the latter permits a challenge to the deprivation of liberty to be made «on behalf of any person». The jurisprudence takes the broad view and does not exclude non-citizens from invoking Article 40.4.2°.

Article 40.5 provides for the inviolability of the dwelling of every citizen and Article 40.6 prescribes the right of citizens to express freely their convictions and opinions, to assemble peacefully and to form associations and unions. Note again the persistent references to citizens in these provisions.

Let us now turn to Articles 41 and 42, which do not include any reference to citizens.

Article 41 provides:

«1. 1° The State recognizes 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.

2.1° In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that

i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years,

ii. there is no reasonable prospect of a reconciliation between the spouses,

iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and

iv. any further conditions prescribed by law are complied with.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved».

Article 42 provides:

«1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty

of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognized or established by the State.

1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. 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».

Article 43 articulates a universalist natural law perception of the right to property. The complicating element is that property rights also crop up under Article 40.3.2, which provision is restricted to citizens. So far there has been no clear jurisprudence relating to the position of non-citizens in this context.

Article 44.2.10 guarantees «to every citizen» freedom of conscience and the free profession of religion, subject to public order and morality. The implications for non-citizens have yet to be addressed but they surely raise significant and obvious questions.

### *The jurisprudence on Articles 40 to 42*

Let us turn to consider the jurisprudence on Articles 40 to 42. Three approaches emerge. The first, based on a literal interpretation, concludes that non-citizens do not have protection if the right in question is expressly guaranteed to citizens. The second, based on natural law theory, is willing to give protection to non-citizens, through some instances subject to the requirement of establishing some extra connection with the state. The third accepts that

protection may in some respects be afforded to non-citizens but it is separate from, and unequal to, that afforded to citizens<sup>24</sup>.

Speaking in broad terms, non-citizens have yet to establish a clear and unambiguous judicial recognition of entitlement to protection under Article 40. So far as Articles 41 and 42 are concerned, they have had only limited protection, in spite of the fact that these Articles are not expressed to be limited to citizens.

#### *Article 40*

The most comprehensive analysis of the question whether non-citizens are entitled to protection under Article 40 is still the decision of *The State (Nicolaou) v An Bord Uchtála*<sup>25</sup>. There, a British citizen, the father of a child born outside marriage, challenged the validity of adoption legislation which did not require his being informed of the prospective adoption of the child. The arguments put forward by the father included the claim that the legislation violated Article 40.

In the High Court, differing views were expressed on the entitlement of the father to make this claim.

Henchy J quoted the text of Article 40: 1 and Article 4.3.1. He went on to state:

«It will be observed that these constitutional rights and guarantees are given to citizens. But it is agreed that the prosecutor is not an Irish citizen; he is a British subject. Faced with this apparent impediment to the prosecutor's claim to the benefit of rights and guarantees given only to citizens, his counsel seeks to circumvent this seeming exclusion from the ambit of the constitutional provisions I have quoted by relying on two submissions. First, he says that the word 'citizen' or 'citizens' in these provisions should be read as being equivalent to 'person' or 'persons', thereby including the prosecutor. Second, he says that the impugned provisions of the Adoption Act, 1952, are an unconstitutional violation of the rights and guarantees vested in citizens by these parts of Article 40, and that the prosecutor, although not a citizen, is entitled to rely on such unconstitutionality.

As for the first of these submissions, it is important to remember that Articles 40, 41, 42, 43 and 44 are headed, 'Fundamental Rights'. Article 40

<sup>24</sup> Cf. *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360.

<sup>25</sup> [1966] IR 567.

is sub-headed, 'Personal Rights', Article 41, 'The Family', Article 42, 'Education', Article 43, 'Private Property', and Article 44, 'Religion'. When one reads through these five Articles one sees that certain of the fundamental rights laid down are stated in terms of the citizen and others in terms which are not restricted by the test of citizenship. This is understandable, and, in some cases, necessary, when one considers the nature and scope of the rights protected by these Articles.

It is not, therefore, possible to say that the words 'citizens' or 'citizen' are equivalent to 'persons' or 'person' throughout these Articles. Indeed, I do not understand counsel for the prosecutor so to argue. In fact, he admits that it is not possible to equate 'citizen' with 'person' even throughout Article 40 itself: for example, Article 40, 2, is in the following terms:

1° Titles of nobility shall not be conferred by the State.

2° No title of nobility or of honour may be accepted by any citizen except with the prior approval of the Government.

The bar on accepting titles of nobility or of honour except with the prior approval of the Government can of its very nature be applicable only to Irish citizens as defined by Article 9 of the Constitution. This was conceded by the prosecutor in the course of the argument. One further notices that Article 40, 4, 1°, says: 'No citizen shall be deprived of his personal liberty save in accordance with law,' while Article 40, 4, 2°, 3°, 4°, and 5°, which deal with habeas corpus, refer to the unlawful detention of 'a person'. The prosecutor's argument is therefore reduced to saying that while the words 'citizens' and 'citizen' in other parts of Article 40 may have the meaning given to them by Article 9, they should be read as being identical with 'person' and 'persons' in Article 40, 1 and 3. I find nothing to support this argument.

Article 5 of the Constitution says that Ireland is a sovereign, independent, democratic state. Article 40, 1, states the equalitarian standing of its citizens by saying that as human beings they shall be held before the law. Article 40, 2, seeks to provide that there shall be no obtrusion on this equality of citizenship by the conferring of titles of nobility by the State, or by any citizen accepting a title of nobility or of honour except with the prior approval of the Government. In my view, the citizens referred to in article 40, 1, are the same as those in Article 40, 2, namely citizens as defined by article 9.

Article 9, 2 says: 'Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens'. In so far as personal rights are concerned, the State is concerned primarily only with its citizens, who owe it this loyalty. The preamble to the Constitution, by the words, 'we, people of Eire... Do hereby adopt, enact, and give to ourselves this Constitution', shows that this is basically a constitution of the Irish people for the Irish people.

The purpose of Article 40, 3, of the Constitution –and of other provisions with which I need not concern myself– is to state a constitutional right which attaches to citizenship and falls as a duty on the State. It is only a citizen who can claim that right, and he is entitled to it as a constitutional incident of his citizenship. The prosecutor, being an alien, has no claim to it».

Teevan J came to a somewhat different conclusion. He stated:

«The question... arose whether a non-citizen could be heard to invoke the fundamental rights provision of the Constitution (other than, of course, Article 40, 4, 2 which does not arise in this case), particularly against a statute. The Attorney General did not take the point and his counsel stated that, in the present case, I would be prepared to proceed without reference to the matter of non-citizenship when it has been allowed to pass by the Attorney General.

The Constitution enjoins legal recognition of the fundamental rights it defines and acknowledges. Those rights do not owe their existence to the Constitution. While the Constitution, governing the rights and duties of citizen to citizen, citizen to State and State to citizen, can guarantee the preservation, maintenance and enforcement of those rights and duties only to citizens, I do not think it follows that we are obliged to deny the constitutional protection of those natural rights enshrined in the Constitution to every non-citizen merely on the ground of his non-citizenship, even to a person who not only lack citizenship but is also not resident here (for we have resident non-citizens to whom the point would be of more practical importance).

There must, of course, be many cases wherein the non-citizen must submit to a position of un-equality with the citizen, where the law will deny to the non-citizen privileges and legal remedies enjoyed by the citizen. Where, however, there is no conflict between the common good and the right sought to be asserted by a non-citizen, I do not think the Court should feel obliged willy-nilly to refuse to hear the non-citizen's plaint; that is to say where, if his case be well founded otherwise, his own personal rights are involved...

In my view it is one for discernment according to the particular circumstance. Circumstances may exist by reason of which it would be no more than impertinent for a non-citizen to attack the constitutionality of one of our statutes, or by reason of which it would otherwise be necessary or prudent to take the point. In the present case the Attorney General did not consider it necessary, or politic, to do so and with respect to the opposite opinion I think this should be accepted and that the issues might be determined without reference to the prosecutor's non-citizenship...

It does not directly arise and it is unnecessary for me to state my own opinion but I think I should say that while I agree with the opinion... [of] Mr. Justice Henchy that the constitutional guarantees extend only to citizens, I respectfully disagree with his interpretation of sub-article 2 of Article 40 and with the reasoning he derives there from. Sub-article 1 of Article 40, in my opinion, is complete in itself and does not require the aid of sub-article 2. Of its own force it ensures that the law will be administered without respect of titles».

Teevan J's analysis fell well short of the conclusion that citizenship is irrelevant to the scope of the constitutional protection. Its thrust rather is to deny the absolute proposition that non-citizenship is invariably fatal to a claim for such protection afforded by Article 40. It is surely significant also that Teevan J conceded that there must be «many cases wherein the non-citizen must submit to a position of un-equality with the citizen, where the law will deny to the non-citizen privileges and legal remedies enjoyed by the citizen». Teevan J made no attempt to define what these cases might be or how much latitude the Oireachtas might have in denying rights to non-citizens.

Murnaghan J adopted a neutral stance but one that was clearly unsympathetic to the proposition that citizenship was not relevant to the scope of the constitutional protection.

On appeal, the Supreme Court did not attempt to resolve the question. Walsh J (delivering the judgment of the Court) stated:

«The High Court judgments rested in part upon the fact that the appellant is not a citizen of Ireland. This Court expressly reserves for another and more appropriate case consideration of the effect of non-citizenship upon the interpretation of the Articles in question and also the right of a non-citizen to challenge the validity of an Act of the Oireachtas having regard to the provisions of the Constitution. The opinion which the Court has pronounced upon these Articles is not dependent upon or affected by the fact that the appellant is not a citizen of Ireland or by the fact that the Attorney General through his counsel informed this Court that he did not wish to submit in this case that the rights, if any, of the appellant under the Articles in question were any the less by reason of the fact that he was not a citizen of Ireland».

No subsequent decision has involved such a close analysis of the position of the non-citizens regarding Article 40<sup>26</sup>. The only other decision in which a

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<sup>26</sup> Though Hamilton P, in *Kennedy v Ireland* [1987] IR 587, for reasons unelaborated upon, accepted that a non-citizen (the second plaintiff) was entitled to invoke Article 40.3. In view of the stance of the defendant regarding the second plaintiff's claim, this is scarcely a hugely significant precedent.

serious attempt was made to do so was *Finn v Attorney General*<sup>27</sup>, where Barington J, *obiter*, adopted a natural law perspective in concluding that:

«[t]he fact that the wording of Article 40.3 commits the State to protect and vindicate the life of ‘every citizen’ does not justify the inference that it relieves the State of the obligation to defend and vindicate the lives of persons who are not citizens».

Two comments on this passage seem appropriate. First, it does not amount to the claim that the rights of non-citizens under Article 40.3 are co-existent with those of citizens. Secondly, so far as it is based on natural law theory, one cannot ignore the crass rejection of that theory by the Supreme Court in the Abortion Information Article 26 Reference<sup>28</sup>. It is true that natural law theory has since then been rehabilitated somewhat but the process of resuscitation would need to continue for some time and at greater intensity before one could have any confidence in contending that non-citizens have any, let alone, co-extensive protection under Article 40.3.

### *Articles 41 and 42*

Articles 41 and 42 give effect to a philosophy that regards the family based on a marriage as a crucial focus of normative autonomy, over whose values the state’s values should have priority in only limited, defined circumstances of parental failure to duty for physical or moral reasons. This model of the family-state relationship clearly has implications in relation to state interventions in the areas of guardianship, child care and adoption. The danger, of course, is that too great an emphasis on family autonomy would force state agencies to hold back from protecting children from the risk of injury, abuse or neglect by their parents. Family autonomy translated largely into parental autonomy since children were considered to lack the capacity to exercise autonomy.

Let us turn briefly to consider the position relating to adoption. When adoption was introduced in 1952, it was designed principally to deal with cases where the mother of a child born outside marriage sought to have the child

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<sup>27</sup> [1983] IR 154.

<sup>28</sup> *In re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

adopted. The legislation did not provide for the adoption of children designated «legitimate», whose parents were married to each other at the time of their child's birth. The general legal opinion was that the adoption of this category of children would not be consistent with the terms of Article 41 and 42 of the Constitution.

It was only in the relatively recent past that this opinion came to be questioned. The Adoption Bill of 1987 provided for the adoption of children –regardless of the status of their parents– where the parents «for physical or moral reasons have failed in their duty towards the child», the failure is likely to continue until the child is eighteen, and «constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect of the child».

On an Article 26 Reference<sup>29</sup> by the President, the Supreme Court upheld the validity of the Bill.

#### *The international remit of Articles 41 and 42*

It seems clear enough that the values underlying Articles 41 and 42 are universalist in that they reflect unambiguously a natural law philosophy relating to marriage, the family and the relationship between the family and the state.

Does this mean that Article 41 and 42 should be interpreted as protecting all families throughout the world? Not necessarily. It does not follow from the fact that these Articles reflect a universalist philosophy that they radiate to all corners of the earth. There would be nothing logically inconsistent about their being subject to specific restrictions such as citizenship or residence in Ireland, for example.

The language of the Articles gives only opaque clues as to such possible limitations. The character of the references to the State, notably the pledge by the State to guard with special care the institution of marriage<sup>30</sup> and the State's undertakings to provide for primary education<sup>31</sup> and to endeavour to supply the place of the parents, in exceptional cases of parental failure of duty

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<sup>29</sup> *Re the Adoption (No 2) Bill 1987* [1989] IR656, analysed by Byrne & Binchy, *Annual Review of Irish Law* 1988.

<sup>30</sup> Article 41.1.2°.

<sup>31</sup> Article 42.4.

towards their children<sup>32</sup>, are hard to reconcile with the idea that Articles 41 and 42 were intended to embrace every family in the world.

*Northampton County Council v ABF and MBF*<sup>33</sup> was the first of several decisions involving resort to the Irish courts by English parents seeking the protection of Articles 41 and 42 against threatened action by a local authority in relation to their children –such as adoption– which would not be permissible under Articles 41 and 42. A 14-year-old child had been placed in the care of the plaintiff council by a court order but (it claimed) illegally removed by her father to Ireland. It was «quite clear»<sup>34</sup> that, if the child was returned to England, it was proposed that she should be legally adopted, contrary to the wishes of the father, through her mother appeared to approve. The father and mother were both English citizens and domiciliaries. Their marriage had been celebrated in England and their child had been born there.

Hamilton J refused the plaintiff's application for an order returning the child to it. He quoted Article 41.1 of the Constitution and two passages from Walsh J's judgment in *McGee v Attorney General*<sup>35</sup>. In the first passage, Walsh had said:

«Articles 40, 41, 42 and 44 of the Constitution all fall within that section of the Constitution which is called 'Fundamental Rights'. Articles 41, 42 and 43 emphatically, reject the theory that there are no rights without law, no rights contrary to law and no rights anterior to law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority: and the Family as the natural primary and fundamental group of society has rights as such which the State cannot control»<sup>36</sup>.

In the second passage, Walsh, J. said:

«The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law».

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<sup>32</sup> Article 43.5.

<sup>33</sup> [1982] ILRM 164 (High Ct, Hamilton J, 1981).

<sup>34</sup> [1982] ILRM at 164.

<sup>35</sup> [1974] IR 284.

<sup>36</sup> [1974] IR, at 310.

Hamilton, J. stated:

«In the course of his judgment in *G v. An Bord Uchtála*<sup>37</sup> [Walsh J.] stated that he still held these views, with which I am in complete agreement.

The Supreme Court in *The State (Nicolaou) v. An Bord Uchtála*<sup>38</sup> expressly reserved for another and more appropriate case consideration of the effect of non-citizenship upon the interpretation of the Articles in question.

It seems to me however that non-citizenship can have no effect on the interpretation of Article 41 or the entitlement to the protection afforded by it.

What Article 41 does is to recognise 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, which rights the State cannot control. In the words of Walsh, J. already quoted, ‘these rights are part of what is generally called the natural law’ and as such are antecedent and superior to all positive law.

The natural law is of universal application and applies to all human persons, be they citizens of this State or not, and in my opinion it would be inconceivable that the father of the infant child would not be entitled to rely on the recognition of the Family contained in Article 41 for the purpose of enforcing his rights as the lawful father of the infant the subject matter of the proceeding herein or that he should lose such entitlement merely because he removed the child to this jurisdiction for the purpose of enforcing his said rights.

These rights are recognised by Bunreacht na h-Éireann and the courts created under it as antecedent and superior to all positive law: they are not so recognised by the law or the courts of the jurisdiction to which it is sought to have the infant returned.

Consequently it is for these reasons that I have at this stage refused to grant the orders sought by the applicant herein viz. that the child be returned to them or their agent.

The child however also has natural rights. As stated by the Chief Justice in *G v. An Bord Uchtála*<sup>39</sup> ‘having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must

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<sup>37</sup> [1980] IR 32 (Sup. Ct., 1978).

<sup>38</sup> [1966] IR 567.

<sup>39</sup> [1980] IR, at 56.

equally be protected and vindicated by the State'. It will be necessary therefore to have a full plenary hearing of this application for the purpose of ascertaining whether the child's rights are being protected before any final order can be made in this case»<sup>40</sup>.

Hamilton, J.'s judgment can perhaps be interpreted as involving merely the denial of the unqualified position that Article 41.1 of the Constitution may not be availed of by a non-citizen who has brought a child to this jurisdiction in defiance of a court order in a foreign jurisdiction. This falls well short of the positive assertion that foreigners, wherever they reside or are domiciled, and regardless of the absence of any connection with Ireland, may avail themselves of the protection of Article 41.1. *What Northampton County Council v. A.B.F. and M.B.F.* leaves entirely unresolved is the nature of the connection which will be sufficient to enable a non-citizen to invoke Article 41. 1. The decision, therefore, simply does not address the broad issue that, on a casual reading, it may seem to determine.

*Some later decisions took a far more cautious approach*

It seemed for many years that the *Northamptonshire* decision had not found support in Irish jurisprudence. Relatively recently however, in *London Borough of Sutton v RM*<sup>41</sup>, in the context of the Hague Convention on International Child Abduction, it was accepted on behalf of the applicant that the English family that had come to Ireland was entitled to invoke Articles 41 and 42 of the Constitution.

It might have been the case that the father and children were Irish citizens but, even if this was not so, Finlay Geoghegan J accepted that the children and mother were living in Ireland at the time of the hearing and were entitled to these rights.

*Observations on Jurisprudence of Articles 40 to 42*

This cursory analysis of the case law establishes, I believe, that the courts have just about reached first base in their analysis of the remit of constitutional protection under Articles 40 to 42. The judges have adopted compet-

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<sup>40</sup> [1982] IILRM at 165-166.

<sup>41</sup> High Court, 19 December 2002, analysed by BYRNE & BINCHY, *Annual Review of Irish Law* 2002, 68-71.

ing approaches, some literal, others philosophical, but no judgment could be described as preventing a thorough and comprehensive framework of analysis that brings together all the precedents and seeks to render them coherent.

*The Administration of Justice*

There is one aspect of constitutional protection where it seems clear beyond argument that non-citizenship does not reduce one's rights. This is in relation to the administration of justice. In *The State (McFadden) v Governor of Mountjoy Prison*<sup>42</sup>, Barrington J held that a British national resisting extradition was entitled to invoke the guarantee to the citizen of basic fairness of procedure contained in Article 40.3. He referred to *In re Haughey*<sup>43</sup>, in which Ó Dálaigh CJ had stated:

«The provisions of Article 38.1 of the Constitution apply only to Trials of criminal charges in accordance with Article 38; but in proceedings before any tribunal where a party to the proceedings is on risk of having his good name or his person or property, or any of his personal rights jeopardized, the proceedings may be correctly classes as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactment or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights»<sup>44</sup>.

Barrington J observed:

«The prosecutor is not an Irish citizen, but [counsel] for the respondent<sup>45</sup> has taken no point on this. It appears to me that he was right not to do so. The substantive rights and liabilities of an alien may be different to those of a citizen. The alien, for instance, may not have the right to vote or may be liable to deportation. But when the Constitution prescribes basic fairness of procedures in the administration of the law it does so, not only because citizens have rights, but also because the courts in the administration of justice are expected to observe certain forms of due process enshrined in the Constitution. Once the courts have seising of a dispute, it is difficult to see how the standards they should apply in investigating it should, in fairness, be any different in the case of an alien than those in the case of a citizen».

<sup>42</sup> [1981] ILRM 113 (High Ct, Barrington J, 1980).

<sup>43</sup> [1971] IR 217 (Supreme Ct).

<sup>44</sup> [1971] IR, at 264.

<sup>45</sup> [1981] ILRM, at 117.

Professor Casey notes that:

«[T]his reasoning would avoid several difficulties. If ‘citizen’ in Article 40 cannot be treated as equivalent to ‘person’, certain curious results would seem to follow. Evidence obtained in breach of constitutional rights, inadmissible in criminal proceedings against a citizen, might be he Id admissible against an alien. An example would be statements obtained during the course of detention which, in the case of a citizen, would violate Article 40.4.10; or real evidence obtained by a search which would, in case of a citizen, violate the guarantee of Article 40.5. Any such developments, however logical, would leave the State in breach of its obligations under the European Convention on Human Rights, which protects ‘persons’. But since Article 38.1 guarantees that ‘no person’ shall be tried on any criminal charge ‘save in due course of law’ the way is open to avoid any such result by reading ‘due course of law’ in the light of those obligation»<sup>46</sup>.

In *The State (Trimbole) v Governor of Mountjoy Prison*<sup>47</sup>, where an Australian citizen had been arrested under section 30 of the Offences Against the State Act 1939 as a delaying device to facilitate the processing of an application for his extradition, Egan J invoke McFadden, stating:

«It need hardly be emphasized that in considering the legality of the detention of the prosecutor his guilt or innocence in respect of the charges against him is totally irrelevant. The offences for which he is wanted in Australia could hardly be more serious but the same legal principles would be applicable to an Irish citizen who was wanted in Australia for an offence of simple larceny. The fact that he may be a citizen of Australia does not deprive the prosecutor of his right to basic fairness of procedures...»<sup>48</sup>.

On appeal to the Supreme Court, McCarthy J observed:

«If... the Executive itself abuses the process of law as in this case by the wrongful use of s. 30 of the Offences Against the State Act, 1939, and, for what it is worth, persists in that abuse by giving false evidence in the course of the constitutional enquiry, are the courts to turn aside and, apart from

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<sup>46</sup> CASEY, J., *Constitutional Law in Ireland* (3<sup>rd</sup> ed., 2000), 447.

<sup>47</sup> [1985] IR 550 (Supreme Ct, affirming High Ct., Egan J).

<sup>48</sup> *Id.*, at 565.

administering severe strictures to those concerned, appear to sanction the procedure that has been adopted to secure the extradition of an individual to the requesting State? It is not easy for anyone, particularly those outside the courts, to disassociate legal principles from the facts of any given case; it is important, therefore, to emphasise that the application of such legal principles must be the same for an Australian citizen on a temporary visit to Ireland as they would be for an Irish citizen, permanently resident in Ireland, when either of them is sought by a requesting State with which State Ireland has an extradition treaty or arrangement»<sup>49</sup>.

It is scarcely surprising or controversial that the courts should be solicitous to ensure that the administration of justice is applied even-handedly as between citizens and non-citizens. Article 38.1 contains no limitation regarding citizenship: it provides simply that: «[n]o person shall be tried on any criminal charge rule in due course of law»<sup>50</sup>.

As the passage quoted above from Professor Casey's textbook shows, it would be difficult if the guarantee contained in Article 38.1 were qualified by violations of due course of law which are capable of being classed as falling under other constitutional provisions which are expressed to apply to citizens. The courts have a distinct sense of proprietorship of the administration to justice<sup>51</sup>.

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<sup>49</sup> *Id.*, at 581-582. See also *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *D. P. v Governor of the Training Unit, Glengarriff Parade* [2001] 1 IR 492 (High Ct, Finnegan J), *Murphy v Greene* [1990] 2 IR 566, at 578 (Supreme Ct, perGriffin J).

<sup>50</sup> Emphasis added. For consideration of Article 6.5 see KELLY, J.M., *The Irish Constitution* (4<sup>th</sup> ed., 2003), chapter 6.5.

<sup>51</sup> See also *Rederij Kennemerland BV v Attorney General* [1989] ILRM 821 (Supreme Ct, 1988, aff'g High Ct, Gannon J, 1987). This decision contains the following broad statement by Gannon J (at 840):

«The vessels involved in these proceedings are Dutch owned and operated, and the masters are Dutch nationals and I infer, are neither citizens of Ireland nor have property nor place of business nor residence in Ireland. By entering and making use of the waters within the fishery limits of the State they become amenable to the laws of this country. Thereupon they are entitled to expect and to insist that those laws will be applied and administered in accordance with the Constitution of the State. To the extent that the laws are no so applied o administered in relation to them, their persons and property they are entitled to call upon the Superior Courts to uphold the Constitution and to provide a remedy against breach of the provisions of the Constitution. But I do not think they have any right or standing in this Court to challenge the legislation of this country enacted or adopted by the legislature beyond or for any purpose other than of affording to them a remedy or relief for a wrong, harm or disadvantage suffered by such alleged failure to uphold the Constitution».

CONCLUDING OBSERVATIONS

This brief review of international developments shows how difficult and unresolved are the questions concerning the rights of non-citizens. We can hope for further clarification in future years.

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KELLY, *cit.*, para. 7.1.44 comments in respect of this passage from Gannon J's judgment that: «[t]he significance of this approach is that it allows for the application of the fundamental rights provisions of the Constitution to non-citizens without having to invoke any natural law theory». It would be wrong to regard this dictum as representing a major jurisprudential contribution to the debate on the remit of constitutional protection of non-citizens. Gannon J came to no conclusion that any law was unconstitutional. On appeal the Supreme Court had nothing to say on Gannon J's obiter observation. If the intended import of his remarks was that mere entry into the jurisdiction of the State automatically confers as extensive constitutional protection on foreigners as on citizens, this proposition has no legal precedent and, whatever its possible merits, would need some further elaboration.