

BOOK REVIEW**“CHILDREN’S RIGHTS IN IRELAND –
LAW POLICY AND PRACTICE”**

(Tottel Publishing, 2008)

Dr Ursula Kilkelly

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Dr Kilkelly’s book is a comprehensive study of children’s rights in Ireland, and examines in commendable detail all the relevant law on the topic. This includes our own constitution, all international conventions and associated instruments, our own case law, that of other jurisdictions and of the European Court of Human Rights and the European Court of Justice, and our own legislation and government initiatives.

The author concludes that “the infrastructure necessary to underpin effective protection of children’s rights in Ireland is largely missing”. She blames the absence of independent rights for children in the Constitution, particularly their right to a say in their lives. She seeks a shift away from the paternalistic approach, whereby adults know best, to the recognition that children are rights-holders with a right to a say in their lives. She emphasises, indeed she labours, this point in considering it from various aspects. First in considering the law of other countries, where she cites with approval the decision of the Canadian Supreme Court in *Baker v. Canada*¹ in holding that the Immigration Officer did not adequately consider the best interests of the children. In considering our own constitutional law, she criticises the overwhelming majority of the jurisprudence as ignoring or underplaying children’s rights when they come into conflict with those of the parents. She contrasts unfavourably the decisions of Geoghegan J. and Hardiman J. in the Baby Ann case² where the Supreme Court returned a child from her adoptive parents after

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¹ [1999] 2 S.C.R. 817

² *N. v. Health Service Executive* [2006] IESC 60.

two years, to the dicta, of which she approves, of Finlay-Geoghegan J in *F.N. v. C.O.*³. In that case the judge took into account that each of the girls was of an age and maturity at which it was appropriate to take into account their wishes. The author praises this as a “dynamic” interpretation of Article 40.3.

Dr Kilkelly examines the proposed draft Articles 42A of the Constitution on which she and others made submissions to the *Joint Committee on the Constitutional Amendment on Children 2008* and says it does not re-calibrate the historic imbalance between the constitutional rights of children and those of parents and the family. Rather than strengthen the constitutional recognition and protection of the rights of children, the proposed provision appears to entrench in the Constitution the inferior constitutional position of children as compared with adults. Quite logically she homes in again on the Baby Ann case and *NW Health Board v. HW*⁴ (the “heel prick” PKU case), and says the proposed Article is substantially weaker than both section 3 of the 1964 Act and Article 3 of the Convention on the Rights of the Child.

Dr Kilkelly develops her argument in further chapters on defining the Child and the Family, the Child’s Right to the Family, Abduction and Protection from Harm. She does have trenchant and reasonable criticism of the rights, or lack of them, for children in care. On adoption, she does have some well founded criticism of our present law. She has some interesting observations on health care and education, and criminal law.

Dr Kilkelly makes a credible case for constitutional change, and to a lesser extent for importation of European and international instruments into our domestic law. This book however leaves me with a feeling of unease. We have had no lack of law and practice through the years based on abstract rights. The sacredness of the family gave us generations of non-interference in apparently rock solid family units. Hence, the Kilkenny Incest case and the McColgans in Sligo and many more known only to God. During most of the nineteenth and twentieth

³ [2004] 4 I.R. 311.

⁴ [2001] 3 I.R. 635.

centuries, the manifest failure of a mother to look after her children (such failure sometimes consisting of her cohabiting with a man other than a husband), was sufficient to hand children to an institution after perfunctory court consideration. The result is catalogued in a depressing but all too believable genre of autobiographical literature.

How will Baby Ann and the subject of the PKU case react in later life? Will Baby Ann rejoice that she was reunited with her natural parents, or will she suffer psychologically from the rupture of the bond with her adoptive mother? If the child who did not get the heel prick test suffers a serious disability in the future, will he rejoice that he has his constitutional right intact if not his health?

In my view a constitutional right is merely a valuable skeleton. I feel more comfortable when it is filled out with the flesh of judge made law – law, may I say, crafted by judges when hearing human cases, ideally not appeal judges or academics.