The State, the Courts, and the Care of Minors at Risk

Many aspects of contemporary 'Child Law' merit scrutiny and will be explored in today's conference. Indeed the recent report by the Law Society's own Law Reform Committee ('Rights-based Child Law: The case for reform', March 2006) highlights the growing number of areas where the legal rights of the child are being articulated. The scope of this paper is far more modest. Drawing from my experience in charge of the High Court 'Minor's List', I wish to consider children's rights in the specific context of the care of 'minors at risk'. My more immediate focus is the manner in which, by the exercise of inherent jurisdiction, the Superior Courts have been called on to deal with increasingly complex problems with regard to young persons at risk in cases decided during the last 15 years.

In dealing with this issue in a necessarily selective way perhaps I might be permitted at the outset to raise a question as to the title of this conference, namely "Achieving Rights-based Child Law". To perceive "rights" in isolation from duties must surely be a fallacy especially when those whose rights are to be vindicated must rely on others to do so. While it is attractive to engage in the exercise of identifying rights *per se* it is necessary to recognise that there may be correlative duties, and also to recognise that rights may be subject to limitation in order to ensure that the Constitution is harmoniously interpreted. Thus the scope of this paper involves selective consideration of one area where the courts have been called on to vindicate rights but where in fact much of the court work involves ensuring compliance with duties already statutorily defined *or* seeking to identify ways in which statutory and constitutional rights may be properly be performed and fulfilled having regard to other balancing interests.

Those attending this conference will be familiar with the type of problems which have arisen regarding young people at risk where the High Court is called upon to exercise inherent jurisdiction, *viz.* powers which the courts hold themselves in order to ensure that constitutional rights are vindicated. Typically such a young person comes from a broken home, is not attending school, spends long hours on the streets, is dangerously involved in drugs, is often under the malign influence of older people and is "out of control". But most critically such young person will be engaging in conduct which poses a threat to his or her own life, health or welfare (or that of others). Typically again, circumstances are such that the parents are unwilling or unable perform and fulfil their true roles as parents.

In the absence of the parental role, the State may embark on two courses of action.

First, an application may be made for a care order in the District Court. Historically there were gaps and omissions in legislation such as the Children's Act 1908, which deprived that court of the power, where appropriate, to detain young persons at risk in the interests of their safety. Thus, in the last 20 years a new – second – form of action was devised (outside the realm of wardship proceedings) where the High Court was asked to exercise its inherent jurisdiction to place such young person in detention for their own safety. I will describe here the form of such proceedings, consider their constitutional context and thereafter consider how such rights relate to duties, and how, in practice and in general, such constitutional and statutory duties have been fulfilled. I will also briefly touch on decisions made by the European Court of Human Rights in Strasbourg.

Background: The Category of Cases and the Procedure Involved

For those unfamiliar with such High Court proceedings it may be helpful briefly to describe the judicial review procedure which is invoked. Such an application may be brought by the Health Service Executive (hereinafter 'HSE'), a third party, a parent or a guardian *ad litem*. The essential relief sought is for the temporary civil detention of a young person. That detention is, and in order to be lawful generally must be, sought in a suitable special care or high support unit. Such units must provide a course of educational or therapeutic treatment in a secure setting and for a limited period.

It is interesting to trace the way in which this jurisdiction has expanded, even within one decade. A situation which was perceived in the 1990's in cases such as *F.N.* and *D.G.* as entirely exceptional has now evolved into a list where, typically, on each Thursday there are 15 to 20 cases and sometimes upwards of 80 healthcare professionals and others in court. In passing I must observe that this apparent 'escalation' is no doubt due in part to certain negative societal changes – but is also, I believe, in part due to positive factors, namely a greater awareness of the problems and increased willingness and efforts by relevant agencies (currently *inter alia* the HSE) to address them.

Each party in the proceedings is represented by solicitor and counsel. Sometimes in more complex cases senior counsel are retained. It is not unknown for there to be five or more legal teams representing, respectively: the young person's mother and (perhaps separately) father, the guardian *ad litem*, the Health Service Executive, the Special Residential Services Board, and (together) the Attorney General and the Minister for Education. To clarify: The HSE has a statutory duty to provide for the care of young people in the area in which it operates in the event of

such care not being provided by parents. The Special Residential Services Board (SRSB) fulfils a specific and valuable role in the identification (sometimes at very short notice) of a suitable secure setting where the educational and therapeutic role must be provided. I also mentioned that it is occasionally necessary for the Attorney General and Minister for Education to be represented. This might arise in circumstances where it is accepted that the detention is necessary but where no suitable space can be identified in an appropriate secure location.

The Constitutional Context

A common feature in all such applications if that the placement of the minor in an appropriate secure place of detention is sought because their life, safety or welfare is said to be at stake. Such applications raise profoundly important issues.

D.G. v. Eastern Health Board

Only six years ago Professor James Casey in his work "*Constitutional Law in Ireland*" 3rd Edition, 2000, at p. 502 wrote;

> "Until recently the proposition that a person not charged with any offence could be detained by a court order in the interests of his or her own welfare would have been dismissed as outlandish. But it has now been endorsed by the Supreme Court in the extraordinary case of *D.G. v. The Eastern Health Board* [1998] 1.I.L.R.M. 241."

In that case, the applicant, a minor, sought an order compelling the defendants to provide suitable care and accommodation for him. He came within the general description of young persons set out earlier. Various temporary arrangements had been made. But all such expedients were exhausted. The applicant had both medical and psychological problems. Ultimately an order was made by the High Court (Kelly

J.) directing the applicants detention in St. Patrick's Institution (a penal unit) for a period of weeks during which time a full psychiatric assessment was to be carried out upon him. This order was made by the court as a last resort and the judge made clear that the placement of an applicant in a penal institution in the absence of any other suitable accommodation albeit for a limited period and for good reason, raised profoundly important constitutional concerns. A rationale of the detention was that there was then no other suitable accommodation.

On appeal, the Supreme Court held that the courts had such an inherent power to detain in order to defend and vindicate the constitutional rights of a citizen and consequently (in the case of a young person at risk) had jurisdiction to do all things necessary to vindicate his or her rights. Hamilton C.J. stated that this jurisdiction should be exercised only in –

> "Extreme and rare occasions, when the court is satisfied that it is required for a short period in the interests of the welfare of the child and that there is at the time no other suitable facility".

Denham J.'s dissenting judgment, although accepting that the court had such inherent jurisdiction, identified a number of constitutional concerns in adopting, as an expedient what she termed "a step to far" of civil detention. First, the applicant was to be detained in an inappropriate *penal* institution, in the course of civil proceedings brought by him in relation to his proper care and accommodation. Second, she considered that such an order invaded several of his constitutional rights, including those to liberty, equality and bodily integrity. The rationale for detention therefore can only be based on the vindication of superior constitutional rights in the hierarchy. The fact that applications of this kind have become more commonplace does not

detract from the proposition that the courts must be careful to ensure that such rights are protected in the context of a harmonious interpretation of the Constitution.

Learned authors (see Kilkelly) have raised questions as to the ultimate logic of the principles involved in *D.G.* if pursued to an ultimate conclusion. While, on its face, it is authority only for the emergency detention of a young person at risk why *in principle* might such a power not be invoked in relation to an adult at risk? A further concern is the breadth and potential subjectivity of the justifying criteria which may be relied upon such as welfare, health or education. While common sense, the balancing of constitutional rights and the principle of proportionality may necessarily arise, these fundamental concerns based in our Constitution, must not be disregarded.

The ECHR Context

The *D.G.* decision did not end with the Supreme Court. In May 2002, the Court of Human Rights in Strasbourg found Ireland in violation of Article 5 of the Convention on Human Rights (right to liberty and security of persons). The judgment of that court affirmed that the provision of *education* was a prerequisite to lawful detention under Article 5(1)(d). The court rejected any concept of the use of detention for the sole purpose of protection or containment of young persons at risk. What may be striking to an observer was the extent to which the Court of Human Rights in some earlier cases (which *D.G.* did not overrule) appeared to countenance the idea that detention for 'educational' purposes (using a broad definition) may be lawful under the Convention on Human Rights).

The applicant had been placed in St. Patrick's because there was no other secure place for him at the time. The placement of young person in a penal institution in the absence of due criminal process may only be a last resort. The rationale of such

a court determination may only be that it places the right to life and welfare in a superior place, and on the facts, in the constitutional hierarchy to other fundamental values such as liberty, equality and bodily integrity.

I must point out that the Superior Courts in Ireland had felt constrained to adopt this exceptional course of action *inter alia* because of *lacuna* in the legislation dating back as 1908. As Geoghegan J. had pointed out in *P.S. v. The Eastern Health Board* (High Court, Geoghegan J., 27th July, 1994) the health boards had no powers of civil containment or detention under the legislation then pertaining. Thus notwithstanding their statutory duty to provide for children in need of care and protection, the health boards were powerless under the legislation with respect to children who were out of control, and at risk and who required such care in a secure setting. It was only in such circumstances that the Superior Courts felt constrained to invoke the remedy of detention upon the basis of inherent jurisdiction. Ultimately in Part 3 of the Children Act 2001, the Legislature proceeded to address the omission by inserting a new section into the Child Care Act 1991 (s. 23) imposing on the health boards a duty to seek a special care order in the District Court where the behaviour of the child or young person was such that it imposed a real and substantial risk to his or her health, safety, development and welfare and where it was necessary in the interests of the child that such a course of action be adopted. I will revert to this jurisdictional issue later in this paper (see 'Interpolation'). For now, however, I need just point out that whatever technical or jurisdictional changes are underway (and they are a step in the right direction), the aforementioned key issue of compliance and enforcement of duties (and correspondingly, rights) will remain justiciable, before whichever court, and therefore the *substantive* points I am raising today are in no way moot.

Returning to the ECHR aspects: The concepts of health, safety, development and welfare as a rationale for detention may be perceived as both broad and subjective. That these are not artificial concerns was illustrated in the case of *Koniarska v. The United Kingdom* (decision 12th October, 2000, no. 33670/96). There the European Court of Human Rights appeared to countenance the detention of a 17-year old girl, on the stated basis of "educational supervision" which was considered to include detention for the purpose of providing secure care and treatment. As was pointed out by Dr. Ursula Kilkelly in one of her many stimulating and comprehensive articles ('Children's Rights – *D.G. v. Ireland*' [2002] DULJ 268) the Court held that, in the context of the detention of minors, the words "educational supervision" should not be equated rigidly with notions of classroom teaching, but might embrace many aspects of the exercise by a local authority of parental rights for the benefit and protection of the person concerned.

In countenancing such form of detention the court distinguished *Koniarska* from an earlier case, *Boumar v. Belgium* (judgment 29th February, 1998, series A No. 129, 11 E.H.R.R) where it had concluded that the detention of a young man in a remand prison in conditions of isolation and without the assistance of staff with educational training did not constitute "detention for the purposes of educational supervision". Commentators have raised the question as to whether these earlier decisions are overly deferential to states, especially in the context of criteria for detention which may be difficult to define or might be seen as over-broad.

When *D.G.* came before the Court of Human Rights the judgment of the court confirmed that the provision of education was a prerequisite to lawful detention under Article 5(1)(d), it also rejected any concept of the use of detention for the sole purpose of protection or containment of young persons at risk. What is striking to an Irish

observer however is the extent to which the Court of Human Rights would still appear to consider that detention for "educational" purposes (using a broad definition) may still be justifiable and lawful under the Convention.

More worryingly some traces of E.C.H.R. jurisprudence appear to indirectly countenance or perhaps at least indicate an institutional phenomenon well-known and recognised by United States commentators. That is the concept of "mission creep" where certain powers and objectives are entrusted to a body and thereafter such powers expand and are implicitly rationalised in order to fill a social or political vacuum which may exist.

In particular two concepts have been seen as especially worrying. The first is the elision of the civil and criminal jurisdictions of the courts. Second is the deployment of a broad interpretation of the term "education" as a rationale for a step that may be seen as morally justifiable but (from an Irish perspective) constitutionally dubious on the path of expediency.

The cases in practice – actual or potential problems:

I now want to touch briefly on a number of questions which from time to time have arisen and which may still arise. One must acknowledge that developments in the social and medical sciences (both in a diagnostic and remedial capacity) as well as relative availability of resources may mean the evolution or enhancement of legal rights and duties. Likewise, what can be expected in any era under the rubric of 'good administration' can change and in turn effect the content of those rights and duties. Whether these or issues arise in a legal guise depends on a matrix of facts in each case, but it is appropriate that these issues be expressed, and again appropriate that in this forum they be expressed only as questions. They include the following: whether

there is a sufficiency of special care and high support units in the jurisdiction; whether there is sufficient space in such units; whether there is an adequate number of care workers or health professionals in such units when in operation; whether there are adequate treatment and 'step-down' and aftercare facilities; while sincerely emphasising the extreme dedication of the managers and professionals involved in this work, whether there are difficulties, due to the factual and institutional complexities, in devising timely and complete care plans; whether there exists a shortage of speech therapists or psychologists who must deal with perennial problems such as a need for cognitive therapy treatment or in order to treat drug or alcohol addiction; whether in terms of lines of demarcation between various state agencies a more efficient situation could be reached (and I fully understand that the historical situation is fortunately being redressed in this regard); and whether indeed there are new and more flexible procedures which the courts could adopt.

I emphasise these are merely questions. The answers lie outside the scope of this paper. The answers to such questions and indeed their precise implications for legal rights in any one instance may only be determined in a court of law on the basis of evidence and without any prejudgment. It is not for the courts to dictate policy as such. However, the courts do have a function in identifying the duties which devolve upon state agencies and the consequences which may arise in the event of failure to perform such duties.

Compliance with a court order, whether for detention or other purposes, cannot be reliant on a process of facilitation. Court orders once made must be obeyed. However, ideally we should be moving towards a situation where the inherent power and indeed the judicial review powers of the superior courts would be invoked only in exceptional cases involving the appropriate rationale for temporary

detention. At this point it is appropriate, and I wish to take the opportunity, to put on record the selfless and dedicated service of the Chief Executive of the Special Residential Services Board, Mr. Roger Killeen, for his selfless and dedicated service in the resolution of many of the intractable issues which sometimes trouble the courts.

Clearly too, great care must be taken, as I am sure it is, to ensure that difficult situations involving young persons in other units (i.e. units other than special care units, namely support units and step-down units) is not permitted to evolve into "crisis" so as to necessitate an application to court by way of judicial review when, of course, early intervention by expert agencies or professionals can obviate the need for such an application. While the rights of other residents can and may be vindicated, administrative inconvenience does not fall into the same category, and potential litigants must remain vigilant (as I am sure they are) to ensure that courts are not inappropriately and unnecessarily cast in the role of decision-makers where the appropriate performance of statutory duty mandates and dictates detention of a young person in a particular way, and in a particular unit.

As I already stated, the function of the courts in these cases is often to identify the appropriate manner in which duties should be performed. It would be inappropriate for a court to engage in a process of re-interpretation of law where there are difficulties in performing a statutory duty devolved upon an agency. It is not the day-to-day function of courts to redefine lines of demarcation and responsibility which already exist in statute. The invocation of the inherent power (and too, the judicial review power) of the superior courts should only appropriately arise in exceptional cases.

However, in appropriate cases it *is* essential that the courts articulate steps which may, or may not be, taken in order to ensure the harmonious interpretation of

rights under the Constitution, even in the context of identified statutory rights. In *T.D. v. The Minister for Education and Others* [2001] 4 I.R. 259, Murray J. (as he then was) defined the scopes and limitations of the jurisdiction of the courts in this context where he observed:-

> "Judicial statements as to the amplitude of the powers of the court in this regard in such cases as the *State (Quinn) v. Ryan* and *D.G. v. Eastern Health Board* can only be applied and interpreted within the ambit of the role conferred by this Constitution on the courts with due respect to the role and function of the executive and legislature."

With regard to adjudicating on whether the State may have acted in disregard of its constitutional obligations to provide for minors he defined a threshold of justiciability or reviewability with reference to:-

> "[a] conscious and deliberate decision by the organ of the State to act in breach of its constitutional obligations to other parties, accompanied by bad faith or recklessness."

Obviously the courts are and must be careful to ensure that the fundamental distinctions between the role and function of the Executive and the Legislature are properly observed and maintained. The issue as to whether there is a duty under the E.C.H.R. to ensure the vindication of Convention rights relating to children by all measures which may reasonably be expected of States is not one which to my knowledge has been considered in the courts of this jurisdiction under the E.C.H.R. Act of 2003 (see *Zawadka v. Poland* 4854 2/1999, 23rd June, 2005; *Siemianowski v. Poland* 459720/00, 6th September, 2005; *Karadzic v. Croatia* 35030/04, 15th December, 2005). Such recent decisions of the Court of Human Rights may possibly

be of significance as they may raise the issue of the adequacy of steps in order to ensure substantive compliance with Convention rights.

Interpolation: A note on jurisdictional issues

Latterly, the legislature moved to vest the District Court with an analogous jurisdiction to that currently deployed by the High Court. This was to be effected in statutory form by s.16 of the Children Act 2001. This new section provided for the amendment of the Childcare Act 1991 for this purpose. The new section (s.23) outlines the duties of the (then) health boards (now HSE) towards children at risk. It empowers the District Court to commit such children to the care of health boards for their accommodation in appropriate certified special care units. These are of course non-penal institutions. A child on being found guilty of an offence shall not be placed in such unit. Such units are to provide for the health and care of the child. While the new section has been commenced by statutory instrument (S.I. 548 of 2004), that instrument specifically excludes the proposed powers of the Gardaí to endeavour to deliver or arrange for the child to be delivered to the custody of the Health Board. Therefore, the full panoply of the new District Court jurisdiction is not yet being relied on routinely.

Final Observations:

As I am conscious of both limitations of time and appropriate constraints on the judicial office there are perhaps four points I would raise at this juncture.

The first is based on the fact that the Constitution designates the family as the fundamental unit of society. This is more than a mere shibboleth. There is a surprising low level of parental involvement in many of the cases. In my experience

of these cases, it is (regrettably) rare for a mother to appear in court and (equally regrettably) exceedingly rare for a father to appear. It is striking that the causes of these court applications may be symptoms of more profound familial problems. Are there further steps which could be taken in order to ensure an appropriate level of family involvement in the resolution of these issues? Second, it is appropriate that I comment on the skill and professionalism of the legal practitioners in this difficult area. This very much eases the task of the court and ensures that work can be done expeditiously. I would however invite reflection on this: Are there further steps that might be taken in order to ensure that disputes or issues which may be resolved prior to attendance in court? Third, it is necessary to recognise the valuable role played by Guardians *ad litem*. They play a critical part in the vindication of the rights of young persons and ensuring their adequate treatment in care. Questions may arise as to the difficulties which occur in the performance of that role both *vis-à-vis* other care professionals and with regard to duties to the young person and to the court. Issues of public interest may also arise in order to ensure persons engaged in that role are properly identified and their role itself properly defined. Perhaps this is a question for others to take on.

Fourthly, and most importantly, the Minister for Children Brian Lenihan T.D. recently quite rightly identified one of the key issues as being the identification of "what works" in the context of dealing with this and other problems relating to young people. While the stabilising of the young person in a secure environment may be necessary for their protection and welfare ultimately the resolution of such issues must be within the community. Re-integration of the individual in the community is the overall concept. Perhaps a time has come for research in order to identify precisely what "works" – i.e. how the best results can be effected in the interests of

the young person and how to avoid difficulties of demarcation (and jurisdiction) in situations which necessarily require a flexible response. Indeed, may I say that as a judge I would profoundly welcome research into the narratives of these young citizens: What interventions work best and least?

In conclusion perhaps I might be permitted one observation, and in this I would turn to the point of departure in this paper. The identification 'on paper' of rights subject to limitations under the Constitution and the rights of others, is an important process but perhaps practice indicates that there exists a correlative need to look to duties in order to ensure that rights already identified are realised. In other words, the vindication of statutory and constitutional rights may necessarily involve the 'hard graft' of auditing, assessing and ensuring compliance in practice, while at the same time having regard to the overall vision which rightly animates this conference and those bodies under whose *aegis* this conference takes place. They are particularly deserving of our thanks today.

Mr. Justice John MacMenamin,

14 October 2006.