Michael Williams wants an end to Judges trespassing into the role of elected legislators especially through inference of rights from the consitution.

Michael Smith wants a new constitution but meanwhile, apart from theoretically (!), is relaxed about whether judges inferring rights is democratic and useful.

Michael Williams doesn't approve of judicial additions to Constitutional rights

Judges exceed their constitutional powers.

In 1937 our grandparents adopted a Constitution, Bunreacht na hÉireann, laying out how they wanted their country to be governed. They specified it would be a democracy. Only elected legislators would make laws. If we were not satisfied with how they served us, we could reject them at the next election.

Over eighty years later, judges have inflated their role. 'Superior Court' Judges, especially in the Supreme Court, make law by annulling legislation that is compatible with the people's Constitution, if they find it incompatible with "rights" they identify, but which the Constitution does not mention.

They have changed the rules on how public money is to be spent, how referenda to amend the Constitution are to be managed and who may claim Constitutional rights. They refused a Habeas Corpus hearing to a man who credibly claimed he was unlawfully imprisoned. The constitution promises that everyone who makes a stateable case that he is imprisoned unjustly, has a right to a speedy hearing by a judge and prompt release if he is entitled to it. In Edward Ryan v. Governor of Midland Prison, the Supreme Court effectively inserted the word "not" before "everyone". They adjudicate on what legislators do or say in the course of their work.

Judges should be bound to enforce legislation compatible with all express terms of our Constitution.

Gladys Ryan: her case precipitated inferred rights

In a 1965 High Court case, Gladys Ryan claimed that the The Health (Fluoridation of Water Supplies) Act, 1960 was unconstitutional because it authorised the addition of a small amount of fluoride to piped water. She said this contaminated water supplied to her home, claimed she and her children had an implied right under our Constitution to an uncontaminated water supply and the Act infringed their right by depriving them of that supply. She asked the Court to examine scientific material, to disagree with the decision of the Oireachtas on the merits of fluoridation, and to "correct" the "blunder" of the Oireachtas, by annulling the legislation.

Article 15.2.1° of our Constitution declares the power of the Oireachtas to make laws for the State to be "sole and exclusive". Those words must

Michael Smith argues that a new constitution is needed but that for the moment the judges can be trusted as much as other forces for democracy

New constitution and constitutional convention needed

I think Bunreacht Na hÉireann betrays ancient and religious thinking in a modern and post-religious world. It is is after all invoked "in the name of the holy spirit from Whom is all authority and to Whom, as our final end, all actions both of men [sic] and States must be referred" The spirit infuses the whole document. It should be taken out.

My personal - probably radical - view is that we should have a new constitution-making process, somewhat similar to the Citizens' Assemblies we have had on several issues, but with everybody involved - and steered to take not their own interest but the public interest or common good as their guide on every issue.

I think a series of citizens' assembles should preface a non-religious, progressive, liberal and egalitarian new document enshrining civil, political social, environmental and economic rights.

It would also guarantee against fascism, Trumpery and Putinism. In places it should replicate the existing Constitution to avoid years of clarifying litigation. The new document should be regularly reviewed following further citizens' assemblies and additional rights enshrined.

Meanwhile...

This does not seem to be on the political agenda and, while we wait for radical change, I am relaxed enough about judges inferring rights from the fact the rights are, crucially, stated not to represent a comprehensive iteration.

However, needless to say the separation of powers between the judiciary and the government and legislature is important.

I appreciate that the separation of powers is crucial and that there is a technical danger of judicial tyranny. But not in Ireland in 2022. An ideal constitution would aim to make all rights explicit. It would rewrite the role of judges but would also rewrite the roles of the executive and the legislature. One overarching concern is that the appointment and censure of judges should be a lot less political and more stringent and seems anywhere close to being the case at the moment.

Interventionism peaked in 1970s

Actually the courts have been more and more reluctant to intervene to infer rights. The court of Chief Justice Cearbhall Ó Dálaigh was the most interventionist or "activist", 40 or 50 years ago, and current judicial thinking reflects the unfashionability, perhaps driven by the debate in the US of judicial interventionist. The recent move from unenumerated to derived reflects lack of enthusiasm for the swashbuckling theories of the optimistic 1970s.

Derived rights

Among the derived rights identified by the Clarke-led Supreme Court is that to seek work. A 2020 Supreme Court judgment, written by

mean that even if, as Mrs Ryan contended, the Oireachtas had been wrong in its conclusion about the benefits of fluoridation, a judge had no power to correct it. But Judge Kenny, who heard the action, came up with a new theory that in his eyes justified him in hearing and deciding Mrs. Ryan's claim.

This was that the short list of citizens' rights mentioned in the Constitution was not meant to be exhaustive, and citizens might have other rights. Elected legislators in the Oireachtas could of course legislate to recognise such rights, but Judge Kenny asserted that judges might also identify rights. If they did, the "right" they identified would notionally be added to the Constitution, so that if an Act of the Oireachtas was incompatible with that "right" he or she had authority to annul that Act as though the "right" had been included in the People's Constitution.

Nothing in it suggests judges have such power and it is on its face incompatible with Article 15.2.1°, I argue the right answer to Mrs Ryan was that the our sole and exclusive lawmaker had examined the arguments in favour of fluoridation, accepted them and legislated accordingly. No other organ of government was authorised to re-examine that issue or to set aside a decision validly made by the people constitutionally authorised to make it.

Judge Kenny made two statements that I reject. One was that judges had identified rights in the formative years of the Common Law and the other was that there was no reason why they should not do so now. On the first, my understanding is that judges have always identified duties (which of course produced reciprocal rights) but only in cases that were not governed by Statute. If they were, judges were obliged to apply the Statute. So the first statement was incomplete, and misleading. The second, that there was no reason why they should not do so now, ignored the Constitution, which vests in elected legislators the sole and exclusive power of making laws for the state. The Ryan decision opened a door for judges to say, "we disapprove of what the Oireachtas has decided and therefore won't apply it. In fact, we'll annul it".

The exercise by the judiciary of powers it did not constitutionally own was not static. Judges seem to me to have trespassed further and further from their boundaries, relying on "legal precedent". They adopted Judge Kenny's concept and labelled it "the doctrine of unenumerated rights" (and latterly "derived rights"). Each means that judges in effect change our Constitution from time to time by adding to it a new "right" not mentioned in its text and then annul legislation that is incompatible with this new "right", as though the "right" appeared in our Constitution.

Only the Irish people may change their Constitution.

This continues to be true on paper, but as judges identify "unenumerated rights", the effect is to amend it. We now have to look at two texts: the one the People adopted and a varying text that includes "rights" judges have added to date, with space for them to add new ones.

Only elected legislators may make laws.

This is no longer true. When judges annul legislation because it is incompatible with an "unenumerated right", they make laws, overriding the sole and exclusive power of elected legislators.

The Constitution does leave the door open for the recognition of rights additional to those it mentions. But the only people whom it authorises to legislate for such rights are those we have elected to the Oireachtas to do so. And a subsequent Act would not be invalidated

Clarke, stopped short of finding a right to a healthy environment, suggesting it might be preferable any such right should be subject to a public debate and democratic control.

In discussing whether housing is a derived right Clarke noted how it would be preferable to have the right established by referendum.

All this recognises the central reality that specific rights would evolve. Rights to housing and a good environment are voguish now. The right to use contraception was outrageous in 1937, marginal when recognised by the Supreme Court in Magee in 1973, and very unoutrageous in 2021. I have said that my preference is for a rolling constitutional convention that would on occasion aim to add relevant new specific rights.

Merits and importance of judicial review

All countries with constitutions have judicial review. The European Court of Human Rights applies a form of judicial review.

How without judicial review do you make the constitution meaningful? That's a question I think Michael needs to answer. How does he think think Roe v Wade inferred abortion rights in the US? I have said my own preference would be for rights to be explicit but updated by regular Constitutional Assemblies.

Judicial review ensures that the democratic will of the people voiced by current legislators comes up against the democratic will of the people enshrined in the constitution. It's a balance. There's a debate as to whether the constitution should then be interpreted as people felt at the time of adoption or as they feel now; or even by adopting a somehow literal or 'textual' approach.

Status of judicial decisions

There is a lot of academic discussion and there are many judicial decisions about judicial review. The discussion varies widely but is live and intense.

Opinion

There are endless books on whether judicial decisions amount, as Michael Williams disparagingly asserts, to little more than opinion but for me the requirement for judicial logic/inference and the appealability of judgments militates against that view. To infer a right and then be overturned by the Supreme Court would be perceived as humiliating and damaging to a judge's career. I'm sceptical of lawyers but the process of inferring rights I don't believe is casual and wouldn't describe as a matter of opinion.

What do they do?

Judges don't trade in opinions, instead they weigh litigants' respective rights and protect the vulnerable.

Bastion against majority tyranny

In many ways judges are a bastion against simple majoritarianism. Their insulation from political vogues and majorities is precisely what is needed to protect the rights of people who the majority may not respect - rights, including minority rights, prevail over majoritarianism. It is an attractive central selling point for a constitution that it protect against the tyranny of the majority.

How rights are formed

The technical answer to how rights are formed is the people decided

because it was inconsistent with such a right. The only rights that may not be infringed by later legislation are those that the people, from whom, "under God, all powers of government .... derive" chose to include in their Constitution.

A regime where wise father-figures restrain juvenile legislators doesn't seem to me to be a democracy.

Democracy requires that if we are not satisfied with how our lawmakers serve us, we can put them out of office at the next election.

When Judges make themselves lawmakers this is not so. It is very difficult to dismiss a serving judge, and impossible to get rid of one who is supported by his or her colleagues.

What elected legislators say and do in making law for us is to be outside the jurisdiction of judges.

We said so in our Constitution because we wanted our lawmakers to be able to go about that work without having to worry about how a judge might view their words.

In the 2019 case of Kerins v McGuinness, Angela Kerins claimed that when she appeared before a Committee of Dáil Éireann she had been subjected to abuse by members of the Committee that caused her psychological harm, and she sought damages from them. The High Court found she could not pursue her claim because Article 15.13 of our Constitution grants absolute immunity to a TD or Senator for anything he or she might say in the Dáil or Seanad. The Supreme Court on appeal unanimously (and that word makes the decision even more worrying) reversed the High Court's decision, and substituted Dáil Éireann as a defendant. The Dáil consists of its members, so the decision meant that Ms. Kerins' claim was against all members of the then Dáil – except, presumably, those she originally sued, who were exempt under Article 15.13. She was directed to sue not those she claimed had injured her, but people who clearly had not. This decision opened for the judges a door into both legislative Houses which our Constitution had shut.

Two Supreme Court decisions affect lawmakers' ability to investigate issues that might call for legislation. In re Haughey, in 1971 the Supreme Court decided that in any Dáil or Seanad inquiry, if anyone's good name came under question, he or she had a right to bring barristers into the inquiry to cross-examine whoever gave evidence threatening his good name, and to give evidence himself. That is, such an inquiry would be converted from an inquiry into a court trial. (One has to wonder what would be the point of having a trial before people who were not judges and therefore could not decide the issue.)

In the Abbeylara case in 2001 a majority of judges went even further and decided that neither the Oireachtas or either of its Houses had power to hold an inquiry if the result might injure the good name of any person – which meant that it could not hold any meaningful inquiry. None of the majority seems to have considered, first, that the people who make laws for the country might need to collect reliable information; and should do so in a transparent way, secondly that a public inquiry might be their only legitimate way of getting information; thirdly that if in the course of establishing relevant facts the inquiry uncovered something discreditable to anyone; that could not infringe his constitutional rights if what emerged was true, and fourthly that an injured person would have access to the Courts to protect his reputation. None of the majority judgments shows any understanding of, or interest in, the concept that in order to legislate wisely lawmakers need reliable information, or that the when they adopted the constitution (and judges just apply the Constitution - never make new law). They now need to be re-formed in a new Constitution.

A definition of rights

One definition of rights is "trumps" against utility (the greatest good for the greatest number) or majoritarianism.

I would embrace a right to equality and, consistently with that, rights to privacy, LGBT equality, contraception, housing, a job, a good environment, a good wage, and also obviously against fascism and Trumpery (as opposed to trumps against majoritarianism).

Some examples

Again, I'd prefer to take my chances on judges applying such a document than the rabble majority. Personally for example I think the rights above shouldn't be a question for the majority, anywhere. Take the rights to practise homosexual sex or contraception - I don't find adoption of Michael's adoption of a view of democracy that could fail to recognise these rights at all attractive. Constitutional democracy is better than that, I think.

Democracy, constitutional rights and inferred rights

Democracy embraces constitutional rights, in part against a tyrannical majority, and I am not convinced inferring rights is anti-democratic. All this is well-traversed territory in constitutional academia.

Of course care is needed.

Safeguards against judicial excess: Appeal, ECHR, EU

Reassuringly judges are susceptible to appeal and the European Convention on Human Rights and EU Human Rights law provide frameworks which circumscribe national abuses.

Inferred rights would need to satisfy half the Supreme Court

If you're a judge and you are considering overturning the legislature on the basis of an inferred right it will not really be a case of your opinion being enough. You will know that if you infer something implausible (as when an ingenuous High Court judge recently inferred a right to a good environment from Bunreacht na hÉireann (1937 i.e. before environmentalism) you will be slapped down by the Supreme Court so High Court judges will need to aim that their inferences are unassailable, The Supreme Court decides by a majority. We all know the complex balance of views that constitutes the US Supreme Court view on Roe v Wade. But it's the same for all inferred rights, even in the Irish Supreme Court. Is Roe v Wade and the US Supreme Court's view on abortion merely opinion?

judges were requiring an inquiry to give more protection to its witnesses than they would receive in a Court hearing.

Public funds were to be controlled by the Government, subject only to Dáil supervision.

In the 1976 case of Healy v Donoghue, the Supreme Court decided that anybody accused of a serious crime was entitled to be defended by a barrister and that the State must pay for his defence if he could not afford to. A system of free legal aid in trials for serious crimes may seem a good idea. But it could be essential only if judges could not ensure that an unrepresented defendant would get a fair trial – which they did not suggest. The effect was to direct the Government and Dáil either to raise additional money in taxes to pay for legal aid or to divert to that purpose money ear-marked for other use, perhaps more meritorious and urgent.

In the 1995 case of, Patricia McKenna v An Taoiseach, the Court further limited the power of the Government to spend money and of the Dáil to approve the spending. A referendum to amend the Constitution was pending, and the Government, with the approval of the Dáil, wanted to be able to spend money on describing why it recommended a yes vote and countering dishonest arguments against it. In forbidding them to do so the Supreme Court seems to have ignored two arguments against their decision. First was that the Government and Dáil, in bringing the issue through the Oireachtas for a referendum, believed they were acting in the national interest, formed that belief validly in accordance with their respective constitutional duties, and were rightly concerned to counter dishonest arguments that had been advanced in a previous referendum. Second was that having initiated a referendum to amend the People's Constitution a government has a duty to the people explain to them why it had done so and why it recommends them to approve. Instead, they accepted a dubious analogy between a referendum to amend the People's Constitution and a team game where Government and Dáil, having, so to speak, thrown in the ball, were barred from the field of play. In this writer's opinion this approach was deeply disrespectful of both the Government and the Dáil.

Provided they do not infringe the Constitution, legislators should be free to make laws and the Government to govern the country as each thought fit.

As the above shows, this is now true only to a limited extent, and our elected lawmakers can never know when the judiciary will strike again and annul laws they have made

So, much of what our ancestors included when they adopted our Constitution no longer applies. In a series of decisions, judges have increased their power at the expense of the other constitutional organs of government. They treat the People's Constitution, not as the fundamental rule of the State with which all Irish people must comply but as a starting point from which judges may develop new concepts, and which they are not obliged to follow literally – though they insist the Oireachtas must.

While I criticise how Superior Court judges have adjudicated on constitutional issues, on most issues since 1937 our Superior Courts have served us well.

We now have roughly six times as many Superior Court judges as we had in 1937. But as a tree grows, its roots extend and become thicker and stronger, so that in time they may threaten neighbouring buildings. Maybe time to clip back?

Dangers of judicial discretion

Set against this certainly are the typical vested interests and conservatism of the judiciary which, it might legitimately be feared, could distort democracy by biased inferences. Former Supreme Court Judge Niall McCarthy noted "when [future judges] do become leading lawyers, they become members of the middle class, with all the prejudices and traditions attached to them. The rights protections of millions of people are largely informed by the cultural influences upon a small, socially stratified community of senior judges, filtered through a legal system with high entry costs".

I am also of course concerned that the process of inference might emphasise some of the regressive in particular religion-based philosophies that grounded Bunreacht na hÉireann. The judiciary has tended to infer rights from an existing enumerated right; the "Christian and democratic nature of the state"; and the Natural Law or as a natural corollary of another unenumerated right.

Moreover, entrusting judges with momentous discretions makes it the more important that they are appointed in a proper way. Even in a democracy it is not regarded as desirable to elect judges but the appointments process in Ireland, leaving so much ultimate discretion to government and with little lay input, is – I concede - flawed.

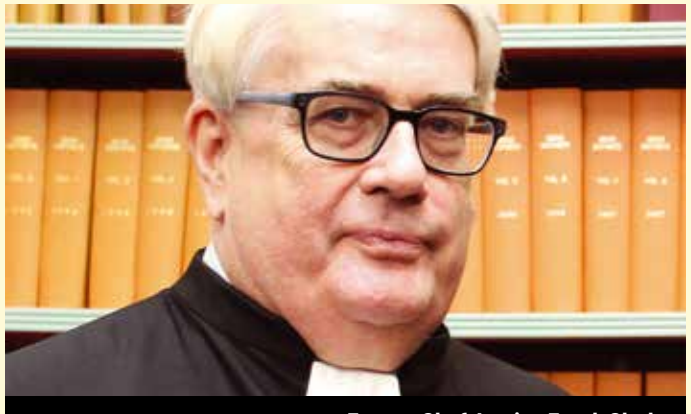
One of the things that makes it difficult to dispute the inference of rights, at least in Ireland, is that it is inarguable that if a constitution, which the informed populus, often imputed with omniscience, adopted in 1937, says that "among the rights this Constitution recognises are", and then it lists some rights, it must be inferred that it intended more rights than just those listed. That was the logic in Ryan.

Beyond the logic of the text, I think the debate needs to factor in decisions in the last year moving from unenumerated to derived rights.

Change from unenumerated to derived rights

Both doctrines centre on Article 40 but recently retired Chief Justice Frank Clarke has led a new "derived rights" doctrine - "repackaging and reining in" the earlier "unenumerated rights" doctrine. Clarke says this is "not so different" from the unenumerated rights doctrine, but "unenumerated" might create an impression of judges "plucking" rights from their heads.

His view is probably wiser and truer to the all. Clarke is right. Except in theory, the distinction is not of overweaning significance.



Former Chef Justice Frank Clarke

Michael Williams' rejoinder

Constitutional academia by its nature is heavily influenced by current judicial thinking. In Ireland today it seems to judges natural and right that they "correct" "blunders" by the Oireachtas that they consider oppressive. What I argue is that this isn't what we voted for in 1937.

On Michael Smith's first point, I'm not convinced that a new Constitution, rather than amending our existing one is the way to go. Before I joined Michael Smith in considering adopting a new Constitution, I'd ask where we find the present one unsatisfactory.

I'm nervous of making decisions that would bind those who come after us, and also think too much fiddling with our Constitution could be bad for us as a country. Stability has value and does not involve total resistance to change. The present one isn't flawless, but it's not bad. I'd be happy with a tidying-up that reined in the judiciary.

Yes, of course I agree that our sense of what rights citizens and others should have evolves over time, and in this country I think it has been evolving in a healthy way, and that judges have made a big contribution to that evolution – however questionably. But I hold that the evolution should be in the control of those we have elected to make our laws, not of judges. That will usually mean that it lags behind progressive thinking. That is frustrating but a price we pay for democracy.

As a general comment on Roe v Wade, I'd say in most societies thinking is evolving about when, between ejaculation and parturition, an entity with human rights should be recognised. We have, sensibly, I think, been moving from recognition too early in that process, it doesn't seem rational to me to place it at parturition, but I don't even know what I think is the right stage.

Who decides what are rights? Our legislators decided condoms shouldn't be imported into or sold in Ireland, to protect the moral health of the community. That I disagreed with their view didn't mean that I had a legal right to import them. Was a judicial decision about Mary McGee's right to marital privacy more authoritative than the decision of our elected representatives? (Putting aside any views any of us might have about the merits). Should a communal willingness to be protected from "impurity" by not being able to buy condoms, expressed through our elected legislators, have to give way to the more enlightened views of people whose function is to administer justice, not to make laws?

In a well known case in 2016 the Supreme Court afforded rights to a Burmese citizen seeking asylum in Ireland. The Constitution plainly affords rights (except Habeas Corpus rights) only to Irish citizens, people who owe fidelity to the state and loyalty to the nation. The Court rewrote it to give the same rights to non-citizens, who have no reciprocal duties. The result was attractive because the direct provision system was and is disgusting - but unlawful.

Since we enacted the European Convention on Human Rights Act, we have a humane and reasonable agreed set of rights which a majority cannot withhold from a minority. The justification or excuse of need, as in McGee, is no longer there. And I think repressive Catholic-influenced legislation is a thing of the past. I think Irish people should be allowed to govern themselves democratically, and judges, clinging to a power the People's Constitution does not give them, prevent that.

Democratic legislatures can make mistakes. But they can correct them and learn from them. That is how they become "mature democracies". Judicial oversight of legislation with a power of veto hinders ours becoming a mature democracy, by undermining the essence of democracy.

Moreover, I think democracy can educate majorities to be sensitive to minorities, and that is one of the reasons I value it.

Is it fair to summarise the differences between us like this? You want a new, secular Constitution and if we had it you wouldn't complain about being governed by sensible, experienced people. I'd quite like to delete some bits of our Constitution but don't look for a complete re-write. But I do complain that it promises us "government of the people by the people for the people" and that promise is being frustrated.

I've enjoyed what's been a wide-ranging constitutional riff.

Michael Williams is a retired solicitor, writting in his personal capacity.

Michael Smith's riposte

There are many regressive forces out there, in some Anglophone countries there is close to a majority of people who don't have any feeling for judicial review or rights or democracy. In Britain, for example, Boris Johnson, is trying to abolish judicial review and the right to protest, and prorogued parliament, before the courts overturned his decision.

I have no particular time for the likely politics of judges in our higher courts, their typically rarefied background or the method of their appointment, but I note that their decisions are among the most progressive, decent and fair of any force in Irish society. They are a safeguard for democracy and rights in dangerous times. Beyond that I would instigate a process of constitution-making led by the citizenry and with a view to establishing the centrality of rights of equality and sustainability. Pending subsequent updating exercises I would be comfortable with them inferring subsidiary rights based on equality and sustainability.

Thanks, Michael, for an energising debate.

Michael Smith studied law and is editor of Village