

Kenny, John Joseph

by Gerard Hogan

Kenny, John Joseph (1917–87), lawyer and judge, was born 19 April 1917, eldest son of John Kenny, building contractor, of 14 Green Park, Rathgar, Co. Dublin, and his wife, Lucy O'Dea. Kenny senior later unsuccessfully sued the president of the executive council, W. T. Cosgrave (qv), when the government reneged on a promise to indemnify him, if he held firm against certain trade union demands, for any losses caused through strike action.

Kenny was educated at the Catholic University School, Dublin, and afterwards at UCD, where he graduated BA in 1938 in legal and political science, LLB in 1941, and MA in 1947; he obtained a Dipl. Kms from the Konsular Akademie in Vienna. He enrolled as a student at King's Inns in 1937, won the John Brooke scholarship in 1940, and was called to the bar on 1 November 1940. Although he took silk in 1957 and was highly regarded as an advocate, he never quite attained the status of a leading member of the inner bar.

As well as practising at the bar, Kenny was a lecturer in company law and property law at UCD. In common with many legal academics of his day, he published little, although in later life he was a consultant editor of Professor J. C. W. Wylie's magisterial and seminal work, *Irish land law*, the first edition of which was published in 1975. As an academic, Kenny clashed with the UCD establishment in 1959 when he challenged the propriety of certain types of academic appointment made by the UCD governing body. He proposed petitioning the government to appoint a visitor to investigate the matter, which the government duly did. In the process Kenny deeply angered Michael Tierney (qv), the UCD president. This anger was later exacerbated when in 1960 Kenny gave legal advice to the college's Literary and Historical Society (L&H) in its increasingly bitter confrontation with Tierney over college regulations governing membership of student societies (Kenny was subsequently elected a vice-president of the L&H).

Kenny was praised in the Dáil for his courage in challenging the UCD system of appointments, which may possibly have endeared him to the Fianna Fáil government, which appointed him a judge of the high court on 9 February 1961. Nevertheless it was the Fine Gael–Labour government that later promoted him to the supreme court, on 21 October 1975. He also served as a commissioner of charitable donations and bequests. Stricken by ill-health, he retired from the supreme court on 26 April 1982, some seven years before the (then) mandatory age of seventy-two.

Kenny's reputation lies chiefly in his work as a judge of the high court. He was part of a cohort – along with Brian Walsh (qv) and Seamus Henchy – of judges who had been appointed to the high court in their early to mid-forties, and all of whom

were to make a striking contribution to the development of Irish jurisprudence, particularly in the area of constitutional law. Indeed, all three judges served together on the supreme court in the late 1970s and early 1980s, but the tenure of Walsh and Henchy on the supreme court was longer and their contribution at appellate level more profound. Kenny must nevertheless rank as one of the greatest high court judges in the history of the state.

As a judge he was patient, courteous and fair-minded. His erudition and knowledge of land law, company law, commercial law and chancery practice generally was unrivalled. He was also one of the first judges to make an impact in the area of family law, an area of practice that had scarcely existed prior to the late 1960s. A prolific writer of judgments, Kenny had a style which was distinctive and elegant, if at times overwrought and ornate. The early judgments, in particular, display his keen appreciation of the historical evolution of the common law over the centuries, and reveal much rigour and learning. He was appointed by the government to be chairman of the committee on the price of building land. The report of this committee (1973, Prl. 3632) is a model of its kind, but the failure on the part of successive governments to implement the Kenny report – in which he had invested so much energy and so many resources – always rankled with him.

His finest contributions were, however, in the realm of constitutional law. His most striking and distinctive judgment was in *Ryan v. Attorney General* (1963), where he held that the personal rights referred to in article 40.3 of the constitution were not confined to the constitutional rights expressly enumerated elsewhere in that document, but extended to such implied rights 'which result from the Christian and democratic nature of the State'. The subsequent development of this unenumerated rights doctrine, to extend to rights such as the right to privacy and basic fairness of procedure, bears ample testimony to the singular importance of this remarkable decision.

*Conroy v. Attorney General* (1964) provides another example from this period of Kenny's remarkable judicial skill and courage. Here he held that the effect of a mandatory disqualification period following a conviction for drunk driving was liable to have such an impact on the livelihood of the accused that this must be regarded as a form of primary punishment. This, he reasoned, meant that a conviction for drunk driving could not properly be regarded as a 'minor offence' for the purposes of article 38.2 of the constitution, with the result that legislation that purported to allow the summary trial (that is, by judge alone without a jury) of persons charged with such offences was unconstitutional. While this decision was quickly reversed on appeal by the supreme court, the judgment of Brian Walsh seems sophistic and unimpressive by comparison with Kenny's forthright and compelling analysis of the problem.

But by the time Kenny was promoted to the supreme court in October 1975 the quality of his output was already in decline. Although the supreme court provided

him with plenty of opportunities to deal with the type of difficult legal issues that were his forte, his judgments by this stage had lost the sparkle of the early years and the quality of his analysis had deteriorated. In particular, the fluidity of the early judgments had all but disappeared and the later judgments often had a dogmatic and even idiosyncratic quality.

A good example is Kenny's judgment for the supreme court in the vitally important decision of *Murphy v. Attorney General* (1980). In this case, legislation that provided for the aggregation of the incomes of spouses for taxation purposes – with the result that married couples paid more tax if married than if they had been unmarried and living together – was found to be unconstitutional. Although the implications of this judgment for the taxation system and society generally were potentially enormous, Kenny's analysis is ponderous and unimpressive, and it has been subjected to robust academic criticism. Having rejected the plaintiffs' more obvious arguments based on constitutional equality guarantees, he nonetheless held for them in the final few sentences of his judgment, on the ground that the legislation in question was inconsistent with the state's obligations under article 41 of the constitution to protect the institution of marriage. In the aftermath of this ruling, the court was required to examine the extent to which its ruling was retrospective and requiring full repayment of unconstitutionally collected tax to all taxpayers. While Henchy's masterly majority judgment gave compelling and principled reasons for the rejection of full retrospection, Kenny's curious dissent – which suggested that all taxpayers would be entitled to full repayment over the previous six years – does less than justice to the arguments that ultimately prevailed with the majority.

Kenny lived with his wife, Marjorie Baskin, whom he had married 29 March 1947, at 69 Nutley Lane, Donnybrook, Dublin. They had two sons, one of whom, Roger John, was a noted barrister in his own right. Kenny was an avid racegoer and his other son, Stewart, became a famous bookmaker. Kenny died on 25 March 1987.

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National Archives S 8478; *Irish Reports* (1962–82); *Irish Law Times and Solicitors' Journal*, 74 (1940); *ITWW*; John Kenny, 'The advantages of a Bill of Rights', *Northern Ireland Law Quarterly* (1979), 189; Gerard Hogan, 'Unenumerated personal rights: Ryan's case re-evaluated', *Irish Jurist*, xcv (1990–92), 25–7; Donal McCartney, *UCD: a national idea* (1999); J. M. Kelly, *The Irish constitution* (2003); Kenneth Ferguson (ed.), *King's Inns barristers 1868–2004* (2005)