

## JUDGES AS LAWMAKERS: THE IRISH EXPERIENCE

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The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.<sup>1</sup>

In that famous passage, the greatest of American jurists - some would say the greatest in the entire Anglo-American tradition - made it clear, not only that the development of the common law has been, in the main, the work of judges and not of legislatures, but that in carrying out that work, they have inevitably reflected opinions and practices prevalent in the society of their time. Nor, as he emphasises, should we ignore the fact that the law may also reflect what he does not shrink from describing as the "prejudices" to which judges are as much subject as their fellow citizens. With what may seem to some an almost brutal degree of realism, he rejects the optimistic view that would see it as attaining in the hands of individual judges the level of ideal justice portrayed in the works of philosophers down the centuries from Aristotle to John Rawls.

In later passages in his seminal work, he gives examples of concepts dating from a more primitive era which the judges refined and adapted to meet the very different sensibilities of the society of their time. Early forms of legal procedure, he says, were grounded in

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<sup>1</sup> Holmes, O.W. Jr., *The Common Law* (Dover Publications, New York, 1991), Lecture I: 'Early Forms of Liability', p. 1.

vengeance: the Roman law started from the blood feud, as did the German law. The person against whom vengeance was sought eventually could buy off the feud by the payment of compensation. What seems to us a primitive concept becomes transformed into a system for compensation for civil wrongs to be found throughout the common law and civil law worlds.<sup>2</sup>

By an analogous process, doctrines which are still a familiar feature of the common law can be shown to originate in the practices of earlier societies which would now strike us as not merely quaint or naïve but barbarous. In Roman law, the person who owns an animal which causes injury to another must surrender the animal to the injured party so that vengeance can be wreaked on the animal itself. So too, we are still shocked to read, with slaves and children. The hatred, at a relatively primitive level, of anything that causes us pain, is reflected in the doctrines of early Roman law. Eventually, the law becomes transformed into our principle of vicarious liability: the master no longer has to surrender the body of his servant so that vengeance may be wreaked on it. Instead, the law obliges him to pay compensation for the wrongs committed by his servant, even though the master himself had committed no wrong.

So too, the person who keeps a wild animal is absolutely liable for any damage it may inflict, even though he has been in no way negligent.

Thus concepts in the law of tort, as well known to us as vicarious liability and absolute liability for injury inflicted by animals known to be vicious, owe their present form to the courts which moulded and transformed ancient practices so that they became the legal doctrines of a more modern society.

Even more strikingly, we can see the same process at work in the case of inanimate objects which have caused harm. These too were subject to what today we would regard as mindless revenge. Holmes explains the ancient law as follows:

As long ago as Bracton, in case a man was slain, the coroner was to value the object causing the death, and

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<sup>2</sup> Holmes, O.W. Jr., *The Common Law* (Dover Publications, New York, 1991), Lecture I: 'Early Forms of Liability', pp. 2-3.

that was to be forfeited as deodand “*pro rege*.” It was to be given to God, that is to say to the Church, for the King, to be expended for the good of his soul. A man’s death has ceased to be the private affair of his friends as in the time of the barbarian folk laws. The King, who furnished the court, now sued for the penalty. He supplanted the family in the claim on the guilty thing, and the Church supplanted him.<sup>3</sup>

We would be seriously mistaken in supposing this to be arcane, medieval law with no place in contemporary jurisprudence. In *Calero – Toledo v. Pearson Yacht Leasing Company*<sup>4</sup> the United States Supreme Court had to consider the constitutionality of a statutory forfeiture scheme under which a yacht had been seized and on which marijuana was discovered. It was argued that the owner, who was unaware of the wrongful use of the yacht by the lessee and had not been notified of the proposed seizure, had not received the due process to which he was entitled. Brennan J. delivering the opinion of the court and upholding the constitutionality of the statute, pointed out that it reflected the medieval law which, in turn, could be traced to biblical and pre-Judean/Christian practices.

Those principles were also cited in the more recent Supreme Court decision of *Michael F. Murphy v. G.M.*<sup>5</sup> where the constitutionality of a statute which provided for the forfeiture of the proceeds of crime was upheld, even though it did not afford the owner of the property the protections which he would normally be afforded in the criminal law of the presumption of innocence and the right to a trial by jury. In the language which lawyers have tended to use, the action was brought, not *in personam* because of some wrong which the owner of the property was alleged to have committed, but *in rem*, because of the tainted nature of the property itself.

In recent times, in the area of admiralty law, the House of Lords in *Republic of India v. India Steamship 6 (No.2)*<sup>6</sup> has protested that to treat a ship as the defendant in legal proceedings because the action is said to be taken *in rem* is a fiction which should be got rid

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<sup>3</sup> Holmes, O.W. Jr., *The Common Law* (Dover Publications, New York, 1991), Lecture I: ‘Early Forms of Liability’, p. 24.

<sup>4</sup> (1974) 416 U.S. 663 (S.C.).

<sup>5</sup> [2001] 4 I.R. 113 (S.C.).

<sup>6</sup> [1998] A.C. 878 (H.L.).

of as soon as possible. So, in the case of a collision at sea, the owner of the vessel whose master has been negligent may be liable to pay for the damage resulting from the collision, even though he was not the owner at the time. In theory, it may be arrested and sold with a view to satisfying any decree.

These doctrines do not survive in the law simply because of a misplaced reverence for the customs of a bygone age. If employers are still held vicariously liable for the wrongs committed by their employees, it is because, in theory at least, the employer who benefits from the activity which causes the damage should bear the loss, either by passing it on to his customers in increased prices or by effecting liability insurance. In societies composed of people for many of whom the countryside is merely a venue for leisure activity, absolute liability for cattle trespass and animals known to be vicious is hardly an everyday concern. Yet the analogous development of the rule in *Rylands v. Fletcher*<sup>7</sup> must now be viewed in the light of an increasing concern for the preservation of the environment. The principle that the owner of land should be absolutely liable for damage caused by the escape of a dangerous substance which he has accumulated on the land may have its origins in the primacy of property values in Victorian law, but it can be seen as having another justification today.

In the case of admiralty law the fact that a ship can be arrested for damage negligently caused while it was in someone else's ownership, to whatever distant law it may be traced, affords today a useful form of security for those engaged in international trade.

Holmes spoke of "intuitions of public policy, avowed or unconscious" as shaping the course of the common law and described them as "the secret root from which the law draws all the juices of life."<sup>8</sup> As he put it:

Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure under our practice and tradition, the

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<sup>7</sup> (1868) L.R. 3 H.L. 330 (H.L.).

<sup>8</sup> Holmes, O.W. Jr., *The Common Law* (Dover Publications, New York, 1991), Lecture I: 'Early Forms of Liability', p. 35.

unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.<sup>9</sup>

The judges of a later era were less inhibited in resting developments in the common law expressly on the ground of policy considerations. But even in our own time one can detect in some judgments an implicit rather than an express recognition of the relevance of policy considerations: in a broader context, can we be certain that the common law of negligence would have evolved throughout the 20<sup>th</sup> century in precisely the same fashion if liability insurance had never existed?<sup>10</sup>

If we regard the 19<sup>th</sup> century and the first half of the 20<sup>th</sup> as the great formative phase of the common law – the period in which it assumed broadly the familiar contours of today – it can be said that the Irish courts played little part in its development. Following the Norman invasion of the 12<sup>th</sup> century, English law over the succeeding centuries extended to the whole of Ireland with the result that, at the beginning of the 17<sup>th</sup> century the indigenous system of Irish law, known as the *brehon law*, which had existed from pre-Christian times had gone in its entirety and been replaced by the English common law, supplemented by the evolving equity jurisdiction of the Lord Chancellor and the statutes of Parliament either in Dublin or at Westminster.

Even legislative independence, in its limited Irish form, was swept away with the Act of Union in 1801 and, at the time the first independent Irish State was established in the form of the Irish Free State, Ireland was governed solely by laws enacted at Westminster and the Irish system of courts was, securely as it seemed, locked into the English judicial structure. Thus, while there was an Irish Court of Appeal, its decisions could be and were frequently set aside by the House of Lords. While that is not to say that there might not have been some room at least for the development of a distinctively Irish

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<sup>9</sup> Holmes, O.W. Jr., *The Common Law* (Dover Publications, New York, 1991), Lecture I: 'Early Forms of Liability', pp. 35-36.

<sup>10</sup> See in this context the somewhat perplexing decision of the Supreme Court in *Moynihan v. Moynihan* [1975] I.R. 192 (S.C.). The two-year-old plaintiff suffered severe burns when she pulled a pot of tea over herself in her grandmother's house. The grandmother was held vicariously liable for the negligence of her daughter (the child's aunt) in leaving her alone in the room with the teapot. It is inconceivable that the grandmother was not insured, but the radical extension of vicarious liability effected by the majority of the court does not rest on any discussion of the implications for persons not insured against such accidents of the decision. For that one has to turn to the dissenting judgment of Henchy J.

jurisprudence, that did not happen to any significant extent, not least because until as late as the mid 19<sup>th</sup> century, Irish barristers, from whose ranks the judges were exclusively recruited, received their legal education in the Inns of Court in London. Unlike Scotland, whose lawyers at one stage looked as much to the civil systems of continental Europe, rooted in Roman law, as to the common law, the Irish law tended faithfully to mirror developments on the other side of the Irish sea.

There were undoubtedly exceptions. A striking example is the appearance in the Irish law of tort of the right to recover damages for what came to be called “nervous shock”. In *Byrne v. Southern & Western Railway Company*<sup>11</sup> the plaintiff, who was a superintendent of the telegraph office at Limerick Junction railway station, sustained such a shock when, as a result of the railway points having been negligently been left open, a train entered a siding and broke down the buffer and the wall of the telegraph office. The plaintiff said graphically

A hair of my head was not touched, I swear I received no physical injury; I got a great fright and shock: I do not mean a physical shake; it was the crash and falling in of the office.<sup>12</sup>

A judgment in his favour was affirmed by the Court of Appeal. Four years later, however, the judicial committee of the Privy Council set aside a verdict in favour of a plaintiff who had suffered such a shock crossing the defendant’s railway line, when, on account of the defendants’ negligence, a train nearly hit her.<sup>13</sup>

The whole issue came back before the Irish Court of Appeal in *Bell v. Great Northern Railway Company*<sup>14</sup> where the plaintiff was a passenger in the defendant’s train when part of the train was unhooked and reversed at great speed down a hill, causing great panic among the passengers. Again, the plaintiff suffered great shock, but no physical injury, and was awarded £50 at trial. On the subsequent appeal the defendants naturally invited the court to

<sup>11</sup> Irish Court of Appeal, unreported, February 1884.

<sup>12</sup> Irish Court of Appeal, unreported, February 1884.

<sup>13</sup> (1888) 13 A.C. 222 (H.L. & P.C.).

<sup>14</sup> (1890) 26 L.R. (Ir.) 428 (Q.B. & Ex. Div.)

follow the Privy Council decision rather than the earlier Irish case. Had the former been a House of Lords decision, the court would have been obliged to follow it, but since it was a Privy Council decision, they were at liberty to prefer the view taken in *Byrne*. The greatest of Irish 19<sup>th</sup> century judges, Palles C.B., rejected the view that had found favour with the Privy Council that “nervous shock” could not properly be described as a personal injury. He observed that

As the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence causes fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which in the ordinary course of things would flow from the negligence unless such injury accompanies such negligence in point of time.

It has been pointed out that Palles C.B. was well ahead of his time in recognising that mental injury, even where unaccompanied by purely physical injury, was a form of injury which should be compensatable where negligence is established. The same doctrine, indeed, did not secure a firm anchorage in English law until the decision of the House of Lords in *McLoughlin v. O’Brian*.<sup>15</sup>

But those early Irish cases were exceptional instances of innovative Irish jurisprudence in the common law. Nor was there any significant change in the early years of the new State. It had, of course, its own structure of courts with the Supreme Court now the final court of appeal, but the Constitution of the new State enacted in 1922 had kept in being the existing common law, except to the extent that it was inconsistent with the Constitution, and the judges showed no disposition to depart from the English model.<sup>16</sup>

I have dwelt at some length on the part played by judges in the

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<sup>15</sup> [1983] A.C. 410 (H.L.). For a discussion of later developments in the law in this area in Ireland, England, the United States and Australia, see *Fletcher v. Commissioners for Public Works in Ireland*, Supreme Court, unreported, 21 February 2003.

<sup>16</sup> It is only fair to add that, since judges can only deal with the cases before them as they are presented by the litigants and advocates, they were probably afforded very few opportunities of adopting new initiatives in the law.

development of the common law, because in the passionate debates to which we have now become accustomed as to the extent to which judges are entitled to make the law, as opposed simply to applying it in individual cases, it is as well to remember that there is little that is novel in the idea of the judge as law maker: it is, as Holmes so eloquently demonstrated, at the very heart of the system of common law. That system lies at the other extreme from the view of Montesquieu, who spoke of the judge as simply the mouthpiece of the law. However, it is in the sphere of constitutional law that, in Ireland as in the United States, the debate as to the lawmaking role of the judge has taken on in recent decades a significantly different dimension.<sup>17</sup>

It might have been thought that, with the arrival of political independence, a written constitution and a new court structure in the 1920's, judicial lawmaking would have blossomed as it had never done when Ireland was part of the United Kingdom. But that would be to speak with the advantage of hindsight. It is true that, in the form of the Constitution of the Irish Free State, the new polity was endowed, not merely with a written constitution, but one with distinctively innovative features. It was radically different from the constitutions of the older dominions in the British Commonwealth, such as Canada and Australia. Not merely did it contain a Bill of Rights, in many respects similar to that incorporated in the United States Constitution by the ten amendments passed shortly after its enactment: it also expressly conferred on the High Court and Supreme Court to be established under the new Constitution an express power of judicial review of legislation, a power which, of course, had not been conferred by the American model, although found by implication to be part of the Constitution by the Supreme Court itself in *Marbury v. Madison*.<sup>18</sup> The development of an Irish constitutional jurisprudence was, however, seriously inhibited in the early years of the State by two factors.

The first was the power which the newly established parliament

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<sup>17</sup> The discussion which follows of this topic is necessarily abridged. I have not dealt with the influence of natural law theories on the development of Irish jurisprudence, which at one stage played a prominent part in the case law, particularly after the enactment of the present Constitution, some of the provisions of which were influenced by Catholic social teaching as reflected in leading papal encyclicals. For further discussion of the topic see the judgments of Kennedy C.J. in *The State (Ryan) v. Lennon* [1935] I.R. 170 (H.C. & S.C.), O'Byrne J. in *Buckley v. Attorney-General* [1950] I.R. 167 (S.C.), Walsh J. in *McGee v. Attorney-General* [1974] I.R. 284 (S.C.) and Hamilton C.J. in *In re the Regulation of Information (Termination of Pregnancies Outside the State) Bill* [1995] 1 I.R. 1 (S.C.).

<sup>18</sup> (1803) 5 U.S. (1 Cranch) 137 (S.C.).

of the Irish Free State enjoyed to amend the Constitution by ordinary legislation during the first eight years of the State's existence and which, as judicially interpreted, was held to confer on the parliament the power to amend that particular provision, thereby enabling the government of the day to pass legislation effectively extending indefinitely the period during which the Constitution could be so amended.<sup>19</sup>

The second feature, which inhibited the growth of Irish constitutional law, was the fact that the judges appointed to office in the early decades of the State's history had been, in the main, educated in the English constitutional tradition. The absolute sovereignty of parliament was, of course, a central tenet of that tradition and the absence of a written constitution ensured that in the United Kingdom there had been no development of that version of the separation of powers which was so distinguishing a feature of the United States Constitution and, on the surface at least, of the Constitution of the Irish Free State.

It might have been thought that these attitudes would have waned with the enactment of a new Constitution of Ireland in 1937 which embodied an even more elaborate charter of fundamental rights than did its predecessor, but also, and more significantly, provided that the Constitution, after a short transitional period, could be amended only by a referendum. There was indeed to be a new departure, but not until the 1960s and the arrival of a new generation of Irish judges who did not share their predecessors' lack of enthusiasm for crafting a new Irish constitutional jurisprudence.

There had, it is true, been earlier portents of change. In the "Sinn Féin Funds Case" of 1948,<sup>20</sup> the separation of powers doctrine had been robustly upheld when the government of the day passed through the Oireachtas a measure which, although well intentioned, was a clear attempt to intervene in proceedings pending before the High Court. However, while the Constitution was successfully invoked in scattered instances, it was the appointment of Cearbhall Ó Dálaigh as Chief Justice in 1961 which signalled the beginning of the new era. He was joined on the court on the same day by Brian

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<sup>19</sup> *The State (Ryan) v. Lennon* [1935] I.R. 170 (H.C. & S.C.).

<sup>20</sup> *Buckley v. Attorney-General* [1950] I.R. 167 (S.C.).

Walsh and it soon became clear that litigants and advocates who looked to the text of the Constitution itself, rather than to constitutional theory as expounded in the British tradition by Dicey and others, would receive a sympathetic audience.

In 1963, the new judicial activism achieved perhaps its most significant victory. In *Ryan v. Attorney General*<sup>21</sup> Kenny J. in the High Court held that the “personal rights” of the citizen which were guaranteed by Article 40 of the Constitution were not confined to the rights specified in that and other Articles of the Constitution. He said that there were unspecified personal rights of the citizen which followed from what he described as “the Christian and democratic nature of the State.”<sup>22</sup> Thus, while the Constitution, like the Constitution of the Irish Free State, expressly extended protection to the rights which were historically recognised in documents such as the American Constitution and the French Declaration of the Rights of Man in 1789, including equality before the law, personal liberty and freedom of expression, it now appeared, for the first time in Irish law, that there was a range of what came to be called “unenumerated rights” which were also entitled to such protection.

In *Ryan’s case*, the plaintiff had claimed that a scheme adopted by a local authority for the mass fluoridation of the municipal water supply in the interests of the dental health of the population violated her constitutional rights by subjecting her and her family to a form of medication which they had not sought. Kenny J. concluded that she did enjoy a constitutional right of “bodily integrity”, not specified in the Constitution, and that it followed that she could not have imposed on her by an Act of the Oireachtas any process which was dangerous or harmful to her life or health. Having considered a wide array of scientific evidence on both sides of the question, he held that she had not established as a matter of probability that this would be the result of the mass fluoridation scheme. His decision was upheld on appeal by the Supreme Court, which also endorsed his finding that the rights guaranteed by the Constitution were not confined to those to which the document extended express recognition.

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<sup>21</sup> [1965] I.R. 294 (H.C. & S.C.).

<sup>22</sup> [1965] I.R. 294 at 312 (H.C.).

In arriving at those conclusions, the Irish courts were anticipating a remarkably similar development in the United States Supreme Court which occurred only two years after *Ryan*. In 1965, in *Griswold v. Connecticut*<sup>23</sup> the court struck down an ancient State law making it criminal to use contraceptives because, in the now celebrated language of Justice Douglas speaking for the majority, it violated a right of privacy which, although not expressly guaranteed in the Bill of Rights, was to be found in what he called the “penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>24</sup>

That decision was to have momentous consequences for United States jurisprudence, since the newly articulated “right of privacy” was the essential foundation of the decision in *Roe v. Wade*<sup>25</sup> in 1973, where a majority of the justices, in probably the most widely discussed opinion of the court since *Brown v. Board of Education*<sup>26</sup> held that the right was, in the words of Justice Blackmun “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>27</sup>

The acute political controversy provoked by that decision which reverberates in the United States to this day had its parallel in Ireland, although, as we shall see in a moment, the issue in Ireland was dealt with in a markedly different context.

*Griswold v. Connecticut* was, however, undoubtedly a major building block in another notable example of Irish judicial lawmaking. The importation and sale of contraceptives had been made the subject of a criminal offence in the 1930s and, in the very different social climate which prevailed in the 1960s a vigorous campaign was mounted for the abolition of the ban. In *McGee v. Attorney General*<sup>28</sup> the plaintiff was a married woman, who, in agreement with her husband, wished for medical reasons to avoid another pregnancy. She issued proceedings claiming that the prohibition on her importing contraceptives to use for that purpose was a violation of her marital privacy, a claim which failed in the High Court but was upheld by a majority in the Supreme Court. Of the majority of four, three treated the right to marital privacy as one

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<sup>23</sup> (1965) 381 U.S. 479 (S.C.).

<sup>24</sup> (1965) 381 U.S. 479 at 484 (S.C.).

<sup>25</sup> (1973) 410 U.S. 113 (S.C.).

<sup>26</sup> (1954) 347 U.S. 483 (S.C.).

<sup>27</sup> (1973) 410 U.S. 113 at 153 (S.C.).

<sup>28</sup> [1974] I.R. 284 (S.C.).

of the personal rights not specified in the Constitution in accordance with the approach adopted in *Ryan*. Budd J. expressly recognised the existence of a general right of privacy. Alone in the majority, Walsh J. did not ground his judgment on an unspecified right of privacy but rather on the right of parents to decide the number of their offspring being an essential feature of the protection afforded to the institution of marriage under Article 41 of the Constitution.

This case, however, and the later decision of the Supreme Court in *Norris v. Attorney General*<sup>29</sup> – where the constitutional validity of laws criminalising homosexual behaviour was in issue – indicated that the form of judicial creativity which appeared to have been sanctioned with the emergence of the doctrine of unenumerated rights could also encounter serious jurisprudential problems. The majority in the latter case, although not rejecting the proposition that there was a right of privacy more wide ranging than the right of marital privacy established in *McGee*, were emphatic in their view that it could not justify what O’Higgins C.J. described as a “no go area” in the field of private morality. The dissenting judgment of Henchy J., however, made it clear that, in his view previous decisions of the court – presumably *Ryan* and *McGee* – had established a right of privacy, broader than a right of marital privacy, which inhered in every citizen by virtue of his human personality. He identified it as

A complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen’s core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy.<sup>30</sup>

Later still, the constitutional right of privacy was held to justify the High Court in the exercise of its wardship jurisdiction giving permission to a family for the withdrawal of nutrition through a tube from a ward who was a member of the family and had been for many years in a permanent vegetative state, although she retained a minimal cognitive capacity. It was held that a competent patient who

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<sup>29</sup> [1984] I.R. 36 (H.C. & S.C.).

<sup>30</sup> [1984] I.R. 36 at 71 (S.C.).

was terminally ill was entitled to elect not to allow or accept treatment and that it followed that, in the case of an incompetent person, the court, applying the test of what was in the best interests of the ward, could make a similar decision on her behalf.<sup>31</sup>

The right of privacy was also successfully invoked in a case where two journalists claimed that the tapping by the State of their telephones infringed their right of privacy.<sup>32</sup>

While the judgments in these cases have attracted some criticism on the ground that they do not provide a comprehensive legal analysis of the concept of privacy<sup>33</sup> it is perhaps understandable that the judges, in dealing with issues so disparate as contraception, homosexuality and the right to refuse medical treatment, preferred to approach the cases on a step by step basis.

The first step was the finding in *Ryan* that the range of constitutional rights was not exhausted by the categories specifically enumerated in the Constitution. The second was that a right of privacy – or, in the words of McCarthy J, the second dissenting judge in *Norris*, the right “to be left alone” – is a right so universally acknowledged as to warrant classification as a constitutional right. The third was the determination whether, in a particular context, the right was being invaded.

The second step rested on an acceptance of the principle enunciated with such conspicuous clarity by John Stuart Mill, the following terms:

... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self protection ... The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it would be better for him to do so, because it will make him happier, because, in the opinions of others, to do so,

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<sup>31</sup> *In re a Ward of Court (No. 2)* [1996] 2 I.R. 79 (H.C. & S.C.).

<sup>32</sup> *Kennedy v. Ireland* [1987] I.R. 587 (H.C.).

<sup>33</sup> See for example McMahon, B., and Binchy, W., *Law of Torts* (3<sup>rd</sup> ed., Butterworths, Dublin, 2000), pp. 1012-1023.

would be wise or even right.<sup>34</sup>

That philosophy with its emphasis on the sovereignty of the individual, has been the subject of much criticism by those who, like Sir James Stephen in the 19<sup>th</sup> century and Lord Devlin in the 20<sup>th</sup> century, declined to accept that the law should turn its back on the enforcement of private morality, a view which, as we have seen, found a sympathetic echo in the majority judgment in *Norris* which declined to treat the criminalisation of homosexual conduct as inconsistent with the fundamental rights guaranteed by the constitution.

It is a debate which we can anticipate will continue to rage throughout the liberal democracies of the west, the controversies now extending to areas such as the use of drugs, whether they are narcotics, alcohol or nicotine and the control of pornography and prostitution. In the cases which have come before the Irish courts, my sympathies would be with those who adopted Mill's approach, rather than Lord Devlin's, to the issue of privacy. But I would also share the unease which has been expressed as to the somewhat dubious premises on which the doctrine of unenumerated rights rests and the dangers for democracy of unrestrained judicial activism in this area.

In contrast to the experience in the United States, however, the doctrine of unspecified personal rights played no part in the unfolding Irish controversy on abortion. The agreement of the two largest political parties to amend the Constitution by providing an express guarantee of the right to life of the unborn was undoubtedly a reaction to fears expressed by some opponents of abortion that the Irish courts would build on the decision in *Ryan* and adopt the same approach as the majority in *Roe v. Wade* resulting in a conclusion that a woman's right to privacy included the right to terminate her pregnancy. The referendum was passed and a new provision included in the Constitution guaranteeing the right to life of the unborn "with due regard to the equal right to life of the mother".<sup>35</sup>

In what the editors of the leading text book on the Irish

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<sup>34</sup> Mill, J.S., *On Liberty and Other Writings* (Collini, S., ed.) (Cambridge University Press, Cambridge, 1992), p. 13.

<sup>35</sup> Constitution of Ireland, 1937, Article 40.3.3°.

Constitution<sup>36</sup> have called the most controversial case in the history of the State, the Supreme Court in 1991 in *Attorney General v. X*<sup>37</sup> set aside an injunction granted in the High Court which would have restrained a 12 year old girl who was pregnant as the result of a rape from travelling to England to have an abortion. The majority concluded that the psychological evidence that the girl was in danger of committing suicide if she carried the pregnancy to its full term meant that there was a risk to the mother which outweighed the right to life of the foetus. The decision, accordingly, essentially turned on how, in such circumstances, the respective rights to life of the unborn and the mother were to be balanced and, although unquestionably the cause of intense debate, cannot be regarded, as some have suggested, as an exercise in judicial activism.<sup>38</sup>

The tide of judicial lawmaking has somewhat receded in recent years in Ireland, as unease persists as to the underlying basis of the decision in *Ryan*. Those who are happy with the view that rights other than those expressly guaranteed received implicit acknowledgement in the Constitution and that the task of defining them is properly a role for judges rather than legislators would probably accept that considerable judicial restraint is called for in this area, if the delicate balance of the separation of powers is to be preserved. More recently still, however, arguments as to the respective roles of the arms of the State have arisen in a somewhat different context. The question has arisen as to whether, in cases where the legislature or the executive can be shown to have failed in the provision of particular social services, the court can come to the assistance of those who are seen as the victims of official indifference or incompetence, not merely by finding the other branch of government to have been in default, but also by making orders requiring them to take positive steps, including the expenditure of money, to remedy the alleged violation of the rights in question.

Altogether apart from the difficulties that the exercise of such a jurisdiction might give rise to in virtually all modern liberal democracies, a particular problem arises in Ireland having regard to the express provisions of the Constitution itself.

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<sup>36</sup> Hogan, G. and Whyte, G., (ed.) *J.M. Kelly: The Irish Constitution* (4<sup>th</sup> ed., LexisNexis Butterworths, Dublin, 2003), p. 1503, para. 7.3.261.

<sup>37</sup> [1992] 1 I.R. 1 (H.C. & S.C.).

<sup>38</sup> See Cox, N., "Judicial Activism, Constitutional Interpretation and the Problem of Abortion: *Roe v. Wade* (1973) and *X. v. A.G.* (1992)" in O'Dell, E., (ed.), *Leading Cases of the Twentieth Century* (Round Hall, Dublin, 2000), pp. 237-254.

Under the heading “Directive Principles of Social Policy”, there are set out a number of principles which are stated to be for the general guidance of the Oireachtas. We need not concern ourselves with the details: they might, not unfairly, be described as mildly progressive with a leaning towards benign capitalism rather than socialism. The language is somewhat dated and, in some respects, at least, even anachronistic: a pledge to “[establish] on the land in economic security as many families as in the circumstances as shall be practicable”<sup>39</sup> could only have been drafted at a time when the impact of modern industrialisation and the move to the abolition of all forms of agricultural subsidies could not have been anticipated. Nor is the requirement that the “control of credit” be organised for the welfare of the people as a whole easily achievable by the State when monetary policy, save in the area of taxation, is now exclusively determined by the European Central Bank. But these are, in a sense, academic considerations, since the article itself says that

The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this Constitution.<sup>40</sup>

That would seem to reflect a view of the framers of the Constitution that the enforcement of what have come to be called “socio-economic rights” is the function of parliament and not of the courts.

However, while there is undoubtedly some powerful judicial support for that view, the matter cannot be regarded at this stage as finally resolved. What has been made clear<sup>41</sup> is that the courts will not usurp what they regard as the role of the legislature and the executive in determining priorities in the allocation of national resources or in supervising the expenditure of money for specific social needs. It had been pointed out that where a declaration is made that the legislature or executive have failed to uphold a particular constitutional right of the citizen, the courts are entitled to assume that their decision to that effect will be treated with the

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<sup>39</sup> Constitution of Ireland, 1937, Article 45.2.v.

<sup>40</sup> Constitution of Ireland, 1937, Article 45.

<sup>41</sup> See for example the judgment of Costello J. in *O’Reilly v. Limerick Corporation* [1989] I.L.R.M. 181 (H.C.).

appropriate degree of respect by the other organs of State. It is quite another matter, however, for the court to assume the roles specifically assigned under the constitution to the legislature and the executive. I will not attempt to improve on the emphatic statement of the law *per* Hardiman J. in *Sinnott v. Minister for Education*:<sup>42</sup>

In my view, conflicts of priorities, values, modes of administration or sentiments cannot be avoided or ignored by adopting an agreed or imposed exclusive theory of justice. And if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others they would step beyond their appointed role. The views of aspirants to judicial office on such social and economic questions are not canvassed for the good reason that they are thought to be irrelevant. They have no mandate in these areas. And the legislature and the executive, possessed of a democratic mandate, are liable to recall by the withdrawal of that mandate. That is the most fundamental, but by no means the only, basis of the absolute necessity for judicial restraint in these areas. To abandon this restraint would be unacceptably, and I believe unconstitutionally, to limit the proper freedom of action of the legislature and the executive branch of government.<sup>43</sup>

It is to be noted that adoption of that view would not have as a necessary consequence, the endorsement of the so called “originalist” school of constitutional construction, in which any deviation from the discernible intentions of the framers of a constitution is condemned. In an extreme, albeit powerfully argued, form, that doctrine has been expounded in the writings of Robert Bork.<sup>44</sup> But the approach so forcefully advocated by Hardiman J. is entirely consistent with the observation of Walsh J. that it is no

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<sup>42</sup> [2001] 2 I.R. 545 (H.C. & S.C.).

<sup>43</sup> [2001] 2 I.R. 545 at 711 (S.C.).

<sup>44</sup> Bork, R.H., *The Tempting of America: The Political Seduction of the Law* (Simon & Schuster, New York, 1991).

accident that the Constitution of Ireland is written in the present tense. It is to be treated as a living document, which without doing extreme violence to its actual provisions, can in many instances be so interpreted as to reflect the changes time inevitably brings. In that, as in their historic role of developing the common law, judges, in Ireland as elsewhere, must inevitably be sensitive and responsive to 'the felt necessities of the time'.