

Constitutional and Legal Reform in Ireland, 1937-1998: The American Context

- An Essay in Culture and Law

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Introduction

The history of constitutional law and legal reform in modern Ireland cannot be fully understood without its American accents, cultural as well as judicial.

In her biography of Mary Robinson, *Irish Times* journalist Lorna Siggins describes how, in 1967, the young law graduate left Trinity College, Dublin, to discover the meaning of 'direct action' at Harvard Law School.[1] Mary Robinson (née Bourke) went to the United States in 1966 at the urging of Harvard's Arthur van Mehren, whom she had met at a session of the Hague Conference on Private International Law the year before, in which she had served as an official note taker and *secrétaire rédactrice*. At Harvard she obtained the master of laws degree (LL.M), in addition to her master's degree in law from Trinity College and her barrister-at-law degree from King's Inns, Dublin. She took six subjects at Harvard: conflict of laws, the prediction and prevention of harmful conduct, an introduction to urban legal studies, international transactions and relations, legal aspects of the European Common Market, and the civil law system. The choice reflected her growing interest in international law and the social problems of modern urban societies.

In hindsight, however, it seems to have been less the academic challenge at Harvard than the contemporary intellectual and political climate in the United States (and at Harvard) that was to provide the greatest stimulus to Robinson's career. Later she would mention her time

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in Cambridge as one of the most significant influences of her life.

The time at Harvard was particularly important for what it taught her about the relation between law and society. Interviewed by the *Sunday Independent* in 1980, she recalled how, in the late 1960s, social issues were suddenly becoming articulated in the debate among American law students. She also recalled how she had been personally affected by the new attention that was not given to matters of personal conscience:

The Vietnam War forced a lot of young people to re-think. There was a great deal of discussion on socialism, on equality, civil rights, and poverty. Many of the very bright students were turning down large law firm salaries, [sic] to get involved in projects and counsel for legal education, which was a totally transformed approach. When I came home, I related all this to Ireland and have continued to do so.[2]

What Mary Bourke brought home with her, then, was a growing awareness of law as one of the structuring dimensions of culture: law as the ‘hidden infrastructure which conditions our society and pervades almost every aspect of our lives,’ as she once put it.[3] Add to this an increased conviction that Irish judges ought to play an active political role. Her direct inspiration for this idea was the United States Supreme Court under Chief Justice Earl Warren.

Seen in a wide, international perspective, “the education of Mary Robinson” illustrates the way in which American culture and law has had a considerable impact on the thinking of European lawyers after the Second World War. But, for historical reasons, Ireland is a particularly interesting case to study, as I hope to show in this essay.

In this essay, I argue that there is an American context to Irish constitutional politics even from time of the drafting of Bunreacht na hÉireann (henceforth the Constitution). After first accounting briefly for the main features of the Constitution, I proceed to discuss it as a social “manifesto” reflecting de Valera’s personal perceptions of the threats to the values of the national community posed by the spreading of a modern, “Americanised” culture. Then I demonstrate the irony that an “American” provision in the Constitution judicial review, later opened the door for “American” values, i.e. individualism, when Irish Supreme Court judges Cearbhall O Dalaigh and Brian Walsh, in the 1960s, initiated a process of legal modernisation on the model of American constitutional construction. In spite of the challenge from political traditionalism in the early 1980s, this reform process continued into the 1990s, now largely as a result of Ireland’s entry into an international European community whose courts, after having assimilated the new, American rights philosophy, served, more or less officially, as Ireland’s highest courts of appeal. At the end of my essay,

I argue for the significance of Mary Robinson as a symbol of this process, which came to full fruition in Ireland with the Belfast Agreement of 1998.

I: Bunreacht na hÉireann and the Challenge of Modernity

‘We the People’

The Constitution of Ireland has often been seen as de Valera's personal legacy to the Irish people. Little wonder, for, since his return to parliamentary politics in 1927, he had campaigned against the Irish Free State Constitution of 1922, and, 1935-1937, he played an active role in the drafting of a new basic law that more openly represented the values of the Irish Revolution.[4]

Even from its narrow passage by popular referendum in July 1937 (685,105 votes to 526,945), the Constitution was an advanced piece of constitutional law for a political system built on the principle of responsible democracy.[5] It created a bicameral parliament (Oireachtas) with a lower house (Dáil) and an upper house (Seanad), the office of a popularly elected president as head of state, and an independent judiciary. The Constitution can reasonably well be described as a written version of the (unwritten) British constitutional tradition, if it were not for three features which show the influence of American constitutionalism: the referendum, the establishment of a Supreme Court with special functions, and the integration of a Bill of Rights. All three provisions came to play an important role for the introduction of legal reform in Ireland from the 1960s on, although, when the Draft Constitution was debated in Parliament in 1937, they were hardly mentioned. At that time, both de Valera and the opposition parties did not regard them as central to the constitutional project.

The Constitution explicitly protected the basic political and civil rights of citizens. This gives it the appearance of a moderately liberal document, given the conservative and authoritarian social values that characterised Irish society and the – how split - nationalist movement in the 1930s. Eamon de Valera had taken great pains to emphasise that from then on ‘the people [would be] the masters’, and that the people would be ‘above the lawyers and above Government and all others.’[6] This republican ideal was also stated in the Preamble: ‘We, the people of Éire [...] do hereby adopt, enact, and give to ourselves this Constitution,’ it said, with an echo from the American Constitution, a source of inspiration for Irish republicans since the end of the eighteenth century.

Nevertheless, the Draft Constitution did give rise to critical comments, including accusations of discrimination against the rights of individual citizens. The criticism was based on the social status it was alleged to give women, especially in its articles on the ‘fundamental rights’ of the family. The way in which de Valera dealt with this issue is key to understanding how his conception of the relation between the citizen and the nation state.

The Rights of the Individual vs. the Interests of the State

During the debate in the Dáil on May 11, 1937, two deputies claimed that the Constitution, if passed, would reduce the rights and opportunities of women. In doing so, they voiced inside the Dáil the criticism raised outside by a number of Irish women's groups, who feared that the proposed constitution would leave the door open for ‘reactionary legislation against women in every department’ and that it would deny women the ‘equal rights and equal opportunities [that] Irishmen and Irishwomen’ had been “guaranteed” in the “Proclamation of the Irish Republic” in 1916.[7] The argument that had been raised during the debate did not concern women's political rights but the delimitation of their social and economic rights by Articles 40.1, 41.2, and 45.[8] Article 40.1 read (and still reads):

All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

The “moral” and “social function” of women was further stated in Article 41.2:

1. In particular the State recognises that by her life within the home, woman gives to the State a support within the home without which the common good cannot be achieved.
2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

De Valera did not recognise the alleged discrimination against women in the wording of this article. On the contrary, he was convinced that the article gave protection to women (including widows, unmarried mothers, mothers married to neglectful or disabled husbands, and mothers with handicapped children) in that it prevented them from being forced by economic necessity to work outside the home. He spent much of his speaking time defending his own reasons for including it. His defence was obviously motivated by the personal unease he felt about the social

consequences of economic modernisation, particularly the effects of the international market economy, as I shall demonstrate below.[9]

This concern led him to include an article (Article 45) which stated a number of Directive Principles of Social Policy intended for ‘the general guidance of the Oireachtas’. In general, these directives could be said, in theory at least, to have laid a moral basis for the creation of an Irish welfare state. We read, for example, that it is the obligation of the State ‘to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life’. Furthermore, the State is obliged to secure that ‘men and women equally [will have] an adequate means of livelihood’ and to regulate the economy in such a way as to serve ‘the common good’ and ‘the welfare of the people as a whole’.

De Valera’s notion of the ‘the common good’ deserves some attention. As it was mentioned above, the Constitution recognises basic individual rights. It is also important to underline that the Constitution expressly guarantees the rights of religious minorities. Still, in practice de Valera’s conception of ‘the common good’ was linked to his majoritarian idea of democracy. He found that if 99 percent of all Irish women shared the values of the Constitution - largely his own values - he was justified in disregarding the interests of the 1 percent who did not.[10] This had implications for the largest religious minority of the State, Irish Protestants, with whom the previous government had clashed in 1923 on the issue of divorce.

The 1937 Constitution integrated the existing statute law against divorce under the rights of the family (Article 41.3). The new constitutional ban originated in the social teaching of the Catholic church and deprived the Protestant minority of a right that did not conflict with the doctrines of their own church. De Valera admitted that the ban reflected the ethos of the religious majority of the state. But he defended it with a secular argument, namely the interest of the common good, arguing that ‘[t]his is not *merely* a question of religious teaching [...] even from the purely social side, apart from all that, I would propose here that we would not sanction divorce [emphasis added].’[11]

De Valera’s argued from his notion of Ireland as a national family ideally kept together in a tight social order by popular common will. His “familist” ideology was a conglomerate of elements that derive from Rousseau (*volonté générale*), Herder (*Volk*), and “romantic” social philosophy, whether rooted in the teaching of the Catholic church or in communitarian ideals of a Tönnies extraction (*Gemeinschaft*). The result was a constitution in which some passages sound less like a legal document

than as a social manifest. The social directives, in particular, appear as a programme about how to save the Irish society from the destructive forces of modernity. Or: how to remain a nation in a modernising and internationalising age.

The Challenge of Anglo-American Modernity

Eamon de Valera's personal experiences since 1916 had taught him that the Irish, in spite of occasional bursts of national fervour, still suffered from an undeveloped sense of national identity. This was partly a result of British colonialism, partly a result of the split within the national movement in 1922. But in his perception it was also a product of an Anglo-American materialist and individualist culture that was eroding traditional Irish values.

De Valera feared that the values and norms of the traditional Irish culture - and, with this, the sense of living in a community based on a common ethos - would be jeopardised if individual interests and rights were to prevail over the rights and interests of the community. The 'interests of the community as a whole' (de Valera's definition of the common good) should therefore set a limit to the freedom of the individual. There was no such thing as an 'absolute' individual right, he claimed.[12] Occasionally - when pointing out that, ideally, Ireland was a cultural, social, national, and geographical unity - he would take recourse to organicist metaphors, describing Ireland, for example, as a 'combination of chemical elements', a 'living body' inspired by a national 'soul'. [13] The political implication of such imagery was that there was little room for dissent from "national" values, and questions of personal morality became concerns of the body politic.

De Valera wanted the new Constitution to be codification of such a nation. But more than that; he also wished that it would serve as a source of inspiration and moral education for future generations striving to reconstruct an Irish nation protected from the ills of modernity. In a broadcast public address a year after the passing of the Constitution Bill, he said:

The statement of principles in the Constitution was intended to be an urge to action, and inspiration and a directive to guide us along the road to true social reform and towards a goal of national reconstruction which would really be worth while. There can, however, be no travelling along this road unless the individuals of the nation have the will to work and even to sacrifice and to endure so that the goal may be reached. To realise that the common good is in the long run the good of each individual requires a high standard of intelligence in the community unless a long tradition has made such wisdom almost instinctive. We are too young as a state for such instinctive wisdom to be the rule amongst us. We must rely on a more laboured appreciation, upon our intelligence and upon our teaching. The gospel of work and of

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service, despite what is sometimes said against it, is the gospel of progress. Without earnest work no such standard of material comfort as is enjoyed by the majority of us today can be made universal or permanent. If we let the ease which modern conditions make possible for a number of us sap our virility or detract from our energy, we are lost as a nation. What other peoples secure by state compulsion it must be our glory to secure by voluntary co-operative effort. (*Speeches and Statements*, 364-65)

This speech deserves to be scrutinised for the insight it yields on de Valera's familist concept of the nation state.

As we read, respect for the value of the common good demands personal sacrifice on the part of individuals. De Valera argues that, if there are people who find it difficult to accept the delimitation of their personal rights, it is due to the tender age of the Irish State and the political immaturity of its citizens; they have not yet developed an understanding of the 'wisdom' of pursuing the ideal of the 'common good'. They need to be 'taught', he says, using experiences from the domestic sphere to make a political point.

Then he goes on with a moral argument, which is enhanced by the religious connotations of 'gospel', 'service' and the notion of the danger of national perdition: 'The gospel of work and of service' is a 'gospel of progress'. Not progress in the liberal and modern sense of the word, however, but progress as a collective, co-operative effort that may save the nation from the morally debilitating forces of 'modern conditions'. Even though this kind of progress is not to be secured by 'state compulsion', people will still need authorities to guide them towards the common goal. They need the 'public authority', i.e. the authority of the State, which is 'truly a gift of God, an instrument of His willing whereby our lives are protected and developed'. According to de Valera's "Pauline" argument, obedience will therefore 'not prove a grudging submission but a willing acceptance of the Creator's sovereignty as it is exercised by men'. As the child must accept the authority of his or her parents if not to jeopardise family unity by an unlimited exercise of individual freedom, so must the individual citizen give in to the authority of the state in order to enjoy to the 'the family good':

[The] permanent union of men united for the general good is what we know as "society". Over and above its material elements is the sovereign public authority, the cohesive bond of union without which society would be a mere aggregate of individuals, not a firmly knit association pursuing a common aim. Just as in a family there can be neither peace nor progress nor union if to the father and mother be denied the right to direct the children to their own and to the family good - so the very notion of the State is futile if it be not conceded that there exists within the State one single and sovereign directing power having the supreme right effectively to co-ordinate all wills in the pursuit of the common end. Further, the sovereign authority

must cease to be effective if it have not the inherent right both to determine the laws by which the common good may be attained and to judge of the application of such laws in concrete cases. This regulative power must reach further still; the public authority were useless if it had not the moral right to enforce its laws and execute its judgements. (*Speeches and Statements*, 423)

De Valera was convinced that the State could not exert its authority without the assistance of other institutions, especially the church and the schools that it was responsible for. Addressing the annual congress of primary school teachers assembled at Killarney in 1940, he reminded his audience that the 20th century had already seen many examples of societies which had broken down under the impact of modernity. The implicit reason was that such societies had been based on an individualist ideology and not on national co-operation and Christian principles (*Speeches and Statements*, 430-32).

Many of de Valera's romantic, anti-modern notions of society were inspired by ideas and attitudes that had been common within both the Catholic church and among cultural nationalists since the last decades of the 19th century: a century during which it was preached from the pulpits and in nationalist papers that capitalism, individualism, and popular culture all came from "England".[14] As the historian R.V. Comerford has shown, de Valera's favourite novel was Charles Kickham's *Knocknagow*. [15] The novel's images of rural Ireland before a commercial market economy wrought havoc on traditional village life were the more likely to have struck home with a man like de Valera who had painful personal experiences of dislocation, growing up with the uneasy awareness of being the abandoned child of an Irish emigrant. His emphatic insistence on his own Irishness - even to the point of claiming that he knew the wishes of the Irish nation from his own heart (Coogan, 179, 246, 280, 296) - may be seen as a product of the very opposite feeling of being a child of 'modern conditions'.

This personal experience may also explain why he felt a particular affinity with the Irish in America. During the Anglo-Irish War, he spent the greater part of two years in the United States. He went in the hope of getting the leaders of Irish America to do 'team work' for Ireland, i.e. put pressure on the American government so that it would support the cause of Irish independence at the peace conference in Versailles.[16] He argued that the claim for Irish national sovereignty rested on the same political principles as the ones upon which the United States had been founded. But although he regarded himself as the spokesman of the Irish 'race'[17], he was soon told by some of the leaders of Irish America, for example his opponent, Judge Cohalan, that he was 'woefully out of touch with the spirit of the country in which [he was] sojourning.' [18] Apparently, it took some time for de Valera

to accept the fact that Irish Americans were developing a new identity, adapting their altered conditions in the New World. He was confused and frustrated to see that ‘men and women of Irish blood’ had lost their ‘racial’ (i.e. ethnic) solidarity.[19]

In the long term, however, his experiences in the United States taught him a lesson about the frailty of a nationhood exposed to the forces of modernity. He seems to have realised what kind of fate might be in waiting for Ireland if people adopted modern, individualist values. The Constitution was meant to prevent this from happening. Ironically, however, it turned out that he had invested it with an instrument which subverted its own mission.

II: The Constitutional Revolution

The Double-edged Sword of Judicial Review

During the debates over the Draft Constitution in 1937, most of the critical voices had been more concerned with the role of the president than with the issue of individual rights. Suspicious of de Valera's democratic disposition, members of the opposition feared that, given the president's election by direct vote of the people (Article 12.2.1) and the possibility of conferring additional powers and functions on the presidency (Article 13.10), de Valera would be able to turn Ireland into a personal dictatorship.[20] To prevent any such future situation, the Free State parliament amended Articles 13.9 and 13.10 and inserted a new Article 13.11. These articles made clear that ‘the powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government’ and that ‘no power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the Government’. De Valera claimed that he merely saw the president's role as a guardian of the Constitution and of the people’s rights against government or parliament.[21] As it later turned out, and despite the presidency's potential for wielding considerable political power, the Irish system of government did not develop into the type of semi-presidential system.[22] This was partly an effect of one of the constitutional provisions.

One of the six discretionary powers of the president, formulated in Article 26, gives the president the privilege to refer any bill other than a money bill to the Supreme Court ‘for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof’. As the

debate and closer scrutiny showed, this provision, rather than giving greater power to the presidency, invests it in the Supreme Court.

On the model of the system in force before and after the Irish Free State Constitution of 1922, the 1937 Constitution set up a hierarchy of Courts of First Instance, including a High Court invested with full original jurisdiction in both civil and criminal law, and a Court of Final Appeal, the Supreme Court. The Supreme Court was given appellate jurisdiction from all decisions of the High Court (Article 34.4.3).[23]

In addition to being the highest court of appeal, the Supreme Court was to determine constitutional construction. This judicial review provision was foreign to the British Constitution and also to the Constitution of 1922. Although it did have some European precedents in the form of constitutional courts, the United States Supreme Court was its most immediate model. However, there are certain differences between the American and the Irish supreme courts. In contrast to the US court, no *stare decisis* principle applies in the Irish court. In Ireland, in addition, the Constitution deliberately mentions judicial review, whereas in the United States it is only implied.

It is evident from the debates in the Dáil that de Valera himself did not foresee the political potentials for judicial review. He did not intend the courts to play a governmental role similar to that of the judicial system of the United States. This may be inferred from other provisions which show that judicial review was not meant to be interpreted as an absolute power. It may, for instance (under Article 28, in cases of national emergency), be superseded by resolutions of the Oireachtas. De Valera saw the Dáil as the centre of the political power in the State. It was there that the Irish people could claim its sovereign authority.(cf. *Speeches and Statements*, 306)

Although he left the Constitution open for future amendments through popular referendum, de Valera obviously did not envisage a process of a constitutional development in which judicial review ended up affecting not only statute law but also, indirectly, the Constitution itself.[24]

Given the judges' unfamiliarity with judicial review, there was indeed great hesitancy throughout the first 25 years about putting it to any practical use.[25] Normally Irish judges interpreted the constitutional rights of the citizens conservatively. Even in the mid-1950s, they refrained from adopting the policy-oriented approach that characterised the American Supreme Court under Chief Justice Warren.[28] Irish Supreme Court justices instead followed the principle held by de Valera that the courts had not been given the authority to control the parliament or to cause social change. In 1940, they declared that

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the duty of determining the extent to which the rights of any particular citizen, or class of citizen, can properly be harmonized with the rights of the citizens as a whole seems to us to be a matter which is peculiarly within the province of the Oireachtas, and any attempt by this Court to control the Oireachtas in the exercise of this function would, in our opinion, be a usurpation of its authority.[29]

A few judges, in particular Mr. Justice Gavan Duffy, a convinced republican and strong supporter of de Valera, took a more activist view. He saw in the new Constitution an opportunity to catholicise Irish law by introducing natural law principles (as understood by the Catholic Church) into the judgements of the courts. Together with a few others who thought along the same lines, Duffy felt that the Constitution offered an opening for a legal system which was particularly fitted to Irish cultural tradition and which could therefore be used to divest it of the - “foreign” - common law imposed upon Ireland by the English settlers.[28]

Not until well into the sixties did the Irish Supreme Court begin to play a new “American” role as policy maker rather than as mere interpreter of the law. It started when two judges, Chief Justice Cearbhall O Dalaigh and Mr. Justice Brian Walsh, sought to exploit the new opportunities in cases of a constitutional nature under inspiration from developments within the legal culture of the United States. In his analysis of the effects of what he calls the ‘revolution in the interpretation of the Irish legal system,’ journalist and writer Colm Tóibín concludes that the new development was motivated by two wishes: first, by a wish to “nationalise” - or “de-Anglicise” - the Irish legal system by making the court system less formal and more humane and, secondly, by a wish to realise de Valera’s original ambition of giving sovereign authority to the people.[29] But although O Dalaigh and Walsh were both supporters of Fianna Fáil, the implementation of these two wishes had implications that de Valera would probably not have consented to in 1937, because it would have meant that the interests and rights of the individual citizen would have been given greater weight than those of the state and the national community. But in practice, this was exactly what happened. In the 1960s, the Supreme Court began to rule against the government in cases in which individual rights were deemed to have been violated. In doing so, the court turned itself into an independent branch of government and became a kind of third house of legislation, as it is in the United States.

Among Irish legal scholars, the decision of the United States Supreme Court in *Brown v. Board of Education of Topeka* (1954) had created considerable attention, and the National University of Ireland had awarded Chief Justice Warren an honorary degree in 1957.[30] In the following

years, O Dalaigh and Walsh began to use the United States Supreme Court as a model for the Irish court. Walsh had already long been an avid student of the judgements of the U. S. court and was personally acquainted with a number of its members, including Associate Justice William Brennan. Both he and O Dalaigh developed the practice of regularly asking counsel if they were able to cite American precedents in their argument, which they could be expected to do insofar as an Irish-American organisation had recently donated a large number of American law books to the Bar Library.[31]

The most significant Irish Supreme Court judgements made under inspiration from the United States can be divided into three categories: (1) the curbing of the arbitrary powers that the government, individual ministers, and other bodies had formerly tended to give themselves; (2) the attempt to define the individual's rights in the area of criminal law and to protect the rights of citizens; and (3) the attempt to expand the rights of the individual on the basis of the Constitution (Tóibín 12).

The accumulated effects of judicial review and constitutional construction as influenced by American jurisprudence and legal culture since the 1960s have been so dramatic that it no longer makes any real sense to characterise the present Constitution of Ireland as the personal heritage of Eamon de Valera. Professor James Casey emphasises, however, that the main significance of judicial review in Ireland cannot be assessed only by a head count of statutes invalidated. Rather, it lies in the effect that it had, in the 1960s and 1970s, on the Irish public in creating a heightened awareness of citizens' rights and of the Constitution's role in diffusing and restricting power. Casey explains the increased invocation of the Constitution by several interdependent cultural, social, and political factors:

It took place during a period in which Ireland gave up its protectionist policies, both economically and culturally, and opened up towards the outside world, not least to American culture and social values:

There was the stimulus of economic development; the opening to the outside world caused by that and by the advent of television. There was plainly also a heightened awareness of, and concern for, rights, stimulated perhaps by the civil rights campaigns in the United States and in Northern Ireland. And as well as this, legal practitioners, and a new generation of judges, had become more conscious of the Constitution's potential for safeguarding - and indeed extending - existing rights.[32]

The adjustment to a new social climate attuned to modern notions of individual freedom and personal rights implied a loosening from the moorings of tradition, as de Valera had originally feared. In the courts, this

meant a weakening of the common law tradition in favour of more abstract principles. Also, it meant more innovative - at times even creative - approaches to constitutional interpretation. The established historical approach to constitutional construction was largely supplanted by a judicial activist approach inspired by the human rights legal philosophy of the secular natural law tradition which was revived in the United States in the post-war period, soon to return to Europe, its place of origin in the Enlightenment.[33] The “Americanisation” of Irish legal practice, thus, is modern instance of the general process of cultural diffusion.[34]

It was in the course of this process that the notion of unenumerated rights turned up in Irish courts. Not incidentally, it happened in 1965, the same year that it was introduced in the United States Supreme Court in connection with *Griswold v. Connecticut*. [35] In *Griswold*, the plaintiff had held that an anti-contraception law enacted in 1879 infringed on the right of a married couple to marital privacy. The majority of the justices had argued that specific guarantees in the Bill of Rights had “penumbras” that gave them life and substance. Among these was a right of privacy. Associate Justice William O. Douglas had even hinted at the existence of ‘a right of privacy older than the Bill of Rights’, that is, a natural right. Associate Justice Arthur Goldberg, in his concurring opinion, had argued that the concept of liberty mentioned in the Fourteenth Amendment ‘protects those personal rights which are fundamental and is not confined in specific terms to the Bill of Rights’.[36]

The same line of argument occurred in the Supreme Court of Ireland in a landmark judgement by Mr. Justice Kenny in *Ryan v. Attorney General*. *Ryan* was not about contraception but about a plaintiff who was opposed to a new practice of fluoridating public water supplies. In his judgement, Mr. Justice Kenny referred to the existence of personal rights that are ‘not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the state’.[37] The judgement made, it allowed for the future creation of several other rights not stated *in* but implied *by* the Constitution.

The personal rights recognised thus far by the Irish courts, apart from the right to privacy, are the right to strike, the right to earn one’s living, the right to communicate, the right to legal protection on criminal charges, the right to the protection of one’s health, the right to travel in the state, the right to travel abroad, the right to marry and found a family, the right to fair procedures in decision making, the right of association, and the right of access to the courts.[38]

The other watershed judgement - this time for the relationship between state and church was *McGee v. Attorney General* (1974). In this

case, two of the judges based their argument for a right of privacy squarely on the interpretation of the United States Constitution in *Griswold v. Connecticut* while citing *Poe v. Ullmann* in support. Indeed, *McGee* may be said to be a key indicator of the degree to which American jurisprudence in the period from the mid-1960s through the 1970s “took root” in Ireland, as Professor Gerard Hogan puts it.[39] In *McGee*, the majority of the Supreme Court held Section 17 of the Criminal Law (Amendment) Act of 1935 (prohibiting the importation of contraceptives) to be unconstitutional, arguing that it impugned the right of marital privacy as protected by Articles 40 and 41. In his attack on Section 17, Mr. Justice Henchy ended his opinion by quoting from the judgements of Associate Justices John Marshall Harlan and Goldberg on the right to privacy.[40]

Concurring with this opinion, Chief Justice Walsh invoked natural law principles of justice, not in order to specify the rights of married parents, but to support his view that the family had unenumerated rights over which the State could not have any control. Walsh argued that Articles 41, 42, and 43 ‘emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law’. Justice was placed ‘above the [positive] law’. This meant that the ‘individual has natural and human rights over which the State has no authority’. Walsh admitted, however, that the specific content of natural law was far from clear.[41]

The way in which the chief justice interpreted the Constitution and natural law was not in accord with the way in which the hierarchy of the Catholic church read it. Church hierarchy was strongly opposed to a liberalisation of the existing law, which banned the importation and sale of means of contraception. The bishops found that ‘the increased availability of contraceptives’ would have a negative effect on ‘the quality of life in the Republic of Ireland’.[42] The Chief Justice rejected this argument. He asserted that, in a pluralist society, the Catholic church did not possess any privileged authority to interpret the Irish Constitution or to determine the scope of personal rights. It was the exclusive privilege of the judges, he argued, to determine which rights should be considered prior to positive law and which should be considered inviolable and unfrangible. The judges should do this exclusively on the basis of the fundamental principles and values of the Constitution, their professional education and experience, and in accordance with the predominant ethos of their own age.[43]

Traditionalism Returns

McGee v. Attorney General may be characterised as the “Brown-v.-Board-of-Education-of-Topeka-case” of Irish legal and political history in that, by

sanctioning a future change in Irish law, the Irish Supreme Court from now on made social change possible in this and other areas where legislators had long hesitated to act. As for the question of contraception, Irish governments hesitated for another six years - although less complacently - until, in 1979, it abandoned Section 17 and legalised the sale of contraceptives for 'family planning or adequate medical reasons'. [44]

This and earlier judgements in defence of specified and unspecified constitutional rights of the individual citizen were instrumental in gradually turning Ireland into a liberal, pluralist democracy. Fifty years from now, this process of social change through legal reform may appear as having been swift and dramatic. To the liberal participant of the day, however, it was often felt as a slow and unpredictable course of development with moments of frustrating and serious setbacks.

One thing that helps explaining the drawn-out course is the fact that the legal profession itself at that time was far from agreed on the extent to which the law should be used at all as a political instrument. As we saw earlier, the notion of the Supreme Court as an independent branch of government was foreign to the intentions of the "founding father" of the Constitution. Because judges in Ireland are appointed, not elected. This would have meant the creation of a body capable of bypassing the people's representatives in parliament and, thus, outside democratic control. A second delaying factor was the rise of divisions in the major political parties between "modernisers" and "traditionalists". Finally, and of greatest importance perhaps, was a widespread popular resistance to legal reform in areas of morality. The fact is that in the Irish political system - with the great powers conferred on the institution of the referendum - it is indeed the voters who are masters, as de Valera had wanted it to be.

This was reaffirmed in the early 1980s when Irish society was once again affected by events in the United States. This time it was the ruling of the Supreme Court in *Roe v. Wade* (1973) which gave occasion to a new round of heated constitutional debate in Ireland.

It began when lay Catholics of a neo-traditionalist persuasion were encouraged by the rise of the New Right in the United States to launch a counteroffensive against the "liberal values" perceived to be spreading in Irish society. In many lay Catholic organisations, *McGee* had caused considerable concern about the ultimate effects of the court's ruling: would the next step of the Irish courts be to overturn the 1861 statute banning abortion? What would happen in the case of a future plaintiff claiming abortion to be a constitutional right protected by Article 40.3? This concern led to the formation, in 1981, of the Pro-Life Amendment Campaign (PLAC), an umbrella group of fourteen organisations. In 1982-1983, PLAC

campaigns successfully for a constitutional ban. The amendment was carried by 67 percent of the votes in a referendum held in September 1983. Inserted in the Constitution as Article 40.3, the ban obliges the state to acknowledge ‘the right to life of the unborn and, with due regard to the equal right to life of the mother [...] in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right’.[45]

Debating at proposed amendment, the minister for justice warned against the continued impact of the United States Supreme Court on constitutional development in Ireland:

It has become apparent that judicial decisions can alter fundamentally what had been accepted to be the law even to the extent of introducing what is virtually a system of abortion on demand. [...] Our constitutional law is in a continuous state of development. In this context, it is only necessary to think of the U.S. Supreme Court decisions on marital privacy.[46]

However, in the Senate, the independent senator, Mary Robinson, appealing to ‘Republican’ values, spoke out strongly against passing the amendment, asking the assembled members: ‘Do we want a Roman Catholic confessional State or a pluralist society in the Republican tradition of Tone and Davis? We can't have it both ways.’[47]

III: The Vindication of an American Rights Culture

The significance and achievement of Mary Robinson

Mary Robinson was, next to Garret FitzGerald, the person who, more than any other public figure in this period, was popularly identified with the cause of liberal legal reforms and a revision of the Constitution.[48] Her senatorial record from the 1970s and 1980s reveals her a persistent defender of individual rights and freedoms in many different areas. It is evident that her career as a political activist in matters of legal and social reform was given a significant impetus after the year she spent as a student in the United States.

As initially described, Robinson’s experiences at Harvard Law School convinced her that the judicial system might have a reforming function in the government of Ireland: ‘I saw Ireland quite different - how we needed change, law reform, and that even our parliamentary structures needed opening up,’ she told a journalist from *The Irish Times* in 1978.[49] Twenty-three years later, she confirmed that her sharpened awareness of the relation between law reform and politics was one of the fruits of her

American experience. She had initially been ‘very interested in the importance of the [American] Constitution and the federal Supreme Court’. She pointed out that the parallels between the constitutions of Ireland and the United States had caused her to see

[t]he potential for issues to be raised and indeed social change to come about as a result of court decisions. I saw, as did others, the potential in an Irish context, where it was hard to get a parliamentary majority for change on issues of law and morality. It was difficult for politicians to take stands partly because of our electoral system. The multi-seat constituency means that nobody is sure of his or her seat, and so you do not have very courageous stands being taken. The other way of getting change, then, [is] to bring up a constitutional case and hopefully have a court decision that could open up the situation.[50]

As a lawyer, Robinson would, mostly successfully, take on cases of alleged violation of the rights of individual citizens.[51] Many of these involved women: the de Burca-Anderson case (1976), challenging the existing jury system (which banned women from sitting in juries); the Murphy case (1982), changing the taxation of married couples, and the Hyland case (1988), ensuring equality of social welfare benefits for married couples. Other cases were concerned with the protection of civil rights and liberties, such as, for instance, the Norris case (1984) against part of the 1861 Offences Against the Person Act (which outlawed homosexual practices between adults), and *Dublin Well Woman Centre v. Ireland* (1988), on the right to inform the public about abortion. In the latter cases, she used international courts to vindicate the rights of her clients.[52]

As a senator, Robinson initiated and supported legislation on, among other concerns, adoption, marital breakdown, equal pay, free legal aid, and other issues relating to equality. She thought that many of the existing laws of the Irish State, including the Constitution, reflected a society of the past and not the complex identity and modern values of contemporary Irish citizens. She frequently accused politicians of shirking their responsibility as legislators. They failed to ‘take a lead’ in adjusting legislation to present social conditions, she would say. This had resulted in a kind of democratic deficit. She also found the administration of the Irish state too centralised. In many areas, it was ‘outside the control of the democratic process’. As a result, many young people were getting ‘disillusioned’ and felt it ‘increasingly difficult to play an active part in the country’.[53]

Robinson found particularly fault with the narrowly confessional values of the Constitution, as for instance expressed in Articles 41 and 42. The State should not ‘enshrine a particular denominational viewpoint, even a majority one, in its Constitution to the outlawing of all others’. This was

‘an infringement on human liberty’, because it meant that Ireland had taken on itself to legislate on issues of private morality. Whether in matters of family planning, censorship, illegitimacy, or adoption, she saw it as the task of the legislator to protect basic human rights as guaranteed under the Constitution. Insofar as she found that the Constitution did not live up to international conventions, she would argue that Ireland’s status as a co-signer of such conventions put the government under obligation to amend its laws accordingly. Early in her career, she saw the future legal implications of Ireland's membership in the EEC. In 1971, she predicted that it would have significant cultural implications and would mean ‘a fundamental constitutional change’. But she was also greatly concerned about the ‘lack of democracy’ in the existing structures of the EEC.[54]

Broad constitutional reform, she hoped, would help create a more stable relationship between the two states on the island of Ireland. For better North-South relations to be achieved, it was also necessary to revise Articles 2 and 3 (on the territorial claim of the Constitution). Instead of articulating the desire for a political take-over of Northern Ireland, revised articles should express an ‘aspiration for coexistence’ in ‘viable [political] units which offer the basic protections of peace and security, of respect for the dignity of human persons and of absence of discrimination and terrorism’. Realising that this was likely to be a long-term goal, however, she emphasised that fundamental human rights should not be sacrificed in the meantime. In the 1970s, she set herself off from other liberals, such as Labour's Conor Cruise O'Brien, by criticising emergency measures that limited the rights of free speech and the standard requirements of due process in the fight against political terrorism.[55]

In such cases, Robinson often drew on her knowledge of American legal precedents. In criticising the Offences against the State Bill in 1972, for example, she found that many sections of the bill reflected ‘a conflict between the protection of the individual and the interests of maintaining law and order’. Lacing her criticism with a reference to American Justice Felix Frankfurter, who, in 1943, said that ‘the history of liberty [had] largely been the history of procedural safeguards’, she went on to cite a couple of American constitutional cases. These references provoked one of her opponents, Senator Tomas Ó Maoláin, to respond: ‘It's a pity that Senator Robinson in her lauding of the various obscure things that they have in America is so selective and that she does not tell us all of what happens over there.’[56]

As President of Ireland from 1990 to 1997, Robinson often returned by invitation to the United States. In 1995, five years after her election, she gave an address at Stanford University on ‘Constitutional Shifts in Europe

and the United States.’[57] This speech deserves closer analysis since it both epitomises the dialectic between Irish and American legal development and reflects a growing recognition that not only individuals but also communities are invested with rights. This recognition may have been enhanced by Robinson’s new role as president.

The individual and the national community

In the speech, Robinson acknowledges that laws protecting individual rights, although crucial for the health of society, should not conflict with basic community values.[58] She reflects on the fundamental issues of democracy: how political power should best be exercised by balancing the interests of the individual with the interests of the community. Ideally, this is done by combining universal principles of justice with the general ethos of the community, reconciling codified law (a Bill of Rights) with common law - which is thus recognised as part of Irish legal tradition. She reminds her audience that this is the way it is done today both in the United States and Ireland and that this “American” feature has made the Irish judicial system unique in a European context. The combination - and tension - of common law and constitutionalism, she argues, may leave necessary room for the protection of community values without violating the rights of the individual citizen. She sees a tendency toward a similar beneficial tension between common and codified law in Europe today, and she describes the way in which decisions made in the European Court of Justice are now in the forefront of every nation's legal system.

In the speech, she also recognises the significance of the recent ‘new shift away from the centre’ and the ‘alternative drive to the new Europe’, in which there will be room for ‘more localised decision making’ and for the protection of national values. However, she emphasises that

localism, or subsidiarity, or special treatment or however it is described, has its limits. Local autonomy can never be allowed to become a shelter in which the abuse of our human rights is permitted out of too deferential a reverence for a national authority.[59]

Robinson goes on to say that she considers the creation of the right balance between localism and universal human rights one of the greatest challenges for Europe today. This challenge is mirrored in the historical evolution of American federalism, she argues. It is therefore useful for present-day Europeans to reflect on the coming into existence of a United States of

America, for the courts have played a key role in transforming the United States into a modern democracy. Without the 'vital role' of the courts, the American Constitution would have become a dead letter and the democratic base of the union would have been weakened through less participation and less accountability.

The courts ought to play a similar role for a developing Europe, she then goes on to argue, calling for an American-styled Bill of Rights for the European Union. This brings her to the subject of the significance of American law for the development of European law. Judicial interpretation, she emphasises, had been of vital importance for both the American and Irish constitutions, in that the courts had thus given effect not only to what was 'explicitly expressed', but also to what is implied, i.e. the unenumerated rights of the citizen. This activist approach of the courts, she reminds her audience, was something Irish judges had first learned from the American Supreme Court when they started the process of turning the Constitution of Ireland into 'a modern rights-based document'. She sees this as part of an ongoing, dialectical process between Europe and the United States:

It was to the pioneering creativity of the Warren Court of the late 1950s and early 1960s that our own Supreme Court in Dublin looked when it began in the mid 1960s to fashion our 1937 Constitution into the modern rights-based document it is today. The Irish judges learned from their American contemporaries, just as earlier generations of American colonists had learned about the control of power from such continental scholars as Montesquieu and Rousseau; and just as both you Americans and we Irish had learned about representative government from the British when our respective founders were planning our States. This process of learning from each other is at least as old as our nations, and its role in our development as nations has been incalculably beneficial.[60]

In 1997, two years after Mary Robinson gave this speech, Mary Robinson was appointed United Nations High Commissioner for Human Rights with the discreet but strong backing of the United States. The support for her candidacy came, it must be remembered, from an American president, Bill Clinton, who deliberately sought to revive the historical links between Ireland and the United States. Clinton obviously sympathised with Robinson's visions and hopes for a "New Ireland" and for an international order in which, although community values would be respected, they would no longer be allowed to conflict with universal principles of justice.[61] This vision could be argued to have found legal expression in the Belfast Agreement of 1998.

The Belfast Agreement

In a public statement on the outcome of the Referendum of 23 May 1998 on the Belfast Agreement, the Taoiseach, Bertie Ahern, praised the 95 % endorsement of the agreement, which had implied the amendment of Articles 2 and 3 of the Constitution of Ireland. He said that ‘the voice of the people [. . . had] redefined Ireland’, adding that the all-Ireland vote, the first since 1918, had ‘infused de Valera’s constitutional vision with a new authority appropriate to the challenges and opportunities offered now at the close of one century and the opening of another’.[64]

It is hard to consent to this statement, considering the fact that, since de Valera’s great moment in 1937, the Constitution has been amended 23 times. Ahern was more to the point, however, in claiming that the Belfast Agreement had redefined Ireland, insofar as it required the Irish Government to introduce constitutional amendments that arguably changed the relation between the two crucial concepts of ‘nation’ and ‘state’, redefining the Irish nation in terms of shared culture and heritage rather than territory and political institutions. Furthermore, among the ‘comparable steps’ that the Irish government promised to take in order to support the agreement was the introduction of measures ‘to strengthen and underpin the constitutional protection of human rights’ within its own jurisdiction.[63] In this way, the Belfast Agreement came to mark the culmination of a process by which the rights philosophy of the American Enlightenment tradition had asserted itself in Irish law – and culture.

Conclusion

As I have shown in this essay, this ‘redefinition’ of Ireland through constitutional and legal reform did not take place overnight, or from one year to another. It was a trajectory which can be followed over a period of more than 30 years; it was a process with many starts and setbacks, beginning with the opening of the Irish society to multiple outside influences - economic, social, cultural, legal etc. - at the end of the 1950s.

The conventional social science term for this process is ‘modernisation’, a process which was already well under way at the beginning of the 20th century, and in my essay, I have demonstrated how legal and constitutional reform in the independent Irish state was originally introduced in the vain hope that Ireland could remain within its own cultural and social loop, protected from the effects of modern, “Anglo-American” culture.

In the long run, however, socio-cultural protectionism proved impossible to uphold, and, ironically, it was one of the provisions of “de Valera’s Constitution” which contributed to its demise. Today, when the

rights philosophy is entrenched in the political and legal systems of most European states and the legal institutions of EU, we tend to forget its “American” accent.

Notes and references:

- [1] Siggins, Lorna, *Mary Robinson: The Woman Who Took Power in the Park* (Edinburgh: Mainstream, 1997) ch. 4.
- [2] Dunne, Jacqui, *The Sunday Independent*, June 15, 1980, quoted in Siggins, 51.
- [3] ‘Women and the Law in Ireland’, in *Irish Women's Studies Reader*, ed. Ailbhe Smyth (Dublin: Attic, 1993) 100.
- [4] For a detailed description of the drafting process, see Andreas Kloeveborn, *Die irische Verfassung von 1937: Entstehung und Rezeption* (Stuttgart: Franz Steiner, 2000).
- [5] Responsible democracy is defined as a political system in which the government can be held accountable for its actions and the basic rights of the citizens are protected. See Alan J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Dublin: Irish Academic Press, 1994) 1-11.
- [6] *Parliamentary Debates, Dáil*, vol. 67 (1937), cols. 40, 74.
- [7] Quoted in Rosemary Cullen Owens, *Smashing Times: A History of the Irish Women's Suffrage Movement, 1889-1922* (Dublin, 1984) 132.
- [8] Scanell, Yvonne, ‘The Constitution and the Role of Women’, in *De Valera's Constitution and Ours*, ed. Brian Farrell (Dublin: Gill and Macmillan, 1988) 124-27.
- [9] See *Parliamentary Debates, Dail*, vol. 67, col. 70.
- [10] *Ibid.*, col. 66.
- [11] *Ibid.* col. 63.
- [12] Eamon de Valera debating the Constitution of Ireland in Dáil Éireann, 11 May 1937, in *Speeches and Statements by Eamon de Valera 1917-73*, ed. Maurice Moynihan (Dublin: Gill and Macmillan, 1980) 320.
- [13] *Ibid.*, 525; Tim Pat Coogan, *Eamon de Valera: Long Fellow, Long Shadow* (London: Arrow 1995) 324. About the use of the organicist in sociology see, e.g., Donald N. Levine, ‘The Organism Metaphor in Sociology’, in *Social Research*, 62/2 (Summer 1995): 240-65.
- [14] Cf., e.g., Tom Garvin, *Nationalist Revolutionaries in Ireland 1858-1928* (Oxford: Clarendon, 1987) ch. 4.; see also Catherine Candy, *Priestly Fictions: Popular Irish Novelists of the Early 20th Century* (Dublin: Wolfhound, 1995).
- [15] *A Study in Irish Nationalism and Literature* (Dublin, 1979) 211. See also Gearóid Ó Cruaí, ‘The Primacy of Form: A ‘Folk Ideology’ in de Valera’s Politics’, in *De Valera and His Times*, ed. J.P. O’Carroll and John A. Murphy (Cork: Cork University Press, 1986) 47-61.
- [16] Letter to Arthur Griffith, 25 March 1920, quoted in T. Ryle Dwyer, *Eamon de Valera* (Dublin: Gill and Macmillan, 1980) 31.
- [17] Longford and O'Neill, *Eamon de Valera* (Hutchinson: London, 1970) 98.

- [18] Quoted in T. Ryle Dwyer, 30.
- [19] For this expression, see, for instance, letter to Arthur Griffith, 9 July 1919, here quoted from Longford and O'Neill, 99.
- [20] *Parliamentary Debates, Dail*, vol. 67 (1937), cols. 229, 303, 1007-09. See also Michael Gallagher, 'The President, the People and the Constitution', in *De Valera's Constitution and Ours*, 78.
- [21] *Parliamentary Debates, Dail*, vol. 67 (1937), cols. 40, 51.
- [22] For a discussion of "semi-presidential systems" see Maurice Duverger, 'A New Political System Model: Semi-presidential Government', *European Journal of Political Research*, 8 (1980): 165-87.
- [23] Although the system of courts was authorised in 1937, it was not established until the Courts (Establishment and Constitution) Act 1961.
- [24] Quoted from Longford and O'Neill, 300; James Casey, 'Changing the Constitution: Amendment and Judicial Review', in *De Valera's Constitution and Ours*, 157.
- [25] There are important examples of its use in this period, such as *National Union of Railwaymen v. Sullivan* (1947), IR 77; *Buckley v. Attorney General* (1950), Irish Reports (IR) 67; and *In re Irish Employers' Mutual Insurance Association Ltd.* (1955), IR 176.
- [26] See Kenneth Holland, 'Judicial Activism in the United States', in *Judicial Activism in Comparative Perspective*, ed. Holland (New York: St. Martin's Press, 1991) 18.
- [27] *In re Article 26 of the Constitution and the Offences against the State (Amendment) Bill*, 1940 (1940), IR 470, 481.
- [28] Hogan, Gerard, 'Law and Religion: Church-State Relations in Ireland from Independence to the Present Day', *American Journal of Comparative Law*, 35 (1987): 47-96, quotation on 56; Basil Chubb, *The Politics of the Irish Constitution* (Dublin; Institute of Public Administration, 1991) 42-44.
- [29] Tóibín, Colm, 'Inside the Supreme Court', *Magill* (Feb. 1985): 8-35.
- [30] Pollack, Jack Harrison, *Earl Warren: The Judge Who Changed America* (Englewood Cliffs, N. J.: Prentice Hall, 1979) 193.
- [31] The tendency, since 1959, to cite American precedent may be exemplified by *O'Byrne v. Minister for Finance* (1959) IR 1; *Quinn's Supermarket Ltd. v. Attorney General* (1972) IR 1; *McGee v. Attorney General* (1974) IR 284; *The State (Healy) v. Donoghue* (1976) IR 325; *The State (M.) v. Attorney General* (1979) IR 73; *King v. Attorney General* (1981) IR 233; *Murphy v. Attorney General* (1982) IR 241; *O'Brien v. Sullivan* (1984) IR 316; and *Clancy v. Ireland* (1988) IR 326. The practice of using American precedents has become an established feature of Irish legal culture. Today important decisions in American courts are cited and referred in a regular column in the *Irish Law Times*. This is an addition to the earlier tradition of citing and referring cases from the House of Lords and the lower courts of the United Kingdom. American court decisions, along with decisions from the European Court of Human Rights and the European Court of Justice, are an important part of the context in which law is practised in Ireland. See Kelly, Hogan and Whyte, *The Irish Constitution*, 3rd ed. (Dublin, Butterworths, 1994) 451, and Patrick McEntee, interview with Gerard Hogan and Justice Barrington, 'The Constitution, Law and Ideology', *The Crane Bag*, 9: 1 (1985): 104-09.

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- [32] Casey, James, *Constitutional Law in Ireland* (London: Sweet and Maxwell, 1987) 29, 156.
- [33] For a discussion of constitutional interpretation and its development in Ireland see *J. M. Kelly: The Irish Constitution*, xcvi-cxviii, and Casey, 297-305. For the reference to the rebirth of natural law thinking see Roger Cotterell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: Butterworths, 1989) 127-32.
- [34] See, e.g., Casey, 'The Development of Constitutional Law under Chief Justice O'Higgins', *Irish Jurist*, 21 (1986) 22-23; Francis X. Beytagh, 'Equality under the Irish and American Constitutions', *ibid.*, 18 (1983), 252-53; and L. Henkin and A. J. Rosenthal (eds.) *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1991).
- [35] 381 U.S. 479 (1964).
- [36] Hall, Kermit L. et al. (eds.), *American Legal History: Cases and Materials* (New York: Oxford University Press, 1991) 520; 381 U.S. 479 (1964), 486 (Justice Goldberg, concurring).
- [37] *Ryan v. Attorney General* (1965) IR 294, 312.
- [38] Casey, *Constitutional Law in Ireland*, 306; Kelly, Hogan and Whyte, *The Irish Constitution*, 755-89.
- [39] Hogan, 'Legal Aspects of Church/State Relations in Ireland', *Saint Louis University Public Law Review*, 7 (1988) 281. From the late 1970s, the impact of European constitutional law has arguably been greater than that of American law in Ireland. See, e.g., Siofra O'Leary, 'The Reciprocal Relationship between Irish Constitutional Law and the Law of the European Communities', in *Ireland's Evolving Constitution, 1937- 1997*, ed. Tim Murphy and Patrick Twomey (Oxford: Hart, 1998) 293-306.
- [40] Hogan, 'Law and Religion', 69; *McGee v. Attorney General* (1974) IR, 326-28 (Justice Henchy) IR, 335-36 (Justice Griffin); *Griswold v. Connecticut*, 367 U.S. 497 (1961); *McGee v. Attorney General* (1974), IR, 326.
- [41] *McGee v. Attorney General* (1974) IR, 310.
- [42] *Irish Independent*, Nov. 26, 1973.
- [43] *McGee v. Attorney General* (1974), IR 284, 318.
- [44] Section 3 of the Health (Family Planning) Act (1979). Further liberalisation was made in 1985 and 1992.
- [45] For an analysis of the historical origins of the amendment initiative, see Tom Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983* (Dublin: Brandsma, 1990).
- [46] *Parliamentary Debates, Dail*, Feb. 9, 1983, vol. 99, cols. 1354-56.
- [47] *Parliamentary Debates, Seanad*, May 4, 1983, vol. 100, cols. 549-53.
- [48] Although FitzGerald in many ways personified modern Irish liberalism with his pluralist attitude and call for constitutional reform, he never succeeded in implementing his reform ideas. On the contrary, he lost credibility in the eyes of many liberals in 1982-1983 after his handling of the abortion amendment initiative.
- [49] Robinson, quoted in *The Irish Times*, Feb. 26, 1977, and in Siggins, 52.
- [50] Böss, Michael interview with Robinson, June 1995.

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- [51] For a select, alphabetically arranged index of reported cases in which Robinson appears, see Michael O'Sullivan, *Mary Robinson: The Life and Times of an Irish Liberal* (Dublin, Blackwater Press 1993) 217-19.
- [52] Mostly successfully, except in one case, in Application No. 15404/89.
- [53] See, e.g., Marital Breakdown Problems: Motion, *Parliamentary Debates: Senate*, June 15, 1983, vol.101, cols. 102-03; see also *ibid.*, col. 100; *ibid.*, Mar. 20, 1974, vol. 74, col. 441; Fourth Amendment to the Constitution Bill, 1972, *ibid.*, July 15, vol. 95, col. 413.
- [54] *Parliamentary debates, Senate*, May 4, 1983, vol. 100, col. 551; Family Planning Bill, 1973, *Parliamentary Debates, Senate*, Feb. 20, 1974, vol. 77, col. 212. See also her contributions to debates on illegitimacy, *ibid.*, vol. 79, 1974, col. 55, and Illegitimacy Status: Motion, *ibid.*, May 16, 1984, vol. 103, col. 1368. See, e.g., Joint Committee on Women's Rights: Motion, *ibid.*, July 6, 1983, vol. 101, col. 813; *ibid.*, Mar. 11, 1971, vol. 69, col. 1291; and *ibid.*, Nov. 22, 1972, vol. 73, col. 859.
- [55] *Parliamentary Debates, Senate*, July 3, 1974, col. 786; Offences Against the State Bill, 1972, *ibid.*, Dec. 2, 1972, vol. 85, cols. 1145ff; Emergency Powers Bill, *ibid.*, Sept. 14, 1976, vol. 85, col. 279.
- [56] Offences Against the State Bill, *ibid.*, cols. 1184, 1186, 1236-37.
- [57] Robinson, 'Constitutional Shifts in Europe and the United States: Learning from Each Other', speech given at Stanford University, Oct. 18, 1995, 1. Unpubl.
- [58] Robinson has always declared herself against free access to abortion in Ireland.
- [59] Robinson, 'Constitutional Shifts in Europe and the United States', 4-6. Unpubl.
- [60] *Ibid*, 2.
- [61] On securing the support of President Bill Clinton, see John Horgan, *Mary Robinson: An Independent Voice* (Dublin: O'Brien, 1997) 195-96, and Lorna Siggins, 228. For analyses of the relationship between the United States under President Clinton and Ireland, see Conor O'Cleary, *The Greening of the White House* (Dublin: Gill and Macmillan, 1996), and Andrew J. Wilson, *Irish America and the Ulster Conflict, 1968-1995* (Belfast: Blackstaff, 1995) chap. 10. Ironically, however, Mary Robinson's term in office was not renewed when she lost the support of the new president, George W. Bush in 2002.
- [62] <http://www.irlgov.ie/taoiseach/press/Archives/1998/23-05-98.htm>
- [63] The Belfast Agreement, <http://www.nio.gov.uk/agreement.htm>, February 2002.