RE-EXAMINING *McGEE, NORRIS* AND THE *X* CASE

ANNUAL DISTINGUISHED LECTURE IN LAW 2020

NUI GALWAY, 3 DECEMBER 2020*

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I sometimes think the adherents of that the butterfly theory of chaos – so that it is said that even the casual flapping of a gull's wings may affect, for example, the path of an oncoming storm – might do well to study law because it is here that one can find many examples of where chance events have had large scale and unpredictable consequences. This truism was vividly illustrated in the context of the law of negligence by Clarke J in *Cromane Seafoods Ltd. v. Minister for Agriculture*[1] when he observed that like "chaos theory" in mathematics, "the true underlying difficulty [in the law of negligence] stems from the fact that we live in a highly interactive world, where each of our fortunes are constantly affected, sometimes trivially, sometimes significantly, by decisions made or actions taken or avoided [by others]". This principle probably admits of wider application so far as the development of the law generally is concerned than is sometimes supposed.

Consider this: who would have thought that the opening of a family planning clinic in New Haven, Connecticut on 1 November 1961 would have had such long term consequences, not only for the United States, but - critically so far as this lecture is concerned - for Ireland as well. Yet in some ways it is this event which hangs over these three seminal decisions of the Supreme Court from December 1973, April 1983 and the months of February and March 1992. Allow me to explain.

McGee v. Attorney General

In the early 1960s, two Connecticut family planning activists were delighted to find that they had been finally prosecuted and convicted of a breach of Connecticut's anti-contraceptive laws by selling contraceptives from a family planning clinic. One might say "delighted" advisedly, because the singular feature of the Connecticut's law was that it had not been enforced. Indeed, the US Supreme Court had famously dismissed two earlier challenges to the constitutionality of that law,

[1] [2016] IESC 6, [2017] 1 IR 119 at para. 66.

precisely for this reason.[2] In those cases, the Court had reasoned that as the plaintiffs could not show that they were likely to be prosecuted, they had no standing to challenge the constitutionality of the law as they had not been affected by its operation.[3] The plaintiffs in *Griswold v. Connecticut*[4] were accordingly delighted that this technical objection to a consideration of the merits of their constitutional case had disappeared and a majority of the US Supreme Court duly obliged.

Unlike its Irish counterpart, the US Constitution contains no express provision protecting family life and the autonomy of the family in Article 41 or the protection of the person in Article 40.3.2 or – to use the words of the Preamble of our Constitution which Henchy J employed to great effect in *McGee* – provisions providing for the "dignity and freedom of the individual." In the absence of such provisions, the US Supreme Court had accordingly struggled in *Griswold* to find the exact basis upon which the Connecticut law could be condemned as unconstitutional.[5] The essence of the judgment was, however, that the right to privacy was *either* part of the "penumbra" of the rights guaranteed by the Bill of Rights (as suggested by Douglas J) or else part of the liberty interests protected by the 14th Amendment (as suggested by Harlan J), i.e., a form of what we would regard as part of an unenumerated rights doctrine. The dissent of Stewart J. is, however, of some interest. He described the Connecticut law as an "uncommonly silly law", but said that he was compelled to say that it was valid unless the plaintiffs could point (which he thought that they could not) to some express provision of the constitutional text which it was said to contravene.

This was the general background to the challenge to the constitutionality of the Irish anti-contraceptive statute in *McGee v. Attorney General*.[6] While the challenge in *Griswold* was brought by two family planning activists who were trying to be prosecuted so that they could challenge the validity of the law, the context of the challenge in *McGee* was completely different. It was brought by a young married woman who had four children in quick succession. She had

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[2] *Tileston v. Ullmann* 318 US 44 (1943), *Poe v. Ullmann* 367 US 497 (1961). See generally, Garrow, Liberty and Sexuality: the Right to Privacy and *Roe v. Wade* (California, 1998), Chps. 3 and 4. Garrow says (at 203) that Estelle Griswold was described as "overjoyed" when the police arrived at the new clinic's offices.

[3] The law was openly flouted, and contraceptives were sold in pharmacies for those who could afford them. See, Catherine G. Roraback, '*Griswold v Connecticut*: A Brief Case History' 16 *Ohio Northern University Law Review* 395, 396; Robert A. Burt, 'Privacy and The Contraception in the American and Irish Constitutions' 7 *St Louis University Public Law Review* (1988) 287, 288.

[4] 381 US 479 (1965).

[5] As Stewart J observed in his dissent, the majority referred to First, Third, Fifth, Ninth and Fourteenth Amendments. But, as he added pithily, the Court "does not say which of these Amendments, if any, it thinks is infringed by the Connecticut law."

[6] [1974] I.R. 284. See generally, MacCormaic, *The Supreme Court*, Chp. 8.

suffered cerebral thrombosis in her second pregnancy and she had been medically advised not to become pregnant again as her life might otherwise be in danger. The Revenue Commissioners had seized contraceptives which she had endeavoured to import.

While the legal prohibition in Ireland – s. 17 of the Criminal Law (Amendment) Act 1935 – was expressed in similar terms as the Connecticut statute[7], there the similarity ended. Our law was rigidly enforced and no one – irrespective of what side of the argument you were on – was going to describe it as an uncommonly silly law: it was rather Exhibit A to the charge that the State in its laws endorsed Catholic social teaching.[8] While *McGee* is often described as the Irish equivalent of *Griswold*, this is, I think, to miss the fundamentally different context in which both cases were decided. The decision in *McGee* started a social revolution, the consequences of which are still being played out. In that respect, *McGee* is much closer to the de-segregation decision of the US Supreme Court, *Brown v. Board of Education*[9] in 1954. Both decisions changed their countries irrevocably and both decisions required real judicial courage and a high degree of judicial imagination.

The challenge failed in the High Court before O'Keeffe P. who had noted that the prohibition contained in s. 17 of the 1935 Act did not actually prohibit the use of contraceptives. He also observed that the prohibition had been enacted by the same Oireachtas which itself had

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[7] It is true that s. 17 merely prohibited the importation of contraceptives, whereas the Connecticut law criminalised both their sale and use. The majority in *McGee* simply regarded this a difference of form, but not one of substance. As Henchy J put it ([1974] IR 287 at)

> "It has been argued that Griswold... is distinguishable because the statute in question there forbade the use of contraceptives, whereas s. 17 of the Act of 1935 only forbids their sale or importation. This submission was accepted in the High Court. However, I consider that the distinction sought to be drawn is one of form rather than substance. The purpose of the statute in both cases is the same: it is to apply the sanction of the criminal law in order to prevent the use of contraceptives..."

[8] Note the following exchange in O'Brien's *States of Ireland* (London, 1972) at 142-143 regarding laws which may strike some as "uncommonly silly". O'Brien described how in about 1952, while working for the Department of Foreign Affairs, he brought a leading English Jesuit to see a Catholic Nationalist politician based in Armagh, Senator JG Lennon. (The Jesuit Provincial was carrying out an inquiry for his Order as to the conditions of Catholics in Northern Ireland):

> "In Armagh, Senator JG Lennon showed us the electoral map of the city, providing the necessary key of religious denominations by area...What he showed us was a classic gerrymander, thorough to the point of pedantry: at one point the city boundary following the line of a particular terrace, suddenly skipped behind the back-gardens of three houses, homes of Catholics. Gerry Lennon explained those things, with considerable indignation, but at the same time a faint touch of local pride: it was not everywhere you could see the like of this abomination. But Father Wingfield-Digby was simply disgusted by such an example of rustic bigotry. 'Good Heavens!' he exclaimed. 'How perfectly stupid!' Gerry Lennon looked sourly at the Jesuit. 'In the name of God' he asked. What's *stupid* about it?'

[9] 341 US 483 (1954). Note the comments of Burt, "Privacy and Contraception in the American and Irish Constitutions" (1988) 7 *St. Louis U. Pub. L. Rev.* 287 at 289: "...no judge or political leader would publicly describe the law overturned in *McGee* as 'silly' or 'asinine'."

passed the Constitution and, applying what would nowadays be described as an 'originialist' view of constitutional law, he held that the fact that the prohibition had been enacted contemporaneously with the Constitution itself was a strong indicator that the legislation could not be unconstitutional.[10]

The Supreme Court afforded Ms. McGee a more receptive audience, as to the surprise of many and, indeed, the consternation of some, the Court invalidated as unconstitutional the prohibition on the importation of contraceptives, with two towering judgments from Walsh and Henchy JJ. in particular. The transcendent social importance of the decision coupled with the majesty of the judicial language may sometimes serves to obscure the actual basis of the decision. What. exactly, did *McGee* decide and what was the basis for that decision? Any consideration of the precise *ratio* of the decision requires a little analysis of the four separate judgments delivered by the majority.

Let us start with the leading judgment of Walsh J.[11] It is clear that the principal argument advanced by him related to the nature of marital privacy protected by Article 41 which he considered to be inherent in those provisions. One could, of course, say that the right to marital privacy is not itself expressly protected by Article 41. Yet, on almost any view of Article 41, it is clearly embraced by and bound up with key concepts of marriage which are either acknowledged or implicit in by the specific provisions of that article. These include the fact that the family is a "moral" institution possessing "inalienable and imprescriptible rights"[12]; that the "constitution and authority" of the family is protected[13] and, finally, that the State guarantees to safeguard the institution of marriage.[14] The privacy of a married couple necessarily extends to decisions in relation to matters of sexual

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[10] As it happens, there have been five separate findings of unconstitutionality directed at different sections of the 1935 Act. In addition to s. 17(3) in *McGee*, s. 1 was found unconstitutional in *CC v Director of Public Prosecutions* [2006] IESC 33, [2006] 4 IR 1; s. 2 was found unconstitutional in *ZS v. Director of Public Prosecutions* [2011] IESC 49, [2013] 3 I 326 and two features of s. 18 were invalidated in *Douglas v. Director of Public Prosecutions* [2013] IEHC 343, 2014] 1 IR 510 and *McInerney v. Director of Public Prosecutions* [2014] IEHC 181, [2014] 1 IR 536 respectively.

In view of view of the comments of O'Keefe P regarding the provenance of the 1935 Act it is slightly ironic to note that no other item of legislation has been the subject of more successful constitutional challenges: see generally, Hogan, Kenny and Walsh, "An Anthology of Declarations of Unconstitutionality" (2015) 54 *Irish Jurist* 1.

[11] "Walsh J's was subsequently the most widely cited judgment [of the various judgments in *McGee*] and it may be the most widely cited judgment in academic scholarship in Irish public law. This is so mainly because of the dramatic language Walsh uses and its apparently racial implications for the meaning of rights and the role of judges....." Doyle and Hickey, "The Use of Foreign Law in Irish Constitutional Adjudication" in Ferrari ed., *Judicial Cosmopolitanism in the Use of Foreign Law in Contemporary Constitutional Systems* (Leiden, 2020) 69 at 78.

[12] Article 41.1.1.

[13] Article 41.1.2.

[14] Article 41.3.1.

intimacy as well as to decisions regarding children. Just as, for example, as is the case in relation to decisions in relation to providing support for elderly parents[15] or making decisions regarding the place where a couple may choose to reside[16], the existence of such a right to privacy in the marriage relationship has long antecedents in our understanding of the nature of marriage and the family. Insofar, therefore, as the right to marital privacy can even properly be described as an "unenumerated" right - and in many ways it is not - it is one which is squarely derived from and is inherent in express provisions of the text of the Constitution itself. The right is, therefore, very closely connected with the constitutional text. It would also obviously merit protection - insofar as such was actually necessary - as a 'derivative' right forming part of the bundle of the personal rights guaranteed by Article 40.3.1.[17]

Having concluded that the provisions of Article 41 necessarily included a right to marital privacy, Walsh J then went on to hold that it was infringed by the existence of the statutory ban on the importation of contraceptives:

> "In my opinion, s.17 of the Act of 1935, in so far as it unreasonably restricts the availability of contraceptives for use within marriage, is inconsistent with the provisions of Article 41 of the Constitution for being an unjustified invasion of the privacy of husband and wife their sexual relations with one another. The fundamental restriction is contained in the provisions of sub-s.3 of s.17 of the Act of 1935 which lists contraceptives among the prohibited articles which may not be imported for any purposes whatsoever. On the present state of facts, I am of opinion that this provision is inconsistent with the Constitution and is no longer in force."

Walsh J then turned to consider the question of whether the provision infringed the plaintiff's personal rights as protected by Article 40.3.1. Here Walsh J stressed that the fact that the

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[15] Cf. *O'Leary v. Minister for Justice, Equality and Law Reform* [2011] IEHC 256, paras. 24 and 25, per Hogan J.:

> "24. Next, it must be recalled that Article 41.1.1 describes the family as a "moral institution" possessing inalienable and imprescriptible rights. This presupposes a system of natural love and support based on ties of blood, kinship and friendship...
> 25. Providing support for parents in advancing years is one dimension of the moral nature of the family as an institution. This precept has been a cornerstone of our moral understanding for at least 2,000 years and it has deep roots in all societies, religions and social systems. By enacting Article 41 of the Constitution, the People clearly espoused a desire to protect the family and to uphold these deeply cherished fundamental values associated with family life."

[16] *Gorry v. Minister for Justice, Equality and Law Reform* [2020] IESC 55.

[17] See now the analysis of this issue contained in the judgment of Clarke C.J. in *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49 which is discussed below.

existence of the ban might be thought to put her life and health in jeopardy engaged the guarantees of Article 40.3.1:

> "So far I have considered the plaintiff's case only in relation to Article 41 of the Constitution; and I have done so on the basis that she is a married woman but without referring to her state of health. I now turn to the claim, made under Article 40 of the Constitution. So far as this particular Article is concerned, and the submissions made thereunder, the state of health of the plaintiff is relevant. ....one of the personal rights of a woman in the plaintiff's state of health would be a right to be assisted in her efforts to avoid putting her life in jeopardy. I am of opinion also that not only has the State the right to do so but, by virtue of the terms of the proviso to s.1 and the terms of s.3 of Article 40, the State has the positive obligation to ensure by its laws as far as is possible (and in the use of the word 'possible.' I am relying on the Irish text of the Constitution) that there would be made available to a married woman in the condition of health of the plaintiff the means whereby a conception which was likely to put her life in jeopardy might be avoided when it is a risk over and above the ordinary risks inherent in pregnancy. It would, in the nature of things, be much more difficult to justify a refusal to do this on the grounds of the common good than in the case of married couples generally..."

In summary, therefore, the judgment of Walsh J appears to be based on Article 41, but he also held that the prohibition violated the personal rights guarantee in Article 40.3.1 insofar as the prohibition effected placed Ms. McGee's life in jeopardy. In passing, however, it might be observed that it seems slightly curious that in view of this reasoning Walsh J located the right in the unenumerated/personal rights provisions of Article 40.3.1 rather than by reference to the express guarantees of life and person in Article 40.3.2.

Turning now to the judgment of Henchy J, it can be said that his judgment amounted to a sustained legal rodomontade condemning the constitutionality of the statutory prohibition:

> "It is the informed and conscientious wish of the plaintiff and her husband to maintain full marital relations without incurring the risk of a pregnancy that may very well result in her death or in a crippling paralysis. Section 17 of the Act of 1935 frustrates that wish. It goes further; it brings the implementation of the wish within the range of the criminal

> law. Its effect, therefore, is to condemn the plaintiff and her husband to a way of life which, at best, will be fraught with worry, tension and uncertainty that cannot but adversely affect their lives and, at worst, will result in an unwanted pregnancy causing death or serious illness with the obvious tragic consequences to the lives of her husband and young children. And this in the context of a Constitution which in its preamble proclaims as one of its aims the dignity and freedom of the individual; which in sub-s. 2 of s. 3 of Article 40 casts on the State a duty to protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life and person of every citizen; which in Article 41, after recognising the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, guarantees to protect it in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the nation and the State; and which, also in Article 41, pledges the State to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack."[18]

This is an example of "the technique of sustained rhetoric leading to an ultimate crescendo", which is one of the "most difficult feats of prose writing".[19] When it did come, however, the crescendo was uncompromising:

> "Section 17, in my judgment, so far from respecting the plaintiff's personal rights, violates them. If she observes this prohibition (which in practice she can scarcely avoid doing and which in law she is bound under penalty of fine and imprisonment to do), she will endanger the security and happiness of her marriage, she will imperil her health to the point of hazarding her life, and she will subject her family to the risk of distress and disruption. These are intrusions which she is entitled to say are incompatible with the safety of her life, the preservation of her health, her responsibility to her conscience, and the security and well being of her marriage and family. If she fails to obey the prohibition in s. 17, the law, by prosecuting her, will reach into the privacy of her marital life in seeking to prove her guilt...
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> In my opinion, s. 17 of the Act of 1935 violates the guarantee in sub-s. 1 of s. 3 of Article 40 by the State to protect the plaintiff personal rights by its laws; it does so not

[18] [1973] IESC 2, [1974] IR 284.

[19] Hogan, "The Judicial Thoughts and Prose of Mr. Justice Seamus Henchy" (2011) 46 *Irish Jurist* 96, 99. For another striking example of this soaring judicial prose, see the judgment of Henchy J in *King v. Attorney General* [1981] IR 233.

only by violating her personal right to privacy in regard to her marital relations, in a wider way, by frustrating and making criminal any efforts by her to effectuate the decision her husband and herself, made responsibly; conscientiously and on medical advice, to avail themselves of a particular contraceptive method so as to ensure her life and health as well as the integrity, security and well-being of her marriage and her family. Because of the clear unconstitutionality of the section in this respect, I do not find it necessary to deal with the submissions made in support of the claim that the section violates other provisions of the Constitution."[20]

But it is worth looking at the two other majority judgments as well. The judgment of Budd J appears to be clearly based on both the dignity and freedom aspect of the Preamble, along with what might be described as a pure unenumerated rights approach to the protection of privacy protected by Article 40.3.1

> "The State guarantees as far as practicable by its laws to vindicate the personal rights of the citizen. What more important personal right could there be in a citizen than the right to determine in marriage his attitude and resolve his mode of life concerning the procreation of children? Whilst the "personal rights" are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognized and accepted with possibly the rarest of exceptions, and that the matter of marital relationship must rank as one of the most important of matters in the realm of privacy. When the preamble to the Constitution speaks of seeking to promote the common good by the observance of prudence, justice and charity so that the dignity and freedom of the individual may be assured, it must surely inform those charged with its construction as to the mode of application of its Articles.
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> When I apply what I have stated about the principles of the Constitution to Article 40, I am driven to the conclusion that the Act of 1935 is in particular conflict with the personal rights of the citizen which the State in sub-s. 1 of s. 3 of Article 40 guarantees to respect, defend and vindicate as far as practicable."

The final judgment of the majority was delivered by Griffin J

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[20] [1974] IR 284 at It is rather remarkable that in the definitive account of sexuality and the law in Irelamd, Ferriter's *Occasions of Sin: Sex and Society in Modern Ireland* (Profile Books, 2009)("Ferriter") there is not a single mention of Henchy J's judgment in this seminal case. Indeed, just as remarkably, the judgment in *McGee* merits just a few lines in a book running to almost 700 pages.

“It seems to me that the right of married persons to establish a home and bring up children is inherent in the right to marry. In so far as the plaintiff is concerned, the questions of whether the right of privacy in relation to her intimate relations with her husband is one of the unspecified rights referred to in sub-s. 1 of s. 3 of Article 40 and, if so, whether such right has been violated by s. 17 of the Act of 1935 are essentially the matters for determination in this action. In my opinion, the right of marital privacy is one of the personal rights guaranteed by sub-s. 1 of s. 3 of Article 40....

To return to sub-s. 1 of s. 3 of Article 40, the guarantee of the State in its laws to respect the personal rights of citizens is not subject to the limitation ‘as far as practicable’ nor is it circumscribed in any other way. The relevant portion of that sub-section in the Irish version, which prevails, is in the following terms :- "Rathaionn an Stat gan cur isteach lena dhlithibh ar cheartaibh pearsanta aon tsaoranaigh." The literal translation makes it a guarantee -"not to interfere with" rather than a guarantee to "respect." Does a law which - effectively prevents the plaintiff and her husband in their particular circumstances from resorting to the use of contraceptives for the purpose of ensuring that the plaintiff will not have another pregnancy ‘respect’ or ‘not interfere with’ the right of family privacy of the plaintiff and her husband?" In this context, I wish to emphasise that this judgment is confined to contraceptives as such; it is not intended to apply to abortifacients, though called contraceptives, as in the case of abortifacients entirely different considerations may arise. In my opinion, a statute which makes it a criminal offence for the plaintiff or her husband to import or to acquire possession of contraceptives for use within their marriage is an unjustifiable invasion of privacy in the conduct of the most intimate of all their personal relationships.

In *Griswold v. Connecticut* (1965) 381 U.S 479*,* which was another case dealing with the same Connecticut law, Douglas J. delivered the judgment of the Supreme Court of the United States; at p. 485 of the report he said: - "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and

> thereby invade the area of protected freedoms ... Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights -older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."[21]

While the four majority judgments chimed with each other and overlapped, it may be helpful if we return now to the question posed and ask again what the precise *ratio* of the decision actually was. Specifically, one must ask: by reference to what provisions of the Constitution was s. 17 of the 1935 Act actually invalidated?

It is often said, of course, that *McGee* is a classic example of unenumerated rights in action.[22] It is true that there are elements of the unrestrained *Ryan v. Attorney General* approach to unenumerated rights in all of the judgments and this is perhaps especially true of the judgment of Budd J. But on closer examination I think it clear that all members of the majority were really applying what we would now call the derivative rights approach found in the judgments of O Donnell J in *Simpson v. Governor of Mountjoy Prison*[23] and that of Clarke C.J. in *Friends of the Irish Environment v Minister for Environment.*[24]

In his judgment in the latter case Clarke C.J. set out the modern understanding of this approach to the protection of personal rights for the purposes of Article 40.3.1:

> ".....it would be more appropriate to characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being derived rights rather than unenumerated rights. The jurisprudence has, of course, identified rights

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[21] [1974] IR 284 at

[22] Note the comments of O'Donnell J. (writing extra-judicially), "The Sleep of Reason" (2017) 40 *Dublin University Law Journal* 191, 197:

> "It is interesting, therefore, that the narrative which that has become embedded in the public discussion refers to the Supreme Court when Chief Justice O Dalaigh and Brian Walsh were driving social change, and suggests that Walsh J wrote the leading judgment and relied on US authority to strike down the provisions of the 1936 Criminal Law Amendment Act prohibiting the importation of contraceptives. This is not correct without at least significant qualification. The majority judgment is, I think, that of Mr. Justice Henchy who did rely on *Griswold v Connecticut* and adopted quite a different approach to the interpretation of the Constitution."

[23] [2019] IESC 81.

[24] [2020] IESC 49.

recognised by the Constitution where the wording of the text does not use a term directly providing for the right concerned. There is no direct reference to privacy. There is no direct reference to a right not to be inappropriately deprived of the ability to work. Yet both of these rights have been recognised as existing under the Constitution, the former in *McGee v. The Attorney General* and the latter in *N.V.H v. Minister for Justice and Equality*[25].

There is a sense in which the term "unenumerated" is not incorrect, precisely because the wording of the Constitution does not refer directly to rights such as those which I have mentioned. However, there is a danger that the use of the term "unenumerated" conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution.
That does not seem to me to have been the process by which the so-called unenumerated rights have come to be identified, but nonetheless it carries a risk of misimpression. It is for that reason that I would consider the term "derived rights" as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole. In saying that, I would emphasise that I do not thereby advocate a narrow textualist approach. ..."[26]

If one, so to speak, retrospectively applies the *Friends of the Irish Environment* test it is perfectly clear, therefore, that insofar as the judgments in *McGee* rest on unenumerated rights such as marital privacy and the right to found a family, these rights are closely aligned with or are derived from one or more express constitutional provisions.

All of this is to say that if one applies a retrospective 'join the dots' style approach one can see the case is firmly rooted in key constitutional provisions as follows:

Preamble: Dignity of the individual: Budd, Henchy

Article 40.3.1: Unenumerated right to privacy as one of the 'personal" rights: Budd, Henchy, Griffin

Article 40.3.1 and Article 40.3.2 Protection of life and person: Walsh, Henchy

[25] [2017] IESC 35, [2018] 1 IR 246.
[26] At paras. 8.4 -8.7.

Article 40.5 Inviolability of the dwelling and privacy: Griffin[27]

Article 41 Family and protection of marital privacy: Walsh, and Henchy

Article 44.2.1. Freedom of Conscience: Henchy[28]

It would seem, therefore, that as three judges based their decision on Article 40.3.1, the strict ratio of the decision appears to be that the law was in question was unconstitutional because it compromised the right to marital privacy deriving from Article 40.3.1. In truth, this probably scarcely matters because nearly all of the majority judgment were replete with references - whether direct or indirect - to key, express constitutional principles of dignity, freedom of the individual, privacy/marital privacy, life, person, the inviolability of the dwelling and the autonomy of married couples.

It is clear that the reasoning in *Griswold* was influential with the majority,[29] although it was only Griffin J who quoted at length from that decision.[30] Yet looking at the judgments almost half a century after they were delivered, what is striking is not only that *McGee* is more deeply rooted in the text of the Irish Constitution than is *Griswold* with its US counterpart, but that the substantive provisions of the Irish Constitution are in fact more protective in this regard of the substantive right to (marital) privacy. Many may be surprised by this statement and as

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[27] It is true that Griffin J did not refer to Article 40.5 in terms, but the reference, e.g., to the sanctity of the marital bedroom would nowadays probably be best regarded as embracing the guarantee of inviolability of the dwelling contained in this provision.

[28] It may be noted that both Fitzgerald C.J. and Walsh J expressly rejected a claim based on freedom of conscience, saying that the constitutional protection was clearly related to free practice of religion. These statements do not, however, appear to form part of the r*atio decided* of that decision and they have not since been followed: see Kelly, *The Irish Constitution* (Dublin, 2018) at 2470-2473 and the judgment of McDermott J in *AMT v. Refugee Appeals Tribunal* [2014] IEHC 388.

[29] It is important to note that Henchy J did refer to *Griswold* and, having quoted from the judgment of Goldberg J (who in turn quoted from the judgment of Harlan J in *Poe v. Ullmann), continued by* saying ([1974] IR 284 at.)

> "It has been argued that *Griswold's case* (1965) 381 U.S. 479 is distinguishable because the statute in question there forbade the use of contraceptives, whereas s. 17 of the Act of 1935 only forbids their sale or importation. This submission was accepted in the High Court. However, I consider that the distinction sought to be drawn is one of form rather than substance. The purpose of the statute in both cases is the same: it is to apply the sanction of the criminal law in order to prevent the use of contraceptives What the American Supreme Court found in *Griswold's Case (*1965) 381 U.S. 479 *t*o be constitutionally objectionable was that the sweep of the statute was so wide that proof of an offence would involve physical intrusion into the intimacy of the marriage relationship, which the court held to be an area of constitutionally protected privacy...."

[30] Note the comments of Walsh J on this point:

> "Three United States Supreme Court decisions were relied upon in argument by the plaintiff : *Poe v. Ullman (*1961) 367 U.S. 497; *Griswold v. Connecticut (*1965) 381 U.S. 479*;* and *Eisenstadt v. Baird (*1972) 405 U.S. 438*.* My reason for not referring to them is not because I did not find them helpful or relevant, which indeed they were, but because I found it unnecessary to rely upon any of the dicta in those cases to support the views which I have expressed in this judgment."

conventional wisdom would doubtless says otherwise, it perhaps requires a detailed examination. This may nonetheless be easily demonstrated.

Let us look first at the relevant words of the 14th Amendment of the US Constitution on which Griswold is ultimately based: "....nor shall any State deprive any person of life, liberty or property, without due process of law...." The historical understanding, the jurisprudence and the proper interpretation of these provisions have been/and are the subject of intense debate in the US. I do not propose to enter upon this vast debate here save to note the relatively uncontroversial fact that the decision in *Griswold* and the subsequent case law from *Roe v Wade*[31] onwards rests, first, on an expanded interpretation of the word 'liberty' and, second, on a similarly expansive reading of the words 'without due process of law.'

In this expanded definition of the 14th Amendment the word 'liberty' is interpreted as meaning not simply liberty in the sense of personal liberty and freedom from imprisonment or detention, but rather liberty in the much broader sense of something approaching civil liberties or personal freedom. Likewise the reference to 'due process of law' has been interpreted as being not simply a reference to what we would term fair procedures. Rather this broader interpretation - known in the lexicon of US constitutional law as 'substantive due process' - requires that these words are given an expanded meaning so that they have substantive (and not simply procedural) effects. What this means is that even though the procedural fairness of a particular law may not be in doubt, that law can still be declared unconstitutional if it is deemed unfairly to abridge rights 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'[32] With these dual expanded interpretations, the 14th Amendment can and has become a vehicle whereby State laws violating or restricting traditional fundamental liberties such as privacy and personal autonomy can be invalidated as unconstitutional, even though these specific rights are not in terms guaranteed by the US Constitution.[33]

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[31] 410 US 113 (1973).

[32] I.e., the key part of the test posited by Harlan J in both *Poe* and later in *Griswold.*

[33] Again, I do not propose to enter upon this critical US debate which has generated a vast literature. I is, I think, sufficient to refer to the following passage in the judgment of Harlan J in *Poe v Ullmann.* 367 US 497 (1961) which is itself regarded as a classic exposition of the issues:

> "It is but a truism to say that this provision of both Amendments is not self-explanatory. As to the Fourteenth, which is involved here, the history of the Amendment also sheds little light on the

An Irish court confronting a *Griswold*-type issue, however, enjoys almost an *embarrass de richesses* in comparison - as *McGee* in its own way shows - even if it is also true that the rights to privacy and personal autonomy are not in terms protected by the Irish Constitution either. Yet, as we have just seen, these rights are not only more closely linked to the text of the Constitution than was the case in *Griswold,* but the language of the Constitution - specifically Article 40.3.1 and Article 40.3.2 - expressly enjoins substantive protection of these rights in a way in which at least the bare text of the 14th Amendment does not.

Consider the relevant options. As the case-law has subsequently confirmed, the right to make decisions regarding the family is clearly a key feature of the guarantees in Article 41 regarding marriage and the family[34] and this theme resonated in all four of

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> meaning of the provision. ...It is important to note, however, that two views of the Amendment have not been accepted by this Court as delineating its scope. One view, which was ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power, sought to limit the provision to a guarantee of procedural fairness. ....The other view which has been rejected would have it that the 14th Amendment whether by way of the Privileges and Immunities Clause or the Due Process Clause, applied against the States only and precisely those restraints which had prior to the Amendment been applicable merely to federal action. However, 'due process' in the consistenview of this Court has even been a broader concept than the first view and more flexible than the second.
>
> Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. ....Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.' [Due process] is discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions. Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
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> It is this outlook which has led the Court continiously to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints....”

[34] See, e.g., *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] 1 IR 305, *North Western Health Board v. HW* [2001] 3 IR 622 and *Gorry v. Minister for Justice and Equality* [2020] IESC 55.

the majority judgments. The US Constitution has no such guarantee. Likewise the guarantee of the inviolability of the dwelling in Article 40.5 is plainly and unambiguously directed at privacy within the home, even if this specific provision was not quoted by Griffin J in his quotation from the judgment of Douglas J in *Griswold*[35]. The Third and Fourth Amendments are perhaps the closest counterpart in the US system.[36] Nor is there any direct US equivalent of the guarantee of association in Article 40.6.1, save the one implied from the contours of the First Amendment.[37] While the right of association is most generally thought of in the context of trade unions, political parties and clubs, it must also extend to personal

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[35] "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship"?

Note here the comments of Hogan J. in *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579 at [32-35], [2013] 4 IR 86 at. :

> "By what possible authority could this Garda officer take it upon herself to invade the sanctity of the bedroom of a sleeping child in the middle of the night and give directions to its mother as to when it was to be woken?.,...
> Here it must be recalled that the Gardaí had no search warrant to enter the dwelling of the Omars for the purposes of a search, still less for an arrest under the Immigration Acts. Absent an acute emergency, therefore, the only possible basis, therefore, by which the child's bedroom could have been entered, would have been if one of the parents had freely given consent for this purpose. But what parent would ever freely give consent so as to permit a complete stranger to enter a child's bedroom in the middle of the night as that child slept or give that stranger authority to wander around the bedroom giving instructions as to when and how the child was to be woken?
> In any event, I am perfectly satisfied from the evidence of Ms. Omar that no true consent was ever given by either herself or her husband or that any such consent would ever have been so given. It was rather a case of where the female officer purported by her conduct and demeanour to insinuate to Ms. Omar that she had, in fact, such an authority to enter the bedroom where the child was sleeping. Viewed objectively and in the absence of either a search warrant which authorised this course of conduct or a true and genuine consent on the part of the parents, this was in itself an extremely serious breach of Article 40.5. It represented a gravely illegal act which this Court views with dismay."

[36] The Third Amendment provides:

> "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[37] As so interpreted in *NACCP v Button* 371 US 415 (1959).

friendships and, at an even deeper level, to intimate and romantic relationships of which marriage is the most profound and cherished expression.[38]

If one next compares the text of Article 40.3.1 and Article 40.3.2 with that of the 14th Amendment the difference is even more stark. The operative wording of the 14th Amendment ("...nor shall any State deprive any person of life, liberty, or property, without due process of law....") *seems* simply to guarantee fair procedures in respect of the deprivation of life, liberty or property. These particular rights (along with the right to good name) are not only also expressly protected by Article 40.3.2, but, by contrast, the text of Article 40.3 unambiguously goes much further than the 14th Amendment in two fundamental respects. First, Article 40.3.2 protects the 'person', a phrase which, as subsequent case-law demonstrates, includes 'not simply the integrity of the human body, but also the integrity of the human mind and personality.'[39] Second, both Article 40.3.1 and Article 40.3.2 oblige the State guarantees to respect, defend, protect and vindicate, subject only to questions of practicability and feasibility. For good measure, the language of Article 40.3.1 seems expressly to sanction the protection of certain personal rights not expressly set out in the Constitution itself. One thing, however, is absolutely clear: Article 403.1 and Article 40.3.2 clearly have *substantive* - and not simply *procedural* - effects.[40]

In a curious way, therefore, judged from a *purely theoretical legal perspective*, *McGee* was almost an easier decision for our Supreme Court to reach than *Griswold* was for the US Supreme Court, precisely because the dignity language of the Preamble, together with the language of the Article 40.3.1 and Article 40.3.2, the protection of the family in Article 41 (along with two constitutional provisions not mentioned in *McGe*e, namely, the the inviolability of the dwelling in Article 40.5 and the right of association in Article 40.6.1) all go further - indeed, much further - than the corresponding language of the 14th Amendment. Yet, back in the back in the

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[38] Cf. The comments of O'Donnell J in *Gorry v. Minister for Justice* [2020] IESC 55 at [67]

> "The unfamiliar language of Articles 41 and 42 of the Constitution (and perhaps, as importantly, the somewhat fusty language with which they have become encrusted through repetition in judgments and textbooks over many years) should not distract us from the obvious fact that a basic part of the human personality that is at the core of the protection of the Constitution is the ability to associate with others to form relationships, and particularly close intimate relationships of mutual benefit and support, which, in turn, create stable units which provide a benefit to society."

[39] *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 47, [2012] 1 IR 467.

[40] See, e.g., *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31, *PF v Director of Public Prosecutions* [2016] IEHC 98.

real world of the 1970s, *McGee* was an infinitely more difficult case, precisely because it touched an issue which went profoundly to the very nature of the Irish State and its willingness to embrace modernity.

These are all important considerations which should be borne in mind when we come to discuss the 8th Amendment/Article 40.3.3 and the *X* case. At the same time, the decision in *McGee* represented the finest hour in the entire history of the Supreme Court.[41] The majority judgments make for powerful and inspired reading. The Court's judgment transformed the political landscape[42] and set the country on a new course. Such a momentous decision required real judicial courage and insight. Most of all, the decision helped many to appreciate the real strengths of the Constitution and debunked – albeit perhaps not entirely – the myth that it was the product of reactionary Catholic teaching.[43]

II

Norris v. Attorney General

In June 1986 in *Bowers v. Hardwicke*[44] a majority of the US Supreme Court upheld the constitutionality of anti-sodomy laws which were then in force in the State of Georgia. These laws were essentially the same type of legislation which criminalised male homosexual acts as had been at issue some three years earlier at in *Norris v. Attorney General*[45] . This was a case where in April 1983 a majority of the Supreme Court had upheld the constitutionality of the similar provisions of s. 11 of the Criminal Law (Amendment) Act 1883. Unlike the situation in *Norris*,[46] these laws

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[41] Note the comments of Dickson, *The Irish Supreme Court: Historical and Comparative Perspectives* (Oxford, 2019) at 233: "The decision is hugely important in the history of the Irish Supreme Court, although it is a rose among many thorns."

[42] Note the comments of Ferriter (at 419): "...the delusion of the Government that it could remain inactive on these issues...was shattered by the decision of the Supreme Court in relation to McGee's constitutional challenge...." See also Foster, *Luck and the Irish: A Brief History of Change c. 1970-2000* (London, 2007) at 42-45.

[43] In the first edition of his magisterial study, *Church and Study in Modern Ireland* Professor JH Whyte stated that the Constitution "was framed on the basic of Catholic social teaching" But by the time of the second edition in 1980, the decision in *McGee* had been delivered over seven years previously and Professor Whyte was left to wonder how "this judgment [had been] wrung out a Constitution so specifically Catholic as the 1937 document had been?" But, perhaps, the true answer lies in the fact that Professor Whyte had been beguiled by the existence of a few specific provisions which did reflect traditional Catholic orthodoxies (*e.g.*, the original ban on divorce) and failed to take into account the extent to which the bulk of the Constitution was based on secular and rationalist theory, i.e., the elements on which (the debateable case of Article 41 aside) Ms. McGee ultimately succeeded.

[44] 478 US 186 (1986).

[45] [1984] IR 36.

[46] Note the comments of Toibin, "A Brush with the Law", *The Dublin Review*, Autumn 2007:

> "David Norris was, in my opinion, both the best and the worst person to bring such a case. He was the best in that, as a lecturer in Trinity College and a person of immense independence of mind, he was in no

had, in fact, been applied in Georgia: the backdrop to *Bowers* was that a male couple had been arrested for private consensual homosexual activity. We in Ireland, on the other hand, had adopted the classic Irish solution to an Irish problem and the laws had, at leats in some respects, been allowed to fall into a form of disuse.[47]

While there was no public enthusiasm for the active enforcement of these laws - such as, for example, had occurred in the 1950s in Britain prior to repeal in 1967[48] - this did not mean that the Irish public in general regarded such laws as "uncommonly silly". Rather, the issue was one which large elements of the public preferred would simply remain hidden from view, with the spectre of the criminal law remaining in the background as a symbol of the fact that society generally regarded homosexuality as unacceptable and preferred that homosexuals should preferably engage in an active deceit regarding their true orientation.[49] Yet others objected to de-

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> danger of losing his job or having his position made impossible as a result of the case. But he was the worst in that he seemed, on the face of it, not to have been damaged by the laws in question: he had not served a prison sentence. He appeared to be a happy, well-balanced person living a life of ease and privilege in Ireland. What exactly was his problem?"

[47] Let me immediately acknowledge that this is an overstatement on my part which minimises the consequences of these provisions. The existence of the criminal sanction pushed elements of the homosexual community underground, often leading to a state of affairs where homosexual men had sexual encounters in compromising positions in public toilets and parks which in turn led humiliating prosecutions: see, *e.g.*, D. Ferriter, "Gay Rights campaign breaches many barriers, but battle is far from over" *Irish Examiner*, June 12, 2008. Even if the number of men prosecuted for these behaviours was low, the criminalization of homosexual behaviour was the State's repudiation of homosexual behaviour, and in consequence, gay men themselves. The brutal murder of Declan Flynn in Fairview Park in Dublin in April 1983 and the subsequent suspended sentence afforded to his killers, confirmed in many people's minds that the Irish State afforded less than full value to the lives of male homosexuals, for which see Ferriter at 449.

One can here only but agree with the comments of O'Malley J in *PP v. Judges of the Circuit Court* [2019] IESC 26 when she referred to "a notorious statutory provision that was a key part of a legal regime that caused so much misery to many homosexual men in Ireland until its repeal in 1993."

[48] This, ironically enough, happened under the stewardship of David Maxwell Fyfe as British Home Secretary, even though Maxwell Fyfe had been the rapporteur of the legal committee of the Council of Europe Parliamentary Assembly which was responsible for the drafting of the European Convention of Human Rights. Article 8 of which guaranteed the right to privacy and a private life..

[49] Note here the comments of the European Court of Human Rights in *Norris v Ireland (*Application No 10583/83) on the issue of Mr Norris' standing to make a complaint before that Court in the absence of a formal prosecution:

> "Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant's case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect.... A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. This conclusion is further supported by the High Court's judgment of 10 October 1980, in which Mr Justice McWilliam, on the witnesses' evidence, found, inter alia, that "One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease."

criminalisation on the ground that this would send the wrong signal, as (along with the decision in *McGee* regarding contraception) it was another step along the road to secularisation and the ending of traditional Irish (Catholic) values.

This was the background to the Supreme Court's decision in *Norris* in April 1983. And the legal historian cannot ignore the social pressures which must have weighed with the Court. The debate on the 8th Amendment of the Constitution Bill 1983 (i.e., what became Article 40.3.3) hovered over the entire proceedings and, following a bruising debate in the Oireachtas, the amendment itself was later to be held in September 1983. One cannot but sense the unease which *McGee* had caused in certain quarters and certain supporters of the Amendment were also determined that to ensure that its passage would also serve as a warning to the Supreme Court to leave the delicate and sensitive matters touching on what they saw as they traditional Irish (Catholic) way of life involved in the prohibitions on abortion and homosexuality alone.[50]

The majority judgment in *Norris* is, however, now almost universally regarded as a significant wrong turning on the part of the Supreme Court. It is perhaps striking that the reasoning of the majority has never subsequently been endorsed by that Court and, quite independently of the European Court of Human Rights[51], one can safely say that it would never be followed in the modern era, even if there had never been a marriage equality referendum in 2015.[52] While previous judgments had previously traced the strong inter-linking of natural law concepts and the Christian tradition, no Supreme Court judge had ever so closely aligned constitutional jurisprudence with the values of a particular religious tradition. This is reflected in the following passage from the judgment of O'Higgins C.J.:

> "The Preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to 'our Divine Lord, Jesus Christ.' It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were

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[50] In the words of MacCormaic, *op.cit.*, 209:

> "The kindest interpretation of the majority judgment in *Norris* is that it was the product of the judges' generation and also a reflection of the climate of public discourse in 1983. The ongoing debate about inserting into the Constitution a 'pro-life' amendment to prevent the legalisation of abortion in Ireland had thrown up some sharp criticism from anti-abortion groups of the Supreme Court's decision in the *McGee* case. This may well have put the judges on guard against any perception that they were attempting to legislate from the bench."

[51] *Norris v. Ireland* (1991) 13 EHRR 36.

[52] Cf. the discussion to this effect in the judgments of Clarke CJ, O'Donnell J and O'Malley J in P*P v. Judges of the Circuit Court* [2019] IESC 49.

> proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult of acceptance."[53]

This passage has been viewed with some scepticism ever since it was first written. As a distinguished comparative constitutional scholar has written:

> "Chief Justice O'Higgins' reasoning hinged crucially on the claim that Christian values were imported into the Irish Constitution by virtue of the Preamble and, therefore, the question of whether legislation was constitutional depended on whether it complied with those values. O'Higgins C.J. did not discuss natural law. Nor did he cite a single case of the Irish Supreme Court or High Court on constitutional adjudication to support his decision."[54]

Dickson was similarly unimpressed:

> "The majority's decision is disappointing in a number of respects. First, it flies in the face of the European Court of Human Rights just 18 months earlier in *Dudgeon v. UK*[55] where 15 of the 19 judges held that the very same legislative provisions as they applied in Northern Ireland were in violation of the applicant's right to a private life under Article 8 of the ECHR. Second, it represents an overly cautious approach to the concept of unenumerated rights which in the 1960s the Supreme Court had been so proud to develop. Third, the Supreme Court's reasoning is at time based on religious and moral

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[53] [1984] I.R. 36 at 64. It is not, with respect, clear why the fact that such conduct had been criminalised in the various jurisdictions of the United Kingdom at the time of the enactment of the Constitution should play any role in this assessment. Surely the whole point of the new Constitution was emphatically to assert the full and complete independence of Ireland as a sovereign democratic nation and to repudiate its status and inheritance as a *de facto* British colony (even if formally part of the United Kingdom), thus rejecting the "laws of the political order which Mr. De Valera and the Founding Fathers of Bunreacht na hEireann, and a majority of the Irish people, rejected 60 years ago":)?: see O'Connor, "Article 50 of Bunreacht na hEireann and the Unwritten Constitution of Ireland" in O'Carroll and Murphy, *De Valera and his Times* (Cork, 1986) at 180.

[54] Kavanagh, "Natural Law, Christian Values and the Ideal of Justice" (2012) 48 *Irish Jurist* 71, 83.

[55] (1982) 4 EHRR 149.

> dogma which should find no place in the judgment of a national supreme court in any modern Western democracy."[56]

While these criticisms are measured, it is nonetheless hard to gainsay them. Any assessment of *Norris* must nevertheless be balanced by a number of other considerations.

First, it is, I suggest, possible to look beyond the technical weaknesses contained in the reasoning[57] and the failure on the part of the majority to engage properly with key precedent such as *McGee* in order to get to the heart of the decision. Here one may, I think, readily agree with the insight offered by Professor Gwynn Morgan:

> "The real ground of the decision may have been that [the majority] judges decided that Irish society was not, at that point, ready for a change; whereas [they] believed the opposite in *McGee*."[58]

Second, *Norris* represented one of the very few - and probably the last - examples where a court expressly invoked avowedly traditional Christian/Irish Catholic values and where these values played a decisive role in constitutional law.[59] The reasoning of the majority has few defenders[60]

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[56] Dickson, 276.

[57] Note the comments, of Gwynn Morgan, *A Judgment too Far? Judicial Activism and the Constitution* (Cork, 2001) at 28:

> "....the majority of the Court went into the supposed effects of homosexuality on society in more detail (risk to public health, undermining marriage, suicide). But their treatment of the evidence was not very impressive. The central fact is that Mr. Norris had called ten experts in, variously, psychiatry, sociology and theology to testify - in short - that homosexual practices was not socially damaging. By contrast, the Attorney General had called no evidence in response to defend the constitutionality of the nineteenth-century statutes [criminalising male homosexual practices.]"

[58] Gwynn Morgan, *op.cit.*, at 29.

[59] There are shades of this in *Re Tilson* [1951] IR 1 concerning religious disputes in respect of the custody and upbringing of children. But even insofar as Catholic teaching crept into majority Supreme Court judgments (a matter which is far from clear) this judgment has nonetheless been widely misinterpreted: see generally, Hogan, "A Fresh Look at *Tilson's* Case" (1998) 33 *Irish Jurist* 311.

[60] In *PP v Judges of the Circuit Court* [2019] IESC 49 O'Malley J observed:

> "It is now thirty-five years since the decision in *Norris*. The radical legislative changes over those years in relation to the legal position of sexual minorities, under both civil and criminal statutes, might have been thought impossible by at least some members of the Court of 1983, but there can be little doubt that they accord with concepts of the dignity and freedom of the individual currently accepted in this State. This proposition can now be stated with confidence because of the change to the Constitution brought about with the approval by the People of the 34th Amendment. That Amendment conferred on same-sex couples the right to enter into relationships and marry on the same terms as heterosexuals. It seems to me to be incontestable that a case such as *Norris* simply could not now be decided on the same basis as that espoused by the majority of this Court in 1983."

While this was a dissent, similar statements are also to be found in the majority judgment of O'Donnell J.

and even the subsequent autobiography of Chief Justice O'Higgins seems to reveal a certain lack of enthusiasm for his own majority decision.[61]

Third (and related to the second argument), the cultural context of the criminalisation of homosexuality has also to be understood. If one has grown up in a State imbued with a strong Christian/Catholic ethos where homosexuality was. considered to be an unnatural perversion which was morally evil and one consistently condemned by all the Christian churches, then it is difficult as a judge to shake off these views and to provide a wholly dispassionate analysis of this topic by pronouncing that this conduct should enjoy constitutional protection. Here it should be pointed out that when the same matter came before the US Supreme Court in *Bowers v. Hardwicke* some three years later in 1986, a majority of that Court not only arrived at the same result, but the judgments of the majority also contain at least a whiff of the 'religious and moral dogma' of which Dickson (rightly) complains.

In *Bowers* White J. said that the essential question was whether the US Constitution confers "a fundamental right upon homosexuals to engage in sodomy." White J.'s judgment answered this question in the negative, stating that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition" or "implicit in the concept of 'ordered liberty' is, at best, facetious." There are also remarkable echoes of the judgment of O'Higgins C.J. in the concurring judgment the US Chief Justice, Burger C.J., who said that:

> "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards.To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[62]

The entire *Norris* debate was ultimately overtaken by events. It was completely predictable –as Henchy J had observed in his dissent – that the legislation would be found to amount to a breach of the guarantee of private life in Article 8 of the European Convention of Human Rights by the European Court of Human Rights in 1988.[63] Adult male homosexual conduct was ultimately decriminalised by the Criminal Law (Sexual Offences) Act 1993 and this in turn

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[61] "This case has often been referred to as one in which the Supreme Court condemned homosexuality. That is not so, because that issue simply did not arise. If in fact legislation had been passed at the time removing criminality from homosexual conduct between adult consenting males and the issue of its validity having regard to the Constitution arose, I have no doubt that the court would have decided that no invalidity existed": O'Higgins, *A Double Life* (Dublin, 1996) at 286.

[62] 478 US 186, 196.

[63] *Norris v. Ireland* (1991) 13 EHRR 36.

paved the way for the 34th Amendment of the Constitution Act 2015 providing for marriage equality. And in the United States, *Bowers* too would would go the way of all flesh, overruled in 2003 by the US Supreme Court's decision in *Lawrence v. Texas*.[64] Influenced in part by an amicus brief submitted by a certain Mary Robinson – who had been counsel for Mr. Norris - which referred to the Norris saga, Kennedy J. stated bluntly that *Bowers* was "not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." This in turn would lead to the landmark decision of the US Supreme Court in *Obergefell v. Hodges*[65] which held that the right to same sex marriage was part of the liberty protected by the 14th Amendment, so that, when read together with the Equal Protection Clause, both federal and state prohibitions on same-sex marriage were held to be unconstitutional.

Returning to the decision in *Norris*, it should not of course be overlooked that Henchy J. delivered a magnificent dissent. [66] He first pointed out that, if the majority reasoning was correct, then *McGee* could never have been decided the way that it was, given that this "was declared to be morally wrong according to the official teaching of the Church to which about 95% of the citizens along."[67] He next pointed out that there was no necessary linkage between moral teaching and the criminal law:

> "The learned judge[68] (who dealt with this difficult case with commendable thoroughness), in substituting his own conclusions on the personal and societal effects of the questioned provisions, seems to have laid undue stress on the fact that the prohibited acts, especially sodomy, are contrary to the standards of morality advocated by the Christian Churches in this State. With respect, I do not think that should be treated as a guiding consideration. What are known as the seven deadly sins are anathematised as immoral by all the Christian Churches, and it would have to be conceded that they are capable, in different degrees and in certain contexts, of undermining vital aspects of the common good. Yet it would be neither constitutionally permissible nor otherwise desirable to seek by criminal sanctions to legislate their commission out of existence in all possible circumstances. To do so would upset the necessary balance which the Constitution posits between the common good and the

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[64] 593 US 558 (2003).

[65] 576 US 644 (2015).

[66] The dissenting judgment of McCarthy J is also impressive, but it is the dissent of Henchy J which has commanded the attention of history.

[67] [1984] IR 36 at 71.

[68] I.e., the judge in the High Court, McWilliam J.

dignity and freedom of the individual. What is deemed necessary to his dignity and freedom by one man may be abhorred by another as an exercise in immorality. The pluralism necessary for the preservation of constitutional requirements in the Christian, democratic State envisaged by the Constitution means that the sanctions of the criminal law may be attached to immoral acts only when the common good requires their proscription as crimes. As the most eminent theologians have conceded, the removal of the sanction of the criminal law from an immoral act does not necessarily imply an approval or condonation of that act. Here the consensus of the evidence was that the sweep of the criminal prohibition contained in the questioned provisions goes beyond the requirements of the common good; indeed, in the opinion of most of the witnesses it is inimical to the common good. Consequently, a finding of unconstitutionality was inescapable on the evidence.

Having given careful consideration to all the evidence, I find that the essence of the unconstitutionality claimed lies not in the prohibition, as a crime, of homosexual acts between consenting adult males but primarily in making that prohibition apply without qualification to consenting adult males who are exclusively and obligatorily homosexual. The combined effect of the questioned sections is to condemn such persons, who are destined by nature to be incapable of giving interpersonal outlet to their sexuality otherwise than by means of homosexual acts, to make the stark and (for them) inhumane choice between opting for total unequivocal sexual continence (because guilt for gross indecency may result from equivocal acts) and yielding to their primal sexual urges and thereby either committing a serious crime or leaving themselves open to objectionable and harmful intrusion by those who would wish to prevent such acts, or to intolerance, harassment, blackmail and other forms of cruelty at the hands of those who would batten on the revulsion that such acts elicit in most heterosexuals."[69]

I had previously stated of this judgment:

"The majesty of this language sweeps all before it and gets to the essence of the human condition. That is why, in many ways, the judgment is so remarkable. It was not even that Henchy was prepared to find for the plaintiff in *Norris* – although that itself was a striking fact in the Ireland of 1983 – but that the language and reasoning of the judgment looked beyond conventional wisdom and inherited assumptions and sought to educate, challenge and enlighten society about the true nature of [human] freedom. ...History has

[69] [1984] I.R. 36 at 77-78.

been on the side of Henchy in *Norris*, as indeed it has been in almost all of his striking and original contributions to jurisprudence. One measure of judicial greatness is correctly to identify the future path of the law and to persuade others – and, indeed, society at large - to follow it. This is why of the many outstanding judgments which this remarkable judge has produced - the judgments in *McGee, Cahill v. Sutton, King, Murphy* and *O'Shea* are all obvious candidates for inclusion in this list – his judgment in *Norris* is the greatest of them all."[70]

Yet before we leave the decision in *Norris*, it is important that we pay attention to the basis on which the minority found these provisions to be unconstitutional. As it happens, all member s of the Court were agreed that the Constitution protected a general right to privacy: they were divided solely on the question of whether a law criminalising homosexual conduct between consenting adult males constituted an infringement of that right.

But where did that general right to privacy come from? In his dissent Henchy J gave this explanation regarding the derivation of the right to privacy:

> "Having regard to the purposive Christian ethos of the Constitution, particularly as set out in the preamble ('to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations'), to the denomination of the State as "sovereign, independent, democratic" in Article 5, and to the recognition, expressly or by necessary implication, of particular personal rights, such recognition being frequently hedged in by overriding requirements such as "public order and morality" or "the authority of the State" or "the exigencies of the common good", there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.
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> Amongst those basic personal rights is 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

[70] Hogan, *Thought and Prose*, at 116.

> constitutional order) and which may be compendiously referred to as the right of privacy. An express recognition of such a right is the guarantee in Article 16, s. 1, sub-s. 4, that voting in elections for Dáil Éireann shall be by secret ballot. A constitutional right to marital privacy was recognized and implemented by this Court in *McGee* v. *Attorney General*; the right there claimed and recognized being, in effect, the right of a married woman to use contraceptives, which is something which at present is declared to be morally wrong according to the official teaching of the Church to which about 95% of the citizens belong. There are many other aspects of the right of privacy, some yet to be given judicial recognition. It is unnecessary for the purpose of this case to explore them. It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of the common good."[71]

If one wanted to be fastidious, it could be said that this passage still does not perhaps quieten all doubts regarding the provenance of a *general* right to privacy. So far as the reliance on *McGee* is concerned, this was different in that marital privacy is of the very essence of marriage - and not just simply in its sexual or child-rearing dimensions - as it presupposes a deep and intense bond of loyalty, trust and love: a particular form of human association sanctified by tradition, culture, religion and, just as importantly, one expressly protected by the Constitution. Nevertheless, the reference by Henchy J to *McGee* and use of the specific instance of the secrecy of the ballot in Article 16 as foundation points for the existence of a general constitutional right to privacy has strong shades of the approach taken by Harlan J in his dissent in *Poe v. Ullmann* and his concurring judgment in *Griswold.* In the words of Lazarus, this approach referred to:

> "Constitutional provisions, common law traditions, the Court's own precedents: these were dots or reference points that when connected created the rough outline - what Harlan called the 'continuum' - of due process liberty."[72]

For most people, that would, I think, be a sufficient link in this joining the dots exercise to the text of the Constitution: it is not as if, for example, the Henchy analysis regarding the existence of a general right to privacy rests on the purely subjective factors which Clarke C.J. rejected in

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[71] [1984] IR 36 at 71.

[72] Lazarus, *Closed Chambers*, 363.

Friends of the Irish Environment as an appropriate method of ascertaining the true scope of these derivative rights for the purposes of Article 40.3.1.

As it happens the Supreme Court has more recently added some further reference points, for in their respective judgments in *Simpson v. Governor of Mountjoy Prison*[73] both O'Donnell and MacMenamin JJ sought to link the enumeration by Henchy J in *Norris* of the general right to privacy with the reference to the Preamble's reference to the dignity of the individual and the protection of the person in Article 40.3.2. While MacMenamin J observed that the judgment of Henchy J in *Norris* should 'now be regarded as having outlined the main contours of the unenumerated right to privacy.', he nonetheless continued by adding:

> "The right is derived from the protection of the *person* to be found in the words of Article 40.3 of the Constitution and from the ethos of the Constitution as a whole, in particular the value of dignity of the person expressed in the Preamble. Henchy J. memorably observed that there was necessarily given to the citizen, within the required social, political and moral framework, such a range of inherent personal freedoms or immunities as are necessary to ensure the *dignity and freedom of the citizen as an individual* (. This complex of rights he categorised as the right to privacy.
>
> Throughout the judgment there is a close link between this constitutional privacy right and the value of dignity. The right to privacy and the value of dignity find their focus point in the right of the appellant to be protected as a "person" as defined under Article 40.3 of the Constitution. The words 'person"'or 'personal' not only carry with them the ideas of individual privacy and dignity, but additionally the respect due to each individual by virtue of his or her status as a human being. The terms "person(s)" and "citizen(s)" are referred to in Article 40 of the Constitution more than twenty times. By virtue of personhood, each individual has an intrinsic worth which is to be respected and protected by others and by the State."[74]

To this one could perhaps add the guarantee of the inviolability of the dwelling in Article 40.5, since the concept of the sanctity of the bedroom applies just as much to homosexual as well as to heterosexual couples. And the right of two men (or, as the case may be, two women) to associate freely and consensually with each other in an intimate fashion is surely as much part of the right

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[73] [2019] IESC 81.
[74] At [88] and [89].

of association protected by Article 40.6.1 as is, for example, the right of a group of friends to associate and to come together, if not, indeed, more so.

Looking back now on this decision through the prism of the different Ireland post marriage-equality referendum, perhaps what is so striking is that only one judge - McCarthy J - was willing to find for the plaintiff on general equality/Article 40.1 grounds and even then perhaps only tentatively. Even Henchy J was prepared to reject the Article 40.1 claim on grounds which, with respect, seem somewhat obscure and unconvincing..[75] If, however, the objective justification for the constitutionality of the legislation (and, by extension, the majority decision of O'Higgins CJ) was that it was criminalising 'unnatural sexual conduct' which Christian teaching had held to be 'gravely sinful', then it seems somewhat odd that such legislation would apply *only* to males and *not* to females.[76] *If* one proceeds from this premise, then surely it is just as much a breach of the Sixth Commandment for two females to engage in intimate sexual acts as it would be for men to do with each other. The very fact, therefore, that the legislation did not apply to women would seem at once not only to undermine what might be termed the gravely sinful/unnatural sexual conduct argument but also to highlight the fact that the legislation was patently discriminatory on the gender grounds - itself a suspect ground which subsequent judgments have (at least in some

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[75] "What the sections have done is to make certain conduct between males criminal, while leaving unaffected by the criminal law comparable conduct when not committed exclusively by males. Therein lies the reason why in my view unconstitutional discrimination under Article 40, s. 1, has not been shown. The sexual acts left unaffected are for physiological, social and other reasons capable of being differentiated as to their nature, their context, the range of their possible consequences and the desirability of seeking to enforce their proscription as crimes. While individual opinions on the matter may differ, it was and is a matter of legislative policy to decide whether a compulsion of the common good is capable of justifying the distinction drawn. I would hold that the proviso contained in the second sentence of Article 40, s. 1, makes constitutionally acceptable under that Article the line of demarcation between the acts made criminal by the impugned sections and those which the plaintiff complains are left unproscribed by the criminal law."

[76] On this point O'Higgins CJ considered that the plaintiff had no standing to advance this case because ([1984] IR 36 at):

> "Furthermore, in alleging discrimination because the prohibition on the conduct which he claims he is entitled to engage in is not extended to similar conduct by females, the plaintiff is complaining of a sit uation which, if it did not exist or were remedied, would confer on him no benefit or vindicate no right of his which he claims to be breached. I do not think that such an argument should be entertained by this Court."

It might be thought, however, that this argument simply fails to take account of the nature of discriminatory legislation. The oppressed minority are surely entitled to complain because they have been singled out for special discriminatory treatment: in the famous words of Jackson J in *Railway Express Agency, Inc. v. New York* 336 US 106 (1949).

> "....there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally."

instances and in admittedly different contexts) held is in itself a sufficient basis upon which legislation discriminating between the sexes in this way should be found to be unconstitutional.[77]

III.

It at this point that we must now retrace our steps back to the opening of that family planning clinic in New Haven in November 1961.

Whatever your stand on abortion or the separate issue of whether the US Supreme Court should have ever have concluded that laws restricting abortion were unconstitutional, what is now scarcely in dispute is that one of the reasons why *Roe v. Wade* remains controversial to this day is because the reasoning of the majority judgment is so weak. The essential critique of that decision remains: it failed to demonstrate how it fitted into the Harlan due process continuum dating back to *Griswold* and even further back into US constitutional history. Here it is difficult to improve on the searing analysis offered by Lazarus:

> "The opinion's legal argument is stunningly brief. Presented with the challenge of extending the right to privacy from contraception to abortion, the Court largely skipped the process of interpretation and moved on to announcing its conclusions. While the Court decorated the fringes of its opinion with historical details, it left the centre barren. *Roe* makes no attempt to define the contours of the right to privacy or its underlying principles. Rather than discuss the traditions or or decisions supporting the right to abortion as a fundamental aspect of liberty, the opinion simply lists precedents bearing some relation to the idea of privacy. The entire section runs but a paragraph, as if the connection between the Court's prior cases (whether involving search and seizure, marriage or contraception) and abortion was self-evident. Then, in the critical culminating sentence, the opinion equivocates even on the basic question of whether the right is properly located in the Ninth Amendment or the Fourteenth Amendment's due process clause. And its discussion of the state's competing interest in fatal life is scarcely more elaborate."[78]

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[77] See, *e.g., SM v. Ireland (No.2)* [2007] IEHC 280, [2007] 4 IR 369. But note that in *MD v. Ireland* [2012] IESC 10, the Supreme Court indicated that even in cases involving legislation which differentiated by reason of gender, the Oireachtas must be accorded great latitude, especially where there were public policy interests which justified such differing treatment.

[78] Lazarus, *Closed Chambers* (New York, 1999) at 366. In his judgment for the majority Blackmun J had observed that foetuses were not constitutional persons 'in the whole sense' and did not possess constitutional rights. But as many have since observed this does not mean that a state did not have an interest - even a compelling interest - in

In the United States the debate regarding the legitimacy of *Roe v. Wade* remains unresolved to this day. It is the source of much political contention even to the point of affecting the entire nomination process for the US Supreme Court for every nominee since Robert Bork in 1987. [79]At this point, however, we can leave that particular debate and turn to the question of how *Roe v. Wade* also ignited the Irish abortion question.

As McCormaic has noted, the first stirrings of the Irish *Roe v Wade* debate took place in the Jesuit academic journal, *Studies.*[80] The protagonists were two of the most gifted lawyers of their generation, James O'Reilly and William Binchy. Both addressed in turn the question of whether *Griswold* and *McGee* could lead to an Irish version of *Roe v Wade.* O'Reilly thought that *McGee* had been over-interpreted by those who maintained that this might be so. In many respects O'Reilly's argument rested on the dicta of Walsh J in *McGee* to the effect that, unlike contraception "any action on the part of either the husband or the wife or of the State to limit family sizes by endangering or destroying human life must necessary not only be an offence against the common good but also against the guaranteed personal rights of the human life in question." Griffin J had likewise stated that "entirely different considerations" might arise in relation to abortion. In any event, O'Reilly thought that a right to abortion would be at odds with the whole "ethos of the Irish system."

While there was much force in this argument, it was not perhaps the whole story. It was true that both Walsh and Griffin JJ had sought to distinguish the case of abortion from contraception, but these comments were pure *obiter dicta* which could not bind any future Supreme Court dealing with the question. As it happens, Harlan J had made similar comments in both *Poe* (in his dissent) and *Griswold* but that did not inhibit the rest of the Court reaching its decision in *Roe v. Wade* in January 1973 a little more than a year after Harlan's retirement in September 1971.[81] This was also Binchy's view:

> "But it is precisely because *McGee* was not concerned with abortion - and therefore is not a legal precedent against abortion, Mr Justice Walsh's remarks on the subject being

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preserving potential human life. As Ely famously stated in his own critique of *Roe*: "Dogs are not 'persons in the whole sense' nor have they constitutional rights, but that does not mean the state cannot prohibit killing them": "The Wages of Crying Wolf: A Comment on *Roe v Wade*" 82 Yale L.J. 920, 926 (1973).

[79] Dworkin's verdict on *Roe v Wade* - dating from1993 - is probably still true to this day: "...it is tearing America apart...it is also distorting its politics and confounding its constitutional law": Dworkin, *Life's Dominion* (London, 1993) at 4.

[80] O'Reilly, "Marital Privacy and Family Law" (1977) 66 *Studies* 8; Binchy, "Marital Privacy and Family Law: A Reply to Mr. O'Reilly (1977) 66 *Studies* 330.

[81] Atkinson, *Leaving the Bench: Supreme Court Justices at the End* (Kansas, 1999) at 145-146. Harlan subsequently died from cancer in December 1971.

obiter - that the dangerous seeds sown in the decision may bear fruit in the future. The concept of marital privacy which *McGee* has imported into this country from the United States, with little analysis, is of such a pliable nature that it may readily be bent, as has happened in the United States, to accommodate the recognition of the 'right' to abortion."[82]

Such were the first stirrings of the Irish *Roe v Wade* debate. Here is not the place to catalogue the ensuing debate which ultimately led to the adoption of an entire new provision in the Constitution - Article 40.3.3 - following the passage of the 8th Amendment of the Constitution 1983 in September 1983.[83] It is sufficient to note *en passant* that following the publication of what I may term the "original" wording of Article 40.3.3 in the Autumn of 1982, the matter then fell to be taken up by the incoming Fine Gael/Labour Government which had taken office in December 1982. The incoming Attorney General, Peter Sutherland SC, considered the draft wording and recommended against it, saying:

"...the wording is ambiguous and unsatisfactory. It will inevitably lead to confusion and uncertainty, not merely amongst the medical profession, to whom it has of course particular relevance, but also amongst lawyers and more specifically the judges who will have to interpret it.

Far from providing the protection and certainty which is sought by many of those who have advocated its adoption, it will have a contrary effect. In particular it is not clear as to what life is being protected; as to whether the 'unborn' is protected from the moment of fertilisation or, alternatively, is left unprotected until an independently viable human being exists at 25 to 28 weeks.

Further, having regard to the e qual rights of the unborn and the mother, a doctor faced with the dilemma of saving the life of the mother, knowing that to do so will terminate the life of 'the unborn' will be compelled by the wording to conclude that he can do

[82] Binchy, 331.

[83] For this see generally, Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983* (Dublin, 1990); Ferriter, 465-475; Walsh, *The Globalist: Peter Sutherland : His Life and Legacy* (London, 2019), Chp. 5 "The Eight Amendment time bomb.'

For a complete analysis of this debate and the legal which arose in the case-law leading up to the *X* case itself, see Sherlock, "The Right to Life of the Unborn and the Irish Constitution" (1989) 23 *Irish Jurist* 13.

nothing. Whatever his intention he will have to show equal regard for both lives, and his predominant intent will not be a factor."[84]

The Attorney General then proposed a more limited wording which would have had the effect of simply of preventing a law prohibiting abortion from being declared unconstitutional.[85] This amendment was not, however, ultimately accepted by the Houses of the Oireachtas and the "original" wording was ultimately approved by the People in a referendum held in September 1983.[86] adoption of the Amendment was initially greeted with silence in the first few years after the passage of the referendum.

For a while it looked as if Article 40.3.3 was fated to join - or, at least, come close to joining - other largely decorative features of the Constitution such as Article 41.2 (the "women in the home clause")[87] or the long deleted provisions of Article 44[88] (providing for the recognition of the special position of the Catholic Church qua guardians of the faith of the great majority of the people). These 'decorative" provisions are/were ones which had no real or significant juridicial effect and these had been included in the Constitution as an indication of the prevailing moral or national values rather than as a means of bringing about enforceable legal rights as such. Thus, for example, the 2nd edition of Kelly, *The Irish Constitution* which was published in 1984 said almost nothing about Article 40.3.3, beyond reproducing the text and adding a footnote by way of explanation regarding the circumstances in which the provision had come to be enacted. As an aside it is worth observing that much of the constitutional change in the last 50 years has addressed these 'decorative' features: the deletion of the "special position" clauses of Article 44 (1972), the "old' version of Articles 2 and 3 (1998) and the reference to blasphemy (2018) could all fairly be regarded as being "decorative" (or, at least, largely "decorative") in this sense.

But by the late 1980s in a series of decisions involving the distribution of information regarding the provision of abortion services abroad it had become clear that Article 40.3.3 was not simply

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[84] The full text of the opinion of Attorney General Sutherland is reproduced in Walsh, *The Globalist*, Appendix 2 at 316-320.

[85] Walsh, *The Globalist*, at 58: "Nothing in this Constitution shall be invoked to invalidate, or to deprive of force or effect, any provision of a law on the ground that it prohibits abortion."

[86] See generally Hesketh, Chp. VIII "Fitzgerald's Unwinnable Gamble?" at 227-262.

[87] The effect of the Supreme Court's decision in *L v. L.* [1992] 2 IR 77 is to render Article 41.2 non-justiciable, at least for most practical purposes. In *L* the Supreme Court held that the non-specific and largely aspirational language of the clause was not such as could be judicially interpreted as vesting specific constitutional rights in favour of mothers who elected to look after their children in the home: see generally, Cahillane, "Revisiting Article 41.2" (2017) 40 *Dublin University Law Journal* 107.

[88] As I have argued elsewhere, these now deleted clauses "....did not belong to the 'efficient' part of the Constitution: the real objection...was to the underlying ethos of the State of which the special position clause had simply assumed an ornamental symbolism": see Hogan, "Harkening to the Tristan Chords" (2017) 40 D.U.L.J. 71 at 74.

a 'decorative' provision of this kind.[89] It is not necessary for our purposes to survey the various twists of the complex case-law which was thereby generated in the lead-up to the *X* case. It is sufficient to say that as a result the *Well-Woman* litigation by this stage the Supreme Court had gone quite far down the 'preserve unborn life at all costs' interpretation of Article 40.3.3 in that the Court had effectively prohibited the distribution of all information relation to the provision of abortion services in the United Kingdom. While both the Court of Justice of the European Union and the European Court of Human Rights would ultimately have their say in this matter, what is important for present purposes is that by the start of the 1990s the position had been reached where, as a matter of Irish constitutional law, the distribution of information in respect of abortion services had been prohibited by judicial decision. It is true that these decisions could now be - and were then - criticised on the ground that they not only failed to accord any real value to the right of free speech contained in Article 40.6.1, but they also seemed to fit uneasily with the right to life of the mother provisions of Article 40.3.3. How, one might ask, was a mother whose life was in fact in danger supposed to access abortion services if she could not even access basic information of this kind?

At all events, what matters for our purposes is that the Supreme Court's *Well Woman* judgments were at many levels perfectly logical outcomes which reflected 'the preserve unborn life at all costs' philosophy which was a key theme underpinning Article 40.3.3. Yet all of this ultimately came to a head with the decisions of the High Court and the Supreme Court in *Attorney General v X*[90] in the months of February and March 1992. The tragic background to this seminal affair is well known. A fourteen year old girl had been sexually abused and then raped by the father of a friend. She was distraught when she learnt that she was pregnant. In consultation with her parents it was decided that she should travel to England to seek an abortion. The parents had reported the crime to local Gardai. They had raised the possibility as to whether a DNA test could be taken in respect of the aborted foetus so that the identity of the father could be confirmed. The Garda authorities then sought an opinion from the Director of Public Prosecutions, who then relayed to the matter to the Attorney General. The Attorney General then applied for and obtained an *ex parte* injunction restraining the young girl from travelling to the United Kingdom

[89] See, e.g., *Attorney General (Society for the Protection of Unborn Children) v. Open Door Counselling Ltd.* [1988] IR 93.

[90] [1992] IESC 1, [1992] 1 IR 1. See generally, Cox, "Judicial Activism, Constitutional Interpretation and the Problem of Abortion: *Roe v Wade (*1983) and *X v A.G.* (1992)" in O'Dell ed., *Leading Cases of the 20th Century* (Dublin, 2000) at 237.

for this purpose. The family were at this point in England, but on hearing of this they elected to return and cancelled the arrangements which had been made for an abortion.

The girl was psychologically distraught and had communicated suicidal thoughts. The psychological evidence was that the danger to her of carrying a child would be "considerable' and that "the damage to her mental health would be devastating'."[91] Following a contested *inter partes* hearing Costello J duly granted the injunction, saying:

> "I am quite satisfied that there is a real and imminent danger to the life of the unborn and that if the court does not step in to protect it by means of the injunction sought, its life will be terminated. The evidence also establishes that if the court grants the injunction sought there is a risk that the defendant may take her own life. But the risk that the defendant may take her own life, if an order is made, is much less and of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made. I am strengthened in this view by the knowledge that the young girl has the benefit of the love and care and support of devoted parents who will help her through the difficult months ahead. It seems to me, therefore, that having had regard to the rights of the mother in this case, the court's duty to protect the life of the unborn requires it to make the order sought."[92]

On appeal, however, a majority of the Supreme Court took a different view. It is really impossible to do justice to the five judgments by way of summary, but perhaps one may select the following key passage from these judgments as representative. On the all important substantive issue of the interpretation of Article 40.3.3 itself Finlay CJ stated:

> "The doctrine of the harmonious interpretation of the Constitution involves in this case a consideration of the constitutional rights and obligations of the mother of the unborn child and the interrelation of those rights and obligations with the rights and obligations of other people and, of course, with the right to life of the unborn child as well. Such a harmonious interpretation of the Constitution carried out in accordance with concepts of prudence, justice and charity, as they have been explained in the judgment of Walsh J. in *McGee v. The Attorney General* leads me to the conclusion that in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be

[91] [1992] 1 IR 1 at
[92] [1992] 1 IR 1 at

so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur. Having regard to that conclusion, I am satisfied that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life.

I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40,s.3, sub-s. 3 of the Constitution."[93]

The logical corollary of this passage, however, is that there was indeed a category of circumstances - however attenuated and specific- in which abortion was lawful by reason of a "real and substantial" risk to the mother's life - as distinct from her health. And a majority of the Court appeared to have left open the possibility that there might be circumstances in which an injunction might be granted to restrain a pregnant mother from leaving the State to secure an abortion.[94]

It is, I think, fair to say that a large section of the public were deeply upset at this turn of events. They were taken aback at the prospect that any female - still less a vulnerable rape victim who at age 14 was barely more than a child - should be injuncted from travelling in this fashion. All of this paved the way for the 11th Amendment of the Constitution Act 1992 and 12th Amendments of the Constitution Act 1992 which safeguarded respectively both the right to travel and to obtain information regarding the provision of abortion services.[95]

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[93] [1992] 1 IR 1 at

[94] Note the comments of Bacik, *Kicking and Screaming: Dragging Ireland into the 21st Century* (Dublin, 2004) at 117:

> "... where a woman was not facing a threat to life, then not only would it be illegal for her to have an abortion in Ireland, but she could also be prevented from travelling abroad to avail of legal abortion elsewhere."

[95] These amendments were overwhelmingly passed by the People, something which later prompted a noted journalist to observe that "Irish people were very, very much against facilitating abortion in Ireland and very, very much in favour of facilitating abortion abroad": see V. Browne, 'Why can't foreigners grasp Irish abortion?' *The Irish Times*, 18 August 1999.

In hindsight it can be seen that the *X* case represented the beginning of the end for the 8th Amendment. Even if the earlier *Well-Woman* litigation had largely passed the public by, the *X* case struck a deep chord with the Irish people. Irrespective of the actual result of the Supreme Court decision and the soothing comforting words of the majority which, in their own eloquent way, had endeavoured to mellow and leaven the bare words of Article 40.3.3, the concrete facts of that case obliged the citizenry - many of whom, quite understandably, wanted to look away - to confront the realities of that issue.

One reality was that if you asked the courts to pursue the wording and objectives of Article 40.3.3 with an undeviating and remorseless logic - *i.e.,* save unborn life at all costs, except where the life of the mother is in danger - then the *Well-Woman* litigation (prohibiting the purveying of abortion information) and the original decision of Costello J in the High Court in the *X* case (granting an injunction restraining a 14 year old rape victim from the leaving the State) were the perfectly natural and, in some senses, even the inevitable by-products of elevating the protection of unborn life to constitutional level.[96] It is true that in *X* McCarthy J had proclaimed that the right to travel was almost inviolable.[97] Likewise in *Society for the Protection of Unborn Children Ltd. v. Grogan*[98] Advocate General van Gerven had suggested that a ban on pregnant women travelling to receive abortion services abroad would be disproportionate from the standpoint of EC law (as it then was).[99] But Advocate General van Gerven was speaking in the context of EC law which saw the provision of abortion services in most other European Community states as lawful. Yet even democratic societies can and do restrict the right to free movement of even their own citizens where this is necessary to safeguard other important interests. Bankrupts and other

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[96] As I observed when writing at the time of the High Court decision in the *X* case that "It has to be conceded that in view of earlier judicial pronouncements on Art. 40.3.3, Mr. Justice Costello's reasoning has a certain inevitability about it": Hogan, *The Irish Times,* 19 February 1992.

[97] On this point McCarthy J observed ([1992] 1 IR 1 at.)

> ".....it is a question as to whether or not an individual has a right to travel — which she has. It cannot, in my view, be curtailed because of a particular intent. If one travels from the jurisdiction of this State to another, one, temporarily, becomes subject to the laws of the other state. An agreement, commonly called a conspiracy, to go to another state to do something lawfully done there cannot, in my opinion, permit of a restraining order. Treason is thought to be the gravest of crimes. If I proclaim my intent to go to another country there to plot against the Government here, I may, by some extension of the law against sedition, be prosecuted and, consequently, subject to detention here, but I cannot be lawfully prevented from travelling to that other country there to plot the overthrow, since that would not be a crime in the other country. I go further. Even if it were a crime in the other country, if I proclaim my intent to explode a bomb or shoot an individual in another country, I cannot lawfully be prevented from leaving my own country for that purpose.
>
> The reality is that each nation governs itself and enforces its own criminal law. A court in one state cannot enjoin an individual leaving it from wrongdoing outside it in another state or states. It follows that, insofar as it interferes with the right to travel, there is no jurisdiction to make such an order."

[98] Case C-139/90 [1991] ECR I - 4704.

[99] [1991] ECR I - 4704 at 4730, at [39].

persons seeking to evade creditors can be restrained from leaving the State or otherwise have their freedom of movement abridged.[100] In more recent times we have come to realise that the right of free movement can be curtailed in aid of the protection of public health and general the right to life, as the recent legislation permitting the making of regulations which severely abridging that right for the purposes of the suppression and control of COVID-19 has shown us.[101] All of this is to say that this aspect of the *X* case concerning the abridgement of the right to travel is not perhaps as remarkable as it seemed at the time.

IV.

What conclusions can we as lawyers draw from these events? The first is an obvious one: it is that words matter and, quite often, matter greatly. This is especially true so far as the drafting of a constitutional amendment is concerned. This is completely understood by lawyers by reason of their training, intuition and experience, but experience has shown that our concerns and objections are sometimes not fully understood or appreciated by non-lawyers, including politicians and other key policy-makers. This was shown in 1983 when many of the Amendment's supporters seemed to have believed that the objections raised by the then Attorney General Sutherland (and others) were essentially contrived.

Second, the parliamentary supporters of the Amendment overplayed their hand by opting for the original wording of the 8th Amendment rather than the alternative version which Attorney General Sutherland had championed. Deep down, one suspects that many members of the general public would have been happy with a largely ornamental style anti-abortion clause, albeit one which safeguarded the existing abortion laws from a *Roe v Wade*-style challenge. By electing, however, to treat the right to life of the unborn as enjoying positive constitutional status, a whole new range of novel actual and potential legal issues were now ushered forth. In the words of de Londras:

> "Although it was originally thought that Article 40.3.3 dealt solely with abortion, its wording was clearly capable of wider application. Not only does Article 40.3.3 prohibit

[100] See, e.g., *O'Neill v. O'Keeffe* [2002] 2 IR 1.

[101] Health Act 1947 s. 31A(a) and (b)(as inserted by s. 10 of the Health (Preservation and Protection and Other Measures in the Public Interest) Act 2020. See also *S v. Health Service Executive* [2009] IEHC 106 where the constitutionality of other detention measures provided for in the 1947 Act in respect of persons suffering from infectious diseases was upheld by Edwards J.

> the introduction of widely available abortion, but it also establishes an autonomous constitutional right to life of the foetus."[102]

Over and above the difficulties identified in cases such as the *X* case, the wording always presented intrinsic difficulties of its own. What, for example, did the word "unborn" mean? Moreover, given the absence of an agreed medical or scientific consensus as to when life begins, it is not clear that the courts had available to them the resources whereby this issue could be judicially determined, so that it might ultimately prove to be non-justiciable.[103] How could one meaningfully speak of an equal right to life of mother and the mother, since by definition if matters ever had to be put to the test, a choice between the two would have to be made? There was, moreover, from a legal perspective something intrinsically strange about affording constitutional protection to unborn life (or, if you will, potential life forms) not yet born so that they could have actual rights as against wider society. The enforcement of these rights was thus invariably dependent on external bodies such as the Attorney General or private bodies, with significant implications for the law of standing.[104]

Third, the unspoken premise of the Amendment - the protection of unborn life, almost at all costs, save where the life of the mother was at stake - was always going to present its own difficulties, precisely because human experience is always much more complex than this. As *PP* v. *Health Service Executive*[105] illustrated, Article 40.3.3 clearly impacted on wider maternal care by reason of what de Londras described as "its capacity to creep into all areas" of such care in a way that was not foreseen.[106] This constitutional premise also proceeded on the basis that there

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[102] De Londras, "Constitutionalizing Fetal Rights: A Salutary Tale from Ireland" (2015) 22 *Michigan Journal of Gender & Law* 243, 267.

[103] This was certainly the view of Murray C.J. in *Roche v Roche* [2009] IESC 82, [2010] 2 IR 321 with regard to question of whether frozen embryos enjoyed the status of 'unborn life' for the purposes of Article 40.3.3:

> "The courts do not, in my view, have at their disposal objective criteria to decide this as a justiciable issue. Issues are not justiciable before the courts where there is, as Brennan J., put it in his opinion in *Baker v. Carr* 369 U.S. 186 (1962), 'a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion;...' That is the position in which the Court in this case is placed regarding the question of when life begins. The onus rests on the Oireachtas to make the initial policy determination so as to define by law the precise point at which "the life of the unborn" begins to enjoy constitutional protection. The other alternative is an amendment to the Constitution."

[104] See, e.g., *Society of Unborn Children (Irl) Ltd. v. Coogan* [1989] IR 734.

[105] [2014] IEHC 622, [2015] 1 ILRM 324.

[106] de Londras, "Constitutionalizing Fetal Rights: A Salutary Tale from Ireland" (2015) 22 *Michigan Journal of Gender & Law* 243, 289.

was, in fact, a clear and always easily definable difference between the life and the health of the expectant mother. Yet medical experience has demonstrated that this is simply not so:

> "If the legal world explores the balance of rights, the medical world explores the balance of risk . .. The wording of the Eighth Amendment is sufficiently ambiguous that there is a real risk that medical imperative could be hindered by an emphasis on balance of rights rather than survival [of the pregnant woman] ."[107]

This premise was tested in practice by almost all of the cases arising under the 8th Amendment/Article 40.3.3. The remorseless logic of this premise was squarely in view in cases such as *X* and the later High Court decision in *PP v. Health Service Executive*[108]. In the latter case a pregnant woman had suffered brain stem death when she was about 15 weeks pregnant. Although clinically dead the hospital nonetheless continued invasive treatment and interventions "to facilitate the continuation of maternal organ supportive measures in order to attain fatal viability"[109] until the foetus had attained 32 weeks. When the father of the woman sought an order discontinuing the treatment, the High Court agreed to this, saying that the prospects of a successful delivery of a live baby were virtually non-existent.[110] The Court nevertheless clearly indicated that matters might well have been otherwise if the unborn child had reasonable prospects of being born alive.[111]

This and other similar case-law simply illustrates *how* the logical conclusion of the wording of Article 40.3.3 was that the protection of unborn life should take precedence, even if this meant a far reaching interference with the mother's right to travel (as in *X*) or denying an abortion in cases (such as profound encephalopathy) where the unborn child had either no realistic chance of being born alive or surviving)[112] or keeping a brain-dead mother medically 'alive' to facilitate the

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[107] Mahony, "Protecting Life in Real Life-An Essay" (2014) *Medico-Legal Journal of Ireland* 104, 105.

[108] [2014] IEHC 622, [2015] 1 ILRM 324.

[109] At [2] per Kearns P.

[110] The facts of the case were critical: had the pregnancy been further progressed, the court might easily have been compelled to order medical staff to keep the woman artificially alive until the foetus was viable and delivery could be safely arranged. One commentator has observed that while the decision was 'legally correct', it nonetheless had significant implications for the dignity and autonomy of the mother: see generally, A Murray, '*PP v Health Service Executive*: A Reanalysis - Part 1' (2015) *Irish Law Times* 33(12) 174; '*PP v Health Service Executive*: A Reanalysis - Part II' (2015) *Irish Law Times* 33(13) 198 at 200.

[111] "The decision strongly implies that maintaining somatic support may be constitutionally mandated in cases where the foetus has a chance of survival": see Mulligan, "Maternal brain death and the legal protection of the foetus in Ireland" (2015) 15 *Medical Law International* 182.

[112] Cf. the discussion of this issue by the European Court of Human Rights in *D v. Ireland* [2006] ECHR 1210. In that case the Court held that the applicant who was denied an abortion in the case of a foetal fatal abnormality

subsequent delivery of her unborn baby (as in *PP.*) The long sequence of high-profile litigation involving Article 40.3.3 (especially from the decision in *X* onwards) all seems to have had the effect of sapping public support for the Amendment to the point of a gradual conclusion on the part of at least some of the electorate, that, regardless of one's position on the substantive issue of abortion, the issue could not be satisfactorily resolved by constitutional provisions of this kind. Nowhere was this more evident than in cases such as *X* and *PP* where the High Court and the Supreme Court were both presented with the unenviable dilemma of either giving effect to the wording and premise of the amendment (even where the results were wholly unpalatable to many) or, alternatively, to fashion what many would regard as the only just or fair result, even if this also meant departing from the strict wording of Article 40.3.3 and the logical consequences of that provision.[113] All of this formed the background to the 36th Amendment of the Constitution Act 2018 which effected the repeal of Article 40.3.3.

V.

For those of us who lived through these years it is perhaps hard to credit that this trilogy of great cases has long passed into the realms of constitutional history, as even the *X* case itself is almost 30 years old. Indeed it is salutary to reflect that by a happy serendipity the 50th anniversary of *McGee* in December 2023 will closely co-incide with the 100th anniversary of the establishment of the Supreme Court itself in June 2024. These were all momentous cases which placed huge burdens of responsibility on the individual judges called upon to decide them.

But as these cases pass into the general social, legal and cultural history of the State, is there any general *legal* - as distinct from cultural or social or political - lesson to be drawn from these events? For me it is the contrast once again between the 14th Amendment of the US Constitution and the provisions of Article 40.3.1 and Article 40.3.2. Perhaps it was not realised in 1937, but the wording of the latter provisions in particular *do* give the Irish courts even wider

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could not pursue a case before that Court by reason of her failure to seek a constitutional remedy before the Irish courts, saying [at 92]:

> "The Court finds that, if the question of whether Article 40.3.3 excluded an abortion in the case of a fatal foetal abnormality was novel, it was, nevertheless, an arguable one with sufficient chances of success to allow the initial burden on the Government to be considered satisfied. Accordingly, on 25 January 2002 a legal constitutional remedy was in principle available to the applicant to obtain declaratory and mandatory orders with a view to obtaining a lawful abortion in Ireland."

[113] Note here the comments of David Byrne SC (Attorney General. 1997-1999)(quoted in Walsh, *The Globalist*)(at 59):

> "I believed that the wording which included a positive right to life or equal right to life would cause an enormous amount of trouble...it couldn't possibly be adjudicated on by the courts; it put a very, very unfair burden on the judiciary if there was ever a dispute, which would be inevitable....":

powers of judicial review than that accorded to their US counterparts. In some ways, therefore, it is striking that the US Supreme Court has gone further in terms of judicial decision making given the more slender basis of the 14th Amendment. It may seem curious to say so, but in January 1973 the US Supreme Court might have been better - indeed, far better - able to justify its decision in *Roe v Wade* had it had the greater firepower of Article 40.3.1 and Article 40.3.2 or, for that matter, the ancillary provisions of the dignity clause in the Preamble or Article 40.5 or Article 41 at its disposal. If the supporters of the 8th Amendment /Article 40.3.3 had all too casually dismissed the legal objections of Attorney General Sutherland (and others) with dogmatic assertions as to what the legal implications of Article 40.3.3 would be, they were in turn perhaps more correct than their Anti-Amendment counterparts in understanding the possibilities that this greater constitutional firepower might one day offer to an Irish court.

And so I close by remarking that this trilogy of remarkable cases in their own way illustrated that the very strength of the express text of the Constitution has paradoxically in one way proved to be its greatest weakness: it was at its heart too radical a document fully and easily to be incorporated into a legal system which had for hundreds of years rested on the bedrock of the common law and a more modest judicial approach to the resolution of these contentious social issues.

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