Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

A Court and the World

Delivered by Mr Justice Donal O'Donnell, Chief Justice, at the Public Law Conference on 6 July 2022

I

In other circumstances, the title of this paper might risk an action for passing-off action since with the substitution of the indefinite for the definite article it copies the title of a relatively recent book published by then Justice Stephen Breyer of the United States Supreme Court: *The Court and the World*.[1] The book was published in 2015 to respectful reviews, against the background of a debate that had arisen in the US Supreme Court in which it had been contended by a number of Justice Breyer's colleagues that the US Supreme Court should not entertain citation of authority from other jurisdictions. *The Court and the World* is a book-length scholarly response, which commences by detailing those areas of law where the US Supreme Court necessarily deals with matters beyond the territorial limits of the United States or with matters within those limits but nevertheless affected by events, and consequently law, outside its boundaries: the exercise of the Executive Power and foreign relations; the treaty power and its impact upon law within the federal and state system; international commercial transactions; the alien tort statute and the capacity to sue in the United States for breaches occurring outside the States, child custody and family law matters which necessarily cross borders and may require interaction and cooperation with foreign jurisdictions; investment treaties and arbitration protecting investments by United States companies outside the United States, and offering corresponding protection to foreign companies investing in that jurisdiction. The theme of the book is that, in an ever-increasingly interconnected world where issues of commerce,

[1] S. Breyer, *The Court and the World: American Law and the New Global Realities* (2015: New York, Knopf).

protection of the environment and security provide problems which can only be dealt with on an international and supranational scale, it is not feasible or, if feasible, not sensible, to attempt to deal with such matters in a form of splendid isolation from other legal systems. Justice Breyer also explains the benefits he has found in his annual engagement with judges and academic lawyers from other jurisdictions and explains why he disagrees with the argument that the US courts should not have regard to decisions from other constitutional courts.

Ireland, we are often told, is a small open economy which has benefited from world trade, and which is particularly open to influence and susceptible to change from developments in other economies. To a large extent, that is true also of the legal economy. Ireland was the "first adventure of the common law",[2] which arrived in Ireland in 1169 with the Normans. Article 8 of the Act of Union in 1800 provided that appeals from the Irish courts lay to the House of Lords,[3] and apart from the decisions of that body which were formally binding on the Irish courts, the decisions of the courts in the rest of the United Kingdom were treated as having a high degree of persuasive authority. Even after independence in 1922, the continued application of the common law in the Free State and, perhaps, the prevalence of text books published in the United Kingdom meant that authority which was now technically foreign and persuasive only was nevertheless regularly cited and analysed and often applied in the Irish courts. Even when there was, from the 1960s onwards, a very conscious attempt to assert a form of national independence in legal matters, that only resulted in the citation of additional authority from more jurisdictions rather than a retreat towards isolation. Accession to the EU and the increase in importance of the European Convention on Human Rights have both been credited with encouraging changes in Ireland in the areas such as social matters, gender equality, and the protection of the environment, but also provided opportunities for lawyers so that there is a relatively high degree of communication with, and interaction between, the Irish courts, the CJEU and the European Court of Human Rights. In addition, graduates of Irish universities have studied abroad and sometimes pursued careers as practising lawyers or academics in other legal systems.

[2] W. J. Johnston, 'First Adventure of the Common Law' (1920) 36 L Q Rev 9.
[3] S. Henchy, 'Precedent in the Irish Supreme Court' (1962) 25 M.L.R. 544.

After demonstrating the degree to which international matters are unavoidably part of the everyday function of the Court, Justice Breyer offers a particular and, to me at least, slightly underwhelming example of a positive benefit that might accrue to the US system if it were more open to developments in other jurisdictions. He suggeststhat the concept of proportionality as applied in the law of the European Union might usefully employed in the analysis of cases under the First Amendment.[4] While acknowledging that the application of proportionality analysis "*may seem in part subjective, the judge inevitably considers contemplating effects, degrees of harm and of importance*", he considers that at least the balancing exercise is made more explicit so that it can be seen and criticised. I lack the expertise to analyse whether the proportionality analysis would provide better results either in substance, or in the process by which they are arrived at, than those made under the approach which has grown up incrementally in the United States, and I think anyone familiar with the operation of proportionality in those jurisdictions where it is regularly adopted might think that there is an element of "far-off fields" about the argument. But since proportionality analysis is employed in Irish courts, and in doing so, the influence of developments in other jurisdictions has been explicitly acknowledged, it provides a useful departure point for my consideration of some broader issues.

As it happens, the concept of proportionality as at least illuminating the analysis of the consistency of any challenged legislation with the requirements of the Constitution can be found at a relatively early stage in Irish law, and in one of the landmark cases on the development of Irish constitutional law: *Ryan v. Attorney General*, where Kenny J. said that a court could interfere with and set aside legislation where:-

> *"[t]here is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen".*[5]

But the widespread use of the proportionality as a tool of analysis can generally be traced to the judgment of Costello J. (as he then was) in the High Court in

[4] Breyer (n 1), 254.
[5] [1965] IR 294 ("*Ryan*").

Heaney v. Ireland,[6] and an extra-judicial article by the same judge entitled 'Limiting Rights Constitutionally' in a series of essays, James O'Reilly (ed), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh*.[7]

In *Heaney*, the judge took the approach suggested by the author, and adopted a proportionality test observing that it had been found helpful to apply such a test "*in the courts of this country and elsewhere*". He noted that it had been adopted by the European Court of Human Rights, citing *Times Newspapers Limited v. United Kingdom*,[8] and that the test had recently been formulated by the Supreme Court of Canada in terms which he adopted: "*The objectives of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society and the means chosen must pass the more proportionality test in that they must:*

> "*(a) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
>
> *(b) Impair the right as little as possible, and*
>
> *(c) Be such that their effects on rights are proportional to the objective*".

The authority cited was *R. v. Chaulk* [1990] 3 SCR 1303 at pp. 1335 and 1336.

Here we have, therefore, a very clear example of what Justice Breyer hoped for in the United States: the adoption of the test of proportionality, by an explicit reference to international authority, in this case looking to the east in the shape of the European Court of Human Rights and to the west in the shape of the Canadian Supreme Court, but, as is evident from Justice Breyer's discussion, the Court might as easily have looked to the Court of Justice of the European Union, and, if his suggestion had been adopted and acted upon, the decisions of the United States Supreme Court.

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[6] [1994] 3 IR 593 ("*Heaney*").
[7] J. O' Reilly (ed), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (1992: Dublin, Roundhall Press).
[8] [1979] 2 EHRR 245.

At this point, it is worth noting a curious feature of the decision. Anyone familiar with the jurisprudence of the Supreme Court of Canada will be aware that the proportionality test in that jurisdiction can be traced to the major early Charter case *R v. Oakes* [1986] 1 SCR 103. *Chaulk* is a relatively minor case which merely adopts and applies the *Oakes* test in the context of criminal law, which was of course the context in which *Heaney* was decided.

Heaney was approved by the Supreme Court, and marked, therefore, the introduction of proportionality into the mainstream of constitutional analysis in this jurisdiction, and was adopted and applied enthusiastically, and almost routinely thereafter. It was observed from time to time that the test was applied with varying degrees of rigour, sometimes relatively loosely when it seemed almost a synonym for reasonableness and sometimes very strictly. One observer noted that in Canadian jurisprudence the proportionality test is quite a demanding one and a form of strict scrutiny which involves quite a structured analysis, whereas in Ireland the overall application of the test was not as demanding.[9]

Almost inevitably this percolated into the jurisprudence of the Irish courts. Perhaps the most obvious point of difference between the Canadian jurisprudence on proportionality and the application of the test in Ireland was the fact that in Canada there was a reversal of the onus of proof. In essence, once it was established that a Charter-protected right was affected by a provision, the onus shifted to the state party, whether federal or provincial, to prove that the interference was proportionate, that it was justified by concerns pressing and substantial on a free society, that it was rationally connected to the objective not arbitrary, impaired the right as little as possible, and was proportionate to the objective.

The possible distinction between the Canadian approach and that adopted in Ireland, was touched on in two Supreme Court cases, and most notably in *PJ Carroll & Co. v. Minister for Health and Children*,[10] and *Fleming v. Ireland*.[11] It might be noted that both these cases are examples of what might be described as

[9] Kenny, 'Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland' (2018) 66 Am J Comp L 537, and Kenny, 'Proportionality, the Burden of Proof, Some Signs of Reconsideration (2014) 52 Ir Jur 141.
[10] [2006] IESC 36, [2006] 3 IR 431.
[11] [2013] IESC 19, [2013] 2 IR 417.

horizontal subject matter comparison: in each case the subject matter of the proceedings (prohibition on tobacco advertising, on the one hand, and a right to die, on the other) was an area in which there was existing Canadian authority dealing with the same issue by reference to the Charter.[12] The subject matter appears to have brought the doctrinal approach to the attention of the Irish courts, rather than the other way round.

In the event, the Irish courts were cautious about adopting the Canadian approach. In *Fleming*, a Divisional Court in the High Court had appeared to accept that an onus shifted to the State to justify any limitation, but that was disapproved of by the Supreme Court, which said:-

> "*An argument was advanced, derived it appears from Canadian jurisprudence, suggesting that the court should approach the question by first determining in general whether a right existed, whereupon the onus shifted to the State to justify by evidence any limitation whatsoever on the general right asserted, by reference to the principle of proportionality… It should be observed that there is no support in the jurisprudence of this Court for such an approach. Accordingly, this court expressly reserves for a case in which the issue properly and necessarily arises, and is the subject of focussed argument and express decision in the High Court, whether the approach to proportionality urged by the appellant… is required by, or compatible with, the Constitution*".

The issue has arisen and been considered very recently in two Supreme Court appeals, in which decisions have been delivered very recently: *Donnelly v. Ireland* [2022] IESC 31 (Unreported, Supreme Court, O'Malley J., July 4th, 2022) ("*Donnelly"*), and *O'Doherty & Waters v. The Minister for Health* [2022] IESC 32 (Unreported, Supreme Court, O'Donnell J., July 5th, 2022) ("*O'Doherty*"). In both cases, the Supreme Court decisively refused the follow the Canadian approach. The Court set out a number of reasons for coming to its conclusion:-

(i) First, the point was not just as clear cut in Charter jurisprudence as might be thought;

[12] See R JR McDonald v AG [1995] 3 SCR 199 (Tobacco Advertising) Carter v Canada (AG) (2012) BCSC 886 (Right to Die)

(ii) Onus-shifting in Canada was derived from a textual analysis of the Charter provisions which were structured as a guarantee of certain fundamental rights subject to a limitation contained in s. 1 of the Charter which guaranteed such rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This naturally suggested that limitations had to be demonstrably justified and that the burden of so demonstrating lay on the State. There was, however, no basis for importing such an approach into the different text and structure of the Irish Constitution, and to do so would both strain credulity and undermine legitimacy;

(iii) Furthermore, as Professor Peter Hogg in his *Constitutional Law of Canada* pointed out, there is a connection between the scope of the right protected and the extent of a limitation on that right. Rights may be broadly expressed but subject to broad limitation, or narrowly expressed and subject to very limited qualification. The end point in terms of the extent of the right protected may be exactly the same, whichever approach is taken, but it is dangerous to mix the approaches;

(iv) The onus-shifting approach is, and was recognised by Canadian authority, as incompatible with any presumption of constitutionality. However, the presumption on constitutionality had been established in Irish jurisprudence almost since the enactment of the Constitution (it can be traced to *Pigs Marketing Board v. Donnelly*,[13] which was the first case in which a statute was challenged under the new Constitution);

(v) Moreover, the presumption of constitutionality in Irish law has been deduced from the separation of powers identified in the Constitution. It would, therefore, be a significant alteration of the perceived balance of the separation of powers established by the Constitution to alter that; and

(vi) The Canadian approach had further consequences for the traditional model of adversarial adjudication which applied in Ireland and was

[13] [1939] IR 413.

> arguably contemplated by Article 34 of the Constitution. Thus, it was accepted in Canadian jurisprudence that courts should distinguish between primary facts, and what were described as social facts or legislative facts which, moreover, did not require proof in the same way. Furthermore, findings of fact by a trial court were not subject to same deference in Charter litigation, and appellate courts had greater liberty to substitute their own conclusions for those of the trial courts.

These were all powerful considerations against the simple adoption of the Canadian approach. However, advocates of that approach suggested that it avoided the possibility of injustice. The Supreme Court doubted that a shifting of the onus of proof would be of significant practical benefit over deference in resolving cases in fact, and that plaintiff challenges would not be significantly disadvantaged by requiring them to discharge the onus of proof. This casts the omission in *Heaney* of any reference to *Oakes* in a different light.

The outcome of both *Donnelly* and *O'Doherty* might, at a superficial level, look like the approach advocated recently in the United States Supreme Court, and which Justice Breyer criticised, of a rejection of the practice of considering or following foreign precedent.

However, on closer analysis, this reading does not hold up. It is notable that the analysis of the Supreme Court in *O'Doherty* was heavily reliant on a detailed consideration of the Canadian jurisprudence and influenced, in particular, by academic commentary such as that contained in the magisterial work of the late Professor Peter Hogg. While the particular argument failed, the conclusion of the Supreme Court is not consistent with less foreign law; if anything, its lesson is that such arguments require *more* analysis of foreign jurisprudence. The cases show a move from a basic comparative analysis looking only at decisions on similar subject matter, towards more detailed consideration of the jurisprudence cited so as to understand those cases against the background of the foreign legal system.

II

Mention of the US Supreme Court brings me to another aspect of this topic. While, at one level, it could be said that Irish courts have always been open to influence

by foreign jurisprudence in the sense that Irish courts have always received and applied the common law decisions of UK courts, that was a largely passive exercise which became increasingly recognised as such, and as undesirable, in the period which followed independence. The 1960s saw an upsurge in activity in the Irish Supreme Court during the Chief Justiceship of Cearbhall Ó Dálaigh and which was characterised by increasing scepticism of authority from the UK and a strong insistence on the independence and integrity of national jurisprudence and a very deliberate invocation of the decisions of other courts, and the US Supreme Court in particular.

These pressures were building up in the early 60s and the dam burst in a memorable case in 1964. The received wisdom among lawyers was that Chief Justice Ó Dálaigh was a quiet, cultured and polite man but it is said that he was red in the face with anger when reading the judgment in *State (Quinn) v. Ryan*.[14] The case involved a man arrested on foot of a British warrant but who had succeeded in securing his release, but who was then removed from the jurisdiction of the Irish courts by arrangement between the Garda Síochána and members of the British Police Force to permit his prosecution in Great Britain. He had been taken by car to Northern Ireland and handed over there to members of the Royal Ulster Constabulary, and transferred to England for prosecution. There was no doubt that this course had been taken to avoid a further application for *habeas corpus*. However, the arrangements which then operated for surrender of suspects to the United Kingdom were contained in a pre-independence statute, i.e., s. 29 of the Petty Sessions (Ireland) Act, 1851, and which permitted what was described as the backing of British warrants in Ireland and the immediate removal of the person sought to the jurisdiction of the courts in Great Britain and vice versa and so this course was, on the face of it, lawful. As Ó Dálaigh C.J. said, the speedy removal of the individual was the purpose of the Act when it was enacted:-

> "*Ireland was then part of the entity known as the United Kingdom, Great Britain and Ireland and was in enjoyment with the benefits of the act of union. One of these benefits was the free interchange of alleged offenders subject to the formality of local backing of warrants*".

[14] [1965] IR 70.

As he said, "*the whole pattern (understandably in what was a homogenous political system) is a pattern of domestic dealing; and no question could arise of an arrested person not being in a position to have access to the courts; the Queen's courts were as much, if not more so, in Britain as in Ireland*". Furthermore, the validity of this provision of the Petty Sessions (Ireland) Act, 1851, had been upheld in two decisions of the Supreme Court: *State (Dowling) v. Kingston (No. 2)*,[15] and *State (Duggan) v. Tapley*.[16] This all appeared to add up to a formidable hurdle to any challenge, but the Supreme Court unanimously held that the provisions of s. 29 were invalid having regard to the Constitution and that the police officers were guilty of contempt of court. In what was, and is, a powerful statement of the impact of the Irish constitution, with Chief Justice Ó Dálaigh saying famously:-

> "*It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvent it. The intention was that rights of substance were being assured to the individuals and that the courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires. Anyone who sets himself such a course is guilty of contempt of the courts and is punishable accordingly*".[17]

These comments sent seismic tremors through the Irish legal system. It is significant that it was in this case that Mr. Justice Walsh also said:-

> "*I reject the submission that because upon the foundation of the State our courts took over an English legal system and the common law that the courts must be deemed to have adopted and should now adopt an approach to constitutional questions conditioned by English judicial methods and English legal training which despite their undoubted excellence were not fashioned for interpreting written constitutions or reviewing the constitutionality of legislation. In this State one would have expected that*

[15] [1937] IR 699.
[16] [1952] IR 62.
[17] [1965] IR 70 at page 122.

if the approach of any court of final appeal of another state was to have been held up as an example for this court to follow it would more appropriately have been the Supreme Court of the United States rather than the House of Lords".[18]

These sentiments illustrate much of the energy of the Supreme Court in that era and led both to the regular citation of US authority in Irish courts and a steady trickle of Irish lawyers choosing to pursue post-graduate studies in the United States. The closeness of the connection, and the impact upon Irish law, can be illustrated by reference to perhaps two cases.

In *People v. O'Brien*,[19] the Supreme Court had to consider the question of the exclusion of both illegally obtained evidence, and evidence which it was contended had been obtained in breach of a constitutional right. This involved a wide-ranging consideration of authority. The judgment of Mr. Justice Kingsmill Moore made express reference to *Mapp v. Ohio* (1961) 367 U.S. 643, and two later cases, *Silverman v. US* (1961) 365 U.S. 505, and *Fahy v. Connecticut* (1963) 375 U.S. 85, while Mr. Justice Walsh went so far as to refer to the jurisprudence of the courts in the United States including a decision of the Supreme Court in *Stoner v. State of California* (1964) 376 U.S. 483, which at that time was unreported and had been delivered on the 23rd March, 1964. What is noteworthy about this is that none of these cases were cited in argument, nor could they have been. They were all decided, and judgments delivered, in the period between the arguments in the Supreme Court and the eventual delivery of judgment.[20] This was in an era before the sort of instantaneous communication we now take for granted and, indeed, the coverage of affairs in other countries and particularly the US, which is part of our daily lives.

This brings us to *McGee* v*. Attorney General*,[21] decided almost a decade later and described recently, and perhaps a little unfairly, as a rose among many thorns in

[18] [1965] IR 70 at page 126.
[19] [1965] IR 142.
[20] R. MacCormaic, *The Supreme Court* (2016: Dublin, Penguin) at 83 details the close relationship between Walsh J and Justice William Brennan and that Brennan sent Walsh three judgments on the exclusionary rule shortly after they met in 1963.
[21] [1974] IR 283 ("*McGee*").

the constitutional jurisprudence of Ireland.[22] In December, 1973, by a majority of four to one, the Supreme Court held that the provisions of s. 17 of the Criminal Law (Amendment) Act, 1935, which prohibited the importation or sale of contraceptives was unconstitutional. This case has particularly contemporary resonance because the US authority which was to the very forefront of the case was the decision of the US Supreme Court is *Griswold v. Connecticut*,[23] which has been discussed recently. The plaintiff/appellants' lawyers took what was then the unusual step of submitting a written summary of their submissions which was reproduced in the report of the case, and which made it clear that *Griswold* and *Eisenstadt* were central to their case:-

> "*11. The American Federal Supreme Court has ruled certain state laws against contraception to be unconstitutional as an invasion of the right to privacy of marriage People: Poe v Ullman: Griswold v. Connecticut: Eisenstadt v. Baird:*
>
> *12. The same line of reasoning supports the authority claimed for parents at para 5 and the rights claimed at para 9*
>
> *13. The American cases also decided that laws which interfere with the family and the private laws of married people require special justification. No such justification has been offered in the present case".*

However, the case is perhaps more significant for what was not referred to. As we all know, *Roe v. Wade*, which relied on the precedent of *Griswold v. Connecticut* and *Eisenstadt v. Baird* (1972) 405 U.S. 438*,* had been decided earlier in that same year on January 22nd 1973 and had made international headlines provoking immediate criticism from the US Catholic bishops and even the Vatican, all of which had been reported in Ireland.[24] *Griswold* was relied on by Henchy J. in the majority judgment, but was even more obvious by its absence from the judgment of Walsh J. who while referring to *Poe*, *Griswold* and *Eisenstadt* said "*my reason*

[22] B. Dickson, *The Irish Supreme Court: Historical and Comparative Perspectives* (2019: Oxford, OUP).
[23] (1965) 381 US 479 ("*Griswold*").
[24] Mac Cormaic (n 17) records that Brennan had arranged for Walsh to be sent a copy of all decisions of the US Supreme Court, so it is probable he had a copy of *Roe*.

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 on any of the dicta in those cases to support the views which I have expressed in this judgment". It seems plausible that this was an attempt both to protect the decision in *McGee* from the accusation that it was reliant on a line of jurisprudence which had led to *Roe v. Wade*, and at the same time to seek to prevent the reasoning in *McGee* from being adapted and used to promote an argument in favour of a right to abortion.

While *McGee* is, therefore, an extremely important case in Irish constitutional law in its own right, it is also like a snapshot which gains significance because of the figures captured in the background, in this case developments in US constitutional law at what has transpired to be a critical juncture.

III

This brings us to the most recent book written by Justice Stephen Breyer: *The Authority of the Court and the Peril of Politics*. In this book, Justice Breyer argues that, notwithstanding the sharp divisions in the Supreme Court, it is jurisprudential rather than political differences that divide the current members of the Supreme Court and that this is critical because the belief that law is just even when it does not deliver the results for which you hope is essential in creating legal obedience which every state requires. This was not as well received as *The Court and the World*. I was particularly struck by one criticism contained in an article, "*Politicians in Robes*" in the New York Review of Books of the 10th March earlier this year. Commentary, even in sophisticated reviews, tends to be at too high a level of generality to be of interest to a specialist public law audience, but this article was authored by Laurence Tribe, the 81-year-old constitutional scholar and author of *American Constitutional Law*, and who had himself appeared on more than 30 occasions before the Supreme Court. The article is a stinging attack on Breyer and his book describing it as containing "*a self-serving series of platitudes*" and "*showing contempt for its readers*" and most of all for not acknowledging that the decisions of the Supreme Court, including *Brown v. Board of Education* and other controversial cases, are "*basically expressions of political and moral views filtered through legal categories and conveyed in a legal voice*".

Tribe also discusses the Presidential Commission on the Supreme Court of the United States, on which he served. This was a body of constitutional scholars and lawyers which were requested by President Biden to consider various proposals to address concerns about the US Supreme Court including enlarging the Court by adding new members,[25] imposing term limits on judges, requiring rotation between the Supreme Court and the lower Federal Courts, creating separate chambers of the Supreme Court, requiring a super majority for invalidation of congressional acts, or indeed, removing that jurisdiction from the Supreme Court altogether. These and other proposals were described by the Commission as measures designed to "*reduce the power of the Supreme Court or of the judicial branch as a whole*" and "*designed to shift power to resolve major social political and cultural issues from the Court to the political branches*". It is not of course unprecedented for such discussions to take place in the US but it is still noteworthy that these matters have reached the level of a formal Presidential Commission asked to analyse and report upon the possible options.

Tribe, however, appears to consider that none of these proposals however radical, are a sufficient remedy for the problem he sees in the current jurisprudential cast of the Supreme Court. Instead, he advances an almost apocalyptic view. Citing a number of scholars who gave evidence to the Commission,[26] he states:-

> "*These scholars made a persuasive case that throughout our history and especially in its current configuration, the Supreme Court has by no means been a friend to politically underrepresented minorities, an ally to the rights of the least powerful among us, or a defender of the rights of all to full and equal participation in the project of self-government – the only reason sufficient in the minds of many, to warrant entrusting a power so vast to so politically unaccountable an institution. They have argued that giving the nation's highest court not just the power of judicial review but of judicial supremacy – the final word and the meaning and application of a flawed by aspirational constitution – has repeatedly been harmful to the cause of*

[25] In this regard, the Commission included Ireland among one of its comparators.
[26] Nikolas Bowie, Michael Klarman and Samuel Moynes.

freedom and equality with infamous decisions being the rule rather the exception".[27]

This is a conclusion not merely that the Supreme Court in its current configuration is arriving at decisions of which these scholars profoundly disapprove, but a rereading of almost the entire history of the Supreme Court to conclude that the exercise of judicial review since *Marbury v. Madison* has been fundamentally harmful and damaging. *Brown v. Board of Education* and the decisions of the Warren court are, on this view, a lonely aberration, which cannot justify the power which the Court has exercised for more than 200 years.

Tribe must still address the fact that some recent decisions cannot fit neatly into an ideological box, perhaps most notably, the decision on same sex marriage*, Obergefells v. Hodges* (2015) 576 U.S. 644 or *Bustock v Clayton County* (2020) 590 U.S., which has, Tribe observes, surprised most court observers when a statutory ban on discriminating on the basis of sex was held to cover anti-transgender discrimination. Tribe considers, however, that "*such decisions reveal only that the justices are in the end masters of their craft and know that their power requires them to act as lawyers. But the sad truth remains that laws constraints are no match for powers' voracious appetites*".

These developments go some way to explain why decisions of the US Supreme Court are no longer cited in Irish courts as routinely as they were in the 60s and 70s: the paths have diverged in ways that might not have been foreseen then.

If so, this is important in its own way and raises a further question of the value of reference to jurisprudence from other jurisdictions. It might indeed be said to provide some support for those in the US court who took the view that the US courts should not consider the jurisprudence of other courts dealing with constitutional or human rights issues. To adapt an image employed by Justice Scalia in the context of statutory interpretation, the process of looking to foreign authority can be reduced all too easily to a process of looking over a crowded room to find a few friends. Tribe's remarks that the law's constraints are no match for power's voracious appetite suggest that, while all lawyers share common

[27] On this reading, a series of much criticised cases, *Dred Scott, Plessy v. Ferguson*, *Lochner v. New York*, *Korematsu v. US* become the rule rather than the exception.

values and value in turn certain skills, and that these values and skills might be thought to constrain judges' power to merely do what they want to do, those constraints are in the end no match for the irresistible gravitational pull of the prospect of the exercise of naked power, and he appears to suggest that this is in truth what animated, and even more strikingly has always animated, the US Supreme Court.

IV

Coming closer to home, recently however, the position of the United Kingdom courts and, indeed, the European Court of Human Rights have become an issue in political debate. In the United Kingdom, the Conservative Party manifesto before the last election promised to look at "*the broader aspects of our Constitution: the relationship between the Government Parliament and the Courts*" and to "*update the Human Rights Act… to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government*". In late November, 2020, it was suggested that there were plans to reform the Supreme Court by measures such as replacing the current Supreme Court bench with a large pool of appeal judges, renaming the highest court as the upper Court of Appeal or reverting to the appellate committee of the House of Lords.[28]

A Commission was established under the chairmanship of Sir Peter Gross a retired judge of the Court of Appeal. The Commission included a distinguished Irish academic lawyer, and held meetings with other courts including members of the Irish Supreme Court.[29] The report[30] made a number of interesting proposals which were reasonably uncontroversial and well received. It proposed an educational campaign to explain the function of the HRA. More specifically it proposed a provision requiring domestic law remedies to be considered before considering remedies under the Human Rights Act and, furthermore, that the United Kingdom should enter dialogue with other Convention states on the question of the extraterritorial application of the Convention, which it considered was a matter of concern. The majority of the members of the board stopped short of

[28] J. Murphy, 'UK Supreme Court Reform: Combating Smoke with Fire', *The Oxford University Undergraduate Law Journal* (2021).
[29] I was one of the members of the Court who met the Commission.
[30] The Independent Human Rights Act Review 2021.

recommending any change to the interpretative obligation under s. 3 of the Act.[31] Nor did the majority of the board suggest any change to the approach to the margin of appreciation. Recently, the UK Supreme Court delivered an important judgment *R (on the application of Elan – Cane) v. Secretary of State for the Home Department*[32] in which, in a judgment of Lord Reed, the Court disapproved of *dicta* in *Re G Adoption (unmarried couple)*[33] and concluded that the obligation was to treat the Act as a domestic or remedial regime in respect of the rights to which the United Kingdom was subject in international law under the ECHR. Interestingly, the judgment made reference to the Irish Act of 2003 which explicitly defines domestic obligations imposes by reference to compatibility with the State's obligations under the Convention.[34]

In the last fortnight, the United Kingdom government has introduced a Bill which would amend the Human Rights Act, 1998. It may be deduced from the terms of the Bill that the government wishes to go further than the recommendations of the IHRAR. The Bill would take some steps by further enhancing the obligation of the courts to give particular effect to freedom of speech, and also by providing further protection for journalistic sources. However, the thrust of the bill is directed towards reversing the trend of interpretation and application of the 1998 Act. Perhaps most notably, the United Kingdom courts were to be precluded from going beyond Strasbourg case law in their interpretation of the convention, but would be permitted to depart from it. The Bill would also reverse the decision of the UK Supreme Court in *Ghaidan v Godin Mendoza* and limit the interpretive obligation under the Act to an interpretation where the words were, as a matter of law, capable of bearing the convention compliant interpretation. If this was not possible, the Court could not go further, but would be limited to making a declaration of incompatibility.

These changes are not, perhaps, dramatic in themselves and it is not my function to discuss the proposals on their merits. However, the detail of the change is perhaps less important than the direction of travel. It seems that the objective of

[31] As interpreted and applied in *Ghaiden v. Godin-Mendoza* [2004] UKHL 30.
[32] [2021] UKSC 56.
[33] [2008] GL 38
[34] At para. 88. These matters are discussed in D. O'Donnell, 'ECHR Act, 2003: Ireland and the Post-War Human Rights Project' (2002) 6(2) Irish Judicial Studies Journal.

the Bill, while framed in terms of supporting and reinforcing the role of the UK Supreme Court and directed more obviously towards limiting the direct impact of decisions of the Strasbourg Court, is nevertheless aimed at reducing the extent to which decisions of the Courts, both in the UK and abroad may have an impact on Governmental or parliamentary decisions.

These developments, while significant, are not limited to the political arena. Concerns have been expressed in legal circles. Shortly after his retirement, Lord Sumption delivered the Reith Lectures on BBC under the heading "*Law's Expanding Empire*", arguing that the law was taking over the space once occupied by politics. Significantly, in particular, he argued that judges, especially those of the European Court of Human Rights, had usurped power by expanding the interpretation of human rights law. Notably, one of the lectures was recorded in Washington and compared the US and UK's constitutional model. He argued that the UK should learn from the United States and be careful about rights which were put beyond democratic choice. In particular, he referred to *Griswold v. Connecticut* and *Roe v. Wade*. While the lectures are particularly thoughtful and stimulating, the discussion was perhaps a little less sure-footed when discussing the US position. Perhaps an unnoticed and beneficial side effect of the encouragement in Ireland of reference to US authority in the 60s is a greater opportunity for engagement by academic and practising lawyers with the extraordinarily rich literature in the US and study built up over more than two centuries. Nevertheless, the drawing of a connection to developments in the US was interesting. The developments in the UK are of a different order to what is occurring in the US but they are interesting straws in the wind and, taken together with developments in some member states of EU, amount to something of which we should take note.

It is rarely helpful however and, in any event would be inconsistent with the theme of this paper, to seek to make some high-level generalisation about these developments. It would certainly be wrong to draw the complacent conclusion that, since the concept of judicial enforcement of rights is being assailed from all sides, it must be in a reasonably stable position. But it is, however, surely noteworthy, particularly so far as Ireland is concerned, that two major common law jurisdictions, both in different ways longstanding standard bearers in the field

of human rights and the application of the rule of law, are jurisdictions in which official government reports have been directed towards the question of restriction of the role of courts, with voices calling for more serious change up to and including completely removing the power of courts to review the compatibility of legislation with the Constitution or Convention and/or to withdraw from conventions providing international protection for rights within national territories. Even more tellingly, this wave of scepticism about the exercise of judicial review comes from opposite ends of the political spectrum. When we put that together with the difficulties the European Union is experiencing in upholding the guarantee of the protection of the rule of law, and the stresses facing the ECtHR and Council of Europe more generally it is I think possible, and not alarmist to see that the post-war model of judicial protection of human rights is under more challenge today in more significant ways and in more locations than at any time since 1945.

In these turbulent international waters, it may appear sensible to withdraw to our national harbours and concentrate on the domestic in the hope that the international storm clouds will dissipate and not make landfall here. That would, however, be a mistake – at least in my view. We have important lessons to learn and perhaps some things to teach. I do not accept that it is somehow inevitable that decisions on constitutional matters should be seen as merely the expression of moral or political views in a legal voice. Nor do I accept that law imposes no real or effective constraints on the exercise of judicial power. But if the protection of rights by judicial review is to be sustained, it must be placed on a firmer footing than a particular decision that is temporarily popular with the general population, or indeed that smaller section that constitutes the legal academic community or opinion formers more generally. A fundamental function of the Court under the Irish Constitution, and indeed any court with a duty to protect rights, is, if required to do so, to make decisions which may be unpopular since, by definition, they are capable of reversing the will of a popularly elected parliament. In Alexander Bickel's famous phrase, the power is in essence counter majoritarian.[35]

In Ireland, we have been fortunate that, with some exceptions, a debate about the role of courts has not yet gained real traction, and certainly not to the point

[35] See e.g., R. Brown, 'Accountability, Liberty, and the Constitution' (1998) Col. L. Rev 531 for a contrarian account.

of questioning the power of judicial review contained in the Irish Constitution. This may be partly because much of the legislation which has been challenged and struck down in the exercise of the power was in fact not the product of a contemporary political majority, but rather old legislation out of step with contemporary views. Other decisions, while controversial, may have been popular and not provoked a reaction in driving scrutiny of the process. There has been an important history of the exercise of the power over nearly a century and an equally important and underrated tradition of general acceptance of the decisions of the Supreme Court by the other branches of government, even when those decisions were more than inconvenient. The fact that the Constitution can be amended, albeit with some difficulty, and has been amended to remove or reverse the effect of some decisions, also has an important consequence in promoting acceptance of decisions and, more broadly, the power to make them. However, we cannot assume that the stars will always be aligned in this way, and, in any event, it is important that we discuss and debate the nature and power of judicial review and, where appropriate, its boundaries, in a context which is insulated from the pressures which can arise in a political crisis.

In that regard, I think that what is indicated is greater study of other jurisdictions, and more in-depth analysis of the case law and jurisprudence. In particular, I think it is unfortunate that more attention has not been paid here, or indeed in the broader context of the ECHR, to the vast theoretical literature that has grown up in the United States particularly in the latter half of the 20th century and a study of which could only, I think, deepen discussion on this side of the Atlantic. Let me take our one example, which is illuminating I think because the charge of exceeding the constraints of the law came from a different quarter and involved those cases and developments which Tribe exempts from his criticism.

Much of the debate, in so much as it is discussed in popular discourse, particularly on this side of the Atlantic, is characterised as a choice between judicial activism and judicial restraint. The idea of judicial restraint is associated with the great US Judge Learned Hand and his 1958 Oliver Wendell Holmes lectures at Harvard. now published in book form as *The Bill of Rights*.[36] It was important that concerns were expressed with the direction of travel of the Warren court by such a significant

[36] L. Hand, *The Bill of Rights*, (1958: Harvard, Harvard University Press).

figure and the vivid and forceful expressions contained in the lecture have made it easily quotable, and the lectures crystallised a growing concern about the extent of the exercise of the power of constitutional interpretation by the Supreme Court. However, for me it is something of a frustration that any note of caution about what might be described as ambitious interpretation of a Constitution or Convention is characterised as judicial restraint, sometimes with references to Hand. His approach, whatever its merits, is not easily translated to other jurisdictions. A central theme in his argument was that since judicial review was not explicit in the Federal Constitution but can only be deduced from it by a process of necessary implication as had occurred in *Marbury v. Madison*, it was a legitimate threshold question for the Court whether, in any given case, it should exercise the power.

It must be apparent that this is not a form of reasoning easily applicable to any other jurisdiction, still less one like Ireland which since 1922 has had judicial review explicitly expressed in the Constitution.[37] Indeed, if the underlying analysis is accepted, it might tend in an entirely opposite direction. The Hand argument is that there no inbuilt limits on what the Court can do and, therefore, judges should exercise restraint. The courts *can do* what they like in the interpretation of the Constitution but *should not*. Anyone who accepts the first step in this analysis and who disagrees with the second, or indeed its application in a particular case, would have a charter for the very type of interpretation which concerned Hand.

The grouping of all concerns with expansive interpretation of the Constitution or Convention under the heading of judicial restraint does not do justice to the many different approaches which expressed anxiety about the direction of jurisprudence in the Warren court, even while often sympathising with the outcomes of the cases. One influential voice, for example, was Alexander Bickel. Two major books, *The Least Dangerous Branch*,[38] and *The Supreme Court and the Idea of Progress*,[39]

[37] Article 65 Irish Free State Constitution: "The judicial power of the *Irish Free State* shall extend to the validity of any law having regard to the Constitution"; see also, Article 34.3.2º Bunreacht na hÉireann.
[38] A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986: Yale University Press).
[39] A. Bickel, *The Supreme Court and the Idea of Progress* (1978: Yale University Press).

traced the arc of his growing disenchantment with the approach of the Court, and in particular the manner in which it purported to reach its conclusions.

Judge Hand's lecture also provoked a response from another quarter, again, sympathetic to the causes espoused by the Warren court, but troubled both by the method the Court adopted, and by the criticism Judge Hand had advanced. In 1959, the Holmes lecture was delivered by Professor Herbert Wechsler. That lecture, *Towards Neutral Principles of Constitutional Law*,[40] came to mind when considering Justice Breyer's book, and Professor Tribe's contention that law was not a constraint, or a sufficient constraint, on the exercise of raw power. Wechsler disagreed that judicial review was a mere interpolation and not grounded in the language of the Constitution. It was instead a duty grounded in the Constitution.

The duty to interpret and enforce the Constitution is "*to decide the litigated case and to decide it in accordance with the law and what all that implies as to rigorous insistence on the satisfaction of procedural and jurisdictional requirements*". The "political question" doctrine[41] was not, in Wechsler's analysis, a prudential decision to refrain from interfering in a politically complex area, but rather a more limited conception so that "*all the doctrine can defensively imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires interpretation*". Difficult as the process of interpretation was, it was something courts were obliged to undertake and by the standards that govern the interpretive process generally. That was something entirely different from a broad discretion to abstain or intervene. Later, Wechsler made an observation that should still resonate with those who are inclined to criticise or defend judgments by reference to their outcome:-

> "*The man who simply lets his judgment turn on the immediate result may not, however, realise that his position implies that courts are free to function as a naked power organ that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law".*

[40] (1959) 73 Harv. L.R.1.
[41] See, in an Irish context, PA McDermott, 'The Separation of Powers and the Doctrine of Non-Justiciability' (2000) 35 Ir Jur 280.

These observations have many modern resonances and cast an interesting light on Tribe's criticism of Breyer. The heart of the lecture was that something more was required from the courts:-

> *"I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decided, or should decide only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application, but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?"*

The lecture had an immediate and deserved impact.[42] Perhaps like other impressive departures it received more acclaim, and had more claimed for it, than it could reasonably sustain. Some sought to draw a connection between Hand and Bickel, and Justices Stewart and Harlan and suggested that there was an emerging school of thought, which shared a commitment to reasoned elaboration.[43]

There was, of course, an inevitable reaction. The standing army[44] of constitutional scholars in the US were quick to point out, with some merit, that what Wechsler was insisting on was essentially a process of reasoned analysis and that the search for neutral principles in the sense of judgments that could command absolute agreement was illusory. It was entirely possible to construct two judgments, coming to opposite conclusions, which nevertheless complied with Wechsler's prescription. If there was a school of thought committed to reasoned elaboration it fell far short of a comprehensive theory of law.

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[42] Surveyed in K. Greenawalt, 'The Enduring Significance of Neutral Principles' (1978) 78 Col. L. Rev. 982.

[43] G. Edward White, 'The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change' (1972) 59 Va. L. Rev. 279. White, a noted legal historian, withdrew the suggestion of a school of jurisprudence some years later in his magisterial book, *The American Judicial Tradition* (1976: Oxford, Oxford University Press).

[44] Patrick Kavanagh was reputed to have said, rather scornfully, that the standing army of Irish poets (that is, those who liked to think of themselves as poets) never numbered less than 10,000.

The argument also suffered from unfortunate timing in two respects. Wechsler worried publicly about the analysis of the Supreme Court in the desegregation cases, the so-called restrictive covenant case in *Shelley v. Kraemer* and *Brown v. Board of Education* itself. But anything that seemed to question what most of us saw, and still see, as one of the great achievements of the US Supreme Court, was likely to face resistance. Perhaps as importantly, when he spoke, the Warren court's revolution was really getting into gear, and there were few, particularly in universities, who did not feel the thrill of the period and revel in the idea that constitutional law could be a powerful agent of change. As Judge Skelley Wright, a supporter of the Warren court, put it rather bluntly, young lawyers "*see no point in querulous admonitions that the Court should restrain itself from combatting injustice now, in order to preserve itself to combat a coup later on*".[45] So the Warren court and its supporters pressed on and commentators as sober as Alexander Bickel were led to conclude that the Warren court "*relied on events for vindication more than on the method of reason for contemporary validation*",[46] and Philip Kurland could conclude that the opinions of the Court "*have tended towards fiat rather than reason*" and that the Court had "*failed abysmally to persuade the people that its judgments had been made for sound reasons*".[47]

These observations were made in 1970, and before *Roe*. It is certainly possible to argue that Wechsler's complaint was that the courts had failed to create law in his own image so that a good judgment had the characteristics of a good law review article and that it may not even be a comprehensive account of the ideal judicial craft. But it is also possible to regret, I think, that these concerns were swept away so comprehensively, particularly in the universities, and to wonder how matters would have developed, if more value had been laid upon those lawyerly virtues of careful reasoning and rigorous analysis which most common law jurisdictions share. In one sense, this is, I think, what Breyer was referring to when he argued that decisions like *Brown* won acceptance and ultimately obedience because the legal rather than political character of the decision was recognised, which promoted respect for the Court and its authority. Laurence Tribe

[45] J. Skelly Wright, 'Professor Bickel, The Scholarly Tradition, and the Supreme Court' (1971) 84(4) Harvard Law Review 769.
[46] A. Bickel, The Supreme Court and the Idea of Progress (1970), 12.
[47] P. Kurland, Politics the Constitution and the Warren Court (1970: Chicago, University of Chicago Press).

implicitly acknowledges that the lawyer's craft is capable of operating as a constraint on the attractions of the exercise of power. If so, then we should attempt at every point to reinforce rather than undermine those constraints.

In this regard, the judgments in *Griswold* and the majority judgment in *McGee* deserve some consideration. Justice Douglas' opinion in *Griswold* is at one and the same time both frustrating and tantalising. It shows an enviable confidence about what the Constitution should be understood as protecting, is almost impatient to reach its conclusions, and makes little, if any, reference to precedent. It is tantalising precisely because almost everything it says so brusquely and dismissively is probably correct, and valuable. But it gives no hint that it recognises that a significant conceptual step is being taken nor does it evince much sense of being obliged to explain or justify it.

In many ways, the decision in *McGee* involved a potentially greater step, since as was famously observed, it appeared to be wrung from a constitution which was perceived as having a strong Catholic flavour.[48] To my knowledge, however, the majority decision of Henchy J. has not been subject to much if any criticism in the succeeding half century.[49] The acceptance of the outcome in *McGee* has of course many sources, not least that the development of public opinion was running strongly and decisively in favour of the availability of contraceptives. The acceptance of the analysis may owe something to inertia perhaps, and something to the fact that the decision stood upon a relatively long history of acceptance of the decisions of the Supreme Court in the interpretation and application of the Constitution. However, some part of the response to the judgment over the last 50 years is, I think, that the judgment so clearly attempts to explain how its conclusion that the Constitution protected a right to privacy was to be deduced from the Constitution, and largely succeeded in doing so, in a passage which has been repeated and expanded on in subsequent decisions.

These thoughts lead me to some tentative if not, perhaps, remarkable conclusions. First, consideration of authority from other common law jurisdictions should not

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[48] JH Whyte, *Church and State in Modern Ireland, 1923-79* (1979: Dublin, Gill & Macmillan).

[49] The judgment of Walsh J., although treated in some quarters as the majority judgment, has perhaps been less successful. See generally, D. O'Donnell, 'The Sleep of Reason' (2017) 40 DULJ 191.

be limited to the search for the chimera of a precisely similar decision addressing the same subject matter. The value of international authority is enhanced if it comes within awareness of the theoretical background to the decisions. When it does, then even when courts decide that foreign authority is not an appropriate guide to a particular decision, the exercise of assessing and analysing that authority can add an important degree of rigour and depth to the judgment, and locate it more soundly, on firmer foundations.

Second, the post-war enterprise of judicial protection of human rights through constitutions and international conventions,[50] is now being challenged perhaps more fundamentally than at any time since the Second World War, and from more surprising quarters than could have been anticipated even a decade or two ago. The vulnerability of that system is now more apparent than any other period. It is important not to simply bemoan those developments. We should address ourselves to what lawyers can do. One thing is to recognise that the perception that courts' decisions are driven by ideology is easily propagated and difficult to shake off, once it gains traction. If that system of protection of human rights, both domestic and international, is to be able to weather the challenges, it is important that it finds a firm footing and we develop a shared understanding of the place of judicial decision-making, and communicate it more generally. In that regard, international examples, even unhappy, and the rich theoretical literature that is built up, particularly in the United States, is particularly valuable, both in the domestic setting and in relation to the ECHR. Engagement with that thought can lead to a more sophisticated analysis, without having to experience the sometimes bruising real world developments that have given rise to the commentary. In this regard, the borderline between provocative academic debate and corrosive public commentary is often very fine. In my view, however, admittedly from a jurisdiction with a Constitution which is capable of amendment, and a strong common law tradition, commentary tends to exaggerate the scope of judicial decision-making and underestimates the significant constraints upon it. I do not accept that judicial decisions can be reduced to an expression of moral or political views in a legal voice. Nor do I accept that law and the legal method do not constrain the ability of courts to act as an unelected and uncontrolled engine of political power. The

[50] P. Sales, 'Strasbourg Jurisprudence and the Human Rights Act: a Response to Lord Irvine' (2015) Public Law 253.

scholarly and lawyerly qualities of attention to detail, rigorous analysis, cautious and incremental development, tolerance of opposing views, and a willingness to entertain the possibility that you are wrong, and a commitment to the law are not merely admirable but old-fashioned virtues: they are important and real constraints upon the possibility of the type of decision-making that can give rise to challenges to the entire process. This suggests more, rather than less, depth of analysis, more, rather than less, thought, discussion and respectful exchange of views and more, rather than less, recourse to international comparisons.

I hope that is an appropriate note on which not just to conclude this paper, but to commence this admirable conference.