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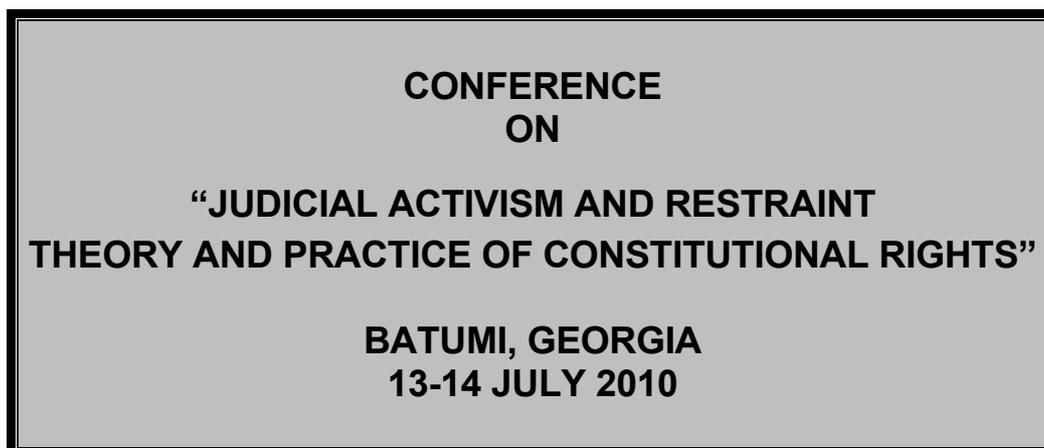
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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
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**and**  
**The Center for Constitutional Studies of Ilia State University**



**REPORT**

**“JUDICIAL ACTIVISM IN IRISH CONSTITUTIONAL LAW”**

by  
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## Introduction

The subject I will speak this morning about is judicial activism. I want to illustrate it by reference to my own jurisdiction of Ireland and the manner in which our judges have approached the identification of fundamental rights in the Constitution of Ireland. By judicial activism I mean primarily a willingness on the part of the judges to go behind the written text of a constitution and find interpretations and meanings which may not at first sight always be obvious. A second form which judicial activism may take is a tendency for the judiciary to venture into areas which have traditionally been seen as the preserve of the executive or the legislature.

## The Irish Legal Context

I need to say a few words about Ireland and its judicial system by way of background. Ireland is a small jurisdiction with a population of about 4.3 million people. Its legal system is one of common law. After it obtained its independence from Great Britain in 1922 it continued in the common law tradition, of which a key element was parliamentary sovereignty. Then, in 1937, Ireland adopted a new constitution which substituted parliamentary sovereignty with the notion of popular sovereignty, expressed through a written constitution, adopted by the People in a referendum, and capable of being amended only by the People in a referendum. The Constitution of Ireland vested the sole and exclusive power of making laws in the parliament, but also provided that the parliament might not enact any law which was in any respect repugnant to the Constitution or any provision of it. Any such law is invalid to the extent of that repugnancy. The laws which were in force at the coming into force of the Constitution were to be continued, but only to the extent to which they were not inconsistent with the Constitution. The High Court is given jurisdiction to make orders concerning the validity of any law having regard to the provisions of the Constitution, and no other court can deal with such a matter except the Supreme Court on appeal. The effect of a finding of invalidity, in the case of pre-1937 laws, is that they ceased to have effect in 1937, and in the case of laws enacted after the Constitution was in force, that they were never valid.<sup>1</sup>

## Fundamental Rights in the Constitution of Ireland

Articles 40-44 of the Constitution deal with fundamental rights. The articles deal respectively with personal rights, the family, education, private property and religion. By comparison with the rights provisions in most modern constitutions, there are a remarkable number of rights which are not expressly referred to. Many of the rights expressly protected are guaranteed "subject to public order and morality", or may be limited "in the public interest", "by the principles of social justice" or in the interests of "the exigencies of the common good". It is clear that the authors of the text, while giving power to the courts in principle to overturn legislation, in practice did not intend or anticipate that this would be done too often.

A separate article deals with social policy.<sup>2</sup> It refers to a number of socio-economic rights such as the right to an adequate means of livelihood, the right to private enterprise, the duty to safeguard the economic interests of the weaker sections of the community, and to support the infirm, the widow, the orphan, and the aged. These directive "principles of social policy" were, however, deprived of all justiciable meaning by a provision that they were solely for the guidance of the parliament and were not cognizable by any court under any of the provisions of the Constitution.

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<sup>1</sup> Article 26 of the Constitution of Ireland also provides for abstract review of a proposed statute where the President of Ireland refers it to the Supreme Court before signing it. The provision is used sparingly. For an account of this provision see JM Kelly: *The Irish Constitution*, 4<sup>th</sup> Ed., Hogan and White, 2003 (ISBN 1 854758950).

<sup>2</sup> Article 45

### Unenumerated Rights

Not surprisingly Irish constitutional jurisprudence in the area of human rights was slow to develop, partly due to the extent to which many of the rights were circumscribed, and partly no doubt because the idea of concrete judicial review of legislation by the courts was an alien graft onto the common law tradition. It was not until 1965, in a landmark judgment in the case of *Ryan v Attorney General*<sup>3</sup>, that the Supreme Court established a new basis for the assertion of human rights in the Irish Constitution. This depended on an interpretation of the following clauses:

*The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*

*The State shall, in particular, by its laws protect as best as it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen*<sup>4</sup>

The court held that the “personal rights” of the citizen extended not merely to those rights which were expressly set out in the Constitution but also covered a range of other rights not specifically enumerated. In the instant case, while the court found against the plaintiff who had argued that the fluoridation of water infringed his right to bodily integrity, it held that nonetheless such a right existed even though on the facts of the case it was not infringed.

Similarly, the guarantee in Article 38.1 not to be tried on any criminal charge “save in due course of law” has been interpreted so as to guarantee many specific rights not expressly referred to.

During the 25 years or so following the *Ryan* case a whole host of unenumerated rights which were not expressly referred to in the Constitution were identified by the courts as being among the personal rights constitutionally protected by Article 40. These included the right to freedom from torture, inhumane or degrading treatment<sup>5</sup>, the right to work and earn a livelihood<sup>6</sup> and the right to marital privacy<sup>7</sup>. A more general right to privacy has also been recognised<sup>8</sup>. The right to personal autonomy was recognised in *In re a Ward of Court (withholding medical treatment) (No. 2)*<sup>9</sup> in which the Supreme Court authorized the withdrawal of artificial nutrition and hydration from a patient who had been in a near persistent vegetative state for many years. That case also recognised the right to refuse to submit to medical treatment. Other rights which have been recognized include the right to litigate and to have access to the courts<sup>10</sup>, the right to justice and fair procedures<sup>11</sup>, the right to travel both within and outside the State<sup>12</sup>, the right to know one’s mother’s identity<sup>13</sup>, and the right to marry<sup>14</sup>. The right to procreate was recognized in *Murray v Ireland*<sup>15</sup>, a case in which a married couple, both of whom had been convicted of

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<sup>3</sup> [1965] IR 294

<sup>4</sup> Articles 40.3.1° & 40.3.2°

<sup>5</sup> *The State (C) v Frawley* [1976] IR 365

<sup>6</sup> *Murtagh Properties v Cleary* [1972] IR 330

<sup>7</sup> *McGee v Attorney General* [1974] IR 284. In this case the Supreme Court held that provisions making access to contraception unlawful violated the right of a married person to privacy in regard to his or her marital relations.

<sup>8</sup> *Kennedy v Ireland* [1987] IR 587. The case concerned a complaint by the plaintiffs of unjustifiable tapping of their telephones by the State.

<sup>9</sup> [1996] 2 IR 79

<sup>10</sup> *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345

<sup>11</sup> *In Re Haughey* [1971] IR 217, *Garvey v. Ireland* [1980] IR 75

<sup>12</sup> *Ryan v. Attorney General* [1965] IR 294, *The State (M) v. Attorney General* [1979] IR 73

<sup>13</sup> *O’T v. B* [1989] ILRM 181

<sup>14</sup> *Ryan v. Attorney General* [1965] IR 294, *McGee v Attorney General* [1974] IR 284

<sup>15</sup> [1985] IR 532

murdering a policeman and were long term prisoners, sought the right to beget children. While the court recognized the general right to procreate it held that the State was entitled to limit it in the case of prisoners. The rights of an unmarried mother in regard to her child<sup>16</sup>, certain rights of children and the right to communicate have also been upheld. In turn some of these rights spawned more specific rights on an inferior level; for example the right to travel abroad implies the right to be issued with a passport.

Many of these cases which recognized unenumerated rights were landmark cases and were seen to serve important social objectives. For example, contraception had been unlawful in Ireland since 1935 and was unlawful at the time the Constitution was adopted. The authors of the Constitution, many of whom were the same people who had made it unlawful "to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import for sale, any contraceptive"<sup>17</sup>, would probably have been surprised to learn in 1937 that some 30 years later the Irish Supreme Court would hold that there was implicit in the Constitution a right to marital privacy (not, however, mentioned anywhere in the Constitution) and that that right implied a right of access to contraception for the purposes of family planning.

In some of this judicial activism the Supreme Court facilitated the transformation of Ireland from a state whose laws were conservative and heavily influenced by the views of the Roman Catholic Church to a more liberal and secular standpoint. It would be difficult, however, to refute the suggestion that in many of these matters the Irish Supreme Court were in effect acting as legislators to introduce changes which a conservative legislature was unwilling to adopt. It was, of course, frequently claimed that the legislature was afraid to pass laws which might earn the disapproval of the Catholic Church. Nonetheless, the legislature was that which the Irish people had elected democratically and it is probably true that many of these changes would have stood little chance of being adopted by the parliament even without any hidden pressures being brought to bear against them and would not have been approved of or supported by a conservative electorate at that time.

Such judicial law making raises many questions. First of all, what is to be the source of authority for the recognition of unenumerated rights? In the early days of judicial activism in Ireland a source sometimes invoked was "the Christian and democratic nature of the state". But Christianity, like democracy, can have many different forms. Some of the judges sought refuge in natural law. The difficulty with natural law, however, is its imprecise and evanescent nature. The Constitution of the United States was sometimes looked to for inspiration, as were Papal Encyclicals. On occasion recourse was had to international human rights instruments, although not with great enthusiasm due to the fact that Ireland's position as a dualist state led her judiciary to be reluctant to introduce international norms into domestic law by the backdoor (a reluctance which continues). As the Constitution Review Group noted:

*The effect of this new approach was that it gave very considerable latitude and power to the courts in determining what rights were among the unspecified personal rights protected by Article 40.3.1<sup>o</sup>. This latitude arises from the absence of clear criteria and sources for the identification of personal rights. It creates a broad spectrum of possibilities for the recognition of new rights ranging from those which have a clear textual basis to those which do not. Few would dispute that the result of such judicial interpretation of the Constitution has been beneficial. However, the identification of rights which have no clear connection with the Constitutional text and the potential for judicial subjectivity in the identification of rights arising from the lack of objective criteria for the courts have given rise to some concern....<sup>18</sup>*

<sup>16</sup> *The State (Nicolau) v An Bord Uchtála* [1966] IR 567, *G v An Bord Uchtála* [1980] IR 32

<sup>17</sup> Criminal Law Amendment Act, 1935, section 17. Curiously it was not unlawful to purchase, use or possess these offending items.

<sup>18</sup> Report of the Constitutional Review Group, May 1996, ISBN0/7076/2440/1, pages 248-249

There is no doubt, however, that the courts have never found an entirely satisfactory answer to this problem and many commentators have criticised what they see as essentially judicial law making which does not have any mandate from the text. In recent years there has been less of a tendency to identify new personal rights, instead concentrating on the development of those already identified using more traditional jurisprudential techniques grounded in the precedents generated in the early days of the identification of unspecified rights. A cynic might observe that given the range of rights already identified there could be very few left by now which had not been considered at some time or other. In *OT v B*<sup>19</sup>, Keane CJ in commenting on the nature of unspecified rights stated as follows:

*It would unduly prolong this judgment to consider in detail the problems that have subsequently been encountered in developing a coherent principled jurisprudence in this area. It is sufficient to say that, save where such an unenumerated right has been unequivocally established by precedent and, for example, in the case of the right to travel and the right of privacy, some degree of judicial restraint is called for in identifying new rights of this nature.*

### **Social and Economic Rights**

I turn next to some more recent developments in which the courts became active in giving judicial recognition to social and economic rights. In the late eighties and early nineties the Irish courts saw an increase in applications for judicial intervention in areas originally considered to be non-justiciable and within the sole remit of the executive. The first major decision in this field was the judgment of Costello J in *O'Reilly v. Limerick Corporation*<sup>20</sup>. The applicants were members of the travelling community residing in caravans. They sought a mandatory injunction to require the State to provide suitable serviced halting sites. In refusing the relief sought, Costello J drew a distinction between what he deemed “commutative justice” and “distributive justice”. Commutative justice, he outlined, involves a consideration of dealings between individuals and a determination by an arbitrator, such as a court, of what is due to one party arising from the relationship between the parties. Distributive justice, on the other hand, considers relationships between individuals and those in authority in a political community when goods held in common for the benefit of the entire community fall to be distributed and allocated. In such cases an independent arbitrator cannot, according to Costello J, determine whether an individual has been deprived of what he was due. The following passage from Costello J gives a clear picture of his concept of the separation of powers between the executive and the judiciary:

*It is the [parliament] or officials acting under the authority of the [parliament] which under the Constitution determine the amount of the community's wealth which is to be raised by taxation and used for common purposes and ... how the nation's wealth is to be distributed and allotted. The courts' constitutional function is to administer justice but I do not think that by exercising the suggested supervisory role it could be said that a court was administering justice as contemplated in the Constitution. What could be involved in the exercise of the suggested jurisdiction would be the imposition by the court of its view that there had been an unfair distribution of national resources. To arrive at such a conclusion it would have to make an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiffs' claim. As the present case demonstrates, it may also be required to decide whether a correct allocation of physical resources available for public purposes has been made. In exercising this function the court would not be administering justice as it does when determining an issue relating to*

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<sup>19</sup> [1998] 2 IR 321

<sup>20</sup> [1989] I.L.R.M. 181

*commutative justice but it would be engaged in an entirely different exercise, namely, an adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources. Apart from the fact that members of the judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the courts, that is on a case by case basis, make them a wholly inappropriate institution for the fulfilment of the suggested role.*

This strongly argued doctrine of separation of powers was somewhat shaken in the mid-nineties when the courts were frequently engaged to adjudicate on whether state agencies were adequately fulfilling their obligations with regards children in state care. The first inkling of a change of attitude came with the decision of Kelly J in *D.B. v Minister for Justice*<sup>21</sup>. The existence of certain constitutional rights with regard to the provision of suitable care facilities had been recognised in previous case law<sup>22</sup>. However, the courts continued to observe a distance from any form of mandatory relief or adjudication on distributive justice. In *D.B.* Kelly J noted that previous declaratory relief had been granted recognising the state's obligation to provide a high support accommodation facility for children, but that the government's response had not been "efficient, timeous or effective". The applicant sought an order directing the Minister for Health to provide sufficient funding to build, open and maintain a 24 bed high support unit. Kelly J considered that the courts did have jurisdiction to grant the orders required but that such action would not be taken lightly. Despite the separation of powers between the judiciary, legislature and executive he found that the case before him exhibited a response by the Minister which fell far short of what the Court was "reasonably entitled to expect". Kelly J stated:

*... the time has now come for this Court to take the next step required of it under the Constitution so as to ensure that the rights of troubled minors who require placement of the type envisaged are met.*

*In proceeding to grant the injunction ... I am not interfering in the policy of the administrative branch of government. As I have already said, it was suggested on the part of the Minister that it would be impermissible for the Court so to do. I am not persuaded by that argument. If, in an extreme case, such were required in order for this Court to vindicate personal rights, then, in my view, it would be open to it to do so. However, I do not have to decide that question at all. I am not dictating or even entering into questions of policy. The order that I propose making will merely ensure that the Minister who has already decided on the policy lives up to his word and carries it into effect.*

A similar order was granted by Kelly J in the case of *T.D. v Minister for Education*<sup>23</sup>. This decision was appealed to the Supreme Court<sup>24</sup> where the Court, in allowing the appeal, outlined a conservative attitude to the doctrine of separation of powers. Keane C.J. stated:

*The difficulty created by the order of the High Court in this case is not simply that it offends in principle against the doctrine of the separation of powers, though I have no doubt that it does. It also involves the High Court in effectively determining the policy which the Executive are to follow in dealing with a particular social problem. This difficulty is not met by the contention advanced on behalf of the applicants that the Ministers are being asked to do no more than carry into effect a programme prepared by them and which they assert it is their intention to implement. The evidence in this case establishes clearly that, in what is unarguably an extremely difficult area,*

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<sup>21</sup> [1999] 1 I.R. 29

<sup>22</sup> *FN v Minister for Education* [1995] I.R. 409, *DG v Eastern Health Board* [1997] 3 I.R. 511

<sup>23</sup> [2000] 3 IR 62

<sup>24</sup> [2001] 4 I.R. 259

*approaches which at one time seemed appropriate may have to be reconsidered: in particular, officials are naturally concerned with how equivalent problems are being dealt with in other countries. There is no reason in principle why the Executive should not adopt a flexible and open minded approach to the problems of children with special needs, while at the same time ensuring that their constitutional right to have those needs met is respected. The making of the High Court order in this form, as the judgment of the trial judge emphasises, will make it necessary for the Minister to return to the High Court to obtain its sanction to any change in policy which necessitates a departure from the precise terms of the order. It cannot be right that the executive power of the Government can only be exercised in a particular manner, even though so to do would not contravene any person's constitutional rights, without the sanction of the High Court.*

This decision, amongst others<sup>25</sup> sent a clear message in areas requiring public expenditure in relation to social policy that judicial activism would not be tolerated.

### **New Problems and Judicial Restraint**

Politically sensitive areas of social change continue to appear before the Courts. As evident from the landmark decision of *McGee v. Attorney General*<sup>26</sup> major changes to social policies can be effected by rulings of the judiciary. Gerard Hogan has noted in response to the *F.N., D.G., Sinnott and D.B* line of case-law:

*At the heart of the present debate regarding the constitutional protection of socio-economic rights lies the issue of the proper role of the courts and judicial review. There is no doubt but that excessive judicial review probably saps at the sinews of the democratic order, especially where the judiciary uses this powerful instrument as a mechanism for imposing its own social mores and economic beliefs on the population at large...On the other hand, if a Constitution cannot ensure a framework whereby the basic rights of the disadvantaged, the poor, the socially excluded and others for whom the democratic process seems unresponsive are protected, it may be said that constitutional law is not fulfilling one of its fundamental purposes in modern society.*<sup>27</sup>

Recent issues to come before the Courts have concerned such issues as the recognition of gender re-assignment surgery; the regulation of assisted reproduction agreements<sup>28</sup>; and the rights of fathers<sup>29</sup> and same-sex<sup>30</sup> couples under family law and the Constitution. These areas are completely unregulated by statute law and so the Courts were faced with an opportunity to fill in the legislative gap.

In the case of *Foy v. An Ard Chlairiteoir*<sup>31</sup> the applicant failed in 2002 in her action to have her birth certificate amended to reflect the fact that she had undergone a male to female gender re-assignment operation. Following the European Court of Human Rights finding in *Goodwin v. United Kingdom*<sup>32</sup> and the partial adoption of the Convention into Irish law through the European Convention on Human Rights Act 2003 the matter came before the High Court again in 2007. McKechnie J made the following observation:

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<sup>25</sup> *Sinnott v. The Minister for Education* [2001] 2 I.R. 545

<sup>26</sup> [1974] I.R. 284

<sup>27</sup> Hogan, *Directive Principles and Socio-Economic Rights*, (2001) 36 Irish Jurist 174, at page 197/198

<sup>28</sup> *Roche v. Roche*, Unreported, Supreme Court, 15<sup>th</sup> December 2009

<sup>29</sup> *McD v. L*, Unreported, Supreme Court, 10<sup>th</sup> December 2009

<sup>30</sup> *Zappone and Gilligan v The Revenue Commissioners, Ireland and the Attorney General* [2008] 2 IR 417

<sup>31</sup> Unreported, High Court, 9<sup>th</sup> July 2002, McKechnie J.

<sup>32</sup> [2002] 35 E.H.R.R. 447

*[The Government] has taken no steps of any significance to redress the undoubted difficulties which continue to exist. ... it must be seriously questioned whether the State has deliberately refrained from adopting any remedial measures to address the ongoing problems.*

In the changed circumstances brought about by the European Convention on Human rights Act and the *Goodwin* decision McKechnie J made the following finding:

*Accordingly, it is very difficult to see how this Court, even still allowing for some 'margin of appreciation' in this sensitive and difficult area, could now exercise further restraint, grant even more indulgence, and afford yet even more tolerance to this State, some five years after both the decision in Goodwin and the July, 2002 judgment. In fact in my humble opinion this Court cannot, with any degree of integrity, so do. Consequently I must conclude that by reason of the absence of any provision which would enable the acquired identity of Dr. Foy to be legally recognised in this jurisdiction, the respondent State is in breach of its positive obligations under article 8 of the Convention.<sup>33</sup>*

It was argued that the terms of the 2003 Act merely allow a Court to grant declaratory relief that a piece of legislation is not compatible with the Convention and that given that in this case there was no legislation on the matter there was no such remedy available to the applicant. McKechnie J wholly rejected this submissions highlighting that the Government could not benefit from adopting a policy of "total denial or inactivity". Therefore, he found that the State was as much in breach of the Convention by failing to enact legislation in the area as if it had enacted prohibited legislation.<sup>34</sup>

The *Foy* case is one of a number recently where the Courts have been faced with an area of law and public policy that is wholly unregulated. In such cases the Courts can be impatient to realise that their suggestions in previous case law have not been acted upon by government or the legislature.

The government's inactivity was again criticised in the decision of *McD v. L*<sup>35</sup>. The applicant in this case was the biological father of a child, who had been conceived through the artificial insemination of the mother, a woman in a committed lesbian relationship. A written agreement had been entered into by the parties that the applicant would fulfil the role of "favourite uncle" with limited visiting rights. The applicant enjoyed a good relationship with the respondents in the beginning and had frequent access to the child. Then the respondents sought to move, with the child, to Australia. The applicant successfully applied for an injunction restraining this move. Although the applicant had no right to this relief expressly grounded in the Constitution Hedigan J stated:

*the silence of the Constitution in relation to same sex de facto families does not necessarily preclude this Court from coming to the conclusion that such units also should be recognised as existing and as having certain rights and duties. Because they are unknown constitutionally, it is hard to see how the recognition of such de facto families could in any way challenge the constitutional sanctity of marriage between a man and a woman.*

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<sup>33</sup> Unreported, High Court, 19<sup>th</sup> October 2007, McKechnie J.

<sup>34</sup> In July 2010 the Irish Government withdrew an appeal pending before the Supreme Court in this case and announced that it would introduce legislation to give effect to its ECHR obligations.

<sup>35</sup> Unreported, Supreme Court, 10<sup>th</sup> December 2009

Hedigan J turned then to a consideration of ECHR jurisprudence. He accepted that no decision of the European Court of Human Rights had found that a lesbian couple living together enjoy the status of *de facto* family, but noted that the other decisions of the Court demonstrated “a substantial movement towards such a finding”. Hedigan J then stated:

*I have come to the conclusion that where a lesbian couple live together in a long term committed relationship of mutual support involving close ties of a personal nature which, were it a heterosexual relationship, would be regarded as a de facto family, they must be regarded as themselves constituting a de facto family enjoying rights as such under article 8 of the E.C.H.R.*

*Moreover, where a child is born into such a family unit and is cared for and nurtured therein, then the child itself is a part of such a de facto family unit. Applying this to the case here it seems clear that ... there exist such personal ties as give rise to family rights under Article 8 of the European Convention on Human Rights.*

This decision was reversed on appeal. The Supreme Court struck down the *de facto* family protection rights and re-iterated that the only family recognised and protected under the Constitution is the family based on marriage. Murray C.J. emphasized that the European Convention on Human Rights Act 2003 only allows for declarations of compatibility in relation to legislation, whereas the court found that Hedigan J was directly applying Convention rights, an act for which there was no legislative authority. Murray C.J. stated:

*An international convention cannot confer or impose functions on our Courts. The role and functions of Courts in the administration of justice are governed by the Constitution and the laws of the State. Of course the Courts may be given jurisdiction to enforce or adjudicate on rights which the State has agreed, in an international treaty, to promote or protect. Moreover, it can only be conferred by national law ... In my view the High Court had no jurisdiction to apply directly the provisions of the Convention in that manner.*

Shortly after this judgment was handed down the Supreme Court reinforced its stance in *Roche v. Roche*<sup>36</sup> where it was asked to determine whether frozen embryos created through IVF could be defined as “unborn life” under the Constitution. The Court again noted the complete lack of legislative guidance in this area. It was held that the reference to “unborn” in the Constitution refers to the unborn in a mother’s womb only. Murray C.J. observed that the question as to when life begins was a very contentious debate, he noted:

*I do not consider that it is for a court of law, faced with the most divergent if most learned views in the discourses available to it from the disciplines referred to, to pronounce on the truth of when human life begins.*

*Absent a broad consensus or understanding on that truth, it is for legislatures in the exercise of their dispositive powers to resolve such issues on the basis of policy choices.*

### **Conclusion**

The Irish courts have at times exhibited a high degree of judicial activism. Between 1965 and 1990 this activism concentrated on the identification of fundamental rights which had not been expressly provided for in the Constitution of Ireland, 1937. The courts, however, never articulated a wholly satisfactory theory as to the source of such rights and increasingly came to recognize the tension between judicial law-making and the democratic accountability of the legislature. In recent years the courts have tended to show greater restraint, concentrating on

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<sup>36</sup> Unreported, Supreme Court, 15<sup>th</sup> December 2009

building on established jurisprudence rather than seeking to recognize new rights. A brief foray into judicial law-making and the exercise of executive powers in the area of social and economic rights was disapproved of and restrained by the Supreme Court. Nevertheless, the courts are still prepared on occasion to recognize a new right particularly where there is a legal vacuum, although in recent years they tend to do so only very sparingly and cautiously.