HERMENEUTIC PERSPECTIVES ON JUDICIAL ACTIVISM: DWORKIN, CONSTITUTIONAL INTERPRETATION AND JUDICIAL LAW-MAKING

Eoin Daly*

> It may be said of a Constitution, more than of any other legal instrument, that while "the letter killeth, the spirit giveth life
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> - Henchy J in *DPP v O'Shea*[1]

> … inverting a Christian axiom, Nietzsche offers the philological aperçu that while the spirit kills, the letter gives life
>
> - Goodrich, *Nietzsche and Legal Theory*[2]

A INTRODUCTION – INTERPRETATION AND THE PROBLEM OF LINGUISTIC AMBIGUITY IN LAW

Since the words used by legal instruments may often be abstract, or their meaning indeterminate when applied to various concrete circumstances, the application of law requires an intervening act of interpretation, of which the precise nature and significance is largely undefined and contested.[3] This consequence of such an (apparently obvious) axiom is that while a distinction necessarily exists between the application of law and its creation, it is often claimed that interpretation, in applying words of often indefinite meaning to various situations, may amount to a creative act that judges in interpreting law, in fact participate in its creation.[4] The problem is stated by MacLean:

> … the process of interpretation is not a humble one… rather than being the servants of the text, interpreters threaten to become its masters by devising and applying the rules by which sense is made of it; indeed, they threaten to become its masters to the point of laying down the law themselves.[5]

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* BCL (Law and French), PhD candidate, Faculty of Law, UCC

[1] [1982] IR 384.

[2] P Goodrich and M Valverde (eds) *Nietzsche and Legal Theory* (Routledge London 2005) 196.

[3] A Marmor *Interpretation and Legal Theory* (Clarendon Press Oxford 1994). Marmor presumes that the various paradigmatic uses of law associated with interpretation are 'intimately linked with the concept of meaning.'

[4] ibid 124.

[5] I MacLean 'Responsibility and the Act of Interpretation' in MacLean, Montefiore & Winch (eds) *The Political Responsibility of Intellectuals* (Cambridge University Press Cambridge 1990) 161.

This observation may well apply to legislation, but is particularly pertinent in the case of written constitutions,[6] as well as declarations of human or fundamental rights. While legislation tends to address specific context, constitutional and human rights documents apply often abstract maxims to a multitude of situations and social problems, which may not be foreseeable to the enactors of these texts. The Irish Constitution, to take one example, refers – even leaving aside the preamble – to such subjective, vague ideals as 'justice and charity' (Article 45) the 'common good' and 'principles of social justice' (Article 43) and most notably, the unenumerated 'personal rights of the citizen' (Article 40).[7] This observation is arguably even truer of such older texts as the United States Constitution. Dworkin points to the 'notoriously abstract' constraints placed on the Organs of Government by certain provisions. The Fifth Amendment, for example, stipulates that Congress cannot take 'life, liberty or property' without 'due process of law.'[8]

This essay will discuss this example of constitutional interpretation as a practice in which the problem of the subjective imposition of meaning by the interpreter is potentially most acute. This problem may be viewed in terms of the practice of identifying, or inferring the intention of the authors or enactors of a text, or alternatively, in light of judicial recourse to norms external to the text in question. The essay will discuss to what extent constitutional interpretation can be considered to constitute the 'retrieval'[9] of meaning, and Dworkin's alternative argument that interpretation is 'constructive,' in the sense of 'imposing purpose on an object or practice in order to make of it the best possible example of the form to which it is taken to belong.'[10] Such interpretive strategies will be discussed in light of MacLean's insistence on 'good faith' in the act of interpretation[11] and of Goodrich's concern as to subjective 'interposition'[12] by the interpreter.

Assuming that legal systems aim to maintain such values as precision, stability and objectivity, while maintaining a robust judicial role in the protection of personal rights, the interpretation question is problematic, I will discuss, not only for legal philosophy and hermeneutics,[13] but also in terms of

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[6] R Post 'Theories of Constitutional Interpretation' Representations, Special Issue: Law and the Order of Culture (30) (Spring, 1990) 13-41: 'sometimes, although rarely, the words of Constitutions appear to speak for themselves' 14.

[7] In *Ryan v Att-Gen* [1965] IR 294 Kenny J stated at 313 that 'there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all.'

[8] R Dworkin *Law's Empire* (Fontana Press London 1986).

[9] J Raz 'Interpretation Without Retrieval' in A Marmor (ed) *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press Oxford 1995) 155.

[10] Dworkin (n 8) 52. This is contrasted with 'conversational' interpretation, which is concerned merely with discerning the 'communication intentions' of the author.

[11] MacLean (n 5) 170.

[12] Goodrich and Valverde (n 2) 195.

[13] Marmor (n 3) (preface, v): '[interpretation] is not only a subject matter legal philosophers are interested in, but according to some influential philosophers, also a general method, a meta-theory of legal theory.'

the political significance of judicial power.[14] In the constitutional order, I will argue, this problem is therefore significant in terms of the relationship between the ideal of democratic majority rule, and the judicial protection of fundamental rights.

B TENSIONS IN CONSTITUTIONAL INTERPRETATION BETWEEN ORIGINALISM AND CONCEPTIONS OF POLITICAL MORALITY

Goodrich writes that 'there are few rules of legal hermeneutics left.'[15] Maxims such as the 'Golden Rule,' the 'Mischief Rule,' and so forth, he suggests, 'are semantic aids rather than linguistic devices for reading the text.'[16] The absence of recognised, binding methods of interpreting law, and the resulting potential for abusive 'interposition'[17] by the interpreter, is particularly problematic, for reasons outlined above, in the case of constitutional law.[18] Common law principles of statutory interpretation have been considered unsuitable for interpretation of constitutional provisions, which 'in the nature of things tend to lay down general principles.'[19] O'Byrne J states:

> A Constitution is to be liberally construed so as to carry into effect the intentions of the people embodied therein.[20]

While it is a common practice to interpret law in terms of what the lawmakers had in mind,[21] the above statement requires faith in the existence of a discernible 'intention' expressed by those who voted to ratify the Constitution – which may be interpreted and applied by judges to a plethora of legal and social problems of which many were unforeseeable to both the framers and the voting public of 1937.[22] The question of whether intention should play a role in statutory interpretation, notes Marmor, is one of the 'age-

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[14] DG Morgan *A Judgment too far? Judicial Activism and the Constitution* (Cork University Press Cork 2001).

[15] Goodrich and Valverde (n 2) 191.

[16] ibid.

[17] MacLean (n 5) 170.

[18] Goldsworthy points out (at 169) that constitutions do not usually contain guidelines as to how they should be interpreted. See J Goldsworthy 'Raz on Constitutional Interpretation' (2003) 22(2) Law Philos 167.

[19] G Hogan and J Whyte *The Irish Constitution* (Butterworths Dublin 2001) 5.

[20] *Sullivan v Robinson* [1954] IR 161, 174.

[21] D Lyons 'Reconstructing Legal Theory' (Autumn 1987) Phil Pub Affairs 16 (4) 377. He notes at 383: 'Reference to lawmakers' intent is inherently ambiguous, and faces formidable obstacles when (as usually happens) the relevant intent is that of a group or corporate body.'

[22] For example, issues arising from technological advances in reproductive medicine: see K Blakenship B Rushing & S Onorato 'Reproductive Technologies and the US Courts' (March 1993) 7(1) Gender Soc 8.

old problems of jurisprudence.'[23] Yet while the concept of intention in terms of statutory interpretation is susceptible to philosophical scrutiny, it is at least possible to seek indices of actual intention, such as *travaux préparatoires*, or parliamentary debates. This is not the case in terms of constitutional interpretation, since the imputation of intention to the 'people,' whose motivations for ratifying a Constitution are surely not susceptible to objective discernment, yet neither is it necessarily clear what the framers of the document may have specifically envisaged by such unsubstantiated, contested concepts as 'principles of social justice' or even 'equality.'

Nonetheless, judicial dicta on constitutional interpretation indicate a large degree of creativity in this practice – the doctrine of harmonious constitutional interpretation amounts to 'a presumption that the people who enacted the Constitution had a single scale of values, and wished those values to permeate their charter evenly and without internal discordance,'[24] while the so-called 'broad' interpretive approach permits regard to be had to the Constitution's 'purpose and objective in protecting human rights.'[25]

What is the alternative to the intention-based, or 'historicist' approach? MacLean, in listing doctrines relied upon in legal interpretation, cites the imputation of intention, recourse to 'context', and the implicit adoption of norms such as rationality, justice, and equality.[26] Reliance on the supposed intention of the lawmakers, or of the 'people,' however, is the subject of considerable contestation. As outlined above, the difficulties in retrieving both meaning and intention from a constitution and the resulting danger of subjective 'interposition' are potentially more acute for texts such as the United States Constitution, which is older, drafted in more abstract language, and whose amendment procedures are more cumbersome.[27] In the context of the American 'constitutional wars,'[28] Dworkin criticises the reverence of the Historicist approach for the acknowledged intentions of the constitutional authors in specific matters such as racial segregation.[29] He argues that constitutional provisions should instead be interpreted in light of the 'principle' enacted, disregarding the known intention of the enactor on a specific matter if it is inconsistent with a contemporary understanding of this principle. This derives from his conception of 'law as integrity,'[30] his theory of constructive interpretation[31], and his belief that constitutional interpretation, insofar as it concerns fundamental law, requires adjudication on fundamental

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[23] A Marmor (n 3) 5.

[24] *Hogan & Whyte* (n 19) 9.

[25] ibid 5.

[26] MacLean (n 5) 178.

[27] See generally Hall & Clark (eds) *The Oxford Companion to American Law* (Oxford University Press New York 2002)

[28] Dworkin (n 8) 357.

[29] ibid ch 8.

[30] ibid 114-117.

[31] ibid 52.

questions of 'political theory.'[32] Thus, in rejecting the primacy of the intention of the constitutional authors he advocates reliance upon principles exterior to normative law.

Similarly, Raz criticises the 'Originalist' approach to constitutional interpretation; understood as the belief that interpretation should conserve the 'original' meaning of the Constitution in order to give effect to the intentions of its enactors.[33] He argues that since the moral authority of a constitution is not based on the moral authority of its founders, but on the need for stability in the framework of Government,[34] the courts may legitimately 'change' the law through a 'moral' approach to Constitutional interpretation.[35] Thus, fidelity to the original meaning of the Constitution may constitute a moral imperative, but one to be considered along with other such considerations.[36]

This position – which rejects the conception of interpretation as the 'retrieval' of original meaning[37] – seemingly amounts to a belief that a Constitution does not itself represent the highest accessible source of legal principle, but merely a mechanism which may be interpreted to reach an antecedent natural or moral justice upon which the judiciary may adjudicate. This approach has found some expression in Irish constitutional jurisprudence. The Supreme Court, in *Re Article 26 and the Regulation of Information (Services outside of the State for Termination of Pregnancies Bill) 1995*[38] decisively rejected the contention that the Courts could apply a conception of natural law which was superior and antecedent to the positive law of the Constitution. Nonetheless, the Courts have otherwise rejected an approach of absolute fidelity to the original or historical meaning of the text, and have proved quite willing to decide constitutional cases with reference to ideals which are broadly exterior to the text of the Constitution. While the Courts have sought to apply ideals of 'prudence, justice and charity' as outlined in the preamble, they have largely accepted that such ideals essentially originate less in the original meaning of the text itself than in a judicial interpretation of such ideals as they prevail in contemporary society. Thus, in *McGee v Attorney General*[39] Walsh J stressed that the nature of the Constitution as fundamental law precluded a purely historical method of interpretation, and that the interpretation of constitutional principles could

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[32] ibid 380.

[33] See J Raz 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in L Alexander *Constitutionalism: Philosophical Foundations* (Cambridge University Press Cambridge 1999) as cited by Goldsworthy (n 18).

[34] ibid 164-169.

[35] ibid 179.

[36] ibid 178.

[37] Raz (n 9).

[38] [1995] 1 IR 1.

[39] [1974] IR 284.

evolve in accordance with prevailing social ideals. In *State (Healy) v Donoghue*[40] O'Higgins CJ stated that:

> [The] preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes or develops, and which fall to be interpreted … in accordance with prevailing ideas … the Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment.[41]

Notwithstanding the expression of some caution as to the interpretation of 'standards and mores' in such cases as *Norris v Attorney General*,[42] the above approach may be considered as tending to position the judiciary as arbiters of moral principles. The implications of such an approach, as will be further discussed below, is that this function may be considered to bear a potentially political hue.

C INTERPRETATION AS THE IMPOSITION OF MEANING VIA EXTRA-LEGAL INTERPRETIVE MAXIMS

Thus, notwithstanding some residual reverence for the historical meaning of the Constitution and the intentions of its enactors[43], the elusiveness of these criteria has, in practice, necessitated judicial recourse to extra-legal values of political morality.[44] Dworkin, in defending this practice,[45] invokes 'fairness' – he asks why citizens should now be ruled by the convictions of the unrepresentative group that drafted the Constitution, arguing that it would be 'perverse' if society could not change its 'public sense of purpose.'[46] Since the Constitution is foundational law, its interpretation must also be 'foundational' – it must 'fit and justify the most basic arrangements of political power in the community… drawn from the most philosophical reaches of political theory.'[47] The obvious objection to this

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[40] [1976] IR 325.

[41] ibid 347.

[42] [1984] IR 36.

[43] The recent case of *Sinnott v Min for Education* [2001] 2 IR 545, for example, relies heavily upon a historicist method of constitutional interpretation.

[44] Again, one of the most striking examples of this practice is the doctrine of unenumerated rights in the Irish Constitution. The wording of Article 40.3.2° has been interpreted such as to allow the Courts to infer unwritten constitutional fundamental rights, from such sources as the wording of the preamble, and the fact that Ireland is a 'Christian and Democratic' state. See *Ryan v. Att-Gen* [1965] IR 294.

[45] *Dworkin* (n 28) 359. Thus, he argues that the importance of the distinction between judges who base their interpretations on constitutional and extra-constitutional justifications is overstated.

[46] ibid 364.

[47] ibid 380.

position, however, is that excessive deference to the convictions of an historical, unrepresentative clique is no more objectionable than subjugation to the 'political morality' of judges, who, as apolitical officers, are equally unrepresentative as those who drafted and enacted the Constitution[48].

Thus, Dworkin arguably does not adequately address what is potentially the most serious problem associated with extra-legal interpretive sources – that concepts of 'political morality' are so amenable to subjective or ideological appropriation as to render the rule of law, and judicial subordination to law-making bodies, hollow and ineffective. Such 'interposition,' suggests Nietzsche, is 'exactly what lawyers do.'[49] Hobbes and Locke both wrote that the fact that each person could by nature produce particular names for certain ideas was, in itself, an insufficient basis for society. In order to engage in public affairs and to constitute a society, men would have to reach agreement as to the meaning of words.[50] The claim, however, that there are shared or common values[51] which may constitute objective maxims of interpretation, is confronted by the fact that concepts such as 'equality' and 'principles of social justice,' are interpreted in radically opposite ways by citizens within constitutional democracies and can be relied upon to produce quite opposite legal outcomes. MacLean's requirement of 'good faith' on the part of the participants in the interpretive process is surely satisfied with great difficulty when the language of the text is sufficiently abstract and indeterminate to facilitate ideological appropriation by the interpreter, who may be deemed a legitimate receptacle of neither semantic, nor political consensus. Dworkin's defence to this objection – that 'most judges will be like other people in the community'[52] – is inadequate,[53] if we accept the precept of the Realist movement in Legal Philosophy[54] that 'all law is politics.'[55] If we recognise that Law is not autonomous from political and ideological discourse, and that judicial behaviour may be sentimental and instinctive rather than rational and deductive, a method of interpretation which relies upon judges' sense of 'political morality' is therefore objectionable, insofar as the legitimisation of judicial policy-making is considered undesirable.

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[48] Morgan (n 14).

[49] Goodrich and Valverde (n 2) 195.

[50] See McDowell G 'The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation' (2000) 44(3) Am J Legal Hist 257-283.

[51] *Dworkin* (n 8). Dworkin himself acknowledges that judges will have conflicting opinions as to what principles should be used in interpretation (p. 250), but answers this objection with the claim that 'most judges will be like other people in the community' (p. 256).

[52] ibid 256.

[53] J Hockett 'Justices Frankfurter and Black: Social Theory and Constitutional Interpretation' (1992) 107(3) Polit Sci Quart 479.

[54] See particularly G Schubert *Judicial Behaviour: A Reader in Thought and Research* (Chicago 1964).

[55] Kalman *Realism at Yale 1927-1960* (University of North Carolina Press Chapel Hill 1986) 231.

In terms of developments in Ireland, Morgan argues that the marked increase in judicial review constitutes a 'radical change' in the nature of the judicial function, which has 'attracted relatively little discussion on the political plane.'[56] Unlike the 'incremental' law-making in which the Common Law is implicated, judges in constitutional cases are less likely to observe the doctrine of precedent, which may be considered to ensure a degree of stability and certainty in the exercise of the judicial function.[57] In this vein, it may be reasoned that if judges are to rely upon a sense of political morality in the task of interpretation, the values and sources which they rely upon are not sufficiently accessible and clear to constitute a legitimate source of legal authority, particularly if we consider that the ideal of the Rule of Law requires that the sources of law be reasonably precise, clear and stable.

Similarly, Goldsworthy criticises Raz's 'moral' approach[58] – although he acknowledges that judges may 'supplement' the Constitution when it is inadequate to resolve the dispute before them.[59] He cautions that such discretion should not extend as far as allowing judges to change the Constitution, as this would set a dangerous precedent for other branches of Government such as the Executive.[60] Raz's idea is thus deemed 'pseudo-interpretation,'[61] and a mask for judicial law-making.

The concern that the judiciary is not appropriately mandated to adjudicate upon matters of political morality is reflected to some extent in *Sinnott v. Minister for Education,*[62] where Hardiman J states that 'conflicts of priorities, values … or sentiments cannot be avoided … by adopting… an agreed or imposed exclusive theory of justice … if judges were to become involved in such an enterprise … they would step beyond their appointed role … [t]hey have no mandate in these areas.'[63] Of course, this argument is susceptible to the criticism that the Superior Courts do in fact frequently engage with matters of public policy and political morality, and that the selective refusal to do so itself constitutes the exercise of political power – or as Langwallner states, that 'one might argue that Hardiman J's judgment itself reflects a policy, that of judicial deference to the legislature.'[64] Accordingly, he argues that 'judges when they interpret the abstract and normative provisions

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[56] *Morgan* (n 14) 1.

[57] ibid 20.

[58] *Goldsworthy* (n 18) 167.

[59] ibid 193.

[60] ibid 183.

[61] ibid 185.

[62] [2001] 2 IR 545.

[63] ibid 711.

[64] D Langwallner 'Two Modest Proposals for Constitutional Interpretation' (2004) Independent Law Review 7.

of a constitutional text are precisely engaged in the task of which Hardiman J denies.'[65]

In this vein, it is certainly arguable that a position of judicial deference to the legislature, rather than constituting a withdrawal from questions of political morality, itself represents a particular philosophical position relating to the fundamental structure of the State. This argument is perhaps strengthened by the fact that the Constitution, in respect of the jurisdiction which it grants to the Superior Courts, does not explicitly provide that this jurisdiction will be exercised in a manner which defers to the Legislature in questions of policy or political morality – in other terms, the power of the Courts to enforce constitutional rights against the Executive and Legislature is not limited with reference to questions or issues of policy or political morality. Furthermore, Irish constitutional jurisprudence is littered with references to the Courts as arbiters of 'the common good.' In *Abbey Films v Attorney General,*[66] the Supreme Court rejected the contention that a statute which empowered the High Court to deicide upon the exigencies of the 'common good' violated the constitutional Separation of Powers. Kenny J stated that while this was primarily the function of the legislator: 'there is nothing to prevent the legislature from investing the Courts with the sole jurisdiction to determine whether a particular act is or is not required by the exigencies of the common good.'[67] Similarly, it is stated in *Moynihan v Greensmith*[68] that 'the State may have to balance its protection of [constitutional rights] against other obligations arising from regard to the common good'[69] – a position which surely posits the judiciary as arbiters as what can be regarded as the common good. Writing extra-judicially, Costello J has emphasised the fact that one of the Constitution's purposes is stated in the preamble as being 'to promote the common good.'[70] In terms of questions which more obviously relate to 'political morality,' it is useful to cite the reference by Kenny J in *Ryan v Attorney General*[71] to the 'Christian and democratic nature of the State.' In light of these authorities, it would seem reasonable to conclude that the reluctance of the Courts to adjudicate upon questions of political morality has been somewhat selective, and that the potential of the Courts to become politically active lies as much in this selectivity as in the adjudication itself.

D INTERPRETATION AND THE PROTECTION OF FUNDAMENTAL LIBERTIES

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[65] ibid.

[66] [1981] 1 IR 158.

[67] ibid 171.

[68] [1977] IR 55.

[69] ibid 71 (O'Higgins CJ).

[70] Costello 'Limiting Rights Constitutionally' in O'Reilly (ed) *Human Rights and Constitutional Law: Essays in Memory of Brian Walsh* (Dublin, 1992) 177, 178.

[71] [1965] IR 294, 313.

The Irish Constitution does not expressly provide guidelines for its interpretation, while the Supreme Court has determined that the methods of interpretation appropriate to statute are not suitable for constitutional interpretation[72]. In the *Paperlink* case,[73] Costello J stated that the nature of the Constitution as 'a political instrument as well as a legal document' means that a 'purposive' rather than a literal approach is appropriate to its interpretation.[74] The reasoning behind this approach is elucidated by Morgan:

> [The Constitution] covers an unimaginably broader span than any statute: it deals with nothing less than the organs of government and also the relationship between the individual and the ordered society. It is addressing a much wider plane than the detailed, concrete provisions of (say) an Occupiers Liability Act.[75]

On the basis of these observations, as well as others outlined in this paper, it is possible to reach with reasonable certainty the following conclusion. There is an absence of accessible, stable and reasonably certain norms governing the interpretation of constitutional law. Alternatively, if such norms exist, it is evident that they are either so weak, imprecise or unstable[76] as to allow for a degree of judicial discretion which borders on the arbitrary, or, that they implicitly legitimise the imposition or 'construction' of meaning by the judicial interpreter of the text.

However, if we reject both the intention-based approach of historicism, as well as the extra-legal rationale of Dworkin's 'constructivist' approach, the question remains as to what may constitute stable, objective and workable axioms in law for the extraction of meaning from abstract or 'old' texts such as constitutions. It is of some significance that the potential for excessively creative – or abusive – interpretation is most acute in the case of such abstract texts as constitutions, while these same texts are most typically implicated in the protection of fundamental liberties. While linguistic ambiguity in law may be problematic in terms of the political hue of the judicial discretion which results from it, only recourse to a broad power to apply the abstract language of principle, to a potentially infinite range of social problems, may enable judges to extensively protect fundamental liberties. The imperative of retaining a substantial judicial bulwark against legislative and executive power militates against any conclusion that the semantic difficulties associated with interpretation, and the politicisation of the judicial function which this implies, necessitate curtailment of the judicial power to adjudicate upon abstract texts. Thus, it would seem that the far-reaching judicial power arising from the maintenance of a hierarchy of norms through judicial review is the necessary price for the avoidance of uncurtailed majoritarian government –

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[72] *State (Browne) v Feran* [1967] IR 147.

[73] [1984] ILRM 373.

[74] ibid 385.

[75] *Morgan* (n 14) 93.

[76] *Raz* (n 33) 177 points out that where rules of interpretation exist, courts typically have power to change them.

the alternative position risks rejecting expansive judicial power to incur instead the possibility of substantial expansion, in very concrete terms, of executive and legislative power.

Of course, it is probably impossible to adequately verify or test claims as to the greater efficacy of constitutional systems which provide a strong judicial bulwark against governmental power through the operation of a hierarchy of norms and judicial review. Although such speculation lies beyond the scope of this paper, it suffices to state that any purported comparison of the efficacy of constitutional systems in the protection of fundamental liberties is confronted by the historical and social context attached to the development of these systems. In Europe, the Constitutions of both the United Kingdom and France do not include a judicial power to strike down unconstitutional laws as is provided for in the Irish and United States Constitutions. Yet it is obviously difficult to construct a causal relationship between the maintenance of human and fundamental rights in these jurisdictions and the long-standing peculiarities of their constitutional systems. The long-standing supremacy of parliament in the Constitution of the United Kingdom, and the French revolutionary tradition of hostility to the political power of judges,[77] are hardly amenable to facile generalisations as to their impact on the protection of fundamental rights.

The question posed here is as to how methods of interpretation in constitutional law may avoid the judicial appropriation of law through the subjective interposition inherent in the expansive interpretation of abstract texts, while maintaining adequate judicial bulwarks against the abuse of fundamental liberties by the organs of government. Both of these imperatives may be seen as flowing from the imperative of the Rule of Law. While this principle may be considered to legitimise the enforcement by the judiciary of the Constitution against both legislature and executive, the same ideal might require that, since judges must also be governed by the law, they must follow reasonably uniform and stable rules of constitutional interpretation.

With such aspirations in mind, what alternative approach(es) may avoid both the unsatisfactory imputation of intention to the enactors of a text, and the spectre of judicial activism in expansive and potentially political interpretation? Some writers have advocated deference to 'tradition and consensus' in constitutional interpretation, in order to reflect the position of judges as 'unelected personages.'[78] While this approach would seem to reject Dworkin's appeal for judges to employ their own conception of political morality in interpretation, it risks substituting for this a potentially

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[77] See Chantebout B *Droit Constitutionnel* (Paris, Armand Colin, 2005). Unlike the US and Irish constitutional systems, the French model places less emphasis on a hierarchy of norms, due to its tradition, influenced by Rousseau's conception of the supremacy of the *general will*, of edifying legislation as immune to judicial censure. Legislation cannot be struck down as unconstitutional in the ordinary courts – the *Conseil Constitutionnel*, a specialised constitutional court, can censure legislation only *before* its promulgation, and at the instigation of select political actors including the President, while the enforceability of the Declaration of the Rights of Man and the Citizen of 1789 against parliamentary bills is the result of the activism of the *Conseil Constitutionnel* itself. This system of limited review has existed only since 1971 – the Constitutions of the Third and Fourth Republics provided for no such safeguards.

[78] *Morgan* (n 48) 101.

majoritarian (or unrepresentative) judicial mediation of traditions and consensuses which themselves are not susceptible to objective discernment or verification.

Similarly, the murky waters of purposive interpretation – which looks to the purpose for which particular words were enacted, rather than to their literal meaning – has the potential to constitute a significant source of judicial power and discretion. Again, the attributing by judges of 'purpose' to historical enactments grants the interpreter a scope which may necessitate deeply philosophical or political choices. The most notable example of this technique, *Quinn's Supermarket v Attorney General,*[79] perhaps illustrates this danger. While the Supreme Court found a conflict in the provisions of Article 44 between the free practice of religion and the prohibition on religious discrimination, it held that since 'freedom of practice of religion' was the 'overall purpose' of the provision, the anti-discrimination principle was subordinate to this purpose. However, the judgment devoted little effort to justifying this largely historical claim, and the difficulty in objectively verifying such historical claims suggests a large degree of judicial discretion in this task.

The doctrine of textualism,[80] which involves the use of historical and legal dictionaries as interpretive tools,[81] has been revived by Scalia J in the United States. Since the purpose of this practice is to discern the intention of the text,[82] the distinction between this approach and historicism may seem slight, but the essential difference lies in the fact that the text itself, rather than concepts or indices exterior to it, remains the sole norm cognised – serving, perhaps, as a bulwark against subjective 'interposition.' While fidelity to the literal meaning of the words used in legal texts[83] potentially avoids the subjective appropriation of their meaning, such an approach must also account of the well-established view, outlined above, that the character of the Constitution as fundamental law militates against strictly literal interpretation.

Regardless of whether Irish judges heed Dworkin's call for the reliance upon ideals of political morality in interpretation, there is a clear imperative of clarity and openness in the potentially political task of constitutional interpretation. Given the pronounced ambiguity surrounding this process, there is considerable merit in Langwallner's call for judges to at least 'come clean by informing us as to the philosophical and jurisprudential basis for their decisions and the particular brand of social and political morality contained in their decisions.'[84]

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[79] [1972] IR 1.

[80] *McDowell* (n 50).

[81] However, others have warned against the use of dictionaries as tools of interpretation, arguing that they can 'mask fundamental arbitrariness with the appearance of rationality' - McDowell (ibid) cites Melinkoff 'The Myth of Precision and the Law Dictionary' (1983) 31 UCLA L Rev 423.

[82] ibid 259.

[83] Goodrich and Valverde (n 2): 'Love of truth in disregard of the words is not necessarily the best mode of interpretation' 170.

[84] Langwallner (n 64) 6.