Protecting Economic, Social and Cultural Rights in Ireland

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It is an honour to have been invited to speak this morning on the same platform as the Honourable High Commissioner for Human Rights, whose tireless work for the advancement of human rights protection around the world has been an inspiration for us all.

The theme of the conference surely could not be more relevant. In Ireland today, we are addressing with a new urgency the themes of social justice and human rights. It is crucial that vulnerable communities should know their rights and be empowered to seek their vindication.

My remarks will be focused on the position in Ireland. The Human Rights Commission has placed huge importance on the protection of economic, social and cultural rights in Ireland and has organised conferences and published materials[1] on the theme, carried out and commissioned research, as well as appearing as *amicus curiae* in litigation involving these rights and making submissions on legislative proposals affecting them.

The constitutional dimension

I shall be speaking primarily of the extent to which social and economic rights are protected under the Irish Constitution.[2] You

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[1] Notably its *ESCR Discussion Document*, published in 2006.

[2] See Kelly, *The Irish Constitution* paras. 7.3.219-7.3.221 (4th ed., by F. Hogan & G. Whyte, 2003), Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Chapter 1 and Addendum (2002), Hogan,"Directive Principles,

might reasonably expect that my report will be depressing. In the early years of this century, notably in two Supreme Court decisions[3] we have witnessed strong denunciations of the claim that courts are entitled to make orders against the executive in vindication of economic and social rights. Off the bench, some judges have expressed a similar view.[4] For a period, the judges least impressed by arguments in favour of the judicial enforcement of economic and social rights displayed the strongest rhetorical powers.

Yet I suggest that there are three good reasons for not surrendering these arguments and for persisting in advocating them in the judicial forum. First, I truly believe that the arguments in favour of the justiciability of economic and social rights[5] are more convincing than those that oppose them. If the constitutional promise of respect for dignity, equality and personal rights is to have any meaning, the courts must protect such rights as the rights to health, education and to earn a livelihood, for example. Concerns

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Socio-Economic Rights and the Constitution", 36 Ir. Jur (n.s.) 174 (2001), Hogan, "Judicial Review and Socio-Economic Rights", in J. Sarkin & W. Binchy eds, *Human Rights, the Citizen and the State: South African and Irish Perspectives,* 1 (2001), Quinn, "Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order", in C. Costello ed., *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter of Fundamental Rights*, 35 (2001). More generally, see Lord Lester of Herne Hill and Colm Ó Cinnéide, "The Effective Protection of Socio-Economic Rights" in Yash Ghai & Jill Cottrell eds, *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights*, 17 (2004).

[3] Cf. *Sinnott v Minister for Education* [2001] 2 IR 545. *T.D. v Minister for Education* [2001] 4 IR 259.

[4] See Hardiman, "The Role of the Supreme Court in Our Democracy" in Joe Mulholland ed., *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers*, 32 (2004), Murphy, "The Administration of Justice", Chapter 21 of J. Sarkin & W. Binchy eds., *The Administration of Justice: Current Themes in Comparative Perspective* (2004) and Keane, "Judges as Lawmakers – The Irish Experience", 4 (2) Judicial Studies Institute J. 1 (2004).

[5] See Whyte, "The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman", 28 D.U.L.J. 1 (2006), Langwallner, "Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual", Chapter 14 of Oran Doyle & Eoin Carolan eds, *The Irish Constitution: Governance and Values* (2008), Aoife Nolan, Bruce Porter and Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Centre for Human Rights and Global Justice Working Paper No. 15, 2007).

for proper respect for executive and legislative action in a democracy are entirely legitimate but in no way invalidate the justiciability of economic and social rights. Rather do they highlight the need for courts to exercise their judicial function of vindicating these rights with due sensitivity to the separation of powers.[6] Sensitivity is quite different from surrender.

The second reason I believe these arguments should continue to be advanced with persistence is that there is some evidence that the robust philosophical antipathy to justiciability is losing its pre-eminence. Other voices are beginning to be heard at both High Court and Supreme Court levels which suggest an openness to protecting these rights. The enactment of the European Convention on Human Rights Act 2003[7] has, I think, contributed to this process. There is some irony in the fact that the Convention, which was not designed as an engine for protection of economic and social rights, has had an influence in encouraging judges to provide that protection (through the medium largely of Article 8) when the Irish Constitution, on any reasonable interpretation, is equipped to do this task far more fully and effectively.

This leads me to my third reason for suggesting that advocacy for economic and social rights should continue to be made with confidence of ultimate vindication. The Constitution is well capable of affording effective protection for these rights. Its foundational values, its protection of personal rights and its principle of

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[6] The experience of South Africa is, of course, the most widely discussed in this regard. That justiciability is not the same as inevitable judicial enforcement is apparent from the recent decision of the Constitutional Court of South Africa in *Mazibuko v City of Johannesburg* [2009] 2 ACC 28, 8 October 2009, which has already provided critical commentary: see, e.g. Jackie Dugard, Constitutional Water Rights Judgment Gets It Wrong, South African Civil Information Service (www.sacis.org.za/site/article/373.1).

[7] See Ursula Kilkelly ed., *ECHR and Irish Law* (2nd ed., 2009).

horizontality of rights protection lead inexorably to this conclusion. Let me refer to each of these aspects in turn.

Foundational Values

Respect for dignity, equality and concern for the common good are core values of the Constitution, reflecting its philosophical premises. The Irish Constitution came into effect at a time when Europe was plagued by ideologies that had little regard for human rights; in contrast to the trend towards totalitarianism, the Irish Constitution, anticipating the Universal Declaration of Human Rights by more than a decade, proclaimed a human rights philosophy that completely rejected legal positivism in favour of an understanding of human rights – and responsibilities[8] – as inhering in every human being, regardless of age or capacity, "anterior to positive law".[9]

At the global and regional levels of human rights protection today, as well as in many constitutions around the world, respect for human dignity is a core value that in turn should generate concern for the protection of economic and social rights.[10] It is not possible to respect people's human dignity while consigning them to a life which subverts their dignity, by denying them sufficient food, accommodation, health provision and work.

In the Preamble to the Irish Constitution, the People set as a goal of the Constitution the promotion of "the common good, with due

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[8] Cf. Articles 9.3, 41.2.2° (admittedly a controversial provision!), 42.1, 42.5 of the Irish Constitution. Article 29(1) of the Universal Declaration of Human Rights provides that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible". Articles 27 to 29 of the African Charter on Human and Peoples' Rights also contains provisions setting out duties of individuals to others in society. Similarly Part IVA of the Indian Constitution.

[9] Cf. Articles 41.1.1° and 43.1.1°.

[10] See McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", 19 European J of Int'l L. 655 (2008), Goldewijk, Baspineiro & Carbonari eds, *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002).

observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured [and] true social order attained …" It is hard to see how the violation of economic and social rights could conceivably harmonise with this goal, in which the dignity of the individual is inexorably integrated with "true social order".

The Constitution's philosophical foundations in the context of the fundamental rights provisions may be traced in part to the political and cultural struggles that gripped Europe over the previous centuries but the lynchpin has been identified as that of natural law.[11] A human being is regarded as having a unique worth by virtue of his or her humanity. That worth is equally shared by everyone. Deriving from the elements of rationality and free choice that characterise human beings, human dignity is the concept that integrates the individual into the wider social framework of solidarity and support. The common good, a notion central to the philosophical underpinning of the Constitution, represents the totality of conditions of social living whereby people are most fully empowered to achieve their own fulfilment as persons.[12] A society where social injustice is tolerated subverts the common good, in contradiction of the constitutional requirements.

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[11] In *DPP v Best* [200] 2 IR 17, Murphy J observed:

> "Whilst the language of the Constitution evokes the rhetoric of the political reformers of the 18th century and the 'fundamental rights' provisions, in particular, repeat many of the phrases contained in the 'Declaration of the Rights of Man' passed by the National Assembly of France on 26 August 1789, the political philosophy of our Constitution owes infinitely more to Thomas Aquinas and Thomas Paine".

See further Quinn "The Rise and Fall of Natural Law in Irish Constitutional Adjudication", American Philosophical Association Newsletter on Philosophy and Law (2000), Murphy, "The Cat Among the Pigeons: Garrett Barden and Irish natural Law Jurisprudence", Chapter 6 of Oran Doyle & Eoin Carolan eds, *The Irish Constitution: Governance and Values* (2008).

[12] See Clarke, "The Concept of the Common Good in Irish Constitutional Law", 30 N.I.L.Q. 319 (1979) for a probing analysis of the concept as used in the Constitution. More generally, see Dembinski, "From Failed Utopias to the Rediscovery of the Common Good", 6 Eur. J. of L. Reform 299 (2004).

The relationship between respect for dignity and respect for equality is crucially important to our understanding of the nature and scope of social and economic rights.[13] The integration of the two is apparent in Walsh J's explanation that Article 40.1 of the Constitution is:

> "not a guarantee of absolute equality for all citizens in all circumstances; it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human Attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in our country".[14]

The call for equal respect is plain in this passage. Yet the courts found difficulty in hearing it clearly; their decisions tended to reflect an occluded vision of Irish society in which the consequences of ingrained social prejudice, inequality and hierarchies of power built on the assumptions identified by Walsh J were regarded as the way things are rather than as situations crying out for judicial intervention to vindicate human dignity.[15]

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[13] See O'Connell, "From Equality before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution", Chapter 18 of Oran Doyle & Eoin Carolan eds, *The Irish Constitution: Governance and Values* (2008).

[14] *Quinn's Supermarket v Attorney General* [1972] IR 1, at 13.

[15] The judicial response to the position of Travellers varies from judge to judge. In *O'Donoghue v Clare County Council*, High Ct, 25 July 2003, Smyth J declined to grant a mandatory interlocutory injunction for emergency accommodation of a Traveller family living "in circumstances of privation " with "serious health issues". Though tempted to respond to the plaintiffs' privations, "whether self-inflicted by a choice of a way of living or otherwise", Smyth J considered it was first for the housing authority to consider and assess the priorities in the light to its duties and resouorces. Referring to the serious health issues, Smyth J observed that:

> "notwithstanding some of the same existed for some time .... thereafter another child was born to the first and second plaintiff. It is no function of the Court in this case to consider fundamental questions of responsible parenthood and I decline to do so."

The Supreme Court affirmed Smyth J on 6 November 2003.

Protection of personal rights

Let us now turn to consider how the Constitution, in recognising the personal rights of the citizen in Article 40.3.1° and 40.3.2°, affords formidable protection to social and economic rights. Most obviously, it protects such rights as the right to health and the right to earn a livelihood.

It may be useful to look more closely than has been the practice at the exact wording of Article 40.3.1° and Article 40.3.2° as this will yield support for the view that Article 40.3.1° provides significant protection for social and economic rights.

The guarantees by the State under Article 40.3.1 are, in its laws, "to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen". The duty to respect may be considered to be fulfilled, at a minimum, where the State does not interfere with the particular personal right. Thus, in the context of the right to health, the State must not engage in activities or enact laws which damage the health of its citizens. It may be argued that a course of conduct, or inaction, by the State which results over time in the suffering of damage by a citizen, in contradiction to the reasonable expectation of the citizen, constitutes a failure to respect the right. Thus, if a citizen, or an identifiable group of citizens, were to suffer from an illnesses or experience premature death as a result of the particular orientation of State policies, this may constitute such a failure to respect the right of the citizen or citizens.[16]

[16] It may well be that the question of a violation of Article 40.1 would also arise. I do not wish to underestimate the reluctance of courts to become involved in interrogating socio-economic policies. The question of causal ascription of injury or death to any particular policy will also be problematic. But the central point

In attempting to determine the scope of the State's guarantee to "defend" and "vindicate" the personal rights of the citizen, it is necessary to look closely at Article 40.3.2°, which provides that:

> "[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

Subsection (2) clearly has greater focus than subsection (1). The matters to which it refers – the life, person, good name and property rights of every citizen – might be considered to be already covered by the guarantee in subsection (1), since subsection (1) covers *all* the personal rights of the citizen and this presumably embraces the right to life, the right to a good name and the property rights of the citizen. But the connection between the two subsections is not quite as simple as that. Subsection (2) does not speak about vindicating "the right to life" but rather "life"; similiarly with "good name". Moreover it imposes an obligation on the State to vindicate the "person" of the citizen. It would be odd to speak of a citizen's "right to person"; of course one can think of broad equivalents – the right to personality, the right to personhood, and so on – but already we find ourselves in a realm of uncertainty and debate. In short, subsection (2) is not simply a focused elaboration of subsection (1) in respect of rights already mentioned in subsection (1): it is an entirely separate, albeit related, provision dealing with particular situations, some involving rights directly, others less clearly so.[17]

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remains: Article 40.3.1° requires the State to respect citizens' right to health in the context of its policy implementation.

[17] In *Ryan v Attorney General* [1965] IR 294, at 313, Kenny J observed that "[t]he words 'in particular' show that sub-s.2° is a detailed statement of something which is already contained in sub-s.1° which is the general guarantee." He went on to note that sub-s.2° "refers to rights in connection with life and good

The argument I wish to make here is that subsection (1) involves a guarantee by the State, not only to respect all personal rights, but to defend and vindicate all of these rights so far as practicable, not merely in the context of prospective unjust attack or in the case of injustice done, but in *all* contexts.

If subsection (2) is seen as a freestanding provision, then its particular contexts begin to make more sense. The State is offering preemptive protection and *ex post facto* vindication in four particular areas of importance: life, person, good name and property rights.

All of this is important because it shows that the particular contexts to which subsection (2) applies are not identical to those of subsection (1). The State's guarantees in subsection (1) go further than protection against unjust attack and vindication in the event of injustice done: they extend to respecting, defending and vindicating the personal rights of the citizen, *whether under unjust attack or not*. Thus they are not at all limited to the context of commutative justice, which impressed Costello J so forcibly. They require the State to engage in such respect, defence and vindication, qualified only by the requirements of practicability. It is striking how similar this approach is to that adopted by the International Covenant on Economic, Social and Cultural Rights.

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name and there are no *rights* in connection with these two matters specified in Article 40." He concluded that it followed that the general guarantee in sub-s.1° must extend to rights not specified in Article 40. It appears from these remarks that Kenny J envisaged that the references to "life" and "good name" connoted implicit references to rights in relation to these matters. He made no reference to the word "person" in sub-s.2°. The Supreme Court also appeared clearly to regard sub-s.2° as identifying personal rights in its reference to "life, person, good name, and property rights": *id*., at 344-345.

What has emerged from judicial analysis of Article 40.3.1° are rights that are not only civil and political in character. They include rights of a social and economic kind – the right to health being perhaps the most striking. Nothing in the text of Article 40.3.1° requires, or even suggests, to courts that the personal rights to which it refers exclude rights of a social or economic kind. On the contrary, there is a cohesion between the civil, political, economic and social dimension which has no parallel with the artificial divisions that characterised the international human rights movement in the years of the Cold War.

Could it be argued that the Directive Principles of Social Policy contained in Article 45 implicitly restrict the scope of the personal rights protected and vindicated by Article 40.3.1°? I would suggest not. Article 45 seeks to guide legislative and executive policy in accordance with broad principles of social justice. Even the most enthusiastic proponent of the justiciability of social and economic rights would not advocate that courts take over running the Government. Article 45 is entirely without prejudice to the breadth of Article 40.3.1° and in no way narrows its content. On the contrary, it should be regarded as ensuring that judicial interpretation of Article 40.3 and the other fundamental rights provisions is fully sensitive to the call of social justice. The jurisprudence of the Indian Supreme Court, in interpreting the Directive Principles of State Policy contained in Part IV of the Indian Constitution and borrowed from the Irish Constitution,[18] offers a statutory model of how this can be done.[19]

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[18] See Manoj Kuman Sinha, *Enforcement of Economic, Social and Cultural Rights: International and National Perspectives*, 162 (2006).
[19] See J.N. Pandey, *The Constitutional Law of India* 399-400 (45th ed., 2008).

It is plain from an examination of the Irish decisions articulating and analysing the right to health that the courts have no problem in principle in acknowledging its social and economic character. They admittedly have not developed the right particularly effectively but this is not on account of any *a priori* objection to its justiciability in the social and economic contexts.

Horizontality of Rights Protection

The question of horizontality of rights protection in the context of economic and social rights has yet to be examined in detail by the courts. Certain matters are, however, clear beyond argument. Following the decision of *Byrne v Ireland*[20] and *Meskell v Coras Iompair Eireann*[21], it is accepted that the Irish Constitution has fully horizontal application: constitutional rights are enforceable not merely against the State but also against non-State actors. The implications of this are vast yet, nearly four decades later, basic questions remain unaddressed. Let me mention a few of them. Are non-State actors obliged to respect Article 40.1 and not discriminate?[22] Must they respect people's personal rights, including the right to health? Are there any direct parallels between the scope of the State's duty not to infringe constitutional rights and the scope of non-State actors' duty not to infringe these rights?[23] The answers are curiously elusive. It seems reasonable to acknowledge (though the courts have yet to do so clearly) that the constitutional contexts of State and non-State actors can be quite different in important respects. Citizens have a complex panoply of

[20] [1972] IR
[21] [1973] IR 121.
[22] Cf. Mullally, "Equality Guarantees in Irish Constitutional Law – The Myth of Constitutionalism and the Neutral State", Chapter 12 of Tim Murphy & Patrick Twomey eds, *Ireland's Evolving Constitution 1937-97: Collected Essays* (1998).
[23] Cf. *Hosford John Murphy & Son Ltd.*, [1987] IR 621, [1988] ILRM 300.

personal rights which of course the State cannot possess. Conversely, the State's relationship with the citizen involves processes that have no parallel in relationships between citizens. It can prosecute, convict and punish people, impose taxes on them and in some respects restrict their freedom and liberties in ways that are distinctive. Its proactive obligations of support and protection are not necessarily coextensive which the obligations one citizen owes another.

Moreover, there are several kinds of non-State actor. As well as human beings, there are corporate entities, commercial and otherwise. The past couple of decades has witnessed a growing willingness at international and regional levels to impose on corporations – especially those of multinational character – a range of obligations to respect the human rights, notably the social and economic rights, of those who come within their areas of influence. Up to now we have had little discussion of the extent to which corporations are required under the Irish Constitution to respect the rights of those with whom they have dealings – their employees, obviously, but many others as well. If the *Meskell* principle is applied, they clearly are required to respect these rights. But in what distinctive way must that respect be given? Are companies under particular obligations, including proactive obligations, to respect their employees' constitutional rights? Do an employee's rights to health and to earn a livelihood, for example, have particular repercussions for their employers'?

To date there has been a virtual judicial silence on questions such as this, yet they are of very real practical importance. So far as answers are available they come through the medium of tort law, since the Supreme Court in *Hanrahan v Merck Sharp & Dohme*

(Ireland) Ltd.[24] held that courts should look to the repertoire of torts as the default means of vindicating constitutional rights. Only where a particular tort is "basically ineffective" in providing that constitutional vindication should it be supplemented by a distinctive freestanding constitutional remedy. This places a very significant burden on courts to scrutinise the traditional principles of tort law to ensure that they fully [25] deliver the necessary protection of constitutional rights.

There is little evidence that courts have engaged in this process. Instead, they have tended to apply tort principles in isolation from the constitutional perspective. This tendency is particularly apparent in relation to the torts of trespass to land and nuisance, both of which have huge relevance to the protection of the social and economic rights of vulnerable people. Let me give some examples from litigation in recent times.

In *Dublin City Council v Gavin,*[26] the defence of necessity failed where the defendants, an extended family, trespassed on the plaintiff's lands. Around 30 caravans were involved. The background to the proceedings is that the defendants had for 25 years been on one of the plaintiff's sites but had been obliged to leave on account of violence allegedly threatened and carried out on them by another Traveller family. There were incidents involving the firing of shots and throwing of petrol bombs; prosecutions against some members of the other family yielded no convictions. Having spent some time in Belfast, they went to a site in Fingal, which they were ordered by Peart J. to leave. They went from there to the plaintiff's property,

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[24] [1989] ILRM 629.
[25] The *Hanrahan* approach appears to acquiesce in a lacuna, since it envisages that, where a tort is not "basically ineffective" in affording such protection, this is all that the victim of an infringement of a constitutional right can call on in seeking vindication of that right.
[26] [2008] IEHC 444.

on lands at the junction of Oscar Traynor Road/Coolock Lane and the M1 motorway. The plaintiff had entered into a contract to sell these lands. The plaintiff, in the discharge of its statutory and constitutional duties, had
offered another site to the defendants, who had rejected it on the basis that it was unfit for human habitation.

When the plaintiff sought an injunction to remove the defendants from the lands on account of their trespass, it was argued on their behalf that the defence of necessity applied. Counsel submitted that, if the defendants were required to return to the only site proposed by the plaintiff, inevitable violence and bloodshed would recur; they ought to be permitted to remain where they were until such time as the plaintiff was in a position to comply with its statutory obligation to provide them with a suitable and safe site.

An unhelpful precedent from the defendant's standpoint was *Southwark London Borough Council v Williams*[27] where necessitous squatters occupying empty houses were denied the entitlement to invoke the defence of necessity. Lord Denning M.R., clearly affected by the appalling vista of social disorder, stated:

> "The doctrine so enunciated must, however, be carefully circumscribed. Else necessity would open the door to many an excuse … The reason is because, if hunger were once allowed to be an excuse for stealing, it would open the way through which all kinds of disorder and lawlessness would pass. So here. If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be

[27] [1971] Ch 734.

> others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless, and trust that their distress will be relieved by the charitable and the good."

Peart J.'s rejection of the defence of necessity echoes this language to some extent. He accepted that the defendants had nowhere to go if they were to remain in one unit, as they wished, which they said was inherent in their tradition. Peart J. observed:

> "On one view it would be reasonable to conclude that their occupation of these lands, as would be the case with any other lands in the present circumstances, is a necessity given that the alternative would be to reside *en masse* on the side of a road, along with their caravans, vehicles and other belongings. That is simply not realistic.
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> But that is not in itself sufficient to bring into play the defence of necessity to the claim of trespass. Were it so, then it would indeed condone and tolerate what is unlawful, leading to social and environmental chaos, and an unrestrainable trampling on the property rights of others in the future. It would undoubtedly risk the outbreak of violence, as those owners in turn, being unable thereafter to access a remedy through the courts, might resort to their own equally unlawful methods of removing those who have taken the law into their own hands and trespassed upon their lands. One can easily and quickly see how the social order would break down.

The defence of necessity, as, and in so far as, it has come to exist, and as discussed in the cases to which this Court has been referred, was never, and never could be, intended to permit an uncontrolled and uncontrollable regime whereby persons, be they travellers or any other grouping in search of accommodation, could simply enter upon the lands of others and claim an entitlement to be there until such time as the local authority for the area provides them with accommodation, and in respect of which they would claim a right of veto should it not be to their liking, or which they consider to be unsuitable by whatever definition suitability be judged…

It seems clear that where a person enters, without consent, the land of another person in furtherance of his own interests rather than the interests of the owner or others thereon, the defence of necessity ought not to be available, even where the entry is for the purpose of relieving what is perceived as an emergency for those so entering.

It follows that a person who through extreme poverty is unable to buy food cannot be absolved from a trespass into a shop where his purpose was to obtain food for himself and/or his family without paying for it, even though such a situation would constitute an emergency or necessity in order to protect life. Equally, persons such as the defendants who are homeless in the sense of having nowhere to lawfully park their caravans, cannot be absolved from trespass where they forcibly enter the lands of another without consent. Such an extension of the law of necessity as a defence would lead to a breakdown of society and law and order, and could not be

> permissible. Those forms of emergency are not those which have traditionally been seen as justifying the defence. The defendants did not trespass in order to relieve a situation of emergency threatening the lives of others, but rather their own. The law does not extend that far."

Instead, Peart J. noted, the Oireachtas had put in place a statutory scheme for the accommodation of members of the Traveller community whose tradition was "to move from place to place as they choose" and to remain in a single unit as member of a particular family group. The "good order of society" required that the defendants should be accommodated by means of the statutory scheme. This could not mean that, at all times and at short notice, the plaintiff was obliged to be in a position to have available to it a site of sufficient size to provide facilities for such a large group as that of the defendants, whose movements were uncertain from time to time.

In the instant case, Peart J. was satisfied that it was reasonable for the defendants to be in fear for their safety if they were to move back to the site without some reasonable steps being taken to address those real fears; but that could not mean that they had a veto on what provision was to be made for them by the plaintiff. The court retained a discretion as to the order it should make in response to the defendants' trespass and, in Peart J.'s view, it would be "an utterly futile exercise" to grant an injunction for the removal of the defendants from the lands since there was "literally nowhere to which the[y] c[ould] move themselves lawfully." Accordingly, Peart J. adjourned the question of what order the court should make until such time as the plaintiff was in a position to make suitable the alternative site that it had proposed, or any other site that it should make suitable. The matter of the safety of the

defendants, should they be required to occupy the alternative site, was something that would "have to be at least considered", though it was not the plaintiff's function to police the defendants or the other family at that site. That would be, "as it must be", a matter on which the Gardaí should advise.

Having found the defendants to be trespassers, adjourned making an order stating:

> "It is axiomatic that the Court will not act in vain. In the present case it seems to me that it would be an utterly futile exercise to grant an injunction for the removal of the defendants and their property from the lands they are in occupation of. It is accepted by the plaintiff council that there is literally nowhere to which the defendants can move themselves lawfully. If they remove themselves from the site in compliance with the Court's order, and I am satisfied that they would do so given that they did so in response to the previous order, they would have no alternative but to trespass yet again onto some other land, owned either by the plaintiff or some other unfortunate owner, leading inevitably to yet further proceedings. That is undesirable, and would be an exercise in futility."

On 3 November 2009, ten months after the adjournment, Peart J ordered the Traveller family to leave the site within the next three months. He is reported[28] as saying that the family faced real problems which required a "fresh, imaginative and realistic approach" from the authorities. Without such an approach, the matter would not go away but would keep returning to the court for "some sort of inevitably short-term solution." To date, Dublin City Council had adopted a "minimalist approach" to the family's concerns about having to return to an estate where they faced threats.[29]

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[28] Irish Times, 4 November 2009.

[29] See also *McDonagh v Kilkenny County Council* [2007] IEHC 350, where O'Neill J gave short shrift to the defence of necessity invoked by Travellers.

The tort of nuisance has similarly worked as an engine of the denial of the social and economic rights of Travellers. The combination of the oppressive criminal trespass legislation[30] and neglect or partial fulfilment by local authorities of their statutory duties to accommodate Travellers has forced Travellers to live in unserviced locations, often as tolerated trespassers on the lands of a local authority, in proximity to some industrial enterprise. The local authority does not always provide sanitary services. Almost inevitably the industrial enterprise will take legal proceedings against the local authority, seeking an injunction for the abatement of the nuisance caused by the Travellers' continuing presence. Equally inevitably the court will grant the injunction on the basis that the local authority has "adopted" the nuisance.

Thus, in *Vitalograph (Ireland) Ltd v Ennis Urban District Council and Clare County Council*[31], Kelly J granted an interlocutory injunction in favour of businesses in an industrial estate in Ennis against Clare County Council , which had tolerated the continuing occupation of land at the entrance to the estate by a large number of Travellers living in caravans with a total lack of sanitary facilities. It appears

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[30] See Byrne & Binchy, *Annual Review of Irish Law 2002*, pp.538-583.

[31] High Ct., 23 April 1997. See also *Harrington Confectioners Ltd v Cork City Council* [2005] EIHC 227, where Gilligan J granted an interlocutory injunction against the Council where Travellers caravans on the Council's land adjacent to a commercial park caused a nuisance. The Council said that it had nowhere to re-house or re-site the Travellers and that if they were forced off this site the same problem as a matter of probability would be created somewhere else. Every effort was being made to provide a transient halting facility but, given the nature of the facility proposed "and the difficulty including political difficulties and legal challenges" the timescale for this project might have to be extended significantly. The Council conceded "that the provision of a transient halting site does not represent a realistic solution to the plaintiffs' [!] problems in the short term."

from Kelly J's judgment that the County Council had made attempts over several years to provide appropriate accommodation for Travellers. Eighteen months previously it had been restrained from using lands near the town as a halting site. It had later obtained another site in the area, with a view to providing a temporary halting site on it. Once this became known, immediate objections were raised by a number of residents. Kelly J noted that there had been allegations of intimidation and threats being made towards the employers of the County Council and its contractors concerning the site. The Council had identified a third site as a possible permanent halting site but "s[u]ch was the level of protest concerning tests to be carried out on that site that the Council itself had to apply to the High Court [for] … injunctions restraining trespass on the lands".

When one turns to the tort of negligence, one experiences particular problems in relation to the protection of economic and social rights. The tort of negligence is based on the norm that society is built on a network of relationships imposing a duty of care on people towards those who are in proximity to them. Clearly the tort protects a range of constitutional rights, including those of an economic or social character. The big debate concerns the proper scope of the duty of care. In recent years courts in many common law countries have retrenched on the scope of that duty and Ireland followed suit in *Glencar Exploration plc v Mayo County Council*[32]. The severe restrictions which the Supreme Court ordained are likely to have real implications for the rights of vulnerable people. In *Fletcher v Commissioners of Public Works*,[33] the Supreme Court went so far as to strike down an award of compensation to an employee who sustained a foreseeable mental illness as a result of the physically

[32] [2002] 1 IR 84.
[33] [2003] 1 IR 465.

dangerous work environment caused by the egregious negligence of his employer. The Court invoked "policy" reasons for its approach. It is very hard to see how Mr. Fletcher's constitutional rights to health and bodily integrity were vindicated by the Court's decision.

It is time for a fundamental reconsideration of the relationship between tort law and the vindication of personal rights in the Constitution. In *Glencar*, the Supreme Court evinced hostility to affirmative obligations and to the imposition of broad liability on public authorities. It made no reference to the constitutional dimension yet this is clearly relevant. If constitutional values were to shape the duty of care, this would be a far more effective means for protecting economic and social rights.

Concluding Observations

I hope that my remarks have, on balance, encouraged you to retain confidence that the courts, sooner rather than later, will afford effective protection to economic and social rights consistent with the foundational values and specific provisions of the Constitution. The present crisis that grips our society offers the court the opportunity to address the subject in real human contexts calling for respect for human dignity.