"In matters of conscience, the law of the majority has no place."
Mohandas Gandhi[1]

The concept of Natural law can be traced as far back as the ancient Greeks, although the first elements of Natural Law appear in **Plato**, **Aristotle** and **Sophocles**, the most ancient formulation by **Cicero**.[2] **Thomas Aquinas** combined the early Greek theory to Christian Theology and provided a foundation for Religious Natural Law. Natural Law is not empowered by any purported grant of right but rather, there exists rights which inhere in man because of his rational nature. [3] **John Hart Ely** points out that "the advantage of Natural Law is that it can be invoked to support anything you want, the disadvantage being everybody knows that,"[4]rendering its use questionable in the Modern World.

The influences of Natural Law are evident in Ireland from earliest time. In Brehon Law there was much variation in the degree of Christian influence in the law – texts: for instance, *Cáin Lánamna* gives detailed descriptions of the procedure for divorce without a word of condemnation while other comentators have quoted Mark 10:9 in their Judgements on the same subject matter 'What god has joined no man shall put asunder.'[5]

Natural Law – 1937 Constitution

The Irish Constitution **(*Bunreacht na hÉireann*)** was ratified by the Irish people in 1937, it has been described both as a personal statement of the philosophy of **Eamon de Valera**, and as a fairly successful union of democracy and catholic teaching.[6] In the 1930's Europe was going through turmoil, on the continent two political ideologies were dominating, communism in soviet Russia under Stalin and fascism in Nazi Germany and Italy under Hitler and Mussolini,[7] while in Ireland the new Constitution was entering a golden period due to the harmony between the civil and religious society. This golden era continued until the 1960's a decade of change and upheaval resulting in a demand in some quarters for the Christian (catholic) ideology to be replaced with more liberal thinking.[8]

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[1] John Barker, *The Anthropology of Morality in Melanesia and Beyond*,(1st Ed, Ashgate Publishers, Aldershot 2007) pg 193
[2] Denis Paterson, *Natural Law, A Companion to Philosophy of Law and Legal Theory*, (1st Ed, Blackwell Publishers, Malden, USA ,1999 ,) pg 223
[3] Donal Coffey, Article 28.3.3°, The Natural Law and the Judiciary, (2004) 22 I.L.T. 310
[4] John Hart Ely, *Democracy and Distrust*, *A theory of Judicial Review* (14th printing, Harvard University Press, Harvard, USA, 2002) pg 50
[5] Fergus Kelly, *A Guide to Early Irish Law,*(Volume 3, Dublin School of Advanced Studies, Dublin,1988) pg 2
[6] D. Keogh , *The Constitutional revolution: An analysis of the making of the Constitution,*(in F.litton (Ed) the Constitution of Ireland,(Dublin Institute of Public Administration, Dublin 1988) pg 66
[7] *Supra n3*
[8] Lesley A Walter, Law as Literature: Illuminating the Debate Over Constitutional Consistency, (2004) COLR XI

Ryan v Attorney General

Few would question Natural Law's influence on the development of the doctrine of unenumerated rights, which has been acknowledged and developed by leading Irish cases.[9] Of these rights, Article 40 entitled "personal rights" has proved to be the most contentious. In ***Ryan v Attorney General***[10] both the High Court and Supreme Court accepted that some personal rights were derived from the 'Christian and Democratic nature of the State'.[11] The Supreme Court confirmed the High Court's decision that Gladys Ryan had a right to "bodily integrity". The recognition of this right came from the fact that the rights mentioned in Article 40.3.2 were not exhaustive as evidenced by the phrase 'in particular' thus affirming the possibility that this list could be expanded.[12] The controversy in **Ryan** arose out of one of the sources, which **Kenny J** consulted in deciding that "bodily integrity" was an unenumerated right. **Kenny J** apparently announced without need for qualification that personal rights stem from the 'Christian and Democratic nature of the State' relying upon supra-textual catholic teaching *(i.e., Pacem in Terris)* to enumerate a formerly unrecognized right.[13]This point was championed by **O'Hanlon J** in his article on Natural Law.[14]**Kenny J's** ruling was partisan in two ways; it resulted in reliance by the Supreme Court on the theocratic Natural Law doctrine to list additional unenumerated personal rights for the next several decades.[15] Also, he rejected the *status quo* of strict reliance on the Constitutional text in exchange for a papal encyclical with the intention of reaching a more just result.[16] As **Hogan** points out the Supreme Court subsequently adopted **Kenny J's** lead in invoking Natural law in cases involving unenumerated personal rights.[17]

Defining Natural Law

According to **Clarke,** the epistemological problems associated with identifying what is meant by 'Natural Law' are not adequately understood or acknowledged by many of its most committed proponents.[18]There are also problems associated with the origins of Natural Law. Despite the landmark decision in **Ryan**, the Irish judiciary's application of Natural Law has caused inescapable conflict with Positive Law, in cases involving unenumerated rights. The reality is that theocratic Natural Law can be open to several interpretations casting doubt on the Judiciary's ability to deliver consistent judgments, which is a necessity in the modern world. Perhaps the most important demonstration of this, in the Irish context, is the divergence between the Catholic and Protestant traditions in relation to Natural Law implications for Positive Law. Both traditions agree on the existence of 'the most Holy Trinity' and 'God' but fundamentally disagree as to what the divine law actually is. These traditions adopt opposing Natural Law positions on the questions of contraception, sterilization and, most significantly abortion.[19] An example of this can be seen in **Reverend Kenneth Kearon's** article where he noted "that there are those in the

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[9] *The State(Nicolaou)* v *An Bord Uchtála*[1966] I.R. 567 ; *The State (Healy) v Donoghue* [1976] I.R. 325
[10] *Ryan v Attorney General* [1965] I.R. 294
[11] G.F. Whyte, The Natural Law and the Constitution, (1996) 14I.L.T. 8
[12] Report of the Constitution Review Group, CH 12, Fundamental Rights,(Stationery Office,Dublin,1996) pg 245
[13] Lesley A Walter, Law as Literature: Illuminating the Debate Over Constitutional Consistency, (2004) COLR XI
[14] Roderick J O'Hanlon, Natural Rights and the Irish Constitution,1993 (11)ILT 8
[15] Report of the Constitution Review Group, CH 12, Fundamental Rights, (Stationery Office,Dublin,1996) pg 247
[16] *Op. cit,* Lesley A Walter
[17] G.Hogan, Unenumerated personal rights: Ryan's case re-evaluated,1990-1992,(25-27) Irish Jurist pg 108
[18] Desmond M. Clarke, The Constitution and the Natural Law: A reply to Mr Justice O'Hanlon,(1993) 11I.L.T .177
[19] Tim Murphy, Democracy, Natural Law and the Irish Constitution,(1993) 11I.L.T. 91

Christian tradition that while opposed to abortion, would argue that some cases may arise where the termination of the life of the unborn would have to be the Christian opinion."[20]

The Irish Courts have used, the historic approach, literalist approach, harmonious interpretation and broad approach in interpreting ***Bunreacht na hÉireann***. Of these the use of Natural Law has always attracted varying degrees of support among commentators. It would appear that while Natural Law is certainly a feature of contemporary law in Ireland it is questionable as to how many commentators find it suitable in the modern world. It might appear that the Supreme Court has distanced itself from Natural Law while remaining dependant on it's principle to assert the basic rights of justice and fairness.[21]

Modern cases

A contrasting example to Ryan in terms of the use of Natural Law was seen in the ***Re Article 26 and the Regulation of the information bill,***[22] where the Supreme Court distanced itself from the application of Natural Law, thus rejecting the view that Natural Law is 'antecedent and superior to Positive Law'. [23]The case involved the right to information to legally available abortions which conflicted with the theocratic Natural Law and the right to the unborn. In essence, the Supreme Court denied that Natural Law had ever played a role in determining unenumerated personal rights despite flagrant evidence to the contrary in the earlier decisions of ***Mc Gee*** and ***Norris***.[24]The existence of unenumerated rights has occurred on an *ad hoc* basis as required by the demands of particular cases, often these cases arose due to the failure of the *Oireachtas* to legislate in certain areas for example in the ***McGee*** case which involved the availability of contraceptives.[25] In ***Mc Gee*****, Walsh J** consulted the authority of Natural Law but also appeared to cast doubt on the reliability of this supra-Constitutional fount.

What exactly Natural Law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not fully agreed…In a pluralist society such as ours , the Courts cannot as a matter of Constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the Natural Law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from Natural Law;" [26]

Interestingly, the Supreme Court decided that the legal denial of access to contraceptives contravened Mrs. Mc Gee's Natural and Constitutional rights and that these rights depend, in some sence, on the Natural Law. However, the Roman Catholic Church claimed for many years that 'artificial' contraception was contrary to Natural Law[27], while **John Finnis** made light of this argument suggesting that "this

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[20] Reverend Kenneth Kearon, 'Christian Values call us away from Divisions,' Irish Times , 5th February 1993
[21] Lesley A Walter, Law as Literature: Illuminating the Debate Over Constitutional Consistency, (2004) COLR XI
[22] *Article 26 and the Regulation of the information bill* [1995] 2 ILRM 81
[23] *Bunreacht na hÉireann , Articles 41*
[24] *Supra n21*
[25] Report of the Constitution Review Group, CH 12, Fundamental Rights, (Stationery Office,Dublin,1996) pg 247
[26] *Mc Gee v Attorney General* [1974] I.R. 284 pg 318
[27] Desmond M Clarke, The Constitution and Natural Law: A reply to Mr. Justice O'Hanlon (1993)11I.L.T .177

argument is ridiculous".[28] These conflicting views highlight the difficulties with Natural Law in the modern world where citizens expect and rely on consistent comparable decisions.

If evidence is needed of the uncertainty that Natural Law interpretations bring about, one need go no further than ***Norris v Attorney General*** where the majority and minority alike in the Supreme Court employed Natural Law arguments to justify their conflicting conclusions on a case concerning the Constitutionality on male homosexual conduct.[29] **Chief Justice O' Higgins** convictions in ***Norris*** on Natural Law would seem to contradict those in ***Re Article 26*** where he stated that:

The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to 'our Divine Lord Jesus Christ'. It cannot be doubted that the people so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and Christian beliefs.[30]

In the same case, **Henchy J** formulated a test whereby the identification of rights is based upon that individual. While many may see this test as a welcome departure given that it's secular and humanistic approach, there is a substantial element of judicial subjectivity in identifying such rights. Given the stark differences in conclusions in ***Re Article 26*** and those in ***Mc Gee*** and ***Norris*** it would appear that judges may vary in their perceptions of what constitutes the essential characteristics of the individual and the rights which flow from them. [31]**Henchy J's** test would appear to do little to expel the hazard of further inconsistency in judgments in modern day cases. The Constitution review group were charged with evaluating whether there was a need for Constitutional reform in the mid 1990's. Their report highlighted that, given the decision in ***Re Article 26***; it appeared the Supreme Court had gravitated away from a catholic view of Natural Law in preference for a more eclectic approach.[32]

Constitutional Review Group

The Constitutional Review Group maintained that the principle dilemma when interpreting the Constitution in this manner is that there is no single version of Natural Law nor is there a text of Natural Law to which reference can be made to ascertain its content. They make the point that humanists and different religious denominations differ in their interpretations of the content of Natural Law and what duties spring from it. This obstacle was highlighted *supra* in **Reverend Kenneth Kearon's** article concerning the divergence within the Christian faiths. The review group criticized the Ryan judgment given its reliance on the 'Christian and Democratic nature of the State' which was regarded as not been sufficiently rooted in the Constitutional text.[33] The Constitutional Review Group concluded that from its review on the development on the doctrine of unenumerated personal rights, Article 40.3.1 was unsatisfactory and was unable to give the Courts sufficient guidance in identification of personal rights and consequently forced the Courts to resolve major social policy which it held would be more

[28] John Finnis, *Natural Law and Natural Rights* (9th Impression, Oxford press,U.K.1980) pg 48
[29] Fergus W,Ryan , *Constitutional Law*,(1st Ed Round Hall Ltd, Dublin 2001),Ch 3,Constitutional Interpretation, pg 13
[30] Roderick J O'Hanlon, Natural Rights and the Irish Constitution, (1993) 11I.L.T. 8
[31] Report of the Constitution Review Group, CH 12, Fundamental Rights, (Stationery Office,Dublin,1996) pg 253
[32] *Op. cit,* Lesley A Walter
[33] Report of the Constitution Review Group, CH 12, Fundamental Rights, (Stationery Office,Dublin,1996) pg 251

appropriately dealt with (under the separation of powers) by the legislature.[34] They held the Article should be amended so as to include an exhaustive list of rights thereby eliminating **G.F. Whyte's** [35] assertion where he suggested that "given the uncertainty of Natural Law, it may act as a convient cloak for judicial law-making."[36]However it should be pointed out that not all commentators agree that Natural Law leads to ambiguity. **O' Hanlon J** pointed out that at the Nuremburg trials Nazi leaders were put on trial, convicted and executed under Natural Law, he opines that the Court was not inhibited by the concern stressed by **Mr. Murphy** in his article where he asked ' in terms of any discussion of Natural Law, the question will always remain whose Natural Law? [37] This development according to the Constitutional Review Group would take any further expansion of personal rights out of the hands of the Judiciary and place it squarely into rubric of Positive Law. The arguments against change included that the article in its present form affords important flexibility and potential for adaption to social change which by its nature could cover all eventualities and which cannot be changed without referendum. On the other hand some commentators consider the article in its current form as been undemocratic in that it provides the Courts with too much latitude for identification of personal rights thus infringing on the principle of the separation of powers, leading to uncertainty in decision making. [38]

Alternative Solutions

The alteration of article 40, or the formation of an Irish Bill of Rights, similar to those in the US, perhaps incorporating the provisions of Article 10(2) of the **European Convention on Human rights**[39] and the **International Covenant on Civil and Political Rights**, would appear to furnish the judiciary with a solid Constitutional text, with which to draw from, while alleviating public concern of excessive judicial discretion. Specifying a list of rights with a sufficient level of generality would enable the Courts to identify within them specific rights which would be necessarily implicit within the broadly described rights, such an approach represents a reasonable compromise between removal of the judiciary's power to identify rights and the very broad discretion which exists at the moment. [40] A more interesting approach was put forward by **Lesley A Walter** where the use of deconstruction could be employed to eliminate the uncertainty brought about by Natural Law. Deconstruction is post- modern literary theory influenced by French philosopher **Jacques Derrida,** deconstruction appealed to the critical legal studies movement since it sought the underlying meaning of the text, thus demonstrating that certain doctrines where unjust or arbitrarily chosen.[41] Deconstruction shows us that language such as that of ***Bunreacht na hÉireann*** is in determinative and that finding a fixed timeless meaning therein, is a hopeless exercise.

The reasoning for the use of Natural Law is supported by the belief that it is antecedent and superior to Positive Law while been seen as the origin of a constant moral truth. It is argued that the use of deconstruction would lead to an avoidance of the uncertainties these decisions invite. If deconstruction

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[34] Fergus W,Ryan , *Constitutional Law*,(1st Ed ,Round Hall Ltd, Dublin 2001),Ch 3,Constitutional Interpretation, pg 65
[35] G.F. Whyte, The Natural Law and the Constitution, (1996) 14 I.L.T. 8
[36] *Supra n32*
[37] Roderick J O'Hanlon, The Judiciary and the Moral Law, (1993) 11 I.L.T. 129
[38] Report of the Constitution Review Group, CH 12, Fundamental Rights, (Stationery Office,Dublin,1996), pg 251
[39] European Convention on Human Rights, Article10(2)
[40] Report of the Constitution Review Group, CH 12, Fundamental Rights, (Stationery Office,Dublin,1996), pg 259
[41] J. Balkin, *Deconstructions Legal Career,* http://www.yale.edu/lawweb/jbalkin/articles/deccar1.htm.

were to be applied uniformly and given that it is ideology neutral it would prove an attractive remedy for those who have concerns over ability of Natural Law to deliver consistent decisions in a Modern World.[42]

Conclusion

It may appear that the Supreme Court has distanced itself from Natural Law while remaining dependant on it's principle to assert the basic rights of justice and fairness. There is a willingness of at least some Judges to conduct Constitutional interpretation which is influenced by Natural Law, it can be said however that the Judiciary are largely against this approach[43]. This reasoning is summed up in the words of **Budd J** in the High Court in ***Riordan v An Tánaiste*** **[1995]** where he held such standards are often "subjective and nebulous and which may not give reliable guidelines in dealing with actual Constitutional problems."[44] Furthermore, the contemporary opinion regarding the relationship between the Church and State was recently summed up by Minister for Justice, **Dermot Ahern**, commenting on the Murphy report where, he held; "It was not acceptable that institutions behaved or were treated as being above the law of the State. This is a republic – the people are sovereign – and no institution, no agency, no church can be immune from that fact."[45]

Despite the lack of interest among most of the Judiciary, this method of interpretation retains a persistent vibrancy, while Natural Law will not feature in the day to day interpretation of ***Bunreacht na hÉireann;*** it is likely to be used on occasion to counteract an unpalatable result which might be produced by a stark, literalist interpretation of the Constitution.[46]

The Constitutional Review Group maintained that the principle dilemma when interpreting the Constitution in this manner is that there is no single version of Natural Law nor is there a text of Natural Law to which reference can be made to ascertain its content. The establishment of an Irish Bill of Rights would appear to set out firm grounds from which the judiciary can work thus discontinuing the *ad hoc* basis with which the enumeration of personal rights occurred in the past. As noted *supra* another option for the judiciary would be considering the theory of deconstruction. However, given that none of the Constitutional Review Group's suggestions have been followed it is unlikely that such a method will be entertained.

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[42] *Op. cit,* Lesley A Walter
[43] JM Kelly, *The Irish Constitution*, (4thEd,Tottel Publishing Hogan,Whyte,Dublin,2003)CH1,Introduction,pg 31 citing DPP V O'Shea [1982] I.R. 134
[44] *Riordan v An Tánaiste* [1995] 3 I.R. 62 at 81
[45] Mary Minihan, "A collar will protect no criminal" ,The Irish Times, November 27th , 2009
[46] JM Kelly, *The Irish Constitution*, (4thEd,Tottel Publishing Hogan,Whyte,Dublin,2003)CH1,Introduction,pg 32