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Dead or Alive?: The Fate of Natural Law in Irish Constitutional Jurisprudence

Introduction

The issue of what is known as the natural law and its relationship with the Constitution of Ireland has been a subject of debate for many years. A large number of articles and commentaries have been written on the subject and many legal experts have discussed it at great length. The issue of natural law first emerged in the area of unenumerated rights in the constitution and has developed over many years. However, in 1995, the Supreme Court stated unequivocally that natural law was neither superior to the express provisions of the constitution nor was it relevant to constitutional interpretation. As a result of this and other decisions, a consideration of the future role of natural law in Ireland's constitutional jurisprudence is merited.

Consequently, this paper endeavours to briefly define and explain the rather amorphous concept of natural law. Following are analyses of pertinent articles of Bunreacht Na hÉireann most often sited as a basis for the application of natural law and the relevant case law. The paper's principle objectives are to examine the evolution of natural law as an aspect of Irish constitutional jurisprudence, to evaluate the appropriateness of its uses and to consider its future.

What is natural law?

The first difficulty in any discussion of natural law lies in its amorphous definition. Murdoch's Irish Legal Companion describes natural law as "law which is based on value judgements which emanate from some absolute source" such as "God's revealed word."[1] Byrne and McCutcheon describe natural law theories as "seeking to evaluate human law in the light of higher sources."[2]

Essentially, the idea of natural law is predicated on the existence of a higher power or God, from whom all authority is derived. The natural law is closely

[1] Murdoch's Irish Legal Companion – online legal database, accessed on 22nd November 2002
[2] Byrne, R. and McCutcheon, J. *The Irish Legal System*, 4th edn (Dublin. Butterworth Ltd. 2001) p.17

associated with the moral law. Supporters of the natural law advocate the view that natural law is superior to all positive or man made law.

However, the term lacks a precise definition as its detractors eagerly point out. Clarke states, "there is very little agreement, even among experts or proponents of natural law theory about its application to specific, complex moral or legal issues."[3] Its evolution is associated with figures such as Plato, Aristotle and St. Thomas Aquinas. The exact nature and extent of the natural law is a philosophical and theological debate too complex to be discussed here.

Despite such complexities, natural law has formed a significant aspect of constitutional jurisprudence for many years. The debate over natural law is not unique to Ireland. It has been the subject of a "more parochial debate among American legal scholars."[4] It was also experimented with briefly in Germany following World War II.[5] Many Islamic states, such as Egypt, Syria and Saudi Arabia require the use of Shariah law in judicial decision-making.[6]

For the purposes of this paper, natural law is taken to refer to the Christian type of natural law theory that is the subject of debate in Ireland. This emanates from the principle that all power derives from God and that God's moral law is superior to all man made law.

Natural Law and the Irish Constitution

Before considering the case law on the issue, it is necessary to examine the Irish Constitution and to evaluate whether it contains ideas of natural law. During the drafting of the constitution, Eamon De Valera "went out of his way to secure the

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[3] Clarke, D.M. "The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon" (1993) *Irish Law Times 11*. p. 177

[4] Lewis, B. "Liberal Democracy, Natural Law and Jurisprudence: Thomistic Notes on an Irish Debate" in *Reassessing The Liberal State: Reading Maritain's "Man And The State"*. (Washington D.C., The Catholic University of America Press, 2001) p. 141

[5] *Ibid.*141, Footnote 4

[6] Twomey, A. F. "The Death of Natural Law?" (1995) *Irish Law Times 13.* p. 273, Footnote 41

approval of the Holy See."[7] While Pope Pius XI did not grant this, several years later, Pius XII "praised the Bunreacht Na hÉireann for its foundation in natural law."[8]

The use of natural law in constitutional jurisprudence is based on the "Christian and democratic nature of the state."[9] The idea that the state is Christian is based on the wording of the preamble of the constitution, "In the name of the Most Holy Trinity from Whom is all authority and to Whom, as our final end, all actions of both men and States must be referred, We the people of Eire, Humbly acknowledging all our obligations to our Divine Lord Jesus Christ, Who sustained our fathers through centuries of trial, …, Do herby adopt, enact and give ourselves this Constitution." The preamble also enshrines the ideals of "Prudence, Justice and Charity."[10]

There are additional examples of the idea of a higher power in the constitution. Article 6.1. states that "All powers of government, legislative, executive and judicial derive under God, from the people." Articles 12.8, 31.4, and 34.5.1, which prescribe the oaths to be taken by the president, members of the Council of State and judges, include references to the existence of God. Article 12.8, the oath to be taken by the president, begins, "In the presence of Almighty God" and concludes with the words, "May God direct and sustain me." Article 44.1 also acknowledges God stating, "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reference and shall respect and honour religion."

There are also several other references to the ideas of morality and natural law. The right to freedom of expression enshrined in Article 40.6.1. is "subject to public order and morality," while the right to ownership of property in Article 43.1.1 is describes as, "a natural right, antecedent to positive law." The constitutional

[7] Lewis, B. *op. cit.* p.147
[8] *Ibid.* 147
[9] *Ryan v. The Attorney General* [1965] I.R. 294
[10] Preamble – Bunreacht na hÉireann – The Constitution of Ireland.

provisions relating to the family, marriage, the right to life and several other areas could also be described as illustrating natural law tendencies.

Natural Law and Judicial Decisions

The issue of natural law has arisen most frequently in cases concerning natural or human rights. The issue first emerged in the case of *Ryan v. The Attorney General.*[11] In his judgement, Justice Kenny declared that "there are many personal rights of the citizen which follow from the Christian and democratic nature of the state."[12] This basis was used to conclude that all citizens had a right to bodily integrity even though this right was not specified in the constitution. This was the first in a series of cases where what became known as unenumerated rights were developed by the judiciary. It is worth noting that Justice Kenny consulted Pope John XXIII 's encyclical letter *Pacem in Terris* when coming to a decision in this case.

Later that year, in the case of *Conroy v. The Attorney General,*[13] Kenny, J. again resorted to the use of natural law. He discussed the evidence of Canon J. McCarthy, a moral theologian, who had considered "the moral gravity which may be derived from and measured by the natural law or natural ethics."[14]

The issue of natural law was examined in greater detail in the case of *McGee v. The Attorney General.*[15] This case centred on whether or not a married woman had the right to use contraceptives. The plaintiff argued that, due to a medical condition, pregnancy would result in a danger to her life. She argued that under her right to marital privacy, she had a right to access to contraceptives. While it was decided that she did have such a right, the reflections of Justice Walsh on the area of natural law are of greater importance here. He stated,

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[11] *Ryan v. The Attorney General* [1965] I.R. 294
[12] *Ibid.* 313
[13] *Conroy v. The Attorney General* [1965] I.R. 411
[14] *Conroy v. The Attorney General* [1965] I.R. 419
[15] *McGee v. The Attorney General* [1974] I.R. 284

"Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but the Constitution confirms their existence and gives them protection."[16]

He also noted "both in its preamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority." "There are many to argue that natural law may be regarded only as an ethical concept and as such is a reaffirmation of the ethical content of the law in its ideal of justice. The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the acknowledgement of Christianity in the preamble and in view of the reference to God in Article 6 of the constitution, it must be accepted that the constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgement of the ethical content of law in its ideal of justice."[17]

While these comments suggest that Justice Walsh accepted that the constitution approved the use of natural law, he noted the difficulties inherent its use. "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 yet fully agreed. While the Constitution speaks of certain rights as being imprescriptible or being antecedent and superior to all positive law, it does not specify them."[18]

Natural law and natural rights also featured in a number of other cases. In *G v. An Bord Uchtala,*[19] Justice Walsh examined the issue of children's rights positing that

[16] *Ibid.* 310
[17] *Ibid.* 317
[18] *Ibid. 318*
[19] *G v. An Bord Uchtala* [1980] I.R. 32

"the child's natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion and to follow his or her conscience."[20]

Moreover, in the case of *Northants Co. Council v. A.B.F.,*[21] Justice Hamilton stated "the natural law is of universal application and applies to all human persons be they citizens of the state or not."[22] The use of natural law continued through until the 1980s. However, during the 1990s, a dramatic change occurred in the Supreme Court's attitude to natural law. Lewis notes similarities with American experiences, as "the issue that reoriented the debate was abortion."[23]

The issue of abortion had been addressed in a constitutional referendum in 1983, when Article 40.3.3. was inserted into the constitution. In 1992, *The Attorney General v. X.*[24] came before the Supreme Court. It involved a fourteen year old girl who was pregnant as a result of rape by a family friend. The girl threatened to commit suicide rather than have the child. While the girl and her family were in England attempting to procure an abortion, the Attorney General sought an injunction to protect the life of the unborn child. The girl and her family returned to contest this injunction in the Supreme Court. The court granted the girl the right to travel to England to have an abortion.

In the aftermath of this decision, the government held three constitutional referenda on the abortion issue. The proposed Twelfth Amendment to the constitution would have allowed for abortion in cases where a threat existed to the life of the mother. The people rejected this proposal. The proposed Thirteenth Amendment to the constitution provided that Article 40.3.3 would not limit the freedom to travel

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[20] *Ibid. 69*
[21] *Northants Co. Council v. A.B.F.* [1982] I.L.R.M. 164
[22] *Ibid. 166*
[23] Lewis B. *op. cit.* p. 154
[24] *The Attorney General v. X.* [1992] I.R. 1

from Ireland to another state, while the putative Fourteenth Amendment provided that Article 40.3.3. would not limit the freedom to obtain or provide information on abortion available in other states. Both of these proposals were accepted. In 1995, legislation was passed to bring the Fourteenth Amendment into effect. The *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995* was referred to the Supreme Court, under Article 26, by President Mary Robinson.

When the case came before the Supreme Court,[25] two counsels were appointed to argue before the court. One, representing the interests of the woman, argued that the law was too restrictive. The other, representing the interests of the unborn child, contended that the law was invalid, because it conflicted with the natural law by permitting abortions at all. He further posited that the case of *The Attorney General v. X.*[26] was incorrect for the same reason.

The Supreme Court held that the legislation could not be declared invalid as it conflicted with the natural law. Delivering the judgement on behalf of the court, Chief Justice Hamilton stated, "the courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State, to which all organs of the state were subject, and at no stage recognised the provisions of natural law as superior to the Constitution."[27] He noted that the constitution should be interpreted in accordance with "its ideals of Prudence, Justice and Charity."[28]

The Chief Justice also quoted from Justice Walsh's comments in the *McGee* case. "In a pluralist society such as ours, the courts cannot as a matter of law, be asked to choose between the differing views, where they exist on the interpretation by the

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[25] *In re Article The Regulation of Information Bill 1995* [1995] 2 I.L.R.M. 81
[26] *The Attorney General v. X.* [1992] I.R. 1
[27] *In re The Regulation of Information Bill 1995* [1995] 2 I.L.R.M. 107
[28] *Ibid. 107*

different religious denominations of either the nature or the extant of these natural rights as they are to be found in the natural law."[29]

The decision of the court can be summarised in two points. First, the people are sovereign and all power rests with the people. This power is absolute, and is limited only by the provisions of the constitution, which the people may amend through a referendum. Second, the natural law is not recognised as being in any way superior to the constitution.

Lewis concludes that this decision "seemed to end the Irish experiment with natural law jurisprudence."[30] However, the issue re-emerged in the case, *Re a Ward of Court (No.2).*[31] This case related to a woman who suffered irreversible brain damage during surgery in 1972 and who had subsequently been made a ward of court. As she was in a near permanent vegetative state and receiving food through a tube, her family sought the removal of the tube to allow her to die. Chief Justice Hamilton decided that in very limited circumstances, the right to life implied a right to let nature take its course and not to have life artificially prolonged.

Byrne and McCutcheon discuss this judgment, stating that while the judgement "would appear to support the overriding importance of the harmonious approach to the exclusion of any natural law or religious component, this may be an inaccurate view."[32]

The Natural Law Debate: Analysis of Arguments For and Against

The issues surrounding natural law have been the subject of debate among academics and legal experts for many years. A consideration of the disputed matters follows.

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[29] *Ibid. 107*
[30] Lewis, B. *op. cit.* p. 155
[31] *Re a Ward of Court (No.2)* [1996] 2 I.R. 79
[32] Byrne, R. and McCutcheon, J. *op. cit.* p .609

Constitutional basis for the use of natural law

Among the central arguments in the natural law debate is whether the Irish Constitution recognises natural law and the existence of a higher source of law than itself. Supporters of the use of natural law argue that the constitution clearly supports its use. Lewis states that "historians and legal scholars are in agreement that the Bunreacht na hÉireann is grounded in a natural law perspective on public morality."[33] Von Prondzynski suggests that it seems to have "been generally accepted that Thomastic ideas are at the root of the Constitution's theological and philosophical outlook."[34] As already mentioned, Justice Kenny referred to the "Christian and democratic nature of the State,"[35] conferring certain rights.

Opponents of natural law reject these conclusions. In his discussion of the *Ryan* case, Hogan argues that there is "nothing in the Constitution to indicate that the State has this (Christian) character."[36] He supports his claims with reference to Article 44.2 of the constitution that prohibits the state from endowing any particular religion. Von Prondzynski also reflects on whether the constitution is "merely urging citizens, in an idealistic way, to do good and to avoid evil."[37]

An examination of the provisions of the constitution and in particular the preamble would suggest that there is little doubt that the constitution recognises higher law principles. While it is impossible to say for certain what the intentions of the drafters of the constitution were, it would appear that it was intended that the constitution would recognise natural law.

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[33] Lewis, B. *op. cit.* p.149
[34] Von Prondzynski, F.F.V.R. "Natural Law and the Constitution" (1977) *Dublin University Law Journal 1.* p. 32
[35] *Ryan v. The Attorney General* [1965] I.R. 313
[36] Hogan, G.W. "Unenumerated Personal Rights: Ryan's Case Re-Evaluated" (1990 – 1992) *The Irish Jurist 25 –27* p. 105
[37] Von Prondzynski, F.F.V.R. *op. cit.* p. 33

Is natural law superior to the Constitution?

Another aspect of the natural law debate is whether the natural law that appears to be recognised by the constitution is superior to its provisions. Writing extra-judicially in 1993, Justice O'Hanlon of the High Court had no doubt that the constitution "acknowledges the authority of a higher law as the source of 'inalienable and imprescritable' rights, which are 'antecedent and superior to all positive law.'"[38] Twomey discusses the "string of decisions handed down by the superior courts over a period of almost sixty years, which clearly acknowledge that the Constitution is not the source and origin of fundamental human rights, but simply recognises or accepts the existence of rights, which have always formed part of the natural law."[39] The existence of a natural law superior to the constitution was implied by Justice Kenny in the *Ryan* and *Conroy* cases and expressly recognised by Justice Walsh in *McGee*.

However, the idea that natural law is superior to the constitution is rejected by many commentators, and was rejected by the Supreme Court in 1995. This was a dramatic divergence from previous Supreme Court decisions and is difficult to fully explain. It does not appear that there is any credible constitutional basis for the court's rejection of natural law. In fact, the constitution would suggest that the court's decision was incorrect.

It may be the case that the decision reflected difficulties with the interpretation of the natural law and a change in the attitudes of Irish society to issues such as abortion, rather than any constitutional reason for rejecting the use of natural law.

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[38] O'Hanlon, R.J. "Natural Rights and the Irish Constitution" (1993) *Irish Law Times 11* p. 8
[39] Twomey, A.F. *op. cit.* p. 270

Justice Walsh discussed the difficulties of interpreting natural law in the *McGee*[40] case and Chief Justice Hamilton referred to this in the 1995 decision.[41]

The difficulty of interpreting the natural law

One of the issues often highlighted by opponents of the use of natural law is that it is ambiguous and consequently very difficult to interpret. Von Prondzynski notes, "There is a general aversion among lawyers at having to deal with something they cannot immediately define."[42] The difficulties with the use of natural law cannot be denied. It has been argued, "there are two entirely different kinds of natural law theories"[43], one secular and one based on religion. Murphy also noted that, while the state may be Christian, this does little to help define natural law as Christian groupings "fundamentally disagree as to what the divine law actually is."[44]

However, this difficulty is not insuperable and should not be treated as so. It is clear from the constitution and from judicial decisions such as that of Justice Kenny in the *Ryan* case, that a Christian type of natural law is advocated rather than a secular natural law theory. The issue of what exactly this means and how it can be applied to complex cases is more difficult to resolve. Von Prondzynski believes that "natural law in its legal sense, as seen by the Constitution has nothing whatever to do with the imposition on us all of a concise set of religious rules as propounded by the Churches."[45]

The difficulties of natural law interpretation could be considerably reduced by the construction of some form of guidelines for the judiciary to use. These would help the judiciary to define the natural law and to interpret it accordingly. There are

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[40] *McGee v. The Attorney General* [1974] I.R. 317
[41] *In Re The Regulation of Information Bill 1995* [1995] 2 I.L.R.M. 81
[42] Von Prondzynski, F.F.V.R. *op. cit.* p. 32
[43] Murphy, T. "Democracy, Natural Law and the Irish Constitution" (1993) *Irish Law Times 11* p. 82
[44] *Ibid. 82*
[45] Von Prondzynski, F.F.V.R. *op. cit.* p. 37

two possible ways of implementing this proposal. The first would be for the judiciary to construct guideline for themselves. However, this would prove divisive and controversial no matter what decision was reached. The second method by which these guidelines could be implemented would be by inclusion in the constitution through the referendum process. Obviously, it would prove very difficult to draw up such a set of guidelines. This could be done by a committee of legal experts, appointed by the government, who would consult all relevant experts and interest groups before arriving at a decision. If the people ratified the guidelines, additional legitimacy would be placed on judicial decisions involving natural law.

The guidelines would have to be constructed with great care. It would be important not to make them too strict and, in doing so, effectively prevent the judiciary from deriving the full benefits from the use of natural law. However, it would also be important to have the guidelines strict enough to prevent the judiciary from wide ranging judicial activism. This would prove to be a very difficult undertaking, but once completed could alleviate many of the problems associated with natural law interpretation at present.

Is the use of natural law really an excuse for judicial activism?

Another issue related to the debate on natural law is that of judicial activism. It has been argued that, in recognising unenumerated rights found in the natural law the judiciary are simply making law.

Under the rule of law, the law should be precise and predictable in its application. While this is the ideal, it does not always occur in practice. The use of natural law has been criticised, as its application is often unpredictable. While this may be a justifiable criticism, the reality is that if the law were absolutely precise and

predictable, the judiciary would not be required to interpret it at all. Its meaning would be clear to all.

Under the doctrine of the separation of powers, the legislature makes laws while the judiciary interpret them. In their function of interpretation, some element of law making and judicial activism is unavoidable. The main criticism of judicial activism is that it is undemocratic. This argument is fundamentally flawed. As already demonstrated, natural law forms an aspect of Irish constitutional jurisprudence because it is recognised by the constitution as a form of law superior to itself and all positive law. It is also worth noting that, as all power "under God"[46] is vested in the people, they can modify or even abolish the constitution as they wish. If the judiciary interprets a particular article or provision of the constitution in a particular way, the people can effectively overturn it by changing the wording of that article in a referendum.

The issue of judicial activism and constitutional interpretation is a complex one too detailed to be fully addressed here. Nonetheless, it is submitted that application of natural law has its own substantive justification and that the doctrine is not merely a red herring thrown up as an excuse for a activist judiciary.

The Future of the Natural Law in Irish Constitutional Jurisprudence: Is Natural Law Dead?

The future of natural law in Irish Constitutional jurisprudence is currently far from clear. It would appear from the Supreme Court decisions in recent years that for the foreseeable future natural law will not play a significant role in constitutional jurisprudence.

[46] Bunreacht na hÉireann – The Constitution of Ireland – Article 6

In his article *"The Death of Natural Law,?"* Twomey describes the recent demise of natural law and the difficulties that have arisen in other areas, as "one of the great tragedies of the bitter debate on abortion."[47] Byrne and McCutcheon state, "It would seem wrong to conclude that the Regulation of Information Bill 1995 case signalled the 'death of natural law.'"[48] They suggest that the "natural law component remains a significant aid to interpretation,"[49] although it will remain inferior to the canon of harmonious interpretation.

Although not dead, natural law's place in Irish constitutional jurisprudence has been radically altered. The doctrine now has a reduced significance in constitutional interpretation and a future growth in stature remains unforeseeable.

Its application has led to many difficulties. However, the use of natural law is not without benefits and its diminution and potential evisceration by the judiciary may prove detrimental. Natural law was invoked over an extended period to protect the rights of citizens not expressly provided for in the constitution, including the right to bodily integrity, the right to travel, the right to earn a livelihood, the right to privacy and the right of access to the courts. It remains to be seen if the Supreme Court's decision will prevent the recognition of further unenumerated rights.

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[47] Twomey, A.F. *op. cit.* p. 272
[48] Byrne, R. and McCutcheon, J *op. cit.* p. 607
[49] *Ibid.* p. 609