Between Scylla and Charybdis.[1] ***The Supreme Court and the Regulation of Information Bill (1995).***[2]

Introduction

Article 26 of the Constitution assigns to the Supreme Court the role of a *credence table*[3]. Here the Supreme Court is served a proposed Bill by the President to test for unconstitutionality before such a Bill is in turn served to the people as a law. The case with which we are concerned arose as a result of the Fourteenth Amendment to the Constitution[4] and it is one of the most important on the modern day constitutional calendar. The relevance of this amendment to the case was that counsel for the unborn adopted[5] the arguments of the late O'Hanlon J[6] and advocated, *inter alia,* that natural law over rode the 13th and 14th amendments, and as a result the proposed Bill was unconstitutional. Duncan in 1995 recognised that it was only a matter of time before this conflict would surface. According to the learned author[7]

> "[t]he difficulty here is that the theory that the natural law stands above the Constitution is being justified by the terms of a human instrument, the Constitution, which is itself subject to the natural law. The Constitution cannot be

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[1]A predicament where avoidance of either of two dangers means exposure to the other. In Classical mythology Charybdis was a whirlpool in the Strait of Messina that was incredibly dangerous to sailors because in avoiding it, sailors often ran the risk of being ship wrecked upon Scylla, a rock opposite.

[2]**Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill (1995), [1995] 1 IR 1; [1995] 2 ILRM 81.** The members of the Supreme Court were Hamilton CJ, O' Flaherty, Egan, Blayney and Denham JJ. Hamilton CJ delivered the decision of the Court.

[3]A table at which food was tasted for poison before serving. In this case the reference relates to the procedure where the President refers a Bill to the Supreme Court for unconstitutionality before such a Bill is enacted and becomes law. Under Article 34.3.3 if such a Bill is subsequently declared valid by the Supreme Court, "No Court whatever shall have jurisdiction to question the validity" of that law.

[4]23 December, 1992. The Fourteenth Amendment of the Constitution Act, 1992 provided in Article 40.3.3 that the right to life of the unborn would not limit freedom to obtain or make available information relating to services lawfully available in another state.

[5] The O' Hanlon theory. See n. 6.

[6] See for instance, O'Hanlon J, writing extra judicially in *Natural Rights and the Irish Constitution,* (1993), ILT 8 and *The Judiciary and the Moral Law,* (1993), ILT 129.

[7] Duncan, *Can Natural law be used in Constitutional interpretation?* Doctrine and life, vol. 45, (1995), at p. 125. As quoted in Whyte, *Natural Law and the Constitution,* (1996), ILT 8 at p. 9.

both subject to the natural law and the legal justification for that subjection. One or other, the natural law or the Constitution, must finally have priority over the other as the ultimate source of legal validity in any potential area of conflict. If indeed the natural law stands above the Constitution, it is necessary to find authority for this proposition outside the Constitution, perhaps within the natural law itself."

The O' Hanlon Theory

As we have already seen, the central issue of the proposed Bill's constitutionality was the matter of natural law and its superiority over referenda that were contrary to natural law (The O'Hanlon theory). Before we consider the Supreme Courts attitude towards this contention, O'Hanlon J's theory will be discussed briefly. For O' Hanlon J[8] "*…the Irish Constitution remains unique among the constitutions of the world*...[because]*…there is a law superior to all positive law, which is not capable of being altered by legislation, or even by a simple amendment of the Constitution itself."*

This being so, the 13th and 14th amendments to the Constitution[9], according to the learned judge, do not have the 'character of law'[10] because they offend natural law. O' Hanlon J then went on to cite a string of cases in favour of this theory, including *McGee's Case.*[11] To this author's mind the choice of *McGee* is an unusual one to be cited in favour of this theory because despite Walsh J' s words that seem to be in support of O' Hanlon J's

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[8] O'Hanlon, *The Judiciary and the Moral Law,* (1993), ILT 129 at p. 130.

[9]O'Hanlon, *Natural rights and the Irish Constitution*, (1993), ILT 8 at p. 10. Here the learned judge asks …("Did the people really realise what they were voting about?) Is it compatible with the Natural Law?" This theory not only applies to referenda but also to any other law or judicial decision.

[10]Per Henchy J, *Precedent in the Irish Supreme Court*, (1962) MLR 544 at p. 550. O' Hanlon J quoted with favour the above sentence on the same point in an earlier article, *Natural Rights and the Irish Constitution,* (1993) ILT 8 at p. 9.

[11] [1974] IR 284.

theory[12], the learned judge, regardless of a Papal Encyclical on the matter[13], still held in favour of the plaintiff.

This theory has been heavily criticised[14], the defects being obvious to this author's mind. The first criticism of O' Hanlon J's theory has already been referred to above. We have seen that the learned judge was of the opinion that the 13th and 14th amendments to the Constitution were not valid because they were, in his opinion, contrary to natural law. Such belief assails the principles of democracy inherent in Article's 27.1[15] and 46[16] of the Constitution.[17]

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[12] According to Walsh J,[1974] IR 284 at p 311, "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 that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority…"

[13] The author refers to *Humanae Vitae,* (1968), in particular paras. 11 and 12 that state "The Church, calling men back to the observance of the norms of natural law, as interpreted by her constant doctrine, teaches that each and every marriage act must remain open to the transmission of life…" and went on to say "We believe that the men of our day are particularly capable of seizing the deeply reasonable and human character of this fundamental principle." As quoted in Murphy, *Natural Law and the Irish Constitution,* (1993), ILT 81 at p. 83.

[14]Most notably by Murphy, *Democracy, Natural Law and the Irish Constitution,* (1993), ILT 81 and Clarke, *The Constitution and Natural Law: A Reply to Mr Justice O' Hanlon,* (1993), ILT 177.

[15] This article deals with the referral of Bills to the Irish People. Article 27. 1 declares that "A majority of the members of Seanad Éireann and not less than one – third of the members of Dáil Éireann may by a joint petition addressed to the President by them under this Article *request the President to decline to sign and promulgate as a law any Bill to which this article applies on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained.* (My Italics).

[16] Article 46. 2. declares "Every proposal for an amendment of this Constitution shall…be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum. Article 46.5 goes on to state that "A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people…"

[17] See Murphy, *Democracy, Natural Law and the Irish Constitution,* (1993), ILT 81. According to Murphy "To claim in a democracy, that the law may not be 'lawful' is a legal fiction of the highest order. It does not contribute in any way to constitutional jurisprudence. Specifically, it is surely not acceptable for him to second guess the will of the people in reaction to, for example, the constitutional amendment on the right to travel by asking? . . . [d]id the people really realise what they were voting about?" *Ibid,* at p. 82.

If this theory was adopted, then the will of the majority would be sidestepped by a 'law' that is not only unwritten but is often the subject of various interpretations.[18] The second point to note is that it is this authors understanding that natural law, contrary to O'Hanlon J's opinion, is not and indeed has never been absolutely superior to the Constitution. As one reads the Constitution, one will note the obvious influence of natural law on constitutional provisions. However, on closer inspection one will note that such influence is limited.

Article 43 provides an example of the subjection of natural law to the Constitution. In the strong language of natural law philosophy, Article 43.1 asserts that "*The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods."* Here we have a provision, clearly in line with natural law tradition, that states the superiority of natural law. However, Article 43.2.1 qualifies this provision. Article 43.2.1 regulates this right by the principles of social justice. Article 43.2.2 also delimits the right to private ownership of external goods '*with the exigencies of the common good*.' However Clarke provides the strongest example of positive law subjecting natural law. According to Clarke[19]

> "…if the rights derived from natural law are given a status which is 'antecedent and superior' to other constitutional rights…they will result in a logical contradiction in our reading of the Constitution because they are inconsistent with Article 28.3.3. Article 28.3.3 implies that emergency legislation which takes advantage of the constitutional immunity from challenge which it provides is superior in the relevant sense to all rights guaranteed by the Constitution. Thus: (i) some rights (i. e. those derived from the natural law) are antecedent and superior to all positive law; (ii) the same rights are not superior to some positive laws (viz. emergency legislation which is immune to constitutional challenge under Article 28."

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[18]Murphy opines that "…the question will always remain: whose natural law?" *Ibid,* the answer to this question for O' Hanlon J was quite simply the Roman Catholic Church's teachings on the natural law.

However, Article 43.1.2 cannot go unmentioned as an example that supports O' Hanlon's theory. This article 'guarantees' that the State will never pass a law that attempts "…*to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property*." Therefore, the State can never abolish the right of property that is inherent in man, by virtue of his rational being (i.e. the general right of mankind to property), although the State is still permitted to restrict the property rights of John Doe for instance, if such restriction is in the interests of the common good.[20] To conclude on the O' Hanlon theory and also to lead back to the discussion on the case at hand "[*o*]*ne suspects that these factors may ultimately lead to some reluctance on the part of the judiciary to adopt this particular corollary of natural law theory."*[21]

The Decision

The Supreme Court was faced with one of two choices. First of all, the O' Hanlon theory could have been accepted. This would herald not only the defeat of positive law but taken to its logical conclusion would also negative the need for a written Constitution[22]. On the other hand the Court could uphold the Bill's constitutionality, reject O' Hanlon's theory and hold that the Constitution, (and not natural law), is the source of all law and that the word of the people by way of referenda is the ultimate decider. In several words the Supreme Court rejected O' Hanlon's theory,[23]

"The Court does not accept this argument."

In doing so the Court added to the grounds of rejection that have already been provided. First of all, by virtue of Article's 5 and 6 of the Constitution:

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[19] Clarke, *The Constitution and Natural Law: A reply to Mr Justice O' Hanlon,* (1993), ILT 177 at p. 178.

[20]For a more in-depth account of property rights, see Casey, *Constitutional Law in Ireland,* (3rd ed.,), (Dublin, Round Hall Sweet & Maxwell Publishers, 2000), chapter 18.

[21]Hogan & Whyte, *Kelly, The Irish Constitution,* (3rd ed,), (Dublin, Butterworths, 1994), at p. 683.

[22] Seeing that all written laws (including the Constitution) would be subject to the unwritten law. Therefore, what purpose would a written Constitution have?

[23] [1995] 1 IR 1; [1995] 2 ILRM 81, at p. 102 of the report,

> "The powers of government therein referred to are exercisable only by or on behalf of the organs of State established by the Constitution and are exercisable only in accordance with the provisions thereof…The Constitution limits, confines and restricts the powers of the State and the organs of State established by the Constitution."

This is not the first time that Article 5 of the Constitution has been referred to as a source of or indeed a limit on natural rights. If one recalls, Hamilton P (as he then was) in *Kennedy v Ireland*[24] opined in relation to the right of privacy that:

> "The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society."

The fact that the State, as recognised by the Supreme Court, is democratic in its construction gave us the first explanation for the rejection of the O' Hanlon theory. If the Court had held otherwise then one could infer that the 13th and 14th amendment (indeed any other referendum passed by the people) was invalid. The second ground for rejecting the O' Hanlon theory was based on Article 15.2.1[25] as restricted by Article 15.4.

This latter provision prohibits the enactment of '*any law which is in any respect repugnant to this Constitution or any provision thereof.'* One should note that it is the Constitution, not the natural law that must be offended before a law is considered repugnant.[26] The Court considered the Articles that affected the judiciary[27] and the oath

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[24][1987] IR 587 at p. 593 of the report. See also Chapter 4 of this work.

[25]"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

[26] [1995] 1 IR 1; [1995] 2 ILRM at p. 103, according to the Court, "These provisions…clearly illustrate the supremacy of the Constitution in so far as the law-making powers of the Oireachtas is concerned." The Supreme Court then went on to discuss the concept of Constitutional supremacy in relation to Article's 26 and 28.

that each judge must take on entering office[28]. The judicial oath demands that each judge must '*uphold the Constitution and the laws',* therefore, how can a judge subject the Constitution to a higher, unwritten law, without breaking the oath?[29] Taken together, all of these constitutional provisions assured the Court that:[30]

> "…all the organs of State, the Oireachtas, the executive and judiciary are subject to the Constitution and the law."

Conclusion

As can be expected, this decision has come under fire from various sources. Chief amongst such criticism are articles by Whyte[31] and Twomey.[32] To what end does this criticism serve. In short none[33]. Whether they like it or not this decision, like all previous references under Article 26, will not be overturned. However, there are deeper issues to consider. The first issue has been touched upon earlier, the matter of democracy. Had

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[27] Articles 34.1 and 35.2.

[28]Article 35.1. However, one should refer to O' Hanlon, *The Judiciary and the Moral Law,* (1993), ILT 129 at p. 131-132, for a differing view of the judicial oath. According to the learned judge "…it does not appear to me to be open to a Catholic judge to keep his head down and hope that the implementation of abortion legislation will never come before him in court, but will be dealt with by one of his colleagues should the need arise. Once the law finds its way onto the statute-book, should that occur, he has to ask himself whether that law is included in the laws which he solemnly and sincerely promised and declared that he would uphold. If it *is* a law, I fail to see how he can reconcile a promise and declaration in those terms with the tenets of his Faith, under which he accepts without qualification the teaching authority of the Church in matters of faith and morals."

[29] For O' Hanlon J, *ibid,* "If he believes, as I do, that any such 'law' would be repugnant to the Constitution and natural law, and therefore null and void, then his conscience can remain clear. He can continue to uphold the Constitution and the laws lawfully made thereunder while refusing to give effect to any attempted legislation which offends against the Constitution and the moral law."

[30][1995] 1 IR 1; [1995] 2 ILRM 85 at p. 104 of the report. The Court also reaffirmed the judicial role in interpreting the Constitution; so long as such interpretation was in harmony with the Constitution's superiority.

[31] Whyte, *op. cit,* n. 7.

[32] Twomey, *The Death of Natural Law? ,* (1995), ILT 270.

[33] Twomey concludes this article by saying "[i]t is to be hoped that history will not remember them [the Supreme Court] as the architects of the death of the natural law." *Ibid.* at p. 272.

Hamilton CJ and his fellow judges chosen the supremacy of natural law over the expressed wish of the people, it would have been a case of the Supreme Court falling on its own sword. However vocal the actual criticism was in the wake of this decision, can one imagine the outburst if an un-elected body of judges held that the word of the people was unconstitutional due to an unwritten and highly subjective 'law'? Indeed, a true case of being caught between Scylla and Charybdis.

To this author's mind it was reality that persuaded the Supreme Court in its decision. It is all too easy to denounce this decision and say that it is anathema to natural law but in reality this is not the case.

True enough, when the natural law and the results of a referendum, (that could be considered contrary to natural law come head to head), natural law loses out, however, natural law and natural rights still play a vibrant role in constitutional interpretation.[34] Judges will continue to implement such rights when the need arises, indeed the Court in the present case felt that it was the responsibility of the judiciary to do so:

> "In addition to administering justice in courts established by law, it is the responsibility of judges of the High Court and the Supreme Court to interpret the Constitution and apply the provisions thereof."[35] *

* This Article is by Ian Walsh

[34] This is recognised by the Constitution Review Group. See Constitution Review Group, *Report of the Constitution Review Group,* (Dublin: Stationery Office, 1996), at p. 249.

[35] [1995] 1 IR 1; [1995] 2 ILRM 85 at p. 106 of the report. The Supreme Court cited with favour the judgment of Walsh J in **McGee v Attorney General [1974] IR 284**, where the learned judge held that in this country it falls ultimately upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior and antecedent to all positive law, or which are imprescriptible or inalienable.