Law as Literature: Illuminating the Debate Over Constitutional Consistency

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Introduction

The complexity of the Irish Constitution, which draws upon the potentially oppositional principles of Christian democracy and liberalism,[1] has often invited debate in legal circles over the appropriate approach to be taken by the judiciary in the development of personal rights. Such debate is particularly poignant in the jurisprudence of unenumerated personal rights, i.e., rights which have been implied as existing in the Constitution due to the judiciary's intertextual references to and incorporation of theocratic natural law. Consequently, some scholarship has been critical of the judiciary's ability to act as an impartial arbiter of justice,[2] but

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[1] *See, generally,* 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, 1988).

[2] *See, e.g.,* D.G. Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press, 2001); J. Cooke, "Implications for the Practising Lawyer" in D. Moloney and M. Robinson (eds.), *The Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments* (I.E.E.L., 1989) "[O]ne of the effects of the Constitution upon the way in which the law is practised in this country has been to introduce an element of indiscipline, looseness and even laziness. For one thing, the Constitution was entirely our own creation and its effects in particular judgments or decisions were not subject to any outside appeal or scrutiny or to comparison with parallel developments elsewhere. Moreover, the code of constitutional law tends itself to general propositions and the making of decisions by reference to broadly-drawn principles …. Most practitioners would, I suspect, acknowledge that the different approach which has been conditioned by the constitutional background in this country produces greater fairness and renders judgments frequently more realistic and compassionate by giving the judiciary an opportunity to be less confined by strict and literal rules of interpretation and of the strait-jacket of procedure. Nevertheless, I think it has also contributed to a loss of the discipline of reasoning that would formerly have been so typical of the common law approach to the arguing of legal issues by reference to precedent. It is relatively rare nowadays in the Irish courts that you see the fully-fledged performance of the intellectual exercise involved in arguing a point by reference to precedent. The disciplined exercise of tracing the development of a particular point by analysing carefully the legal rationale through a long series of cases is not always well received in the modern Irish court. Your typical High Court action will frequently dispose of the legal argument by a reference to one or two older reported cases supplemented by a jump to one or two recent and, preferably, unreported judgments." *See also* G. Hogan, G. Whyte (eds.), Kelly's *The Irish Constitution* (3d ed.) (Dublin, Butterworths, 1994) at p. 5: "One needs to emphasize, however, that

interestingly, little academic criticism is directed at these fundamentally contradictory philosophies of the Constitution, which could arguably be seen as a microcosm of the confusion of Irish society as a whole and its indecisiveness about political identity, morality, and religion. Therefore, rather than focus on the inadequacies of the judiciary as an institution, this essay will direct its scrutiny to methods of interpretation of the Irish Constitution itself. By using post-modern literary theory to review the basis of unenumerated personal rights in the constitutional text, it is hoped to demonstrate that although subjectivity is an unavoidable reality in constitutional adjudication, post-modern literary theory (such as deconstruction) may be used to facilitate more reasoned justifications for controversial decisions based upon natural law – thus lending an air of legitimacy to the process.

I. Problems of Constitutional Interpretation: the Unenumerated Rights Doctrine

In order to appreciate the Irish Constitution's contradictory nature, it is necessary to first explore the background of the document and of the development of the unenumerated rights doctrine in Irish constitutional law, as well as the basic interpretive approaches that have been put forth by the legal establishment thus far and their inherent weaknesses.

In 1937, the Irish electorate ratified a new Constitution (*Bunreacht na hÉireann*) which has been described both as "a personal statement of the philosophy of Eamon de Valera"[3] and (for its time) as "a fairly successful union of democracy and

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the courts have shown no consistency with regard to any particular approach [to constitutional interpretation] and this gives rise to the suspicion that individual judges are willing to rely on any such approach as will offer adventitious support for a conclusion which they have already reached."

[3] Keogh, fn. 1 *supra* at p.66.

Catholic teaching."[4] Although de Valera worked with a small team of civil servants, as well as Catholic clergy, it was still his document:[5]

> In 1937, de Valera was engaged in a politico-psychological exercise. He was claiming to provide the Irish people with their *own* Constitution free of imperial symbols and accretions. Kevin O'Higgins had said in the Dáil on 20 September 1922: 'It [the Constitution] contains the trappings, the insignia, the fiction and the symbols of a monarchical institution, but the real power is in the hands of the people.' Trappings, insignia and symbols were very important in Irish politics. … De Valera sought to introduce his own 'supportive symbolic system' in the guise of a new Constitution.[6]

After ratification, the 1937 Irish Constitution enjoyed a sort of "golden period" during which the dominant political spheres of Catholic and liberal democratic thought which fuelled it did not appear to clash, due to a strong nexus between civil and religious society; this was the Ireland of de Valera.[7] But since the 1960's, and the political and social instability that decade ushered in, the relevant forces of Church and State as seen in the Irish Constitution have been challenged as to their ability to interact for the benefit of society on often divisive moral and political issues.[8] Consequently, the Irish Constitution's "supportive symbolic system" has been challenged as liberal ideology pushes for greater influence in spheres where the Christian (i.e. Catholic) influence has historically been dominant – and at odds with liberal thought.

Along those lines, there is arguably no section of the Irish Constitution more complex and controversial than the Articles which enumerate individual rights, i.e., Articles 40-44. Article 40 in particular, entitled "Personal Rights," has been the subject of contentious debate since the seminal 1965 Supreme Court decision *Ryan v. Attorney*

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[4] *Ibid.* at p.4.
[5] *Ibid.* at pp.11-25, pp.66-67.
[6] *Ibid.* at pp.67-68.
[7] *Ibid.* at p.70.
[8] *Ibid.* at pp. 70-71

General.[9] In *Ryan,* the Irish Supreme Court affirmed the High Court's ruling that the plaintiff, Gladys Ryan, had an unenumerated, personal right to "bodily integrity." The construction of this right came from the High Court's analysis (under Kenny J) that the few personal rights mentioned specifically in Article 40.3.2 (protection of life, person, good name and property rights) were not an exhaustive list, as evidenced by the overall context and the phrase "in particular" in 40.3.2, which implied the existence of other rights.[10]

The controversy of *Ryan* lay in one of the sources from which Kenny J deduced that the plaintiff had an implied, unenumerated right to "bodily integrity" – the papal encyclical *Pacem in Terris*. Kenny J announced, apparently without any need for explanation, that personal rights stem from the "Christian and democratic nature of the State."[11] Considering that Kenny J found certain "Christian" and "democratic" rights to be already enumerated in the Constitution,[12] his decision to rely upon supra-textual, Catholic teaching (i.e., *Pacem in Terris*) to enumerate other, formerly unrecognised

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[9] [1965] IR 294.

[10] Article 40.3.1 and 40.3.2 read as follows: "40.3.1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. 40.3.2. The 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." According to the Constitution Review Group, "A comparison of the language of Article 40.3.1 with that of 40.3.2 suggests that the drafters never intended that the list of rights expressly enumerated by the Constitution would be exhaustive. Since the decision of Kenny J in *Ryan v. Attorney General* [1965] IR 241, the courts have recognised as many as twenty 'unenumerated' personal rights which [fail] to be predicted in Article 40.3.1. These rights include the right to earn a livelihood, the right to privacy and the right to found a family. Some of the rights protected under this rubric might well be considered to be but extensions of rights necessarily implied by other provisions of the Constitution (for example freedom to communicate might well be thought to be an aspect of free speech in Article 40.6.1.i), but it is difficult to find obvious textual justification in the case of some of the other unenumerated personal rights (for example the right to privacy). While the development of the unenumerated rights doctrine has in many respects proved to be beneficial, unease has been expressed in many quarters that the language of Article 40.3.1 – which simply enjoins the State to respect and, as far as practicable, by its laws to vindicate the 'personal rights' of the citizen – offers no real guidance to the judiciary as to what these personal rights are. The experience of thirty years or so since *Ryan* has demonstrated that there does not appear to be any objective method of ascertaining what these personal rights are." Constitution Review Group, *Report of the Constitution Review Group,* (Dublin, Stationery Office, 1996) at pp.214-215.

personal rights was a bold judicial move. Kenny J's bold move set the stage for Supreme Court reliance upon theocratic natural law doctrine to list additional unenumerated personal rights for the next several decades.[13]

It stands to reason that since Kenny J's decision was not based upon the Constitution itself, he drew from his law-making authority as a member of the judiciary. Although a definition of judicial activism would probably include the requirement that the judge strike down all or a portion of existing law or government action as unconstitutional,[14] Kenny J's decision was activist in the sense that he made a deliberate choice to reject the *status quo* of strict reliance on the constitutional text in exchange for reliance upon a papal encyclical published during the course of argument in the *Ryan* case,[15] in order to reach a more "just" result. In the years after *Ryan* and apparently following its lead, the Irish Supreme Court adopted an approach to constitutional interpretation, particularly the area of unenumerated personal rights, by invoking natural law.[16]

Natural law has unclear origins as far as its ultimate source, and its description is equally debatable. It is a morally based concept of law against which man-made legal

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[11] *See* G. Hogan, "Unenumerated Personal Rights: Ryan's Case Re-Evaluated" (1990-1992) 25-27 *Irish Jurist* 95 at p.104.
[12] *Ibid.* at p.105.
[13] It was left to subsequent cases brought before the Irish Supreme Court, then, to develop more unenumerated rights, which to date include: the right not to be tortured or ill-treated; the right not to have health endangered by the State; the right to earn a livelihood; the right to marital privacy; the right to individual privacy; the right of access to the courts; the right to legal representation on criminal charges; the right to justice and fair procedures; the right to travel within the State; the right to travel outside the State; the right to marry; the right to procreate; the right to independent domicile; the right to maintenance; the rights of an unmarried mother with regard to her child; the rights of a child; and the right to communicate. As noted by the Constitutional Review Group, "the identification of unenumerated rights has occurred on an *ad hoc* basis as required by the facts of particular cases. … Thus, the right to marital privacy was identified long before the general right to individual privacy." Interestingly, the Review Group concludes that "the process whereby unenumerated rights have been identified to date has not been based upon a coherent theory of fundamental rights." Constitution Review Group, fn.10 *supra* at p.247.
[14] Morgan, fn. 2 *supra* at 7.
[15] Hogan, fn. 11 *supra* at p.106.
[16] *Ibid.* at p.108; *see also* fn. 10 *supra.*

norms can be compared, and sometimes be found wanting.[17] Thus, it can be referred to as a "higher law," seen either with distinct revelations or with metaphoric meaning about the moral status of law, depending upon the individual.[18] Yet despite the watershed decision of *Ryan,* the Irish judiciary's subsequent application of natural law has at times created inescapable conflict with positive law in cases involving unenumerated rights.[19] Indeed, considering that there is more than one accepted historic tradition of natural law,[20] with differing approaches on certain moral issues, its use begs the question of which version should rightly be applied in a given case.[21]

Perhaps it is the legal establishment's limited understanding and application of natural law, which can at least in part be allocated some of the blame for the historic inconsistency in adjudicating issues involving unenumerated rights.[22] Certainly, involving literary theory as a tool of interpretation of natural law would do little else but assist and clarify the judiciary's use of natural law. The Supreme Court has used a variety of methods of constitutional interpretation apart from natural law on the issue of personal rights, including: the historic approach, the literalist approach, the "harmonious interpretation" approach and the "broad" approach.[23] Yet for purposes of unenumerated personal rights, natural law has been the main influence in their

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[17] B. Bix, *Jurisprudence: Theory and Context* (London, Sweet & Maxwell, 1996) at p.67.
[18] *Ibid.*
[19] *See, e.g.,* D. Clarke, *"Natural Law and Constitutional Consistency,"* in Quinn, Ingram and Livingstone (eds.), Justice and Legal Theory in Ireland (Dublin, Oak Tree Press, 1995).
[20] *See* G. Barden, *"Two Versions of Natural Justice,"* in Quinn, Ingram and Livingstone (eds.), Justice and Legal Theory in Ireland (Dublin, Oak Tree Press, 1995).
[21] Varying natural law traditions are founded upon basic principles which are generally unchanging and immutable. In practice, these principles are applied subjectively by judges and give us "moral law," which can change over time depending upon a judge's subjective experience. Thus, depending upon which principles one focuses upon (as well as the cultural frame of reference of the judiciary), the resulting moral judgment can vary significantly.
[22] *See, e.g.,* Morgan, fn. 2 *supra* at pp.99-102 (theorising that the time of literal interpretation of the Irish Constitution "will no longer serve;" he posits that the new world of constitutional review requires a more consistent and principled purposive approach to constitutional interpretation, as opposed to the courts' historic tendency to bounce from excessive literalism in some decisions to purposive decisions in others which do not seem to follow any consistent principle).

development.[24] And, as set forth *infra,* natural law's "subjective" nature appears to certain critics to be little more than a pretext for the judiciary to justify its decisions not based upon positive law. In an almost palpable response to this criticism, the Supreme Court has distanced itself from natural law whilst remaining dependent upon its principles (in varying degrees, depending upon the makeup of the Supreme Court and the case at hand) to assert basic principles of fairness and justice.

For example, in the *Abortion Information* case,[25] the Supreme Court essentially distanced itself from theocratic natural law when the argument was made that under the Constitution, natural law was "antecedent and superior to positive law" and as such was superior to any constitutional amendment to the contrary – here, the right to information on legally available abortions (created by constitutional amendment), which conflicted under theocratic natural law with the right to life of the unborn. In essence, natural law was denied as ever having served as a means of identifying unenumerated personal rights, despite glaring precedent to the contrary (such as *McGee* and *Norris*).[26] Even though the case highlighted the potential for paradox in the rigid following of theocratic natural law, there are indications (both prior to and after the *Abortion Information* case) that the Irish Supreme Court may be gravitating towards a less Catholic and more "eclectic" use of natural law traditions. Without

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[23] G. Hogan, G. Whyte (eds.), fn. 2 *supra* at xcviii-cxvi.
[24] *Ibid.* at cxviii.
[25] *In Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 2 ILRM 81.
[26] *McGee v. A.G.* [1974] IR 284, *Norris v. A.G.*[1985] IR 36; *see also DPP v.Best* [2000] IR 36. *Best* is particularly significant in that in being handed down after the *Abortion Information Bill* case, the Supreme Court revived its natural law analysis therein and thus indicated that natural law jurisprudence is still applicable to the identification of unenumerated personal rights. As will be discussed further *infra*, the Supreme Court's analysis in the *Abortion Information Bill* case, although outwardly claiming to be independent of natural law, does appear to adopt a sort of natural law test, which has been termed "relative natural law". *See generally* S. Mullally, *"Searching for Foundations in Irish Constitutional Law,"* (1998) Irish Jurist 333.

acknowledging it as such, such an observation was made by the Constitution Review Group in its report on the Constitution in 1996.

The Constitution Review Group (charged with reviewing the need for constitutional reform in the mid-1990s and composed of prominent names in the legal field, hereinafter "CRG") argued that "[t]he main problem associated with natural law as a guide for interpretation is the difficulty of determining its content: 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. Humanists and different religious denominations differ in their interpretation of the content of natural law and the nature and extent of the duties which flow from it."[27] The CRG cited in particular the comment from Walsh J in *McGee*:

> 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 CRG was particularly critical of the development of the natural law doctrine in light of the perceived lack of guidance from other legal sources of personal rights. The "Christian and democratic nature of the State" test developed in *Ryan,* for example, was criticised for not being sufficiently rooted in the Constitutional text.[28] The CRG made similar criticisms of more recent Supreme Court case law which developed differing constitutional guidelines for the judiciary in its identifications of personal rights, particularly the concepts of "prudence, justice and charity," the dignity

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[27] Constitution Review Group, fn. 10 *supra* at p.251.

[28] The Constitution Review Group noted that there are very limited references to either the "Christian" or "democratic" nature of the State in the Constitution. The Constitution refers to certain "democratic" rights such as the right to vote, the holding of elections and the accountability of the Government to elected members of the legislature. Constitutional references to the Christian nature of the State are likewise limited; Article 6 mentions the powers of Government derived "under God" but

and freedom of the individual, and the common good.[29] Interestingly, however, the CRG only credits the *Ryan* test as overlapping in part with natural law; these subsequent tests are interpreted to be tests made by the judiciary as a supplement to the perceived shortcomings of natural law.[30]

The CRG concluded from its review of the development of unenumerated personal rights doctrine, with its aforementioned legal tests, that the wording of Article 40.3.1 was "unsatisfactory" as it was unable to give the courts sufficient guidance for the identification of personal rights and consequently forced the courts to resolve major social policy issues which, it opined, were more appropriately (under the separation of powers doctrine) left to the legislature.[31] Despite their acknowledging that the expansion of rights under the unenumerated rights doctrine was a positive development, the overall recommendation was that Article 40.3.1 should be amended to create an exhaustive list of personal rights, thereby curbing judicial discretion on the matter and a perceived usurping of legislative authority.[32]

This recommendation would effectively put a stop to the ability of the judiciary to make any further expansion under the unenumerated rights doctrine and place the

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simultaneously provides under Article 44 for freedom of religion and bars the State from endowing any religion. *Ibid.* at p.251.

[29] These tests are in particular derived from: the *Abortion Information* case*, McGee,* and *Norris*. *Ibid.* at p.250.

[30] *See* Constitution Review Group*, Ibid* at pp.250-251

[31] *Ibid.* at pp.254-255. "One approach to this issue would be to accept unreservedly that the courts are entitled to decide difficult issues of social policy where these derive from the determination of the personal rights of individuals, regardless of the fact that this means that judges have very wide discretion in interpreting the Constitution. Such an approach, which could be reflected in an amended wording of Article 40.3.1, would benefit individuals who might be marginalised by the democratic process and whose personal rights might have been somewhat neglected. Major difficulties make the attribution of such a role to the courts unacceptable. It would confer a role on unelected judges quite different from that which the Constitution now ordains." Significantly however, the Review Group make no formal citation to the portions of the Constitution which support this assertion.

[32] *Ibid.* at p.259.

legal identification of personal rights squarely under the rubric of positive law.[33] The CRG justifies this drastic recommendation in part by claiming that United States constitutional jurisprudence on personal rights has been similarly limited by the language of its Constitution.[34] And, although the CRG acknowledges that "some flexibility and responsiveness in the identification of further rights would be lost" due to the recommended changes, the changes are put forth as creating "greater certainty" and curbing "excessive judicial discretion."[35]

The issues set forth by the CRG were similarly expressed in an academic debate between Gerard Hogan and Richard Humphreys on the issue of how the Constitution should be interpreted (particularly with regard to unenumerated rights), centred in part on the issue of the natural law doctrine.[36] Hogan argued that the Constitution should be interpreted narrowly, using only principles which can be found within the four

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[33] The Constitution Review Group's recommendation consists of laying out a number of express personal rights, consisting of: rights relating to life and health, rights relating to personal freedom, rights relating to family life, the rights of natural parents, children's rights, rights relating to privacy, rights relating to the administration of justice, the right to work and earn a livelihood, freedom of movement and the right to travel, the rights of aliens, and rights against discrimination on grounds of sex, race, colour, language, religion, etc. These rights are an amalgam of rights taken from the European Convention on Human Rights (not formally adopted by Ireland into Irish domestic law), the International Covenant on Civil and Political Rights, and currently recognised unenumerated rights. *Ibid.* at pp.258-263.

[34] "Despite espousing natural rights thinking at an early stage, the US Supreme Court has taken the position that the only rights which courts can legitimately recognise are those mentioned, explicitly or implicitly, in the written Constitution. The ninth amendment to the United States Constitution provides: 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People.' This provision has obvious similarities to Article 40.3.1. While there have been some attempts to interpret the ninth amendment in a very broad fashion, in more recent years the US Supreme Court has limited constitutional rights to those which were expressly or by implication mentioned in the Constitution itself … ." *Ibid* at p.256. However, in light of recent U.S. Supreme Court decisions, such as *Lawrence v. Texas,* (2003) 123 S. Ct. 2472, the Review Group's assertions here would appear incorrect.

[35] *Ibid.* at p.258.

[36] This debate was instituted in a series of articles between Gerard Hogan and Richard Humphreys: Gerard Hogan, *"Constitutional Interpretation,"* in Litton (ed.), The Constitution of Ireland 1937-1987 (Dublin, 1988), pp. 173-191; Hogan, *"Unenumerated Personal Rights: Ryan's Case Re-evaluated"* (1990-1992) 25-27 Irish Jurist 95; Richard Humphreys, *"Constitutional Interpretation"* (1993) *DULJ* 59-77; Humphreys, *"Interpreting Natural Rights"* (1993-1995) 28-30 Irish Jurist 221.

corners of the text (i.e., positive law).[37] Humphreys opposed this literalist approach and posited that extra-constitutional principles should guide the Court's decision-making process, particularly in the form of secular natural law theory.[38]

Hogan's thesis, sounding in formalism,[39] has the aim of attempting to present an "objective"[40] methodology of constitutional interpretation, thus guaranteeing some manner of judicial consistency and preventing arbitrary lawmaking by the courts. For all intents and purposes, he argues, being strictly bound to the constitutional text would accomplish this end.[41] As to the inevitable questions on how the courts should then handle the fact that the presently recognised unenumerated personal rights are not part of the constitutional text, Hogan agrees with the CRG's recommendation that they should be added to the Constitution by referendum.[42]

Hogan's analysis stems from Kenny J's decision (affirmed by the Supreme Court) in *Ryan v. Attorney General;*[43] in particular he focuses upon the test derived from it and expresses doubts about whether it can be objectively applied and related to the actual text of the Constitution. He further posits that the natural law doctrine, applied since *Ryan,* is relativistic and unclear, and as such provides no guidance to

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[37] Kavanagh, A., *"The Quest for Legitimacy in Irish Constitutional Interpretation"* (1997) 32 Irish Jurist 195 at p.196.
[38] *Ibid.* at p.196
[39] *See* G. Quinn, "*Reflections on the Legitimacy of Judicial Activism in the Field of Constitutional Law,"* (Winter 1991) Dlí, 29 at p.31 (describing formalism).
[40] For the purposes of this essay, it is best to consider the distinction of "subjective" and "objective" as descriptive of one's relationship to society: "It is easy to be confused by the terms 'subjective' and 'objective,' because they have many different meanings. Social life is objective not because it is indisputably true or indisputably real, but because it is shared and structuring. The object is what constitutes the subject. Similarly, by 'subjective' I do not mean 'false' or 'contestable' but rather 'individualised' and 'experiential.'" J. Balkin, *"Ideology As Constraint,"* (1991) 43 Stan. L. Rev. 1133 at p.1143.
[41] Hogan, fn. 11 *supra* at p.104.
[42] *Ibid.* at 116.
[43] [1965] IR 294.

judges.[44] In sum, Hogan would do away with all supra-textual guiding principles altogether as a trade-off for judicial predictability and consistency.

Humphreys alternatively, agrees with the argument put forward by Costello J. that a judge "may be a legal positivist and have no use for natural law concepts, but if the Constitution (as it does) explicitly recognises the existence of rights anterior to positive law these jurisprudential views must yield to the clear conclusions which are to be drawn from the constitutional text."[45] Yet the most fundamental problem with Hogan's approach, as Humphreys points out, is that the Constitution is a document riddled with textual contradictions. Humphreys opines that it is inevitable for the Constitution to have ambiguities and for the judiciary to be in a position where a judgment call must be made; moreover, he sees the very ambiguities inherent in the drafting of the Constitution as authorising that judgment call.[46] It would seem that, contrary to Hogan's argument, the moral principles referred to in the Constitution are too fundamental to its meaning to simply ignore.

Both Humphreys and Hogan appear to agree on one key point: theocratic natural law as a methodology is flawed due to the fact that, as Hogan puts it, "the nature or extent of [it] is a matter of considerable dispute … indeed, this is almost acknowledged by [Walsh J in *McGee v. A.G.*] when he states that the judges must interpret the natural law by reference to *their* ideas of prudence, justice and charity."[47] Humphreys attempts to remedy the problem of the perceived relativistic nature of the natural law doctrine, however, by arguing that international law has created a secular

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[44] Hogan, fn. 11 *supra* at p.108.
[45] Humphreys, *"Interpreting Natural Rights,"* fn. 36 *supra* at p.222.
[46] *Ibid.*
[47] Hogan, fn. 11 *supra* at p.110.

natural law with generally recognised standards and rights.[48] Interestingly, however, Humphreys does not consider the possibility that *both* secular and Christian traditions of natural law could be compared and analysed, separately and/or jointly, with respect to their underlying principles. And, more significantly still, neither critic considers the possibility that the perceived inconsistencies in the application of natural law have less to do with natural law than with the analytical manner in which it has been applied.

The resulting predicament of natural law in Irish jurisprudence, then, is that there remains a perceived crisis in the nature of judicial opinions on unenumerated personal rights because their legal basis in natural law is seen as "inconsistent" itself. The argument appears to be made by critics like Hogan and Kelly (and even Humphreys) that judicial inconsistency arises when constitutional interpretation comes from an abstract, supra-textual source such as theocratic natural law. However, both from the perspective of literary theory in general, and from a closer critique of the underlying assumptions Hogan and the CRG make in arguing that positive law, so to speak, reins in the judiciary, it becomes clear that the problem is not so much natural law or positive law – or even a powerful judiciary – so much as it is a failure of the judiciary to *interpret the law.*[49] As will be explained *infra*, a deconstructionist analysis of natural law, which bears upon the underlying principles of natural law moral thinking, would lead to more reasoned (and therefore disciplined) judgments.

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[48] Humphreys, *"Interpreting Natural Rights,"* fn. 36 *supra* at p.226. A similar concept is explored by the Constitution Review Group, which opines that the Irish Constitution could (as other European countries have) adopt the European Convention on Human Rights into its domestic law as a solution to the perceived shortcomings in the development of personal rights in Irish constitutional law. *See* Constitution Review Group, fn. 10 *supra,* at pp.259-263.

[49] This point overlaps somewhat with the critique made by John D. Cooke, fn. 2 *supra.* Cooke seems to name the culprit, in that courts have become "lazy" in their analysis and have thus brought into question the legitimacy of judgments, but he wrongly attributes it (as other Irish critics) to a failure to adhere to positive law principles such as the doctrine of precedent. As asserted *supra,* the quality of analysis reflects upon the apparent legitimacy of a judgment more so than any alleged institutional weakness in a legal tradition.

II. Post-Modern Literary Theory and Constitutional Consistency

From the standpoint of constitutional interpretation, there exist both "interpretivist" and "non-interpretivist" perspectives. Interpretivism is known as a text-based approach, whereas non-interpretivism is, consequently, a non-text-based approach. Interpretivism is concerned with taking meaning from the four corners of a text, and has two major variants. Literalism, as it suggests, consists of taking a text literally; intentionalist analysis consists of attempting to determine the author's intended meaning.[50] Non-interpretivism also has two major variants: one being a search outwards from the text to determine its underlying theory or theories, the other being a bold step away from the theoretical commitments of the text toward subjective values which are either resonant with society at large or with the judge personally.[51]

In the sense that it seeks to present the judiciary with a structured, methodological approach to analysing difficult cases, interpretivism holds itself out as an "objective" approach to textual interpretation.[52] Conversely, the non-interpretivist approach is an openly "subjective" approach to interpretation, in that it relies more upon the reader's individual social experience, values and political views to reach conclusions about the meaning of the text. But one should not make the errant assumption that one is truer to the "real" meaning of the constitutional text than the other: "[w]hat distinguishes interpretivists from non-interpretivists … is not the different degree of fidelity to the text, but rather the type of adjudicative method they choose in order to interpret it. Both interpretivists and non-interpretivists are concerned to elicit a meaning from the text, but each prefers different ways of

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[50] *See* Quinn, fn. 39 *supra* at p.31.
[51] *Ibid.*

achieving this goal."[53] Unfortunately, this point seems lost on many who, like Hogan and the CRG, equate "objective" methods with legitimacy and the Rule of Law.[54]

Interestingly, both Hogan and Humphreys, and indeed other Irish theorists, have striven for structured, "objective" methodological approaches to the constitutional text, but each has fallen short in different ways. Hogan's interpretivist approach, advocating strict reliance on the literal and historical meaning of the text, is incapable of providing a complete objective structure for the judge, since, as Humphreys points out, the Constitution is a text replete with contradictions which can not be adequately resolved by interpretivist methods. Even relying upon a strict literal approach is, from a practical standpoint, impossible considering that a simple text can be read to mean different things.

Humphrey's approach is quite fascinating in that he attempts to utilise a non-interpretivist method (secular natural law as embodied in human rights standards) to achieve his "objective" approach and lend legitimacy to the judiciary's consideration of moral issues. As creative as the theory is, however, it avoids the basic problem that

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[52] *Ibid.*

[53] Kavanagh, fn. 37 *supra* at p.202.

[54] The concern with adhering to the Rule of Law is characteristic of the interpretivist viewpoint, which envisions that in a difficult case the court could (rightly in their view) decide not to act at all invoking democratic theory as a justification for non-activism. Under the Separation of Powers doctrine a court could rationalise its failure to strike down legislation if to do so would be in its view an antidemocratic act. Contrast this view with the non-interpretivist approach which would choose to adhere to the underlying spirit of the constitutional text and act to expand old rights or create new ones. *See* Quinn fn. 39 *supra* at p.33. As to the interpretivist approach, it is important to note that in trying to reign in the courts' discretionary powers in difficult cases, Hogan and like-minded critics would likely bring about the anti-democratic result they sought to avoid: such a scenario would play out in situations where, due to an imposed methodology of interpretation, the court would be unable to strike down legislation unsupported by the public or motivated against an underrepresented group in society. Indeed, such a scenario could have occurred in the *Abortion Information* case. The Irish Supreme Court was faced with striking down a constitutional amendment added by referendum (a clearly undemocratic act) based upon the abortion bill's direct conflict with principles of theocratic natural law. Although Hogan would favour doing away with natural law, the power of the example should not be lost: any one methodology will inevitably impose interpretive limitations on the judiciary and create previously uncontemplated problems. Moreover, limiting the judiciary to one prescribed methodology raises serious questions as to the doctrine of the separation of powers and whether the courts would ever have the authority to act in a countermajoritarian manner.

morality (and hence moral law) is subjective in nature. Thus, Humphreys falls into the same logical trap which Hogan falls into: that morality and moral issues in law, despite their being inherently subjective in nature, could somehow be transformed into objective, immutable values.

It does not follow from this discussion that Hogan's or Humphrey's approaches to constitutional interpretation are not legitimate or that they do not present practical use. What it does point out is that it is not possible to formulate a methodology of interpretation which ensures consistent consideration of morality in its relation to the law.[55] More importantly, the debate shows that some element of subjectivity is inevitable in the difficult case[56] – and, arguably, it is necessary if constitutional law is to keep pace with the organic nature of politics and society.

In American legal circles in particular, various schools of legal thought have reached the same basic conclusion, albeit in different ways. Those theorists who seek social advances through the law have often championed novel approaches to constitutional interpretation as a means of raising awareness of social injustices and logical inconsistencies in the law. The American Realist movement, for example, espoused the basic premise that the personal experiences and ideologies of the judiciary had as much or more to do with its decisions as the Rule of Law.[57] With the benefit of hindsight, it is possible to draw unmistakable parallels between Structuralist

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[55] *Ibid.*

[56] "Why make the move to non-interpretivism at all? One pat answer is that the text itself forces us onto theory. John Hart Ely makes that point under U.S. constitutional law. … Another answer is that one is entitled to appeal to underlying theories and values not simply because the text moves us to do so but because these theories are as much a part of constitutional 'law' as are the norms actually expressed therein." Quinn, fn. 39 *supra* at p.33.

[57] J. Balkin, *"The Hohfeldian Approach to Law and Semiotics,"* (1990) 44 U. Miami L. Rev. 1119 at pp.1123-1124.

theory and the system of analyses employed by certain Realist writers.[58] Although it is not likely that Realists purposely analysed case law with Structuralist principles in mind, Karl Llewellyn's technical analysis of the legal system[59] is an example of the natural progression of academic thought in the early twentieth century towards an endorsement of Structuralism's basic principles.[60]

Structuralism as a movement is difficult to characterise in a straightforward manner. In general terms, it can be said that:

> [a]t the heart of the idea of structuralism is the idea of system: a complete, self-regulating entity that adapts to new conditions by transforming its features while retaining its systematic structure. Every literary unit from the individual sentence to the whole order of words can be seen in relation to the concept of system. In particular, [one] can look at individual works, literary genres, and the whole of literature as related systems, and at literature as a system within the larger system of human culture.[61]

Ferdinand de Saussure, a Swiss linguist, was responsible for the development of key tools of structural analysis.[62] In Saussure's view, the system of language was the

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[58] *See generally* Balkin *Ibid.*

[59] Karl Llewellyn, an American Realist, wrote that "the goal of technical study is better rules for decision which will make unnecessary much of the elaborately two or seven-faced techniques now current in our efforts to make case-to-case sense out of jumbled rules. The goal of technical study is thus the reduction of its own field of operation. Not its elimination; for rules of law fully plain to every plain man are a will-o'-the-wisp. But confusion, expense, delay, uncertainty, and too frequent injustice in outcome are in most important measure a reducible fruitage of our present inadequate techniques of rules. Reduction, moreover, turns on such technical results as can be give wide democratic appeal at least within the crafts. The results must work out into a form readily communicable, readily grasped. But if the present prospect holds, approach by way of seeing the going institution whole is leading to precisely that. The synthesis which seems ahead seems likely to be simple, because it will rest four-square upon law's bedrock, and will not budge from that." K. Llewellyn, *My Philosophy of Law* (Boston, Boston Law Co. 1941).

[60] J. Balkin, *"A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason,"* at http://www.yale.edu/lawweb/jbalkin/articles/tpoics1.htm; R. Scholes, *Structuralism in Literature: An Introduction* (New Haven, Yale University Press, 1974) at 1-2 ("The last half of the nineteenth century and the first half of the twentieth were characterized by the fragmentation of knowledge into isolated disciplines so formidable in their specialization as to seem beyond all synthesis. … Structuralism … is a response to the need expressed … for a 'coherent system' that would unite the modern sciences and make the world habitable for man again. … [It] is a methodology which is seeking nothing less than the unification of all the sciences into a new system of belief.")

[61] Scholes, fn. 60 *supra* at p.10.

[62] *Ibid.* at p.13.

central focus of linguistic study; the language system is a social product and is therefore conventional.[63] Thus, "[i]n speaking English we have an infinite number of potential utterances at our command, but these are based on a finite number of words and grammatical relationships. And these words and relationships are aspects of a single system."[64] Saussure theorised that no one could understand a language without also understanding its structural system (applying this principle to the study of literature leads to the conclusion that no work of literature can be meaningful unless it is seen in the context of the literary system into which it fits).[65]

Perhaps more significant are the tools of language analysis which Saussure developed. The fundamental unit of linguistic structures was defined as the "sign," which consisted of two aspects: the signifier (a word sound or image in writing) and the signified (the concept or thing envisioned).[66] Significantly, Saussure maintained that the relationship between the signifier and the signified was completely arbitrary: this is seen in the fact that different languages have different signifiers to represent the same signified (e.g., the concept of a tree has different signifiers in different languages, such as "дерево" in Russian or "arbor" in Latin, yet each signifier has no logical connection to the signified idea or concept). Saussure theorised that the study of signs and sign systems can lead to a deeper knowledge of humanity and the systems in which they live.[67]

Structuralism argued against human autonomy. The reasoning was that people, limited to their society and understanding of language, were merely products of a larger social system with predetermined human social roles, manners of

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[63] *Ibid.* at p.14.
[64] *Ibid.* at p.14
[65] *Id.* at pp.14-15.
[66] *Ibid.* at p.15.
[67] *Ibid.* at p.16.

communication, and understanding.[68] According to Structuralist views, people were not capable of stepping back and viewing society objectively because they were part of its structure and were, in fact, its vessels or instruments.[69] Thus, according to Structuralist views, people were incapable of making decisions beyond that which they were socialised to make, and were often not even aware of their lack of freedom in making the socially predetermined choice. Certainly, the parallel between Realist criticism of the judiciary and Structuralist social theory reflects a close corollation.

Deconstruction developed as an impassioned post-modernist reaction to the rigid uniformity of Structuralism, a key influence being the French philosopher Jacques Derrida.[70] Derrida and other deconstructionists argued against the Structuralist concept of universal, fixed structures of meaning, believing instead that:

> structures of social meaning are always unstable, indeterminate, impermanent and historically situated, constantly changing over time and accumulating new connotations. But these criticisms didn't challenge the idea that individuals were constructed by larger social and linguistic forces, and deconstructionists didn't dispute that individuals were not fully in control of the forces of social and linguistic meaning.[71]

The literary application of deconstruction thus focused upon pointing out the ambiguities and relativity of meaning in a given text, and as such presented no obvious benefit to the legal theorist.[72]

Yet deconstruction held special appeal to those involved in the Critical Legal Studies movement (CLS). CLS argued that judges and the legal system in general were bound by social conventions and that decisions were made within those constraints. Moreover, deconstruction's methodology of taking apart theories and applications to

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[68] J. Balkin, *"Deconstruction's Legal Career,"* at http://www.yale.edu/lawweb/jbalkin/articles/deccar1.htm.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*

expose underlying meaning appealed to CLS for the purposes of showing that certain doctrines or arguments were unjust or arbitrarily chosen.[73] CLS in particular adopted the notion that all normative concepts are based upon unresolvable conflict which can be deconstructed, thus exposing the competing forces at play.[74] Thus, any normative concept which has developed over time has consequently displaced a competing normative concept, which through deconstructive analysis can be brought to light. Morevoer, CLS espouses the view, as does deconstructionism, that language is indeterminate and that finding fixed, timeless meaning therein (such as the true legislative intent of a statute) is a hopeless exercise.[75]

In reviewing the preceding descriptions of American scholarship's use of modern literary theory in its criticism and analysis of the legal establishment, it should be clear that these movements place great emphasis upon the unavoidable role of subjective experience in adjudication. These schools of thought sought to confront this reality openly, assess the nature of human subjectivity, and illustrate how an awareness of subjective understanding could effect progressive social change.

But it nevertheless appears that the illusory principle of "objectivity" is a key reason that modern literary theory is not regularly employed as a means of interpreting the constitutional text (and especially for purposes of this thesis, in Ireland). Basic misconceptions are commonly made about literature and what it has to offer law as a discipline: firstly, that it is a form of high consumption or mere aesthetic pleasure; and, secondly, that it is an exercise in 'style' over substance of a text.[76] For example, in his 1993 article "Constitutional Interpretation," Richard Humphreys comments that:

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[72] *Ibid.*
[73] *Ibid.*
[74] G. Schultz, *"Statutory Deconstruction: An Examination of Critical Legal Studies in Context*," (1996) 26 Cumb. L. Rev. 459 at p.491.
[75] *Ibid.* at p.490.

"Pondering an infinity of interpretative choice is a most pleasant exercise, and one which may happily be engaged in by those engaged in literary criticism, other academic activity or advocacy. For a judge, however, the exercise is a somewhat more pointed [one] since a result must be arrived at."[77]

But to make such presumptions misses the point entirely:

> [A] literary understanding of language – one that recognizes its incompleteness, its inadequacies, its gaps and imperfections … does this largely by the continual recognition of other possibilities. In literature our language itself is put into question, and with it the habits of thought and feeling (and the social and political relations reinforced by those habits) that we have theretofore taken as natural. This affects our reading not only of "literature" but of all the texts we confront in life; and the literature from which we can learn, once we begin to learn how to do it, includes the literature we make and read in our ordinary lives.[78]

Thus, a literary understanding of language is something which assists the individual reader to discern greater meaning in *any* text, no matter how trivial or banal.

But certainly in the case of the Irish Constitution, such an extreme case need not be made, for as already pointed out, it was a moral and political document, intended to be a "supportive symbolic system" to communicate powerful and compelling ideas to the Irish people about their identity and system of government. Not coincidentally, such concepts are closely tied to the ideas of literature and art as a whole:

> [T]o learn to read [with a literary understanding of language] is to expose the root of power, which is linguistic and ideological in nature. Whoever controls our languages has the greatest power of all. … This kind of power is rhetorical, a form of persuasion and acquiescence; it always rests upon texts of one kind or another; and it can be studied, as it is exercised, linguistically and culturally.[79]

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[76] J.B. White, *"Law and Literature: 'No Manifesto'"* (1988) Mercer Law Review at pp.746-747.
[77] Humphreys, *"Constitutional Interpretation"* fn. 36 *supra* at pp.60-61.
[78] White, *supra* fn. 76 at p.745.
[79] *Ibid.* at pp.747-748.

As with politics and culture, the ties between art and morality are inextricably linked:

> The greatest benefit we owe to the artist, whether painter, poet, or novelist, is an extension of our sympathies. Appeals founded on generalizations and statistics require a sympathy ready-made, a moral sentiment already in activity; but a picture of life such as a great artist can give, surprises even the trivial and selfish into that attention to what is apart from themselves, which may be called the raw material of moral sentiment.[80]

Consider now what Richard Humphreys himself says about the Irish Constitution:

> It is not difficult to see why the framers of constitutions and great charters of international rights have chosen to frame their documents in terms of natural law. Natural rights theory is poetic, overarching, mysterious, immense. It places us in awe of the wonder of the human condition. It asserts that the challenges of our condition have meaning, and that the denial of life, liberty and well-being violates an awesome moral character which pre-exists the insignificant circumstances of mere human governments and laws. Natural law is an affirmation of the significance of the human person and of his or her sacred entitlement to respect. It refutes, with the ultimate argument of the transcendent, the sometimes horrendous suffering inflicted upon our fellow men and women.[81]

Interestingly, this commonly held, romantic view of constitutional texts necessarily conflicts with a no less common view that framers of a constitutional text have a more legitimate (and binding) influence on interpretation of the language and principles within. One need only look to scholars such as Richard Posner[82] and Robert Bork,[83] who argue that a law's meaning, legitimacy and authority derives exclusively from the drafter(s), and *not* from the reader(s) of the law (i.e., those meant to interpret

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[80] *Ibid.*

[81] Humphreys, *"Interpreting Natural Rights,"* fn. 36 *supra* at p.222.

[82] Richard Posner has been a member of the U.S. Seventh Circuit Court of Appeals since 1981, and has published a number of articles advocating "originalist" or intentionalist interpretive methods in constitutional and statutory texts. *See, e.g.,* R. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Harvard University Press, 1988). Posner argues that non-interpretivist readings of legal texts cause disorder and chaos and argues, furthermore, that legislative or constitutional law takes the form of a command from the original drafter(s). As such, judicial interpretation outside of the legislature's or drafter's intent constitutes a judicial overstepping of their legitimate authority.

[83] Robert Bork, a former U.S. Supreme Court nominee, is a controversial advocate of interpreting the U.S. Constitution only within the context of the framers' original intent. He argues that many U.S. Supreme Court cases where incorrectly decided as they ignored the historical context under which the

and apply the law in a given dispute). This "originalist" belief derives from the notion that to do otherwise would make the law a matter of subjective speculation – and betray the guiding structure and principles which bind a given legal system together. In essence, this view argues that "chaos" would, and does, ensue where originalist approaches are not employed by the judiciary.

As stated above, certain Irish commentators have argued that the very use of natural law doctrine in Irish constitutional law has, so to speak, opened such a Pandora's Box of uncertainty – particularly by creating the constitutional jurisprudence of unenumerated personal rights. Consequently, the Irish Supreme Court has been accused, since the *Ryan* decision, of inconsistency and of arbitrary reasoning. Yet an application of post-modern literary theory to the interpretation and role of fundamental natural law principles can assist in introducing sounder reasoning in major decisions, which affect the development of the unenumerated rights doctrine.

Conclusion

The use of natural law as a basis of unenumerated rights in Irish law has been largely based upon two major assumptions which have affected the ability of the judiciary to make consistently reasoned decisions: 1) the premise that natural law must be seen as a source of immutable, unchanging truth; and 2) the premise that natural law is antecedent and superior to positive law.[84] The post-modern literary theory of deconstruction, when applied to major case decisions, shows that these premises can be avoided in order to circumvent the logical paradoxes they invite.

Constitution was drafted. *See e.g.* R. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline,* (New York, Regan Books, 1996) at pp.96-119.

[84] *See* Clarke, fn. 19 *supra.*

Yet no suggestion appears to have been made by Irish commentators that the textual analysis of the Constitution should involve post-modern literary theory (particularly deconstruction), although they openly acknowledge the use of traditional literary theory in the form of interpretivist approaches to textual ambiguities.[85] This hesitance is ironic in the sense that deconstruction is ideologically neutral: just as it could be used for progressive social change, it could just as easily be used as a means for advocating retrogressive change, or, for that matter, the *status quo*.

The post-modern literary approach of deconstruction provides a systematic analysis of meaning which, if applied consistently, would grant the judiciary both the flexibility needed to expand upon unenumerated personal rights and the analytical technique to reinstill judicial credibility. Most importantly, however, the use of modern literary theory would serve as a means of assisting the judiciary in questioning their own reasoning in making a decision and whether they are operating under unsupported biases or oversimplified notions of social justice. Opening the judiciary's own eyes to arbitrarily set conventions, legal doctrines and moral standards within the framework of social constraint may prove a powerful ally in advancing social progress and the expansion of unenumerated personal rights.

[85] *See, e.g.,* Quinn, fn. 39 *supra* at p.33.