

OUR HERCULEAN JUDICIARY?: INTERPRETIVISM AND THE UNENUMERATED RIGHTS DOCTRINE

*Abstract: This paper examines the unenumerated rights doctrine through the prism of Dworkinian legal theory. It contends that an interpretivist attitude is evident in much of the essential judicial dicta, and further explores the extent to which judges in the unenumerated rights cases have exercised an interpretive methodology akin to law as integrity, Dworkin's theory of law and adjudication propounded in *Law's Empire*.*

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Introduction

In the discussion of the theoretical underpinnings of the unenumerated rights doctrine, natural law theory has dominated and has been thoughtfully explored in a number of academic articles.¹ This is unsurprising given the explicit advertence to that school of jurisprudence in a number of the key judgments, perhaps most notably that of Walsh J in *McGee v Attorney General*.² Equally, the doctrine has been analysed, and chiefly criticised, from a positivist perspective on law, for the reason that it allows judges to 'make law' without the clear constraints of precise and preordained constitutional text.³ Thus, while the doctrine has sometimes been characterised as a conflict between these competing schools of jurisprudence, it has not been extensively explored through the prism of interpretivism and Dworkinian legal theory.⁴ This is somewhat striking, given the extraordinary influence of Dworkin in legal scholarship over roughly the same period as the lifespan of the unenumerated rights doctrine.⁵

The aim of this paper is to show some of the key unenumerated rights judgments through a different prism. It contends that an interpretivist attitude is evident in much of the essential judicial dicta, and further explore the extent to which the judges have exercised an

* I would like to thank Conor Crummey, Alexandra Hearne and Advocate-General Gerard Hogan for their comments on earlier drafts of the paper. Any remaining errors are my own.

¹ See Aileen Kavanagh, 'The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice' (2012) 48(2) *The Irish Jurist* 71; Richard Humphreys, 'Interpreting Natural Rights' (1993) 28(1) *The Irish Jurist* 221; Roderick O'Hanlon, 'The Judiciary and the Moral Law' (1993) 11(6) *Irish Law Times* 129; Mark De Blacam, 'Justice and Natural Law', (1997) 32(1) *The Irish Jurist* 323; Cian O'Connor, Laurence Kelly and Eoghan McSwiney, 'Natural Law: A Bible for Judicial Reasoning?' (2012) 15(1) *Trinity College Law Review* 75.

² *McGee v Attorney General* [1974] IR 284 (SC).

³ See Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated' (1990) 25(1) *The Irish Jurist* 95; John Maurice Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed. Allen Figgis & Co, 1967) 42-47.

⁴ Desmond Clarke has noted a parallel between Dworkin's theory of adjudication and the reasoning employed in the unenumerated rights case law: 'Without appealing to natural law, and without reducing law to mere fact, he [Dworkin] seems to have captured both the challenge and the risks involved in what the Irish courts of appeal have practiced since *Ryan v Attorney General*'. Desmond Clarke, 'Interpreting the Constitution: Essentially Contested Concepts' in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 112. Aileen Kavanagh also alludes to Dworkin's work when discussing the unenumerated rights doctrine in Aileen Kavanagh, 'The Quest for Legitimacy in Constitutional Interpretation' (1997) 32(1) *The Irish Jurist* 195.

⁵ *Ryan v Attorney General* [1965] IR 294 (HC), the first case to discover unenumerated rights, was decided in 1963, while Dworkin's first major article, 'The Model of Rules' was published in 1967 in the *University of Chicago Law Review*. (Ronald Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14)

interpretive methodology akin to law as integrity, Dworkin's theory of law and adjudication propounded in *Law's Empire*.⁶

To support the first proposition, that Irish constitutional law is interpretive, it is necessary to establish (i) that the principle of legality exists in Irish law and informs constraints on the State's use of coercive force; and (ii) that substantive disagreement exists as to its content. This flows from a central premise of Dworkin's theory of law; that the grounds of law, the means by which determine whether a proposition of law is true or false, are not exhausted by the simple record of what legal institutions have previously decided, but include the principles those decision pre-suppose and endorse. As we will see, Dworkin demonstrates this by reference to the deep theoretical disagreement among judges and lawyers as to what the grounds of law actually are.

Having thus established the existence of the interpretive attitude, I explore to what extent the judiciary, in attempting to devise a theory of interpretation for the unenumerated rights doctrine, have utilised a methodology akin to law as integrity.

The paper examines the various methods utilised by the courts for identifying what rights Art. 40.3 protects, particularly the 'Christian and democratic nature of the state' and the 'human personality test', and argues that they represent serious, albeit flawed, attempts to identify the most basic principles underlying Ireland's legal order and to enumerate rights derived therefrom. This reflects the central thrust of law as integrity; that rights and legal decisions should follow from the principles of justice and fairness that provide the best constructive interpretation of the community's legal practice.⁷

Interpretivism in Irish Legal Practice

This section will investigate whether an interpretive attitude exists in Irish law, and in constitutional adjudication in particular. This is necessary as law as integrity builds on and presupposes an interpretivist attitude to law and legal practice. An interpretivist attitude is one that sees the principles that underlie a given legal instrument or decision as forming as much a ground of law as the legal instrument or decision itself.⁸ Interpretivism relies on evidence of theoretical disagreement among judges and lawyers to demonstrate this. In order to show an application of the interpretive attitude in Irish law, and particularly with respect to the unenumerated rights doctrine, it is therefore necessary to establish two things: (i) that the principle of legality exists in Irish law and informs constraints on the State's use of coercive force; and (ii) that substantive disagreement exists as to its content

The Principle of Legality

The first point is that Irish legal officials accept that constraints exist on the State's use of coercive force by virtue of the principle of legality, such that we can have theoretical disagreement about that very principle.

The principle of legality, broadly stated, is the setting of conditions for the legitimate exercise of state coercion. It speaks to the point of law, to place conditions on the exercise of arbitrary

⁶ Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).

⁷ Dworkin (n 6) 210.

⁸ In Dworkin's language, an interpretivist considers the plain text of law ('the plain statute') and then interprets or constructs the plain text in light of the relevant legal principles to arrive at a full, true statement of the law ('the real statute'). Dworkin (n 6) 16-20.

power such that the individual may flourish in a free society. Law and liberty are thus closely connected and interdependent values.⁹ The principle of legality requires us to look at the value we attach to the requirement that officials act in accordance with law, be they merely procedural such as predictability and clarity, or substantive, reflecting a goal of equal citizenship.¹⁰

The question we have then is whether the relevant officials in the Irish legal system, specifically judges, accept conditions on the state's monopoly of coercive force flowing from principles which underlie the point or purpose of law. This may seem axiomatic in a country where legislative power is expressly constrained by a codified constitution, but it requires proper elucidation. We don't have to look far to find endorsement of the essential point. Walsh J addressed the issue in *Byrne v Ireland*:¹¹

It is as much a duty of the state to render justice against itself in favour of citizens as it is to administer the same between private individuals. The adjudication of such claims by their nature belong to the judicial power of government ... the whole tenor of our Constitution is to the effect that there is no power, institution, or person in the land free of the law save where such immunity is expressed, or provided for, in the Constitution itself.¹²

Walsh J's insight is as obvious as it is important; Ireland's constitutional settlement places substantive constraints on the ability of the State to effect incursions on fundamental rights. In some cases, these constraints are relatively clear-cut, such as in the express prohibition of the death penalty in Art. 15.5.2, but in respect of the unenumerated rights the Constitution equally protects via Art. 40.3, we have profound disagreement.

Disagreement

The second element that must be established in order to identify Irish legal practice, and the unenumerated rights doctrine in particular, as interpretive, is the presence of theoretical disagreement in law. Such disagreement does not turn solely on whether or not a statute empirically can be said to contain certain words or whether a court has previously decided a particular point, it turns on the point or principle behind these words, and whether they too can be said to form one of the grounds of law.¹³ Dworkin famously used the case of *Riggs v Palmer*¹⁴ to make this point.

In *Riggs v Palmer*, a New York court had to decide whether a man could inherit under a will despite having murdered his grandfather in order to do so. The majority, in the absence of a clear pre-existing rule, relied on various established legal principles, including that 'a man may not profit from his own wrong'. By contrast, the minority took the view that the relevant statute must be constructed literally, and in the absence of any express rule restricting the inheritance of murderers, he should be allowed to keep his inheritance. As Dworkin observes, the disagreement here cannot be said to be an empirical one, such as whether a statute does or does not provide a legal speed limit of 60 miles per hour.¹⁵ Rather the

⁹ T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford 2013) 89.

¹⁰ For competing conceptions see Paul Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' [1997] Public Law 467.

¹¹ [1972] 1 IR 241 (SC).

¹² *ibid*, 281.

¹³ See Dworkin (n 6) Chapter 1.

¹⁴ 115 N.Y. 506, 22 N.E. 188 (1889).

¹⁵ Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14, 25.

disagreement is theoretical, it turns on whether or not the legal proposition that a murderer may not inherit is only to be determined by reference to the plain words of the relevant statute, or if the moral principles presupposed by this legal rule must also factor. It is a disagreement about the grounds of law. While the minority argued for an approach that placed a premium on the legal values of certainty and predictability, the majority insisted that the principle that a person should not profit from their own wrong outweighed those principles in this case.

Disagreement of this nature pervades the unenumerated rights doctrine to an extent arguably not reflected in any other area of Irish legal practice. The very existence of the many diverse schemes of identification in the case law makes such a conclusion uncontroversial, but it bears more clear and rigorous explication. To effect this, I turn to the case of *Norris v Attorney General*,¹⁶ a case that demonstrates not just theoretical disagreement but the profoundly contradictory dictates of the various approaches.

The case concerned a challenge to the constitutionality of various laws prohibiting homosexual activity. Senator Norris sought invalidation of the laws on the basis of the right to privacy identified under Art. 40.3 in *McGee*.¹⁷ The majority of the Supreme Court found against the plaintiff. Henchy J, in dissent, redeployed and reframed the human personality test he advocated in *McGee*:

...there is necessarily given to the citizen...such a range of personal freedoms as are necessary to ensure his dignity and freedom as an individual in the society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.¹⁸

O'Higgins CJ, writing for the majority, took a markedly different approach, and read Art. 40.3 in light of the State's commitment to Christian values:

From the earliest days, organised religion regarded homosexual conduct such as sodomy and associated acts, with a deep revulsion as being contrary to the order of nature, a perversion of the biological functions of the sexual organs and an affront to both society and to God...

The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligations to our Divine Lord Jesus Christ. It cannot be doubted that the people ... were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith with Christian beliefs.¹⁹

The Court duly found that the protection of privacy in Art 40.3 could not be extended so as to invalidate laws against homosexuality owing to the 'Christian' nature of the state. Thus, for the majority, the principle of legality must be read in light of Christian values. The legality

¹⁶ [1984] IR 36 (SC).

¹⁷ [1974] IR 284 (SC).

¹⁸ [1984] IR 36, 71.

¹⁹ *ibid*, 61-64.

of state action fell to be measured in light of Christian doctrine rather than the more abstract appeals to dignity and autonomy preferred by the minority.

O'Higgins CJ declares at the beginning of the judgment: 'The Courts declare what the law is – it is for the Oireachtas to make changes if it so thinks proper'.²⁰ This suggests a view of law where the role of the judge is a mechanical one, to consult the relevant texts and accordingly declare what the law is as applied in the case. The body of his judgment could not in sincerity be described in this manner. While both judgments quote haphazardly from different sections of the Constitution to justify their conclusion, their arguments could not reasonably be said to be empirical in nature. They turn on what values underpin the legitimacy of law and legal decisions, not on what either the text or past legal officials actually said.

O'Higgins CJ was, perhaps unwittingly, making an interpretive argument about the law, identifying Christian morality as the current of principle running through the Constitution and the relevant case law. Conversely, the minority interpreted constitutional law as providing, more abstractly, a sphere of independence to the citizen which the State could not lightly interfere in. The importance of this theoretical disagreement could not be overstated, the former upholding the legitimacy of odious and oppressive laws and the latter condemning them as legally invalid.

On this evidence, it is clear that Irish constitutional law, and specifically the unenumerated rights doctrine, is interpretive. The disagreement between O'Higgins CJ and Henchy J was not an empirical or semantic disagreement about what the Constitution or the case law actually said, but rather was a deeper, theoretical disagreement about which moral principles the Constitution and the case law reflected.

From interpretivism to integrity

Building on the notion of law as an interpretive concept, and the value of legality as the locus of interpretation, Dworkin applies his own methodology in order to reach his own interpretive conclusions. His account of legal practice, premised on the best constructive interpretation of that practice, yields a theory of law as integrity.²¹

Dworkin's theory of law as integrity holds that, as far as possible, judges should identify legal rights and duties on the understanding that law and rights derive from the community as an entity, and that they express the community's conception of justice and fairness.²² According to Dworkin, propositions of law are true if they follow from the principles of justice, fairness and procedural due process, which provide the best constructive interpretation of the community's legal practice.²³ It demands that the law speak with one voice and as such judges should be cognisant when faced with a particular case that it is but part of a larger intellectual system which must be coherent in principle, unitary and of equal application.²⁴ Integrity is not a vision of justice, rather it demands that a community's vision of justice, which falls to be interpreted in its best light from posited legal materials, be extended to each member of the community in equal measure. The state must treat its citizens with equal concern and

²⁰ *McGee* (n 19), 53.

²¹ Dworkin (n 6) Chps 6 and 7.

²² *ibid.*

²³ Dworkin (n 6) Chps 6 and 7.

²⁴ Dworkin (n 6) 210.

respect, and judges give effect to this principle by applying the law of the community, and the scheme of principle which underlies legal decisions, equally to all citizens.

Dworkin's thesis asserts that law and legal adjudication cannot be divorced from questions of political morality and legitimacy: 'Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend more generally, on the scheme of principles those decisions presuppose and endorse'.²⁵ An interpretivist judge is compelled to construct a moral theory that coheres with or makes sense of the positive legal materials with respect to the point or purpose of the control those decisions presuppose and reflect. This involves a three-step process. First, in the pre-interpretive stage, the judge identifies all the relevant positive legal material which need to be accounted for. Secondly, at the interpretive stage, the judge articulates a principle which both *fits* and *justifies* that material. Thirdly, at the post-interpretive stage, the judge uses that principle to decide the case at hand.²⁶

At the interpretive stage, the question of fit is one of identifying a principle that the relevant legal materials can reasonably be said to presuppose. A judge practicing law as integrity will assess the legal materials and will likely find more than one principle or scheme of principle that could be said to be presupposed by those materials. Having identified a number of such principles, he or she will move beyond the dimension of fit, and to the dimension of justification. At this stage, he or she must choose among the principles which can be said to fit the legal practice, choosing that which places the legal practice in its best light, morally speaking. To perform this task, Dworkin introduces a character named Hercules, a superjudge, with unmatched legal knowledge and powers of analysis, and unlimited time to trace the lines of principle in the law. Hercules acts as a metaphor for an ideal of legal adjudication, an ideal for judges and lawyers to measure against.

In determining a question as to what personal rights are presupposed in our legal practice, as must be done in constitutional adjudication, the principles which we can view as fitting legal practice in that context must necessarily be broad and stated at a very abstract level. In *McLoughlin v O'Brian*,²⁷ the 'nervous shock' case utilised by Dworkin in *Law's Empire* to demonstrate how competing constructive interpretations of precedent and legal materials could be weighed against each other, the competing interpretations Hercules must measure are stated as differing conceptions of reasonable foreseeability.²⁸ By contrast, in unenumerated rights cases, this process will entail identifying and choosing between much broader and more fundamental concepts such as democracy and the human personality, and the extent to which they can be said to fit and justify Irish constitutional law. Dworkin makes precisely this point about how integrity must be practiced in constitutional adjudication:

The Constitution is foundational of other law so Hercules' interpretation of the document as a whole, and of its abstract clauses, must be foundational as well. It must fit and justify the most basic arrangements of political power in the community, which means it must be a justification drawn from the most philosophical reaches of political theory.²⁹

²⁵ Dworkin (n 6) 211.

²⁶ Albert Keating explores Dworkin's interpretive methodology with reference to Irish case law in Albert Keating, 'A Concept of Interpretative Methodology' (2017) 35(11) *Irish Law Times* 139.

²⁷ *McLoughlin v O'Brian* [1983] 1 AC 410.

²⁸ Dworkin (n 6) Ch. 7.

²⁹ *ibid* 380.

Thus, the demands that law as integrity places on judges in deciding question of constitutional law are of a significantly higher order than in private law disputes.³⁰

The unenumerated rights doctrine and integrity

To what extent can the central unenumerated rights judgments be characterised as employing such an interpretive methodology? We can first consider *Ryan v Attorney General*. In *Ryan*, Kenny J ruled that the personal rights expressly identified in Art. 40.3 were but a subset of a wider body of personal rights protected by the Constitution.

Kenny J came to this conclusion through a careful parsing of the constitutional text. He reasoned that as Art. 40.3.2° specified certain named personal rights that the State was ‘in particular’ obliged to protect, it followed from this language that the rights there enumerated were merely a ‘detailed statement of something which is already contained in sub-s.1’, which contains a generalized commitment to the protection of personal rights. Therefore, the general guarantee to protect personal rights in Art. 40.3.1° must be read as conferring a body of unenumerated rights on the People. The validity of this deductive inference has been energetically debated by a number of critics, both defending and criticising Kenny J.³¹ However, I will leave aside the question as to whether Kenny J’s construction of the Article was correct and will assume for the purposes of the paper that his analysis on this point was, in Professor Kelly’s words, ‘logically faultless’.³²

For our purposes, the means by which he proposed these rights be identified is the important point; accepting that there are rights beyond those expressly provided for in the Constitution, by what means can we identify them? By pointing to an unenumerated, non-textual but nonetheless constitutional and equally fundamental body of rights, Kenny J gave us what could be characterised as a supplementary common law constitution. Constitutional law became not simply the careful consideration of the meaning and application of the words set out in the text but equally the identification of the rights and principles inherent in Irish legal practice, endowed with constitutional force by virtue of Article 40.3.

He first states that the enumeration of these rights should be performed by the Superior Courts, rather than by the Oireachtas, by virtue of their responsibility in determining the validity of laws under the Constitution vested in them by Art. 34.3.2°. Importantly, he argues that while the enumeration of unspecified rights might appear a matter for the Oireachtas rather than the courts, ‘it was done by the Courts in the formative period of the Common Law and there is no reason why they should not do it now’.³³ I consider this advertence to a body of common law decisions as a guide to the identification of unenumerated rights to be of some importance. I will therefore subject this statement to some analysis, before turning to the formal test he laid down, the ‘Christian and democratic nature of the State’ test.

³⁰ The Supreme Court recently adverted to Dworkin’s theory of law as integrity in the context of constitutional adjudication in *Ellis v Minister for Justice and Equality* [2019] IESC 30. Charleton J noted that the Constitution should be interpreted in light of the Preamble’s ‘due observance of Prudence, Justice and Charity’ and the attainment of a ‘true social order’. He further observed, at [17], that ‘[t]his is not far from the theory of law and justice as integrity as developed by philosopher Ronald Dworkin’.

³¹ Gerard Hogan and Gerry Whyte in *JM Kelly: The Irish Constitution* (4th edn, Butterworths 2003) 1418-1419, stated that ‘[t]he logic of Kenny J’s inference can hardly be questioned...’ By contrast, Desmond Clarke has argued that Kenny J’s reasoning on this point is ‘fatally flawed’. See Desmond Clarke, ‘Unenumerated Rights in Constitutional Law’ (2011) 34(2) *Dublin University Law Journal* 101.

³² Kelly (n 3) 42.

³³ *Ryan v AG* [1965] IR 294, 313 (HC).

What lessons from the ‘formative period of the common law’?

While the focus of comment on this case has centred on Kenny J’s statement that rights should be identified by reference to the ‘Christian and democratic nature of the State’, which is considered below, his direction that we should have reference to the approach taken by early common law courts in enumerating rights has received comparatively little scrutiny. However, it is important that Kenny J did not see himself as assuming some entirely new judicial power but rather reasserting an ancient, and perhaps inherent, one. Given the scant detail offered elsewhere on the method to be applied in enumerating rights under Art. 40.3, this allusion to a body of precedent that operated to do just that merits closer analysis. What, then, was the approach taken by judges in this context in the ‘formative period of the Common Law’?

While the work of A.V Dicey³⁴ is often taken as the formal starting point for the study of constitutional law in England, certain Elizabethan judges, most particularly Sir Edward Coke, gave judgments asserting the power of the common law to identify and defend personal rights. It is this line of cases that I take Kenny J to be referring to. A particularly notable judgment is *Dr Bonham’s Case*.³⁵ The case concerned Dr Bonham, a physician who set up a practice in London without a licence from the Royal College of Physicians. The college had him arrested and thrown in prison. When sued for false imprisonment, the College produced their statute of incorporation, which ostensibly empowered them to jail those who violated their regulations.

Coke CJ, writing for the majority, held that the statute, on a proper construction, did not so empower them. However, he continued to address the question of how a court would respond had Parliament actually conveyed the power the College purported to exercise.

In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.³⁶

Coke sought to assert the power of the common law to enforce a general right to due process as a legal virtue inherent in the common law, and independent of the authority of Parliament. He was not alone. In a case following but a few years afterwards, Hobart CJ stated that ‘even an Act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself’.³⁷ While the English courts have never made good on Coke’s threat to ‘strike down’ an Act of Parliament, his more modest proposition that the common law will ‘control’ Acts of Parliament has been amply borne out.³⁸

Coke, having asserted a progenitor of the modern doctrine of *nemo iudex in causa sua* in Bonham’s Case, found a right to be heard, or *audi alteram partem*, in *Bagg’s Case*. James Bagg was a burgess of the City of Plymouth who removed by the council for having incited

³⁴ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London 1885).

³⁵ (1608/1610) 8 Co. Rep. 114a.

³⁶ *ibid.*

³⁷ *Day v Savadge* (1614) Hobart 85 (quoted in Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge 2015) 144).

³⁸ Recent cases such as *R (Evans) v Attorney General* [2015] UKSC 21 and *R (UNISON) v Lord Chancellor* [2017] UKSC 51 are particularly strong examples of the increasing willingness of the UK courts to use common law principles to place constraints on Acts of Parliament

taverners not to pay the local wine duty. Bagg was never given any opportunity to respond to the case against him. Coke held his removal from office to be invalid.

Although they have lawful authority...to remove anyone from the freedom, and that they have cause to remove him; yet [if] it appears by the return that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void...and...is against justice and right.³⁹

In the *Case of Prohibitions*,⁴⁰ Coke also asserted the power of the courts to determine disputes, and the correlative right of a person to an independent and impartial arbiter of a dispute. Coke rebuked King James I for intervening in a dispute and purporting to settle it by means of his royal prerogative. The case is notable for Coke's exposition of the nature of judicial reasoning.

A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did not belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace...⁴¹

Returning to the judgment in *Ryan*, we can see that these 'formative' cases of common law rights and constitutionalism espouse a vision of the law in which certain basic rights and privileges are to be found in the body of the common law. By looking to the accumulated volume of legal decisions, such decisions could be found to presuppose certain principles of fairness and justice, such as a right to an independent and impartial hearing and to have one's case heard in the determination of a dispute. The tracing of the lines of principle in the existing corpus of the common law seen in these cases reflects an interpretive methodology that is seen in Dworkin's theory of law as integrity. That is, these 'formative' cases decided the controversies before them not solely on the basis of previous decisions, but rather on the basis of what principles could be said to fit that legal practice, and be further applied to the case at hand.

Coke's reasoning in the *Case of Prohibitions* is particularly noteworthy for its categorical denial of the relevance of free-standing, extra-legal principles, or 'natural reason', to the law. Rather the law demands an exercise in 'artificial reason', whereby a judge, learned through 'long study and experience', not just in the narrow articles directly relevant to the dispute, but to

³⁹ *Bagg's Case* (1616) 11. Co. Rep. 93 (quoted in Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge 2015) 162).

⁴⁰ [1607] EWHC KB J23.

⁴¹ *ibid.*

the law as an institution, issues a decision that is consonant with the good practice of law, as understood in that community.

The ‘Christian and democratic nature of the State’ test

Kenny J, regrettably, does not provide us with a great deal in the way of detail as to the reasoning behind his finding that new rights should be identified by reference to ‘the Christian and democratic nature of the State’. The statement is rather a bald one, made with little introduction and we must construct a good deal from it ourselves. However, earlier in his judgment, Kenny J refers to Article 5 of the Constitution as:

...in many ways the most important in the Constitution, for Article 5 declares that Ireland is a democratic State and what can be more important in such a State than the personal rights of the citizens...

The conception of democracy preferred by Kenny J is interesting for its breadth. It is no narrow, majoritarian conception of democracy but rather a picture of the kind of democracy that Ireland represents. For Kenny J, Irish democracy presupposes a rights-based society, and those rights can extend beyond those expressly provided for in the Constitution and inhere in the legal character of the jurisdiction. This all suggests that Kenny J did not simply have regard to the text of the Constitution in identifying Ireland as a democratic State, but rather to the kind of democracy practiced in the jurisdiction, and how that principle was understood in Irish legal practice and society at large.⁴²

The ‘Christian’ element of Kenny J’s test is certainly the more problematic limb of the test, bringing with it certain theocratic overtones and all the attendant difficulties of defining a state by reference to a majority creed. However, to use Dworkin’s language, it is certainly arguable that Christian values satisfy the dimension of fit as concerns Irish legal practice and the principles underlying it. The extensive reference made to Jesus Christ and the Holy Trinity in the Preamble, as well as the very clear Christian influence in constitutional adjudication both under the Saorstát Éireann Constitution and under Bunreacht na hÉireann lead us to an unavoidable conclusion that Christian principles and values are a part of the fabric of Irish constitutional law. For instance, in *State (Ryan) v Lennon*,⁴³ Kennedy CJ in dissent argued that, as the Saorstát Constitution drew its authority from Almighty God, purported amendments thereof that contravened this authority were necessarily null and void.⁴⁴

Thus, we might say that, while Christianity or Christian values certainly ‘fits’ Irish legal practice, or at least it did at the time of Ryan’s case, we might equally find that some other principle or body of principle puts our legal and constitutional practice in a better light. While Christianity might fit our legal practice, it arguably does not *justify* our legal practice. As discussed earlier, under law as integrity, it is not enough to identify a principle as simply fitting the relevant legal materials. Where there are multiple competing principles which can be said to fit a given body of legal practice, as will inevitably be the case in constitutional adjudication, the judge must identify the principle or scheme of principle that puts legal

⁴² For a discussion of competing conceptions of democracy in the context of Irish constitutional adjudication, see Anthony Whelan, ‘Constitutional Amendments in Ireland: The Competing Claims of Democracy’ in Gerard Quinn, Attracta Ingraham and Stephen Livingstone (eds) *Justice and Legal Theory in Ireland* (Oak Tree Press 1995) 45; See also Ronald Dworkin’s discussion of majoritarianism and democracy, and his rejection of the equivalence of those concepts, in *Freedom’s Law* (Oxford 1996).

⁴³ *State (Ryan) v Lennon* [1935] IR 170 (SC).

⁴⁴ *ibid*, 204.

practice in the best light that the existing legal facts will bear. In this way, part of what the law is, is what the law should be. It is arguable that it was this sense that, whatever the coherence of the ‘Christian and democratic nature of the State’ test with existing constitutional practice, it failed to show it in its best light, that motivated the identification of an alternative test.

The ‘human personality’ test

Not long after the identification of the Christian and democratic nature of the State test, the courts began to enunciate a different test. In *McGee v Attorney General*,⁴⁵ Mary McGee challenged the constitutionality of s. 17(1) of the *Criminal Law Act 1935* which prohibited the importation of contraceptives into Ireland. Mrs McGee, a married woman with four children, had been advised by her doctors that a further pregnancy would pose a risk to her life. She claimed that Art. 40.3 conveyed on her a right to privacy, and that the implications of the prohibition on her private married life constituted a breach of that right. The Supreme Court, by a majority, agreed with her.

Henchy J took the view in *McGee*⁴⁶ that certain rights ‘inhere in the citizen in question by virtue of his human personality’,⁴⁷ rather than the nature of the state to which they belong. These rights fell to be determined as those ‘fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution’.⁴⁸ He stated his approach in more detail in *Norris*, which we discussed above:

There is necessarily given to the citizen...such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the constitution.⁴⁹

The human personality test is quite evidently a more abstract vision of the values envisaged by the legal order reflected in the Constitution. While the ‘Christian and democratic nature of the State’ refers to two relatively discrete and identifiable value systems, human personality speaks to a less precise interpretation of Irish constitutional practice as placing particular value on the dignity of the human person and the inviolability of a certain sphere of autonomy around the individual.⁵⁰ Henchy J is quite explicit in looking to the nature of the ‘social, political and moral order’ of the jurisdiction in determining that Irish legal practice is underpinned by a certain respect for the capacity of the citizen to exercise a degree of autonomy necessary to the blossoming of the human personality. It has been argued that the human personality test reflects nothing more than a secular version of the natural law theories of constitutional adjudication preferred elsewhere.⁵¹ However, while similar accusations of

⁴⁵ [1974] IR 284 (SC).

⁴⁶ *ibid.*

⁴⁷ *McGee* (n 46), 325.

⁴⁸ *ibid.*

⁴⁹ *Norris v AG* [1984] IR 36, 71 (SC).

⁵⁰ McCarthy J, also dissenting in *Norris*, and agreeing that the human personality test was the test to be applied, was more explicit in his reference to the concept of dignity as underlying his approach. ‘The dignity and freedom of the individual occupy a prominent place in these objectives [set out in the Preamble] and are not declared to be subject to any particular exigencies but as forming part of the promotion of the common good’. [1984] IR 36, 99-100. William Binchy discusses the role the concept of dignity plays in the Constitution more broadly in William Binchy, ‘Dignity as a Constitutional Concept’ in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Round Hall 2008) 307.

⁵¹ Hogan (n 3).

vagueness and imprecision might be levelled at the test, it certainly reflects a more liberal vision of the State, and one which understands the principles underlying the Constitution as building up from the individual and the community, rather than derived down from an extra-legal source. Thus, while it is susceptible to certain similar criticisms, it represents a mode of interpretive methodology of an entirely different character to the natural law approach.

The human personality test is perhaps even more apposite to be characterised as representing an integrity-style approach to adjudication than the ‘Christian and democratic nature of the State’. Henchy J states, at a very high level, a constructive interpretation of the values presupposed by Irish constitutional law and legal practice more generally. He is clearly concerned that this value be capable of being identified in the Irish legal order, appealing as he does to the ‘social, political and moral order’ of the State, satisfying the dimension of fit. In terms of the dimension of justification, as I stated above, it is arguable that a concern that the Christian and democratic nature of the State failed to properly justify Irish legal practice, i.e. show it in its’ best light, which drove Henchy J to look again at the principles of justice and fairness that fit Irish constitutional law and identify an alternative that better justified the practice, namely the human personality test.

The Natural Law

In a concurring judgment in *McGee*, Walsh J took the view that the Constitution recognised human rights as an element of the natural law, a jurisprudence superior to all positive law, and merely affirmed the natural fact of their existence:

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.⁵²

He reasoned from this that natural law must play a crucial role in constitutional adjudication and in the identification of unenumerated rights;

In this country it falls finally upon the judges to interpret the constitution and in doing so determine... the rights which are superior or antecedent to positive law or which are imprescriptible and inalienable.⁵³

This approach was followed through the 1980s, notably in adoption cases affirming the ‘natural right’ of a mother to the custody of her child. The courts took the view that this right ‘is clearly based on the natural relationship which exists between a mother and child...and from the mother’s natural determination to protect and sustain her child’.⁵⁴

The natural law approach to the identification of new rights under Art. 40.3 is of markedly different character to the other two approaches. Despite the starkly contrasting conclusions reached under those two tests, most notably in *Norris*, they represent, as I have argued, a very similar mode of interpretation and constitutional adjudication; one which can be characterised as akin to law as integrity. The natural law approach is quite different. It purports to directly apply a body of principle quite separate from the law. This application

⁵² [1974] IR 284, 310 (SC).

⁵³ *ibid*, 318.

⁵⁴ *G v An Bord Uchtála* [1980] IR 32, 55 (SC).

of extra-legal principle is anathema to the practice of law as integrity. In applying law as integrity, a judge must have regard to the principles presupposed by the legal facts; he or she cannot transpose an alien body of principles into the community's legal practice.

Dworkin makes this point when he draws an analogy between the rules of a chess tournament.⁵⁵ A participant in a chess tournament has a 'chess right' to be awarded a point if he or she checkmates his or her opponent. However, the poorest contestant does not have such a 'chess right' to be awarded the prize money owing to their greater need, notwithstanding the fact that, as a matter of background morality, this would be the most just outcome. Our rights must be those understood by the practice of the institution, be it a legal system or a chess tournament, not by reference to abstract morality. This necessarily follows because, as discussed, integrity is not itself a vision of justice, but rather a theory about how the community's conception of justice and fairness should be applied to its members in an equal fashion.

However, it is arguable that the natural law flavour of many of the judgments can be attributed in greater measure to the natural law inspiration for the rights in the Constitution, rather than a wholesale adoption of a natural law theory of adjudication. A natural law inspiration for the personal rights provisions of the Constitution is undeniable, but the fact that the rights there enumerated reflect such an inspiration does not require judges to adjudicate by reference to the natural law, whatever that means. Even in Walsh J's judgment in *McGee*, the most influential of all the natural law judgments, he stated immediately following his excursus on the primacy of the natural law in the Irish constitution that 'no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts'. The idea that rights are to be determined by reference to prevailing social values is quite plainly contradictory to a natural law philosophy of rights adjudication. Walsh J is therefore quite uneven in his analysis as to the role natural law plays in Irish constitutional law. He appears to assume a false choice between legal positivism, something he sees as quite incompatible with constitutional interpretation,⁵⁶ and a natural law theory of interpretation. The problem this false choice poses has been explored by Kavanagh:

The problem with presenting natural law and legal positivism in a false dichotomous light is twofold. It gives rise to the fallacy that rejecting formalist judicial reasoning entails support for a natural law approach. Moreover, it suggests that endorsing the natural law is the only morally respectable choice. After all, who wants judicial decisions which are so formalistic that they are blind to justice?⁵⁷

In *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995*,⁵⁸ the Supreme Court beat a hasty retreat from its natural law jurisprudence when faced with its logical end. The court was asked to adjudge an amendment to the Constitution, ratified by the people, as itself unconstitutional on the grounds that it was repugnant to natural law. The amendment concerned the availability of information on abortion services lawfully available in other states, abortion being prohibited, except in extreme circumstances, as a matter of constitutional law in Ireland at the time.

⁵⁵ Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057, 1078.

⁵⁶ [1974] IR 284, 319 (SC).

⁵⁷ Kavanagh (n 4) 71.

⁵⁸ [1995] 1 IR 1 (SC).

Assuming that the termination of a pregnancy was contrary to natural law, the applicant argued, relying on *McGee* and *G v An Bord Uchtála*,⁵⁹ that natural law was a body of principle superior to all positive law including the Constitution and must consequently override any purported attempt to facilitate abortions, irrespective of the determination of the people. Counsel for the applicants argued; ‘The Court is obliged to take into account the natural law. The *vox populi* cannot be the decisive arbiter of what is right and wrong’.⁶⁰

The Court rejected this argument and asserted that the people were sovereign and could amend the Constitution in whatever way they saw fit. The Court was somewhat disingenuous in its denial that it ever asserted a higher order of law to that posited in the Constitution, perhaps to spare it the exceedingly complex task of spelling out the ramifications for the rules governing the ultimate validity of the Irish legal system.⁶¹

While the *Abortion Information Case*, and various judicial dicta following it,⁶² had been thought to have marked an undignified end for the unenumerated rights doctrine, more recent jurisprudence has shown the doctrine to be very much alive, albeit shorn of the natural law approach that brought such jurisprudential chaos.⁶³ Rather, the natural law approach is the only approach that has fallen outright and completely. The human personality and Christian and democratic nature of the state tests persist, precisely because they are the product of a far more stable and coherent interpretive methodology than the natural law jurisprudence of Walsh J and others.

Future directions

The unenumerated rights doctrine has begun to re-emerge from a period of dormancy in the last several years. In 2014, the first case to return to the doctrine, *AM v Refugee Appeals Tribunal*⁶⁴, identified a new right of individual conscience.

The facts concerned a family of Kazakhs seeking asylum in Ireland. They had previously travelled to Israel and been naturalized as citizens there. In Israel, they claimed to have been subject to discrimination on account of their faith and sought to take flight when they were compelled to take part in military service contrary to their sincere conscientious objection. Their request for asylum was denied and they sought judicial review.

While McDermott J denied relief to the applicants owing to sufficient protection for conscientious objectors in Israeli law, he nonetheless expressly enumerated a right flowing from Art. 40.3 to a ‘freedom of individual conscience’. He outlined his reasons for doing so in this passage:

⁵⁹ *G v An Bord Uchtála* [1980] IR 32 (SC).

⁶⁰ [1995] 1 IR 1, 10 (SC).

⁶¹ For discussion see Oran Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ (2003) *Dublin University Law Journal* 53.

⁶² Keane J (as he then was) was harshly critical of the doctrine, noting in [1998] 2 IR 321 (SC) that ‘there exists no identifiable and superior corpus of law to which judges may have recourse... it follows that the existence of the right will depend on the opinions of the individual judges...’. Keane CJ also expressed serious doubts about the legitimacy of identifying socio-economic rights under Art. 40.3 in *TD v Minister for Education* [2001] 4 IR 259 (SC).

⁶³ See *AM v Refugee Appeals Tribunal* [2014] IEHC 388 and *NHV v Minister for Justice and Equality* [2017] IESC 75.

⁶⁴ [2014] IEHC 388.

Freedom of individual conscience underpins many of the democratic values and fundamental rights of the Constitution. The right to vote, to participate as a candidate in any form of election, the rights to freedom of expression, association and assembly and religious freedom are all dependent on the freely exercised will and conscience of the individual. Though it is not recognised as a separate fundamental right under the Constitution, it is clearly part of the constitutional fabric and, as such, is, I am satisfied, an unenumerated right guaranteed by Article 40.3 of the Constitution.⁶⁵

This is an interesting passage for a number of reasons. In the first place, it relies strongly on the democratic character of the State and of the Constitution as the relevant principle in the identification of individual rights. This appeal solely to the State's democratic character, and not its Christian one, is indicative of the shifting dimension of fit. As discussed above, while describing the State and its legal practice as reflecting Christianity and Christian values appears now to be dated and even theocratic, at the time Ryan was decided, it could hardly have been argued otherwise. The decision in *AM* reflects the community's altered conception of its basic principles of justice and fairness. Irish constitutional law can no longer be said to be substantially underpinned by Christian values.

Secondly, the interaction of the democratic values alluded to by McDermott J with a protection of the 'freely exercised will and conscience of the individual' arguably reflects a collapsing boundary between the two surviving tests; the Christian and democratic nature of the State test and the human personality test. With the diminishing relevance of Christian values, and indeed arguably the amputation of that particular limb of the original test, the two are no longer mutually incompatible. We may therefore begin to see a more unified theory of interpretation for the unenumerated rights doctrine as further cases develop.

In 2017, the Supreme Court addressed the unenumerated rights doctrine in *NHV v Minister for Justice*.⁶⁶ The Court had to determine whether the right to work, a right previously enumerated under Art. 40.3 could be extended to non-citizen asylum seekers in direct provision. For the Court, this required them to determine whether a right to work was in essence social, and therefore 'tied to the civil society in which citizens live, in the way that it might be said that voting is limited by belonging to the relevant society', or if it was a part of the human personality and therefore equally applicable to all persons, irrespective of whether or not they are citizens.⁶⁷ O'Donnell J, giving judgment for the Court, found that working and earning a livelihood was strongly connected to human dignity and therefore;

...a right to work at least in the sense of a freedom to work or seek employment is a part of the human personality and accordingly the Article 40.1 requirement that individuals as human persons are required be held equal before the law, means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens.⁶⁸

The Supreme Court, although reframing an existing unenumerated right through the prism of the constitutional equality guarantee, appears to state a preference for the human

⁶⁵ *ibid*, [33].

⁶⁶ [2017] IESC 75.

⁶⁷ *ibid*, [13].

⁶⁸ *NHV* (n 67), [17].

personality test as the best means of identifying unenumerated rights. We may therefore have to wait a little longer to see a unification of the tests, as hinted at in *AM*.⁶⁹

Another interesting strand in the recent unenumerated rights jurisprudence has been the reliance placed in a number of cases on Ireland's international human rights obligations in enumerating new rights under Art. 40.3.⁷⁰ In *Merriman v Fingal County Council*,⁷¹ the High Court (Barrett J) made reference to a number of international conventions, including the Aarhus Convention and the European Convention on Human Rights, in identifying an unenumerated 'right to an environment consistent with human dignity and the well-being of citizens at large'.⁷² Similarly, in *Carter v Minister for Education and Skills*,⁷³ the High Court (Humphreys J) cited the Universal Declaration of Human Rights, the ICESCR and the Charter of Fundamental Rights of the European Union in finding that an unenumerated right to third level education existed as a logical corollary of the previously identified right to earn a livelihood.⁷⁴

In two cases from 2017, *Duniyva v Residential Tenancies Board*⁷⁵ and *ESB v Kenehan*,⁷⁶ Barrett J discussed the possibility that a right to housing might yet be enumerated under Article 40.3. He based this argument, to some extent, on a number of international human rights documents that provide for a right to housing including, *inter alia*: the ECHR, the European Social Charter, and the International Covenant on Economic, Social and Cultural Rights. Concerns have been raised about the propriety of this approach.⁷⁷ It has been argued that the approach raises similar concerns to the application of natural law in identifying unenumerated rights, as it attempts to use an external source of law to determine the content of constitutional rights.⁷⁸ Given the recency of these decisions, it remains to be seen whether they constitute the beginnings of a significant new direction for unenumerated rights, or a more temporary phenomenon.

Conclusion

Critically analysing the interpretive methodology exercised in the unenumerated rights jurisprudence is important. The power the doctrine gives to judges is considerable, and while many would rather it was quietly packed into storage, it does not appear desirable or likely that the courts will render one of the most important rights-giving articles of the constitution a 'dead-letter'. If we are to have an unenumerated rights doctrine, we should have clarity on how judges go about identifying unwritten rights, and it should be coherent and stable. Integrity and the interpretive attitude are seen in the unenumerated rights jurisprudence, but in a rough and unrefined state, and inconsistently applied. It is arguable that a more rigorous application of integrity might yield a stable doctrine, capable of giving life to Art. 40.3 and a

⁶⁹ (n 64).

⁷⁰ James Rooney explores this emerging trend in James Rooney, 'International Human Rights as a Source of Unenumerated Rights: Lessons from the Natural Law' (2019) *Dublin University Law Journal* 141.

⁷¹ [2017] IEHC 695. See Orla Kelleher, 'The Revival of the Unenumerated Rights Doctrine: A Right to an Environment and its Implications for Future Climate Change Litigation in Ireland' (2018) 25(3) *Irish Planning and Environmental Law Journal* 97; Eadbhard Pernet, 'The Right to an Environment and its Effects for Climate Change Litigation in Ireland' (2019) 22(1) *Trinity College Law Review* 151.

⁷² [2017] IEHC 695, [264].

⁷³ [2018] IEHC 539.

⁷⁴ This decision was recently overturned on appeal. *Carter v Minister for Education* [2019] IECA 150.

⁷⁵ [2017] IEHC 578.

⁷⁶ [2017] IEHC 604.

⁷⁷ Rooney (n 70)

⁷⁸ *ibid*, 20-23.

rich personal rights jurisprudence without sacrificing to an unacceptable degree classic legal values such as certainty and predictability.

That is, however, a discussion for another time. My project has been a descriptive, not a prescriptive one, and has sought to identify the interpretivist attitude taken in the central unenumerated rights cases and to further explore the extent to which the judgments have exercised an interpretive methodology akin to law as integrity. Indeed, the title of the paper questioned whether our judiciary could even be said to be ‘Herculean’ in their application of law as integrity. That question must plainly be answered in the negative: no judiciary could be described as such by virtue of the role Dworkin ascribes to Hercules; that of an ideal, a superjudge, against whom we can measure our practice. The Irish judiciary has not been consistent in its interpretive approach to the unenumerated rights doctrine, as I have conceded, but it has for the most part, I argue, exercised a methodology that reflects the central thrust of law as integrity. The ‘Christian and democratic nature of the State’ and the ‘human personality test’ represent serious attempts to distil just what values and principles are presupposed by our legal and constitutional framework, broadly stated. The challenge of attempting to identify abstract principles that make our constitutional and legal practice morally cohere is an enormous one, and we should not be surprised that there is fault to be found in their attempts.