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Reflections on the „Other Rights“ Provision in the Draft New Constitution of the Faroe Islands

Føroyskt úrtak

Stjórnarskipanarnevndin hevur í uppskoti sínum í Fyrra Flaggdagsáliti til nýggja føroyska stjórnarskipan valt at skriva ta hugsanina beinleiðis inn í stjórnarskipanina, at tað kunnu vera onnur stjórnarrættindi, ið eiga verju, hóast tey ikki verða nevnd millum beinleiðis ásettu rættindini. Frammanfyri ítøkiliga rættindapartinum undir yvirskriftini „Almenn rættindi og skyldur“ er grein 8, ið ber heitið „Onnur rættindi“: „Umframt rættindi ásett í hesi skipan verjir hon onnur rættindi, sum eru sjálvsøgd, ómissandi ella neyðug.„ Verða teir at virka undir hesi skipan, fáa dómstólarnir í Føroyum við hesum beinleiðis heimild til at viðurkenna stjórnarrættindi, ið ikki eru at síggja í skrivaða skjalinum. Henda grein hugleiðir um ta aktivismu frá dómstólunum, ið ein stjórnarskipanargrein sum henda kann fara at hava við sær. Hesar hugleiðingar eru fyrst og fremst grundaðar á læruna um óskrivað rættindi, ið eru ment undir írsku stjórnarskipanini, Bunreacht na hÉireann, frá 1937. Víst verður á, at hóast virðismikið so er vanliga kjakið um dómstólaaktivismu í sambandi við rættindi uttan fyri tekstin grundað á stórar misskiljingar um, hvørji fyribrigdi hugtøkini lóg og rættindi sipa til. Greinin leggur út eitt ástøði um lóg, ið svarar til Aristotelsku-rómversku-thomistisku tradisjónina innan løgvísindi, og greinin roynir at grundgeva fyri, hví hetta er einasta farbara leið, um ein vil skilja og góðtaka andsøgnirnar, ið koma í innan rættindadiskurs.

English Summary

The Faroese Constitutional Committee have decided to incorporate explicitly in the text of the Draft New Constitution the idea that there may be constitutional rights that should be defended and protected that do not appear in the rights provisions of the Draft. Preceding the catalogue of rights in the constitutional text, under the heading „General Rights and Duties“, is Article 8, titled „Other Rights“: „In addition to the Rights enumerated in this Constitution, other rights shall be defended that are self-evident, inalienable or necessary.„ The judicial organ of the Faroese polity, therefore, if operating under this clause, would unambiguously be empowered to recognise constitutional rights not found in the text. This article reflects on the debate and discussion about judicial activism

that Article 8 would be likely to provoke. This reflection is based mainly on the doctrine of unenumerated rights that has developed under the 1937 Constitution of Ireland, Bunreacht na hÉireann. It is suggested that, while valuable, typical debates on judicial activism in the context of extra-textual constitutional rights are based on fundamental misconceptions regarding the nature of law and rights. The article outlines the theory of law in the Aristotelian-Roman-Thomist jurisprudential tradition and argues that this theory is the only viable option if one seeks to understand and accept the paradoxes involved in rights discourse.

1. Introduction

Jurisprudence – the philosophical pursuit of wisdom about law, legal systems and justice – has traditionally been regarded as an esoteric subject, even amongst lawyers. Yet according to Christopher Gray interest in philosophy of law „thrives today around the world"; new developments in law in both age-old and more recently established nations, he observes, call for a good deal of philosophical reflection, and new institutional and disciplinary contexts encourage that reflection and have further increased its range. The precise extent of contemporary interest in legal theory is difficult to discern; it seems fair to surmise, however, that much of the interest that does exist relates to the role of the judiciary in contemporary liberal democracies – rather than to, say, the nature of law in the abstract, or the internal structure of legal systems. It is often remarked that it is now impossible to recount, much less understand, the major political, social and economic developments in Western societies without attention to legal norms and legal processes as they are filtered by courts and judges: „Increasingly, scholars are coming to view courts as political actors and to argue that judges, their modes of arguing, the type of evidence they require, even their partisan policy preferences, influence lawmakers and administrative agencies.„

In the field of constitutional law, individual rights are a secure part of most existing constitutional democracies and judges have a key role in their interpretation. It is pretty much accepted that courts, in undertaking this interpretive role, decide important matters of principle and policy on a routine basis, and it is understandable therefore that concern is sometimes expressed about the emergence of a system of „government by judiciary". This concern tends to reach a peak when judges go beyond the interpretive task in relation to rights and begin to recognise or discover „new" constitutional rights for which there is often no explicit textual basis.

The idea of rights „beyond" a constitutional text – that is, implied rights not enumerated in a constitution or bill of rights – is a part of the constitutional jurisprudence of many jurisdictions. Some judges of the United States Supreme Court have searched for rights in the „penumbras" and „emanations" of the Bill

of Rights. The Australian Constitution, to take another example, provides few explicit guarantees of individual rights and, in general, the Australian High Court, in its interpretation of the Constitution, has taken a conservative view of the Constitution's protection of individual rights. In recent years, however, the Court has recognized that the Constitution contains not only express rights but also implied rights. Yet another prominent example of this form of judicial activism is the „implied bill of rights theory" in Canadian constitutional jurisprudence. Although this theory was invoked more often before the Canadian Charter of Rights and Freedoms was enacted (as part of the Constitution Act, 1982), the Canadian Supreme Court revisited the theory in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, and the ideas outlined in the Provincial Judges Reference were developed further in the Reference re Secession of Quebec.

The Faroese Constitutional Committee have decided to incorporate explicitly in the text of the Draft New Constitution the idea that there may be constitutional rights that should be defended and protected that do not appear in the rights provisions of the Draft. The Second Part of the Draft Constitution guarantees a range of different types of rights: Equal Rights; Personal Rights; Rights of Faith; Political Rights; Economic Rights; Rights of Subsistence; Social Rights; Administrative Rights; and Process Rights. Preceding this catalogue of rights, under the heading „General Rights and Duties", is Article 8, titled „Other Rights":

> "In addition to the Rights enumerated in this Constitution, other rights shall be defended that are self-evident, inalienable or necessary.„

The judicial organ of the Faroese polity, therefore, if operating under this clause, would unambiguously be empowered to recognise constitutional rights not found in the constitutional text. Judges would be entrusted not only with interpreting the rights found in the constitutional document, but also with deciding ultimately whether other, unenumerated rights were „self-evident, inalienable or necessary".

This article reflects on the debate and discussion about judicial activism that Article 8 would be likely to provoke. This reflection is based mainly on the doctrine of unenumerated rights that has developed under the 1937 Constitution of Ireland, Bunreacht na hÉireann, which we will outline first. This doctrine is both similar and different in kind to the draft Article 8 – it is similar because there is some textual basis for a doctrine of „other rights" in the Irish Constitution, but it is different because it does not provide any textual basis for what the „other rights" might actually be. Secondly, the article shall discuss various Irish perspectives on the legitimacy of judicial activism that recognises extra-textual rights, perspectives that are similar to that found in all jurisdictions where this type of judicial activism exists. It shall be suggested that, while valuable, the debates on judicial activism in the context of extra-textual constitutional rights

are based on fundamental misconceptions regarding the nature of law and rights. Thirdly, we shall outline the theory of law in the Aristotelian-Roman-Thomist jurisprudential tradition and argue that this theory is the only viable option if one seeks to understand and accept the paradoxes involved in rights discourse.

2. The Doctrine of Unenumerated Rights in Irish Constitutional Law

The Irish Constitution of 1937 is primarily based – like the Draft New Faroese Constitution – on the political ideology of liberal democracy. Political liberalism is constitutionally and legally expressed by two key aspects of „liberal legalism“ – „constitutionalism“, or the fencing-in of public power mainly by the separation of powers doctrine and justiciable individual rights, and the „rule of law“, or rule through law rather than the arbitrary whim of persons and the requirement that law must be general, equal, clear and certain before it can be labeled „good“ law. The general liberal legalist position is mirrored accurately in the provisions of Bunreacht na hÉireann and the Draft Faroese Constitution. Both constitutions are founded on the idea of the rule of law and the bulk of the articles in both constitutions deal with the institutions of government and their inter-relation, that is, with the separation of powers; a lesser number of articles in both constitutions are devoted to individual rights. In the Irish Constitution, five articles – Articles 40 to 44 – are devoted to „Fundamental Rights". The main matters dealt with in these articles are: Article 40.1 – Equality before the law; 40.3 – „Personal rights“ generally, particularly the rights to life, person, good name, and property; 40.4 – Personal liberty; 40.5 – Inviolability of the dwelling; 40.6 – Expression, Assembly and Association; 41 – The Family; 42 – Education; 43 – Property; and 44 – Religion.

Although, as has been stated, the Irish Constitution is predominantly liberal democratic in nature, the traditionally strong influence of the Roman Catholic Church in Ireland is also evident. This influence has contributed to the development of a particularly complex (and, it must be said, often incoherent) constitutional jurisprudence. Among two of the more important instances of the Catholic influence in the 1937 Constitution are the Preamble and Article 6.1. The Preamble reads:

> In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire [Ireland], Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the

> individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.

Article 6.1 reads: „All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.„

These religious references, along with the natural rights language contained in certain of the rights provisions, have been invoked to argue that Irish constitutional jurisprudence is founded on the philosophy of Christian democracy as well as on the philosophy of liberal democracy. The rights provisions containing natural rights language concern the Family, Education, children, and private property: Article 41.1 recognises the Family as „the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law"; Article 42.1 acknowledges that „the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children"; Article 42.5 provides that, where there is a failure of parental duty towards children, the State shall endeavour „to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child"; and Article 43.1.1, which reads: „The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods."

The view that the Irish Constitution is influenced by Christian democracy as well as by liberal democracy has sometimes been converted into a far more radical argument, namely, that Irish constitutional jurisprudence is founded ultimately on a modern version of theocratic, Catholic, natural law. This perspective has not been reflected consistently in the case law but there are, however, many decisions that do support a natural law approach of some kind to the Irish Constitution. As we shall see presently, the most important feature of the adoption of a natural law approach in Irish constitutional jurisprudence has been its use in the development of the unenumerated personal rights doctrine, the constitutional cornerstone of which is Article 40.3.1-2. These provisions state:

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.
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.

Between 1937, when the Constitution was adopted, and 1963, little attention was paid to these provisions other than with regard to the rights specified in Article 40.3.2. In 1963, however, in Ryan v. Attorney General, the broad clause in this Article 40.3.1 – „personal rights“ – was held, by virtue of the reference „in particular“ in Article 40.3.2, to refer to more than the „life, person, good name and property rights of every citizen“. The plaintiff claimed that legislation requiring the public water supply to contain a minimum level of fluoride breached her constitutional right to bodily integrity, a right that is not specifically mentioned in the Constitution. Kenny J. in the High Court, in a judgment that was upheld by the Supreme Court, accepted that the plaintiff had an unenumerated constitutional right to bodily integrity. Although he held that it was not violated by the fluoridation (because the fluoridation was in his view proven scientifically to be beneficial and that it was therefore an acceptable public health measure), the judge's reasoning was that the words „in particular“ in Article 40.3.2 implied the existence of other rights than the ones which were mentioned in that provision; that there was in fact a whole range of unenumerated rights which „follow from the Christian and democratic“ nature of the State; and that the 1963 papal encyclical, Pacem in Terris (“Peace on Earth“), which identified „bodily integrity“ as being amongst the natural rights of a person, supported the conclusion that one of these unenumerated constitutional rights was the right to bodily integrity.

The decision in Ryan was the first of a series of decisions that identify such unenumerated, „personal“ rights. In 1996 the Report of the Constitution Review Group listed seventeen rights in addition to the right to bodily integrity that have identified by the courts as being amongst the unenumerated rights constitutionally protected by Article 40.3.1: 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 to have 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 in regard to her child; the rights of a child; and the right to communicate.

It is critical to note, however, that the basis for the identification of unenumerated rights has not been restricted to those arising from the „Christian and democratic“ nature of the State. As has already been mentioned, the most important feature of the adoption of a natural law approach in Irish constitutional jurisprudence has been its use in the development of the unenumerated personal rights doctrine. Natural law has been by far the most important source referred to by the courts in the process of identifying unenumerated personal rights. As the Constitution Review Group observed, this is unsurprising „since the drafters of the 1937

Constitution clearly held natural law principles, as is evident from [the natural rights language of some provisions … and the various religious references in the Constitution]". Other sources that have been invoked less frequently with reference to the identification of unenumerated rights are the rationalist „human personality test" formulated by Henchy J. in Norris v. Attorney General (whereby the identification of rights is based upon the essential characteristics of the individual); the Preamble; and the provisions of Article 45, the „Directive Principles of Social Policy".

3. Irish Perspectives on the Legitimacy of Identifying Unenumerated Rights

There has been much debate regarding the legitimacy of the judicial activism of Irish courts in using Article 40.3.1 as a source for rights not mentioned in the Constitution. Similar debate has taken place in the other jurisdictions where extra-textual constitutional rights have been recognized by courts of law and it would be inevitable, if the Draft New Constitution of the Faroe Islands was adopted, and if the judicial organ of the Faroese polity decided that any unenumerated right or rights were either „self-evident", „inalienable" or „necessary" (or some combination of these), that broadly similar debate would ensue in the Faroese context.

Two of the most prominent commentators on Irish constitutional jurisprudence, the late John Kelly and Gerard Hogan, have both argued that while the language of Article 40.3.1 and 40.3.2 would seem to compel the courts to arrive at the analysis approved in Ryan, there is no objective means of ascertaining the provenance of the personal rights referred to in the provision, and that this seriously undermines the important legal values of objectivity and certainty.

Hogan has addressed and criticised the three main possible sources for the unenumerated „personal rights" of Article 40.3.1 that have been relied on by the Irish courts. Firstly, on the approach taken by Kenny J in Ryan – that the rights stem from the „Christian and democratic" nature of the state – Hogan argues that the two „limbs" of this test are unpersuasive guides to ascertaining which rights are protected. There is only one recognised unenumerated right – the right to travel outside the State – that could be said to derive from the „democratic" nature of the State. As for the „Christian" nature of the state (leaving aside the fact that some of the text of the Constitution, for example Article 44.2, which prevents the state from endowing any religion or from imposing disabilities or making any discrimination „on the grounds of religious profession, belief or status", suggests that the State does not in fact have this character), Hogan points out that the „practical utility" of this standard in determining the rights of citizens is also highly questionable. Hogan refers to the use in Ryan of the 1963 papal encyclical, Pacem in Terris, where the reference therein to a right to bodily integrity was invoked by Kenny J, and points out that the use of this

encyclical to interpret the 1937 Constitution, given that it was only published during the course of argument in the Ryan case, „seems remarkable", and also that the later decision in McGee v. Attorney General directly contradicts the teaching on contraception contained in another papal encyclical, Humanae Vitae (“Human Life“; 1968).

Hogan also dismisses the argument that the natural law approach provides anything like an objective standard for the identification of unenumerated personal rights. He notes that there is „an express judicial acknowledgement that the nature or extent of natural law is a matter of considerable dispute, but that it falls to the judiciary to determine its extent and application.„ Walsh J. in McGee v. Attorney General referred to the problems that this poses for judges in selecting from different versions of natural law:

> 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 … natural rights as they are to be found in the natural law.

Finally, Hogan dismisses the „human personality test“ of Henchy J. in McGee as „a secular version of earlier natural law theories".

Hogan describes „the gist of [his] objection“ as being „that the rather loose language of Article 40.3.1 has resulted in a vast – and, it must be said, unprincipled – expansion of the power of judicial review“. In rejecting the „politicisation“ of constitutional adjudication, Hogan supports the suggestion of John Kelly, who wrote in the wake of the decision in Ryan that one solution would be:

> … to amend the Constitution by incorporating in Article 40 an expanded recital of specific personal rights, laying down in each case the standards upon which the [Parliament] may delimit such rights. We would then be back to the simple principle of testing black-and-white constitutional norms.

This view received further support when, in 1996, the Report of the Constitution Review Group recommended the amendment of Art.40.3.1 to provide a comprehensive list of fundamental rights along the lines of the Kelly-Hogan suggestion (Hogan was a leading member of the fifteen-person Review Group). The Report recommended that this list „might also include those set out in the European Convention on Human Rights and the International Covenant on Civil and Political Rights", and Sionaidh Douglas-Scott observed subsequently:

> This recommendation, building upon the outward-looking approach that characterises some of the more progressive aspects of modern Irish

> society and which seeks to locate itself within best practice internationally, surely provides the basis for the future development of [Bunreacht na hÉireann] towards the realisation of its early potential as a liberal rights based document.

But not everyone agrees with the idea of expressly enumerating all constitutional rights and thereby restricting judicial freedom to recognise „other rights". Richard Humphreys rejects the argument that natural law does not provide adequate guidelines for the task of ascertaining unenumerated rights and favours a constitutional jurisprudence that would draw on natural rights theory and „the international experience". Humphreys' approach is one that entrusts the judiciary with the task of rights protection, irrespective of the fact that there may be a high degree of uncertainty and subjectivity involved in that process. He argues that the natural rights language of the constitutional text cannot simply be overlooked, and his view of drawing on natural rights theory and international human rights law is as an aid in interpreting the Irish Constitution rather than as a means of assisting the task of exhaustive enumeration. Judges, he suggests, should be permitted

> … to determine the extent to which the international community has recognised the right sought to be protected, and the result of that enquiry goes directly to the question of whether the right concerned, or the aspect of it that is at issue, deserves protection as a natural right under the Constitution of Ireland.

In concluding this survey of the Irish doctrine it should be noted that the role of natural law in the context of Bunreacht na hÉireann would appear to be greatly diminished by virtue of the Supreme Court decision in Re the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995. In that case the Supreme Court declared:

> From a consideration of all the cases which recognised the existence of a personal right which was not specifically enumerated in the Constitution, it is manifest that the Court in each such case had satisfied itself that such personal right was one which could be reasonably implied from and was guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity. The Courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution.

While some have suggested that this heralds the „death" of natural law theory in Irish constitutional jurisprudence, others have – more correctly – emphasized

both the inaccuracy of the Supreme Court's claims and its flawed reasoning in this judgment. Indeed, natural law conceived as „higher law“ has been invoked on the Supreme Court subsequent to the Regulation of Information decision. Some may suggest that even if some form of natural law theory endures in Irish constitutional jurisprudence, the doctrine of unenumerated rights is in decline simply because the present crop of judges seem far less eager to invoke it. Significantly this reluctance has been evident specifically in relation to the protection of socio-economic rights. The crucial point in the present context, however, is that the doctrine remains in force and can be invoked by any litigant under Irish constitutional law.

What can we observe about Article 8 of the Draft New Constitution of the Faroe Islands in light of the issues raised regarding the Irish doctrine of unenumerated rights? It is first necessary to reiterate the prima facie difference between the two approaches to „other rights“. Whereas there are no criteria for other rights set out in the text of the Irish Constitution, we will recall that the Draft Faroese Constitution makes explicit provision for the „defence“ of unenumerated rights „that are self-evident, inalienable or necessary“. Let us examine each of these three criteria in turn. The first – „self-evidence“ – does not provide anything like an objective means of ascertaining the provenance of the „other rights“ referred to in the provision. It is, in short, question begging, because what will be self-evident to one person (or to one judge) will not be self-evident to another. A relatively sophisticated approach to „self-evidence“ featured in the preliminary stages of the natural rights theory developed by J.M. Finnis, but that theory has now been challenged and refuted on countless occasions.

If we turn to the second criterion – „inalienability“ – this perspective on rights originates from the concept of natural rights formulated by classical liberal theorists and is associated with modern natural law and natural rights theory. „Inalienable“ rights are said to be absolute, non-transferable rights that are not conferred by any human agency or power and that cannot be given away or repudiated. Again, as in the case of „self-evident“ rights, several different sets of inalienable rights have been suggested. So again the text of the Draft Faroese Constitution does not offer certainty or objectivity in relation to this criterion.

Finally, there is the category of „necessary“ rights. Necessary to whom, or to what? The sense of question begging that characterises the other two criteria remain.

In short, all three criteria for identifying „other“, unenumerated rights set out in Article 8 of the Draft New Faroese Constitution are vague and open to subjective interpretation. The next questions are these: Is this vagueness and openness to subjectivity a problem? And are there objective criteria for identifying other

rights that could or should have been included in the text of Article 8? The answers to these questions, like the questions themselves, are interrelated and can be discussed together. One can say that the vagueness of these criteria is not a problem, and that no more objective criteria could have been included in the text of Article 8, for the very simple reason that rights – whether conceived as „natural rights", „individual rights" or „human rights" – do not exist in the sense presupposed by many contemporary thinkers. Alisdair MacIntyre expressed the irrefutable argument to this effect in his work, After Virtue:

> The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns. Every attempt to give good reasons for believing that there are such rights has failed.

Despite the fact that it is commonplace to begin discussions of rights and rights theory on the assumption that rights do in fact exist in some real sense, it remains incontrovertible that no satisfactory normative justification for human rights has ever been proffered by anyone, irrespective of the extent to which they have been adopted in positive law. The most common type of attempt is to try to ground human rights in some form of political, moral or legal theory based on the rational nature of the human being, but even among these approaches there is persistent disagreement and this makes any reference to objective theories of rights implausible.

Given the prevalence and currency of „rights-talk" in contemporary culture, many will find this argument alarming. If there are no human rights, how are the values we associate with them to be protected? Are MacIntyre and his ilk suggesting that we dispense completely with the idea of human rights and allow those who hold political, economic or military power to ride roughshod, if they so wish, over any sense of human autonomy or dignity? To understand how misplaced these questions are, we must step back and examine the tradition out of which arguments like those of MacIntyre have emerged, namely, the Aristotelian-Roman-Thomist philosophical and jurisprudential tradition.

4. Rights in the Aristotelian-Roman-Thomist Jurisprudential Tradition

Originating in Aristotle and developed principally in the work of Cicero, the Roman jurists and St. Thomas Aquinas, the Aristotelian-Roman-Thomist tradition is concerned with fundamental questions about law's nature, sources, and consequences as a social phenomenon. The tradition has been maintained in recent times and in various forms by thinkers such as the twentieth century

French jurist, Michel Villey (1914-1988), Alisdair MacIntyre, and the contemporary Irish philosopher, Garrett Barden.

Villey noted that what characterises modern legal thinking is the tendency to regard law as a system of rules that are „a product of … the exclusively human spirit“. With regard to applying the law at the judicial stage, modern thinking – whether of the rationalist natural law or legal positivist variety – is that the legal outcome is derived deductively from the rule, and law is thus „the paradise of logic conceived as the art of deduction“. The notion of law normally expounded in classical and medieval theory, on the other hand, was quite different: the law – or „the just“ – is identified with the concrete solution that will be found in each case. The law is neither legislation nor the content of legislation, but the effort, in the light of previous discoveries, to discover what in the particular circumstances is just. There are, of course, rules, but these rules „are not the law, applicable as such to new cases, because to respond precisely to the conditions of each case, each solution must adapt itself to the 'nature of the matter at hand', to the nature of each case“.

The classical view of law is based on the Roman law idea that „the just“ (ius) is the rendering to each what is their due, that to which they are entitled: Justitia est constans et perpetua voluntas jus suum cuique tribuens. When law is applied at the judicial stage, the question that is asked by the court is always: „Who in these particular circumstances is entitled to what?“ The answer to the question – the law in any given instance – is discovered in the course of the judicial proceedings, which are in effect a „discussion“ or „controversy“. The traditional understanding of the judicial discussion or controversy

> had no other ambition than to arrive at the broadest possible agreement among the opinions: it aimed to convince, if not the losing litigant, at least the greatest possible number of the trial participants, of the wise men present in the audience and of the third parties who would agree the following day to help carry out the sentence. Yet this rational agreement was the sign of an approach to the truth.

Modern rationalism tends not to be satisfied with mere „agreement“ that „approaches“ the truth. How can justice be merely the giving to each what is their due when this means that the principles of justice are not specified in advance? The point is that justice, or what is due to whom, cannot be specified in advance because it cannot be known in advance: it must be discovered through the discursive judicial process. It represents the law because law demands a discovery based on the nature of each particular case with which it is confronted: a decision is required and the decision will relate to the particular facts of the case as well as to the legal rules in the abstract. The rationalist tendency is to suggest

that justice can be known, that a set of unassailable principles of justice can be formulated and particular conclusions of justice deduced therefrom. In effect this is a formalist mindset, in which justice becomes another „paradise of logic conceived as the art of deduction".

The judicial discovery of law – of the just – does not take place in a vacuum: it takes place in social context. The Roman jurists recognized that every society was governed partly by laws which were peculiarly their own (the ius civile of a particular society) and partly by laws which were common to all mankind. These latter laws they termed the law of nations, ius gentium:

> What natural reason establishes among all men and is followed equally by all people is called the law of nations (ius gentium) for all nations use it. It is common to all humankind for nations have established laws as occasions and the necessities of human life required.

The ius gentium is not invented as a common law; rather it is discovered to be common. It is common because humans are reasonable and social beings whose lives together are in very basic and important ways similar in different societies; so, for example, no human society can survive in which random and indiscriminate killing is approved or practiced; no human society can survive if whatever is in any way owned may be taken against the owner's will by another at his whim; no human society exists in which no agreements are made, or in which it is not accepted that agreements are to be honoured. That agreements should be kept – pacta sunt servanda – is not an arbitrary rule added to agreement; it is essential to agreement.

Thomas Glyn Watkin writes that the ius gentium „pre-exists the group's existence and the group's own legislative enactments must conform to this higher law in order to be valid.„ The phrase „higher law" may easily mislead by giving the impression that the ius gentium, already fully formed, is in some sense imposed from above. It is not. Its provisions are discovered to be common to different societies but, before they were discovered to be common, they were in fact common, and were similar responses to similar exigencies. The Roman law idea is that the ius gentium is a response to the very basic exigencies of human life that, as a matter of fact, are common to humankind.

The philosopher F.S.C. Northrop distinguished between the positive law of the community and the „living law", a concept similar to the ius gentium. The latter was a reference to how people in every community were brought up to do a whole host of things in particular ways that had nothing to do with the positive law, including, for example, established procedure, custom, habit, mutual expectation, assumption, and so on and so forth. The living law of a community does not come

into existence by any process of rational consideration or debate, is not for the most part explicitly formulated in language, can not be changed by any individual or institution, and if it changes at all it is only slowly. This is the background context or tradition against which dialectic or debate on positive law takes place; it constitutes the sense of justice of a given community or society, a sense that evolves as a consequence of people living together and dealing with the continual jural demands that ordinary living imposes upon them. This sense of justice not only provides the framework within which law is judicially interpreted; it also provides the basis of formulated law, that is, of constitutions and legislation. Society is lived; the law or formulated rules express an understanding of how society actually operates, how it is lived. Whatever is discovered as law in the social context – whether through interpretation or formulation – will not of course be infallible: what is discovered will often be the subject of intense debate and disagreement.

Garrett Barden has observed that this sense of communal justice that provides the context in which law is discovered may be recognised in a written constitution and, „to the extent that this recognition occurs, the written constitution acknowledges openly its own partial character“. He gives the example of the Dutch Civil Code, the Burgerlijk Wetbok, which refers to the „common opinions held about law by the Dutch people“ of which the written constitution and code are a partial expression. We find an allusion to this background or context in many constitutional preambles; in the Preamble to the Draft New Constitution of the Faroe Islands, it is stated: „We [the People of the Faroe Islands] built this Land in ancient times and governed ourselves with a Law Thing, Laws and Rights. We have held this Law Thing until this day and organised ourselves according to the needs of the People around the entire Land.„

What, then, of „rights“ in the tradition that we are discussing? We have seen that Alisdair MacIntyre has referred to belief in individual or human rights as akin to belief in witches or unicorns. This does not mean, however, that the Aristotelian-Roman-Thomist tradition rejects the vocabulary of „rights“ completely; but the term, when it is used, means something entirely different to – and much broader than – its more conventional meaning. St. Thomas Aquinas in his Summa Theolgiae, written in the thirteenth century, expressed this other sense of „right“ in particularly clear terms, but it is worth remarking first that the modern, conventional understanding of rights pre-dated St. Thomas.

The canon law of the twelfth and thirteenth centuries possessed both a fully developed concept of subjective rights and nascent theories of natural rights. Brian Tierney has shown that it was in the two centuries after Gratian's Decretum of 1140 that the phrase ius naturale, which traditionally meant cosmic harmony or objective justice or natural moral law, began to acquire also the sense of a subjective natural right. Although St. Thomas was influenced in some respects

by the canonists' teaching on various issues, he did not adopt their conceptions of a „right“ as either a power inhering in an individual or a zone of personal liberty. In the Summa Theologiae, St. Thomas offers the following version of the Roman law definition of justice: „the habit whereby a person with a lasting and constant will renders to each his due". The objective interest of justice, says St. Thomas, is called „the just thing, and this indeed is a right.„ Thus, in this conception of justice, a „right“ comes into existence in real terms when something is recognised as being due to someone. St. Thomas argues that „right“ is fittingly divided into natural right and positive right:

> [T]he right and just is a work that is commensurate with another person according to some sort of fairness. This can be measured in two ways. One, from the very nature of the case, as when somebody gives so much in order to receive as much in return: this is called natural right. The other, the commensurate to the other is settled by agreement or mutual consent, as when a person counts himself content to receive such or such in return. And this may come about in two ways. First, by private engagement, as when the parties bind themselves to a contract without the State entering in; and second, by public agreement, as when the whole civil community or State fixes what is adequate and commensurate or when this is so ordained by the sovereign authority who has charge over and personifies the people: this is called positive right.

In St. Thomas' thought, therefore, „natural right“ refers to entitlement in a situation of justice where no agreement or law exists, and „positive right“ refers entitlement in a situation of justice where an agreement as to entitlement has been arrived at either privately or publicly.

In the Aristotelian-Roman-Thomist tradition, therefore, rights-claims of any kind – including of course claims that an individual or human right exists in a given situation – represent claims to entitlement. All law – and all justice – is in this sense about „rights“: to ask who is entitled to what in a particular case is to ask who has a right in that particular case. Rights, therefore, like law and „the just“, are discovered. All law, moreover, is about potential or actual „conflicts“ of rights. What is always discovered in court is a resolution of a rights conflict.

5. Conclusion

If adopted, Article 8 of the Draft New Constitution of the Faroe Islands has the potential to give rise to substantial controversy. If invoked, there shall undoubtedly be occasional or frequent dissatisfaction with what the judiciary – or more specifically, what individual judges – consider to be „self-evident, inalienable or necessary“. But of course similar dissatisfaction may arise from judicial

interpretation of the rights that are enumerated in the constitutional text. This is the nature of interpretation. It is rarely, if ever, unanimously agreed upon. In the Irish debate on the enumerated rights doctrine those who favour the express and „exhaustive“ enumeration of rights have sometimes been forced to drop their guard when it comes to the question of interpretation. Gerard Hogan, for example, remains conscious of a problem with the proposal of a return to „black-and-white constitutional norms": there is still indeterminacy and significant room for interpretation, and therefore the possibility of subjective bias on the part of the judges. He acknowledges this, to some limited extent at least, when he refers to the express protection of rights in the European Convention of Human Rights: „This, of course, is not to pretend that the wording of the Convention is not very 'open-textured' and leaves much to individual judicial discretion."

Yet the quest for certainty and objectivity in constitutional jurisprudence – and indeed in law generally – is unlikely to end. The Aristotelian-Roman-Thomist tradition, which does not participate in this quest, represents an alternative and viable option in terms of understanding and accepting the paradoxes involved in rights discourse It is worth noting that for St. Thomas Aquinas, as indeed for Cicero, the ultimate authority of law is that it is a reasonable but not infallible solution, being only the best available opinion – in the main, and in a given institutional context (where some conclusion must be reached) – to a given problem.

This is not to suggest that the theory of law and rights that perceives them as being constantly discovered offers a complete jurisprudence. As with any tradition, there is always ongoing reflection and development. For example, a great deal of debate focuses on how judges should interpret constitutions and constitutional rights; what is noticeable about much of this debate is the absence of any reference to the personnel that actually do the interpreting, that is, the judiciary. We have seen that Aristotelian-Roman-Thomist jurisprudence gives prominence to the facts of each individual case but it does not engage sufficiently with twentieth century American realist jurisprudence, some of which gives even more prominence to the facts of cases and all of which turns the spotlight on judicial personnel. If one accepts the basic realist assumption as being „that judges – stimulated, primarily, by the facts before them rather than by the rules to which those facts might be fitted – work backwards, 'from a desirable conclusion to one or another of a stock of logical premises'", then the question of selecting the judiciary become highly significant (but a question that is not addressed much in the literature on constitutional adjudication). Brian Leiter has recently pointed out that the most influential realist view regarding what actually determines the responses of judge to particular fact has been that it is „common sociological facts about judges (e.g. their background, their professional socialization experiences, and the like)“ (rather than Jerome Frank's view that it is idiosyncratic facts about each judge's personality which counted). This view does find some expression

in an Appendix to the Irish Report of the Constitution Review Group entitled „The independence of the judiciary". The author, Kathleen Lynch, observed:

> While it may not have been the remit of the Constitution Review Group to engage in a class and gender analysis of the judiciary … they remain matters which impact directly on how the Constitution and the laws operating under it will be, and have been, interpreted. For it is a sociological fact that the perspectives of all persons are profoundly influenced by their own biographical experience, including their gender and social class-related socialisation. Judges (and other persons exercising judicial functions), being human, are subject to the same biases and prejudices as other persons…

Issues such as these would seem to be far more significant than the illusive search for „objectivity" in constitutional interpretation; moreover, they are issues that the Aristotelian-Roman-Thomist jurisprudential tradition has yet to accommodate theoretically.

FIN

C. B. Gray, „Introduction" in C. B. Gray (ed.), The Philosophy of Law: An Encyclopedia (New York, Garland, 1999), p.vii.

S. J. Kenney, W. M. Reisinger and J. C. Reitz, „Introduction: Constitutional Dialogues in Comparative Perspective" in S. J. Kenney, W. M. Reisinger an J. C. Reitz (eds.), Constitutional Dialogues in Comparative Perspective (New York, St Martin's Press, 1999), p.1.

Griswold v. Connecticut [1965] 381 U.S. 479. The Due Process Clause in the United States Constitution raises similar issues. For a recent discussion of whether a process can be „due" only if it accords with judicially ascertained principles of liberty and justice, see A. Hyman, „The Little Word 'Due'" (2005) 38 Akron Law Review 1.

Australia Capital Television v Commonwealth of Australia [1992] 177 C.L.R. 106. See A. Stone, „The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 Melbourne University Law Review 668. See also R. M. O'Neil, „Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter?" (1994) 22 Federal Law Review 1.

[1997] 3 S.C.R. 3.

[1998] 2 S.C.R. 217.

The original reads: „Onnur rættindi: Umframt rættindi ásett í hesi skipan verjir hon onnur rættindi, sum eru sjálvsøgd, ómissandi ella neyðug.„

For background to the Irish Constitution, see D. Keogh, „The Irish Constitutional Revolution: An Analysis of the Making of the Constitution“ in F. Litton (ed.), The Constitution of Ireland 1937-1987 (Dublin, Institute of Public Administration, 1988).

For an overview of this area of Irish constitutional law, see D. Gwynn Morgan, The Separation of Powers in Irish Constitutional Law (Dublin, Round Hall Sweet and Maxwell, 1997).

In the Irish Constitution, the right to vote – another classic liberal-democratic right – is guaranteed in a provision (Article 16.2) other than the provisions entitled „Fundamental Rights".

Other provisions where the religious influence is or was evident include Article 34.5.1 (providing the wording of judges' declaration upon appointment, which begins „In the presence of Almighty God I… do solemnly and sincerely promise and declare…") and the original text of Article 44.1.2 and 44.1.3 (providing that, while other religious denominations are recognised by the state, the „special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens“ be recognised in particular). Article 44.1.2 and 44.1.3 were deleted by referendum in 1972.

See, for example, G. Whyte, „Some Reflections on the Role of Religion in the Constitutional Order“ in T. Murphy and P. Twomey (eds.), Ireland’s Evolving Constitution (Oxford, Hart, 1998).

The right to own private property is guaranteed twice in the Irish Constitution: as a right under Article 43 and also under Article 40.3.

See, for example, R. J. O'Hanlon, „Natural Law and the Constitution“ (1993) 11 Irish Law Times 8 and „The Judiciary and the Moral Law“ (1993) 11 Irish Law Times 129. For responses to Judge O’Hanlon’s arguments, see T. Murphy, „Democracy, Natural Law and the Irish Constitution“ (1993) 11 Irish Law Times 81 and D. Clarke, „The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon“ (1993) 11 Irish Law Times 177.

[1965] I.R. 294. Although not reported until 1965, Ryan was decided in 1963. For a thorough discussion of this case, see G. Quinn, „Reflections on the Legitimacy of Judicial Activism in the Field of Constitutional Law“ (Winter 1991) Dlí 29.

Report of the Constitution Review Group (Dublin, Stationery Office, 1996), p.246. James Casey, in his Constitutional Law in Ireland, 3rd ed. (Dublin, Round Hall Sweet and Maxwell, 2000), lists only twelve unenumerated rights (p.395); this difference can be explained by a combination of different interpretations of cases and differing ideas as to what precisely constitutes a „right".

ibid., p.249.

[1984] I.R. 36, at 71. In Norris, Henchy J.'s minority judgment held that an unenumerated right to privacy existed and was breached by legislation that criminalized male homosexual behaviour. The legislation in question was subsequently repealed by the Criminal Law (Sexual Offences) Act, 1993 after Ireland was judged to be in breach of the European Convention on Human Rights in Norris v. Ireland [1988] E.C.H.R. 22.

See the judgment of Walsh J. in McGee v. Attorney General [1974] I.R. 284.

Article 45 states that it is „intended for the general guidance of the Oireachtas [Parliament]" and „shall not be cognisable by any Court under any of the provisions of this Constitution". However, the wording of Article 40.3.1 „enables matters which were supposedly beyond the scope of judicial enforcement to be rendered indirectly cognisable by the courts by virtue of being identified as a personal right". Report of the Constitution Review Group, p.253. See Murtagh Properties v. Cleary [1972] I.R. 330.

See J. M. Kelly, Fundamental Rights in the Irish Law and Constitution, 2nd ed. (Dublin, Jurist Publishing, 1984) and G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated" (1990-1992) 25-27 Irish Jurist 95. See also G Hogan, „Constitutional Interpretation" in F. Litton (ed.), op. cit.

G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated", at 104-11

The State (M.) v Attorney General [1979] I.R. 73.

In McGee, the Supreme Court held that a married couple had an unenumerated right to marital privacy that was breached by the criminal law prohibiting the importation, sale or advertising of contraceptives.

G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated", at 110.

ibid., at 111.

ibid., at 114.

J. M. Kelly, op. cit., p.47.

Report of the Constitution Review Group, p.259.

S. Douglas-Scott, „'A disposition to preserve and an ability to improve': The Report of the Constitution Review Group in the Republic of Ireland“ (1997) Public Law 55, at 62.

R. Humphreys, „Interpreting Natural Rights“ (1993-95) 28-30 Irish Jurist 221, at 227. See also R. Humphreys, „Constitutional Interpretation“ (1993) 15 Dublin University Law Journal 59.

[1995] 2 I.L.R.M. 81, at 107.

A. F. Twomey, „The Death of Natural Law?“ (1995) 13 Irish Law Times 270.

G. Whyte, „Natural Law and the Constitution“ (1996) 14 Irish Law Times 8.

See for example the judgment of Murphy J. in D.P.P. v. Best [1998] 2 I.L.R.M. 549. For the argument that to conceive of natural law as necessarily „higher law“ is inaccurate, see T. Murphy, „St. Thomas Aquinas and the Natural Law Tradition“ in T. Murphy (ed.), Western Jurisprudence (Dublin, Thomson Round Hall, 2004).

See Sinnott v. Minister for Education [2001] 2 I.R. 545 and D. (T.) v. Minister for Education [2001] 4 I.R. 259. On the Irish debate regarding socio-economic rights, see T. Murphy, „Economic Inequality and the Constitution“ in T. Murphy and P. Twomey (eds.) op cit., and G. Whyte, Social Inclusion and the Legal System (Dublin, Institute of Public Administration, 2002).

See J. M. Finnis, Natural Law and Natural Rights (Oxford, Clarendon, 1980).

For an early critique, see N. MacCormick, „Natural Law Reconsidered“ (1981) 1 Oxford Journal of Legal Studies 99.
A. MacIntyre, After Virtue, 2nd ed. (Notre Dame, Ind., University of Notre Dame Press, 1984), p.69.

For a recent example, see G. W. Rainbolt, „Rights Theory“ (2006) 1 Philosophy Compass 11. See also C. Harvey, „Talking about Human Rights“ in T. Murphy (ed.), op. cit., p.299 (“[My] view is that moral rights exist beyond the context of their legal recognition.„)

For examples, see D. Richards, A Theory of Reasons for Actions (Oxford, Clarendon, 1971); R. Dworkin, A Matter of Principle (Cambridge, Harvard University Press, 1985); and A. Gewirth, The Community of Rights (Chicago, Chicago University Press, 1996).

For discussion of this issue, see R. O'Connell, „Do We Need Unicorns When We Have Law?" (2005) 18 Ratio Juris 484, at 484-492.

I would like to thank Professor Barden for his assistance regarding this part of the article. Responsibility for any flaws, gaps or errors remains mine alone.

See M. Villey, „Questions of Legal Logic in the History of the Philosophy of Law" in V. Gessner, A. Hoeland and C. Varga (eds.), European Legal Cultures (Aldershot, Dartmouth, 1996), p.111 (emphasis in original). This is a translation of „Questions de logique juridique dans l'histoire de la philosophie du droit" (1967) 37 Logique et Analyse 3-22.

M. Villey, „Questions of Legal Logic", p.113.

ibid., p.114 (emphasis in original).

The Institutes of Justinian, Book I, Title I ("Of Justice and the Just"). In English: The virtue of justice is the constant and enduring will (determination) to render to each what is due.

See G. Barden, „Of the Naturally and Conventionally Just" in T. Murphy (ed.), op.cit.

As Villey has suggested, to carry out the judge's task in each particular case, „there is a method – supple, prudent, approximative – inherited from the ancients: the method of discussion". M. Villey, Critique de la pensé juridique moderne (Paris, Dalloz, 1976), p.136 (trans. G. Barden: „Discovering a Constitution" in T. Murphy and P. Twomey (eds.), op. cit., p.5; emphasis in original).

M. Villey, „Questions of Legal Logic", p.115.

See, for example, P. Hillyard, „Invoking Indignation: Reflections on Future Directions in Socio-legal Studies" (2002) 29 Journal of Law and Society 645 at 655 ("[W]e need the absolute value, a utopian concept of justice, in order to challenge [inequalities].„)

Institutes of Justinian: Bk.I. Title II. #1, 2.

T. G. Watkin, An Historical Introduction to Modern Civil Law (Aldershot, Dartmouth, 1999), p.25.

For an account of Northrop's theory, see Bryan Magee: Confessions of a Philosopher (London, Phoenix, 1997), pp.166-167.

See G. Barden, „Discovering a Constitution“, pp.5-6.

ibid., p.4.

Burgerlijk Wetbok, Preliminary Title, s.7. The provisions of the code, Barden notes, „may be conceived less as deductions from abstract principles than as attempts to discern and express the developing sense of justice“. „Discovering a Constitution“, p.4.

Emphasis added. The original reads: „Vit bygdu hetta landið í fornari tíð og skipaðu okkum við tingi, lógum og rættindum. Vit hava hildið ting til henda dag og skipað okkum eftir fólksins tørvi um landið alt.„

See B. Tierney, The Idea of Natural Rights (Atlanta, Scholars, 1997). See also B. Tierney, „Origins of Natural Rights Language: Texts and Contexts, 1150-1250", History of Political Thought, Vol. X, No. 4, Winter 1989, 615.

Summa Theologiae, II-II, q.58, a.1c, Vol. 37 (1975), p.21 (emphasis in original), trans. Blackfriars (London, Eyre and Spottiswoode, 60 Volumes).

Summa Theologiae, II-II, q.57, a.1c, Vol. 37 (1975), p.5.

Summa Theologiae, II-II, q.57, a.2c, Vol. 37 (1975), p.9.

G. Hogan, „Unenumerated Personal Rights: Ryan's Case Re-evaluated“, at 116.

N. Duxbury, Patterns of American Jurisprudence (Oxford, Clarendon Press, 1995) p.123 (quoting Max Radin).

B. Leiter, „Is There An American Jurisprudence?“ (1997) 17 Oxford Journal of Legal Studies 367, at 375.

Report of the Constitution Review Group, Appendix 26, p.584. See also J. A. G. Griffith, The Politics of the Judiciary, 4th ed. (London, Fontana, 1991) and G. H. Gadbois, „Indian Supreme Court Judges: A Portrait“ (1968-69) 3 Law and Society Review 317.

Consider, for example, John Hart Ely's account of a judicial class bias: „Experience suggests that there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle professional class from which most lawyers and judges, and for that matter, most moral philosophers, are drawn… [W]atch when most fundamental-rights theorists start edging towards the door when someone mentions jobs, food or housing: those are important, sure, but they aren't fundamental.„ J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge, Harvard University Press, 1980) pp.58-9.