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***Developing Trends in the Catholicity of Judicial  
Decisions on the Constitution***

***Trinity College, Dublin***

***Ph.D***

***2010***

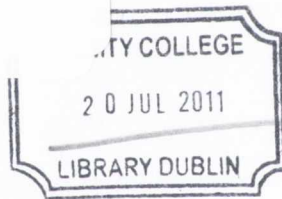
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## SUMMARY

In this thesis I examine the development of Catholicity as an influence on judicial decisions on the Constitution. When I refer to Catholicity, it concerns Catholic thought, Catholic social teaching, clerical intervention in the legal process and evidence of judicial deference towards the Catholic hierarchy. I argue that there is less evidence of Catholicity in judicial decisions on the Constitution in the early years of the State than one would expect given the confessional culture that existed. I argue that the reason for this was the residual influence of the British liberal concept of parliamentary supremacy on the judiciary which meant that the Courts adopted an unassertive position and tended not to engage with the Catholic norms in the 1937 Constitution. An exception to this unassertiveness and unwillingness to engage with the Constitution was Gavan Duffy P whose judgments represent the high water mark of Catholicity at a time in which the Catholic Church's political influence was at its peak.

During the early years of the State, there was little temptation for clerical figures to attempt to intervene in the legal process as the judiciary was not capable of being socially transformative because of the dominance of the British principle of parliamentary supremacy which limited the Court's power of judicial review. Because the Church did not exert its influence for its own sake, it did not have a motivation to attempt to influence the judiciary. Clerical intervention in the legal process would only take place if the Courts had the potential to be socially transformative. Therefore, the clergy would only intervene in the legal process if it was necessary to conform Irish society to Catholic social and moral norms.

In the 1960s, the judiciary became more assertive and receptive to constitutional arguments just as the post-Vatican II Church had become less assertive. The Church therefore stated that it did not expect civil laws to always mirror Church law. Therefore, just as the judiciary was becoming a more active participant in society the

Church was redefining its role as the conscience of society. This decreased the likelihood of clerical intervention and created more space for a Catholic judge to decide a case contrary to Catholic morality as the Church accepted that all civil laws could not reflect Catholic morality. These developments explain the context in which civil law and Church law diverged in *McGee*. The emergence of a more activist judiciary during the 1960s took place at a time of important institutional changes within the Catholic Church as a result of the Second Vatican Council and as society was becoming increasingly more secularised. Northern Ireland also became central to the politics of the island and there was a growing awareness of the religious sensitivities of Northern Protestants. Therefore, laws which were perceived as being sectarian or confessional were subjected to a greater level of scrutiny as pluralism became a central norm in law and politics.

These extra-legal developments meant that the power of judicial review would be used as a means of encroaching on the power of the Catholic Church rather than buttressing its position as would have been the case had the Courts been more assertive at an earlier stage. I argue that while post-Vatican II the Courts have been prepared to strike down religiously non-plural laws they have been prepared to grant special protection to religion but not uniquely to any one religious view. In the 1980s, the Catholic counter reaction against the rise of liberalism was reflected in the 3/2 division of the Supreme Court in *Norris*. In recent years O'Hanlon J has been the only judge to display deference to the Catholic Church. In contemporary times the Courts' jurisprudence has drifted towards a more secular approach exemplified by Hardiman J's interpretation of Article 41 and 42 as coincidentally reflecting secular philosophical positions.

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## Acknowledgements

I would like to give particular thanks to my supervisor Professor Gerry Whyte for the encouragement, knowledge, and assistance he gave me in the course of my research over the last years. I would also like to thank Gabriel Doherty and Professor Dermot Keogh who laid the seeds for my interest in Church-State studies as an under-graduate history student at University College Cork. I would like to thank a number of people who have offered assistance, advice and encouragement during the course of my research, these include: Kay O'Reilly, Brendan Ó Cathoir, Fr Albert McDonnell, Professor Ivana Bacik, Marcus Bourke, Oran Doyle, Rory O'Connell, David Prendergast, Donal Coffey, Mark Coen, Professor Diarmaid Ferriter, Mark White, Vera Orschel, and Noelle Dowling. I would also like to thank the staff of the following institutions: National Archives, UCD Archives, the National Library, Trinity Library, Irish Pontifical College (Rome) and Vatican Secret Archives. I would like to give special thanks to Cólín, Emma, Bea and Eoghan for their encouragement and support. I would like to give particular mention to Gearoid (1973-2009) who sadly passed away in the course of my research. Ba mhaith liom buíochas ar leith a ghabháil le mo thuismitheoiri i gcomhair an ghrá agus an chúnaimh a thugadar dom agus mé ag cuir na taighde seo diom.

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# Developing Trends in the Catholicity of Judicial Decisions on the Constitution

## Introduction

*'I want to throw open the windows of the Church so that we can see out and the people can see in.'*<sup>1</sup> Pope John XXIII

The second edition of John Kelly's *The Irish Constitution* was published with Sir John Lavery's painting, *The Blessing of the Colours*<sup>2</sup> on the cover. The painting is set in a Church and depicts a member of the Irish Free State army kneeling on one knee with his head bent over facing the ground, deep in prayer, while he clutches a tricolour the tips of which fall to the floor. The dominant figure in the painting is a Bishop standing assertively above the soldier with a crozier in his left hand and his right arm raised as he blesses the soldier and the flag. To the Bishop's left, an altar boy holds a Bible aloft. The message is clear: the Irish nation kneels facing the Catholic Church in docile piety and devotion. When the third edition of the book was published, the painting had been dropped from the cover which prompted Richard Humphreys to comment 'I am not sure that we have yet reached the point of modernisation where the authors can fully justify their removal from the cover of the book of the lovely picture by Sir John Lavery, "The Blessing of the Colours—"'.<sup>3</sup> The synthesis between loyalty to the State and loyalty to the Catholic Church are viewed as interchangeable in Lavery's painting. The Catholic Church assumed a hegemonic role in early twentieth century Ireland based on a rise in vocations, increased ownership of property, a deferential political class, and the assertiveness of the Romanised Church particularly from 1850 onwards. The 1950s represented the high water mark of the Church's hegemony in the broader social, political and cultural life of the country.

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<sup>1</sup> Quoted in Tony Judt, *Postwar: A History of Europe since 1945*, William Heinemann, London, p.360.

<sup>2</sup> Hugh Lane Municipal Gallery, Dublin.

<sup>3</sup> Richard Humphreys, Review of 'Kelly, *The Irish Constitution*', (1994) *Dublin University Law Journal* 16, p.222.

In this thesis I propose to examine a specific aspect of Church-State relations, namely the development of the influence of Catholicity on judicial decisions on the Constitution. When I refer to Catholicity, it concerns Catholic thought, Catholic social teaching, clerical intervention in the legal process and evidence of judicial deference towards the Catholic hierarchy. I argue in this thesis that there is less evidence of Catholicity in judicial decisions on the Constitution in the early years of the State than one would expect given the confessional culture that existed. I argue that the reason for this was the residual influence of the British liberal concept of parliamentary supremacy<sup>4</sup> on the judiciary which meant that the Courts adopted an unassertive position. Because the Church did not exert its influence for its own sake there was not a motivation to attempt to influence the judiciary. An exception to the unassertiveness of the judiciary was Gavan Duffy J whose judgments represent the high water mark of Catholicity at a time in which the Catholic Church's political influence was at its peak. In the 1960s the judiciary became more assertive and receptive to constitutional arguments just as the post-Vatican II Church had become less assertive. The Church therefore stated that it did not expect civil laws to always mirror Church law. Therefore, just as the judiciary was becoming a more active participant in society the Church was redefining its role as the conscience of society. This decreased the likelihood of clerical intervention and created more space for a Catholic judge to decide a case contrary to Catholic morality as the Church accepted that all civil laws could not reflect Catholic morality. These developments explain the context in which civil law and Church law diverged in *McGee v AG*<sup>5</sup>. I argue that while post-Vatican II the Courts have been prepared to strike down religiously non-plural laws they have been

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<sup>4</sup> Dicey described the concept of parliamentary supremacy as the right of parliament 'to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.' AV Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1959, p.39-40. Dicey viewed England as synonymous with Great Britain and Ireland. Dicey had been a vociferous opponent of Home Rule publishing his views on the subject in 1887 in *England's Case Against Home Rule*, Richmond P, Surrey, 1973. The concept of parliamentary supremacy is a direct result of the English civil war with parliament declaring itself sovereign in the Bill of Rights, 1689 and the Act of Settlement, 1701. The concept therefore arose from the particular historical circumstances existing in 17<sup>th</sup> century England. Lord Cooper in the Inner House in *McCormick v Lord Advocate* 1953 SC 396 stated *obiter dicta* 'the principle of the unlimited sovereignty of Parliament is a distinctly English principle with no counterpart in Scottish law.' Lord Copper's *obiter dicta* echoed Kennedy CJ's attempt to create an indigenous jurisprudential tradition in Ireland in *State (Ryan) v Lennon* [1935] IR 170. See chapter 3.

<sup>5</sup> *McGee v AG* [1974] IR 284.

prepared to grant special protection to religion but not uniquely to any one religious view. In the 1980s the Catholic counter reaction against the rise of liberalism was reflected in the three-two division of the Supreme Court in *Norris v AG*<sup>6</sup>. In recent years O'Hanlon J has been the only judge to display deference to the Catholic Church. In contemporary times the Courts' jurisprudence has drifted towards a more secular approach exemplified by Hardiman J's interpretation of Article 41 and 42 as coincidentally reflecting secular philosophical positions.

The principal source I used in compiling evidence of Catholicity in the process of adjudication was a textual examination of judicial judgments e.g. Kenny's J reliance on the papal encyclical *Pacem in Terris* in *Ryan v AG*<sup>7</sup> is evidence of Catholicity. I also examine archival evidence from the private papers of John Charles McQuaid, the Vatican Secret Archives, the Irish Pontifical College, Rome, Irish Government Papers, the de Valera Papers, and the judicial papers of Hugh Kennedy, Cearbhall Ó Dálaigh and George Gavan Duffy all of which I personally visited. I also refer to secondary legal and historical sources. I have concentrated on the *Irish Times* as the paper of record when referring to media coverage of particularly significant or controversial cases. I have also used the *Irish Independent* though less frequently. I chose not to rely on interviews because of the risk of bias. While the release of the McQuaid papers gives some fascinating insights into his period as Archbishop, there are no letters from members of the judiciary indicating the Archbishop had attempted to lobby them on any particular issue. However, contained within the Archbishops' papers, there is list of all the members of the Supreme Court and High Court (this appears to be from around 1961, the time of the Ó Dálaigh Supreme Court) with their private addresses and phone numbers.<sup>8</sup> This list might provoke conjecture but can not be regarded as historically substantive proof of the influence of the Archbishop on the judiciary. One can only speculate as to whether or not the Archbishop ever phoned the numbers on the list and if he did what the content of those conversations might have been. I exploit the various sources of judicial evidence of Catholicity to explain the development of

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<sup>6</sup> *Norris v AG* [1984] IR 36.

<sup>7</sup> *Ryan v AG* [1964] IR 294.

<sup>8</sup> DDA, *McQuaid Papers*, AB8/A/V undated.

judicial decisions on the Constitution since 1922. I therefore draw on these sources to create a narrative which follows the development of Catholicism as an influence on the judiciary in the context of Church-State studies.

I argue that during the early years of the State there was little temptation for clerical figures to attempt to intervene in the legal process as the judiciary was not capable of being socially transformative because of the dominance of the British principle of parliamentary supremacy which limited the Court's power of judicial review.<sup>9</sup> Clerical intervention in the legal process would only take place if the Courts had the potential to be socially transformative. As Murray wrote in the context of clerical political interventions:

The recurring political assertiveness of the Irish clerical church throughout the period [1922-1937] cannot be explained simply as a reflection of an impulse to exert power for its own sake. Clerical political power was an essential means to a greater end: to ensure that Irish society functioned in conformity with Catholic moral and social principles, which churchmen could not but regard as fundamental to individual and communal well-being.<sup>10</sup>

Therefore, the clergy would not intervene on the legal process for its own sake but if it was necessary to conform Irish society to Catholic social and moral principles. The timidity of the judiciary lessened the likelihood of clerical intervention. An exception to the conventionalism of the judiciary was the judgments of Gavan Duffy P who was guided by a belief that it was necessary to reframe Irish jurisprudence and break away from the influence of English law and give Irish law 'a more distinctly Catholic cast'.<sup>11</sup> The dominant and assertive role of the Catholic Church in Ireland tended not to be reflected in judicial decisions to the same extent as it was in the policy based decisions of the legislature and the executive. This was due to the Court's own belief in the

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<sup>9</sup> Therefore in *O'Byrne v Minister for Finance* [1959] IR 1, 40 Lavery J commented: '...the judicial power is the weakest of the three organs of government, as it holds neither the sword nor the purse.' O'Dalaigh CJ is reported to have commented in 1961 'We have a Constitution but nobody knows what it means.' Quoted by Colm Toibin, *Magill*, February 1985. The author does not identify the case in which the comment was made.

<sup>10</sup> Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, Fontana P, London, 2000, p.419.

<sup>11</sup> John Whyte, *Church and State in Modern Ireland*, p.167. O'Hanlon J also showed a similar level of commitment to Catholic thought i.e. in *Donoghue v Minister for Health* [1996] 2 IR 20 the judge relied on the Vatican II document *Gravissimum Educationis*.

limitations on its powers. There was a general lack of judicial engagement with the 1937 Constitution as Delaney stated in 1957:

In the 35 odd years in which Ireland has been under a written Constitution, surprisingly few cases have come before the Courts in which constitutional issues have been directly or indirectly raised. This is all the more surprising in a situation where an express power of review is given to the Courts, but may have resulted from the fact that the whole idea, was and is, an unfamiliar one.<sup>12</sup>

This situation changed fundamentally after *Ryan v AG* as the potential of the Constitution as a source of unenumerated rights was recognised and the courts became more receptive to constitutional based arguments by litigants.<sup>13</sup> However, there was occasional evidence of judicial activism prior in the 1940s as Hogan states ‘It is now sometimes forgotten that...the 1940s were to see occasional bursts of judicial activism that were to presage the significant developments of the 1960s and later decades.’<sup>14</sup> Therefore, the Supreme Court held that the School Attendance Act 1942<sup>15</sup>, Part III of the Trade Union Act, 1941<sup>16</sup> and the Sinn Féin Funds Act, 1947<sup>17</sup> were unconstitutional. In contrast Hogan describes the 1950s as ‘a relatively fallow period.’<sup>18</sup>

I further argue that the emergence of a more activist judiciary during the 1960s took place at a time of important institutional changes within the Catholic Church as a result of the Second Vatican Council and as society was becoming receptive to secular norms. Northern Ireland also became central to the politics of the island and there was an

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<sup>12</sup> VTH Delaney, ‘The Constitution of Ireland: Its Origins and Development’, (1957) 12 *University of Toronto Law Journal* 1, p.10.

<sup>13</sup> The important jurisprudential developments which took place during Ó Dálaigh CJ’s period as Chief Justice (1961-1973) were viewed with concern by the government. The judge who was most active in these developments was Walsh J. The judge was ‘stepped over’ three times by the government of the day in selecting a Chief Justice [in the selection of Fitzgerald CJ (1973-1974), O’Higgins CJ (1974-1985) and Finlay CJ (1985-1994)] He is reported to have written to Ó Dálaigh CJ following the Chief Justice’s decision to resign from the Court in 1973 ‘I also have the suspicion that the administration may avail of the opportunity so to adjust the leadership and the personnel of the court to reduce the risk of a continuation of the Court’s ‘initiatives’ of the past decade.’ Colm Toibín, *Magill*, February 1985.

<sup>14</sup> Gerard Hogan, *The Development of Judicial Review of Legislation and Irish Constitutional Law 1929-1941*, PhD, Trinity College, Dublin, p.158.

<sup>15</sup> *Re Article 26 and the School Attendance Bill 1942* [1943] IR 334.

<sup>16</sup> *National Union of Railwaymen v Sullivan* [1947] IR 77.

<sup>17</sup> *Buckley and Others (Sinn Féin) v Attorney General* [1950] IR 67.

<sup>18</sup> Gerard Hogan, *Development of Judicial Review 1929-1941*, p.158.

increasing awareness of the religious sensitivities of Northern Protestants.<sup>19</sup> Therefore, laws which were perceived as being sectarian or confessional were subjected to a greater level of scrutiny. These extra-legal developments meant that the power of judicial review would be used as a means of encroaching on the power of the Catholic Church rather than buttressing its position as would have been the case had the Courts been more assertive at an earlier stage. The primary example of this was *McGee v AG*<sup>20</sup> which saw the Supreme Court, by a 4-1 majority, strike down the law proscribing the sale and importation of contraceptives as unconstitutional. Walsh J referred to the natural law tradition in striking down the legislation despite the fact that the natural law influence on the Constitution was inspired by Catholic thought. Therefore, a Catholic concept (albeit not exclusively) was relied on to support a position that was contrary to Catholic social teaching. The development of a more assertive judiciary coincided with a move towards a less assertive Church. These twin developments were crucial in creating the context in which civil laws and Catholic moral laws as stated in *Humanae Vitae* were to diverge as a result of *McGee*. The recognition of the potential of the power of judicial review meant that there was now, as Whyte states, a 'triangular' relationship between Church, government, and judiciary which was to replace the bipolar Church-State relationship.

I argue that the development of this 'triangular' relationship meant that there was potentially a motivation for the Church to attempt to influence the legal process. However, following Vatican II the Catholic hierarchy stated that it did not necessarily expect the State's civil laws to mirror Church laws. The Church therefore adopted a less coercive and more passive role as the nation's conscience. This meant that a judge deciding a case in a manner which did not conform to Catholic morality may not have been contravening the Church's post-Vatican II rules concerning the Church's relationship with the State. Therefore, in cases such as *McGee* and *X* the majority

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<sup>19</sup> In 1981 Garret Fitzgerald stated that he believed that the South of Ireland had 'slipped into a partitionist attitude with institutions which are acceptable to people living down here but could never be the basis to enter discussions with unionists in Northern Ireland...Our laws, Constitution and our practices are not acceptable to the Protestants of Northern Ireland.' Quoted in John Cooney, *The Crozier and the Dáil Church and State 1922-1986*, Mercier Press, Cork, 1986, p.7-8.

<sup>20</sup> [1974] IR 284.

opinions may be reconcilable with the post-Vatican II rules of the Church despite the fact that the final majority decisions were contrary to Catholic morality as stated in papal encyclicals. A Catholic citizen was expected to abide by Catholic moral teaching but a judge in deciding a case was not necessarily expected to conform the law to the Church's laws. While the Church could criticise judicial decisions which did not conform with Catholic morality, it was not opposed to judges moulding the law in a manner that did not mirror the rules of the Catholic Church.

### **Catholic Thought and the Irish State**

In 1937 the Constitution bore the influence of Catholic social teaching which was socially dominant at the time. The provisions that most clearly bore that influence were: the Preamble, Articles 19, 41, 42, 43, 44 and 45. The Constitution also contained classic liberal democratic rights such as freedom of conscience and the banning of religious discrimination. The Constitution recognised the special position of the Catholic Church but this was seen as recognition of its demographic position and certainly nothing akin to establishment. Writing in 1954 Vincent Grogan viewed the special position of the Catholic Church in the Constitution as meaning that the Court could, or perhaps even should, draw on papal encyclicals in adjudicating:

‘Our courts and lawyers are not, however, left to the hazards of the unaided application of pure reason. They have judicial knowledge of the Universal Declaration of Human Rights. Further the Constitution recognises the truth of the Christian religion. Divine Revelation in the Old and New Testaments and the exposition of the Doctors of the Church are their binding precedents. The pronouncements of modern Christian leaders on the application of Divine Teaching to appease human problems are available for their guidance. Finally, in seeking for enlightenment, it is not too much to ask the individual, whatever his personal religious persuasion, to have particular regard to the Social Encyclicals in view both of their intrinsic merit and the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the majority of the citizens.’<sup>21</sup>

In 1972 the provision recognising the special position of the Catholic Church was deleted with the support of the Catholic hierarchy and in 1996 the Constitution was amended to provide for divorce. These constitutional changes reflected societal changes which were taking place in Ireland as it became more secular and liberal. This meant that individual freedom came to supersede adherence to a code of morality as the

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<sup>21</sup> Vincent Grogan, ‘The Constitution and Natural Law’, (1954) *Christus Rex* 7, p.218.



basis for social and legal reform. From around 1958 Ireland's economy, under the influence of Seán Lemass and T.K. Whitaker, began to open up to inward capital which was to lead to migration to urban areas. This move away from traditional agrarianism was to cause a decline in the Church's influence.<sup>22</sup> Ireland's membership of the EEC in 1974 led to greater influence from secularising forces from other European countries. The media tended to have a more liberal position on social issues and quickened the process of secularisation. In the 1980s and 1990s the division in Irish society between liberals and conservatives was evident in a number of cultural and social battles over issues such as abortion and divorce. The Courts were not immune from these developments.

The extent to which the State has compromised and moulded itself to reflect the wishes of the Catholic hierarchy and Catholic thought is open to debate. There have been occasions when the State has clearly been influenced by the hierarchy. There have also been times when the State has refused to follow the hierarchy's line. Whyte in *Church and State in Modern Ireland*<sup>23</sup> rules out both the theocratic State model and the idea that the Church was just another interest group in civil society. He writes that:

'The difficulty is that the hierarchy exerts its influence not on a *tabula rasa* but on a society in which all sorts of other influences are also at work. Party traditions can affect the bishops' power; so can change in the climate of opinion; so can the nature of the issues on which they are seeking to exert pressure. The best answer to the question 'how much influence does the hierarchy possess in Irish politics?' is that no simple answer is possible; it depends on the circumstances. This may seem an answer disappointingly lacking in precision, but it corresponds to the reality of things: any more definite answer would do violence to the evidence'.<sup>24</sup>

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<sup>22</sup> In the early 1940s Seán Ó Faolain wrote of a 'new jostling spirit' to be seen in the 'wholesale exodus from the country side' and that Ireland was 'feeling the full force of the cold blast of social change.' Quoted in Terence Browne, *Ireland: A Social and Cultural History, 1922-1985*, Fontana Press, London, 1985, p.199.

<sup>23</sup> John Whyte, *Church and State in Modern Ireland 1923-1979*, Gill and Macmillan, Dublin, 1980. Marcus Bourke has described the Catholic Church's pervasive influence thus 'To an extent that is difficult to appreciate today, the Catholic Church in 1940 had an enormous influence on the daily life of the community...a state of affairs that was to continue for another thirty years.' Marcus Bourke, *Murder at Marhill Was Harry Glesson Innocent?* Geography P, Dublin, 1993, p.5.

<sup>24</sup> John Whyte, *Church and State in Modern Ireland*, p.376.

Whyte's book in many ways remains the classic account of Church-State relations. That it should remain so is surprising for two reasons: firstly, one might expect a text completed in 1970 to be dated at this stage and to have been superseded by more recent scholarship. However, such was Whyte's thoroughness and objectivity, his work remains an important pillar in our understanding of Church and State in Ireland. Secondly, Whyte did not have access to archival material at the time of writing his book. In particular, neither the McQuaid nor the de Valera papers were available to him. There can be little doubt but that those papers would be central to any new general study of the influence of the Catholic Church on the Irish State. Whyte described his book as examining the influence of the Catholic Church on the Irish State. He defines the State as meaning the twenty-six-county area which has existed since 1922. Essentially Whyte examines the influence of the Catholic Church on the Irish legislatures, executives and political parties from 1923-1970. In defining his text as examining a geographical area it would appear to imply a social history i.e. examining the influence of the Catholic Church on the broader population.

Whyte's book is concerned with high politics, not general social practices. This work is also concerned with high politics. It examines the influence of the Catholic Church on a group who are an elite stratum within Irish society. It is therefore, a limited view of the role of the Catholic Church in Irish society. The power of the Catholic Church did not exist at its strongest amongst this group. Its real strength lay amongst ordinary people. Its influence existed in the social and cultural practices of the general population.<sup>25</sup> But judges were educated and lived in a society that engaged in such social and cultural practices. While not representative of the general population, they are influenced by attitudinal norms and many judges were also strong Catholics. The influence of Catholicism on the Irish judiciary does not take place on, to use Whyte's phrase, a *tabula rasa*. Therefore, factors such as attitudinal norms and the Church's perspective on social issues must influence any analysis of the extent of the Church's influence.

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<sup>25</sup> See Tom Inglis, *Moral Monopoly*, UCD Press, Dublin, 1998 for a sociological analysis of the Catholic Church's role in Irish society.

The extent of the Church's influence can be viewed primarily in the context of its ideological influence over, as Whyte describes it, 'the conscience of society'<sup>26</sup>. However, it is also important to bear in mind the extent of the Church's resources at this time.<sup>27</sup> Inglis describes the sheer scale of such resources as enabling the Catholic Church 'to control the moral discourse and practice of the Irish people' and to maintain a 'moral monopoly'.<sup>28</sup> Whyte however would be likely to reject this as resembling too closely the theocratic state model. Fulton argues that while the state's apparatus is secular it does not signify 'an absence of Roman Catholic power in the construction of public morality but rather an indirect recognition of the sovereignty of the Church in most areas of moral concern besides education...Roman Catholic power was to be accepted as normative in an entirely natural way by the Catholic population...[and its] hegemonic role can be seen in the translation of religious preoccupations into law via the concept of natural law.'<sup>29</sup>

There has been no examination of the relationship between the Catholic Church and the judiciary. Whyte has little to say in *Church and State in Modern Ireland* on the judiciary.<sup>30</sup> There has been an examination of the cultural power of the Catholic Church since 1950 in Louise Fuller's *Irish Catholicism since 1950 the Undoing of a Culture*<sup>31</sup>. There is also Tom Inglis's *Moral Monopoly*<sup>32</sup> which examines the Church's

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<sup>26</sup> M. Hornsby-Smith uses similar language to Whyte in 'Social and Religious Transformation in Ireland: A Case of Secularisation?', in *The Development of Industrial Society in Ireland*, ed. John Goldhorpe and Chris Whelan, Oxford University Press, Oxford, 1992, p.265-90 writing that the institutional church has changed in the maintenance of its 'moral monopoly' and the church has shifted its strategy from one of coercion to one of being the 'conscience of the nation'.

<sup>27</sup> Inglis documents the scale of the Catholic Church's physical and bureaucratic organization and notes that for an estimated Catholic population of 3.7 million there were 1,322 parishes, 2,639 churches, 591 Catholic charitable institutions, including hospitals, homes for the deaf and blind, and reformatories, and 3,844 primary and 900 secondary schools. Tom Inglis, *Moral Monopoly*, 1987, p.33.

<sup>28</sup> Ibid.

<sup>29</sup> John Fulton, *The Tragedy of Belief: Division, Politics, and Religion in Ireland*, Oxford, Clarendon, 1991, p. 134-35.

<sup>30</sup> Whyte refers to the following cases: *Maguire v Attorney General* [1943] IR 238, *Cook v Carroll* [1945] IR 515, *Re Tilson* [1951] IR 1, *Ryan v Attorney General* [1965] IR 294, *McGee v Attorney General* [1974] IR 284, and *M v An Bord Uchtála* [1977] IR 287.

<sup>31</sup> Louise Fuller, *Irish Catholicism since 1950 the Undoing of a Culture*, Gill and Macmillan, Dublin, 2002.

<sup>32</sup> Tom Inglis, *Moral Monopoly The Rise and Fall of the Catholic Church in Modern Ireland*, UCD Press, Dublin, 1998.

role in Irish society from a sociological perspective. In 1954 Paul Blanshard wrote *The Irish and Catholic Power*<sup>33</sup> in which he is heavily critical of the Church's role in Irish society but ultimately exaggerates the Church's influence. In the legal area little has been written on Church-State relations.<sup>34</sup>

This thesis is not directly concerned with defining influence. Different factors that might have influenced judges would be difficult if not impossible to trace: a discreet phone call, a word in someone's ear, or the influence of the climate at the time. Therefore determining the extent of the influence of the Catholic Church and Catholic norms on the judiciary is problematic. The fact that judges do not have free moral choice also creates particular difficulties in defining both motive and influence. The aim of this thesis is to explain the Catholicity of judicial decisions on the Constitution and to contextualise these cases in the history of Church-State studies. Therefore, it examines the relationship between Catholicism and the judiciary since the foundation of the State. It does not purport to examine the issue of judicial motive. When I refer to the term 'influence' it is intended to mean evidence of Catholicity based on a textual examination of judicial decisions and from archival sources. While I will explore the case law in detail in the body of this thesis, I would make one general observation which is that in the vast majority of decisions there is no evidence of Catholicity. The primary reason for this is that the Church would simply not have been interested in the issues under question as the Church's reach is limited by an eschatological view which limits its influence.

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<sup>33</sup> Paul Blanshard, *The Irish and Catholic Power*, Beacon Press, Boston, 1953.

<sup>34</sup> Exceptions include: Gerard Hogan, 'Law and Religion: Church-State Relations in Ireland from 1922 to the Present Day' 35 *American Journal of Comparative Law*, 1987, p.44-96 and Gerry Whyte, 'Some Reflections on the Role of Religion in the Constitutional Order', in Murphy and Twomey (eds) *Ireland's Evolving Constitution 1937-1996 - Collected Essays*, Hart Publications, Oxford, 1998.

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## Chapter 1 Church and State: An Historical View

In this chapter I will examine the historical background to the role of the Catholic Church in Ireland and examine the level of Catholicity in society during the early years of the State. This will assist in understanding the historical context in which the Courts operated from the foundation of the State until the early 1960s. It is necessary to outline the history of Church-State relations in order to understand the level of Catholicity that was present in Irish society while the cases which I will examine were decided. Judicial decisions tend to reflect the ethos of the community in which they were decided. Therefore, the fact that there was a high level of Catholicity present in Irish society during this period and the evidence of deference shown by the ruling political class towards the Catholic Church are important factors in understanding the level of Catholicity, or otherwise amongst the members of the judiciary. I will examine political and historical events separately from the case law as Church-State relations were conducted on a largely bipolar basis between government and Church during this period. In the post-Vatican II period the judiciary became an active participant in Church-State relations and therefore, I will examine the law and historical events from that period together to demonstrate the development of a 'triangular' relationship between government, Church and judiciary. In this chapter I will examine: the rise of clericalism and the important role which the Church played in the formation of the education system during the 19<sup>th</sup> century; the development of Catholic social teaching; the growing level of Catholicity after independence exemplified by prohibitions on the sale and importation of contraceptives, divorce, the adoption of a child by mixed religious couples and evidence of unease amongst the Protestant population at the growing confessionalism of the new State.

### **The Roots of Clericalism**

The prevalence of clericalism within Irish society can be traced back to the period of the penal laws during the 18<sup>th</sup> century which created a close link between laity and clergy. A number of factors contributed to the influence of clerics during this period:

the fact that the clergy had formal education amongst an uneducated community; indiscipline within the hierarchy which left the clergy unhindered in maintaining a direct relationship with the community; and the destruction of most of the country's native aristocracy and landed gentry.<sup>1</sup> As Catholics emerged from the penal laws following Catholic emancipation, they started the building of churches, schools, hospitals and orphanages frequently without State involvement. Murphy writes that the clergy and the people were drawn together in a 'common struggle for survival against despotism of an alien ascendancy and a minority privileged church'.<sup>2</sup>

There was also opposition to the clergy characterised by the anti-clericalism of the Whiteboy disturbances of 1785-1786 in Munster.<sup>3</sup> The clergy's participation in the Emancipation campaign gave them a flavour for politics and an opportunity to further assert their influence. Despite protestations from Rome, the great majority of priests became ardent repealers in the campaign which reached its peak in 1843 and inspired O'Connell to support the Irish clergy. O'Connell's popularity meant that a large part of the general population followed his lead in supporting the Catholic clergy as O'Connellism became increasingly more confessional in contrast to the religious pluralism of the Young Ireland movement.<sup>4</sup> Following the famine period the Church's financial position improved greatly and there was a considerable increase in vocations to religious life despite the fall in the population. The absence of political leadership from O'Connell to Parnell and the lack of political engagement from the Catholic professional classes contributed to the increase in political power and social influence of the clergy within Irish society. The Catholic hierarchy remained largely silent as the Irish Parliamentary Party divided over Parnell's relationship with the divorcee

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<sup>1</sup> See Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, UCD P, Dublin, 2000 and John A. Murphy, 'Priests and People in Modern Irish History' (1969) *Christus Rex* 23, 257.

<sup>2</sup> John A. Murphy, 'Priests and People in Modern Irish History' (1969) p.257. In the eighteenth and nineteenth centuries the members of the Church of Ireland which constituted about eight percent of the population of Ireland, held a virtual monopoly of power and wealth on the island. In 1775 only five percent of the land of Ireland was still retained by the Catholic inhabitants. See Garret Fitzgerald, *Reflections on the Irish State*, Irish Academic Press, Dublin, 2003, p.138.

<sup>3</sup> John A. Murphy, 'Priests and People in Modern Irish History' (1969), p.257.

<sup>4</sup> See R. V. Comerford, *The Fenians in Context: Irish Politics & Society 1848-82*, Wolfhound Press, Dublin, 1998 and Christine Kinealy, *Repeal and Revolution 1848 in Ireland*, Manchester UP, 2009.

Katherine O'Shea. Parnell's downfall was largely the result of his great rival within his own party, T.M. Healy's 'acute Catholic'<sup>5</sup> nationalist rhetoric in which he portrayed Parnell as an Anglo-Irish aristocrat. The post-divorce period saw at times 'savage'<sup>6</sup> Episcopal attacks on Parnell. Murray argues that clerical anti-Parnellite rhetoric was motivated by a 'desire to see a political movement which had been dominated by laymen returned to a greater measure of clerical control.'<sup>7</sup> The years after Parnell are regarded as the peak of the clerical ascendancy as the 'disappearance of landlordism enhanced the stature of the priest in the social, educational, business and political life of the rural community'.<sup>8</sup> The clergy's support for the anti-conscription campaign in 1918 extended the Church's influence as it placed the hierarchy at the 'head of a popular movement'.<sup>9</sup> R.V. Comerford traces Ireland's pious Catholicity back to the 1880s and the increasing involvement of the lower-middle classes in associational life and the hold of 'a long-gestating puritanism on public life...which did not lose its potency for over eighty years.'<sup>10</sup> Comerford sees Ireland's invention as a Catholic state as being spearheaded not by the Constitution or statutory law, but in the nation's wider 'cultural life and practice'.<sup>11</sup>

### **The Development of Catholic Social Teaching**

As the Catholic Church was extending its political influence in Ireland, the Holy See was also extending its reach by issuing encyclicals on social issues. The beginning of modern Catholic social teaching stems from the papacy of Pius IX and the first Vatican Council of 1870 (particularly in the development of the centralised Vatican centred system which to characterise the Church from Pius IX up to the present).<sup>12</sup> Leo XIII

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<sup>5</sup> Frank Callanan, *The Parnell Split 1890-91*, Cork UP, Cork, 1992, p.3.

<sup>6</sup> Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, p.3.

<sup>7</sup> Ibid.

<sup>8</sup> Frank Callanan, *The Parnell Split 1890-91*, p.3.

<sup>9</sup> Patrick Murray, *Oracles of God The Roman Catholic Church and Irish Politics, 1922-1937*, p.4. Murray further states that the clergy's opposition to conscription genuflected 'the bishops to the popular will in 1918, rather than to the traditional theological imperative of support for the law of the land.'

<sup>10</sup> R.V. Comerford, *Ireland Inventing the Nation*, London, Arnold, 2003, p.113.

<sup>11</sup> Ibid.

<sup>12</sup> In 1864 the Papal Encyclical *Quanta Cura* was issued, in which liberalism was severely criticised. Religious toleration, freedom of conscience and the press, the validity of secular legislation, rationalism, and socialism were all concerned. It was also denied that the Pope either could or should tolerate 'progress, liberalism, and modern civilisation.' This was the period of the *Risorgimento* and the new Italian State was viewed with distain and suspicion from Saint Peters, a view which was to remain

was the first Pope to issue an encyclical which directly addressed social issues which were current at the time. Leo XIII was responding to the growth of the proletariat following the industrial revolution and the perceived threat of socialism. The predominant theme of this theological development was counter-revolutionary. Hastings writes that the more this development responded to 'Rome's own ethos, the less accommodating it was in regard to the values of either Protestantism or modern secular, liberal society.'<sup>13</sup> The Vatican was still fearful of revolutionary anti-clericalism and appeared to turn to ultramontanism<sup>14</sup> as the 'direct heir of medieval papalist and Counter-Reformation Catholicism' after Vatican I.<sup>15</sup>

The Holy See's opposition to modernism stems from the threat which anti-clerical revolutions in France and Italy had posed to the papacy. It was this clerical unease with destabilising ideologies that caused leading clerical figures such as Cardinal Cullen<sup>16</sup> to oppose Home Rule, viewing it as 'identical' to the revolutions that had 'undermined the Catholic religion' in France and Italy.<sup>17</sup> The growth in the assertiveness of the Irish Church did not stem solely from indigenous clerics but also from the fact that the Irish Church had become Romanised at a time when the long nineteenth century's

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unaltered until the signing of a Concordat between the Vatican and Mussolini's government in 1929 when the Vatican finally recognised the existence of the Italian state. The *Risorgimento* is generally viewed as an anti-clerical movement. However, the Constitution of the new Italian state stated 'the Catholic, Apostolic, and Roman religion is the sole religion of the state.' Despite this many patriotic Italians were placed under collective excommunication and barred from the sacraments.

<sup>13</sup> Adrian Hastings, *Modern Catholicism*, Oxford UP, Oxford, 1991, p.1.

<sup>14</sup> Ultramontanism perceives papal authority as absolute.

<sup>15</sup> The schism in the church following the reformation was copperfastened following the Council of Trent as the Church refused to be influenced by Protestant led reforms such as worshipping in the vernacular and the right of priests to marry. It was Pius IX's 19<sup>th</sup> century revival which was to reinforce medieval notions of anti-Protestantism and ultramontanism. Indeed, the reformation itself may be characterised as a direct reaction to the development of an autocratic papacy following the 11<sup>th</sup> century Gregorian reforms.

<sup>16</sup> Cardinal Cullen is perhaps the most influential Irish clerical figure. He was rector of the Irish Pontifical College, Rome before becoming Archbishop of Armagh in 1849. He was utterly committed to the Romanisation of the Church and this is reflected in the institutional reforms which took place as a result of the Synod of Thurles (1850). This event led to the Rome centred triumphalism which was to characterise the Irish Church and arguably represents the philosophical and historical basis for a judge such as George Gavan Duffy's commitment to the institutional Church. Interestingly, Cullen was highly critical of Gavan Duffy's father the Young Ireland leader, Charles Gavan Duffy, describing him as the Irish Mazzini. It is likely that Cullen would have been more pleased with his son's contribution to Irish jurisprudence. Cullen was suspicious of destabilising nationalist movements as a result of his experiences of the Young Italy movement and in 1859 recruited an Irish brigade to fight against Garibaldi.

<sup>17</sup> Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, p.21.



revolutions caused the Holy See to seek refuge in ultramontanist. The Romanised Irish Church under Cullen's influence generally towed the ultramontane line.<sup>18</sup> The combination of ultramontanist priests and Catholic revolutionaries would prove a potent mix that was to have a profound impact on Irish politics until the 1960s. Cardinal Cullen's fears of an anti-clerical revolution were proven unfounded as Rome had little to fear from the Irish revolutionaries, who Kevin O'Higgins memorably described as the most 'conservative minded' in history.<sup>19</sup>

### **Education and the Church**

One of the main areas in which the Church established its influence was through the education system. The Church continues to maintain considerable influence in this area, due primarily to the system of patronage in which members of the Church hierarchy act as patrons for the vast majority of primary schools in the State. The roots of this system may be traced back to the Catholic Relief Act, 1782, which allowed Catholics to teach in schools, though the unofficial system of education developed during the penal law days and continued to receive the support of the population. In 1831, two years after Catholic Emancipation, a plan for the establishment of a nationwide non-denominational National School System was set up by Lord Stanley, Chief Secretary of Ireland. The schools were to be under the patronage of an important local figure. Coolahan writes it was the State's intention to 'operate a non-denominational primary education system wherein children of all denominations would be educated together in secular subjects and separate arrangements would be made for doctrinal instruction according to different denominational tenets.'<sup>20</sup> Both of the main Churches strongly opposed the concept of mixed education. The Churches, while eager to benefit from State financial support, strove to mould the national school system according to their denominational requirements.

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<sup>18</sup> However, in 1888 the Irish clergy refused to follow the papal decree against the Plan of Campaign (which sought reduced rents for tenant farmers) as the bishops followed the people rather than Rome. See Emmet Larkin, *The Roman Catholic Church and the Plan of Campaign, 1886-1888*, Cork UP, Cork, 1978.

<sup>19</sup> See John McCarthy, *Kevin O'Higgins: Builder of the Irish State*, Irish Academic P, Dublin, 2006.

<sup>20</sup> John Coolahan, *Irish education history and structure*, IPA, Dublin, 1981, p.5

The clergy's role in education during the penal law days and the organisational and educational skills they developed during that period increased their capacity to influence the education system. Under the system, Catholic teachers formed a closer official alliance with the Catholic clergy becoming their employees in the schools system, a situation which continues to the present day.<sup>21</sup> The teacher's appointment was dependent upon his or her teaching of the Catholic faith and upholding the Catholic ethos of the school.<sup>22</sup> It was through this system that the clergy secured the religious ethos of the scholastic system.<sup>23</sup> A system of State controlled training for teachers and model schools was regarded as 'intolerable'<sup>24</sup> to the Churches. The Catholic hierarchy banned the attendance of Catholics at model schools.<sup>25</sup> Cardinal Cullen, Primate of Armagh who presided over the Synod of Thurles in 1850, issued a decree warning about dangers in the national school system and stated 'the separate education of Catholic youth is, in every way, to be preferred to it.'<sup>26</sup> He also declared the national school system to be 'very dangerous when considered in general because its aim is to introduce a mingling of Protestants and Catholics.'<sup>27</sup>

The State education system was also seen by the English government as a means of cultural assimilation and Anglicisation. This led to an increase in English literacy rates but this was to the detriment of the Irish language. The poor ecumenical relations between Protestant, Catholic and Presbyterian, particularly a feeling of resentment amongst Catholics against the established minority Church as well as a culture of proselytising on both sides, all contributed to vociferous opposition against mixed religious education. Coolahan writes that conflict between Church and State resulted in 'the state's retaining the concept of a de jure mixed system which, from mid-century onwards, became increasingly denominational in fact.'<sup>28</sup>

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<sup>21</sup> See *O'Keefe v Hickey* [2008] IESC 72.

<sup>22</sup> See *Flynn v Power* [1985] IR 68.

<sup>23</sup> See Dympna Glendenning, *Education and the Law*, Buttersworths, 1999, p.15

<sup>24</sup> John Coolahan, *Irish Education History and Structure*, p.5

<sup>25</sup> Model schools are run by the Church of Ireland.

<sup>26</sup> Quoted in John Coolahan, *Irish Education History and Structure*, p.18.

<sup>27</sup> Quoted by Fintan O'Toole, *Irish Times*, June 6, 2009.

<sup>28</sup> John Coolahan, *Irish Education History and Structure*, p.5.

### Growing Catholicity in the New State

Following the revolutionary period of 1916 to 1922 which took everybody including the clergy by surprise, the Church aligned itself with the Free State in the interest of order and moderation. FSL Lyons has suggested that the Church's decision to commit itself 'so wholeheartedly to one side of an issue which had divided men so deeply...could be held to have threatened its own power-base in the community as a whole.'<sup>29</sup> Lee views the Church as having had essentially a negative impact on Irish cultural life in the early years of the State:

'The sanctity of property, the unflinching materialism of farmer calculations, the defence of professional status, depended on continuing high emigration and celibacy. The church did not invent these values. But it did baptise them. Rarely has the Catholic Church as an institution flourished, by materialistic criteria, as in the Free State. And rarely has it contributed so little, as an institution, to the finer qualities of the Christian spirit. Censorship, Irish style, suitably symbolised the impoverishment of spirit and the barrenness of mind of the risen bourgeoisie, touting for respectability'.<sup>30</sup>

There was growing evidence of political interventionism and assertiveness in the statements of clerical figures in the early years of the State. In 1922 Jesuit, Peter Finlay asserted that 'local bishops were divinely-appointed teachers of the flock' and there was no 'authority on earth' which might contradict their teachings or 'defy their commands'.<sup>31</sup> In the same year, Bishop Cohalan of Cork, declared that 'one who is Catholic, who already believes in the Catholic Church, in the teaching office of the Catholic Church, does not set up his own subjective speculations or judgments in opposition to the teaching of the Church or of its pastors, whom he is bound to obey'.<sup>32</sup> Murray describes Cohalan's statement as evidence that in 'the eyes of the bishops...their pronouncements, even on political issues of the day, were not matters for

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<sup>29</sup> FSL Lyons, *Culture and Anarchy in Ireland, 1898-1939*, Oxford, 1980, p.150. It should however be noted that there were many individual clerics who were strongly republican, notably Mgr John Hagan, Rector of the Irish College, Rome and Archbishop of Melbourne, Daniel Mannix. See Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, p.210-218 for an account of Mannix's anti-treaty activities, in particular his speaking tour of Ireland in 1925 in which he sought the support of the population for the republican position to the consternation of the clerical establishment.

<sup>30</sup> Joe Lee, *Ireland 1912-1985, Politics and Society*, Cambridge University Press, Cambridge, 1989, p.159.

<sup>31</sup> Quoted in Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, p.14.

<sup>32</sup> Pastoral Letter 25-Sept-1922 quoted in *ibid.*

debate but for uncritical acceptance by the faithful to whom they were addressed.’<sup>33</sup> In 1923, Bishop Hallinan of Limerick, asserted that it was acceptable for the clergy to intervene in politics because of the unique position of the Catholic hierarchy in Ireland and that the active leadership of the clergy had earned them the right to such power ‘when natural [political] leaders [had] failed’ the people.<sup>34</sup>

In 1933 Mgr McCaffrey, President of Maynooth College, warned against clerical interventions in political matters although he limited this to circumstances in which ‘faith and morals are not concerned’ and that by doing so clerics would be ‘in a stronger position to intervene in case political programmes and policies deviated from sound Catholic principles.’<sup>35</sup> While McCaffrey’s statement appeared to encourage certain circumspection, as Murray states the general tone

‘...underlying such Episcopal discourse in the post-Treaty period was the principle that it was the exclusive right and duty of the bishops themselves to determine what issues, political or otherwise, came within the sphere of their authority. There was the further principle that once the Episcopal body, or indeed an individual bishop, had decided that a pronouncement was justified, anyone wishing to remain a Catholic was obliged to accept and act upon the teaching mediated in the pronouncement’.<sup>36</sup>

Jean Blanchard writing in 1958 described the pervasive influence of the Catholic clergy and the receptiveness of the State to clericalism:

‘The Bishops of Ireland appear to have more power, in practice, than those of any other country in the world. As the natural outcome of a long historical tradition which has created exceptionally strong bonds between the nation and its clergy, their authority is great over the Faithful...a member of the congregation listens more readily to his Bishops than he does, to his deputy. The social importance of the head of the diocese is unrivalled. Besides, the state fixes no limit to the Bishops’ powers.’<sup>37</sup>

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<sup>33</sup> Patrick Murray, *Oracles of God*, p.14.

<sup>34</sup> Quoted in *ibid* p.24.

<sup>35</sup> Patrick Murray, *Oracles of God*, p.27.

<sup>36</sup> *Ibid*. Bourke has described the annual Lenten statements issued by bishops as ‘a kind of diocesan policy document, spilling over into politics and economic policy.’ Marcus Bourke, *Was Harry Gleeson Innocent?*, p.5.

<sup>37</sup> Jean Blanchard, *The Church in Contemporary Ireland*, Clonmore and Reynolds, Dublin, 1963, p.18-19. (Originally published as *Le Droit Ecclésiastique Contemporain d’Irlande*, Paris, 1958).

The early years of the State saw the enactment of statutory legislation that was heavily influenced by Catholic social teaching. These included the Film Censorship Act 1923, the Intoxicating Liquor Act 1927 and the Censorship of Publications Act 1929. When Fianna Fáil came to power in 1932, this trend continued with the Public Dance Halls Act, 1935 which laid down more stringent control of dances, a constant source of concern to the clergy<sup>38</sup> and s.17 of the Criminal Law Amendment Act 1935 prohibiting the sale and importation of contraceptives. Lee's reference to a moralising society 'touting for respectability' in the context of a domineering Church is exemplified by the events that led to the enactment of the Criminal Law Amendment Act, 1935. On 17 June 1930, a committee was appointed by James Fitzgerald Kenney, Minister for Justice in the W.T. Cosgrave-led Cumann na nGaedhael government, to consider if the Criminal Law Amendment Acts of 1880 and 1885 required modification, and to consider whether new legislation was needed to deal with issues concerning, *inter alia*, juvenile prostitution and certain sexual offences.<sup>39</sup> Pressure for change in the law had come about as a result of statutes passed for England and Scotland in 1922 and 1928, and for the North in 1923. As a result, the law with regard to sexual offences against young persons was more lenient in the Free State than in Britain. This indicates that opposition to contraceptives was not unique to Catholic cultural thought and social teaching. In 1934 Edward Cahill SJ wrote to Eamon de Valera concerning the availability of contraceptives stating that 'Civil law and government cannot indeed make or even keep a nation moral. They can however keep a check on unfair

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<sup>38</sup> This process of oppressing the private affairs of citizens and censoring works of literature, theatre and film during this period was not unique to Ireland. Tony Judt writes: 'Until the early 1960s, public authorities throughout Western Europe (with the partial exception of Scandinavia) had exercised firm and mostly repressive control over the private affairs and opinions of the citizenry. Homosexual intercourse was illegal almost everywhere, and punishable by long prison terms. In many countries it could not even be depicted in art. Abortion was illegal in most countries. Even contraception was illegal in some Catholic states, albeit often condoned in practice. Divorce was everywhere difficult, in some places impossible.' Tony Judt, *Post-War: Europe since 1945*, William Heinemann, London, 2005, p.373.

<sup>39</sup> It is one of the peculiarities of the Criminal Amendment Act, 1935 that the drafters felt it was appropriate to place contraception along side such issues as child prostitution and sexual assault. The inference would appear to have been that contraceptives were similarly destructive of society. In the *Seanad*, Senator Johnson in opposing section 17 stated that 'to imply...that the use of contraceptives is in the same category as a crime against young girls and in the same category as the keeping of brothels and prostitution is a libel upon hundreds and perhaps thousands of honest, God-fearing, holy women. It is putting their practice in the same category as brothel-keeping and prostitution. I object strenuously to that combination in this legislation.' 1257 *Seanad Debates* 19, 6 February, 1935

temptations or allurements to vice.’<sup>40</sup> The chairman of the committee was William Carrigan KC. The committee also included three other men and two women - a Catholic clergyman, a Church of Ireland cleric, a surgeon, a matron and a commissioner of the Dublin Union. The committee, which viewed itself as operating in the context of the ‘secular aspect of social morality’, heard oral evidence over 17 days from a variety of witnesses, including Dr Dorothy Stopford Price, representing the Irish Women Doctors’ Committee, and Edith Tancred of the Women’s Police of Great Britain. The report of the Carrigan Committee was completed on 20 August 1931. The tone of the report displays a dim view of moral standards at the time. Reference is made to ‘commercialised’ Dance Halls and it was stated that ‘the opportunities afforded by the misuse of motor cars for luring girls are the chief causes alleged for the present looseness of morals.’<sup>41</sup> Archbishop Byrne of Dublin made a submission to the committee stating that ‘conduct that in other countries is confined to brothels is to be seen without let or hindrance on our public roads.’<sup>42</sup> The Very Reverend Canon Bruff deplored the decay of country morals stating, ‘It is common knowledge that immorality has developed to an alarming extent in recent years.’ He described the Dance Halls as ‘Schools of Scandal’ and he urged the necessity for legislation to ‘stop the incoming tide that threatens the ruin, moral and material, of the country.’<sup>43</sup>

The twenty-one recommendations of the report included one stating ‘that the sale of contraceptives should be prohibited except in exceptional circumstances’.<sup>44</sup> It was also stated in the report regarding contraceptives ‘that the articles in question should be banned by an enactment similar to the Dangerous Drugs Act, 1920’.<sup>45</sup> In the addendum to the report, Rev John Hannon, SJ said that he understood the:

‘exceptions’ did not include contraceptive ‘appliances’: ‘I take them [the exceptions] to apply only to certain drugs, which, though commonly used for contraceptive purposes, may also be used for other medicinal ends. The suggestion is that such drugs should be excluded ‘by an enactment similar to the Dangerous Drugs Act, 1920.’ That they should not be excluded altogether is due

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<sup>40</sup> UCDA, *De Valera Papers*, 1095, 7 July 1934.

<sup>41</sup> *Carrigan Report*, 2004/32/105, Department of Justice, p.12.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* p.13.

<sup>44</sup> *Ibid.* p.36.

<sup>45</sup> *Ibid.* p.37.

only to the fact that they may be required for medical purposes other than contraception. Hence the 'exceptional conditions' indicated in the 'Summary of Recommendations' are to be taken to mean occasions when drugs commonly used for contraceptive purposes are required by the medical profession for the treatment of disease...My object, then, in sending this *addendum* is to state that the Report does not make exception for the sale of contraceptives *as such* in any circumstances.<sup>46</sup>

According to Finola Kennedy, a meeting of the Executive Council took place on 2 December 1931 in which the Carrigan Report was referred back to the Minister for Justice with a request for the considered views of the Minister.<sup>47</sup> Following the election of Éamon de Valera in February 1932, James Geoghegan SC was appointed Minister for Justice. Kennedy writes 'the unequivocal recommendation of the Minister for Justice was that the Carrigan Report should not be published; that it contained sweeping statements against the state of morality in the Saorstát which, even if true, should not be given currency by publication.'<sup>48</sup> Kennedy further states that the same memo stated it found, with regard to the proposed ban on contraceptives, 'difficulty in ascertaining the relevance of this subject to the terms of reference.'<sup>49</sup> A committee was subsequently set up under the chairmanship of James Geoghegan. The Geoghegan Committee recommended a more lenient approach than Carrigan on a number of issues including contraception, stating that a complete ban would be unduly severe. According to a memo attached to a letter sent by Assistant Secretary, Stephen Roche, Department of Justice, the Geoghegan Committee recognised that drugs used for contraceptive purposes were also used for other purposes and decided the ban should be limited to contraceptive appliances. It was stated: 'They felt, however, that it would be unduly severe on persons who did not regard the use of such appliances as improper, and who were advised by their Doctors to employ them, to prohibit completely the importation and sale of such appliances. Head 16 [of the proscribed bill] accordingly contemplates that qualified medical practitioners may prescribe and supply such appliances to their patients.'<sup>50</sup>

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<sup>46</sup> Ibid. p.45.

<sup>47</sup> See Finola Kennedy, *Cottage to Creche: Family Change in Ireland*, IPA, Dublin, 2001.

<sup>48</sup> Ibid. p.159.

<sup>49</sup> Ibid. p.158.

<sup>50</sup> Roinn an Taoisigh S 6489 A, 10 November 1933 quoted in Finola Kennedy, *Cottage to Creche*, IPA, Dublin, 2001, p.160.

Kennedy writes that the Geoghegan Committee proposed that there should be a general prohibition against the sale or distribution, and importation for sale or distribution, of contraceptive appliances. However, they recommended that doctors should have the power to prescribe and to supply such appliances to their patients. The quantities required by such practitioners would be imported under licence granted by the Minister for Local Government and Public Health. Registers of supplies received should contain full particulars of the persons to whom such appliances were supplied. The registers would be open to inspection by any Medical Inspector duly authorized by the Minister for Local Government and Public Health. According to Kennedy, Minister for Finance, Seán MacEntee agreed to the recommendation of the Geoghegan Committee but Minister for Local Government and Public Health, Seán T. Ó Ceallaigh<sup>51</sup> objected stating: ‘The Minister for Local Government and Public Health has, however, informed the Minister for Justice that he is unable to concur to head 16 [section concerning contraceptives] in so far as it empowers qualified medical practitioners to prescribe and supply the appliances in question to their patients.’<sup>52</sup>

On 14 February 1934, John Duff from the Department of Justice wrote to Geoghegan stating: ‘The question of contraceptives seems to have given a very considerable amount of trouble and it is only in the last few days that a decision was finally reached. It has not been communicated to us in writing but it amounts to this: all appliances and substances for contraception are to be definitely prohibited and no exceptions whatsoever are to be made.’<sup>53</sup> On the 15 June 1934, the Criminal Law Amendment Bill was approved by the Executive Council. The text of the Bill was circulated to the members of the Geoghegan Committee. It was decided by the members of the

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<sup>51</sup> It should be noted that Ó Ceallaigh was a particularly strong Catholic, even for his time. He succeeded Douglas Hyde as president. Seán MacEntee expressed the view in conversation with John Bowman (*Bowman on Sunday*, RTE Radio 1) that Ó Ceallaigh had supported the establishment of the Catholic Church in 1937. While there were members of the cabinet who supported this position, de Valera, Seán MacEntee and Frank Aiken were opposed to such a view.

<sup>52</sup> Department of Justice 8/20, 14 February 1934 quoted in Finola Kennedy, *Cottage to Creche*, p.160.

<sup>53</sup> *Ibid.* p.161.



Committee not to make any recommendations to the executive on the matter.<sup>54</sup> The path was now clear to introduce the Bill to the Dáil and this was done on 21 June 1934.

On 25 June 1934, an editorial appeared in the *Irish Times* which was critical of section 17 of the Bill. The editorial broadly welcomed many of the provisions but it was felt that ‘acts of parliament are powerless to impose rigorous standards of morality on a nation. Ireland, in this respect, certainly is no worse, and probably, is little better than any other country; but the polite fiction that vice does not exist is absurd. The effect of clause 17 of the new bill will be to encourage the spread of disease, as well as to increase the already alarming amount of illegitimacy in the country.’ The editorial then draws a link between section 17 and infanticide, appearing to imply that a prohibition on contraceptives would lead to more young women getting pregnant and there would therefore be a greater threat to the lives of their children at the hands of their disapproving parents:

‘One of the saddest and most reprehensible, crimes in the calendar is infanticide, instances which are exposed with dreadful frequency in the Irish courts. Only last week in Dublin Mr. Justice Hanna deplored the growth of infanticide in Dublin, attributed to some extent at any rate, to the harshness of parents towards their erring daughters. One girl of nineteen swore that her father had threatened to cut her throat, and, on the previous day, a case had been heard in which the girl had been refused admission to her home. So long as parents hold this attitude infanticide will be difficult to check. We are afraid that the new bill will create conditions in which it will continue in increase in the Free State; and we hope that this aspect of the case will not be forgotten when the measure is debated on the second reading in the Dáil.’<sup>55</sup>

The Bill was brought to the attention of the Dáil on 28 June 1934 by the Attorney General who started by outlining what he viewed as the difficult societal context in which the Bill was drafted:

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<sup>54</sup> Kennedy states that Professor Thrift of Trinity College (who was Protestant) was the one member of the Geoghegan committee to hold out in opposing a total ban on contraceptives. Kennedy interprets this fact as pinpointing a difference between Protestant and Catholic attitudes towards contraception. Finola Kennedy, *Cottage to Creche*, p.163.

<sup>55</sup> There was also opposition to the passing of the bill in the letters page of the *Irish Times*, 25 June 1934 wherein a writer refers to section 17 of the Bill as a measure that ‘can only be construed as a flagrant encroachment on personal liberty, and on this account alone, should be most strenuously opposed.’ The writer concludes by stating ‘section 17 is hysterical and excessive, Utopian and non-practical. Let us improve our public standards if we can; but let us leave the perfection of sanctimonious human nature to the higher hands, which fashioned it.’ It should be pointed out that the *Irish Times* was seen as the ‘Protestant’ paper at the time, indeed Conor Cruise O’ Brien in *States of Ireland*, Panther, London, 1974, describes some readers having the paper delivered to their home in brown paper wrapping to avoid arousing the suspicions of their neighbours.

‘This Bill is the result of the recognition by members of all Parties of the necessity for strengthening the law dealing with sexual offences, particularly with regard to offences against young girls. It has to be admitted that there has been an increase of offences against young girls in recent years in this country. This increase may be attributed, with a considerable show of reason, to the altered conditions of modern life, with its greatly enlarged opportunities for amusement and enjoyment, and the mingling of the sexes without that supervision which obtained in former days. It may also be said to be due in part to the relaxation of parental control. Whatever be the causes it is clear this Bill is necessary. The Bill marks a great step in advance in the law for the protection of young girls. It is drastic in its provisions. The ground for the measure was cleared by the Carrigan Committee. The report of the Committee has been of great help in estimating the problem which had to be dealt with. We have also had in the framing of this measure the help of a Committee of members of this House, representative of all Parties. The desire of the framers of the measure has been to produce a workable measure adequate, in so far as legislation can be adequate, to deal with an unhealthy condition of things.’<sup>56</sup>

The Attorney General referred to s.17 as forbidding:

‘the sale or importation of any contraceptive. It also prohibits advertisements of such things. Section 18 relates to unseemly conduct in public. Except in certain towns, prosecutions for such offences could not be taken summarily in the District Court, and it is obviously undesirable to have to proceed by way of indictment.’<sup>57</sup>

Deputy Rowlette made an interesting contribution to the debate, appearing to predict what was to come to pass some forty years later *McGee*. The deputy described himself as agreeing with the general moral judgment on contraception. Despite this he felt that there may be instances where ‘a respectable married woman is in ill-health. She is told that her health or her life may be endangered should she again have to undergo the trials of pregnancy and childbirth.’<sup>58</sup> Deputy Rowlette stated that in these circumstances a woman has two options. The first is to abstain from marital sex with her husband. The deputy stated that this could put great strain on the woman’s relationship with her husband as she may suffer from nervous disorders. The deputy then referred to the:

‘The other alternative open to a woman who is in the unfortunate position of having received a warning that if she continues her ordinary married life her health or her life may suffer; that is the adoption of contraceptive measures to prevent pregnancy occurring. That is a matter which she herself must decide by her own conscience, under such guidance as she conscientiously sees fit to seek. One cannot overlook the fact there is a considerable number of people in this condition both in this and in other countries who do not adopt the view that the use of contraceptives in such a position is contrary to morality. I am quite aware that the other view is generally adopted in this country. I do not at all wish to question that those

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<sup>56</sup> 1248 *Dáil Debates* 53, 28 June 1934.

<sup>57</sup> *Ibid.*

<sup>58</sup> 2017-19 *Dáil Debates* 53, 1 August 1934.

who adopt that view should be bound by their own consciences in the matter, but we must not overlook the fact that there are others who do not adopt it as a point of conscience—whose conscience is quite easy in adopting the second of the alternatives open in the case I have spoken of. It is not possible to enforce moral principles by statute, and however strongly we may wish that this alternative were not open it is an alternative which many women put in that dilemma will choose to adopt. It is questionable whether it is either feasible or just to try to enforce morality by statute. We all agree that people should do what is right from the common point of view of the community as well as from that of the individual conscience, but it is not a practical matter to enforce a general moral standard by statute.<sup>59</sup>

Deputy Rowlette was emphasising individual conscience against a common coercive morality and also asserting practical difficulties which can arise when there is a threat to a married woman's health if she becomes pregnant. These were the two core issues in the *McGee* case: the immediate risk to the woman's health and the philosophical concept of having a zone of autonomy (or right to privacy) within which to decide one's actions based on one's conscience. Therefore, Deputy Rowlette's comments were remarkably prescient. On 9 August 1934, the Bill was passed by the Dáil and sent to the Senate. On 12 December the Bill was referred to a special committee, chaired by Senator Brown KC. Senator Kathleen Clarke opposed section 17 of the Bill.<sup>60</sup> The motion proposed by Senator Clarke was approved by the committee 5-3. However, on 20 February 1935 the Criminal Law Amendment Act was passed by both Houses of the Oireachtas and the King's assent was sought. The passing of the Criminal Law Amendment Act demonstrates the high level of Catholicism which was present in Irish

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<sup>59</sup> Ibid. It should be noted that Deputy Rowlette was Protestant. Oliver St. John Gogerty was also critical of the measure see 1253-55 *Seanad Debates* 19, 6 February 1935.

<sup>60</sup> Senator Clarke was the widow of Tom Clarke who was executed for his role in the 1916 rising. She had lived in America with Tom Clarke from 1898-1907 and her experience there had an impact on her decision to oppose section 17. In the *Seanad* Senator Clarke stated: 'You will not alone bring the State and the laws of the State into contempt by inserting prohibition in this Bill, but you will bring the Church and religion into contempt. These are dangers which we really ought to look at and think of before passing such a clause. I do think that if the Church and the State put their heads together they ought to be able to devise some means other than this clause for dealing with this evil. We admit that if it grows to any extent in our country the reactions from it are going to be very terrible. I cannot believe, however, that it is as bad as represented, because this is a Catholic country and if the laws of the Catholic Church prohibit the use of these things, well, then, I do not think we have really a terrible lot to fear. If you have prohibition, however, human nature is a peculiar thing, and the minute you prohibit anything the human being is inclined to rebel against it. In the case of those who never had a desire to do a thing before, the fact that they are prohibited from doing it often creates a desire within them. For these reasons I am totally opposed to this clause. I think that there should be some other method by which we would be able to appeal to the higher and nobler and more spiritual side of the human being than that of prohibition.' 1247-48 *Seanad Debates* 19, 6 February 1935.

society and political life during this period. It further demonstrates the deference which existed amongst the political class towards the Catholic hierarchy.

A deepened sense of Catholic religiosity between 1922 and 1937 meant that the 1937 Constitution was drafted at a time of a heightened confessional atmosphere within the Irish State. In particular, the Eucharistic Congress<sup>61</sup> which took place in Ireland in 1932 served as the perfect opportunity for the newly elected Fianna Fáil government to prove its adherence to the Catholic hierarchy. Despite this de Valera did not attempt to create an established Church<sup>62</sup> under the 1937 Constitution, the principle of a free church in a free state, a legacy of Tone and the United Irish Men, had deep historical roots and could not be easily discarded in favour of a confessional polity.<sup>63</sup>

In tandem with this process of enshrining the Catholic moral code in the laws of the State was an attempt to purge from the State the remnants of its colonial past and to weaken its links to the British Empire. Conor Cruise O'Brien wrote 'the more "the Free State" asserted its independence, the more explicitly it also asserted its Catholicity'.<sup>64</sup> It would though be incorrect to view Irish Catholicism in the 1930s as a monolith: in fact there was a plurality of streams and ideas under the umbrella of the

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<sup>61</sup> At the beginning of the Eucharistic Congress de Valera received the papal legate with a reference to 'our people ever firm in their allegiance to our ancestral faith'. *Irish Independent*, 22 June 1932. Dermot Keogh, *Ireland: Nation and State*, p.68 states 'Fianna Fáil did not wish to interrupt the zealous preparation for the Eucharistic Congress which the Cosgrave government had so assiduously pursued in the last years of its term of office. On the contrary, de Valera grasped the opportunity with enthusiasm to publicise internationally "the nation's loyalty to Catholicism and to Rome". Fianna Fáil's relations with the Catholic Church had improved before the general election. If residual anti-clericalism had continued to exist in the ranks since the time of the civil war, it was eclipsed by the carefully crafted confessional strategy pursued by Fianna Fáil from the late 1920s'. This 'confessional strategy' reached its high point when one of the party's supporters, John Charles McQuaid was made Archbishop of Dublin in 1940. For an account of the Eucharistic Congress see John Cooney, *John Charles McQuaid Ruler of Catholic Ireland*, O'Brien Press, Dublin, 1999. p.73-76. When Fianna Fáil was replaced by the first inter-party government, after 16 years in power, the incoming Taoiseach, John A. Costello sent a message of homage to Pope Pius XII stating the cabinet 'repose at the feet of Your Holiness' and assuring the Pope of the government's devotion and their 'resolve to be guided in all our work by the teaching of Christ and to strive for the attainment of a social order in Ireland based on Christian principles' *Irish Catechetical Directory* (1949), 24 February 1948, p.705.

<sup>62</sup> While Article 44.1 of the 1937 Constitution recognised the 'special position' of the Catholic Church it did not create an established Church.

<sup>63</sup> I examine the influence of Catholicism on the Constitution in chapter 2.

<sup>64</sup> Conor Cruise O'Brien, *States of Ireland*, p.121.

Church. Groups like An Rioghacht<sup>65</sup> represented a more extreme wing to Catholic thought while de Valera represented a more liberal or Christian Democratic approach. John Whyte states that ‘the process of making Irish society Catholic culminated in the late 1940s’ and ‘the early 1950s marked the high-water mark in Ireland of the Catholic social movement’.<sup>66</sup> Groups within Irish society like An Rioghacht, the Christus Rex Society, the Guilds of Regnum Christi, and others, were dedicated to reshaping Ireland along the lines of Catholic social teaching. There were certainly few dissenting voices during this period: the rare exceptions being found in *The Bell*<sup>67</sup>, which disappeared in 1954, and *The Irish Times*, which had a relatively small readership at the time, and was generally known as ‘the Protestant paper’. One of the most important features of Irish Catholic culture in the post-independence era was the extent to which the state legitimated the Catholic ethos. Louise Fuller writes:

‘An alliance was formed between the Catholic church authorities and the Free State government during the civil war years, and W.T. Cosgrave during his tenure in office looked to the church to augment the authority of his government. The alliance was a mutually reinforcing one. The bishops were prepared to throw their weight behind the new state and endorse its political legitimacy, which was being contested by the anti-treaty Republicans, and the rulers of the new state were not disposed to question the authority of the church in matters having to do with education, health or sexual morality, traditionally seen by the church as its areas of competence’.<sup>68</sup>

Conor Cruise O’Brien has written of the relationship between expressions of independence and a growing confessional climate:

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<sup>65</sup> An Rioghacht was led by Fr Edward Cahill S.J. and was committed to the ‘gradual building up of a Christian State on the lines of the Catholic national tradition’. John Cooney, *John Charles McQuaid Ruler of Catholic Ireland*, O’Brien Press, Dublin, 1999, p.64. Cahill’s most important work is *The Framework of a Christian State*, Gill, Dublin, 1932.

<sup>66</sup> John Whyte, ‘Church, State and Society, 1950-70’ in Lee (ed.), *Ireland 1945-70*, Gill and Macmillan, Dublin, 1979, p.73.

<sup>67</sup> See Hubert Butler, ‘The Bell’ in *Escape from the Anthill*, Lilliput Press; Mullingar; 1985, p.147-152. Butler states ‘We remnants of the Anglo-Irish ‘intelligentsia’ would have been nobody’s children, had Sean O’Faolain’s *The Bell* not taken us under its wing’. Hubert Butler’s work is an important contribution to inter-ecclesiastical understanding and represents an elegant voice of tolerance despite his own experience of intolerance. Butler found himself isolated in his home town of Kilkenny after he was alleged to have caused offence to the Papal Nuncio having caused the Nuncio to walk out of a meeting of the Foreign Affairs Association. See his essay ‘The Sub-Prefect should have held his Tongue’ in *Escape from the Anthill*, Lilliput Press, Mullingar, 1985, p.270.

<sup>68</sup> Louise Fuller, *Irish Catholicism since 1950, The Undoing of a Culture*, Gill and Macmillan, Dublin, 2004, p.6.

‘The peculiar nature of Irish nationalism, as it is actually felt, not as it is rhetorically expressed. The nation is felt to be the Gaelic nation, Catholic by religion. Protestants are welcome to join the nation. If they do, they may or may not retain their religious profession, but they become, as it were, Catholic by nationality. Recognising, as they must, at least the overwhelming primacy and preponderance of the Gaelic and Catholic component of the nation, they are not expected to quibble or jib at such an expression as ‘We are a Catholic nation’. But Protestants who neither sought nor acknowledged such membership might well be annoyed, as well as puzzled, at finding the territory where they were in a majority claimed as part of a state constituted by the Catholic nation. One point could not escape their notice: the more ‘the free state’ asserted its independence the more explicitly it also asserted its Catholicity’.<sup>69</sup>

In many respects it was the symbiosis of Catholic and Irish that was to have a profound effect on Church-State relations in the new State.<sup>70</sup> In the 1930s the two main principles at the core of this Catholic movement were a distrust of state power and vocationalism. Vocationalist ideas had been developed by Pope Pius XI in *Quadragesimo Anno* (1937) and were taken up with great fervour by the Irish hierarchy. Vocationalism was a plan to divide industry into different vocational groups in the interest of social harmony. The church believed that if power could be diffused to strong vocational groups, there would be less need for a strong state. Therefore the two principles vocationalism and distrust of the state are related, with one pointing out the negative, that is the state itself, and the other offering a solution, which is vocational organisation. Vocationalism was also a strong influence within another Catholic nation, Mussolini’s fascist Italy. George Gavan Duffy appeared to be a supporter of vocationalism as he wrote to de Valera in 1936 encouraging him to read Salazar’s new Portuguese Constitution which included a senate based on vocationalist theory.<sup>71</sup> The influence of vocationalism is clear in Article 19 of the Irish Constitution pursuant to which the Oireachtas was empowered to provide for the direct election of candidates to the Seanad by functional or vocational groups or associations. However, this mechanism has never been utilised, reflecting the limited impact of vocationalism in practice. In light of the centrality of vocationalism to Catholic thought and the pervasive nature of Catholic thought during this period, the failure of vocationalist ideas to form an integral part of Irish politics demonstrates the limitations on the

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<sup>69</sup> Conor Cruise O’Brien, *States of Ireland*, p. 121.

<sup>70</sup> The roots for this symbiosis between Catholicism and national-ethnic identity can be traced back to the failure of the Protestant reformation to take hold in Ireland. This is perhaps the most defining event, or non-event, in Irish history.

<sup>71</sup> See Chapter 2.

influence of Catholic thought on the political class.

Whyte has pointed to the mood of increasing integralism in Ireland in the 1940s:

‘All sorts of forces were at work to make Ireland a more totally committed Catholic state than it had yet become...more totally committed to Catholic concepts of the moral law, more explicit in its recognition of the special position of the Catholic Church...this had been the direction of thrust in Irish history ever since Independence, and it was in these years that the process reached its culmination’.<sup>72</sup>

In 1951 the most celebrated event in Church-State relations took place in the mother and child scheme controversy. Dr. Noel Browne, who was made Minister for Health on his first day in the Dáil in the first inter-party government (1948-1951), attempted to introduce a scheme to provide free maternity care for all mothers and expectant mothers and free medical care for all children up to the age of sixteen. This entailed an extension of state control that was anathema to vocationalists and the Catholic Church. The Irish Medical Association also opposed the scheme albeit for different reasons. The hierarchy decided the scheme was indeed in opposition to Catholic social teaching in this area and requested that the government withdraw the scheme. Dr. Browne’s cabinet colleagues refused to support him, the scheme was dropped, Dr. Browne resigned and subsequently the government fell.<sup>73</sup> Whyte states that this event ‘could only have happened at this moment in Irish history’, as it was only at this time that ‘Catholic social principles were sufficiently distinctive, and held with sufficient assurance, for the hierarchy to base a condemnation upon them.’<sup>74</sup> In 1952-3, the

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<sup>72</sup> John Whyte, *Church and State in Modern Ireland*, p.158-9.

<sup>73</sup> On his resignation Browne stated in the Dáil ‘I, as a Catholic obey my Church authorities and will continue to do so.’ 125 *Dáil Debates* 781, 12 April 1951. Similarly, deputy Norton stated that ‘There will be no flouting of the authority of the Bishops in the matter of Catholic social or Catholic moral teaching.’ Ibid. 951-2. Norton was a member of the Knights of St Columbanus, as were a number of other politicians from this period including General Mulcahy, Minister for Education, Joseph Blowick, Minister for Lands, and Minister for Justice, Seán MacEoin. See Dermot Keogh, *Irish: Nation and State*, Sweet and Macmillan, Dublin, 2000, p.209.

<sup>74</sup> John Whyte, *Church and State in Modern Ireland*, p.80. For a comprehensive account of the Mother and Child scheme controversy see John Whyte, *Church and State in Modern Ireland*, p.196-272. However, Whyte’s argument that the origins of the 1951 crisis were based on a conflict between vocationalist and bureaucratic forms of government, with the Church supporting vocationalism is challenged by Eamonn McKee, ‘Church-State Relations and the Development of Irish Health Policy: The Mother and Child Scheme 1944-1953,’ (November, 1986) *Irish Historical Studies* 25, p.159-194. Keogh has argued that the Mother and Child Scheme controversy has been ‘erroneously’ interpreted as a

Fianna Fáil government had trouble with the hierarchy when it tried to introduce a modified version of Dr. Browne's scheme; but by essentially symbolic amendment it was able to avert a condemnation.<sup>75</sup>

### **Protestantism and the Free State**

It would be overly simplistic to regard the Irish state as an oppressive religious state or to over emphasise the 'oppressive pieties' of the State. Whyte illustrates that it is difficult to define on exactly what basis Church-State relations were conducted, but that a simple picture of the state under the Church's absolute control is inappropriate. Indeed, there have been occasions when the politically hegemonic party, Fianna Fáil has rejected the advice of the Catholic hierarchy and without suffering in subsequent elections. It should also be noted that Noel Browne was one of the most popular politicians in Ireland, frequently topping the poll in elections despite the mother and child scheme controversy. Protestants at five percent of the population enjoyed the same political rights as everybody else and indeed many flourished economically, in contrast to the oppressive treatment which the minority Catholic community was subjected to North of the border. In 1926 the numbers of Protestants in the key socio-economic groups (commerce, insurance and finance, management and administration, and the professions) was at 32.5% against 16% for Catholics.<sup>76</sup> While the slogan of Edward Carson's resistance to home rule was 'Home rule means Rome rule' any precise definition of the extent of the Church's powers is problematic. This may have

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Church-State crisis as the primary reason it failed was because of opposition from the medical profession who feared that as the scheme would be paid for by the State, doctors would have to reveal the extent of their earnings and pay their fair share of income tax. Keogh quotes Bishop of Ferns, Donal Herlihy's bitterness at the doctors: 'we allowed ourselves to be used by the doctors, but it won't happen again.' Dermot Keogh, *Ireland: Nation and State*, p.213. See also *Comhar* editorial 'Cás an Dochtúra de Brún', vol.10, May 1951.

<sup>75</sup> A further example of a Church-State clash during this period took place in 1955 when James Dillon, Minister for Agriculture in the second inter-party government, proposed to centralise agricultural education in a new state run Agricultural Institute. Several bishops who argued it marked an unwarranted extension of state power attacked the scheme, and Mr. Dillon had to withdraw it. Bishop Lucey condemned the scheme on the basis that it represented a move towards 'out-and-out Statism.' Quoted in John Whyte, *Church and State in Modern Ireland*, p.310.

<sup>76</sup> See Garret Fitzgerald, *Reflections on the Irish State*, Irish Academic Press, Dublin, 2003 p.150. Fitzgerald goes on to write: 'by 1991 the proportion of working Protestants in the higher groups had risen by seven percentage points, to 39.5% of the Protestant population. This reflected upward Protestant social mobility during the history of the state, for much of this increase was at the expense of a drop in the proportion of Protestants engaged in clerical occupations, which in this period fell from 14.5% to 8%.' *Ibid.*



led Whyte to conclude that the Catholic hierarchy's role in Irish politics lay somewhere between two extremes. One could not argue persuasively that the Church is just another interest group within civil society. Neither could one argue that Ireland was a theocratic State.

While Ireland was not a theocracy, there was a culture of deference to the wishes of the Catholic hierarchy under the Cumann na nGaedheal governments from 1922-1932. Despite initial concerns on the part of the hierarchy towards de Valera these concerns were quickly allayed as de Valera displayed his adherence to the Catholic Church in his zealous support for the Eucharistic Congress in 1932. Fianna Fáil was also to use the Dunbar-Harrison case to prove itself as capable of displaying its Catholicity as Cumann na nGaedheal had been when in power. This episode involved the appointment of Miss Dunbar-Harrison as County Librarian of Mayo. Miss Dunbar-Harrison was a Protestant and a graduate of Trinity College. The Mayo Library Committee objected to her appointment. The argument against the appointment was that her religious background and education meant she was not suitable for the task of librarian of the predominantly Catholic population of Mayo. Following a boycott of library services the government transferred Miss Dunbar Harrison to another position.<sup>77</sup> When the matter was raised in the Dáil in June 1931 de Valera defended the people of Mayo:

'If it is a mere passive position of handling books that are asked for, then the librarian has no particular duty for which religion should be as a qualification, but if the librarian goes round to the homes of the people trying to interest them in books, sees the children in the schools and asks these children to bring home certain books, or asks what books their parents would like to read; if it is active work of a propaganda educational character-and I believe it to be such, if it is to be of value at all and worth the money spent on it-then I say the people of Mayo, in a county where...over 98 per cent of the population is Catholic, are justified in insisting upon a Catholic librarian.'<sup>78</sup>

The Dunbar-Harrison case, which took place mere months before Fianna Fáil gained power, and the Eucharistic Congress in 1932 were essential for Fianna Fáil as it legitimised Fianna Fáil as respectable and Catholic, as there were still feelings of distrust towards Fianna Fáil at the time, with Cumann na nGaedheal even labelling the

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<sup>77</sup> For an account of the Dunbar-Harrison case see Whyte, *Church and State in Modern Ireland*, p.44-46.

<sup>78</sup> 39 *Dail Debates* 518, 17 June 1931.

party as 'red' and 'communistic' during the 1932 election. It seems though despite Cumann na nGaedheal spin the Church hierarchy did not view Fianna Fáil as a threat. The Papal Nuncio wrote at the time of the 1932 election that 'in the area of religion the two parties, once they were not in the compromising position of governing, were indistinguishable. In that sense it is difficult to say which of the two is less Catholic.'<sup>79</sup> The fact that Fianna Fáil were seen as Catholic and 'respectable' helped to reconcile Catholicism with Republicanism, Fianna Fáil as the 'Republican Party' was now adopting Catholic doctrine and creating a symbiosis between Catholicism, Republicanism and ethnic Nationalism. This period is vital for Fianna Fáil as it was the crossing of the Rubicon from Civil War disrespectability to purveyors of Catholic and Republican thought, in the context of a *quasi* political hegemony which has lasted to the present day. The Papal Nuncio to Ireland Monsignor Robinson writing privately to the Vatican's Secretary of State, Pacelli in 1932 wrote of the deference which Irish legislators show to Protestants which the government particularly demonstrate when it comes to the application of laws which may be applied less rigidly to Protestants. The Nuncio gives the Dunbar-Harrison case as an example of this deference in which a Protestant was to run a library in a County in which the population was '*eminente Cattolica*.'<sup>80</sup>

While there was a high level of deference shown towards the Catholic Church from the government, it should be noted there is also evidence of de Valera rejecting the wishes of the Church hierarchy. In June 1943 the opening of the new children's Court in Smithfield is referred to in files of the Department of Justice. Reference is made to the suggestion of MacCarthy J (who presided over the children's Court) that:

'His Grace the Archbishop of Dublin should be invited to bless the Court before the first Sitting takes place. The Court will, of course, deal with persons of all religious denominations and the suggested ceremony might possibly not be welcomed by persons who think that the Court is being too closely associated with Catholic religious activities...On the other hand, the overwhelming majority of the children who will be dealt with in the Court are Catholics and the business of the Court as regards these children may be said to be, to a very large extent, the re-education of these children in the system of conduct and morals in which they were brought up as Catholics. His Grace the Archbishop has taken a great deal of interest in this work and it is

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<sup>79</sup> *The Vatican Secret Archives, Papers of the Nunziatura d'Irlanda, Undated, (IV Periodo).*

<sup>80</sup> *Ibid.*

due to his interest and energy that the Court has now the assistance of a large number of voluntary Probation Officers organised by the Legion of Mary, and of evening school facilities provided free, by the Christian Brothers.<sup>81</sup>

In handwriting dated 28 June 1943 on the above letter, it is written that, having regard to McCarthy J's suggestion 'the Taoiseach thinks it would be better not to pursue the suggestion for the blessing of the Court.'<sup>82</sup> This document challenges the traditional view of the State blindly deferring to the Church during this period. It supports the view that the extent to which the State was prepared to follow Catholic orthodoxy during this period should not be overstated.

In 1950 the Knights of St. Columbanus succeeded in taking the Meath Hospital, a traditionally Protestant establishment, from Protestant control albeit it was later restored to its previous management through an Act of the Oireachtas. In 1957, the Protestants of the village of Fethard-on-Sea in Co. Wexford suffered a boycott by their Catholic neighbours because they were believed to have helped the Protestant partner in a mixed marriage to abscond with her children to Northern Ireland. Though de Valera condemned the boycott, the Catholic bishop and clergy supported it.<sup>83</sup> In 1958 local Catholics assaulted two Protestant preachers in Killaloe, County Clare. Although the district court judge convicted the defendants his comments reveal his sense of intolerance towards the victims: 'When men come to an Irish village and provoke the people by foisting their views upon them, they are abusing whatever rights they have under the Constitution'.<sup>84</sup>

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<sup>81</sup> NAI, Department of Justice, 1 June 1943.

<sup>82</sup> Ibid. In the same year in which the children's Court was opened 35 children and an elderly woman died in a fire in an orphanage in Cavan town. The orphanage was run by the enclosed order of Poor Clare Nuns. This tragic event led to a tribunal of enquiry under the chairmanship of senior counsel, Joseph McCarthy. The tribunal in questioning the Poor Clare Nuns had to enter the convent to avoid the necessity of the nuns having to get a dispensation from their enclosure vows. (*The Irish Times*, 8 April 1943) The tribunal found that the nuns were not responsible for the fire but that a lay teacher, Miss O'Reilly 'committed a grave and critical error of judgment' in failing to lead the children in two dormitories from the building. (*The Irish Times*, 17 September 1943) The failure of the inquiry to find any of the nuns responsible was satirised by Myles na gCopaleen (who was secretary to the inquiry) writing: 'In Cavan there was a great fire, Judge McCarthy was sent to inquire, It would be a shame, if the nuns were to blame, So it had to be caused by a wire.'

<sup>83</sup> See Tim Fanning, *The Fethard-on-Sea Boycott*, Collins, Cork, 2010 and Hubert Butler, *Escape from the Anthill*, Lilliput Press, Mullingar, 1985, p.134-152.

<sup>84</sup> John Whyte, 'Church, State and Society, 1950-70', p.73.

It is clear that there were elements within Irish society who resented the Protestant tradition this was evident in sectarian inspired murders during the revolutionary period. Later evidence of sectarianism arose in cases such as Dunbarr-Harrison and the Fethard-on-Sea boycott. There was also evidence of religious pluralism in de Valera's condemnation of the boycott and the recognition of inter alia, the Church of Ireland in the 1937 Constitution. Society is not monolithic therefore different forces may come to the surface depending on the context and the political climate. Because of the pervasive influence and triumphalism of the Catholic Church, there was an increased likelihood that sectarian forces would reveal themselves during this period. Despite the evidence of tolerance towards the Protestant tradition on the part of the political class, there was a sense of unease amongst many Protestants at the growing influence of the Catholic Church. This sense of unease is clear from the reaction of many Protestants to what was perceived by many as the judiciary's support for the *Ne Temere* decree in *Re Tilson*<sup>85</sup> in 1951. Generally the political and social landscape appears to demonstrate that while there is evidence of both tolerance and intolerance towards the minority Protestant tradition, both take place within the context of the growth of confessionalism within society and politics.

### Divorce

Opposition to divorce was and continues to be an essential feature of Catholic culture. Because of the growing influence of the Catholic Church in the fledgling State pressure would inevitably come to prohibit divorce. The Matrimonial Causes Act, 1857 which provided for divorce in England did not apply to Ireland. However, people domiciled in Ireland could be granted a divorce by a private act of parliament under the Matrimonial Causes Marriage Law (Ireland) Amendment Act, 1870 by the King's

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<sup>85</sup> [1951] IR 1. I examine *Re Tilson* in detail in chapter 3. *Ne Temere* was issued by Pius X in 1908. The decree stated that when a Catholic married a non-Catholic the marriage would only be valid if it was witnessed by a Catholic priest and it was required that the children be reared as Catholics. In 1910 controversy arose in the McCann case. Alexander McCann was a Belfast Catholic who married the Presbyterian Agnes McCann in a Presbyterian ceremony. Alexander McCann fled with the couple's two children allegedly following Episcopal pressure to marry in a Catholic ceremony which Agnes McCann resisted. The case was skilfully used by Unionists as evidence of the religious consequences of Home Rule with Ulster Unionist leader, Edward Carson, describing the case in the House of Commons as a 'grave public scandal'. See Anthony Hepburn, *Catholic Belfast and Nationalist Ireland in the Era of Joe Devlin*, Oxford UP, Oxford, p.130, Joe Lee, *Ireland 1912-1985*, p.11, and Eoin de Bhaldráithe, 'Mixed Marriage and Irish Politics: The Effect of *Ne Temere*', (Autumn, 1988) *Studies* 77, 284.

Bench Division of the High Court of Justice (sitting in Dublin). The Court only had the power to grant a judicial separation (*a mensa et thoro*) or a declaration of nullity of the marriage. This was in contrast to the position in England where, under the 1857 Act, the High Court of Justice had the power to grant decrees of divorce (*a vinculo matrimonii*). If an Irish person wanted a grant of divorce he or she had to petition parliament and seek *ad hoc* legislation. For many Protestants the divorce motion of 1925<sup>86</sup> was problematic as it was regarded by many as a specifically Catholic measure.<sup>87</sup> W.B. Yeats was the exception to the muted criticisms emanating from Protestant circles as he vehemently denounced the Bill in the Senate as inflicting a wrong on the Protestants of Ireland.<sup>88</sup> It should however be noted that Yeats was not necessarily representative of broader Protestant opinion as many within the Protestant community opposed divorce. Ó Corrain writes that ‘All the Protestant Churches disapproved of divorce to varying degrees even though it was available in Northern Ireland since 1939. Speaking on ‘The Family in Contemporary Society’ at the 1958 Lambeth Conference, Bishop Arthur Butler of Tuam felt that the lack of divorce in the

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<sup>86</sup> See Donal O’Sullivan, *The Irish Free State and its Senate*, Faber, London, 1940, p.161. Following an attempt in 1924 to lodge three bills to provide for divorce with the Examiner of Private Bills an attempt was made to change the standing orders to prevent the lodgement of such bills. This was eventually abandoned by the government. See Hanna J’s criticisms of this process in *McM v McM* [1936] IR 177. In Northern Ireland no opposition was raised in the commons to the admission of divorce bills. See ‘Divorce and Separation in Modern Irish History’, *Past and Present Society*, no.114, Feb. 1987, p.172-196

<sup>87</sup> For an account of Protestant opposition to divorce and a challenge to the view that the Protestant Churches were more liberal than the Catholic Church see Daithí Ó Corrain, *Rendering to God and to Caesar, The Irish Churches and the Two States in Ireland, 1949-73*, Manchester UP, Manchester, p.97-103.

<sup>88</sup> Yeats stated in the Seanad: ‘It is perhaps the deepest political passion with this nation that North and South be united into one nation. If it ever comes that North and South unite, the North will not give up any liberty which she already possesses under her Constitution. You will then have to grant another people what you refuse to grant those within your borders. If you show that this country, Southern Ireland is going to be governed by Catholic ideas and by Catholic ideas alone, you will never get the North. You will create an impassable barrier between South and North, you will pass more and more Catholic laws, while the North will, gradually, assimilate its divorce and other laws to those of England. You will put a wedge into the midst of this nation...If the entire Protestant episcopacy of Ireland came out with a declaration on this subject, it would not influence a vote in this House.’ *5 Seanad Eireann Debates* 434-5. 11 June 1925. O’Sullivan described W.B. Yeats’ famous speech thus: ‘His speech was nothing less than an envenomed attack on the religion of the majority of his fellow countrymen. He attacked the Catholic Church in general, and in Ireland in particular...And he concluded by bombastic references to the superiority of the ascendancy class.’ Donal O’Sullivan *The Irish Free State and its Senate* London, Faber, 1980 p.167.

Republic meant “the moral backbone of people living under that system [was] very much better”.<sup>89</sup> The only newspaper to oppose the legislation was *The Irish Times*.

While the legislature was prevented from introducing divorce under the 1937 Constitution<sup>90</sup>, persons domiciled in Ireland still had ‘the theoretical right, at common law, to petition Parliament by means of a Private Bill for divorce *a vinculo matrimonii*. No person did so, however, in view of the certainty that such a Bill would be rejected.’<sup>91</sup> According to Kennedy even a Papal Decree of dissolution of an unconsummated marriage *ratum, non consummatum* was not recognised under Irish law. McQuaid who had assisted in drafting Article 41 stated that it was:

‘...hardly possible to describe how great are the evils from divorce. Matrimonial contracts are by it made variable, mutual kindness is weakened, deplorable inducements to unfaithfulness are supplied, harm is done in the education and training of children, occasion is afforded to the breaking up of homes, the seeds are sown of dissension among families, the dignity of womanhood is lessened and brought low, and women run the risk of being deserted after having ministered to the pleasure of men.’<sup>92</sup>

O’Rahilly suggested the Constitution contain a provision stating: ‘The civil validity of religiously solemnised marriage shall be recognised, provided that the details of registration prescribed by legislation are duly complied with.’ He wrote that without this ‘there would be no reference to the religious aspect of marriage.’<sup>93</sup> Cosgrave’s Attorney General and future Chief Justice Hugh Kennedy is quoted as somewhat begrudgingly approving of divorce for non-Catholics saying ‘we should make provision for divorce for those who approve of that sort of thing’.<sup>94</sup> Lee writes that Cosgrave came under massive episcopal pressure on the issue. Archbishop Byrne of Dublin insisted that the Catholic Church had a right to decree marriage laws for Protestants no less than for Catholics because ‘all members who had been baptised are members of the

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<sup>89</sup> Daithí Ó Corrain, *Rendering to God and to Caesar The Irish Churches and Two States in Ireland*, p.98.

<sup>90</sup> Article 41 ‘no law shall be enacted providing for the grant of a dissolution of marriage.’

<sup>91</sup> Finola Kennedy, *Cottage to Creche*, p.44.

<sup>92</sup> UCDA, *de Valera Papers*, P150/2411 undated.

<sup>93</sup> *Irish Independent*, 15 May 1937.

<sup>94</sup> Joe Lee, *Ireland 1912-1985*, p. 157.

Church and under its jurisdiction.’<sup>95</sup> Lee then states that ‘Cosgrave brought in legislation prohibiting divorce through private bills, indifferent to the fears of Northern Protestants who felt the legislation confirmed that freedom of conscience would not be permitted by the Free State.’<sup>96</sup>

### Adoption

The events which led to the passing of the Adoption Act, 1952 exemplify the deference of the political class to the Catholic hierarchy and the level of Catholicity in society during this period. The close relationship between politicians and clergy meant that the eventual legislation was entirely in tune with Catholic social teaching. Ireland was unusual in that legal adoption was only introduced in 1953, whereas in England and Wales it was introduced in 1926 and in Northern Ireland in 1930. In March 1944, the Secretary of the Department of Justice, Stephen Roche, wrote to McQuaid to gauge his reaction to a proposal to provide for the adoption of ‘destitute children’ as this would give ‘illegitimate children a better status’ and ‘they would be registered as adopted children under the new name.’ Roche also wanted to know McQuaid’s attitude towards a provision in any Bill ‘prohibiting the making of an adoption order in any case where it is not proved to the court that the religion of the adopter and the child are the same.’<sup>97</sup> McQuaid replied stating that legal adoption was not contrary to Catholic thought but that ‘I should urge that no step be taken in respect of Catholic children - and you know what a proportion that category entails - without referring the matter to the Catholic hierarchy.’<sup>98</sup>

An Adoption Society was set up in 1948 to campaign for legal adoption. Despite a strong lobbying campaign, the Minister for Justice, General MacEoin refused to introduce legislation largely due to clerical opposition. Charles Casey, the Attorney-General to the inter-party government gave two reasons for the refusal to legislate. Firstly, he felt it might be contrary to Article 42 to allow a non-marital child to be

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> *Irish Times*, March 3 1996.

<sup>98</sup> Quoted in John Cooney, *John Charles McQuaid*, p.171.

adopted.<sup>99</sup> Secondly, he stated that ‘This country is predominantly a Catholic country. That does not mean that Parliament should penalise any other creed, but it does mean this, that Parliament cannot surely be asked to introduce legislation contrary to the teachings of that great church.’ The AG envisaged circumstances in which a non-marital child was adopted and the mother then having ‘...rehabilitated herself’ would be powerless to bring the child up in ‘what she knows is the true faith.’<sup>100</sup> This shows a considerable level of deference from the State to the wishes of the hierarchy. The main fear amongst the hierarchy appeared to be proselytizing aimed at non-marital children. The Catholic Protection and Rescue Society had been set up in 1913 in response to Protestant institutions which catered for unmarried mothers of all denominations.<sup>101</sup>

Legal adoption was put on a statutory footing in Ireland with the passing of the Adoption Act, 1952. This provided for the establishment of the Adoption Board (An Bórd Uchtála) which had the power to grant adoption orders. Prior to the passing of the 1952 Act, both fosterage and informal adoptions were arranged through private adoption societies who tended to be linked with the Catholic Church. Around 1952, following consultation with McQuaid concerning the proposed adoption legislation, the hierarchy set up an episcopal committee under McQuaid’s chairmanship to examine the issue.<sup>102</sup> The committee issued a statement stating:

Legal adoption, if it be restricted within certain limits and protected by certain safeguards, is consonant with Catholic teaching. A child in respect of faith and morals must be protected by such safeguards as will assure his adoption by persons who profess and practise the religion of the child and who are of good moral character.<sup>103</sup>

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<sup>99</sup> As it transpired the attorney was incorrect as the Supreme Court ruled that non-marital parents were not covered by Articles 41 and 42 in *(State) Nicolau v An Bord Uchtála* [1966] IR 567.

<sup>100</sup> Quoted in John Whyte, *Church and State in Modern Ireland*, p.189-190.

<sup>101</sup> The society issued a statement in 1950 stating they had: ‘... assisted a Catholic mother in recovering the custody of her three children from a Bird’s Nest.’ Ibid. 191.

<sup>102</sup> The committee also included: Archbishop Kinane (Cashel), Bishop Browne (Galway), Bishop Farren (Derry) and Bishop Lucey (Cork).

<sup>103</sup> Quoted in John Cooney, ‘Adopted child’s religion McQuaid’s main concern’ *The Irish Times*, 18 March 1996.



Under s.12 (2) Adoption Act, 1952 it was required of the adopting parents that they be 'of the same religion as the child and his parents or, if the child is illegitimate, his mother.'<sup>104</sup> This had the effect of preventing spouses of different religions from adopting. The board also had to be satisfied that the applicant was of good moral character. Cooney writes that 'each clause of the draft had been vetted by McQuaid and his chief adviser on adoption and social issues, Fr Cecil Barrett.'<sup>105</sup> The Hierarchy's concerns were allayed by the 1952 Act. Whyte writes: '...the text of the bill bore out the closeness of the consultation, for regard was had to all the limits and safeguards for which the committee of the hierarchy had asked.'<sup>106</sup>

Whyte writes:

'Perhaps the provision that adopting parents were to be of the same religion as the natural parents was the most important, because, in a stroke, it removed the bogey of proselytism. There could be no question of Protestant parents adopting Catholic children (or vice versa) and, since legal adoption has been established, proselytism has practically ceased to be an issue in Ireland.'<sup>107</sup>

Kennedy argues that the adoption system:

'...derives from the attitudes and customs of the 1950s. Central to these attitudes was the sanctity and supremacy of the marriage-based family, which was both a constitutional cornerstone of society and a sacrament of the Catholic Church. Giving birth to a child outside marriage stemmed from a sin in the eyes of the Church and was a social offence meriting punitive social treatment that included social denial. The social offence factor was widely accepted outside Catholic circles and outside Ireland at the time.'<sup>108</sup>

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<sup>104</sup> S.12 (3) of the 1952 Act stated that 'The Board, may having regard to the special circumstances of a particular case, make an adoption order although the persons referred to in subsection (2) are not all of the same religion, provided that each of them is a member of one of the following denominations, namely, the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, the Baptist Union of Ireland and the Brethren, commonly known as the Plymouth Brethren.' This appears to indicate that the primary purpose of the legislation was to prevent adoption by inter-Church (Catholic and Protestant) couples.

<sup>105</sup> Ibid p.297. It seems that one of McQuaid's motivations in approving the adoption legislation was to legitimise American adoptions of Irish non-marital children. In 1996 the files of 2,000 Irish babies who had been sent for adoption between 1941 and 1961 were discovered. Each file contained a letter of surrender by the mother of the baby. The files contained the mother's declaration that the child was extra-marital, that she relinquished her claim to the child forever and surrendered the child to the person in charge of the orphanage or adoption agency, generally a nun or a priest. The adoptive parents were to undertake to give the child a Catholic education. See Finola Kennedy, *Cottage to Creche*, p.43.

<sup>106</sup> John Whyte, *Church and State in Modern Ireland*, p.276-277.

<sup>107</sup> Ibid 277.

<sup>108</sup> Finola Kennedy, *Cottage to Creche*, p.44-45.

The passing of the Adoption Act, 1952 reflected the assertiveness of the Church and the receptive nature of the political class towards clerical political intervention during this period.

The dominance of the ultramontane tradition on clerical thinking meant that while the Church may have hoped to insulate itself from the development of modern liberal intellectualism and scholarship, it was to become clear towards the end of Pius XII's pontificate that, as Hastings writes, 'the post-medieval, ultramontane model was simply not proving workable in either intellectual or social terms.'<sup>109</sup> In 1950 the Pope issued the Papal Encyclical *Humani Generis* which denounced as dangerous new ideas but by then the Holy See's responses 'were almost bound to be ineffective, and as the intellectual viability of ultramontanism crumbled, the now unprotected power structure, the papal monarchy came more and more into open and criticisable view.'<sup>110</sup> It was then left to John XXIII to appeal to a principle of *aggiornamento* as scholars and cardinals descended on Rome for Vatican II. Vatican II led to the vernacular Mass and a new ecumenical perspective towards the other Churches. Interestingly, it appears that the Irish hierarchy contributed very little to discussions during the Council. Smith writes that Irish bishops were invited to send in proposals for discussion during the council but that 'one has to conclude that the Irish Church had little awareness of the major challenges confronting the faith in Western Europe and beyond.'<sup>111</sup> It appears that Archbishop McQuaid was reluctant to introduce the Vatican II reforms in Ireland. This contrasts with the vigour with which the Irish hierarchy accepted the more

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<sup>109</sup> Adrian Hastings, *Modern Catholicism*, p.3. However, the Jesuit George Tyrell was an example of a modernist Catholic intellectual within the Church. Following Tyrell's attack on monolithic anti-modern Catholicism in *Medievalism* he was excommunicated.

<sup>110</sup> Ibid p.4.

<sup>111</sup> Michael Smith, 'Life in the Irish College during the Second Vatican Council', in *The Irish College, Rome and its World*, Keogh and McDonnell (eds), Four Courts Press, Dublin, p.262-263. Smith goes on to write 'In the main, these submissions were of a canonical nature, some focusing on the minutiae of particular canonical regulations. In the minutes of the bishops' conference meetings between the announcement of the council and its beginning in October 1962, the only references to the council are to the national collection for the renovation of the college and the charter flight that Aer Lingus was organising to bring the bishops and others to Rome! One has to wonder why the bishops' conference did not establish a committee to oversee the preparation and to inform the people on what was happening...sadly an opportunity was lost...It was indicative of an unhealthy complacency – perhaps a touch of arrogance – and an unwillingness to engage in the major discussions and debates taking place at that time.'

triumphalist dogma stemming from Rome, particularly during the pontificate of Pius X.

It is clear from the above that there is considerable evidence of deference on the part of the political class towards the wishes of the Catholic hierarchy. Because of the receptiveness of those with power and the general population to the ultramontane Church there appeared to be little space within Irish society and politics for pluralism and the liberal tradition of State neutrality concerning religion. The triumphalism and pervasive influence of the Church had the potential to lead Ireland towards theocracy. It is to the credit of de Valera that in the drafting of the 1937 Constitution he was unreceptive to such a course and it is to that subject that I turn next.

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## Chapter 2 The Catholic Church and the 1937 Constitution

*‘Constitutions in the modern sense are finally from a people with their history as well as for a people with their hopes and aspirations. Mr. de Valera understood all this very well as he sought to combine the political thrust of Irish republicanism from Tone to Pearse and after, its cultural aspirations, the persistent Catholicism of the vast majority of the Irish people, their economic conservatism and the needs of particular religious minorities. While the Constitution would be a new one, the first to be freely adopted by the Irish people, its positive resources and final limitations were inherited.’*<sup>1</sup>

### Introduction

A Constitution is not a treatise on philosophy or theology but rather as Wheare states ‘a selection of the legal rules which govern the government of that country and which have been embodied in a document’.<sup>2</sup> But as was stated by the Supreme Court in *Re Article 26 and the Criminal Law (Jurisdiction) Bill*<sup>3</sup> the Irish Constitution ‘expressed not only legal norms but basic doctrines of political and social theory’ and ‘reflects, in part, [the people’s] aspirations and aims’.<sup>4</sup> Similarly, in *Attorney General v Paperlink Ltd*<sup>5</sup> Costello J stated that ‘the Constitution is a political as well as a legal instrument.’<sup>6</sup> Archbishop Lucey writing in 1937 wrote that:

‘Since neither God nor the natural law designates exactly who shall hold the reins of government or how they shall be moderated, men must do so for themselves. The instrument by which this is done for each country nowadays is known as the Constitution. A Constitution, therefore, is simply the collection of rules according to which the personnel of the government,

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<sup>1</sup> Enda McDonagh, ‘Philosophical-Theological Reflections on the Constitution’, *The Constitution of Ireland 1937-1987*, Frank Litton (ed.) Institute for Public Administration, Dublin, 1987 vol. 35, no. 4, p. 192-193.

<sup>2</sup> KC Wheare, *Modern Constitutions*, (2<sup>nd</sup> ed.) Oxford University Press, London, 1966 p.2. John Charles McQuaid argued the exact opposite to Wheare stating that a Constitution was a ‘thesis of philosophy and theology’. Quoted in Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937*, Mercier Press, Cork, 2007, p.108.

<sup>3</sup> [1977] IR 129.

<sup>4</sup> Ibid. 147.

<sup>5</sup> [1984] ILRM 373.

<sup>6</sup> Ibid. 385.

the powers of the government and rights of the governed are decided in any country..a constitution really amounts to a law of laws standing above and limiting the authority of whatever government is in power at any given moment. It is a barrier against arbitrary action and tyranny on that government's part'<sup>7</sup>

In this chapter I will discuss the extent to which the Catholic Church was an influence on the 1937 Constitution and the extent to which the Constitution expresses doctrines that reflect Catholic social theory. I argue that the philosophical basis of the text lies on a paradox between the continuity of an agreed legal and government system, and a denunciation of colonisation in the text's catholicity and secessionist republicanism. I examine the drafting of the Constitution and in particular, the role of John Charles McQuaid during the drafting process and the influence of Catholic thought on the Preamble, Articles 41, 42, 43, 44 and 45,<sup>8</sup> the influence of nationalism and republicanism on the Constitution; their link with Catholic social thought and the influence of natural law on the text of the Constitution.

#### **After Independence**

The Constitution of Dáil Éireann and the Democratic Programme 1919 were based on a strong social programme under the influence of the Irish Labour Party, while the 1922 Constitution was bound by the Anglo-Irish Agreement and so reflected the British liberal tradition. Because the 1922 Constitution was the result of compromise, it included provision for an oath of allegiance to the British Crown, a right of appeal to the Privy Council in London, and an office of Governor General, the monarch's representative in Ireland. However, the 1922 Constitution broke with the British

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<sup>7</sup> Cornelius Lucey, 'The Principles of Constitution Making', (January, 1937) *Irish Ecclesiastical Record* 49, p.17.

<sup>8</sup> Article 40 is generally perceived as not being based on Catholic social teaching. Gerard Hogan argues that Article 40.3 owes more to the 14<sup>th</sup> Amendment to the United States Constitution than to *Rerum Novarum* and he argues that 'one would be hard put to find any Catholic influences whatever in Article 40.' Foreword to Keogh and McCarthy, *The Making of the 1937 Constitution*, p.22. Emphasis in original. Similarly, Declan Costello writing in 1956 argued that Article 40, in contrast to Articles 41, 42, and 43, derived from 'secular and rationalist theory'. Declan Costello, 'The Natural Law and the Irish Constitution' 1956, *Studies*, 403, p.414. However, Keogh and McCarthy suggest that *Rerum Novarum* and *Humanum Genus* may have influenced the final draft of Article 40. See Keogh and McCarthy, *The Making of the Irish Constitution 1937*, p.111-112. It should be noted that the Eighth Amendment protecting the right to life of the unborn reflects Catholic social teaching concerning the sanctity of life. Furthermore, the phrase 'human persons' in Article 40.1 was been interpreted (based on archival evidence) by Doyle as being based on Catholic thought. See Oran Doyle, *Constitutional Equality Law*, Thomson Round Hall, 2004, Chapter 3.

tradition of parliamentary supremacy in so far as it provided for the power of judicial review. Indeed, without that power any fundamental rights would be severely undermined. Conor Cruise O'Brien regarded the 1922 Constitution as a more 'liberal'<sup>9</sup> document than the 1937 Constitution<sup>10</sup> and Whyte described it as 'a typical liberal-democratic document which would have suited a country of any religious complexion.'<sup>11</sup> However, this analysis fails to take account of the fact that the 1922 Constitution had ended 'in almost total failure'<sup>12</sup> and that it had failed to protect fundamental rights and the democratic institutions of the State. Indeed, following de Valera's decision to abolish the Senate in 1936, as Brian Farrell noted, de Valera could have legally set up a dictatorship, by amending the 1922 Constitution with the support of a simple majority of the Dáil.<sup>13</sup> As the Constitution was progressively dismantled by Fianna Fáil it became clear that de Valera sought the 'fresh start' which he perceived the 1922 Constitution had failed to provide. There was also evidence of clerical unease with the provisions of the 1922 Constitution with Patrick Daly, PP Castlepollard, Co. Westmeath describing it as a 'Godless Constitution for a Christian land'.<sup>14</sup>

### A Post-Colonial Constitution

The Irish Constitution attempts to define the nation in opposition to its former colonial power. The text is based on a reactive concept of national identity. It represents a textual attempt to compensate for cultural dilution, although it is important to note that the long process of colonisation failed to purge the nation of its religious-

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<sup>9</sup> Conor Cruise O'Brien, *States of Ireland*, London, Panther, 1972, p.120

<sup>10</sup> Cruise O'Brien argued provocatively that the 1937 Constitution made 'sectarianism the law of the land' *States of Ireland*, p.120. While Nicholas Mansergh described the Constitution as an attempt 'to reconcile the notion of an inalienable popular sovereignty with the older medieval notion of a theocratic state'. Nicholas Mansergh, *Survey of British Commonwealth Affairs: Problems of External Policy, 1931-1939*, Oxford University Press, Oxford, 1952, p.297. FSL Lyons described the Constitution as achieving 'stability' after 30 years of 'incessant war, revolution and political change'. FSL Lyons, *Ireland since the Famine*, Fontana P, London, 1973, p.549. Foster viewed the Constitution as being based on the assumption that 'that the nature and identity of the Irish polity was Catholic.' RF Foster, *Modern Ireland: 1600-1972*, Penguin P, London, 1988, p.54

<sup>11</sup> John Whyte, *Church and State in Modern Ireland 1923-1979*, (2<sup>nd</sup> ed.) Gill and Macmillan, Dublin, 1980, p.51

<sup>12</sup> Richard Humphreys, Review of John Kelly, *The Irish Constitution*, (1994) 16 *Dublin University Law Journal*, p. 222.

<sup>13</sup> Brian Farrell, 'From First Dáil through Irish Free State', in B. Farrell (ed.), *De Valera's Constitution and Ours*, p.30.

<sup>14</sup> Quoted in Patrick Murray, *The Roman Catholic Church and Irish Politics, 1922-1937*, UCD Press, Dublin, 2000, p.294.

anthropological identity due largely to the failure of the Reformation to take hold in Ireland. The most effective means of emphasising Irish cultural exceptionalism and political sovereignty was by emphasising the nation's Catholicity. Ireland's cultural and social history in the early years of the State was defined by a conservative Catholic culture and an institutional Church with a disproportionate influence on the processes of social and political transformation. Irish identity needed to be self-defined rather than imposed extrinsically. Edward Said in *Orientalism*<sup>15</sup> shows how western conceptions of the Orient have defined Eastern culture as existing in opposition to Western values. This concept of the 'Other' is also an important paradigm which can be applied to Anglo-Irish relations. There is a peculiarity to the Irish colonial experience as it began hundreds of years before the height of the age of imperialism. Therefore the process of cultural colonisation was deeply rooted in Ireland, which accounts for the fundamental philological, cultural and anthropological purging which had taken place, albeit there was also a discourse of dissent rooted in Burke's anti-imperialism and Tone's enlightenment republicanism under the influence of Tom Paine's *The Rights of Man*.<sup>16</sup> There was also no real success in attempts to Protestantise Ireland's social life by introducing norms from the Reformation and this was to be pivotal for the nation's social and cultural development. However, with the advent of independence, despite a desire for political and anthropological sovereignty, Irish judicial and governmental institutions would continue to follow the path of British liberalism.<sup>17</sup> The different currents (de Valera, McQuaid, Hearne, and to a lesser extent the Jesuits) that influenced the drafting of the Constitution were representative of the broad nationalist tradition under the influence of 1930s Catholic social teaching and, in

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<sup>15</sup> Edward Said, *Orientalism*, Penguin, London, 1978. Said does not actually mention Ireland in *Orientalism* but, he examines Ireland's colonial experience in *Culture and Imperialism* London, Chatto and Windus, 1993 p.266. Said uses literary criticism of Yeats as the basis for a cultural and literary examination of Ireland's reaction and resistance to imperialism. Said describes Yeats as 'the indisputably great national poet who during a period of anti-imperialist resistance articulates the experiences, the aspirations, and the restorative vision of a people suffering under the dominion of an offshore power'. One might question the extent to which Yeats as a member of the Protestant aristocracy is representative of the broader Irish experience.

<sup>16</sup> Thomas Paine, *The Rights of Man*, J.M. Dent, London, 1993.

<sup>17</sup> In the 19<sup>th</sup> century Mazzini refused to support Irish independence on the basis that Ireland was not a nation and was not seeking a unique way of life separate from England. See Nicholas Mansergh, *The Irish Question 1840-1921*, Allen and Unwin, London, 1975.

the case of de Valera and Hearne, democratic constitutionalism. The influence of papal encyclicals on the Constitution came from McQuaid, continuity from the 1922 Constitution from Hearne, and the religious pluralism of Article 44.1 from de Valera. While de Valera did not draft many of these Articles they were ultimately subject to his approval or otherwise. Therefore, the Constitution reflects both a long history of colonisation, the need for a 'fresh start', and the individual currents that were influential during the drafting process.

As the Irish nation sought to assert its independence, instead of being defined by its former colonial power,<sup>18</sup> there appeared to be a growing level of Catholicity amongst the population and within the institutions of the State. The Constitution was to be used as a forum for self-representation and the basis for an indigenous constitutional narrative. This need for self-representation stems from 19<sup>th</sup> century counter-enlightenment nationalism and the birth of the concept of self-determination during the decline of the empires. But the 1937 Constitution could never be defined in any manner other than through the prism of colonial influence and so the Constitution as a normative legal and political document reflects not only the nation's aspiration for genuine cultural and political sovereignty, it also carries with it a history of colonisation and in particular, the psychological wreckage of 19<sup>th</sup> century Ireland, defined by failed rebellions, famine and the malign effects of colonisation. Irish history does not start in 1922 or 1937. The Constitution does not operate in a historical vacuum. Rather it bears the influence of a history which came in 1937 to be defined by a post-colonial struggle for national self-representation. This struggle for representation coincided with the existence of an extremely strong and confident Church hierarchy and a population that was ninety-three percent Catholic and so Irish Catholicism and cultural identity and representation became further interwoven into the fabric of Irish life.

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<sup>18</sup> There was a long history of colonial misrepresentation of the Irish in the interest of creating a perception of English racial superiority. Edmund Spenser in *View of the Present State of Ireland* (1596) Clarendon Press, Oxford, 1970 described the Irish as barbarians who should be exterminated.



### **John Charles McQuaid and the Drafting of the 1937 Constitution**

There is always an inherent difficulty in measuring the influence of any institution or individual within society. This is particularly true when one speaks of the Catholic Church as much of the contact between Church and State was conducted at an informal or private level. Therefore measuring the extent to which John Charles McQuaid was an influence on de Valera in drafting the Constitution is always problematic. Dermot Keogh writes 'But who was the most responsible for contributing to the formulation of the new document over the two-year period? The central figure in the process was unquestionably John Hearne – an able and knowledgeable civil servant who had once been a student for the priesthood. He had the task of drafting articles and coordinating submissions from sources outside the government'.<sup>19</sup> Keogh and McCarthy view McQuaid's role in the drafting of the Constitution as having developed from casual conversations between McQuaid and de Valera that then evolved into a close working relationship. They also view McQuaid's role as an unwelcome one from the perspective of the small group of civil servants assigned to draft the new Constitution. By early 1937 there was frequent correspondence between McQuaid and de Valera, sometimes as often as twice a day. McQuaid sent de Valera copies of papal encyclicals, letters with suggested ideas and numerous drafts of various articles of the Constitution. He sent de Valera copies of two books *Manuel Sociale* by the Belgian Jesuit, Fr Vermeersch and *Code of Social Principles* published by the International Union of Social Studies. McQuaid also sent de Valera a critique of Rousseau's theory of civil authority.

John Cooney in his biography of John Charles McQuaid describes McQuaid as 'co-maker'<sup>20</sup> of the Constitution. This is, it would appear, an overstatement. Keogh in a review of Cooney's biography states: 'The term 'co-maker' implies that the archbishop enjoyed an equal share with de Valera. However, this is to further compound a fundamental misunderstanding of the drafting process: de Valera was not the other author of the 1937 Constitution. If there was a single author of the 1937 Constitution

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<sup>19</sup> Dermot Keogh, *The Vatican, the Bishops and Irish Politics 1919-1939*, Cambridge University Press, Cambridge, 1986, p. 203.

<sup>20</sup> John Cooney, *John Charles McQuaid*, p 94.

then that author must have been John Hearne.<sup>21</sup> Keogh's assertion is certainly debatable given that Hearne was working under the supervision of de Valera, who was at all times free to accept or reject Hearne's drafts. It is also clear that much of Hearne's work consisted of a redrafting of the 1922 Constitution, as Hearne under de Valera's instructions stated his belief that the Constitution ought to consist of 'a far reaching constitutional reform within the framework, as far as possible, of the existing State rather than to establish a new State with a constitutional system fundamentally different from that now obtaining'.<sup>22</sup> If we define the Constitution as shifting the State from the influence of British liberalism to a hybrid of influences - Catholic social teaching, secessionist republicanism and liberal democracy - then the most innovative shift toward greater Catholicity comes from McQuaid, while continuity stems from Hearne. But both were subject to the supervision and approval or otherwise of de Valera.

John Charles McQuaid was Archbishop of Dublin from 1940 to 1972. He was a close friend of de Valera and his wife Sinead. At the time of the drafting of the Constitution, McQuaid was president of Blackrock College and had taught de Valera's children. Born in Cotehill, Co. Cavan in 1895, McQuaid was academically gifted and was educated by the Holy Ghosts Fathers in Blackrock College and by the Jesuits in Clongowes Wood. He went on to become a clerical student entering the novitiate of the Holy Ghost Fathers. As a clerical student, he studied at University College Dublin receiving a BA and then a MA during which he wrote a dissertation on the life and philosophy of Seneca. In 1925 McQuaid was recalled from Rome, where he was writing a doctorate in theology, to become dean of studies at Blackrock College. In 1931 McQuaid became president of the college.<sup>23</sup> He is described by Keogh and McCarthy as 'an excellent administrator and a teacher with progressive ideas, fostering interest in art and sport. In relation to discipline, he pleaded that it should not be

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<sup>21</sup> Dermot Keogh, 'Review of Cooney, *John Charles McQuaid*', (2000) *Studies* 89, p. 161.

<sup>22</sup> UCDA, Memorandum prepared by John Hearne, 17 May 1936, *de Valera Papers*, 1029/6.

<sup>23</sup> For further biographical information see John Cooney, *John Charles McQuaid Ruler of Catholic Ireland* and Dierdre McMahon, 'John Charles McQuaid Archbishop of Dublin 1940-1972' in James Kelly and Daire Keogh (eds) *A History of the Catholic Diocese of Dublin*, Four Courts P, 2000, p.331-344.

severe, allowing pupils much more freedom than was usual in Ireland at the time.<sup>24</sup> This description of McQuaid contrasts with the image of a stern disciplinarian he was later to develop.<sup>25</sup>

In November 1940, McQuaid succeeded Archbishop Byrne as Archbishop of Dublin. Politically, McQuaid was close to Fianna Fáil and his appointment as Archbishop may have been influenced by the view that he would have some influence over the government. It would though be incorrect to view de Valera as passively accepting McQuaid's wishes, as his rejection of McQuaid's confessional Article on religion demonstrates. McQuaid viewed the Constitution as being guided by the 'teachings of Catholic philosophy and theology' and argued that it should 'set forth what ought to be our Christian endeavour in social policy.' He continued that 'We desire – within the vast freedom of the social encyclicals to achieve the common good of the nation on Christian lines and by Christian methods.'<sup>26</sup>

Keogh and McCarthy argue that the probable methodology used by McQuaid and de Valera was that McQuaid assembled excerpts from Papal Encyclicals and passed them on to de Valera who in turn gave them to John Hearne and Arthur Mathison as guides in the drafting process. These drafts were then returned to McQuaid who redrafted them.<sup>27</sup> Because de Valera limited the drafting of the Constitution to such a small group of people, the competing currents did not have the opportunity to influence its content. The opening to the public of the papers of Archbishop John Charles McQuaid has shown that the Archbishop of Dublin would appear to have had some considerable influence on de Valera during the drafting of the Constitution.<sup>28</sup> Enda McDonagh

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<sup>24</sup> Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937*, p.107

<sup>25</sup> McMahan warns against 'crude caricatures of hidebound Catholic reaction with which McQuaid has been identified since his death' and that many benefited from his public and private charity. Dierdre McMahan, 'John Charles McQuaid Archbishop of Dublin 1940-1972' in *A History of the Catholic Diocese of Dublin*, p.333.

<sup>26</sup> Undated document entitled 'Directive Principles' quoted in Keogh and McCarthy, *The Making of the Irish 1937 Constitution*, p.108

<sup>27</sup> See Keogh and McCarthy, *The Making of the Irish Constitution 1937*, chapter 4.

<sup>28</sup> Dermot Keogh's essay 'The Constitutional Revolution: An Analysis of the Making of the Constitution', *Administration*, Vol. 35, No. 4 (1987), p. 69 was done without the McQuaid papers and underestimates his influence. Keogh has tended to concentrate on drawing a distinction between what he

states that the articles on fundamental rights 'indicate the successful coalition of republicanism and liberal democracy in a Catholic context'.<sup>29</sup> As well as the Preamble and the fundamental rights Articles, the influence of Catholic social teaching is also evident in Article 15.3.1 which refers to the setting up of 'functional or vocational councils representing branches of the social and economic life of the people' and Article 19 which refers to 'the direct election by any functional or vocational group or association or council of so many members of Seanad Éireann as may be fixed by such law...'. The inclusion of these Articles in the Constitution reflects the interest that Catholic scholars in the thirties had in vocational organisation following the publication of the Papal Encyclical *Quadragesimo Anno* in 1931.<sup>30</sup> Catholicism is just once stream running into the text. The two other primary influences were Irish secessionist republicanism and British liberal democracy. These three influences are the essential basis of the text. Chubb states that one can clearly detect 'the great legacy of the British that both geography and history made inevitable; nationalism; and the Catholic social teaching of the inter-war period which a ninety-three per cent Catholic population was conditioned to accept without question.'<sup>31</sup>

The most fundamental break from the 1922 Constitution which the 1937 Constitution represents is the move from liberal individualism to the family as the fundamental unit which ought to be the basis of society. This demonstrates the aspirational and didactic nature of the Constitution as it sought to represent and promulgate the Christian concept of the 'perfect society'. In this context the Constitution is not only descriptive, that is reflecting the shared cultural and societal norms (this is a somewhat crude

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perceives as McQuaid's conservative brand of Catholicism against de Valera's more liberal beliefs. Keogh later suggested in his submission to the Forum for Peace and Reconciliation that McQuaid had a greater influence than had been previously thought. See Forum for Peace and Reconciliation, Building Trust in Ireland, Blackstaff Press, Belfast, 1996, p. 85-214. See also Cathal Condon, 'The Influence of Archbishop John Charles McQuaid in the drafting of the 1937 Constitution', UCC, unpublished MA thesis, 1995 in which he argues that McQuaid had a pervasive influence in the drafting of the Preamble, Articles 1-3 and 40- 45.

<sup>29</sup> Enda McDonagh, 'Philosophical and Theological Reflections on the Constitution', *Constitution of Ireland 1937-1987*, p.198.

<sup>30</sup> This Encyclical proposed that class struggle be displaced by the creation of corporations or guilds each representing each class and caste in society, a system modelled on medieval Christendom. It attacked the centralised State and advocated the principle of subsidiarity.

<sup>31</sup> Basil Chubb, *The Constitution and Constitutional Change in Ireland*, Institute of Public Administration, Dublin, 1979, p.3.

concept, but given the essentially homogenous nature of Irish society at this time it is perhaps appropriate), but also didactic and aspirational as the document sought to lead society toward greater Catholicity and thereby greater anthropological and political sovereignty. But the Constitution was also aspirational in its nationalism. This is most obvious in the claim to the whole island in Articles 2 and 3 ‘pending the re-integration of the national territory’ which combined with the Catholic influence on the Constitution confirmed in the minds of Northern Unionists that Home Rule really did mean Rome rule. I now turn to examine those elements of the Constitution which have been influenced by Catholic thought.

### Preamble

The Preamble to the Constitution is clearly influenced by Christian thought as it refers to ‘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’. De Valera wrote his own draft for the Preamble which was extremely confessional in tone. De Valera’s draft read: ‘Preamble – The I. people ack. their depend. on Almighty God, accepting the ten comdts. as fund. law, give themselves this constit, so as to 1,2,3 See proc. 1916, Dec. of In 1919 and Dem Prog’.<sup>32</sup> Hearne also wrote a draft Preamble which was influenced more by liberal democracy than Catholic social teaching and only mentions God once.<sup>33</sup> The reference to the ‘Most Holy Trinity’ is a specifically Christian theological concept. The Preamble is arguably in conflict with the republican character of the Constitution as in a republic power derives from the people (albeit the word ‘republic’ does not actually appear in the Constitution). References in the Preamble to the Holy Trinity, Our Divine Lord Jesus Christ, and Prudence Justice and Charity, could not be classified as specifically Catholic, but rather Christian concepts. Arguably, however, the reference to ‘Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our Fathers through centuries of trial’ refers to the struggle

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<sup>32</sup> UCDA, *de Valera Papers*, 1029, undated.

<sup>33</sup> Hearne’s draft read: ‘In the name of Almighty God, We the sovereign Irish people, through our elected representatives assembled in this Dáil Eireann sitting as a Constituent Assembly, in order to declare and confirm our Constitutional Assembly, in order to declare and confirm Constitutional rights and liberties, consolidate our national life, establish and maintain domestic peace on a basis of freedom, equality, and justice, ensure harmonious relations with neighbouring peoples, and promote the ultimate unity of Ireland do hereby, as of undoubted right, ordain and enact this Constitution’. UCDA, *de Valera Papers*, P. 150/2419, undated.

which Catholics underwent for religious freedoms and which reached its peak with Catholic Emancipation.<sup>34</sup> Hannon argues that the reference to “centuries of trial” ‘betokens a Catholic provenance.’<sup>35</sup> Similarly, Murray argues that the reference to “centuries of trial” given the religious context created in the Preamble, can only suggest the persecutions endured by Catholics at the hands of Protestants.<sup>36</sup> Hogan has criticised the Preamble describing it as having ‘unfortunate, perhaps sectarian overtones.’<sup>37</sup>

The Preamble has been relied on by judges such as Gavan Duffy, Walsh, and O’Higgins JJ. All three have referred to the religiosity clearly present in the wording of the Preamble. Gavan Duffy J in *The State (Burke) v Lennon*<sup>38</sup> emphasised the importance of the Preamble stating ‘The Constitution, with its most impressive Preamble, is the charter of the Irish people and I will not whittle it away’.<sup>39</sup> In *Maguire v Attorney General*<sup>40</sup> the same judge, in holding that a testamentary gift to found a convent for the perpetual adoration of the Blessed Sacrament was a valid charitable gift, stated that ‘that conclusion is in harmony with the Constitution enacted by the Irish people ‘in the Name of the Most Holy Trinity...to Whom, as our final end, all actions both of men and States must be referred’.<sup>41</sup> In *Quinn Supermarket Ltd v Attorney General*,<sup>42</sup> Walsh J said the ‘Constitution reflects a firm conviction that we are a religious people’ and that ‘the Preamble acknowledges that we are a Christian people.’<sup>43</sup> In *McGee v Attorney General*<sup>44</sup> Walsh J also referred to the Preamble as ‘the ultimate

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<sup>34</sup> Roy Garland writing in the *Irish News* described the Preamble as ‘exclusive’ and he argues that the Irish people ‘are clearly defined as Catholic people. Irish Protestants are not acknowledged while the British are relegated to the status of unwelcome imperialists.’ *The Irish News*, 25 November 2002. During the talks which ultimately led to the Good Friday Agreement, David Trimble objected to the reference to the Holy Trinity in the Preamble arguing that it ought to be replaced with ‘Almighty God’. See Alastair Campbell, *The Blair Years*, Hutchinson, London, 2007 p.288.

<sup>35</sup> Patrick Hannon, ‘In God’s Name, What Next? Religion, the Constitution and New Ireland’ in Carolan and Doyle, *The Irish Constitution Governance and Values*, Thomson Round Hall, 2008, p.464.

<sup>36</sup> Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, p.291.

<sup>37</sup> Gerard Hogan in *Cultural Identity and Tolerance*, Cultures of Ireland, 1996, p.57.

<sup>38</sup> [1940] IR 136

<sup>39</sup> Ibid.

<sup>40</sup> [1943] IR 238

<sup>41</sup> Ibid. 254

<sup>42</sup> [1972] IR 1.

<sup>43</sup> Ibid. 23

<sup>44</sup> [1974] IR 284

source of all authority’ and that in view of the reference to Christianity in the Preamble and God in Article 6 ‘it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the category of natural law derived from God’s law.’<sup>45</sup> Walsh J also referred to both Aristotle and the Christian philosophers as having regarded justice as the highest human virtue and that Christianity introduced charity as a great additional virtue. According to the Preamble, he stated, the people gave themselves the Constitution to promote the ‘common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured’.<sup>46</sup> O’Higgins CJ in *Norris v Attorney General*<sup>47</sup> stated: ‘It cannot be doubted that the people, so asserting and acknowledging their obligations to Our Divine Lord Jesus Christ, were proclaiming a deeply religious conviction and faith and intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs.’<sup>48</sup>

The Preamble was also referred to in a dispute in 1956 which arose as a result of an assault and the seizure of literature from two members of the Jehovah’s Witnesses in Clonlara. The case, *AG v Rev. Patrick Ryan*, was heard before Hurley J in Limerick District Court and prompted the Bishop of Killaloe, Joseph Rogers to write to the then Taoiseach, John A Costello expressing his shock and disgust at:

‘...what I heard in the Limerick District Court today from Mr Miller, the “minister” of the Jehovah Witnesses. Blasphemy is but a mild term to use for his smug denial of a) the doctrine of the Blessed Trinity, b) the Divinity of Jesus Christ, c) the Divine Motherhood of Our Blessed Lady, and his repeated assertions, under oath, that all religion and all forms of civil government originate from Satan. Mr Millar, in open court, blandly claimed parity and equal authority with Jesus Christ Himself. I find it hard to credit that the Attorney General, had he been fully aware of the pernicious and blasphemous literature distributed and sold in my diocese...would have proceeded against one of my priests for upholding and defending the fundamental truths of our treasured Catholic Faith. I also find it passing strange that *despite the fact that the preamble of our Constitution invokes and honours the Blessed Trinity, your Attorney-General should arraign in Court an excellent priest, of my diocese and the other loyal Catholics of Clonlara Parish, for their defence of the doctrine of the Blesses Trinity, a doctrine so nobly enshrined in our Constitution.* Are we to have legal protection in future against such vile and pernicious attacks on our Faith? We censor literature: your Attorney-General prosecutes one of my priests

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<sup>45</sup> Ibid. 317-8. While Walsh J description of natural law is redolent of Catholic theology his decision in *McGee* is not in line with Catholic theology as asserted in *Humanae Vitae*.

<sup>46</sup> Ibid. 319

<sup>47</sup> [1984] IR 36

<sup>48</sup> Ibid. 64

for doing what I, and all good Catholics here, regard as his bounden duty and right. The matter cannot rest.<sup>49</sup>

Costello replied on 14 August 1956 rejecting the Bishop's attempt to interfere with the legal process stating that, if a priest or layman has reason to believe a person is blaspheming the 'proper course is to make a complaint to the Garda Síochana' and 'the action which they took was prima facie contrary to the law' and the authorities had no choice but to 'allow the machinery of the law to take its course.'<sup>50</sup> The Taoiseach concluded by remarking that should people take the law into their own hands 'not only would the public peace be threatened but the true interests of religion and morality would inevitably suffer.' In a letter to Costello dated 16 August 1956, John Charles McQuaid refers to having had a meeting with Bishop Rodgers in which the incident was discussed and he assured the Taoiseach that there would not be 'a repetition of the incident.'<sup>51</sup>

O'Hanlon J offered a non-plural and confessional interpretation of the constitutional effect of the Preamble viewing it as meaning that all legislation enacted by the Oireachtas must be in conformity with 'the Constitution, that is to say is enacted in the name of the Most Holy Trinity from whom is all authority.'<sup>52</sup> In 1996 the Constitution Review Group stated that the language of the Preamble reflected the ethos of the 1930s and was 'overly Roman Catholic and nationalist in tone, is gender-biased, and would be objectionable to many in Ireland today.'<sup>53</sup> However, Whyte questions the underlining assumption of the CRG that the Constitution should be purged of its religious influences as doing so 'without putting anything in its place, thus threatens the balance which the present Constitution strikes between the rights of the individual and the interests of society and reduces the potential of the Constitution for promoting the

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<sup>49</sup> NAI, Department of An Taoiseach, 27 June 1956. [Emphasis added]

<sup>50</sup> Ibid. 14 August 1956.

<sup>51</sup> Ibid. 16 August 1956.

<sup>52</sup> O'Hanlon J, 'Natural Rights and the Irish Constitution, (1993) *ILT* 11, p.8.

<sup>53</sup> *Report of the Constitution Review Group* (1996) p.5-6. Francis Beytagh *Constitutionalism in Contemporary Ireland: An American Perspective*, Round Hall-Sweet and MacMillan; Dublin, 1997, p.8 states that the Preamble is 'an advertent commitment to sectarianism.'



communitarian goal of social inclusion.<sup>54</sup> Similarly, Iglesias argues that the Preamble is necessary to maintain ‘the dignity and freedom of the individual and true social order’ and this reflects a universal ethico-legal concept without which the idea of the common good loses all its sense. She argues that this part of the Preamble expresses the core of our constitutional values and ‘Without it the whole purpose of the Constitution is left unsaid, in a vacuum, with no explicit directions as to how this vacuum is to be filled.’<sup>55</sup>

### Articles 41 and 42 – The Family

Alfred O’Rahilly drafted an Article on the family for the 1922 Constitution stating:

‘Article 53

1. Marriage, as the basis of family life and national well-being, is under the special protection of the State: and all attacks on the purity, health and sacredness of family life shall be forbidden.
2. The Irish State shall recognise, as heretofore, the inviolable sanctity of the marital bond.
3. The civil validity of religiously solemnised marriage shall be recognised, provided that the details of registration prescribed by legislation are duly complied with.<sup>56</sup>

However, the final draft of the 1922 Constitution was to contain no reference to the family. The Jesuit social thinker, Fr Edward Cahill, sent de Valera a copy of his book, *The Framework of a Christian State*, with specific pages referred to so that de Valera could devise a Constitution which would mark a ‘definite break with the liberal and non-Christian type of state’.<sup>57</sup> Bartlett writes that ‘some responsibility for the wording of the article on the family and on that prohibiting divorce (Art 41) may be attributed to Fr Cahill.’<sup>58</sup> The Jesuits’ (and Cahill’s) submission stated:

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<sup>54</sup> Gerry Whyte, ‘Discerning the Philosophical Premises of the Report of the Constitution Review Group: an Analysis of the Recommendations on Fundamental Rights’ (1998) *Contemporary Issues in Irish Law and Politics* 2, p.224

<sup>55</sup> Teresa Iglesias, ‘The Dignity of the Individual in the Irish Constitution’, (2000) *Studies* 89, p.21

<sup>56</sup> Quoted in Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937*, p.112.

<sup>57</sup> In response to this gift de Valera wrote: ‘Is fiú é’léigheamh agus a aith léigheamh agus is minic d’ar liom, a raghfarr chuige chun comhairle agus treóruí ‘fhagháil.’ Quoted in Keogh and McCarthy, *The Making of the Irish Constitution 1937*, p.94, de Valera to Cahill, Jesuit Archives 2 August 1932.

<sup>58</sup> Thomas Bartlett, ‘Church and State in Modern Ireland, 1923-1970: An Appraisal Reappraised’, in *Christianity in Ireland* Columba P, Dublin, 2002, p.249.

‘The Civil Powers cannot dissolve a marriage validly contracted and betrothals and marriages of Catholics shall be identical with those laid down in the Code of Canon Law of the Catholic Church.’<sup>59</sup>

George Gavan Duffy wrote to de Valera in April 1935 suggesting that he read the Portuguese Constitution which had been ratified the previous year under the fascist dictator Salazar. Gavan Duffy described the Constitution as ‘highly original and most interesting in many respects.’<sup>60</sup> He wrote that the Constitution ‘undertakes to protect the family as the basic unit of the State; parish councils are elected by the families exclusively; above the parish councils there are municipal and above these provincial councils, and both sets of bodies are elected by the parish councils, representing the families, and by vocational and other guilds.’<sup>61</sup> In an undated draft which closely resembles the final draft Article on the family, McQuaid wrote as follows:

‘The State recognises the family as the primary and fundamental unit of society demanded by human nature, as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law, having for primary purpose the procreation and upbringing of children, in conditions suited to proper human life and development.

The State guarantees to protect the family in its constitution, authority and government, as being the essential basis of social life and order and as indispensable to the welfare of the nation.

The State pledges itself to guard with special care the institution of marriage, on which the family is founded and to protect it against attacks that would either impair its sanctity or indissolubility or undermine the integrity of family life.’<sup>62</sup>

Articles 41 and 42 of the 1937 Constitution are clearly influenced by Catholic social teaching and Thomistic natural law.<sup>63</sup> Article 41.1 recognises the family as ‘a moral institution possessing inalienable and imprescriptible rights’<sup>64</sup>, antecedent and superior

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<sup>59</sup> Jesuit submission quoted in Keogh and McCarthy, *The Making of the Irish Constitution*, p.113.

<sup>60</sup> UCDA, *de Valera Papers*, P152/39(1).

<sup>61</sup> Ibid. Gavan Duffy also wrote ‘With regard to the Second Chamber in particular I think the position may interest you:- The legislative body is the National Assembly, but side by side with it is a Corporative Chamber, consisting of representatives of local authorities and representatives of “social interests of an administrative, moral, cultural and economic character”, chosen in manner prescribed by law.’

<sup>62</sup> DDA, *McQuaid Papers*, AB8/A/V (47-61).

<sup>63</sup> In *Director of Public Prosecutions v Best* [2000] 2 IR 17, 65 Murphy J stated that ‘the political philosophy of our Constitution owes more to Thomas Aquinas than Thomas Paine.’

<sup>64</sup> In *Ryan v AG* [1965] IR 294 the adjectives ‘inalienable’ and ‘imprescriptible’ were described by Kenny J: “‘Inalienable’ means that which cannot be transferred or given away while “imprescriptible” means that which cannot be lost by the passage of time or abandoned by non-exercise.’ The Constitutional Review Group argued that these terms emphasised familial autonomy to the detriment of the child and should therefore be deleted. *Report of Constitutional Review Group* (1996), p.331.

to all positive law.’ Article 41.2 ‘guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order...’ In Article 42.3, one of the most contentious Articles in the Constitution, the State ‘recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.’ Article 42.2 pledges the State to ‘endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.’ Article 42.1 refers to the ‘inalienable right and duty’ of parents regarding education and the ‘natural and imprescriptible rights of the child.’

The Papal Encyclical, *Quadragesimo Anno* (1931), which argued for the principle of subsidiarity was influential in the drafting of Articles 41 and 42. Subsidiarity viewed State interference in family life with suspicion. The basic philosophy underlying Articles 41 and 42 was the defence of the family against interference by the State. *Quadragesimo Anno* envisaged the State granting subsidium (or assistance) to different elements of society, particularly the family as the fundamental unit of society, but within strict limits. In *Quadragesimo Anno* the Church warned that it was an injustice and a grave evil for a larger association to arrogate to itself functions that can be performed efficiently by smaller and lower societies. According to *Quadragesimo Anno*, the State should only interfere with the realm of the individual and the family in exceptional circumstances. The encyclical envisages decision making at the lowest level possible in society. The encyclical states:

‘It is true, as history clearly shows, that because of changed circumstances much that formerly was performed by small associations can now be accomplished only by larger ones. Nevertheless, it is a fixed and unchangeable principle, most basic in social philosophy, unmoveable and unalterable, that, just as it is wrong to take away from individuals what they can accomplish by their own ability and efforts and then entrust it to a community, so it is an injury and at the same time both a serious evil and a disturbance to right order to assign to a larger and higher society what can be performed successfully by smaller and lower communities. The reason is that all social activity of its very power and nature should supply help (*subsidium*) to the members of the social body, but may never destroy or absorb them.’<sup>65</sup>

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<sup>65</sup>See: [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_pxi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_pxi_enc_19310515_quadragesimo-anno_en.html).

According to the philosophical ideal of subsidiarity, the State would never replace the individual or smaller unit groups of society.<sup>66</sup> As Cardinal D'Alton stated, the Church was of the opinion that the State's duty was 'to supplement, not to supplant'.<sup>67</sup> The principle of subsidiarity opposed State interference in family life when such interference did not comply with Catholic social teaching. However, in intimate areas of familial and personal life, such as contraception, abortion and divorce, the Catholic Church clearly advocate governmental interference. Joe Lee states 'The social clauses of the Constitution blended prevailing Catholic concepts with popular attitudes rooted in the social structure'.<sup>68</sup> Whyte described Article 41 as 'obviously marked by Catholic thought...with sonorous declarations'.<sup>69</sup> Writing extra-judicially, Costello J described Article 41 as 'most efficacious and based on philosophical truths incorporating natural law tenets and not mere empty formulae safeguarding individualistic liberty'.<sup>70</sup>

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<sup>66</sup> Kennedy compares Article 41.1.1 with *Rerum Novarum*: "The family is a society limited, indeed in numbers, but no less a true society, anterior to every kind of State or nation, invested with rights and duties of its own, totally independent of the civil community." Article 41.1.2 is compared with *Casti Connubii*: "Those who have the care of the State and of the common good cannot neglect the needs of married people without bringing great harm upon the State and upon the common welfare." In the Preamble to the Constitution, the attainment of 'true social order' is one of the objectives for which the Constitution is adopted. The phrase 'social order' also appears in Article 45.1 regarding the Directive Principles of Social Policy, as well as in Article 41.1.2 and Article 41.2.1. Article 41.2.2 is similar to *Quadragesimo Anno* where it states "Intolerable and to be opposed with all our strength is the abuse whereby mothers of families, because of the insufficiency of the father's salary, are forced to engage in gainful occupations outside the domestic walls, to the neglect of their proper cares and duties, particularly the education of their children." Article 41.3.1 and 41.3.2 can be compared with *Casti Connubi* where it is stated: "Not only in those things which regard temporal goods is it the concern of public authority that proper provision be made for matrimony and the family, but also in matters pertaining to the good of souls: namely, just laws should be made for the protection of chastity, for reciprocal conjugal aid, and for similar purposes." See Finola Kennedy, *Cottage to Creche*, p.191-192.

<sup>67</sup> Quoted in Daithi Ó Corrain, *Rendering to God and to Caesar The Irish Churches and Two States in Ireland, 1949-1973*, Manchester UP, Manchester, 2006, p.118.

<sup>68</sup> Joe Lee, *Ireland 1912-1985*, Cambridge UP, Cambridge, 1989 p.206. Lee views the family provisions in the Constitution as being influenced by de Valera's family background: 'De Valera clung to an ideal image of the Irish family as a loving haven of accord. It was as if he were subconsciously striving to obliterate the memory of his own childhood. He had lost his father when he was a baby, and his mother had sent him back to her family in Ireland while she went out to work in New York. However happily he was reared by his relatives, he would hardly have been human had the experience not left its mark throughout his life. He appears to have made strangely little allowance for his mother's plight, and for that of thousands like her. It was as if the constitution tried to blot out the memory of the experience by denying that it could really happen. He made little attempt to ensure that women who found themselves in his mother's position would enjoy a decent chance of rearing their own children in any sort of comfort, even his habitual 'frugal comfort'. The ideal of the family projected in the Constitution ignored the realism, however reluctant, with which Irish parents sacrificed their children to the emigrant ship.'

<sup>69</sup> John Whyte, *Church and State in Modern Ireland*, p.51-52.

<sup>70</sup> Declan Costello, 'Legal and Social Studies' (Spring, 1962), *Studies* 51, p. 201.

O’Rahilly described Article 41 as ‘in many ways excellent, and at last [removing] a glaring defect of the present Constitution which calmly ignores the family.’<sup>71</sup>

An example of the fear of ‘Statism’ that existed arose in 1945 when Fianna Fáil introduced the Public Health Bill<sup>72</sup> which Whyte described as ‘probably further from Catholic social teaching than any scheme produced anywhere in the world at this time.’<sup>73</sup> The Bill included the compulsory inspection of schoolchildren and was criticised by the *Standard*:

‘...the responsibility that parents must exercise over their children is openly challenged [in the Bill]. The State, as the Constitution points out, only steps in “in exceptional cases, where the parents, for physical or moral reasons, fail in their duty towards their children”. It is in the light of this moral principle that we must view the practice of submitting all school children to a periodical medical examination. Under the new regulations this examination will be compulsory and universal. It will be extended to schools hitherto exempt from its operation.

This means that the State accepts the presumption that parents are unwilling or incompetent to safeguard the health of their own children...Again we claim that there is no evidence of widespread neglect or of any serious threat to the health of the community which would justify setting aside the parents wishes in a matter of such radical importance.’<sup>74</sup>

Five years after the dispute over the 1945 Bill, the hierarchy came out in vocal opposition to the Mother and Child Scheme on the basis that it represented excessive governmental interference in the realm of the family’s autonomy.<sup>75</sup> The vigour with which the hierarchy believed in protecting familial autonomy is clear from Cardinal D’Alton’s Lenten Pastoral in 1952 in which he warned of a:

‘...milder form of Totalitarianism, known as the Welfare State, which in its own way tends to undermine the foundations of human liberty...A system of social services, which began by assisting the needy, ends by being made compulsory for all. The State thus makes unwarranted inroads on the family, and usurps functions that properly belong to parents.’<sup>76</sup>

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<sup>71</sup> *Irish Independent*, 15 May 1937. As outlined above O’Rahilly had drafted an Article on the Family which was not incorporated into the 1922 Constitution.

<sup>72</sup> The Bill was not criticised by the Church hierarchy, indeed it appears that it may have been welcomed by Archbishop McQuaid. See John Whyte, *Church and State in Modern Ireland*, p.137-138.

<sup>73</sup> John Whyte, *Church and State in Modern Ireland*, p.134.

<sup>74</sup> *Standard*, 14 Dec. 1945 quoted in John Whyte, *Church and State in Modern Ireland*, p.137.

<sup>75</sup> Cathal Daly wrote at the time: ‘The family in the welfare state is in grave danger of being injured as fatally by state benevolence as it formerly was by state neglect. It can be killed by too much kindness; too much of the wrong-headed kindness, which violates its nature, its dignity, and its independence.’ Cathal Daly ‘Family Life: The Principles’ (1951) *Christus Rex* 5, p.11.

<sup>76</sup> Quoted in Daithí Ó Corráin, *Rendering to God and to Caesar*, p.119.

The Church's opposition to State intervention in the realm of social services and welfare was mirrored in the context of the family as it was perceived to be necessary to protect it from both the State and social mores which could potentially be anathema to Catholic thought. The State itself could undermine the family and therefore the family and its members had to be protected from potentially non-Catholic Statist norms, whether based on welfare-ism or State controlled education. The Church controlled primary education and sought to limit the influence of the State further in the realm of social services.

However, both Church and State appeared quite happy to intervene into the realm of the family in sending children to industrial schools. Quinn writes that those who criticise the Constitution as failing to allow for greater State intervention into the family: '...need to explain how so many children in decades past were removed from their families and put into industrial schools if the Constitution makes such action almost impossible. Remember, in the 1930s, 1940s and 1950s the family was supposedly even more inviolable than today because of social attitudes and yet courts were very happy to put thousands of children into industrial schools, frequently because of neglect.'<sup>77</sup> The apparent unquestioning placement of children into industrial schools was evidence of how excessive deference by the State to the wishes of the Catholic Church could have deeply injurious consequences. Many of the children sent to these schools were savagely beaten, abused, raped and provided with no education. The State colluded in this process by feeding children (primarily from poor backgrounds) to the industrial schools systems via District Court judges, frequently for trivial reasons such as truancy. It seemed that the limitations on the powers of State intervention into the family unit did not apply to families who happened to be in a lower socio-economic group.

Between 1936 and 1970, 170,000 children were sent to industrial schools for various reasons.<sup>78</sup> The majority of children were committed because they came under the

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<sup>77</sup> *Irish Independent*, 30 January 2009.

<sup>78</sup> See *Commission to Inquire into Child Abuse* (2009), p.41.

category of ‘needy’ meaning they were living in poverty although a significant number of children were also committed ‘because of other social circumstances such as illegitimacy.’<sup>79</sup> Many children were committed because of non-attendance at school or because of involvement in criminal offences. Under the s. 58(1) of the 1908 Children’s Act, a child could be committed to an industrial school for, inter alia, begging, lack of subsistence, parent or guardian missing, destitution, or if the parent or guardian was unfit to care for the child. According to the Commission the number of adjournments which were granted before a committal was made suggested a judicial reluctance to commit children to industrial schools. In 2009 the Catholic Church responded to the findings of the *Commission to Inquire into Child Abuse* (generally known as the Ryan Report) thus: ‘The Ryan report represents the most recent disturbing indictment of a culture that was prevalent in the Catholic Church in Ireland for far too long. Heinous crimes were perpetrated against the most innocent and vulnerable and vile acts with life-lasting effects were carried out under the guise of the mission of Jesus Christ. This abuse represents a serious betrayal of the trust which was placed in the church. For this we ask forgiveness. We are ashamed, humbled and repentant that our people strayed so far from their Christian ideals.’<sup>80</sup>

### **Role of Women under the Constitution**

An undated handwritten draft which closely resembles Article 41.2 was written by McQuaid and reads:

‘In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved; and therefore the State shall see to it that woman, especially mothers and young girls, shall not be obliged to enter avocations unsuited to their sex and strength.’<sup>81</sup>

The final draft of Article 41.2 refers to ‘woman’s life in the home’ and requires that the State endeavour to ensure that mothers shall not be compelled by economic necessity to

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<sup>79</sup> Ibid. p.42.

<sup>80</sup> *The Irish Times*, 11 June 2009.

<sup>81</sup> UCDA, *de Valera Papers*, P150/2387, ‘X Formula’, Part IX.

work outside the home.<sup>82</sup> The provision is described in Kelly as ‘perhaps, the single most dated provision of the Constitution’.<sup>83</sup> McQuaid’s reaction to the women’s criticism of Article 41.2 in 1937 was that they were ‘confused’ and that ‘*Casti Connubii* and *Quadragesimo Anno* answer them.’<sup>84</sup> McQuaid referred to Pius XI’s statement that ‘mothers will above all devote their work to the home and things connected with it’. McQuaid emphasised that women should not view their role as subservient to men:

‘Nothing will change the law and fact of nature that woman’s natural sphere is the home. She is perfectly free not to marry or to marry: to choose this or that career. No article in the Draft Constitution even attempts to deny woman’s fundamental rights as a human being.

Article 41.2.1 merely acknowledges a fact: the dignity and indispensable role of those women who choose to get married.

Article 41.2.2 having acknowledged that fact, guarantees that it will endeavour to see, not that women will be prevented from engaging in this or that career, but a certain class of woman, namely Mothers, will not be forced, by pressure of need, so to engage in work as to neglect their proper home-duties.’<sup>85</sup>

There had been criticism amongst women’s groups regarding the position of women under the Constitution. This was not limited to Article 41.1, but also included Article 40.1 and Article 45.4.2. However, the Catholic group An Rioghacht supported the suggested Article 41.2 stating:

‘If in the interests of women...alterations are to be made in the draft it should not be done by suppressing or toning down, on the lines of un-Christian Liberalism, provisions which are implicit in Christian teaching. Rather should the provisions for putting into operation the social teaching of the Encyclicals be strengthened and made mandatory. In this way the ideal can be more easily and quickly realised, in which it would be made possible for every young man of adult age to found a family and for every husband and father to support his family in decent comfort.’<sup>86</sup>

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<sup>82</sup>Article 37.1 of the Italian Constitution states: ‘Working women are entitled to equal rights and, for comparable jobs, equal pay as men. Working conditions have to be such as to allow women to fulfill their essential family duties and ensure an adequate protection of mothers and children.’

<sup>83</sup> John Kelly, *The Irish Constitution*, p.1866.

<sup>84</sup> Amongst those who criticised the role of women in the Constitution was Hanna Sheehy Skeffington, founder of the Irish Franchise League, who wrote: ‘It is unfortunate, but inevitable, that the well-known reactionary views of Mr de Valera regarding women should have strongly coloured the Draft Constitution, which is his handiwork...His ideal is the strictly domestic type of woman who eschews ‘politics’ as male concerns...’ *Irish Independent*, 11 May 1937.

<sup>85</sup> DDA, *McQuaid Papers*, AB8/A/V (47-61).

<sup>86</sup> *Irish Press*, 20 May 1937.



In the Dáil, de Valera defended the Article stating ‘We state here that mothers in their homes give to the State a support which is essential. Is there anybody who denies it? Is it not a tribute to the work that is done by women in the homes as mothers.’<sup>87</sup> He then stated that mothers in the home give to the state:

‘...support which is vital and essential. What is wrong in trying to work for a social system in which it will not be necessary for those people, who by the very fact that they are married and have undertaken those duties, and may be assumed to have a preference for performing those home duties, to labour outside? I would like to know from any women's organisation or from any woman what is wrong in saying that we should strive for a social system which will be such as will not compel women to go out and work to supplement either the wages of their husbands or otherwise to maintain the household? It is against the social system that this is directed—to try to remedy it if we can, and to try to work in that direction. We may not succeed, it is true. It is a very difficult thing to bring about. But the present social system, inasmuch as it compels mothers to leave their natural duties as mothers and go out and become breadwinners when their husbands are idle and cannot get work, is a system which we ought to try to reform. One of the reforms should be in the direction of enabling a man, if it is a man, to earn sufficient to cover all his domestic needs; and, if it is a widow who has young children, to enable the State to come to her aid and contribute to such an extent as will not necessitate her leaving her duties as a mother and engaging in outside labour.’<sup>88</sup>

When James Dillon (Fine Gael) suggested in the Dáil that the word ‘mother’ should be used instead of ‘woman’, de Valera refused stating: ‘There are mothers and wives too, and not all wives happen to be mothers...I have made up my mind that this is accurate and I am not going to put in anything else.’<sup>89</sup>

Lee is highly critical of the provision viewing it as hypocritical, writing that the:

‘injunction that “the State shall ...endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home” was to be honoured more in the breach than in the observance...needless to say, male wages were not raised to relieve mothers of poor families from the necessity of eking out their husbands’ miserable pittance. The illusion fostered by the Constitution that Irish society placed special value on motherhood diverted attention from the fact that social values prevented a higher proportion of women from becoming mothers than in any other European country.’<sup>90</sup>

Finola Kennedy argues that at the time of the 1937 Constitution ‘a broad consensus existed...regarding women’s place in the home, and it was not purely a reflection of

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<sup>87</sup> 67 *Dáil Debates* 67, 11 May 1937

<sup>88</sup> *Ibid.*

<sup>89</sup> 67 *Dáil debates* 1,868, 4 June 1937

<sup>90</sup> Joe Lee, *Ireland 1912-1985*, 1990, p.206.

Roman Catholic or conservative political views.<sup>91</sup> In support of this view she cites an editorial comment in the *Irish Times* (then seen as the Protestant paper) which hoped that:

‘Some day, please Heaven! The nation will be so organised that work will be available for every man, so that he may marry and assume the burdens of home, and for every woman who embarks upon her proper profession – which is marriage.’<sup>92</sup>

Therefore, while Article 41.2 is clearly influenced by Catholic social teaching, it also reflects a general ethos or norm within society which was as strong a feature of Protestant values as Catholic ones. Therefore, many Protestants would have welcomed many of the provisions of the Constitution which are generally regarded as being influenced by the socially dominant Catholic Church.<sup>93</sup> The fact that McQuaid was intimately involved in the drafting of the Articles indicates that the philosophical inspiration and intention of the drafters must be seen in light of Catholic thought.

### **Education in the Constitution**

With independence it became clear that the new State favoured denominational education and was suspicious of State intervention in education preferring a principle in which parents and not the State were central to education.<sup>94</sup> Eoin McNeill who was the first Minister for Education in the Free State<sup>95</sup> articulated his views on education thus:

‘Catholic teaching regards education as a right and duty of parentage. Statism regards education as a right and duty of the State i.e. of the government for the time being. Education on Catholic principles has for its aim the perfection of the individual. Statism subordinates the individual to the community and the community to what should be no more than the political organ of the community, the State. The State notion of education corresponds to a materialist view of

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<sup>91</sup> Finola Kennedy, *Cottage to Creche: Family change in Ireland*, p.82.

<sup>92</sup> *Irish Times*, 22 February 1937, cited in Finola Kennedy, *Cottage to Creche*, p.82.

<sup>93</sup> There were elements within the Protestant community who supported the prohibition on divorce. See Daithí Ó Corrain, *Rendering to God and Caesar: The Irish Churches and the Two States in Ireland 1949-73*, Manchester UP, 2006.

<sup>94</sup> Historically the State has been reluctant to legislate in the area of education preferring instead to have a more flexible system, although more recently the situation has changed quite radically with the introduction of the Education Act, 1998. In *O’Shiel v Minister for Education* [1999] 2 ILRM 241, 247 Laffoy J noted that primary schools were controlled by the non-statutory ‘Rules for National Schools’ (1965) which despite being frequently altered were not contained in one compendium of rules which gave rise to an ‘unsatisfactory state of affairs’.

<sup>95</sup> There was no Minister for Education under the 1919 Constitution although there was a Minister for the Irish language.

humanity. In this view the individual ends with death, the community is more permanent, the organisation of the State aims at giving the maximum permanence to the community and is thus regarded as the paramount interest of its members. Consequently, the transitory interest recognised in the individual is subordinated to the permanent interest recognised in the State. In the Christian teaching, the individual is immortal, the particular community to which he belongs, and its political organ, the State are transitory. Therefore, the interest of the community and of the State is subordinate to the interest of the individual.<sup>96</sup>

Three years after the introduction of the 1937 Constitution, Murnaghan J set out the relationship between Church and State in regard to education as a system which was ‘adopted to obviate difficulties connected chiefly with religious belief. In most cases the schools were not the property of the Board but they were recognised by it as national schools. A manager, e.g. the parish priest or rector of the Church of Ireland, was nominated by an outside authority and the nomination was sanctioned by the Board – when sanctioned the duties and functions of the manager were minutely provided for in the Rules and Regulations made by the Board.’<sup>97</sup>

There were also non-religious reasons why the British primary school system was deemed to be inappropriate for Irish children. It was claimed that it ‘sapped’ Irish children of any initiative in education and it was a purely competitive system with ‘material success as its be-all and end-all’.<sup>98</sup> Therefore, it was proposed to ‘remove the most enslaving features of the English system and allow a system of education based on Gaelic culture’.<sup>99</sup> The synthesis between Catholicism and cultural identity manifested itself in the context of educational policy formation and polity building during this period, as the more Catholic the educational system became, the more indigenous and Gaelicised it became. Atkinson argues that there was a natural predisposition which favoured the existing educational system and this was reinforced by religious imperatives that operated at both national and local levels. Atkinson identifies three factors which strengthened the position of the Catholic Church. Firstly, partition which increased the leverage of the Catholic Church in the south, since partition removed

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<sup>96</sup> Eoin McNeill published in ‘Guidelines for an Irish Educational Policy’ (1979) *Irish Jurist* 14, p.380.

<sup>97</sup> *McEaney v Minister for Education* [1941] IR 430, 439.

<sup>98</sup> ‘Free State Schools: Aims of the Ministry of Education’ in *Freeman’s Journal* (I.F.S. supp.), 13 August 1923 cited in Karol Anne Mullaney-Dignam, *State, Nation and Music in Independent Ireland, 1922-51* Ph.D, (2008, NUI, Maynooth). In 1924 the system of paying schools grants based on academic results was abolished.

<sup>99</sup> *Ibid.*

much of the Protestant counterweight to the Church's influence. Secondly, the Church had aligned itself with the new government following the civil war largely in the interest of moderation and stability. Thirdly, Atkinson writes 'the new Free State government was much more responsive to Irish domestic lobbies, among them the churches, Protestant as well as Catholic, than the United Kingdom legislature had been. By and large the leaders of the main churches in the Free State were satisfied with the existing educational arrangements, for local management of national and intermediate schools was almost entirely in religious hands; this applied to Protestant as well as Catholic schools.'<sup>100</sup>

The main rule which teachers were to follow in primary schools was 'to act in a spirit of obedience to the law and loyalty of the state' and to pay the 'the strictest attention to the morals and general conduct of their pupils, and omit no opportunity of inculcating the principles of truth, honesty, temperance, unselfishness and politeness'.<sup>101</sup> An example of the extent to which the Catholic hierarchy would guard its independence in educating children is a dispute that arose with the Irish National Teachers Organisation. The INTO had campaigned to secure the transfer of responsibility to local authorities for the cleaning, heating and sanitation of primary schools. This had been the responsibility of the clerical manager of each school since before independence. There was concern about the system as many schools were in poor condition. The campaign had begun in 1926 and continued sporadically until Cardinal D'Alton rejected the proposal outright in 1952.<sup>102</sup>

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<sup>100</sup> D.H. Atkinson with Seán Farren and John Coolahan, 'Pre-University Education, 1921-84' in Hill (ed.) *New History of Ireland* 7, p.721.

<sup>101</sup> *Rules and regulations for national schools under the department of education* Dublin, 1932, p.68.

<sup>102</sup> This event is referred to in the recent case of *O'Keefe v Hickey* [2008] IESC 72 in which the Supreme Court ruled that a woman who had suffered sexual abuse at the hands of a school principal as a child could not sue the State for being vicariously liable as it was the board of management (or the Catholic bishop) who employed the abuser and not the State. The State provided *for* free primary education, it did not provide free primary education. Hardiman J refers to the evidence given by Professor Coolahan during the case, who stated in relation to the INTO's campaign: 'Eventually Cardinal Dalton took a very strong view on this issue and said there should be no interference whatever with the inherited tradition of managerial rights of schooling and it did not matter, because it was the thin edge of the wedge in his view, if local authorities [only] took control of the maintenance of schools. In due course, he said, it might intrude into other aspects of the Manager's authority vis-à-vis the appointment and dismissal of teachers which was of course the key concern that had been fought for and won over the years.'

### Article 42 and Subsidiarity

The Papal Encyclical *Quadragesima Anno* viewed the role of the State in education with deep suspicion and advocated the principle of subsidiarity which perceives the State as playing a very limited role in the education of children. The Church viewed the family as the primary educator of children with the State having a subsidiary role and duty to protect the child only in the case of parental default, incapacity or misconduct. Glendenning states that these principles 'became the upholding pillars of Articles 42 and 44 as the system envisaged would be a State-aided system in which the State's role would be subsidiary and the family/parents would be the primary educators'.<sup>103</sup> In Kelly, Articles 41 and 42 are described as being inspired 'in part by Catholic papal encyclicals and by Catholic teaching.'<sup>104</sup>

In *Quadragesimo Anno*, Pope Pius XI stated the State should not assume the control of education if it can be adequately managed at a lower level, such as by parents.<sup>105</sup> The Pope asserted that the State must bear in mind the principle of subsidiarity in order that no school monopoly arises. The Pope argued that such a monopoly would be contrary to the rights of the human person, the development and spread of culture itself, the peaceful association of citizens, and pluralism. The Church objects to the State monopolising education based on a secular non-denominational curriculum. In *Divini Illius Magistri*, Pope Pius XI emphasised the role of the family as the primary educator

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(Emphasis in original). It should be noted that in *Ryan v Madden* [1944] IR 154 the High Court stated that a school manager could be held to be vicariously liable for a teacher's negligence.

<sup>103</sup> Ibid p.51.

<sup>104</sup> John Kelly, *The Irish Constitution* p.1827. Kelly is referring to *Divini Illius Magistri* (1929), *Quadragesima Anno* (1931) and *Casti Connubi* (1930).

<sup>105</sup> The Church referred to the principle of subsidiarity following Vatican II in its *Declaration on Christian Education* stating that civil society 'exists to arrange for the temporal necessities of the common good. Part of its duty is to promote the education of the young in several ways: namely, by overseeing the duties and rights of parents and of others who have a role in education, and by providing them with assistance; by implementing the principle of subsidiarity and completing the task of education, with attention to parental wishes, whenever the efforts of parents or of other groups are insufficient; and, moreover, by building its own schools and institutes, as the common good may demand.' 'Declaration on Christian Education' cited in Walter M. Abbott (ed.), *The Documents of Vatican II*, New York, 1966, p.641-2. The Church maintained its right to control education following Vatican II. There was no evidence of an ideological shift towards a more non-denominational or ecumenical approach in the context of education. However, more recently, Archbishop Martin indicated that the Catholic Church had no interest in dominating the provision of education and he would welcome debate about the future management model. The archbishop said he could envisage 'divesting current Catholic schools' if there was no demand for Catholic education. Press release 6 September 2007 from Archbishop Martin available at <http://www.dublindiocese.ie>.

and argued that the State should respect the inherent rights of the Church and of the family concerning Christian education. He stated that the State can take measures to secure that all its citizens have the necessary knowledge of their civic and political duties, and a certain degree of physical, intellectual and moral culture, which is really necessary for the common good. *Divini Illius Magistri* also stated that it was the duty of the State to protect the rights of children when inadequate parenting meant that their physical or moral care was not being properly cared for whether because of incapacity or misconduct. This is reflected in Article 42.5 in which it is stated that:

‘In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.’

The submission on education from the Jesuits may also have influenced the final draft. The draft from the Jesuits stated: ‘It is the natural right as well as the duty of parents to provide, as far as in them lies, for the education religious, moral, physical, and intellectual of their children. Parents may freely choose teachers for their children, and freely select the schools to which their children’s education is to be entrusted.’<sup>106</sup> This is referred to in their submission as stemming from *Divini Illius Magistri*. The final draft of Article 42 read: ‘1.1 The State 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. 1.2 Parents shall be free to provide this education in their homes or private schools or in schools recognised or established by the State.’

### **An Historical View of the Property Guarantees**

The central role that property (or more particularly land) played in the War of Independence is often underestimated. There is no doubt that attacks on property, such as the burning of Anglo-Irish houses, were motivated by envy of Protestant neighbours’ lands and petty grievances, more than any broader concept of civic nationalism. The leaders of the fledgling State appeared more interested in land redistribution than in its

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<sup>106</sup> Quoted in Keogh and McCarthy, *The Making of the Irish Constitution 1937*, p.116

sanctification and protection in 1922.<sup>107</sup> It would, as Dooley states, be ‘difficult to exaggerate the extent to which the redistribution of lands was seen by nationalist contemporaries to be restitution for perceived historical wrongs.’<sup>108</sup> Therefore, land redistribution was associated with the idea of reversing ‘Cromwell’s policy’. This is reflected in the absence of any protection for property rights in the Free State Constitution.

There were a number of provisions which touched on the issue of property rights prior to 1937. The Home Rule Bill, 1893 contained provisions preventing legislation which would involve the taking of ‘property without just compensation’.<sup>109</sup> The 1916 Proclamation declared the ‘right of the people of Ireland to the ownership of Ireland’ and the Democratic Programme of the first Dáil in 1919 had a declaration that ‘all right to private property must be subordinated to the public right and welfare,’<sup>110</sup> while section 5 of the Government of Ireland Act, 1920 contained a provision prohibiting the Parliament of Southern Ireland or Northern Ireland from diverting property from ‘religious denominations for the purposes of...works of public utility upon payment of compensation.’ This last provision was copied in Article 16 of the Treaty and Article 8 of the 1922 Constitution and then in Article 44.2.6 of the 1937 Constitution.

There was no provision in the 1922 Constitution that corresponded with the property guarantees in the 1937 Constitution. Two provisions of the 1937 Constitution, Articles 40.3 and 43, contain property guarantees. Article 40.3 states: ‘The State shall, in

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<sup>107</sup> It should however be noted that Cumann na nGaedheal represented a more moderate voice on the issue of land, while the more radical voices remained outside the Dáil because of their refusal to take the oath of allegiance. Dooley writes that ‘after 1923, the great debate on who actually owned the land was effectively decided upon by an independent Irish parliament, Dáil Éireann, when it legislated for the remaining tenanted lands in the hands of landlords to be compulsorily acquired and – to relieve congestion – for the redistribution of other untenanted lands amongst farmers, “the nation-forming class” identified by Emmet Larkin as the class for whom and by whom the Irish state was created and consolidated.’ Terence Dooley, *The Land for the People The Land Question in Independent Ireland*, UCD Press, Dublin, 2004, p.2.

<sup>108</sup> Ibid p.3.

<sup>109</sup> It appears that this provision was influenced by the Fifth Amendment to the American Constitution.

<sup>110</sup> At the opening assembly of the first Dáil the leader of the Labour Party, Tom Johnson was described as having ‘wept tears of pride’ as the programme was read out. Halligan writes that the programme’s ‘significance lay in the commitment to a political morality which reflected Labour’s social philosophy and ennobled the new State at its moment of creation.’ Brenndan Halligan, ‘Labour of Love’, *Irish Times*, 21 January 2009.

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.’ Article 43 asserts that ‘man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.’ However, the State reserves the right to regulate private property according to the ‘principles of social justice’ and in the ‘exigencies of the common good.’

The property clauses in the 1937 Constitution need to be viewed in the context of the history of land disposition and agitation in Ireland. An outstanding feature of 19<sup>th</sup> and 20<sup>th</sup> century Irish social and political history has been the antagonistic and subaltern relationship between those with land and those without. It would be no exaggeration to describe it as the abiding feature in the development of the social and hierarchical structure of the Irish State. Therefore, Irish history does not conform to a view which sanctifies property, rather it has tended to view land as interchangeable, through social and agrarian unrest and with the advent of the new State, through limited government intervention. Therefore, the qualification on the right to private property is more in tune with Irish social history than is its sanctification. Fianna Fáil represented the views of the landless far more than Cumann na nGaedheal who were seen as the representatives of the large Catholic land owners. The dominant political culture from 1922 -1932 was based on the conservatism and religiosity of large farmers from whom much of the clergy was drawn.<sup>111</sup> Therefore, if Articles 43.2.1 and 43.2.2 are regarded as being radical (as Wheare famously suggested) it should be viewed in the context of Fianna Fáil’s role in representing the interests of the labourers and landless.

### **Papal Encyclicals and Property Rights**

Catholic social teaching on property was first addressed by Pope Leo XIII in the Papal Encyclical *Graves de Communi Re* in which he condemned social democracy as anathema to the principles of Christian democracy. The Pope described the aim of social democracy as being to put ‘all government in the hands of the masses, reducing

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<sup>111</sup> In a survey of Irish judges conducted in 1969 it was revealed that only 6.8% of judges came from a farming background while 27.2% had a legal background, 20.5% business and 11.3% civil servants. Therefore, judges tended to come from a different professional background than members of the clergy. See Paul Bartholomew, *The Irish Judiciary*, IPA, Dublin, 1971 p.46-50.



all ranks to the same level, abolishing all distinction of class, and finally introducing community of goods. Hence, the right to own private property is to be abrogated, and whatever property a man possesses, or whatever means of livelihood he has, is to be common to all.’ In contrast Christian Democracy:

‘...by the fact that it is Christian, is built, and necessarily so, on the basic principles of divine faith, and it must provide better conditions for the masses, with the ulterior object of promoting the perfection of souls made for things eternal. Hence, for Christian Democracy, justice is sacred; it must maintain that the right of acquiring and possessing property cannot be impugned, and it must safeguard the various distinctions and degrees which are indispensable in every well-ordered commonwealth. Finally, it must endeavor to preserve in every human society the form and the character which God ever impresses on it. It is clear, therefore, that there is nothing in common between Social and Christian Democracy. They differ from each other as much as the sect of socialism differs from the profession of Christianity.’<sup>112</sup>

Leo XIII stated a forceful defence of private property as of central importance to the family. Recognition of the importance of private property in Catholic teaching goes back as far as Aquinas. However, Catholic social teaching does not view possession of property as an absolute right; its possession also implied social obligations. In *Quadragesimo Anno* Pope Pius XI stated that the riches that economic-social developments create should be distributed amongst the community to the common advantage of all. This is reflected in Articles 43.2.1 and 43.2.2 where the right to private property is regulated in the interest of social justice and the exigencies of the common good.

*Quadragesimo Anno* had an invigorating effect on Irish Catholic movements and led to bishops such as Browne (Galway) and Lucy (Cork) developing and lobbying for vocational organisation as a method of organising society (largely based on the idea of a return to medieval guilds) as an alternative to both capitalism and communism. The promotion of vocational organisation largely stemmed from a philosophical position which viewed State involvement with suspicion. The classic example of the hierarchy’s suspicion of State involvement is of course, the Mother and Child Scheme controversy. Yet Article 43 does envisage a supervisory role for the State in promoting the social responsibilities attached to property rights as envisaged in Catholic social

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<sup>112</sup> [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_1-xiii\\_enc\\_18011901\\_graves-de-communi-re\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_1-xiii_enc_18011901_graves-de-communi-re_en.html)

teaching. To that extent it represents a different conception of the relationship between the State and property than that which was displayed in, for example, the attitude of the Northern Bishops to the Beveridge Report (which laid the basis for Atlee's welfare state) and the threat of the 'omni-competent state.'<sup>113</sup> The Vatican was to alter its position with John XXIII's encyclical, *Mater and Magistra* (1961) which represented a more benign view of State involvement once it was guided by the principle of subsidiarity.

In *Magera et Magistera* Pope John Paul II while asserting that man had a natural right to property, also emphasised the social obligations which arise for those in possession of property. The Pope asserted that ownership of property is a natural right which the State cannot suppress. But it also entails a social obligation which must be exercised not only for one's own personal benefit but also for the benefit of the community. Pope John Paul II looked more favourably to free enterprise than previous Popes. On the anniversary of Leo XIII's *Rerum Novarum*, John Paul II issued *Centesimus Annus* (1991) in which he described the fundamental error of socialism as 'anthropological in nature.' The Pope asserted that:

'Socialism considers the individual person simply as an element, a molecule within the social organism, so that the good of the individual is completely subordinated to the functioning of the socio-economic mechanism. Socialism likewise maintains that the good of the individual can be realised without reference to his *free choice*, to the unique and exclusive responsibility which he exercises in the face of good or evil. *Man is thus reduced* to a series of social relationships, and the concept of the person as the autonomous subject of moral decision disappears, the very subject whose decisions build the social order. From this *mistaken conception of the person* there arise both a distortion of law, which defines the sphere of the exercise of freedom, and an opposition to private property.'<sup>114</sup>

As stated, John Paul II was more pro-market than either Leo XIII or Pius XI stating, 'It would appear that, on the level of individual nations and of international relations, the *free market* is the most efficient instrument for utilizing resources and effectively

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<sup>113</sup> See Daithi Ó Corrain, *Rendering to God and Caesar*, p.119. In his Lenten pastoral in 1952 Archbishop D'Alton warned of a 'milder form of Totalitarianism, known as the Welfare State, which in its own way tends to undermine the foundations of human liberty...A system of social services, which began by assisting the needy, ends by being made compulsory for all. The State thus makes unwarranted inroads on the family, and usurps functions that properly belong to parents.' Ibid.

<sup>114</sup> See: [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html)

responding to needs'.<sup>115</sup> He also asserted that where self-interest is suppressed, it is replaced by a burdensome bureaucracy which is anathema to initiative and creativity. Article 43 is influenced by the Papal Encyclical *Rerum Novarum*, in which Pope Leo XIII sought to articulate the Vatican's response to the challenges of socialism and laissez-faire capitalism and *Quadragesimo Anno* of Pope Pius XI. In *Rerum Novarum*, Leo XIII stated, the right to possess private property is derived from nature, not from man; and the State has the right to control its use in the interests of the public good alone, but not to absorb it altogether. This is reflected in the reference in Article 43.1.1 to the State recognising that 'man, in virtue, of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.'

Keogh and McCarthy correctly emphasise McQuaid as a significant influence on Article 43, writing that 'from the available evidence it would appear that John Charles McQuaid had a considerable influence on the articles that eventually became Article 43 and 45.'<sup>116</sup> It appears that there was an earlier draft, printed 16 March 1937, with drafts of the property guarantees and Directive Principles of Social Policy together making up Article 41.<sup>117</sup> McQuaid wrote to de Valera on 16 February 1937 enclosing 'three new paragraphs for the private property section'. He wrote that they were accurate as he had 'spent the day on an analysis of *Quadragesimo Anno* and *Rerum Novarum*'.<sup>118</sup> Following the enactment of the Constitution, the Catholic group, An Rioghacht, issued a statement welcoming a number of its provisions, including Article 43: 'We recognise that the articles dealing with personal rights, the family, education, private property, and religion are in general accord with the Catholic social teaching...'.<sup>119</sup>

In contrast to Article 43, Article 40.3 does not appear to be religiously inspired. O'Donnell emphasises the influence of liberal theory on the Article: 'However, the Constitution did not simply repeat the teaching of *Quadragesimo Anno*. Instead, in

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<sup>115</sup> Ibid.

<sup>116</sup> Keogh and McCarthy, *The Making of the Irish Constitution*, p. 117.

<sup>117</sup> See Keogh and McCarthy, *The Making of the Irish Constitution*, appendix p.490-491 for a copy of the draft Article 41.

<sup>118</sup> UCDA, *de Valera Papers*, P150/2395, McQuaid to de Valera, 16 February 1937.

<sup>119</sup> Quoted in *Irish Independent*, 3 May 1937.

guaranteeing the protection of individual rights in Article 40.3 in exactly the same terms as all other fundamental rights, it seemed to lean towards the classic, liberal, Blackstone, common law theory of the importance of property rights – not enough perhaps for commentators such as Wheare, but more than enough to alarm the Catholic Church.’<sup>120</sup> The wording of Article 40.3.2 appears to resemble the 14<sup>th</sup> Amendment to the American Constitution which provides that ‘nor shall any State deprive any person of life, liberty, or property without due process of law.’ Costello argued that Article 40, in contrast to Articles 41, 42 and 43, derived from ‘secular and rationalist theory’.<sup>121</sup> Hogan writes in agreement that ‘one would be hard put to find *any* Catholic influences whatever in Article 40, unless it be the anti-abortion provisions of Article 40.3.3 inserted by referendum in 1983.’<sup>122</sup>

Keane describes Article 43 as owing its appearance in the Constitution to the influence of Catholic social teaching. He states that it reflects the broad political consensus in Irish society ‘in its rejection of communist or utopian visions of a propertyless society on the one hand and unbridled *laissez-faire* on the other’.<sup>123</sup> Keane also sees Article 43 as ‘rejecting the positivist philosophy of Austin and his disciples, and defines the right of private property as one that derives from natural law rather than positive law.’ Keane is critical of the natural law language in Article 43, stating ‘one cannot help wondering what the words ‘in virtue of his rational being’ are doing in the article in the first place, or what the necessary relationship is between man’s rational capacity and his ‘right’ to own property.’<sup>124</sup> The Constitutional Review Group has said, in relation to the acknowledgement in Article 43.1.1 that man, by ‘virtue of his rational being’ has the natural right to private ownership ‘of external goods’, that it does not ‘greatly assist either the Oireachtas or the courts in their attempts to protect the substance of the

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<sup>120</sup> Donal O’Donnell, ‘Private Property in the Irish Constitution’ in Doyle and Carolan (eds) *The Irish Constitution: Governance and Values*, Thomson Round Hall, Dublin, 2008, p. 412.

<sup>121</sup> Declan Costello, ‘The Natural Law and the Irish Constitution,’ (1956) *Studies* 45, p.414

<sup>122</sup> Gerard Hogan, Foreword to Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937*, p.22 emphasis in original.

<sup>123</sup> Ronan Keane, ‘Property in the Constitution and in the Courts’ Brian Farrell (ed), *De Valera’s Constitution and Ours*, Gill and Macmillan, Dublin, 1988, p.149.

<sup>124</sup> *Ibid*, p.145.

right.’<sup>125</sup> The wording of Article 43.1.1 does not contain coherent principles which the Courts could apply to factual scenarios. Indeed, in an exchange with counsel in *Buckley v AG*.<sup>126</sup> Black J questioned the reference to natural rights in Article 43.1.1 as ‘antecedent to all positive law’: ‘I cannot understand the meaning of this term ‘natural rights’. It strikes me that natural right, if it means something antecedent to positive law, only means the right of the strongest to take what he can and hold what he gets.’<sup>127</sup>

FSL Lyons stated that by balancing two competing rights in Article 43 (based on individualism and collectivism) ‘doctrinaire positions could not be taken up in advance, and that in its attitude towards private property a government responsive to Catholic doctrines would be guided by expedience and human welfare, conditioning factors which might easily change from time to time.’<sup>128</sup> In contrast Keogh states ‘the cluster of articles 41 to 45 is a petrified image of positions particular to a certain current of Irish Catholicism in 1937.’ Keogh writes that a senior civil servant once heard Seán Lemass say to de Valera during the drafting: “But you can’t put the papal encyclicals into the Constitution.” However, he did do so, and that has resulted in certain difficulties as Irish society and Catholic social teaching have changed in the meantime. Pope Leo XIII’s *Rerum Novarum* is quite distinct from Paul VI’s *Populorum Progressio* and John Paul II’s *Sollicitudo Rei Socialis*.<sup>129</sup> Similarly, Faughan has argued:

‘Eamon de Valera rejected, on a number of occasions, the view that the Constitution was simply a legal, administrative document. As the fundamental law of the State it should, he argued, inspire the loyalty of the people. The document as a result reflects the Christian and, more particularly the, Catholic ethos of the society from which it came. The problem today is not simply that a number of specific articles embody large portions of the teachings of one particular Church, but that this teaching is, itself, fifty years old. The teaching of the Catholic Church today on, for instance the right of private property and the position of women in society is distinctly different from that which prevailed in the atmosphere of the 1930s and which is embodied, to a considerable degree, in the Constitution. It has been argued that the particular inspiration behind specific constitutional provisions is irrelevant. The Constitution is written in

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<sup>125</sup> *Report of the Constitutional Review Group* (1996), p.358.

<sup>126</sup> *Buckley v Attorney General* [1950] IR 67.

<sup>127</sup> *The Irish Times*, 24 June 1947.

<sup>128</sup> FSL Lyons, *Ireland since the Famine*, p.546-547.

<sup>129</sup> Dermot Keogh, ‘Church and State’, Brian Farrell (ed), *De Valera’s Constitution and Ours*, p.118.

the present tense and the courts interpret its provisions with regard to contemporary attitudes and circumstances.<sup>130</sup>

One peculiar aspect to the 1937 Constitution is the fact that property rights are protected by two separate provisions.<sup>131</sup> The Constitution reflects two paradoxical views of property: one liberal, the other communitarian. The liberal view emphasises personal autonomy and the protection of a person's use and enjoyment of property. The communitarian view values property as having a social purpose and emphasises the social responsibilities attached to property, particularly in promoting social inclusion. This communitarian view seems to reflect the Church's attitude to property rights. However, during the pontificate of John Paul II, there appeared to be a change in emphasis as the Church held a more liberal view of property rights. This may be explained by John Paul's reaction against communism based on his experiences in Poland during the Cold War.

Kelly describes Article 43 as having played a 'relatively small part in constitutional jurisprudence' until the 1980s, a fact which is attributed to the substantial qualification attached to property rights in favour of the common good. In light of this fact Wheare contrasted the stress placed on the right to private property 'calculated to lift up the heart of the most old-fashioned capitalist' with the qualification on the right in the exigencies of the common good in Article 43.2 which he says 'hardly goes further' than the Constitution of the Former Yugoslavia. It was, he said a 'classic example of giving a right with one hand and taking it back on the other.'<sup>132</sup> McQuaid had categorically rejected the idea that Article 43 was influenced by communism:

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<sup>130</sup> *The Irish Times*, 29 December 1987.

<sup>131</sup> The Irish courts view articles 40.3 and 43 as being read together. The constitutional protection of private property against 'unjust attack' is qualified by the 'principles of social justice' and the 'exigencies of the common good'. All persons have the right to private property while at the same time the State must regulate the exercise of the right according to the principles of social justice. The State is permitted when pursuing a principle of social justice to delimit the exercise of property rights with a view to reconciling their exercise with the exigencies of the common good. The Courts will examine whether the means selected to serve a social justice purpose is disproportionate.

<sup>132</sup> KC Wheare, *Modern Constitutions*, Oxford UP, Oxford, 1966, p.62. Keane has written of the 'unattractive language' and 'tortured syntax' of Article 43. Land Use, Compensation and the Community' (1983) *Irish Jurist* 18, p.23. Interestingly, Kenny J appeared to indicate that the English version of the text was translated from the Irish 'the one [Article 43] in English seems to me to be a most

‘It is very incorrect to state that Art.43, 2 might find its place quite properly in a Communist Constitution. Art. 43, 2. must be read in conjunction with 43,1. which guarantees the right of private ownership as a natural right, and guarantees to pass no law attempting to abolish that right. That is not Communist teaching. Art. 43, 2 claims for the State the right to delimit that right of private ownership, but always with a view to the common good. One must never omit this view-point of the common good. In so claiming, Art. 43, 2 is but quoting *Rerum Novarum*. ‘The right to possess private property is derived from nature, not from man; and the State has the right to control its use in the interests of the public good alone, but by no means to absorb it altogether.’ And again quoting QA. “It follows from the twofold character of ownership which we have termed individual and social, that men must take into account in this matter, not only their own advantage but also the common good. To define in detail these duties when then need occurs and when the natural law does not do so, is the function of the government. Provided that the natural and divine law is observed, the public authority, in view of the common good, may specify more accurately what is licit and what is illicit for property owners in the use of their possessions. Moreover Leo XIII had wisely taught that ‘the defining of private possession has been left to God to man’s own industry and to the laws of individual peoples.’” And, again, a very cogent proof – if further proof is needed – quoting from QA. “When civil authority adjusts ownership to meet the needs of the public good, it acts not as an enemy, but as the friend of private owners; for it thus effectively prevents the possession of private property, intended by nature’s Author in His Wisdom for the sustaining of human life, from creating intolerable burdens and so rushing to its own destruction; and far from weakening the right of private property, it gives it new strength.”<sup>133</sup>

### Property Guarantees and the Law

The issues that have arisen in cases concerning the property guarantee have not directly concerned the Catholic Church. Therefore, the Courts have deliberated over the relationship between Article 40.3 and 43<sup>134</sup>, questioned whether economic value created by regulation is protected by the Constitution<sup>135</sup> and have ruled that the property guarantee extends to private companies.<sup>136</sup> It should be noted that Article 44.2.6 provides a specific protection for the property of religious and educational institutions and an entitlement to compensation. It states that ‘The property of any religious denomination or any discrimination or any educational institution shall not be diverted

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unhappy attempt to reproduce the meaning of that in Irish.’ See *Central Dublin Development Association v AG* (1975) 109 ILTR 69, 83.

<sup>133</sup> DDA, *McQuaid Papers*, AB8/A/V.

<sup>134</sup> Kelly states that ‘in the vast majority of cases, the courts look to both Article 40.3 and Article 43 when considering constitutional protection of property and these Articles mutually inform each other. Indeed, in retrospect it would seem that the debate as to which Article applied may have been ‘much sound and fury, signifying nothing.’ John Kelly, *The Irish Constitution*, p.1993. See *O’Brien v Bord na Móna* [1983] ILRM 314, *PMPS v Attorney General* [1983] IR 355, and *Blake v Attorney General* [1982] IR 117.

<sup>135</sup> See *Maher v Minister for Agriculture and Rural Development* [2001] 2 IR 139 in which Keane CJ refused to accept that milk quota constituted property for the purpose of the Constitution and *Hempenstall v Minister for the Environment* [1994] 2 IR 20 in which it was accepted that taxi licences were property rights.

<sup>136</sup> See *Iarnród Éireann v Ireland* [1996] 3 IR 321.

save for necessary works of public utility and on payment of compensation'.<sup>137</sup> While Article 44.2.6 speaks of a specific entitlement to compensation, the Courts have adopted various positions regarding the entitlement to compensation, although the current position appears to allow for the acquisition of property by the State in the public interest with compensation at market values but with certain exceptions.<sup>138</sup> It is likely that the historical roots of this provision may be found in the American Constitution and the Church's reaction to the seizure of its lands during the French revolution.

Hogan argues that the Courts have rendered the property rights provisions of the Constitution almost irrelevant by relying on what is known as the proportionality test. He writes 'If we attempt to sum up these developments, it seems clear that we have arrived at the position whereby the actual language of Article 40.3.2 and Article 43 does not really matter. Certainly, even if Article 43 was inspired by Catholic social teaching, the case law has long since broken loose of that particular inspirational source. Instead, the courts have sought to employ a workable judicial methodology and this is why the adoption of the proportionality doctrine is so significant.'<sup>139</sup> In Kelly, Hogan's assertion is questioned as 'going too far...what we are witnessing here is a judiciary grappling with indeterminate constitutional provisions, as many constitutional provisions are. Rendering such norms determinate through the use of such devices as

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<sup>137</sup> In *Crighton v Landcommission and Gault* (1950) ILTR 84, 87 the land commission was prevented from acquiring lands and a school house belonging to the Church of Ireland diocese in Kilmore. The Land Commission had acted *ultra vires*, despite this Sheehy J in the Circuit Court also referred to Article 44.2.6: 'This schoolhouse was held by a religious body for educational and religious purposes, and therefore the attempted acquisition by the Land Commission was unconstitutional and void.' McQuaid referred to Article 43 rejecting the idea that it might be interpreted as meaning: 'that private property might be confiscated without compensation' as to do so 'is to forget the emphasis explicitly set in this very Article and constantly reiterated in the Section -- on the common good. The common good (Social Justice) forbids the refusal to pay compensation.' DDA, *McQuaid Papers*, AB8/A/V.

<sup>138</sup> In *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321, 350, the Supreme Court stated: 'Where the property of the citizen is compulsorily acquired by the State or one of its agencies for what are deemed by the legislature to be important social objectives, it has in general been recognised that he or she is entitled to at least the market value of the property so taken as constituting fair compensation for the invasion of his property rights. However, that this generally recognised right, although unquestionably of importance, is not absolute was made clear in two decisions of this court.'

<sup>139</sup> Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) *Irish Jurist* 32, p. 396.



the proportionality doctrine is an innate part of the interpretation of such a text, rather than its abandonment.’<sup>140</sup>

As the Courts have tended not to allow Catholic social teaching to influence them in their interpretation of the property provisions, the question needs to be posed why was this case? Hogan writes that there are two reasons why the Courts have not held a confessional view in interpreting Article 43. Firstly, he argues that the extent to which Catholic social teaching was an influence on the Constitution has been exaggerated and that ‘what was surprising was the extent to which the Constitution derived from what has been described as secular and rationalist theory’. He also asserts that de Valera’s private papers indicate that the Catholic Church was unhappy with the final draft of the Constitution. Secondly, he argues that the open textured nature of Articles 40-44 has led to the Courts eschewing the actual text and instead ‘the accumulated sense of legal tradition and case-law, together with legal methodology and reasoning make up a sort of *acquis constitutionnel* and it is this which really counts.’<sup>141</sup>

It may be that one of the main reasons why the Courts have not taken a confessional view of Article 43 is that the acknowledgment that man, by ‘virtue of his rational being’ has the natural right to private ownership ‘of external goods’ is of little use to the Courts in adjudicating whether a citizen’s property rights have been infringed as the language is too abstract.<sup>142</sup> Therefore, while the Courts have accepted that under the Constitution man has a natural right to the ownership of external goods, they have simply acknowledged the existence of the right rather than interpreting it and relying on it to protect citizens’ property rights in light of Catholic social teaching.<sup>143</sup>

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<sup>140</sup> John Kelly, *The Irish Constitution*, p.2001-2002. See Rachel Walsh, ‘The Constitution, Property Rights and Proportionality: A Reappraisal’, (2009) 31 *Dublin University Law Journal* 1.

<sup>141</sup> Gerard Hogan, ‘The Constitution, Property Rights and Proportionality’, (1997) *Irish Jurist*, p.374.

<sup>142</sup> A similar point was made by the Constitutional Review Group where they stated that ‘this elaborate statement as to the origins of the right to property does not greatly assist either the Oireachtas or the courts in their attempts to protect the substance of the right’. *Constitutional Review Group Report* (1996), p.358

<sup>143</sup> See e.g. Kenny J in *Central Dublin Development Association v Attorney General* (1975) 109 ILTR 69 wherein he asserted that an analysis of the text of the Constitution and ‘of the decisions on it’ lead to, *inter alia*, the conclusion that: ‘In virtue of his rational being, man has a natural right to individual or private ownership of worldly wealth’.

O'Donnell suggests that 'even if *Quadragesimo Anno* generated enthusiastic admiration in clerical and Catholic intellectual circles, neither its teaching, nor the refinement perhaps discernible in the Constitution could be said to have percolated to such a level as to have been a generally accepted part of Irish thinking in 1937 or immediately thereafter. In that sense, the protection of property rights did not fit the eye of the Irish people post-1937 and the manifest judicial unease with the property right guarantee in the decades that followed can perhaps be explained, in part, by the fact that there was no deeply ingrained belief in either the importance of property rights in general, or the analysis contained in *Quadragesimo Anno* in particular.'<sup>144</sup> It might be true to say that while the landless during the revolutionary period had little concern for property rights, there may however have been a shift in attitude as those without land benefited from the land redistribution policies (particularly when de Valera came to power in 1932), while historically (certainly since Davitt) there was not a tradition of emphasising the importance of private property. It does not appear to be the case that the developing norms in the relationship between property and citizens have been influenced by Catholic doctrine. As the Church adopted a nuanced and slightly abstract position on property, it was difficult to allow Catholic social teaching to inform public life in the same way as the Church's simple message regarding the sinfulness of divorce, contraception, and, allegedly blasphemous books subsequently did.

Doyle describes the property rights case law as a 'case study in how a relatively coherent corpus of constitutional law can be developed in a manner that does not pay particular attention to the historical or philosophical antecedents of the guarantees that it interprets'.<sup>145</sup> The case law indicates that the Courts when faced with the indeterminate language of Article 43 have not chosen to rely on other constitutional provisions in order to protect Catholic social principles or rely on extra constitutional sources such as Papal Encyclicals in interpreting the property guarantees. Instead, the Courts have recited the natural law language of Article 43 without actually exploring it

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<sup>144</sup> Donal O'Donnell 'Property Rights and the Irish Constitution' in Carolan and Doyle (eds) *The Irish Constitution: Governance and Values*, p. 412.

<sup>145</sup> Oran Doyle, *The Irish Constitution Texts, Cases and Materials*, Clarus, Dublin, 2008 p.165.

and without using it to further a confessional view of property rights. In recent years the Courts have tended towards a position of eschewing the language of Article 43 in favour of the proportionality test. It appears that the indeterminate and abstract language used in Papal Encyclicals has been of little assistance to judges when adjudicating on issues concerning property rights.

As was stated Article 43 reflects the teachings of Pope Leo XIII and Pius XI. However, Catholic social teaching concerning property rights has not been static and has changed under different pontificates. Therefore, it may be said that John Paul II was more favourable towards capitalism and the right to hold property than Leo XII or Pius XI. While Catholic social teaching may have developed in this particular direction the development of the law concerning property rights in Ireland has not been influenced by these developments. While judges have recited the natural law language of Article 43, they have not sought to develop a line of jurisprudence in line with Catholic social teaching as it has developed. In a sense the law has been hermetically sealed from developments in Catholic social teaching. While one can speculate as to whether or not this was a conscious decision on the part of judges, ultimately it indicates a judiciary which was secular in its interpretation of Article 43.

### **The Special Position of the Catholic Church<sup>146</sup>**

John Charles McQuaid drafted a confessional article on religion which included the triumphalist phrase ‘The State acknowledges that the true religion is that established by our Divine Lord, Jesus Christ Himself, which he committed to His Church to protect and propagate, as the guardian and interpreter of true morality. It acknowledges, moreover that the Church of Christ is the Catholic Church. 4. The State recognised the Church of Christ as a perfect society, having within itself full Competence and sovereign authority, in respect of the spiritual good of men...(3) In cases where the jurisdiction of Church and State requires to be harmoniously co-ordinated, the State

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<sup>146</sup> Article 44.1 was a radical departure from any of the provisions in the 1922 Constitution. In contrast Article 44.2 was largely based on Article 8 of the 1922 Constitution in recognising freedom of conscience, practice and profession of religion subject to public order and morality; prohibiting the State from endowing any religion or discriminating on the basis of religion; recognising the right of children to attend schools receiving public monies without attending religious instruction and the property rights of religious denominations and their right to compensation.

may come to a special agreement with the Church and other Religious Bodies, upon particular matters, civil, political and religious.’<sup>147</sup> However, de Valera was not prepared to accept this article most likely because of the understandable sensitivities of southern Protestants and Northern Unionists towards any perceived confessionality within the State.

During the period March to April 1937 de Valera engaged in a diplomatic tour in an attempt to garner support from the Catholic hierarchy for the Constitution, and in particular the article on religion. This included meetings with the Papal Nuncio, Cardinal MacRory and Archbishop Byrne. Both the Papal Nuncio and Archbishop Byrne, while preferring a religious article which recognised the Catholic Church as the one true Church, were sympathetic to his difficulties, particularly in light of Northern Unionists’ views. Cardinal MacRory took a more dogmatic approach and de Valera wrote after meeting him: ‘He felt the omission of any mention of the Holy Catholic Church would cause considerable difficulty and cause me to be attacked.’<sup>148</sup> In a letter dated April 9, 1937 from MacRory to the Papal Nuncio, the Cardinal stated: ‘I feel that I acted right in not agreeing with the President, though very unworthy, I am the heart of the Irish Church, and as such I think I couldn’t do (?) less than insist that not only the Preamble but the Constitution itself should show some special recognition of our religion. As it is the Constitution makes us no better than the Quakers. But I can see the president’s point of view too.’<sup>149</sup> De Valera also met the leaders of the Church of Ireland, the Presbyterian Church, the Methodist Church and the Jewish Congregation. All of them welcomed the new Constitution. De Valera showed the draft Article on religion to the leader of the Methodist Church, who in a letter to de Valera dated April 15 welcomed the new Article stating:

‘We find nothing in the substance or wording of the sections submitted to which we could fairly take exception. As to the phrase ‘the CC’, we are not sensitive on the matter. We are satisfied that it should be used as the official title of the C of the great maj in this country, so long as it is not used in any deliberately exclusive way. The succeeding para in the draft copy in which the other ‘churches’ in this country are ‘recognised’ as such removes any doubt on this point...As

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<sup>147</sup> DDA, *McQuaid Papers* AB8/A/V.

<sup>148</sup> UCDA *de Valera Papers*, 5 April 1937, P. 150/2419.

<sup>149</sup> Archivio Segreto Vaticano, Affari Ecclesiastici Strordinari, L’Irlanda (1937).

president of this country, I greatly appreciate the courtesy and fairness shown by you in arranging for our interview, and seeking to understand our point of view...'<sup>150</sup>

It seems likely that de Valera was influenced by the submission he received from the Jesuits in deciding on the final draft for Article 44.<sup>151</sup> The religious Article that was submitted by the Jesuits referred to the demographic fact that the vast majority of Irish population was Catholic. The submission read:

'(a) Freedom of Religious worship (in public and private) is guaranteed to all within the limits of public order and morality.  
(b) The Catholic Faith is the faith of *the vast majority* of the nation, and which is inseparably bound up with the nation's history, traditions and culture, occupies among religions in our country a unique and preponderant position'<sup>152</sup>

Instead of an article on religion reflecting a culture of *integralismo*<sup>153</sup> and triumphalism as McQuaid had wanted, the final draft was a curious combination of descriptive demographic fact and religious pluralism. De Valera described the Catholic Church as having a 'special position'.<sup>154</sup> Despite this it was the clause on which de Valera was at his most confrontational with the hierarchy. Had de Valera created an established church in Ireland, he would have followed a particular path not unknown in Europe as there are heterogeneous constitutional traditions in Europe<sup>155</sup> with many countries having either established religions or a mention of God in their constitutions. Therefore, an overt display of the State's religiosity through the insertion of a clause

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<sup>150</sup> UCDA *de Valera Papers*, P. 150/2419

<sup>151</sup> For an account of the role of the Jesuits in the drafting of the Constitution see Seán Faughan, 'The Jesuits and the Drafting of the Irish Constitution of 1937', (1987) *Irish Historical Studies* 25.

<sup>152</sup> *Ibid.* (Emphasis added).

<sup>153</sup> *Integralismo* was a continental theological movement which regarded revelation as a body of truths to be delivered by the hierarchy to the obedient masses. Integralists were vehemently opposed to any signs of liberalism in the Catholic Church and viewed Protestantism as anarchic individualism. See John Cooney, *John Charles McQuaid*, p. 44.

<sup>154</sup> Under Article 16.3 of the Spanish Constitution (1978) the fledgling democracy introduced a similar clause, although establishment was specifically proscribed: 'No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.' In the 1930s, prior to Franco's accession to power, the Catholic Church had been deeply angered by the socialist government's decision to legalise civil marriage, divorce, and abortion. There had been considerable support in Ireland for Franco during the civil war with Eoin O' Duffy travelling to Spain with a battalion to fight for the fascists and 'Catholic' Spain.

<sup>155</sup> Countries with established religions include the United Kingdom, Norway, and Denmark. On the other hand France and Turkey are committed to secularism.

granting *quasi*-establishment to the Catholic Church would not have been constitutionally *sui generis*. But what would have been problematic was the fact that a ninety-three per cent Catholic population and an extremely powerful and influential hierarchy combined with a *quasi*-established church would have together created a *de facto* if not *de jure* confessional State. It would also have meant particular difficulties with Northern Unionists and the minority Church of Ireland community in the Irish State. It is likely that it was the Northern perspective which de Valera most feared from a triumphalist article on religion.

It appears that there was an argument between McQuaid and de Valera over the Article on religion which led de Valera to send Joseph Walsh, Secretary of the Department of External Affairs, to Rome to try to get the approval of the Vatican for the new Constitution. It is probable that the main reason for de Valera's concern was that the Constitution would not be approved by referendum without the Catholic hierarchy's approval. Walsh arrived in Rome with a 'pro memoria' from de Valera stating that while the article on religion was not 'the Catholic ideal as regards the relationship between Church and State,' it was 'not deemed possible to go farther than is provided.' De Valera stated that 'if the attempt were made to embody in the new Constitution the full Catholic ideal there would be an immediate outcry from the Protestant section of the population, and a bitter religious controversy might easily ensue.' He further stated 'The premier and special position accorded to the Catholic Church as 'guardian of the Faith of the great majority of the citizens' will mean in practice that the Catholic Church will be the Church associated with the State on all public occasions.' De Valera writes that 'Under our democratic Constitution the vast majority of the Ministers of State are certain to be Catholic, who will profess their religion openly and will attend religious functions in a Catholic Church on all occasion in which a manifestation of religious belief is called for.'<sup>156</sup>

In a letter dated April 17, 1937 the Papal Nuncio wrote to the Secretary of State Pacelli at which point Joseph Walsh was on his way to Rome:

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<sup>156</sup> UCDA, *de Valera Papers*, P150/2419, 16 April 1937

‘A few days ago the President of the Irish Free State Mr de Valera came to the Nunziature to show me a draft of the article on religion in the new Constitution which will shortly be voted on the Irish people, I believe when the next general election takes place.

The president has shown a desire to consult by means of confidential and secret means, with other leaders of the Church in Ireland. For this reason the president has met Cardinal McRory and the Archbishop of Dublin. The end result of these meetings has been that he has decided that the Holy See should see the articles in question. For this reason the president has decided to send Mr Walsh, the secretary of the department of external affairs, he is currently on his way to Rome.

President de Valera wanted, in writing the articles with regard to religion, to follow the norms of the popular encyclicals and the laws of the Church but he has found himself in some difficulty in this regard.

The new Constitution is concerned with all of Ireland. It aspires to bring together all of the State, to form one State that embraces all of the island including Ulster, where the majority is not only Protestant but also very hostile. Mr de Valera wants to display in the new Constitution tolerance and good will to the Protestants of Ulster.’<sup>157</sup>

The Secretary of State wrote of the Article on religion that it:

‘...seems to me to sound a bit unsatisfactory; as it talks solely of adoration to God it resembles theism. It seems to be me that the Constitution should only talk of religion.

II It seems too little recognition that religion merits solely a special position. This position is seen in saying that the State protects religion and that it will be used in official functions.

III Too much importance should not be placed on other religions. It would be enough to affirm that the State recognises all there religions once they are not contrary to morality or the State.

Should these observations be used it would constitute a significant improvement on what is currently in force.’<sup>158</sup>

Walsh had discussions with the Secretary of State who did not indicate a positive position on the article on religion, stating in minutes during the course of negotiations that ‘The Holy Father does not approve. Since He could not but disapprove, He prefers to refrain from expressing his judgment...If he had to express a judgment, it could not be other than unfavourable (disapproval). The Holy Father does not oppose; He could not but disapprove if He were to express a judgment.’ There is also another draft response in the Secretary of State’s papers in the Vatican Secret Archives stating ‘In

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<sup>157</sup> Archivio Segreto Vaticano, *Affairi Stroordinari Ecclesiastici*, undated, IV Periodo (l’Irlanda). [Translated from Italian]

<sup>158</sup> Ibid.

regard to the article proposed for the new Con., the HF has responded: We do not approve nor do We not disapprove: We shall remain silent in the matter (underlined in original) but this silence does not signify consent: written below – we shall learn of it from the newspapers... And if the proposers are, as they affirm, unable to do more, they will do what they can.’<sup>159</sup> According to Walsh, Pacelli stated: ‘He felt however that the ‘special position’ given to the Catholic Church had no real value so long as there was not a formal acknowledgment of the R.C. Church as the Church founded by Christ. Moreover its importance was based on numbers only (as far as the test was concerned) and the recognition given to the other Churches nullified any advantage which might have been derived from exclusive recognition. He thought we should use the word ‘tolerates’ in regard to them. He could see no judicial consequences flowing from the text used which could confer advantages on the Catholic Church not equally conferred on the bodies. Ireland was *the* Catholic country of the world, and he thought we should have made a special effort to give to the world a completely Catholic constitution.’<sup>160</sup>

In the end, the position which the Vatican adopted was relatively positive from the Irish perspective, as the Pope stated ‘*Ni approvo ni non disapprovo; taceremo*’ (‘I do not approve or disapprove; we shall remain silent’). Walsh wrote to de Valera stating that Pacelli viewed the Pope’s position in a positive light: ‘It was an attitude of complete neutrality. He might have taken the text without bearing in mind all the implications of the explanations I had given, because the text after all was what counted, but he refrained from disapproving. He would not say ‘I approve’ and while he would not say ‘I do not disapprove’ he took the middle position of keeping silence. So argued the Cardinal and while he clearly wanted to give us a crumb of consolation he had to maintain that the Pope went to the extreme limit to which his position allowed him to go.’<sup>161</sup> Joe Lee described Article 44 as ‘an astute and not ignoble formulation of the principle of religious liberty in a predominately Catholic country’<sup>162</sup>, while Keogh

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<sup>159</sup> Archivio Segreto Vaticano, *Affairi Ecclesiastici Stroadinari*, 1739/37 1937 May 10

<sup>160</sup> UCDA, *de Valera Papers*, P150/2421

<sup>161</sup> *Ibid.*

<sup>162</sup> Joe Lee, *Ireland 1912-1985*, p.203.



described the recognition of the Jewish congregation as ‘a deliberate challenge to the anti-Semitism of the vociferous supporters of right-wing Catholic thought.’<sup>163</sup>

In *Re Howley*<sup>164</sup> three years after the enactment of the 1937 Constitution, Gavan Duffy J referred to the Catholic Church ‘whose special position as the guardian of the Faith professed by the great majority of the citizens, is formally recognised by the State under the Constitution’<sup>165</sup> and in *Re Tilson*<sup>166</sup> the same judge stated ‘religion holds in the Constitution the place of honour which the community has always accorded to it in public opinion. The right of the Catholic Church to guard the faith of its children, the great majority, is registered in our fundamental document, while non-Catholics are assured that their privilege shall be respected.’<sup>167</sup> In 1967 the Committee on the Constitution recommended the deletion of the special position provision in Article 44. The Committee stated that the clauses ‘give offence to non-Catholics and are also a useful weapon in the hands of those who are anxious to emphasise the difference between North and South.’ It is particularly significant that the Committee noted that as result of the Second Vatican Council ‘the Catholic Church does not seek any special recognition or privilege as compared with other religions.’<sup>168</sup> This was followed two years later by Cardinal Conway stating that he would ‘not shed a single tear if the relevant sub-sections of Article 44 were to disappear. It confers no legal privilege whatever on the Catholic Church and, if the way to convince our fellow Christians in the North about this is to remove it, then it might be worth the expense of a referendum.’<sup>169</sup> In 1972 a proposal to delete Articles 44.1.2 and 44.1.3 of the Constitution was approved. In 1973 a new perspective from the Church hierarchy following Vatican II was reflected in an apparent redefinition of the Church’s view of the State’s obligations to the Church with the move towards ecumenism and greater debate within the Church. Article 44.1 has had a very limited role in the jurisprudence

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<sup>163</sup> Dermot Keogh, ‘The Irish Constitutional Revolution: An Analysis of the Making of the Constitution’, Litton (ed) *The Constitution of Ireland 1937-1987*, p.39.

<sup>164</sup> [1940] 1 IR 119.

<sup>165</sup> [1940] 1 IR 119.

<sup>166</sup> [1951] IR 1.

<sup>167</sup> [1951] IR 1, 14.

<sup>168</sup> *Report of the Committee on the Constitution* (Stationery Office, Dublin, 1967), para. 136.

<sup>169</sup> *The Irish Times*, 23 September 1969

of the Courts although in *Campaign to Separate Church and State Ltd v Minister for Education*<sup>170</sup> Barrington J stated that Article 44 was:

‘...pluralist in the sense that all the religious denominations existing in the State at the coming into operation of the Constitution were “recognised”. Those which could be identified by name were recognised under the title by which they described themselves. Many of the minority denominations were pleased with the result. The better opinion appeared to be that the recognition of the “special position” of the Roman Catholic Church was merely a recognition of a fact and implied no privileged position in law.’<sup>171</sup>

### **Article 45 – Directive Principles of Social Policy**

The non-justicible provisions of Article 45 are described by Coughlan as containing a vision of society founded ‘on classical Catholic social principles, although it remains just that – a vision – for the Constitution itself does not provide means for its materialisation or for those principles being implemented by resort to the courts, unlike in the case of the fundamental rights provisions of Articles 40-44’.<sup>172</sup> The aim of the principles of social policy seems to be aspirational as Article 45.1 demonstrates ‘The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order on which justice and charity shall inform all the institutions of the national life’. The aim is essentially the Christian concept of the ‘perfect society’.<sup>173</sup> McQuaid wrote regarding Article 45 that:

‘It has been frequently said that the Directive principles of social policy are but pious aspirations, devoid of effective force but that statement is based on a misunderstanding both of the nature of a constitution and of the intention of this Draft Constitution. 1. A Constitution purports to lay down the directive lines along which the Nation shall strive, in unity of mind and will, to attain the common good. A Constitution is not a thesis of philosophy and theology. It is an enactment guided and delimited by the teachings of Catholic philosophy and theology. It

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<sup>170</sup> [1998] 3 IR 321.

<sup>171</sup> [1998] 3 IR 321, 355.

<sup>172</sup> Anthony Coughlan, ‘The Constitution and Social Policy’, *The Irish Constitution 1937-1987*, (Litton ed.) p.145.

<sup>173</sup> Initially, the Courts took the wording of Article 45 literally, viewing its text as non-cognisable in *Buckley v Attorney General* [1950] IR 67 and *Byrne v Ireland* [1972] IR 241. However, in *Murtagh Properties v Cleary* [1972] IR 330 Kenny J stated that the opening passage of Article 45 ‘does not mean that the courts may not have regard to the terms of the Article, but that they have no jurisdiction to consider the application of the principles in it in the making of laws. This does not involve the conclusion that the Courts may not take it into consideration when deciding whether a claimed constitutional right exists.’ [1972] IR 330, 335-336 Similarly, McCarthy J in *Kerry Co-Operative Ltd v An Bord Bainne* [1991] ILRM 851, 870 stated that ‘the exclusion of the application of the Article by any court in respect of the making of laws, does not exclude their consideration in the construction of the common law.’ Article 45 has not figured in the jurisprudence of the Courts since 1991 which suggests judicial unease with its provisions.

enshrines and sets forth the aim of what ought to be our Christian endeavour in social policy. 2. The intention of this draft of this Draft Constitution – to one who carefully studies it – is clearly set forth: it means seriously to endeavour to create those circumstances of temporal life which shall realise the Christian ideal of society. We desire – within the vast freedom of the social encyclicals – to achieve the common good of this Nation on Christian lines and by Christian methods. If there be one lesson we can learn from other countries it is that we must endeavour to avoid in our Young Society the evils that have characterised their social organisation.’<sup>174</sup>

### McQuaid and Natural Law

The 1937 Constitution introduced Christian natural law into the Irish legal system. The Constitution refers to certain rights those in Article 41 and 43 as ‘antecedent to positive law’. This Aquinian natural law principle stems from the influence of Catholic social teaching and, in particular, the hand of John Charles McQuaid. It may be argued that natural law can, as Rousseau argued, exist without God. That is, natural law concepts can also exist in a purely secular society. However, McQuaid rejected Rousseau’s theory of natural law in a letter to de Valera stating ‘His purpose is to find a juridical basis for society, and in that search he ends by basing his whole theory on human liberty’.<sup>175</sup> In light of the clear influence of Catholic social teaching on the Constitution as a whole, it would be incorrect to argue that the presence of the concept of natural law in the Irish Constitution owes itself to anything other than Catholic social teaching and thirteenth century Aquinian thought. Aquinian natural law is based on certain basic principles which include: the existence of God; the concept of Divine Reason controlling the universe; the concept of practical reason; the will of the governor or

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<sup>174</sup> DDA, *McQuaid Papers*, P.150/2411. Emphasis in original. De Valera defended Article 45 in the Dáil stating: ‘With regard to these social directives, some people say: “They cannot be taken cognisance of by the court; why have them there then? They are pious aspirations; they cannot be any more. Why put them there?” My answer to that is that they will be there as a constant headline, something by which the people as a whole can judge of their progress in a certain direction; something by which the representatives of the people can be judged as well as the people judge themselves as a whole. We will judge of our progress in a certain direction by asking ourselves how far we have advanced in this direction. They are intended to be directive to the Legislature. They are not to be determined by the courts for this reason—that it is the Legislature that must determine how far it can go from time to time, in the set of circumstances, in trying to secure these ideals and aims and objectives. It would be clearly absurd that a court should come in and say: “The Dáil has not done this which it might do; it has not gone as far as it could go,” and that the determination of that should be left to the court. That determination clearly has to be left to the representatives of the people. The people themselves will have to advance in this direction. They will have to be led by their representatives in this direction; their representatives will have to put up policies to them leading in this direction. If they are to be judged from time to time, it is right that they should be judged by their actions in the Legislature and not that some body like the Supreme Court should become the judge. The people as a whole will have to judge the Legislature in that matter, and the Legislature will have to be its own judge in regard to the set of circumstances and the advances which are to be made.’ 67 *Dáil Debates* 68-69, 11 May 1937.

<sup>175</sup> UCDA, *De Valera Papers*, file 1091, undated.

sovereign having the force of law only as long as it accords with reason; and law being directed by the common good.<sup>176</sup> The enshrinement in the Constitution of the principle that rights exist without positive laws is further evidence of the influence of Catholic social teaching on the drafters of the Constitution. The Catholic Church has argued that natural law is the law of the Church. If one were to accept this argument, it could potentially follow that natural law/church law was superior to Irish constitutional law. In a letter to de Valera, McQuaid wrote that 'once a State acknowledges God's right to public worship, it cannot be secular, even if it is not Catholic. And when the State legislates according to natural law, of necessity it legislates according to Catholicity, because the latter is the guardian of the natural law'.<sup>177</sup> However, while a textual analysis of the Constitution would appear to indicate that Aquinian natural law was an influence, the courts have tended towards a more confused view of natural law in that they have, according to Clarke, used five different natural law arguments within their jurisprudence.<sup>178</sup>

Declan Costello wrote in the Jesuit periodical *Studies* that while Article 40 is not couched in natural law language, Article 41 uses a Thomistic concept of man possessing rights by virtue of his rational nature.<sup>179</sup> He further argues that where Articles of the Constitution can be traced to 'philosophical truths' they can act as real safeguards to individual liberty. Perhaps the main exponent of natural law from the bench was Mr Justice Walsh who in *Attorney General v McGee*<sup>180</sup> asserted that: '[T]he natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men.' He then stated that in light of the 'acknowledgment of Christianity in the preamble and in view of the reference to God in

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<sup>176</sup> See Chapter 3.

<sup>177</sup> UDCA, *De Valera Papers*, P. 150/2419.

<sup>178</sup> See Clarke, Desmond, 'The Role of Natural Law in Irish Constitutional Law', (1982) *Irish Jurist* 17, p.187. Five different types of natural law have been cited by Des Clarke. First, those rights which are contingent on various natural facts, events or relations-such as the existence of a blood tie between adult and child-but the validity or justification of which rights is derived from some independent constitutional, legal or moral source. Second, it can be on the basis of humanity. Thirdly, it might denote a sub-class of the two previous meanings, that is, certain basic rights enforceable against persons in a natural relationship. Fourthly, it can derive from the nature of, or a definition of justice. Finally, it may describe those rights derived from, and which conform with, God's will.

<sup>179</sup> Declan Costello, 'The Natural Law and the Irish Constitution', (Winter, 1956) *Studies* 45, p.403.

<sup>180</sup> [1974] IR 280.

Article 6 of the Constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgement of the ethical content of law in its ideal of justice.’<sup>181</sup> Writing extra-judicially in *Studies* Walsh J wrote that ‘[I]n both Irish and United States constitutional law the fundamental rights of the citizen held to be guaranteed and protected are not confined to those which are enumerated in the respective Constitutions. In both countries legal positivism has been rejected by the judges.’ Walsh then states that a consequence of this development was that judges could develop what is called ‘legal humanism’. He wrote that

‘Legal humanism is the name given to that legal approach which underlines the importance of human needs and feelings. The guaranteed and protected natural rights protect persons not only against the State but against society itself. In such jurisdictions the law is subordinate to justice. The judge in the administration of justice must take note of major changes in social values and in public attitudes to human feelings. He must not only provide judicial remedies for persons whose rights have been infringed but he must also be able to recognize what constitutes a right which falls within the guarantees and requires the protection of a remedy. This I believe to be the spirit which informs the administration of law in matters of fundamental rights in both Ireland and the United States.’<sup>182</sup>

Walsh J’s vision of the Irish legal system was one which appeared to accept natural law as a fundamental component in adjudication.<sup>183</sup> Perhaps the main strength of the Church in Ireland was its influence over man’s conscience, and its use of natural law to justify its teachings. The Church has used its own theory of natural law as moral law that is universally binding. The Catholic Church argues that there are objective moral values, which can be discovered by reason, independently of religious faith, and that those values are the natural law of the church. Natural law, therefore, refers to moral values rather than to any particular theory or coherent account of these values. Pope Pius XII, in the encyclical *Humani Generis* (1950) said that ‘absolutely speaking, human reason by its own natural force and light can arrive at a true and certain knowledge...of the natural law’. The Constitution appears to endorse a natural law

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<sup>181</sup> Ibid. 318-319

<sup>182</sup> Brian Walsh, ‘Comment’, (Winter, 1974) *Studies* 63, p.337.

<sup>183</sup> However, this view was later rejected in *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 in which the Supreme Court stated that the Courts ‘at no stage recognised the provisions of the natural law as superior to the Constitution.’

approach. Therefore, a non-positivist judicial philosophy is mandated by positive law i.e. the Constitution.<sup>184</sup>

### **Nationalism, Republicanism and Catholic Thought**

The 1937 Constitution unites republicanism and nationalism. In the Irish context these ideologies are frequently viewed as interchangeable. But Republicanism is based on the ideas of the Enlightenment with its emphasis on freedom and reason replacing authority. This reached its apex with the American and French revolutions and it was the republicanism espoused by Tone and Emmet. Nationalism stems from the counter enlightenment and is based on sentiment and tradition. Nationalism can also accommodate monarchy, whereas republicanism excludes it. Indeed, the founder of Sinn Féin, Arthur Griffith, was a cultural nationalist monarchist. Enda McDonagh writes 'The 1937 Constitution sought to give expression to this combination of nationalism and republicanism. It did not avert to the strains likely to result when the enlightenment's rational republicanism was joined with a Romantic concept of a nation'.<sup>185</sup> The 1937 Constitution then contains a further paradox between two disparate ideologies: republicanism and nationalism. When republicanism and nationalism merge, it means a weakened form of pluralism in society. This follows from the irrational nature of nationalism which weakens the protections and tolerance for minority communities as society becomes subsumed into a shared ethnic and cultural background with a common history. There was a deep distrust of republicanism within the church during the early years of the State as the Church associated Republicanism with French anti-clericalism. This distrust may be viewed as surprising given the close connection which later developed between republicanism and Catholicism in defining national identity. But their entwining must be viewed in the context of post-colonial secessionism as the further the State affirmed its Catholicity the further it strengthened its sovereignty.

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<sup>184</sup> Duncan argues that 'the theory that the natural law stands above the Constitution is being justified by the terms of a human instrument, the Constitution, which is itself subject to natural law. The Constitution cannot be both subject to the natural law and the legal justification for the subjection.' William Duncan, 'Can Natural Law be used in Constitutional Interpretation?' (1995) 45 *Doctrine and Life* 125, p.127. See also Oran Doyle, 'Legal Validity: Reflections on the Irish Constitution' (2003) 25 *DULJ* 56, p.65-66.

<sup>185</sup> Enda McDonagh, 'Philosophical and Theological Reflections on the Constitution', *Constitution of Ireland 1937-1987*, p.196.

The inclusion of aspirational nationalism within the text should not be viewed as separate to the Catholicity present in the text. Rather, both the Constitution's Catholicity and nationalism are entwined in their promulgation of secessionism in a post-colonial context. As stated previously, it is important that Constitution making and polity building in Ireland during this period be understood in a post-colonial context as the philosophical mind set is one of coloniser and colonised. Therefore, it is anachronistic that the Constitution should represent both continuity and rejection. Rejection lies in the tectonic philosophical shift from British liberalism to a hybrid system immersed in the influence of Catholic social teaching, while continuity lies in the basic institutional framework, judicial and government. But the core intention underpinning the Constitution is secessionist and post-colonial in outlook and aspiration. In light of the excommunication of Republicans, including de Valera during the Civil War, it may be argued that those republicans who became Fianna Fáil were not as bound to Catholicism as sometimes portrayed. Seán Lemass had indeed been critical of the church giving a quite venomous anti-clerical speech in 1925.<sup>186</sup> One can only speculate as to the genuineness or otherwise of de Valera's Catholicism but it seems likely that while it was largely sincere, it came second to his belief in secessionist republicanism.

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<sup>186</sup> Lemass as young politician gave the speech during a by-election campaign: 'The question of the political influence of the Catholic clergy, an influence with uncanny consistency to defeat the aspiration of Irish nationality had to be faced sooner or later... Whenever the Irish people came within sight of national independence the full political power of the church was flung against them, and forced back. That political power must be destroyed if our national victory is ever to be won... We are opening the campaign now against the political influence of the church. If we succeed in destroying that influence we will have done good work for Ireland and, I believe, for the Catholic religion in Ireland.' Quoted in Joe Lee, *Ireland 1912-1985, Politics and Society*, p.160-161 On the other hand in July 1927 Lemass wrote to Archbishop Byrne asking: 'Am I morally justified in taking the Oath outlined in Article 17 of the Constitution of the Irish Free State, seeing that I am publicly pledged to my constituents, and privately determined also, to nullify, by every honourable means available to me, the authority of the British Crown and Cabinet in Irish Affairs'. DDA, *Byrne Papers*, 466, 8 July 1927. Lemass's government had appointed Walsh J to the Supreme Court in 1961. Walsh J quoted Lemass as having said to him on his appointment that he hoped the Court would follow the activist line of the American Supreme Court under Warren CJ (quoted in Sturgess and Chubb, *Judging the World: Law and Politics in the World's Leading Courts*, Butterworths, London, 1988, p.144.)

There was a certain peculiarity to de Valera's position as his party had been labelled as communistic by Cumann na nGaedheal during the 1932 general election. The fact that Fianna Fáil's accession to power in 1932 represented both a continuation and an increase in the State's religiosity is surprising given the perception of the party as renegade. John A. Murphy writes 'distrust of de Valera was expressed from many a pulpit in 1927 (the traditional lay dissent being often expressed by walking out) when he sought a constitutional return to power; the distrust was not finally allayed till he proved his respectability in office'.<sup>187</sup> It seems likely that de Valera as the shrewd tactician he was saw the need to reassure the public of his own devotion to the church in the interest of electioneering as much as his own religious beliefs. It was clear de Valera would oppose the hierarchy when he felt they were wrong about the Irish Republic. Murphy states it 'is hardly an exaggeration to say that the Irish revolution of 1913-1921 completely bypassed the priests, and that it was carried through without benefit of clergy'.<sup>188</sup> Again this clearly indicates a separation between Republicanism and Catholicism. However, as Chubb states 'Irish republican thought, though deriving in general from American and French ideas, was never in the main stream of European liberal theory. It had on the whole never been doctrinaire or dogmatic and was now, with national independence achieved, becoming ever more qualified and modified by the influence of Catholic teaching.'<sup>189</sup>

### **How Catholic is the Constitution?**

The Constitution was drafted at a time which Wheare describes as the 'fresh start'<sup>190</sup> or the early period of post-colonialism during which most Constitutions are written. The 1922 Constitution did not represent the required 'fresh start' and so was abandoned. But the 1937 Constitution could never be entirely a 'fresh start' and many of the rights contained within the Constitution such as habeas corpus, freedom of expression, religious freedom, freedom of association and the inviolability of the citizen's home are essentially British liberal legal concepts. The legal concepts that stem from the British liberal tradition might be described as agreed legal procedures. Desmond Clarke states

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<sup>187</sup> Murphy A. Murphy, (1969) *Christus Rex*, p.297.

<sup>188</sup> *Ibid.*

<sup>189</sup> Basil Chubb, *Constitutional Change*, p.24.

<sup>190</sup> KC Wheare, *Modern Constitutions*, p.9.



that 'moral and political theory, no less than agreed procedures of basic law, significantly determine the provisions of a country's constitution'.<sup>191</sup> Clarke's idea is helpful in categorising the paradox between continuity and rejection which lies at the heart of the Constitution. The State's moral and political theory was deeply immersed in the Catholic tradition, but there was agreement on legal and governmental procedure that ran concurrently with the State's Catholicity and secessionism and it is these disparate streams of thought that run into the Constitution.

John Whyte described the Irish Constitution as enshrining 'Catholic principles in the law of the land.'<sup>192</sup> Murray described the Constitution as a 'formal expression of de Valera's commitment to the principle of a Catholic Republic.'<sup>193</sup> FSL Lyons described Articles 41-44 of the Constitution as being 'distinctly Catholic'<sup>194</sup> and as being based on the encyclicals of Pope Pius XI and the Catholic Social Code.<sup>195</sup> Hogan on the other hand argues that the extent to which the Catholic Church was an influence on the 1937 Constitution has been overstated and that much of the content of the Constitution has in fact been derived from secular and rationalist theory.<sup>196</sup> He argues that the reason why the Courts have been able to decide cases in a way which is clearly contrary to the teachings of the Catholic Church is because they have chosen to ignore a textual analysis of the Constitution in favour of reliance on common law principles and legal methodology to create an *acquis constitutionnel*. Hogan's distinction between rational theory and Catholic theory appears to presume that Catholic theory is in some sense irrational. While secular and rational are used as interchangeable terms, he also argues that modern scholarship has indicated that the Catholic Church was 'unhappy' with the 1937 Constitution. While it is true that the Vatican hierarchy refused to endorse the new Constitution, it did not express discontent with its contents preferring instead to

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<sup>191</sup> Desmond Clarke, 'The Concept of the Common Good in Irish Constitutional Law', (1979) *Northern Ireland Legal Quarterly* 30, No.4, p.320.

<sup>192</sup> John Whyte, *Church and State in Modern Ireland*, p.56.

<sup>193</sup> Patrick Murray, *Oracles of God the Roman Catholic Church and Irish Politics, 1922-1937*, p.291.

<sup>194</sup> FSL Lyons, *Ireland since the Famine*, Fontana P, London, 1973, p.544.

<sup>195</sup> The synthesis of Catholic social teaching was published by the International Union of Social Studies, Malines, Belgium in *Code of Social Principles* (1927) a copy of which can be found in the *McQuaid Papers*, DDA, AB8/A/V (47-61).

<sup>196</sup> See Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) *Irish Jurist* 32, p. 396

remain silent. However, Vatican radio welcomed the new Constitution stating 'It is a Constitution which embodies the Catholic principles of the Irish nation - a Constitution which found its inspiration in the Papal encyclicals.'<sup>197</sup> John Charles McQuaid wrote in March 1937 of one of the final drafts of the Constitution to de Valera: 'It is such a joy to see it in print; now it remains to see it enacted. It reads very well. I think I note a few changes made.'<sup>198</sup> Hogan's second argument, that judges have ignored the Constitution and thereby arrived at secular and rational decisions appears to negate his first point. If the Constitution was as 'secular and rational' as he asserts, then surely judges would not have to adjudicate according to extra-constitutional principles, but could come to such judgments according to the secular and rational text of the Constitution.

Hogan has also used a comparative framework to argue that Ireland's constitutional sphere was not remarkable in terms of the State's attitude to religion. In comparing Ireland with other countries it is important to note the level of Catholicity present in the general population, the overlapping between morality and social and professional capital, the complex and sensitive relationship between the Irish government and Unionism and Protestantism, and the extent to which certain statutory laws had come to reflect Catholic values. These factors combined indicate that the Catholic Church was a significant voice in the constitutional development of the nation as well as its wider social and civic life. Hogan correctly argues that the relationship between Church and State in Ireland is unexceptional given the fact that it rejects the post-Reformation principle '*Cujus regio, ejus religio*' (the religion of the ruler determines the religion of the State). This principle operates in Britain where the monarch is the 'Supreme Governor' of the Church of England and where the appointment of bishops of that Church is a crown prerogative, exercised by the Prime Minister. In certain Scandinavian countries, such as Norway, Lutheran Churches are State churches. In Germany there are religious taxes to support religions from which citizens have the option to exempt themselves. There is also a German concordat regulating relations

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<sup>197</sup> *Vatican Radio*, Christmas 1938.

<sup>198</sup> UCDA P150/2395, McQuaid to de Valera, 16 March 1937.

between Rome and Germany. In Italy there is also a concordat, originally signed by Pope Pius XI with Mussolini in 1929, which regulates Church-State relations. The other extreme is represented by countries such as France and Turkey which operate under a strongly secular and anti-clerical political ideology.

Enda McDonagh describes the Irish Constitution as ‘by no means perfect – either in its democratic aspirations or in its adaptation of Catholic teaching,’ but that it was ‘a fairly successful union of democracy and Catholic teaching’, and that it ‘is a splendid achievement and its general solution of the Church-State problem has much to offer to modern politicians and theologians in their search for a satisfactory formula’.<sup>199</sup> The Irish Constitution is heavily influenced by the confessional climate in which it was drafted. Yet, it also carries with it the nation’s history of colonisation and outside influence. At the heart of the Constitution lies a paradox between a desire to break the link with Britain and the continuity which lies in the influence of the British liberal tradition on institutional government in Ireland. This paradox stems from the cultural dependence and antagonism which are the result of false representation and colonial rule. The Constitution was designed to reflect the exceptionalism of Irish identity and it achieved this through emphasising the nation’s Catholicity. The nation’s struggle for cultural particularism meant it came to be defined in opposition to its past, but yet anachronistically the 1937 Constitution also represented a continuation of the nation’s colonial influence. The Constitution must be viewed in the context of a reaction to the anthropological, cultural and philological alterations which took place as a result of colonisation. This historical contextualising of the text may help to explain the didactic romantic nationalism and Catholicity in the text as it sought anthropological renewal and rebirth based on sentiment, tradition and religiosity. The 1937 Constitution was part of a process of cultural de-colonisation and an attempt to create a new narrative for Irish history. The roots of this process can be traced back to 18<sup>th</sup> century enlightenment republicanism, 19<sup>th</sup> century counter-enlightenment nationalism and the prevalence of clericalism within Irish society. Ireland needed to assert what Benedict Anderson calls

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<sup>199</sup> Enda McDonagh, ‘Church and State in the Constitution of Ireland’, (1961) *Irish Theological Quarterly* 28, p.131.

the 'imagined community',<sup>200</sup> the nation needed to demonstrate its identity and construct an indigenous constitutional narrative. But a nation cannot be separated from its history, so despite the desire for cultural decolonisation the Constitution carried with it the legacy of colonial rule. Decolonisation and the search for self-representation coincided with the apex of clericalism within Irish society resulting in a Constitution that was heavily imbued in Catholic thought. I now turn to examine the textual evidence of Catholicity amongst the judiciary during this confessional pre-Vatican II period of Irish history.

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<sup>200</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London, 1991.

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## Chapter 3 Judicial Deference to the Catholic Church in the Early Years of the State

### Introduction

In examining Church-State relations it is important to bear in mind the covert and secretive nature of much of the contact. Therefore, by its very nature there is likely to be a scarcity of documentary evidence showing the extent to which the Catholic Church may have been an influence on the legal sphere. While government papers and private clerical papers may be of value, there will of course be no record of a discrete phone call or a private word in a senior official's ear. Basil Chubb in reviewing *Church and State in Modern Ireland* alluded to this difficulty stating '[T]he subject that John Whyte deals with in this book is one of the most difficult in contemporary Irish history. To attempt to measure 'political influence' is difficult in any case. To assess the influence of the Irish catholic church upon the Irish state poses particular problems. They arise from...the private nature of many of the transactions as they occur – a privacy often desired by both parties – and the layers of myth, gossip and innuendo which in this country in the past have been quickly deposited over and around almost any transaction between public authorities and bishops.'<sup>1</sup> Whyte estimated that in the period up to 1970 there had been only three or four dozen occasions in which the government and the Catholic bishops had been in contact on some matter of legislation or policy. The main areas of contact were family law, education and issues with a perceived moral aspect such as liquor licensing laws. It should be noted that there may also have been covert contacts and legislation or policies which were not even suggested because it was clear the hierarchy would object.

The Catholic Church's cultural hegemony manifested itself textually in the 1937 Constitution and coincided with a period of cultural and philological renewal. But the relationship between this government sanctioned and encouraged Gaelicisation and Catholicisation of Irish society created particular difficulties for a legal system that was so immersed in the English common law system. As W.T. Cosgrave in a circular to the

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<sup>1</sup> Basil Chubb, 'Review of *Church and State in Modern Ireland*', (1972) *Irish Historical Studies* 18, p.116.

Judiciary committee set up to review the Irish legal system with Hugh Kennedy at the helm, dated 29 January 1923, stated ‘The body of laws and the system of judicature so imposed upon this Nation were English (not even British) in their seed, English in their growth, English in their vitality... Thus it comes about that there is nothing more prized among our newly won liberties than the liberty to construct a system of judiciary and an administration of law and justice according to the dictates of our own needs and after a pattern of our own designing.’<sup>2</sup> The judgments of George Gavan Duffy best exemplify the contradiction between cultural renewal and continuity as he sought to create an indigenous Gaelicised constitutional narrative through rejecting British precedent and emphasising Irish cultural independence through reliance on Catholic doctrine. His judgments also frequently exemplify how law can reflect broader social norms and the ethos of the community in which adjudication takes place. That is, certain judgments clearly reflect the social and culturally hegemonic position of the Catholic Church in Irish society during this period.

The early jurisprudence of the superior courts was characterised by a dearth of constitutional judgments. There appeared to be a lack of engagement on the part of the judiciary with either the 1922 Constitution or the 1937 Constitution during the early years of the State. The radical political transformation of Irish society brought about during the revolutionary period (1916-1922) meant particular problems for the judiciary. The power of judicial review contained in the 1922 Constitution was largely ignored by the judiciary ‘chiefly because the legal culture was unreceptive to the novel concept of judicial review of legislation based on fundamental concepts of human rights’.<sup>3</sup> During the period 1922-1937 the power of judicial review was only utilised on two occasions.<sup>4</sup> John Kelly noted that judges from this period ‘were used to the idea of the sovereignty of

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<sup>2</sup> Joe Lee, *Ireland 1922-1985*, Cambridge UP, Cambridge, 1989, p.128 Similarly, in *Melling v Ó Mathghamhna* [1962] IR 1, 46 O Dálaigh J recognised this desire for a fresh start in rejecting pre-1922 standards as a guide in interpreting the 1922 Constitution stating: ‘The framers of the Constitution of Saorstát Éireann had no particular reason to look with reverence or respect to the British statute roll in Ireland as affording them an example of standards which they would wish to enshrine in their new Constitution...’. See also Lavery J in *Byrne v Minister for Finance* [1959] IR 1, 43.

<sup>3</sup> Gerard Hogan, ‘The Constitution Review Group of 1934’ in Ó Muirceartaigh (ed.) *Ireland in Coming Times: Essays to Celebrate TK Whitaker’s 80 Years*, Dublin, IPA, 1997 p.344

<sup>4</sup> Hogan cites these two cases as *R (O’Brien) v Governor of North Dublin Military Barracks* [1924] 1 IR 32 and *ITGWU v TGWU* [1936] IR 471.

parliament, and notions of fundamental law were foreign to their training and tradition. The effect of these clauses in the 1922 Constitution was thus minimal.<sup>5</sup> The 1937 Constitution ushered in certain seismic philosophical changes in the creation of Ireland's indigenous constitutional law. The judiciary appeared slow to recognise this shift away from legal positivism, which characterised the 1922 Constitution, toward Christian-democracy as one of the main characteristics of Constitutionalism in Ireland. Indeed, it was not until the 1960s and the Ó Dálaigh Supreme Court that the potential of the 1937 Constitution was realised, in particular as a source of unenumerated constitutional rights.<sup>6</sup> In this chapter I examine evidence of Catholicity in the development of Irish jurisprudence following independence. I argue that while there is significant evidence of judicial deference to the Catholic Church (particularly Gavan Duffy J), the evidence of Catholicity is less than might be expected given the pervasive influence and hegemonic position of the Catholic Church during this period. I argue that the reason for this is the residual influence of the British principal of parliamentary supremacy which limited the powers of the judiciary. The unassertiveness of the judiciary meant that Church-State relations were conducted on a bipolar basis between Church and Government and the judiciary was generally not an active participant in Church-State politics from the 1920s to the early 1960s. Gavan Duffy J's judicial activism was underpinned philosophically by his jurisprudential nationalism and his Catholicity. I first turn to a piece of archival evidence demonstrating judicial deference to the Catholic Church.

### **Judicial deference to the Catholic Church**

An example of judicial deference to the Catholic Church in the early years of the State arose in the context of the ban placed on Catholics attending Trinity College, Dublin. The Catholic hierarchy was deeply suspicious of Trinity College, Dublin owing to the emphasis which the college placed on its Protestant ethos. This ban was adverted to in a letter from Kennedy CJ to Archbishop Byrne of Dublin regarding the appropriateness of his sending Catholic wards of court to be educated in Trinity College. Kennedy CJ wrote (22 April 1928):

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<sup>5</sup> John Kelly, *Fundamental Rights in the Irish Law and Constitution*, Hodges Figgis, Dublin, 1967, p.16-17.

<sup>6</sup> See *AG v Ryan* [1965] IR 294.

‘Dear Lord Archbishop,

Will you forgive my troubling you to help me on a point of difficulty which sometimes occurs with me in practice. As your grace knows perhaps, I am responsible for the education of a large number of minors of all ages, many of whom are Catholics, and I am bound – in the case of Catholic minors – to give them a Catholic education. As I understand, the Bishops have never raised the ban which they placed upon Trinity College as a place of education for Catholic wards entering Trinity College for the purpose of University studies. I have required them to proceed to the National University. I have recently had some vigorous protests on the subject. It has been pointed out to me that many Catholic boys are now proceeding direct from Catholic schools in Trinity College, apparently with the sanction of their school authorities (generally clerics) who prepare them for the entrance exams. It is urged upon me that this is clear evidence that TC has now become acceptable for the higher education of Catholic youth (male and female) and that the authorities of the Catholic Church in Ireland no longer object to the sending of Catholic boys and girls to pursue any of the University courses of study in that institution.

I have been personally much surprised because it was on the ground of the ecclesiastical ban that I was myself diverted from Trinity, for which I was originally prepared, to the old Royal University; and, though I have always kept in pretty close touch with the current University history, I do not remember to have heard that the ban had been lifted, nor indeed, so far as I know, has there been any change in the teaching, the courses of study or the government or organisation of TC or Dublin University, which would substantially alter the state of affairs existing at the time when the ban was first imposed.

As the matter is one of considerable importance for me in my care of Catholic wards, I take the liberty of asking Your Grace for guidance as to the present position of the Church in the matter.’<sup>7</sup>

The Archbishop wrote in reply on 14 May 1928:

‘In reply to your letter about Trinity College allow me to express my appreciation of the thorough soundness of your views and the Catholic manner in which you put them into practice. As you very properly say you hold a heavy responsibility for the Catholic character of the education of Catholic Minors under your wardship and you are, of course, anxious to prevent their attendance at any educational institution which bears the mark of the Church’s disapproval. Now I may state definitely that there is no change in the Church’s attitude towards Trinity College. It is still an institution to which a Catholic can go only at grave peril to his Faith; its atmosphere still remains Protestant and unsafe for our young people at the susceptible and formative period of their lives.’<sup>8</sup>

Kennedy CJ wrote in response to the Archbishop dated 17 May 1928:

‘I beg respectfully to thank you grace for your most helpful letter and very full advice. I am very happy to have such guidance in laying down a definite policy and rule in the administration of my office as regards the education of my Catholic wards. There is no doubt that a very loose mentality on this subject prevails in this country at the moment, fostered partly by social folly, partly by ignorance: The ignorance is I believe due in some measure to our wretched press. Formally the Lenten Pastoral was published in full and was read and studied as a whole by the people, whereas

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<sup>7</sup> DDA, *Byrne Papers*, 466, 22 April 1928.

<sup>8</sup> UCDA, *Hugh Kennedy Papers*, P4/1236(1), 14 May 1928.



now we are supplied with badly made clippings by newspaper sub-editors, who destroy the effect of the most impressive introduction by the manner of presentation.’<sup>9</sup>

This correspondence between the first Chief Justice and the Archbishop of Dublin is an explicit example of a member of the judiciary deferring to a member of the Catholic hierarchy. It is indicative of the cultural climate and the developing assertiveness of the Catholic hierarchy during that period. It should be noted that it was Kennedy CJ who initiated the correspondence and not the Archbishop of Dublin. It is therefore an example of judicial deference to the Church rather than direct clerical interference. Archbishop Byrne was to reinforce the hierarchy’s prohibition on Catholic attending Trinity College in his Lenten pastoral in 1930:

‘Non-Catholic Colleges, inasmuch as they are intrinsically dangerous to faith and morals, remain under the ban of the Church. Since there are within the Irish Free State three University Colleges sufficiently safe in regard to faith and morals, we, therefore, strictly inhibit, and under pain of sin, we forbid priests and all clerics by advice or otherwise, to recommend parents or others having charge of youth to send the young persons in their charge to Trinity College. Likewise, we forbid priests and clerics to recommend young people themselves to attend Trinity College.’<sup>10</sup>

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<sup>9</sup> DDA, *Byrne Papers*, 466, 17 May 1928. In June 1932 Archbishop Byrne received a letter from Alfie Byrne, James Larkin (and others) relating to a Mrs Jane Cousins who was sentenced to death asking that the Archbishop intervene as if he did we feel ‘the sentence would be commuted’. Ibid. 24 June 1932. A letter dated 25 June 1932 to Archbishop Byrne from the Dept of Justice stated: ‘As a Notice of Appeal was lodged almost immediately after the verdict and sentence the case has not come before me for consideration. Your grace will readily understand that unless and until the Appeal has been dismissed by the Court of Criminal Appeal I am not entitled to assume that the Appeal is not well founded. If the decision of the Court of Criminal Appeal renders it necessary for me to investigate the facts and circumstances, I shall certainly have regard to the representations of Your Grace.’ Ibid. 25 June 1932. A similar though earlier instance of clerical interference in the legal process is referred to by Brendan Ó Cathaoir in *Clare History and Society 1700-1945*. The case concerned the murder of a Mrs Kilmartin who was the wife of a herder. Four men were charged with her murder and a charge was preferred to a jury in the Central Criminal Court on 7 December 1926. It was unclear what happened following this but Ó Cathaoir writes: ‘A search among the files of the local press and in the National Archives proved inconclusive. Eventually, I was privileged to meet the last surviving member of the Kilmartin family. In her home on the top of the Corkscrew Hill, Winifred Agnes Keane, aged 92, provided the missing information. In a paradigm on post-Civil War Ireland, she maintained: “It was the priests got them off.” The case was quashed apparently through the intervention of James Considine, PP, Carron and his brother, Dean Anthony Considine. This scandalous abuse of clerical power reeked of class distinction and reflected the prevailing attitude towards the children of herdsmen: “They’ll manage somehow.” In conversation with the author he expressed the view that it was likely that the wrong people had been charged with the crime. Brendan Ó Cathaoir ‘Another Clare: Ranchers and Moonlighters, 1700-1945’, *Clare History and Society 1700-1945*, Geography Publications, Dublin, 2008, p.404-406.

<sup>10</sup> Archbishop Byrne, Lenten pastoral, April 1930, quoted in John Whyte, *Church and State in Modern Ireland*, p.305.

The principle of denominationalism was reinforced by Archbishop Byrne's successor, Archbishop McQuaid when he stated that parents have a 'most serious duty to secure a fully Catholic upbringing for their children...only the Church is competent to declare what is a fully Catholic upbringing...Those schools alone, of which the Church approves, are capable of providing parents and guardians [with a Catholic education]...Deliberately to disobey this law is a mortal sin and they who persist in disobedience are unworthy to receive the sacraments.'<sup>11</sup> However, the Archbishop was prepared to accept the NUI colleges were acceptable to Catholics although they failed to acknowledge the one true faith. In 1956 the Maynooth Synod decreed: 'Only the Dublin Ordinary is competent to decide, in accordance with the instructions of the Apostolic See, in which circumstances and with what guarantees against the danger of perversion, attendance at that college [Trinity] can be tolerated.'<sup>12</sup> Seven years after writing to the Archbishop of Dublin the first chief justice was to demonstrate his belief in an independent legal system in *State (Ryan) v Lennon*.<sup>13</sup>

### **Judicial Rejection of Natural Law**

Kennedy CJ appeared to be an isolated figure on the bench in being receptive to natural law arguments as it appeared that natural law would have little role to play in Irish jurisprudence when a majority of the Supreme Court rejected the argument that certain rights were so fundamental as to be beyond the power of the Oireachtas to abridge by way of amendment of the written Constitution.<sup>14</sup> The Court held that the insertion of article 2A into the 1922 Constitution providing for internment without trial and military

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<sup>11</sup> Quoted in John Whyte, *Church and State in Modern Ireland*, p.306.

<sup>12</sup> Quoted in Louise Fuller, *Irish Catholicism since 1950*, p.16. Trinity College's vice-chancellor, Thomas Moloney was unhappy with the Archbishop's attitude and in 1944 the Catholic vice-chancellor, fellows and staff of Trinity sent a declaration of devotion to the Pope and the Church. See Dermot Keogh, *Ireland: Nation and State*, Sweet and Maxwell, Dublin, 2000, p.146. Trinity College was also to play a role in the Mother and Child Scheme controversy as Minister for Health, Noel Browne had been educated in Trinity. This factor may have further stiffened McQuaid's opposition to the scheme. The ban on Catholic students attending Trinity was lifted in 1970 reflecting social changes, the influence of ecumenism and institutional reforms within the Church.

<sup>13</sup> [1935] IR 170.

<sup>14</sup> See Gerard Hogan 'A Desert Island Case Set in the Silver Sea. The State (Ryan) v Lennon (1934)' in O'Dell (ed), *Leading Cases of the Twentieth Century*, Round Hall, Dublin, 2000, p.80. Kennedy CJ demonstrated his nationalistic aspirations for the Irish legal system in his thwarted attempt to introduce a legal costume based on the costume used by Brehan judges to replace the wig and robe. See James Dougherty, "'Ocular Demonstration" or "Tremendous Treasure"' *History Ireland*, 18 (May/June 2010).

courts were valid notwithstanding that their effect was to abrogate to some extent the constitutional guarantees of fundamental rights.

The majority of the Supreme Court rejected the argument put forward by counsel for the applicants that the provision was repugnant to natural law. Fitzgibbon J said:

‘[Counsel for the applicants] assert that there are certain rights, inherent in every individual, which are so sacred that no Legislature has authority to deprive him of them. It is useless to speculate upon the origin of this doctrine which may be found in the writings of Rosseau, Thomas Paine, William Goldwin...as we are concerned, not with the principles which might or ought to have been adopted by the framers of our Constitution, but with the powers which have actually been entrusted by it to the Legislature and Executive which it set up. “The Declaration of the Rights of Man and of Citizens” by the National Assembly of France on October 5<sup>th</sup>, 1789, that “liberty, property, security, and resistance to oppression are the natural and imprescriptible rights of man”, cannot be invoked to overrule the provisions of a statute enacted in accordance with the provisions of a written Constitution. When a written Constitution declares that “no person shall be deprived of his liberty except in accordance with the law”, then if a law is passed that a citizen may be imprisoned indefinitely upon a *lettre de cachet* signed by a Minister or, as we have seen, even by a Minister’s clerk: *The State (Quinlan) v Kavanagh* the citizen *may* be deprived of his “inviolable” liberty, but, as the deprivation will have been “in accordance with the law”, he will be as devoid of redress as he would have been under the regime of a French or Neapolitan Bourbon...

Unless, therefore, these rights appear plainly from the express provisions of our Constitution to be inalienable, and incapable of being modified or taken away by any legislative Act I cannot accede to the argument that the Oireachtas cannot alter, modify, or repeal them. The framers of our Constitution may have intended “to bind man down from mischief by the chains of the Constitution” but if they did, they defeated their object by handing him the key to the padlock in Article 50’.<sup>15</sup>

Fitzgibbon J is clearly asserting that the rights which exist are those which the State says citizens have. He rejects the idea that rights are capable of being based on natural law on the basis that the 1922 Constitution did not describe such rights as inalienable. He argues that if the Constitution did do so the Court would be bound to interpret the Constitution in such a way as to take account of the fact that particular rights are described as inalienable. Therefore Fitzgibbon J would be prepared to accept a non-positivist approach if the positive law itself was based upon such an approach. Therefore, a positivist approach could itself be used to justify a natural law approach if mandated by positive law.

Murnaghan J stated:

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<sup>15</sup> [1935] IR 170, 234.

‘In reference to...Articles which are alleged to be fundamental, the only criteria which the applicants can suggest is that the Court should undertake the responsibility of deciding in any set of circumstances which Articles should be held to be fundamental. Before the Court should seek to assume such a power it is, in my opinion, necessary that the Court should find a very stable foundation for such an exercise of jurisdiction.’<sup>16</sup>

The British tradition of the supremacy of parliament still hung over the Courts and had not been severed despite political independence. Both Fitzgibbon and Murnaghan JJ gave judgments which were influenced by British ideological influences which might loosely be defined as Protestant in origin or at the very least not Catholic. Indeed, by rejecting the idea of natural law, if the majority had Aquinian natural law in mind, they were directly placing themselves in opposition to the Catholic Church. Unlike Murnaghan J, Kennedy CJ did not fear the creation of unstable foundations in his dissenting judgment as he accepted the natural law arguments of the applicants:

‘The Constituent Assembly [conferred] on the Oireachtas [an amending] power...but that power is limited and circumscribed by a number of restrictions...In the first place, what I may describe as an over-all limitation arises in this way. The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend or repeal), that all lawful authority comes from God to the people, and it is declared by Article 2 of the Constitution that “all powers of government and all authority, legislative, executive, or judicial, in Ireland are derived from the people of Ireland”. It follows that every Act whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God. From this it seems clear that, if any legislation of the Oireachtas (including any purported amendment of the Constitution) were to offend against that acknowledged ultimate Source from which the legislative authority has come through the people to the Oireachtas, as, for example, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and inoperative.

I find it very difficult to reconcile with the Natural Law actions and conduct which would appear to be within the legalising intendment of the provisions of the new Article 2A relating to interrogation. I find it impossible to reconcile as compatible with the Natural Law the vesting, in three military servants of the Executive, power to impose as punishment for any offence within the indefinite, but certainly extensive, ambit of the Appendix, the penalty of death, whenever these three persons are of the opinion that it is *expedient*. Finally, the judicial power has been acknowledged and declared (and the acknowledgment and declaration remain) to have come from God through the people to its appointed depository, the judiciary and courts of the State. While they can fulfil that trust, dare one say that the natural law permits it, or a part of it, to be transferred to the Executive or their military or other servants?’<sup>17</sup>

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<sup>16</sup> Ibid. 240.

<sup>17</sup> [1935] IR 170, 204-205.

Kennedy CJ's strong dissent was the first sign that the Courts might be receptive to natural law ideas. However, at the time of *State (Ryan)* the courts were adjudicating in the context of the 1922 Constitution, which could be loosely defined as positivist in substance, in contrast to the 1937 Constitution.<sup>18</sup> Kennedy CJ was grounding his arguments, not in history or extrinsic ideologies, but in the Constitution Act, the nature of the judicial power and Article 2 of the 1922 Constitution, the same Constitution that was legally bound to the Anglo-Irish Treaty and thereby the influence of British liberalism. To that extent Kennedy CJ's dissent is based on an interpretation of positive law and not simply pulled 'out of the air.'<sup>19</sup> The climate in which Irish lawyers and judges had been educated was heavily influenced by the 19<sup>th</sup> century British liberal tradition which viewed with derision the idea that rights could exist without law. While the majority in (*State*) *Ryan* represented the continuity which lingered on from independence, Kennedy CJ's dissent was a sign of future developments which would characterise Irish constitutional law beginning in the 1960s. The acceptance of natural law is more in line with Catholic thought than its outright rejection. However, there is no indication that Kennedy CJ was accepting a confessional view of natural law. Yet, the Church supported stability and the maintenance of the established order. The Church had expressed support for the military courts in the 1920s and had supported the provisional government's resistance against republicans.<sup>20</sup> Therefore, the majority judgments are in line with the Catholic Church's position to the extent that they support political stability and oppose the undermining of the established order. However, where the majority appear to part from a position which the Catholic Church would welcome is in their rejection of natural law. In 1935 the same people who had been attempting to undermine the State in 1922 were now in power and were viewed as the legitimate government by the Church hierarchy. Therefore, despite earlier Episcopal censure they were in the eyes of the Church legitimately protecting the established order from illegitimate destabilising forces.

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<sup>18</sup> Although the 1922 Constitution contained a reference to all lawful authority coming from God to the people, and Article 2 stated 'all powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland'.

<sup>19</sup> John Kelly, *The Irish Constitution*, p.1252.

<sup>20</sup> See Patrick Murray, *Oracles of God*, p.72.

Keane viewed Kennedy CJ's judgment as being particularly significant:

'...[T]he bill of rights provisions of the Constitution, the document to which Kennedy had contributed so notably, were to be virtually swept away by the Supreme Court itself three years later in *The State (Ryan) v Lennon*. Kennedy was an isolated dissident as FitzGibbon and Murnaghan in judgments redolent of Austinian positivism proclaimed the courts powerless in the face of executive and legislative intent on enacting draconian "law and order" measures'.<sup>21</sup>

Hogan regards Kennedy CJ's dissent as being less inspired by Aquinian natural law (as e.g. a judge like O'Hanlon J) than 'a personal judicial response to an extreme and draconian constitutional amendment which had been enacted by legislative sleight of hand without sanction of the electorate in the manner in which the Constitution had originally intended.'<sup>22</sup> Hogan described Kennedy CJ's dissent as displaying his hope for 'the creation of an indigenous legal system [and] for the development of a vibrant constitutional law, augmented by judicial review of legislation... This profound clash in judicial attitude-between what might conveniently be described as the enthusiastic nationalism of Kennedy CJ and the pessimistic scepticism of Fitzgibbon J – ultimately came to a head publicly in cases such as [*Ryan*]'.<sup>23</sup> Kennedy's belief in an indigenous legal system which would break with the Westminster model is similar to Gavan Duffy's judicial philosophy.<sup>24</sup> Kennedy's preparedness to follow the Catholic Church's position concerning Catholic wards of court combined with his judicial nationalism are indicative of the common cause which both Kennedy CJ and Gavan Duffy P shared. Both appeared to recognise that by facilitating the views of the Catholic Church it would create a distinctive and genuinely independent legal system.

### **Judicial Recognition of Foreign Divorces**

The judiciary's rejection of natural law appeared to fit uneasily with the mainstream of Catholic thought. There were also indications that the Courts were prepared to recognise

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<sup>21</sup> Ronan Keane, 'The Voice of the Gael: Chief Justice Kennedy and the Emergence of the New Irish Court System 1921-1936' (1996) *Irish Jurist* 21, p.203

<sup>22</sup> Gerard Hogan 'A Desert Island Case Set in the Silver Sea. *The State (Ryan) v Lennon* (1934)' *Leading Cases of the Twentieth Century*, 2000 p.95-96.

<sup>23</sup> Gerard Hogan, 'Chief Justice Kennedy and Sir James O'Connor's Application' (1988) *Irish Jurist* 23, p.156.

<sup>24</sup> Kennedy CJ demonstrated his hopes for an autonomous Irish legal system in his attempts to replace the traditional wig and robe attire of the legal profession with a brehon costume. His attempts were scuppered by the Unionist senator and judge Lord Glenavy. See James Dougherty, "'Ocular Demonstration" or "Tremendous Treasure"' in *History Ireland*, vol.18, no. 3, May/June 2010, p.34-37.

foreign divorces. This position is not in line with Catholic thought and was first stated in *Mayo-Perrott v Mayo-Perrott*<sup>25</sup> wherein Kingsmill Moore J stated:

‘The general policy of the Article seems to me clear. The Constitution does not favour dissolution of marriage. No laws can be enacted to provide for a grant of dissolution of marriage in this country. No person whose divorced status is not recognized by law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law, that dissolution of marriage by foreign courts, where the parties are domiciled within the jurisdiction of those courts, will be recognized as effective here. Nor does it in any way invalidate the remarriage of such persons...’<sup>26</sup>

These *obiter* comments, in so far as they provide for recognition of foreign divorces are in conflict with Catholic social teaching which had unequivocally condemned divorce as a threat to the sanctity of the family and society.<sup>27</sup> The judge was Protestant but as stated previously there were many within the Protestant community who supported the prohibition on legislating to provide for divorce. Therefore, his comments do not indicate that he was necessarily supportive of divorce nor are they necessarily representative of broader Protestant opinion on the issue. In *Bank of Ireland v Caffin*<sup>28</sup> Kenny J supported Kingsmill Moore J’s position in *Mayo-Perrott*. However, in *Gaffney v Gaffney*<sup>29</sup> Griffin J stated that the Supreme Court had not affirmed the position in *Caffin*. In 1986 the Oireachtas enacted the Domicile and Recognition of Foreign Divorces Act, which recognised as a rule of law the position that a divorce is recognised if granted in a country in which both spouses are domiciled.<sup>30</sup>

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<sup>25</sup> *Mayo-Perrott v Mayo-Perrott* [1958] IR 336.

<sup>26</sup> *Ibid* 348. It should be noted that Maguire CJ took the opposite view of Kingsmill Moore J.

<sup>27</sup> See John Kelly, *The Irish Constitution*, p.1879-1889.

<sup>28</sup> [1971] IR 123.

<sup>29</sup> [1975] IR 133.

<sup>30</sup> In the area of nullity the constitutional protection for the family and the now deleted provision prohibiting the introduction of legislation to provide for divorce meant that the burden of proof which had to be met by a petitioner was particularly heavy. In *S v S* [1976-77] ILRM 257 Kenny J stated that the burden of proof was beyond all reasonable doubt. However, in *N (otherwise K) v K* [1986] ILRM 75 McCarthy J stated the case for nullity had to be established on the balance of probabilities. In *S v K* (2 July 1992) HC, 33 Denham J described the burden as being of a ‘quasi-criminal trial nature.’ The grounds upon which nullity could be granted included duress, incapacity to form a caring or considerate relationship and misrepresentation. See *N (K) v K* [1985] IR 733 and *RSJ v JSJ* [1982] ILRM 263.

### Parents' Rights and Denominationalism

The Courts showed a willingness to uphold parental autonomy in relation to education during the early years of the State.<sup>31</sup> In *Burke and O'Reilly v Burke and Quail*<sup>32</sup> Gavan Duffy P ruled that a testamentary gift to a minor to whom the testatrix was not related was invalid as it stipulated the moneys were to be used for bringing up the minor in a Catholic school in Ireland. Gavan Duffy P ruled that it was an unconstitutional incursion into parental authority in so far as it dictated the religious upbringing of the minor. The judge held:

'the will at this point would override the sacred parental authority and defy the parental right and duty of education under Article 42 of the Constitution. Consequently, this clause in the will, however well-meaning from the standpoint of an anxious benefactor, is inoperative and must be ignored.'<sup>33</sup>

Gavan Duffy P's position was followed by Dixon J in *Re Blake, deceased*<sup>34</sup> in which a testator bequeathed a legacy to trustees in trust on condition that the beneficiaries were brought up as Catholics. The judge referred to Article 42 as putting the:

'matter on a different and higher plane in this country, as the parental right and duty is declared and guaranteed by our fundamental law...It is clear that any attempt to restrict or fetter that right would be contrary to the solemnly declared policy and conceptions of the community as a whole and therefore such as the courts established under that Constitution could not and would not lend their aid to. The provision in the will that the children to benefit should have been brought up in the Roman Catholic faith is, therefore, void as against public policy and cannot be given effect to. It is hardly necessary to add that this principle applies and must be applied irrespective of the particular religion involved.'<sup>35</sup>

Therefore, the Courts have upheld the paramount rights of parents against third parties in educating their children. However, parents must provide a certain minimum education or the children may be forced to attend school. Therefore, the right is not absolute just as the right to familial autonomy is qualified by the power vested in the State to intervene in exceptional cases of parental neglect. The powers vested in parents regarding the education of their children in reality rests with the Catholic hierarchy who control 3,000

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<sup>31</sup> In *In re Westby Minors* (No.2) [1934] IR 311,317 Murnaghan J stated that the court 'should not on an assumption of national policy force children to be educated in a way the parents do not approve.'

<sup>32</sup> [1951] IR 216.

<sup>33</sup> *Ibid.* 222.

<sup>34</sup> [1955] IR 89.

<sup>35</sup> *Ibid.* 97.



out of 3, 470 primary schools in the country. Parental autonomy was also encroached upon with the introduction of the Compulsory Attendance Act, 1926 which required children between six and fourteen to attend school or have a home education.<sup>36</sup> It is clear that the judiciary accepted the centrality of parental choice in its interpretation of the education provisions in the Constitution. This coincides with Catholic thought and represents an acceptance of a minimalist role for the State in education. The Courts in emphasising parental autonomy were indirectly strengthening the role of the Churches.

In 1943 the Supreme Court was to further strengthen parents' rights in education in striking down the School Attendance Bill, 1942 as a violation of parental rights. In 1942 President Douglas Hyde<sup>37</sup> referred the School Attendance Bill, 1942 to the Supreme Court to test its constitutionality. The Bill proposed that parents would be obliged to send their children to certain prescribed schools if they could not show the children were receiving 'suitable education within the meaning of this Act in a manner other than by attending a national school, a suitable school or a recognized school.' In *Re Article 26 and the School Attendance Bill, 1942*<sup>38</sup>, the Court considered that s.4 of the Bill was repugnant to the Constitution, ruling that the Minister in construing the section might require a higher standard of education than could be properly prescribed as the minimum standard under Article 42.3.2. The Court also felt that the standard might vary from child to child and accordingly did not constitute the standard of general application

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<sup>36</sup> The 1926 Act had an effect as average daily attendance as a percentage of the average number on the rolls rose from seventy-seven per cent in 1925-6 to eighty-two point nine per cent in 1930-31. See D.H. Akenson, 'Pre-University Education, 1921-84' in *New History of Ireland*, p.723.

<sup>37</sup> Douglas Hyde's funeral in 1949 is an extraordinary example of both the Catholicity and poor ecumenical relations at the time. The entire cabinet, instead of attending the funeral, waited around the corner of St Patrick's cathedral. However, under the Code of Canon Law it was permissible to attend such services as a matter of courtesy or civic duty, once there was no active participation. Despite this, Costello and his cabinet remained outside. Austin Clarke vividly described the episode in his poem 'Burial of an Irish President': 'At the last bench Two Catholics, the French Ambassador and I, knelt down. The vergers waited. Outside: The hush of Dublin town, Professors of cap and gown, Costello, his Cabinet, In government cars, hiding Around the corner, ready Tall hat in hand, dreading Our Father in English. Better Not Hear that 'which' for 'who' And risk eternal damnation.'

<sup>38</sup> [1943] IR 334. This was the first piece of legislation that the Supreme Court struck down under the 1937 Constitution. This fact may have been influential in the reluctance of the Department of Education to introduce new legislation until the Education Act, 1998. It seems that the motivation behind the 1942 Bill was: to prevent parents sending their children to be educated in England and to ensure the teaching of Irish in all primary schools. See WN Osborough, 'Education in the Irish Law and Constitution' (1978) *Irish Jurist* 13, p.145. It should be noted that the 1942 Bill did not benefit from the presumption of constitutionality as it would today.

contemplated by the Constitution. The Court also stated that the State could not control the manner in which parents provide the child's education, once they are providing a minimum standard of education.<sup>39</sup> The Court stated: 'The State is entitled to require that children shall receive a certain minimum education. So long as parents supply this general standard of education we are of the opinion that the manner in which it is being given and received is entirely a matter for the parents and is not a matter in respect of which the State under the Constitution is entitled to interfere.'<sup>40</sup> This exemplifies the constitutional emphasis which was now placed on parental autonomy and the opposition to State involvement which characterised Church-State relations in the wake of *Quadragesimo Anno*. This suspicion is also evident in the movement towards vocational organisation which ironically led to State run schools with a minimum of Church involvement under the Vocational Education Act, 1930.<sup>41</sup> Grogan described the Court's position as providing 'effective protection for denominational schools as being the means chosen by parents for their children's education.'<sup>42</sup>

### **Gavan Duffy and Catholic Thought**

George Gavan Duffy was born in 1882 and educated at Stoneyhurst and in France. He was the son of Charles Gavan Duffy who was a leader of the Young Ireland movement and founder of the *Nation*. He qualified as a solicitor and practiced in London until 1917.<sup>43</sup> During this period he prepared the defence of Roger Casement at a time when no other lawyer would accept the case.<sup>44</sup> Gavan Duffy was a reluctant signatory to the 1921 Treaty and was to change sides in 1922 resigning from his position as Minister for

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<sup>39</sup> A similar approach was evident during the drafting of Protocol 1(2) of the European Convention on Human Rights in 1950 when the Irish delegation objected to the Protocol on education as it did not explicitly protect parental choice and the right to educate at home.

<sup>40</sup> [1943] IR 346. More recently in *DPP v Best* [2000] 2 IR 17 the defendant was prosecuted under s.17 School Attendance Act 1926 for not sending her children to school without reasonable excuse. The Supreme Court stated that the absence of a statutory definition of 'suitable elementary education' did not preclude a conviction. The five judges provided general guidance on what would constitute 'a certain minimum education' and stated that the phrase 'suitable elementary education' could not be interpreted to require a level of education that exceeded the constitutional requirement of a 'certain minimum education, moral, intellectual and social'.

<sup>41</sup> Although vocational schools would generally have a cleric who would be a member of the board of management of the school. Frequently, there would be both a Catholic and Protestant member.

<sup>42</sup> Vincent Grogan, 'Schools under the Constitution' (Winter, 1970) *Studies* 59, p.378.

<sup>43</sup> See GM Goulding, *George Gavan Duffy 1882-1951: A Legal Biography* Irish Academic Press, Dublin, 1982.

<sup>44</sup> Gavan Duffy may be seen with his wife, Margaret, seated next to him in Sir John Lavery's painting 'The Trial of Roger Casement'.

Foreign Affairs. The staunchly republican, Mgr John Hagan, Rector of the Irish Pontifical College, Rome (1919-1930) wrote to Bishop Mulhern of Dromore in 1922 warning of the threat posed to the Church by the signatories to the Treaty and he expressed his hope that ‘neither Collins nor Griffith nor Gavan Duffy will be allowed to indulge the luxury of anti-clericalism to which I fear they may have some inclination.’<sup>45</sup> In light of Gavan Duffy’s later contribution to Irish jurisprudence it appears that Hagan’s charge of anti-clericalism was misplaced. Following his return to legal practice Gavan Duffy was appointed to the High Court becoming president of the Court in 1946.

An exception to this general lack of engagement with the potential of Constitutional law during the early years of the State, were the judgments of President of the High Court George Gavan Duffy. He appeared to recognise the potential of the 1937 Constitution and, in particular, Catholic social teaching as an influence on Irish constitutionalism and as a potential influence on the State’s jurisprudence. John Kelly described Gavan Duffy J’s judgments related to Article 44 as displaying ‘unique adventurousness’.<sup>46</sup> John Whyte described Gavan Duffy J as ‘a single individual who, because of his position, was able to exert an important influence’ and that ‘His judgments were noted for their trenchancy and originality, and he was one of the most important judicial innovators that Ireland has had. Where religious issues arose his policy was to use the provisions of the Constitution to override precedents built up by English and Protestant judges, and thus to give Irish law a more distinctly Catholic cast.’<sup>47</sup> Whyte also wrote that ‘Judge Duffy’s decisions looked as if they were opening a new era in the judicial interpretation of the Church’s legal position [but]...no other judge has shown any interest in extending the line of development which he initiated.’<sup>48</sup> Bishop Newman when writing about Gavan Duffy stated that: ‘Given a judiciary composed of men like Gavan Duffy, the Catholic Church in Ireland could rest assured of receiving treatment, at least at common law, of a kind that would fully measure up to the requirements that Public Ecclesiastical Law lays down, while non-Catholics, conversely, would be assured that their rights and liberties

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<sup>45</sup> Quoted in Patrick Murray, *The Roman Catholic Church and Irish Politics, 1922-1937*, p.202.

<sup>46</sup> John Kelly, *The Irish Constitution*, p 2037.

<sup>47</sup> John Whyte, *Church and State in Modern Ireland*, p 167.

<sup>48</sup> *Ibid.* 194.

would be respected.<sup>49</sup> Kennedy writes that Gavan Duffy attended the first meeting of Jesuit Edward Cahill's organisation An Ríoghacht whose objectives were to organise Irish society on the lines of Catholic social principles and to promote Catholic social action.<sup>50</sup>

In 1939 Gavan Duffy J set out his view that the Irish Courts were not bound by pre-1922 English precedent in the case *Exham v Beamish*<sup>51</sup> stating:

'In my opinion, this Court cannot be fettered in the exercise of the judicial power by opinions of very different courts under the old regime, unless those opinions must reasonably be considered to have had the force of law in Ireland, so that they formed part of the code expressly retained...If, before the Treaty, a particular law was administered in a way so repugnant to the common sense of our citizens as to make the law look ridiculous, it is not in the public interest that we should repeat the mistake. Our new High Court must mould its own *cursus curiae*; in so doing I hold that it is free, indeed bound, to decline to treat any such absurdity in the machinery of administration as having imposed on it as part of the land...'<sup>52</sup>

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<sup>49</sup> Jeremiah Newman, *Studies in Political Morality*, Scepter, Dublin, 1962, p.444. However, Gavan Duffy J was not entirely open to clerical interference as the case *Attorney General v O'Ryan and Boyd* [1946] IR 70 demonstrates. The case arose because of an agrarian dispute in the Nire valley, Co. Waterford which resulted in a riot and assault with five men being charged. A Rev. Dean Byrne wrote to the State solicitor for Co. Waterford asking that the Court take a lenient view of the accused in the interest of peace in the region. This letter was read out by counsel at the end of the Circuit Court proceedings which were heard by Sealy J. The judge asked whether Rev. Dean expected that men engaged in such activities outside his own Church should go unpunished. One of the defendants, O'Ryan, wrote a letter to the judge in which he engaged in an tirade of abuse stating 'I take exception to your taunt and sneer at the Most Venerable Dean Byrne from your exalted perch. I fling that taunt back into the face of the worthy representative of the seed and breed of Cromwell.' (Ibid. 72) O'Ryan pleaded guilty to contempt and scandalising the Court as a result of his letter. The letter was read out at a meeting of Waterford County Council and the counsellors passed a resolution condemning the judge's remarks concerning Rev. Dean. In the High Court, Gavan Duffy J stated (*ex tempore*) that 'this particular contempt of Court is graver and even more reprehensible in Ireland than it might be in many other countries. A very large proportion of our citizens reveres religion profoundly and an attack on religion is fiercely resented. There is no excuse for a man of influence who works upon the zeal and piety of a Catholic community, like the people of Waterford, by stirring up public feeling against the judge in the area, who is not a Catholic, on the pretext that he has degraded his office by behaving in Court as a sectary and partisan. On the facts Judge Sealy had done nothing to provoke the ribald letter, and its publication by O'Ryan at the quarterly meeting of the County Council held up his administration of justice to public obloquy.' (Ibid. 85) Sealy J's position showed a lack of deference towards the views of a member of the Catholic hierarchy, while Gavan Duffy (and Maguire P) upheld Sealy J's position. Given O'Ryan's exaggerated and colourful language this is unsurprising. However, the case shows that the judiciary was not prepared to accept clerical intervention unquestioningly.

<sup>50</sup> Cahill wrote that 'The country has lost touch with the traditional Catholic culture of Europe. The English literature upon which the mind of the people is largely founded is predominately Protestant.' See Finola Kennedy, *From Cottage to Creche*, IPA, Dublin, 2001, p.264.

<sup>51</sup> [1939] IR 336.

<sup>52</sup> Ibid. 349.

Therefore, according to Gavan Duffy J if pre-1922 common law was to be in harmony with the Constitution, it would also have to be in harmony with the common sense of the Irish people. Viewing this decision in the light of later judgments it seems likely that when Gavan Duffy referred to Irish people's 'common sense' he had a Catholic nationalist perspective in mind. However, this jurisprudential philosophy was not followed by other judges, as Henchy states Gavan Duffy J's 'declaration of judicial freedom from the doctrine of *stare decisis* does not seem to have received general acceptance. On the contrary, opinions have been expressed by Supreme Court judges to the effect that decisions of the House of Lords before the coming into operation of the Constitution of 1922 are binding on the Supreme Court until their effect has been altered by the legislature.'<sup>53</sup> In *Re Howley*<sup>54</sup> Gavan Duffy J held, *inter alia*, that a clause in a will directing that the Bishop of Killala dispose of the balance of a bequest 'each year at the annual meeting of the chapter on what in their united wisdom they consider to be in the best interests of religion'<sup>55</sup> was void for uncertainty and remoteness. Despite this the judge displayed his Catholic and nationalist perspective in rejecting the English decision in *Cocks v Manners*<sup>56</sup> where a gift to a community of nuns, established to work out the salvation of the sisters by religious exercises and self-denial, was held not to be a charitable gift in English law, on the ground that private piety in a convent does not edify the public. This dictum had come to represent established law in England and was described by Gavan Duffy J as having been 'tacitly accepted here under similar jurisprudence, which constantly resorts for precedent to the vast field of English Judge-made law'.<sup>57</sup>

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<sup>53</sup> Seamus Henchy, 'Natural Law and the Constitution' (1962) *MLR* 25, p.549. See Black J in *Boylan v Dublin Corporation* [1949] IR 60,77, Murnaghan J in *Minister for Finance v O'Brien* [1949] IR 91,116 and Maguire CJ in *Corry v National Union of Vintners* [1950] IR 315, 323. However, in *Byrne v Minister for Finance* [1959] IR 1, 43 Lavery J states that 'judges appointed under the Constitution are not successors of the judges of the British regime nor are the Courts established by the Constitution successors of the British courts in Ireland. The courts and judges represent a new departure constituted under different ideas. There is no justification, in my opinion, for referring to British precedents. So far from being founded on British precedents or recognising British forms the Constitution of 1922 repudiated deliberately these institutions.' This argument is certainly questionable in light of the fact that the 1922 Constitution was bound by the terms of the 1921 Treaty.

<sup>54</sup> *Re Howley* [1940] IR 119.

<sup>55</sup> *Ibid.* 112.

<sup>56</sup> (1871) L.R. 12 Eq. 574.

<sup>57</sup> [1940] IR 119, 112.

Gavan Duffy J goes on to state:

'I apprehend that the point ought not to be taken as having been finally settled for us in England, where the law was determined by the English outlook upon societies for self-sanctification. The assumption that the Irish public find no edification in cloistered lives, devoted to purely spiritual ends, postulates a close assimilation of the Irish outlook to the English, not obviously warranted by the traditions and *mores* of the Irish people'.<sup>58</sup>

Gavan Duffy J was also of the view that the Reformation had merely interrupted and distorted the common law, which an Irish court could rediscover and apply:

'The great stream of the common law rolls on from generation to generation, remaining through all vicissitudes (subject to statute) the same stream, so that interruptions to its normal flow during three centuries must be regarded as temporary pollutions, the removal of which leaves the common law under our Constitution today the same vigorous current'.<sup>59</sup>

Gavan Duffy J is arguing that the influence of the English common law on Irish law has tarnished the law in Ireland and that judges should adapt the common law to reflect Irish societal mores. In referring to Irish social mores there would appear to be an implication that these reflect Catholic norms. There is also an implication that they exist in contradiction to English or Protestant norms. In *Re Maguire*<sup>60</sup> Gavan Duffy J held that a bequest to found a convent for the perpetual adoration of the Blessed Sacrament was a valid charitable gift. Gavan Duffy J states in reference to the decision in *Cocks v Manner*<sup>61</sup> that what:

'The law laid down was that religious purposes, to be charitable, required services tending to instruct or edify the public... Taking the view of *Cocks v Manners* I hold that there is not now, and never has been, the flimsiest warrant for attributing the same outlook to public opinion here. I shall waste no time in establishing the proposition of fact that the cloister is a powerful source of general edification in this country. The finding, or assumption, in *Cock v Manners* that the convent of a contemplative

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<sup>58</sup> Ibid. 113. [Emphasis in original]

<sup>59</sup> Ibid. Gavan Duffy J had expressed the view that pre-reformation law was a legitimate source from which to find precedent in *Re Very Reverend Archdeacon Casey, deceased* (unreported) when he first came to the bench: 'utter a word of warning against an alarming theory...that the common law of England and the common law of Ireland are identical...The distinction...must be borne in mind in case of religious and quasi-religious gifts, which so often raise the question, *'what is the position at common law'*. [Emphasis in original]

<sup>60</sup> [1943] IR 238.

<sup>61</sup> (1871) L.R. 12 Eq. 574.

community tended neither directly nor indirectly towards public edification had no scintilla of authority as a determinant of the actual position among us.<sup>62</sup>

He also refers this non-edification argument as sounding ‘grotesque’<sup>63</sup> in this jurisdiction and refers to Ireland as a ‘Christian polity.’<sup>64</sup> Gavan Duffy J attempted to find guidance in the pre-reformation law of Ireland. The judge adopts a nostalgic view of pre-reformation society, viewing it as ‘spiritual’ and not ‘materialistic’. He also describes it as a period when people took religion seriously. This position reflects a de Valerean view of society in which a materialist view is subordinate to the nation’s spiritual needs and it is a position which is in line with the mainstream of Catholic social teaching during this period. The judge asserted that:

‘To rescue the gift from the post-Elizabethan morass and place it upon firm ground, I am driven back to the earlier position...The old common law of England, from which the common law in force in Ireland before the Treaty was, for the purposes of charity law generally, indistinguishable, is therefore open to me...

Thus I find myself back in an era when the mass of the people, in England as in Ireland, believe devoutly in the Christian Revelation; religion is, as a rule, taken very seriously; the well-springs of life are spiritual, and the spiritual has not yet been subordinated to the materialistic outlook.

...The temper of our own world towards religion is remote from the spirit of the old common law that a modern lawyer can hardly approach in its proper setting the position of pious uses and of the Blessed Sacrament at and before the Reformation without first recalling the outlook of long-forgotten days upon the things that did not belong to Caesar. The testamentary judge is, as he long remained, the bishop of the diocese, and the ‘dead’s part’ of an intestate’s goods falls to the Church and the poor.’<sup>65</sup>

In the case *Walsh v Walsh*<sup>66</sup> decided during the emergency years Gavan Duffy J set out a somewhat idyllic view of Ireland’s ‘Christian’ country life stating:

‘One of the persistent characteristics of Irish country life, perhaps, indeed, of peasant life elsewhere, is the prevalence of family feeling, the intense feeling of the family for the family; whatever may be the outlook in the towns, that essentially Christian society of our countryside treats the family in actual practice as the basic unit of the social order; that approach to the problem of life was

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<sup>62</sup> [1943] IR 238, 248-249

<sup>63</sup> Ibid. 247.

<sup>64</sup> Ibid. 249. In *Commissioners of Charitable Donations and Bequests v McCartan & ors* [1917] 1 IR 388 O’Connor M.R. had held that personal sanctification did not signify the edification of the public and stated that without public benefit there can be no charity in law.

<sup>65</sup> [1943] IR 238, 251

<sup>66</sup> *Walsh v Walsh* [1942] IR 403.

indigenous, natural, traditional, among the unspoilt sections of our people long before the Constitution proclaimed it...'.<sup>67</sup>

This quote is interesting as it demonstrates Gavan Duffy J's belief in the centrality of familialism to the 1937 Constitution and also it shows the influence of both 19<sup>th</sup> century nationalism and romanticism on Gavan Duffy J. The ideas forming the basis of romanticism are based on counter-enlightenment thinking and reacting against the centrality placed on reason by high enlightenment thinkers. Both nationalism and romanticism have their roots in ideas of the traditional and the irrational and, in particular, emphasised an idealised view of man's landscape as Gavan Duffy J alluded to in the above quote.

In *Maguire v Attorney General*<sup>68</sup> Gavan Duffy J relied on the Preamble of the Constitution in deciding that a testamentary gift to found a convent for the perpetual adoration of the Blessed Sacrament was valid at common law. The judge viewed the common law as recognising the 'Blessed Sacrament' and he regarded the common law in this area as reflecting 'the doctrine of the Catholic Church.' The judge regarded the reference in Constitution to the 'Most Holy Trinity' as offering constitutional support for his position:

'The common law knew the mass. The common law knew the Blessed Sacrament. The common law knew the adoration of the Blessed Sacrament. Therefore I know them judicially. The doctrine known to the common law is the doctrine of the Catholic Church. In my judgment, a testamentary gift to found a convent for the perpetual adoration of the Blessed Sacrament is, beyond all doubt, a gift charitable at common law, because it is a gift to God, a gift directly intended to perpetuate the worship of God. And that conclusion is in harmony with the Constitution enacted by the Irish people "In the name of the Most Holy Trinity...to Whom, as our final end, all actions both of men and States must be referred."'<sup>69</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> [1943] IR 238.

<sup>69</sup> Ibid. GM Goulding, *George Gavan Duffy 1882-1951: A Legal Biography*, p. 93 states that Gavan Duffy J's 'ire' was provoked by the judgment of Black J in *Munster & Leinster Bank v A.G. & ors.* [1940] IR 19 in which he stated '...unless a further and sweeping inroad be made on the rule against perpetuities, the line must be drawn somewhere. *Cocks v Manners* has drawn it.'



### Gavan Duffy and Article 44 of the Constitution

Gavan Duffy was prepared to use the special position granted to the Catholic Church as conferring real advantage on the Catholic Church. In *Re Howley*<sup>70</sup> he held that corporations established by the Church should be recognised by the Irish courts, referring to the Treaty of the Lateran 1929, and the existence of diplomatic relations between the Vatican and Ireland in support of his view, as well as the special position granted to the Catholic Church in Article 44 of the Constitution ‘whose special position as the guardian of the Faith professed by the great majority of the citizens, is formally recognised by the State under the Constitution’.<sup>71</sup> In *Burke and O’Reilly v Burke and Quail*<sup>72</sup> a testamentary gift was made conditional on the beneficiaries not ‘ceasing to practice the Catholic religion’ and was for that reason found to be void for uncertainty and to be an unconstitutional incursion on parental authority contrary to Article 42. Gavan Duffy J stated that ‘under a Constitution which ‘recognises 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’ this court requires no formal proof of the ordinary obligations of a Catholic’.<sup>73</sup>

By contrast Murnaghan J in *Re Tilson*<sup>74</sup> stated the belief of the Court that Article 44 did not ‘confer any privileged position before the law upon members of the Roman Catholic Church.’<sup>75</sup> In the view of Black J this position was insufficient stating it was necessary to ‘unequivocally declare that our Constitution does not confer any such privileged position before the law upon members of any religious denomination whatsoever.’<sup>76</sup> It should be noted that Black J was Protestant and may have been expressing a particular sense of concern and unease amongst the Protestant population at the idea that they might be

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<sup>70</sup> [1940] IR 119.

<sup>71</sup> Ibid. It should also be noted that Dixon J in *Bank of Ireland Trustee Co Ltd v AG* [1957] IR 257 stated that it was implicit in the terms of Article 44, that adherence to and practice of, any of the religions there recognised may be presumed to be of public benefit. Accordingly he held that a bequest to a Roman Catholic contemplative order was for a charitable purpose.

<sup>72</sup> [1951] IR 216.

<sup>73</sup> Ibid. 220.

<sup>74</sup> [1951] IR 1.

<sup>75</sup> Ibid. 35.

<sup>76</sup> Ibid. 43.

treated as having a weaker form of Constitutional protection than their Catholic neighbours.<sup>77</sup>

### Conferring a Sacerdotal Privilege

In *Cook v Carroll*<sup>78</sup> Gavan Duffy J created a new category to the communications which a witness is under no obligation to disclose, namely sacerdotal privilege. In this case the Catholic parish priest of Ballybunion had refused to testify regarding a private meeting he had with a girl who alleged she had been seduced by the defendant. The defendant was also present at the meeting. An action for seduction was brought by the girl's mother against the defendant and the priest was called to give evidence regarding his interview at the Circuit Court. The priest's refusal to disclose what had taken place at the interview was upheld by Gavan Duffy J and was not held to be a contempt of court. Gavan Duffy J stated in his judgment that he 'must treat the law here at the date of the Constitution as *tabula rasa*.' Gavan Duffy J also states that 'No canon law was cited to me and I shall determine the issue without reference to the law of the Church.'<sup>79</sup> It seems then that had counsel invoked canon law in the course of the legal proceedings it may have been accepted as potentially influencing the outcome of the case.<sup>80</sup>

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<sup>77</sup> I examine Gavan Duffy P's judgment in *Re Tilson* in detail below. More recently in *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321, 355 Barrington J asserted that the 'special position' of the Roman Catholic Church was merely recognition of a fact and implied no privileged position in law.' This position would appear to accord with the intention of the drafters of the original Article 44 who viewed it as recognising a demographic fact rather than conferring any form of privilege. This was largely due to the fear that to confer a privilege on the majority Catholic population would antagonise Northern Protestant opinion and cause resentment amongst Southern Protestants. The Preamble arose as an issue during the talks which led to the Good Friday Agreement with Unionists at one point insisting that the Preamble be altered as it was viewed as overtly Catholic, however this issue did not form part of the final agreement. See Alastair Campbell, *The Blair Years*, Hutchinson, London, 2007 p.288.

<sup>78</sup> [1945] IR 515.

<sup>79</sup> *Ibid.* 517.

<sup>80</sup> In the nineteenth century the House of Lords ruled in *O'Keefe v Cullen* 2 QB 1873 CL 7 319 that the civil laws of Ireland as an English dominion were superior to the ecclesiastical laws of the Catholic Church. In independent Ireland the Supreme Court ruled in *O'Callaghan v O'Sullivan* [1925] 1 IR 90 that canon law constituted foreign law in eyes of the Court. It had been argued in the case that as canon law was not confined to any one State and as it was universal it could not be regarded as foreign to the Courts. Kennedy CJ in rejecting these arguments stated: 'In my opinion all law is foreign to these courts other than the law which these Courts have been set up under the Constitution of Saorstát Éireann to administer and enforce, that is to say, other than laws given force and validity by Article 73 of the Constitution and the enactments of the Oireachtas made after the coming into operation of the Constitution. No other laws are known to us judicially; nor can we take judicial notice of any other laws, unless they are proved to us as facts. All other laws are extrinsic to these Courts of Justice...' (at 109). The Chief Justice also stated: 'The Canon law of the Roman Catholic Church is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well-settled rules as to proof of foreign law...The

Gavan Duffy J states:

‘The issue here is governed by common law, not by any act of Parliament, and while common law in Ireland and England may generally coincide, it is now recognised that they are not necessarily the same; in particular, the customs and public opinion of the two countries diverge on matters touching religion, and the common law in force must harmonise with our Constitution.’<sup>81</sup>

Gavan Duffy J stated that pre-reformation law in England respected the seal of the confessional albeit it is difficult to ascertain the precise law from that period. He states his belief that there were some ‘rare judicial’<sup>82</sup> decisions which upheld sacerdotal privilege in the nineteenth century but that the common law was not regarded as denying any privilege to priest made inside or outside the confessional. In the case *Wheeler v Le Marchant*<sup>83</sup> the Court had held that ‘communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune are not protected.’ This was considered to be the law at the time. Therefore ‘no sacerdotal privilege was recognised in an Ireland dominated by English legal precedent for its common law.’<sup>84</sup>

Gavan Duffy J cited Louisiana and Quebec as places in which sacerdotal privilege was respected. In Louisiana the privilege extends to all communications made to anyone seeking spiritual advice or consolation, but the privilege belongs to the layman who may waive it. While in Quebec the law states a witness ‘cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser.’<sup>85</sup>

Gavan Duffy J goes on to state:

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corresponding position of members of the Church of Ireland after disestablishment of the Church was defined in s 20 of the Irish Church Act, 1869’ (at 113). In *Gaudem et Spes* the Catholic Church adopted a similar position in holding that the political community and the Church are autonomous and independent of each other in their respective fields.

<sup>81</sup> [1945] IR 515, 517.

<sup>82</sup> Ibid.

<sup>83</sup> *Wheeler v Le Merchant* 17 C.D. 675.

<sup>84</sup> [1945] IR 515, 518.

<sup>85</sup> Ibid.

‘I have to determine the issue raised in this case on principle and in conformity with the Constitution of Ireland. That Constitution in express terms recognises the special position among us of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens; and that special recognition is solemn and deliberate. The same Constitution affirms the indefeasible right of the Irish people to develop its life in accordance with its own genius and traditions.

In a State where nine out of every ten citizens to-day are Catholics and on a matter closely touching the religious outlook of the people, it would be intolerable that the common law, as expounded after the Reformation in a Protestant land, should be taken to bind a nation which persistently repudiated the Reformation as heresy. When, as a measure of necessary convenience we allowed the common law generally to continue in force, we meant to include all the common law in harmony with the national spirit; we never contemplated the maintenance of any construction of the common law affected by the sectarian background. The Oireachtas is free to-day to determine how far our Courts are to recognise the sacerdotal privilege, but I am not concerned with that aspect of the matter. I am concerned with a juristic system of evidence surviving to us from an alien polity, and it is unthinkable that we should have imposed on ourselves in this matter the regrettable preconceptions of English Judges as having here the binding force of law, when merely re-echoed by pre-Treaty Judges in Ireland.<sup>86</sup>

Instead of seeking guidance in English common law Gavan Duffy J consulted Wigmore’s work on the Anglo-American system of evidence. He quotes Wigmore’s four fundamental conditions which are necessary to establish privilege against the disclosure of communications between persons in a given relation.<sup>87</sup> The relationship that concerned Gavan Duffy J was that between parish priest and two of his parishioners and ‘theirs towards him at a time of crisis, in a moment of gravest anxiety, which he will often be in a much better position to relieve than anyone else. As a rule he is regarded as being truly the spiritual father of his people and his traditional devotion to the people through generations has won for him in Ireland the prerogative of an extraordinary moral authority.’<sup>88</sup> Gavan Duffy J states ‘I think the rule was first adopted to England at a period when religious bias was inevitable and when public opinion would have resented the privilege as being mainly a concession to Popish priests. It is sometimes forgotten that the Catholic Emancipation Act, with its provisions for suppression and banishment,

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<sup>86</sup> Ibid. 519-520

<sup>87</sup> The communications must originate in a *confidence* that they will not be disclosed; this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation; the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and the *injury* which would ensue to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. [1945] IR 515, 520. [Italics in original]

<sup>88</sup> Ibid. 521.

proclaimed the dislike of the Jesuits and members of other religious orders as late actually as the year 1829, a spirit of that sort is very powerful and dies hard.’<sup>89</sup>

Gavan Duffy J describes English common law regarding sacerdotal privilege as ‘warped’<sup>90</sup> but that despite this, Irish judges blindly followed the English precedent. He then states:

‘But, treating the question as one of substantive law, I hold that the emergence of the national Constitution is a complete and conclusive answer to the objection that I have no judicial precedent in favour of the parish priest. I hold that I am free to give judgment, in light of the Constitution, on principle and that I am bound to do so.’<sup>91</sup>

Goulding states that ‘[A]stonishingly, the *obiter dicta* of Deale J comprise, together with Kelly’s quiescent précis<sup>92</sup> the only approval which *Cook v Carroll* has received. The law is generally accepted still to be based on *Wheeler v Le Merchant*.’ Kenny J is quoted in personal communication to G.M. Goulding as stating his view on *Cook v Carroll* as being: ‘Neither party had any objection to [the parish priest] giving evidence but he refused to do so. There was accordingly no question of the communication being confidential...*It is obvious that the point whether what is said to a priest by one person is confidential never arose.* Judge Duffy took the opportunity to display his very militant Catholicism. *I do not regard the case as being an authority for anything.*’<sup>93</sup> *Cook v Carroll* indicates the extent to which Gavan Duffy was prepared to go to uphold Catholic norms within Irish society; reject English precedent as an appropriate source of law for the Irish people; and use the law as means of leveraging Irish law, based on a perception

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<sup>89</sup> Ibid.

<sup>90</sup> Ibid. 523.

<sup>91</sup> Ibid. Gavan Duffy J also stated *obiter* that the privilege could not be waived without the express prior consent of the priest. In the later case of *Forristal v Forristal & O’Connor* (1966) 100 ILTR 182 the defendant wrote a letter to a priest containing defamatory statements relating to the plaintiff. The defendant claimed privilege for this letter and the priest said in evidence that he regarded the letter as privileged. Deale J stated that the ratio in *Cook v Carroll* was ‘that a confidence made to a parish priest by two parishioners, in circumstances clearly showing that the communication was made with the intention of secrecy behind it, is privileged, i.e. has a sacerdotal privilege which absolves the priest from the duty to disclose the communication in a Court of law.’ Ibid. 183 Deale J held sacerdotal privilege did not apply in this particular case due to *inter alia* the fact that both parties were not co-parishioners.

<sup>92</sup> Kelly stated ‘The result of this judgment is that private interviews with, and, *a fortiori*, statements made in the Confessional box to priests are privileged’ John Kelly, *Fundamental Rights in the Irish Constitution* p. 251.

<sup>93</sup> GM Goulding, *George Gavan Duff: A Legal Biography*, p. 140. [Emphasis in original]

of social mores, away from the influence of the British colonial influence. Gavan Duffy appeared prepared to use the law as a political tool with which to distance Ireland from British influence and he achieved this through drawing a symbiosis between Catholic social thought and Irish nationalism. In deciding that privilege could be extended to create a new category of sacerdotal privilege he was drawing on his Catholicity, a sense of deference to a Church that was highly influential, and his political nationalism. He defines these norms in opposition to Ireland's former colonial power and bases them on a non-plural monolithic view of Ireland as a Catholic nation.

### **Gavan Duffy and anti-Semitism**

In 1942 Gavan Duffy J handed down possibly the most prejudiced judgment in the Irish Law Reports. In the case of *Schlegel v Corcoran and Gross*<sup>94</sup> he refused to hold as unreasonable the refusal of a landlord to consent to the assignment by a tenant of his interest to a Jewish assignee.<sup>95</sup> The facts of the case were that the plaintiff let rooms in her house for use as a dental surgery by the first defendant's late father. The first defendant, who had succeeded to his father's interest in the tenancy, wished to assign that interest to the second defendant, a Jewish dentist. The case was an appeal from an order from the Circuit Court of Dublin in which Shannon J held that the plaintiff had reasonable grounds for refusing her consent to the assignment of certain premises from Kevin Corcoran to Nathaniel Gross. Mrs Schlegel on hearing from Mr Corcoran that Mr Gross was Jewish immediately refused her consent stating 'their principles are not ours and they are anti-Christian, and I could not have an anti-Christian living in the house where I live' and 'because he is a Jew and all that entails.'<sup>96</sup> Gavan Duffy J refused to accept the argument that there was a connection between 'the problem before the landlord and the constitutional veto upon any discrimination by the State on the ground of religious belief.'<sup>97</sup> The judge appeared to be saying that as Mrs Schlegel was not an emanation of the State her actions could not come within the scope of the prohibition on religious discrimination.

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<sup>94</sup> [1942] IR 19.

<sup>95</sup> Landlord and Tenant Act 1993, s 56 (Landlord and Tenant (Amendment) Act 1980, s 66) provided that such consent should not be unreasonably held.

<sup>96</sup> [1942] IR 19, 21.

<sup>97</sup> *Ibid.* 25.

Gavan Duffy J in his judgment stated:

‘The plaintiff’s objection has been characterised as a caprice and as mere prejudice; but caprice is not the right word for an anti-Semitism which far from being a peculiar croquet, is notoriously shared by a number of other citizens; and if prejudice be the right word, the antagonism between Christian and Jew has its roots in nearly two thousand years of history, and is too prevalent as a habit of mind to be dismissed offhand, in a country where religion matters, as the eccentric extravagance of a bigot, without regard to the actual conditions under which consent was withheld.’<sup>98</sup>

Casey states that: ‘While the State normally acts through the executive and the Oireachtas it also acts through the courts; and a court may not, therefore, ratify acts of religious discrimination by private parties.’<sup>99</sup> Casey also states that the clause would have to be in conformity with the Constitution and this would seem to preclude the view that religious discrimination is ‘reasonable’. Kelly describes this as “the dark side of a remarkable judge”<sup>100</sup> and that “while the decision of Gavan Duffy J may have been in fact a proper one, the language in which the judgment was dressed is most unattractive.”<sup>101</sup> Goulding states ‘[O]f both *Schlegel* and *Cook v Carroll* the late Mr Justice T.C. Kinsmill Moore observed that Gavan Duffy’s greatest contribution to Irish law was the protection of the liberty of the individual, “except that he was a devoted son of the Church.” In both cases (and in *Tilson*) his clearly enunciated philosophy was of Aquinas, but it must be submitted that his judicial balance was upset by the blinding light of his religious faith.’ Goulding, in line with the hagiographical tone of his biography, attempts to explain Gavan Duffy’s judgment in *Schlegel* based on the idea that ‘[W]e are all children of our age’ and he describes the judgment as a ‘slip’.<sup>102</sup>

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<sup>98</sup> Ibid.

<sup>99</sup> James Casey, *Constitutional Law in Ireland*, Sweet and Macmillan, Dublin, 2000, p 701. It should however be noted that Article 44.2 refers to ‘The State’ and not to individual citizens. Casey’s interpretation would therefore render the word ‘State’ meaningless. In *Shelley v Kramer* (1948) 334 US 1 it was held that a state court could not constitutionally lend its aid to the enforcement of a racially restrictive covenant attached to property. This would constitute a breach of the Fourteenth Amendment’s equal protection guarantee.

<sup>100</sup> John Kelly, *Irish Constitution*, p 2059. It should be noted that under the Equal Status Acts, 2000-2004 there is an exemption from the specified grounds where the provision of accommodation by a person is in a part of the person’s home.

<sup>101</sup> John Kelly, *Fundamental Rights in the Irish Constitution*, p. 250.

<sup>102</sup> GM Goulding, *George Gavan Duff: A Legal Biography*, p. 141. For an analysis of *Schlegel* see Ruth Cannon, ‘The Bigoted Landlord: a Re-Examination of *Schlegel v Corcoran and Gross*’, (2005) 12 (1) *Dublin University Law Journal* 248.

It may be argued that Gavan Duffy J's judgment should be viewed in the context in which it was given<sup>103</sup> and that it simply reflected certain prejudices within Irish society at the time.<sup>104</sup> However, only five years previously Eamon de Valera had approved of the inclusion of a clause recognising the Jewish congregation in Article 44 of the Constitution.<sup>105</sup> It should also be noted that the institutionalised anti-Semitism in Germany and elsewhere was well publicised all over Europe some years before this decision. Therefore, it is incorrect to attempt to appease criticism of the judge by suggesting there are valid arguments, based on historical context, which are capable of mitigating the anti-Semitic phraseology used in his judgment.

### **A Custody Dispute and Catholicity**

Two years after *Schlegel in Re Tamburrini*<sup>106</sup> the Court displayed a high level of deference to the views of the Catholic Church. The case concerned a custody dispute between the mother of an eight year old boy and her husband and the child's grandparents. The child was born outside of marriage and was brought up by his grandparents. The mother was working in Scotland and in a relationship with an Italian divorcee who had two children from his previous marriage. The mother wanted to reclaim custody of her child and have him live with her and her husband in Scotland. The Court did not examine any provisions of the Constitution deciding the case instead

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<sup>103</sup> Ibid. p.166.

<sup>104</sup> In 1943 Fianna Gael TD Oliver J Flanagan made the following reprehensible anti-semitic speech in the Dáil: "How it is that we do not see any of these Acts directed against the Jews, who crucified Our Saviour nineteen hundred years ago, and who are crucifying us every day of the week?...There is one thing that Germany did, and that was to rout the Jews out of their country. Until we rout the Jews out of this country it does not matter what orders you make. Where the bees are there is the honey, and where the Jews are there is the money." 572 *Dail Debates* 91, 9 July 1943. Gavan Duffy stated in a meeting of the second Dail 'the main difficulty in getting facts known to abroad lay in the existence of the octopus of the big foreign agency called by different names but all run by big Jew firms in London which had complete control of the first news wires in respect of Irish affairs as they appeared in the continent.' *Minutes of Proceedings of the Private Session of the Second Dail*, 23 August 1921, p. 53.

<sup>105</sup> The Chief rabbinic committee wrote to de Valera in December 1937 noting 'with great satisfaction and due appreciation that the Jewish Congregation are included in the clause giving equal recognition to the Religious bodies in Éire'. Quoted in Keogh and McCarthy, *The Making of the Irish Constitution 1937*, p.161.

<sup>106</sup> *Re Tamburrini* 1944 IR 508. There were a number of other early parent-stranger custody disputes where the Courts did not consider Articles 41 and 42 instead emphasising the child's best interest: see *The State (Williams) v Markey* [1940] IR 421, *Re M, an Infant* [1946] IR 334, and *Re Cullinane, an Infant* [1954] IR 270.



on the basis of the child's best interests. Maguire P regarded the crux of the case as arising:

'...from the objection which the grandparents have to allow the child to go to a home where the prosecutors are, on their own admission, living openly in defiance of the laws of the Church to which they claim to belong. The prosecutors stress in their affidavits their strong desire to continue to bring the child up in the Catholic religion, yet Antonio Tamburrini in the box admits that he cannot regularise in the eyes of the Catholic Church his union with his wife until the woman from whom he is divorced dies, while his wife admits that the priests in her parish do not approve of her conduct.'<sup>107</sup>

The judge viewed the circumstances of the case as exceptional because of the natural mother's personal situation:

'In our view this is an exceptional case and one in which, in our view, a wise parent in all the circumstances would leave the child in its present surroundings. It would, in our opinion, be a radical and disturbing change for the boy, at the most formative period of his life, to be removed from the moral atmosphere in which he has been reared to a home in which he has been reared to a home in which the conduct of his mother is regarded by her own clergy with disapproval.'<sup>108</sup>

Haugh J stated that as the mother and her husband were living in contravention of the teachings of the Catholic Church they would not be setting a good example to the child:

'To me it is clear that protestations by the prosecutrix and her husband that they should be regarded..."as good Catholics" should receive little serious attention from the Court. Their admitted way of living is in flagrant disobedience and disregard of a fundamental law of the Church to which they both say they owe and give allegiance...on the admitted facts of the case there can be no proper example in that new home of his.'<sup>109</sup>

Haugh J viewed the child's mother's marital situation as representing a threat to the child's moral formation:

'...a time must slowly come, if his religious teaching continues as promised, when his own mother's inconsistent way of living, contrasted with what he has been taught by and through her, will seem so contrary to all the fundamental principles he has been taught to believe in, that moral injury is bound to be done to all his religious sentiments and beliefs. Such is my view of his future on this aspect of the case, if he is, in fact, reared as a Catholic.'<sup>110</sup>

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<sup>107</sup> Ibid. 513.

<sup>108</sup> Ibid. 514.

<sup>109</sup> Ibid. 517.

<sup>110</sup> Ibid. 518.

The judge viewed the fact that the child's mother and husband would not be in a position to receive the sacraments as evidence that they would not be able to provide for the child's religious education:

'The prosecutrix has voluntarily put herself outside the pale of the Church, on a fundamental law governing all its subjects. How can they propose to see that the boy will attend to his sacramental duties, when they, as long as present conditions continue, cannot themselves do so?' <sup>111</sup>

*Tamburrini* is evidence of a judiciary which was prepared to show considerable deference to the Catholic Church's views on remarriage and divorce. The Court while accepting the presumption that the child's best interest lay with his natural mother was swayed by Catholic orthodoxy to rule against the mother. These judgments are redolent of Gavan Duffy P's Catholicity. *Tamburrini* indicates that Gavan Duffy was not unique amongst the members of the judiciary in allowing Catholic orthodoxy, which was reaching the peak of its influence during this period, to influence them in the process of adjudicating. <sup>112</sup>

### **Bigamy and Catholic Thought**

It should be noted that a difficulty could arise in the area of marriage when the Church nullified a marriage which had taken place in a Catholic Church and which was also recognised by the civil law. According to canon law the separated persons could remarry, however under civil law if they were to do so they would be guilty of bigamy. In *The People (AG) v Ballins* <sup>113</sup> a woman who had first married in a registry office and had been married by a priest to another person was convicted of bigamy. Unless a civil nullity was obtained, the parties though free to marry under canon law were not free to marry under civil law prior to the introduction of divorce in 1995. Cardinal Conway had stated 'We are here concerned merely with showing that the attitude of the Church in regarding as mere empty form certain ceremonies which the civil law regards as true marriages, is a simple and logical deduction from divinely revealed truth.' Conway

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<sup>111</sup> Ibid.

<sup>112</sup> The provisions of the Constitution were not considered in a number of custody cases in the 1940s and 50s and therefore the Courts placed greater weight on the child's best interest. See *The State (Williams) v Markey* [1940] IR 421, *Re M an Infant* [1946] IR 336, and *Re Cullinane, an Infant* [1954] IR 270.

<sup>113</sup> *The People (AG) v Ballins* (1964) Ir Jur Rep 14.

insisted that 'no contract of marriage by a Catholic shall be valid which is not made in the presence of a duly authorised priest.'<sup>114</sup>

An example of judicial deference to the Catholic Church arose in 1945 when Haugh J in the Central Criminal Court had to rule in a case of bigamy involving a Protestant man, Robert Hunt who had married a Catholic woman in a registry office in London.<sup>115</sup> Hunt having experienced marital difficulties decided to remarry in Ireland having converted to Catholicism. He was informed by the local parish priest that as his wife was Catholic his marriage was not valid in the eyes of God or the Church. A Canon Dwyer told Hunt that there was no canonical obstacle to his marrying in a Catholic Church and he gave evidence at the trial to the same effect, stating he was aware of Hunt's position under civil law. The Archbishop of Cashel also gave his approval to the marriage. Haugh J stated that though there had been a calculated intention to break the law, the case, in all the circumstances could not be regarded as flagrant.<sup>116</sup> The *Irish Times* wrote regarding the case: 'Here the nation is faced with what would seem to be a deliberate challenge to the State by the Roman Catholic Church.' During the case defence counsel referred to the special position of the Catholic Church. However in the same article in the *Irish Times* it was argued:

'...no right is conferred on its [the Catholic Church's] bishops and clergy to ignore or even to defy the law of the land. The evidence of the Hunt case made it abundantly clear that the parish priest, acting under the direct authority of the Archbishop of Cashel and his coadjutor, encouraged Robert Hunt to break the Civil Law and commit what, in fact, was, and still is, a criminal offence. Manifestly, the matter cannot be allowed to rest where it is. The Civil Law either overrides Canon Law, or it does not. An appalling precedent has been set by the ecclesiastical authorities in the Archdiocese of Cashel. ..We are not concerned for the moment with the moral aspect of the case which, as we think, is sufficiently shocking. We are concerned, and deeply concerned, with its purely civil aspect, which raises all sorts of unpleasant, and even frightening, possibilities. From the political point of view, of course, the whole thing is deplorable. This open defiance of State by Church will be regarded, not unnaturally, in the North as an attempt to lay the foundations of a

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<sup>114</sup> Conway, 'Marriage in Ireland: Church and State', (1946) *Irish Ecclesiastical Record* 68, p.361. Kennedy refers to a case in the 1920s: '...in which a man was sentenced to six months imprisonment for bigamy under the civil law although Catholic Church authorities regarded him free to marry. The man, a Catholic, had married in a Protestant church in England in 1922, and shortly afterwards he left this wife. In 1927 he married another woman in a Catholic Church in Ireland. According to the State the true marriage was the first marriage, while according to the Catholic Church the second marriage was the valid one.' Finola Kennedy, *Cottage to Creche*, p.157

<sup>115</sup> Reported in *Irish Times*, 12 December 1945.

<sup>116</sup> Hunt was given a six month suspended sentence and ordered to pay £75 towards the prosecution's costs.

theocracy in the Twenty-Six Counties. So far, the government of Éire has had an exemplary record in religious affairs. It has never discriminated between the sects; but the Hunt case definitely is a danger sign.<sup>117</sup>

One senses from the above that there was a fear that the Catholic Church was becoming overly assertive and domineering and that the religious tolerance which the State had hitherto shown would be threatened by such a posture. While the writer fears theocracy there is no suggestion that Ireland was a theocracy at that point, though this period was in many respects the apogee of Catholic thought as an influence on the State. The judge's reference to the offence as trivial is regrettable but the penalty does not seem overly disproportionate to the severity of the crime. However, the behaviour of the Catholic Church is unfortunate and reflective of a pre-Vatican II non-ecumenical view. Similar to Gavan Duffy's judgment in *Tilson* just five years later it was symptomatic of poor ecumenical relations. The *Irish Times* article exemplifies the sense of insecurity that existed amongst Protestants at the potential threat from a domineering Church.<sup>118</sup>

### **The Paternal Supremacy Rule**

I now turn to examine the case *Re Tilson*<sup>119</sup> and the paternal supremacy rule. Before *Re Tilson* the common law rules regarding paternal supremacy were clear: the father had the

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<sup>117</sup> *Irish Times*, 12 December 1945. Chubb states that Lavery J [according to the *Irish Times* the judge in question was Haugh J] at one point appeared to be: 'heading down the same road' as Gavan Duffy J (i.e. enshrining Catholic moral code on jurisprudence) when in 1945 'in a bigamy case where the ecclesiastical authorities in effect chose to regard as invalid a registry office marriage between a Catholic and a Protestant and knowingly sanctioned a second marriage, he imposed a trivial penalty. Holding that it "could not be regarded as a flagrant type of case", he quoted Articles 42 and 44 of the Constitution.' Basil Chubb, *The Politics of the Irish Constitution*, IPA, Dublin, 1991, p.44. Frank Hill of Trinity College wrote to the *Irish Times* regarding the case: 'There does not appear to be any evidence that the Church, or the clergy in this case claimed any privilege. The facts appear to be simple. The law of the land accepts certain marriage ceremonies as valid which the Catholic Church does not. This man's first marriage ceremony was such a one. For a Catholic the law of the Church is the moral law and when the law of the land is contrary to it the Catholic is bound by the moral law. That does not mean that the Church refuses to recognise the right of the State to punish those who break State laws even though their actions are morally just. It is clear, then, that, if the State failed to punish those responsible for a breach of its laws, the fault lies not with the Church but with the State.' *Irish Times*, 20 December 1945. In typically acerbic fashion Myles na gCopaleen referred to his own paper's assertion that there may be a threat to the State's laws from the Catholic Church as: 'Momumentum Éire Perennius?' *Irish Times*, 14 December 1945.

<sup>118</sup> While the editorial writer emphasises the South's image in the North, it may well have been that the Protestant community's most immediate fear was that they would be subjected to the same intolerance as that which the minority Catholic community was the victim in the largely ignored State North of the border. One could scarcely imagine a Catholic writer in Northern Ireland in the same period describe her government as having an 'exemplary record in religious affairs.'

<sup>119</sup> [1951] IR 1

right to determine the child's education and religion. This position was outlined clearly *In re Meades, minor*<sup>120</sup>, a pre-1922 case in which Lord O'Hagan LC stated:

'The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty and to be sustained to the uttermost by human law. It is not to be abrogated or abridged without the most coercive reason. For the parent and child alike, its maintenance is essential...But the father's authority is a trust and not a power and the abuse of it will justify its restraint. Or, if the interest of the child cannot be secured...this Court will interfere to see that those interests are legitimately guarded, either by its absolute suspension, or by the imposition of conditions on its exercise'.<sup>121</sup>

The first post-1937 case in which the issue of the paternal supremacy rule appeared was *Re Frost*<sup>122</sup> in which the Protestant father executed an ante-nuptial agreement undertaking that the children would be raised as Roman Catholics. However, the mother acquiesced to the father's wish that the children be raised as members of the Church of Ireland. Following the death of the father, the mother sought custody of the children who were under the care of the Bird's Nest. Sullivan CJ delivered the judgment of the Supreme Court stating:

'But if, as I must hold on the authority of the cases of which I have referred, the father has the right in law to determine in what religion his children shall be educated unless that right is displaced by consideration of the children's welfare, then the question in this case is: 'Does the welfare of the children require that their father's determination that they should be educated as Protestants be disregarded?' In my opinion, the answer to that question, must be – "no", and, as the father's wishes would unquestionably be disregarded if the mother's application for a order of habeas corpus were granted, it follows that, in my opinion, her application should be refused.'<sup>123</sup>

The Chief Justice went on to speak of the paternal supremacy rule, stating:

'I am satisfied that the Court has jurisdiction to control the exercise of parental rights, but in exercising that jurisdiction it must not act upon any principle which is repugnant to the Constitution. The Constitution does not define the respective rights of the parents during their lifetime. Where, as in the present case, the parents could not agree on the particular religion in which their children

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<sup>120</sup> (1871) IR 5 Eq. 98.

<sup>121</sup> *Ibid.* 103. The Court also held the view that the enforcement of an ante-nuptial agreement would be at variance with the public policy objective underlying the paternal supremacy rule. In the English Court of Appeal in *Andrews v Salt* (1871) 8 Ch. App. 622 it was stated: '...we think a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own.' and in *Re Agar-Ellis* the Court held that an ante-nuptial agreement was "absolutely void" as it interfered with the exercise of the father's jurisdiction and "undoubted right as master of his own home, as king and ruler in his own family."

<sup>122</sup> [1947] IR 1.

<sup>123</sup> *Ibid.* 27-28.

should be brought up and educated, the children should not be deprived of all religious education. If that be so, then the only alternative is that one or other of the parents should have the legal right to determine the religion in which the children shall be educated. The rule which the Courts in this country and in England have consistently followed, is that the father has the legal right, and that when that right has been exercised by him, the children must be educated in the religion which he has chosen, by his wife should she survive him. In my opinion that rule is not inconsistent with any article of the Constitution, and the Courts are entitled to act upon it.<sup>124</sup>

In *Re Corcoran*<sup>125</sup>, the Protestant mother in an inter-church marriage executed a pre-nuptial agreement promising to rear their child as a Catholic. Their marriage experienced difficulties and the mother left home. When the mother discovered that the child had been placed by the father with her paternal grandmother, she commenced proceedings in order to obtain custody of her daughter. The High Court held that given the intervening passage of six years since the separation of mother and child, it would not be in the child's best interest to have her returned to her mother. Black J dissenting referred to:

'The extremity, fanatical as it seems to me, to which this 'right' of the father has been carried is shown by the rule that it must be upheld even if the father has induced the mother to marry him on the faith of a solemn undertaking that he will renounce the right in question and let the child be brought up in the mother's religion. The law is that even that solemn undertaking is unenforceable...it follows that this father has the right to have the child brought up in his religion and I am not satisfied that the authorities permit me to hold, as I should like to do, that his cruelty has deprived him of that right...'<sup>126</sup>

This position was to change dramatically as a result of *Re Tilson*.

### ***Re Tilson and the Ne Temere Doctrine***

The facts of *Re Tilson* were that Ernest Tilson and Mary Barnes were married on 10 December 1941. Mary Tilson was only sixteen at the time and she was pregnant. While Mary Tilson was a Roman Catholic her husband was a Protestant. The couple wanted to be married in a Catholic Church and so it was necessary for them to obtain a dispensation because of her husband's religion. Mary Tilson applied twice but was refused on both occasions. The dispensation was eventually granted, following the interviewing of her

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<sup>124</sup> Ibid. 28-29.

<sup>125</sup> (1952) 86 ILTR 6.

<sup>126</sup> Ibid. 21. Hogan states that in refusing custody to the mother: 'The Court must have been swayed by the mother's absence over a long lapse of time, along with the religious education issue. What is, however, clear from *Corcoran's* case is that the majority of the Court clearly proceeded from the basis that *both* parents had rights and that an ante-nuptial agreement as to the exercise of such rights could not be unilaterally varied by one party.' Gerard Hogan, 'A Fresh Look at *Tilson's* Case', (1998) *Irish Jurist* 23, p.321.

husband by the Rev. Harley. As the Reverend explained in his affidavit:

‘Mr. Ernest Tilson – the Protestant party – took the unusual course of applying for the personal interview with the Parish Priest. I was deputed by the Most Rev. Dr. Wall to interview him. I saw him and he pressed his case very strongly. He intimated that he was taking instructions in the Catholic faith. He gave assurance that he would do all in his power to safeguard the religion of Miss Barnes and he undertook to bring up any children born of the proposed marriage in the religion of the Catholic Church. I was convinced of his sincerity and on the basis of his sincerity and the moral certainty of his keeping his promises I recommended that the application for the dispensation be granted. If there had been any doubt that the promises would not be kept the dispensation would not have been granted and the marriage would not have taken place.’<sup>127</sup>

The dispensation was granted and Ernest Tilson made the following promise:

‘I, the undersigned, do hereby solemnly promise and engage that all the children of both sexes who may be born of my marriage with Mary Barnes shall be baptised in the Catholic church and shall be carefully brought up in the knowledge and practice of the Catholic religion and I also solemnly promise and engage that I will not interfere with the religious belief of Mary Barnes, my future wife, nor with her full and perfect liberty to fulfil all her duties as a Catholic.’<sup>128</sup>

The couple’s four children were all baptised and raised as Catholics. The couple had marital difficulties and on April 3, 1950 Ernest Tilson covertly removed the children to their parental grandparents’ home and later put them in the Bird’s Nest in Dun Laoighaire. It was proposed that the children would be educated as members of the Church of Ireland. When the children’s mother discovered where they were she commenced *habeas corpus* proceedings to recover custody of the children.

### **The High Court**

Two issues of law were raised in the High Court and the Supreme Court - whether the common law rule conferring parental supremacy in matters of upbringing, education and religious instruction was consistent with Article 42.1 of the Constitution and whether the husband was bound by the ante-nuptial promise he had made prior to the marriage. The case could have been decided on far less contentious grounds of estopping the husband from taking custody of the children because of his conduct in secretly removing the children from their family home. However, Gavan Duffy P chose to haul the case into

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<sup>127</sup> [1951] IR 1.

<sup>128</sup> Ibid. 16.

‘deeper constitutional waters’.<sup>129</sup> In the High Court Gavan Duffy P chose to reject pre-independence precedent, in a rather pretentious style of prose, as wholly inappropriate to the Irish State:

‘Articles 41 and 42, redolent as they are of the great papal Encyclicals *in pari material*, formulate first principles with conspicuous power and clarity...The strong language of these articles arrests attention; it must have been chosen of set purpose, because the grave subject-matter demanded that Ireland today should define her position. Thus, for religion, for marriage, for the family and the children, we have laid our own foundations. Much of the resultant polity is both remote from British precedent and alien to the English way of life, and, when the powerful torch of transmarine legal authority is flashed across our path to show us the way we should go, that disconformity may point another way.’<sup>130</sup>

Here is an example of a judge referring specifically to papal encyclicals as an influence on the Constitution. Similarly, Kenny J was to rely on a papal encyclical in his judgment in *Ryan v AG*<sup>131</sup> some thirteen years later. Gavan Duffy P is again drawing a connection between the influence of Catholic thought on Irish Constitutionalism and Irish cultural independence from British social and legal influences.

He then went on to state:

‘...the doctrine of Articles 41,42 and 44 of the Constitution appears to me to present the ante-nuptial agreement of the parties upon the creed to be imparted to their future children in a new setting and, subject to the welfare of the particular infants concerned, to invite recognition of the agreement in our Courts as a compact that serves the social order in Ireland, because the agreement, far from conflicting in any way with those articles, is consonant with their spirit and purpose and tends directly 1, to safeguard a marriage which cannot be dissolved; 2, to safeguard the innate and imprescriptable right of the child to a religious education, its most precious inheritance in the eyes of a Christian State. I apprehend that this court is bound under the Constitution to cherish that inheritance of helpless citizens. Consequently, however wide the unfettered *patria potestas* may be, a judicial theory, which, under cover of public policy would freely allow a father to spoil his children’s birthright by uprooting their creed at his pleasure in plain defiance of his gravest express obligations undertaken as husband and father, can find no place in a jurisprudence moulded to fit the Constitution of Ireland, whether the agreement be held to give them moral claim before the court or as a legal right...The simple, clear and positive consequence of the ante-nuptial agreement, made to comply with the Catholic Church, is this – that by the express compact of the parents 1, the Constitution of their particular policy (which our Constitution protects) is to be Catholic to the extent required by their promises, and

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<sup>129</sup> Gerard Hogan, ‘A Fresh Look at Tilson’s Case’, (1998) *Irish Jurist*, p.311.

<sup>130</sup> [1951] IR 1, 15.

<sup>131</sup> [1965] IR 294



2, their parental authority (which our Constitution protects) is to be exercised over the children of the marriage in the Catholic way to the extent required by their promises.’<sup>132</sup>

Gavan Duffy P then concluded by stating:

‘...an order of the Court designed to secure the fulfilment of an agreement, peremptorily required to secure the fulfilment of an agreement, peremptorily required before a ‘mixed marriage’ by the Church whose special position in Ireland is officially recognised as the guardian of the faith of the Catholic spouse, cannot be withheld on any ground of public policy by the very State which pays homage to that Church. In my opinion, the highest interest of this community and of this State demands that the parties, whose marriage is permanent, shall be informed by the High Court of Justice that the ante-nuptial agreement upon religion is treated under the law of Ireland as a weighty factor in a contest between parents as to their children’s creed, and a factor by no means to be displaced except by a factor of greater weight. I discern no such factor here.’<sup>133</sup>

Gavan Duffy P uses Article 44 as textual evidence that the government’s public policy is based on Catholic social teaching as the State pays homage to the same Church through its Constitution. This interpretation of Article 44 is clearly at variance with that envisaged by the drafters of the Constitution, who viewed it as simply recognising a demographic fact. Hogan points out that the *ratio decidendi* of the decision is that the court would enforce the ante-nuptial agreement and that other judicial comments on the status of the Catholic Church and canon law while contentious were *obiter dicta*. However, this does not lessen the social and cultural impact of a High Court judge making such contentious comments in the context of the sensitive ecumenical relations on the island at the time. While Gavan Duffy P’s decision to overturn the paternal supremacy rule may be welcomed his *obiter dicta* were utterly lacking in ecumenical empathy at a time of religious sensitivity.

### **The Supreme Court**

On appeal to the Supreme Court, it was held that the common law rule whereby fathers enjoyed the sole prerogative of determining the religious education of their children was contrary to Article 42.1 of the Constitution.<sup>134</sup> The court further held that an ante-nuptial

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<sup>132</sup> [1951] IR 1, 19.

<sup>133</sup> Ibid. 17-18.

<sup>134</sup> This provides that: ‘The state 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.’

agreement that the children of the marriage would be raised as Catholics given by the Protestant father prior to the marriage was binding. The argument that the common law rule remained unaffected by the Constitution rested on a contrived reading of the word 'parents'. This point is illustrated in an exchange between Murnaghan J and Mr. Leonard KC, counsel for Mr. Tilson:

'Mr. Justice Murnaghan: It is not the father's rights. The Constitution puts it as the parents' rights – parents in the plural.

Mr. Leonard agreed that it was the parents' rights, but that, as between the parents, it would be the father who had the right.

Mr. Justice O'Byrne: Before 1937 the mother had no rights regarding the religious education of the child. It was the father who had the rights in these matters, but had not the Constitution of 1937 changed that?

Mr. Leonard submitted that the assertion of 'parents' in the plural did not change the law.<sup>135</sup>

Murnaghan J rejected this interpretation of the word 'parents'. He explained in his judgment that: 'The word 'parents' is in the plural and, naturally should include both father and mother...The parents – both father and mother – have a joint power and duty in respect of the religious education of their children'.<sup>136</sup> The Court ruled that Article 42.1 of the Constitution had abrogated the paternal supremacy rule.<sup>137</sup> Therefore the ante-nuptial agreement was capable of binding both parties to the marriage. Black J in his dissenting judgment disagreed fundamentally with this interpretation of Article 42.1 stating:

'It would seem to me at least improbable that Article 42.1 was intended to invest the mother with any different right in regard to her children's religion that she had previously, namely, a right subordinate in the last resort to the father's overriding dictatorship as recognised by the common

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<sup>135</sup> *The Irish Times*, August 1, 1950.

<sup>136</sup> [1951] IR 1, 32.

<sup>137</sup> In *Re May, Minors* [1954] IR 74 a married couple who were both Catholic had been being raising their five children as Catholic when the father converted to the Jehovah's Witnesses. He attempted to have the children's schooling changed to non-denominational education. Davitt P stated that there was an inferred agreement between the parties that the children would be raised as Catholics. The judge upheld Murnaghan J's interpretation of Article 42.1 in *Tilson* (at 34) and on that basis 'neither parent has the right to depart in any way from the terms of such agreement.' [1954] IR 74, 77 Interestingly, the judge also interpreted Murnaghan J's dicta as meaning: 'If they [the married couple] cannot agree initially, the father's wishes are to prevail.' Ibid. 76 This may indicate that the paternal supremacy rule still had some residual effect notwithstanding *Re Tilson*.

law'.<sup>138</sup>

Murnaghan J in his judgment rejected the idea that Article 44 conferred a special legal privilege on the Catholic Church:

'It is right, however, to say that the Court, in arriving at its decision, is not now holding that the last-mentioned Articles [41,44] confer any privileged position before the law upon members of the Roman Catholic Church, and during the argument counsel for the respondent expressly disclaimed any such privileged position.'<sup>139</sup>

However, Black J viewed this as an inadequate response stating:

'It is not, in my view, enough to say that we are not now holding that the last-mentioned Articles confer any privileged position, etc; for that might be read as admitting of a mental reservation that these Articles do confer such a privileged position, and that although not now held to do so, they may at some future time be held to do so. I think it would be in the national interest and in that of our jurisprudence that we should here and now unequivocally declare that our Constitution does not confer any such privileged position before the law upon members of any religious denomination whatsoever. For my part I declare that such is my opinion. Further, Mr Liston, [counsel for Mrs Tilson] while making the disclaimer alluded to, seemed reluctant to answer my query as to whether the non-discrimination in the matter of ante-nuptial contracts was confined to those whose religion is Christian. This leads me to add that in my opinion it is not so confirmed.'<sup>140</sup>

*Re Tilson* has been the subject of severe criticism, indeed some of it is justified, but much of the criticism fails to understand the legal reasoning behind the decision. Generally, the criticism has centred on Gavan Duffy's *obiter* rhetoric in the High Court, albeit with the exception of a more balanced view in *The Irish Times* editorial.<sup>141</sup> The effect of *Re Tilson* was that ante-nuptial agreements were now legally enforceable and this was seen as *de facto* state backing of the Roman Catholic church's *Ne Temere* decree. This had contributed to the decline in the Protestant population in the Irish state since 1922 and had disastrous implications for relations with Northern Protestants.<sup>142</sup> The most peculiar

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<sup>138</sup> [1951] IR 1, 39-40.

<sup>139</sup> *Ibid.* 35.

<sup>140</sup> *Ibid.* 43.

<sup>141</sup> See below.

<sup>142</sup> See Garret Fitzgerald, 'Address to the Consultation on Mix Marriages', in M Hurley (ed) *Beyond Tolerance: The Challenge of Mixed Marriage*, Chapman, London, p.188-93 in which he argues that *Ne Temere* contributed to religious divisions at a time of political tension and that it had caused a decline of 1% a year in the Protestant population from 1946-1961. In 1970 the effect of the ecumenical movement on Church doctrine was evident as *Ne Temere* was superseded by *Matrimonia Mixta* in which it was no longer required that the Protestant spouse agree to rear the couple's children as Catholics. However, the Catholic

aspect to the case is that the demise of the paternal supremacy rule, that was so patently discriminatory and unfair to mothers, should have been met with such hostility from liberal quarters. It is also important to remain sceptical of the validity of the ante-nuptial agreement in light of the context in which it was agreed on. Since the agreement was signed at a time of a domineering and triumphalist form of Catholicism within the State, it is clear that a question mark must remain on whether Mr Tilson's consent was meaningful. Given that the couple had been refused two dispensations prior to eventually being successful on the third occasion, it is at least arguable that Mr Tilson was forced into a situation in which he had to sign the ante-nuptial agreement if he wanted to marry, as well as being pressurised by prevailing Catholic mores in Irish society.<sup>143</sup>

### **Reaction to *Re Tilson***

The editorial writer in *The Irish Times* was, as referred to above, balanced though critical of the High Court judgment in stating:

‘Mr. Gavan Duffy was entirely frank in his attitude. This country has a huge Roman Catholic majority; the Constitution recognises expressly the ‘special position’ of the Roman Catholic Church. Therefore, the Roman Catholic view of ante-nuptial agreements should prevail. The Supreme Court, while upholding the decision in this case has laid no emphasis on its religious aspects. Indeed, it has taken some trouble to keep the religious dimensions of the case to background. Nevertheless, it is difficult to avoid the impression that the philosophy underlying Irish jurisprudence is tending, slowly but surely, to be informed by the principles of the Roman Catholic Church’.<sup>144</sup>

One letter writer to *The Irish Times*, a Mr. J.W.P., writes:

‘As a member of the Church of Ireland, living in the Republic of Ireland, I am left with a feeling of uncertainty for the future as a result of the Tilson case...there is a world of difference between a ‘special position’ and an exclusive right, as was claimed for the Roman Catholic Church, in the Tilson case when a leading counsel argued that a Roman Catholic wife would be deprived of her religious liberty under the Constitution if her husband did not allow her to bring up her own children in her own faith. What about her husband? Is he not entitled to equal treatment? Or does the Constitution discriminate against the minority?’<sup>145</sup>

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spouse was still expected to do so. See Eoin de Bhaldraithe, ‘Mix Marriage and Irish Politics: The Effect of *Ne Temere*’, (Autumn, 1988) *Studies* 77, 284, particularly p.294.

<sup>143</sup> In the later case, *G v An Bord Uchtála* [1980] IR 32, 74 Walsh J referring to the issue of consent (in the context of adoption) stated that a ‘consent motivated by fear, stress or anxiety, or consent or conduct dictated by poverty or other deprivations cannot constitute a valid consent’.

<sup>144</sup> *The Irish Times*, 7 August 1950.

<sup>145</sup> *Ibid.*

In *The Irish Jurist* Dr. V.T.H. Delany wrote:

‘In the mean time one cannot but regret the passing of the paternal power, which had the great merit of certainty. The whole question was effectively summarised by Gibson J in the earlier case of *In Re Grey*, 1902 2 IR 684, when he said: “In every country where sectarian divisions exist, it is essential that there should be a settled and intelligent rule as to the religion of the offspring of wedlock, it is better that there should be some rule than none at all. The decision of each case ought not to depend on the varying impulse of uncontrolled judicial discretion. As the rule exists, it should be, in the absence of exceptional circumstances, steadily and unswervingly applied. Today it is a Protestant father whose rights are in question, tomorrow it may be a Roman Catholic. A lay tribunal does not and cannot distinguish and adjudicate between the claims of the various Churches as leaders of divine truth; it cannot affirm that an infant’s welfare is bound up with any particular form of creed; but if it has an objective rule – the male parent’s professed religion – it can decide securely and without appearance of bias.” It is to be feared that the new rule, in its practical application, will lead to those very difficulties of which Gibson J was so justly apprehensive. Uncontrolled discretion is a dangerous thing in itself, for, in its extreme form, it can be productive of what is even more deplorable than bias – lack of certainty.’<sup>146</sup>

Delaney’s view is certainly debatable as he appears to be saying that a rule which is archaic, unjust and discriminatory should be retained merely because it has the merit of certainty. Certainty alone is an unpersuasive justification for such a rule.

Writing in 1967 Kelly agreed with Black J’s dissent:

‘...it is very difficult to read into Article 42.1 the intention that paternal supremacy is to be replaced by the joint parental authority; on the contrary, one might imagine that the very fact that the Constitution did not expressly provide for such a radical change in the law was a fair indication that such a radical change in the law was a fair indication that such a change was not intended; and there is much to be said for Mr. Justice Black’s belief that no such idea of the possible effect of the Article had ever occurred to any judge or lawyer before.

This is not to say that the old rule should not have been changed. Its retention in modern Ireland (or anywhere else) would be hard to justify. On the other hand, it is unfortunate that the Supreme Court could not have thought of some other way of changing the law than by such a doubtful interpretation of the Constitution. One would have thought that Mr. Justice Gavan Duffy’s suggestion obiter about estoppel might have been more properly adopted; and the Supreme Court could easily have declared the rule, in its application to Ireland, to be contrary to public policy, without considering the Constitution at all.’<sup>147</sup>

Both Kelly and Delaney fail to take account of the clear textual justification for overturning the rule based on the use of the word ‘parents’ in Article 42.1. Blanshard in his rather tendentious book *The Irish and Catholic Power* also voiced his criticisms of the judgment in 1953:

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<sup>146</sup> VTH Delany, ‘The Custody and the Education of Children’ (1952) 18 *Irish Jurist* 18, p.23.

<sup>147</sup> John Kelly, *Fundamental Rights in the Irish Law and Constitution*, p.229.

‘The Court held that the new Irish Constitution, with its special recognition of religion, made the mixed marriage pledge enforceable. Would a predominately Catholic court in Ireland enforce a mixed-marriage pledge which ran in favour of the Protestant parent, calling for the education of the children as Protestants? In the *Tilson* case, the only non-Catholic member of the Irish Supreme Court, Justice Black, raised this question, and because he could not get an answer from his colleagues, he registered a vote dissent. He was quite justified in his scepticism. The Catholic Church denies the reality of Protestant marriage for Catholics and no Catholic judge in Ireland would be permitted to enforce a promise which, in the Catholic view, arose out of immoral relationships.’<sup>148</sup>

Whyte says the judgment is ‘A prime example for those who wish to argue that Ireland is a clerically dominated state. Without necessarily endorsing this judgment, one can at least say that the deliverance of such a ruling at such a time was symptomatic of the ‘integralist’ atmosphere of these years.’<sup>149</sup> In his submission to the New Ireland Forum in 1983, Whyte referred to concerns amongst Northern Protestants at ‘the support which, it is claimed, the courts give to the mixed-marriage regulations of the Catholic Church.’<sup>150</sup>

Noel Browne was scathing in his criticism of *Re Tilson*, stating:

‘In [the *Tilson*] case the Supreme Court upheld judge Gavan Duffy’s ruling in the High Court that, because of the special position of the Church of Rome in the Constitution, the child of a failed inter-church marriage ought to be awarded to the mother, contrary to practice at the time, because she was a Catholic, as against the claims of the child’s Protestant father’.<sup>151</sup>

Browne’s analysis is not correct as it fails to take account of the existence of the ante-nuptial in which it had been agreed between the parties that the children should be brought up as Catholics and the fact that the anachronistic paternal supremacy rule had been superseded by the 1937 Constitution.

G.M. Gouding in his biography of Gavan Duffy writes that:

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<sup>148</sup> Paul Blanshard, *The Irish and Catholic Power*, Beacon Press, Boston, 1953, p.165-166.

<sup>149</sup> John Whyte, *Church and State in Modern Ireland*, p.171.

<sup>150</sup> John Whyte, ‘Submission to the New Ireland Forum 1983’, (Winter, 1985) *Studies* 73, p.412.

<sup>151</sup> Noel Browne, ‘Church and State in Modern Ireland’ in Murphy and Twomey (eds.), *Ireland’s Evolving Constitution 1937-1997*, Hart Publishing, Oxford, 1998, p.46.

‘In *Tilson*, Gavan Duffy’s philosophy may be summarised as being the invocation of the religious nature of the Constitution, and permeated as it is with Catholic doctrine, to support this by reference to papal encyclicals. Such was his justification in departing from what he termed “British” precedent.’<sup>152</sup>

JE Warnock, Northern Ireland Attorney General, was highly critical of the *Tilson* case viewing it as:

‘...a clear statement that the Common Law of England is no longer to apply in Éire. That must never happen in Northern Ireland...If Northern Ireland was to be incorporated into the Irish Republic we would find ourselves in a country which has a system of law, foreign to that which we are accustomed and subordinated to the law of the Roman Catholic Church...It is not my business – and I am speaking with very great care – to criticise the judiciary of Éire, but we have all noticed that the Courts in Éire have tended to place the law of the Roman Catholic Church in a supreme position over the Common Law.’<sup>153</sup>

The Attorney was engaging in political opportunism in exaggerating the affects of the case. Nonetheless, Gavan Duffy P’s unfortunate *obiter dicta* provided Northern Unionists with the perfect opportunity to dig an even deeper wedge between North and South.<sup>154</sup> Crawford described the effect of *Tilson* as confirming ‘for Protestants just how pervasive was the influence of the Catholic ethos.’<sup>155</sup> The Irish ambassador to the Vatican, Joseph Walshe, wrote to the Archbishop of Dublin John Charles McQuaid regarding *Re Tilson*, stating in his letter of 24 August 1950: ‘I can echo your Grace’s expression at the Gavan Duffy decision-and I am above all delighted that it was brought about by your patient and consistent work’. The Ambassador informed the Archbishop that the Vatican had paid special attention to the case and whenever he met Monsignor Tardini (a Vatican official) he mentioned the case and the Monsignor’s questioning made Walsh feel ‘like a Protestant’. ‘Thanks be to the Lord it is all over and has been done in

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<sup>152</sup> GM Goulding, *George Gavan Duffy*, p.89-90.

<sup>153</sup> *Irish Times*, 6 September 1950. In the same article Reverend JG Macmanaway, MP is quoted to have said that *Tilson* proved that Home rule was Rome rule and ‘In view of that would we not be the most utter fools if we were, for one moment, to contemplate putting ourselves in the power of a State when that State is obliged to carry out in its laws of courts, the dictates of a Church which is contrary to our law? If we need any justification today in our attitude in saying that we will never consent to be included in the Irish Republic, then the High Court of Éire has given us every justification within the past few weeks.’

<sup>154</sup> Similarly, the McCann case in 1910 referred to in fn 84 Chapter 1 was used by Unionists in a effort to equate Home Rule with Rome Rule.

<sup>155</sup> Heather Crawford, *Outside the Glow Protestants and Irishness in Independent Ireland*, UCD P, Dublin, 2010, p.114.

the best way',<sup>156</sup> Walshe wrote. It is not clear from Walshe's comments whether McQuaid had any direct involvement in *Re Tilson*. McGarry describes McQuaid's aim as being to make 'the Catholic Church the unchallenged arbiter of all questions in which it could reasonably claim to have an interest...This attitude was not enunciated with any arrogance, or even very explicitly, but it was implemented by continuous hints, directives and pressures.'<sup>157</sup> This exemplifies a pre-Vatican II, non-ecumenical view of Church-State relations which reached its apogee at the time of *Re Tilson* and the Mother and Child Scheme controversy of 1951. Both *Tilson* and the Mother and Child Scheme would prove hollow victories for the Church as before long ecclesiastical reform, secularising influences and judicial innovation created a context in which constitutional and judicial reforms took place which would have been difficult to imagine in 1950.

In analysing *Re Tilson* it is important to distinguish between the High Court judgment and the Supreme Court judgments. The rhetoric regarding religion in Gavan Duffy P's judgment is, as Whyte said, 'symptomatic of the "integralist" atmosphere of these years'.<sup>158</sup> However, the Supreme Court judgment was decided on less contentious grounds. Indeed, it is likely that were the case decided today the result would be the same, albeit one would hope the Court would convey the impression that it was not privileging one religion over others. It is certainly the case that the Court would endorse the view the parents possess equality rights in the education of their children under Article 42. Hogan states 'that while the criticisms of the Supreme Court judgment are to some extent ill-founded, the failure on the part of Murnaghan J to deal satisfactorily with the issues raised by Black J in dissent allowed the judgment to be misinterpreted and false impressions to be created'.<sup>159</sup> However, in analysing the legalities of the case, it is important to realise the impact that Gavan's Duffy P's *obiter dicta* had on the minority Protestant community at a particularly sensitive time in inter Church relations. It is clear that the case is symptomatic of poor ecumenical relations though not religious oppression

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<sup>156</sup> DDA, *McQuaid Papers*, AB8/B/XVIII/6. This letter is contained in a box under the heading Knights of St Columbanis which may indicate that Walshe was a member of the secretive Catholic organisation.

<sup>157</sup> *The Irish Times*, 2 December 2008.

<sup>158</sup> John Whyte, *Church and State in Modern Ireland*, p.171.

<sup>159</sup> Gerard Hogan, 'Fresh Look at Tilson', (1998) *Irish Jurist*, p. 332.



during the 1950s; it is also evidence of a theocratic culture though not theocratic State and lastly, the criticisms of Gavan Duffy's *obiter dicta* in the High Court are justified but the Supreme Court's judgment has been frequently misunderstood. The High Court judgment in *Re Tilson* reflects the triumphalist nature of Catholicism within Irish society at the time, and is evidence that this period represented the apogee of the influence of the clericalism.

Gavan Duffy was pioneering in the fact that he engaged with the 1937 Constitution when it was ignored by many on the bench. His judgments reflect the influential position of the Catholic Church during this period. His jurisprudential philosophy is based on a strong sense of nationalism and Catholicity. These two strands are related as the more the judge emphasised Ireland as a Catholic polity, the more he emphasised the country's political and legal sovereignty. His judicial philosophy is symptomatic of the pre-Vatican II Church and a domineering current of Catholic thought that would come under strain as integralism was replaced by ecumenical dialogue and pluralism. The Catholicity evident in his judgments reflects the confessional culture that existed in Irish society during this period. Kennedy CJ's letter concerning wards of courts to Archbishop Byrne is also symptomatic of the confessional atmosphere that existed during the early years of the State. Kennedy CJ's acceptance of natural law in *State (Ryan)*, while not necessarily an acceptance of the Catholic theological view of natural law, fits more easily with the mainstream of Catholic thought during the 1930s. However, the majority judgments in *State (Ryan)* may also be viewed as being in line with Catholic thought to the extent that they protect the established order from potentially destabilising forces. Both Kennedy CJ and Gavan Duffy P's judicial philosophy was informed by their nationalism. Gavan Duffy P displayed a greater level of Catholicity in his judgments than Kennedy CJ. The deference shown by the Court in *Tamburrini* is also systematic of the integralist culture that existed during this period. It appears to indicate that members of the judiciary other than Gavan Duffy P, were prepared to allow deference to the norms of the majority religion influence them philosophically. Generally, there is not the same evidence of Catholicity at a judicial level as there is at a social and political level during this period. The primary reason for this is the fact that the residual influence of the concept of

parliamentary supremacy still held a firm influence on the legal profession. O’Rahilly had voiced criticisms of British jurisprudence in 1937, viewing it as alien to Ireland’s ‘Catholic sociology’:

‘...we do not know what principles of jurisprudence they [the judiciary] will employ. Without being a lawyer I know enough of British jurisprudence and law-principles – in which most of our legal men are saturated – to know that on many important points they differ from the presuppositions of Catholic sociology. Hence I see no use in registering new social principles (i.e. new in relation to British legalism) in the Constitution and then allowing them to be pared down with the knife of an alien jurisprudence.’<sup>160</sup>

Ironically, it was the liberal British tradition and the residual post-colonial acceptance of the concept of parliamentary supremacy which kept the judiciary in a kind of jurisprudential strait jacket as it deferred to a legislature and government which had itself shown deference to an assertive Catholic hierarchy. It was only when the Courts began to recognise the power of judicial review that they started to break free of the constraints which British liberalism placed on judicial activism. Therefore, using O’Rahilly’s terminology the Constitution contained a ‘knife’ called, judicial review which was to pare Ireland’s Catholic sociology. British jurisprudence was less of a threat to those who aspired to a Catholic polity than judicial activism and judicial review. In 1954 McWhinney wrote:

The positive law of the Constitution of 1937, from the opening remarks of the Preamble onwards through the Fundamental Rights and the Directive Principles of Social Policy purports to represent a society whose ‘living law’ is Roman Catholic and social democratic. But the actual approach of the Irish judges to the cases considered in detail above<sup>161</sup> has been but rarely innovatory, and in general fairly conventional throughout. To this extent it is clear that the impact of modern Catholic political, social and economic ideas on legal development in present-day Ireland has been rather less significant or substantial than the adoption of the radically new Constitution of 1937 might have seemed at the time to foreshadow.<sup>162</sup>

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<sup>160</sup> *Irish Independent*, 15 May 1937.

<sup>161</sup> The main Irish cases the author examined were: *Pigs Market Board v Donnelly* [1939] IR 413, *Re Article 26 and the Offences Against the State (Amendment) Bill*, [1940] IR 470, *State (Walsh) v Lennon* [1941] IR 68, *Re McGrath and Harte* [1941] IR 68, *Re Article 26 and the School Attendance Bill*, 1943 IR 334, *National Union of Railwaymen v Sullivan* [1947] IR 77, *Buckley (Sinn Féin) v AG* [1950] IR 67 *Re Frost, Infants* [1947] IR 3 and *Re Tilson* [1951] IR 1. McWhinney described Gavan Duffy P’s High Court judgment in *Tilson* as the ‘strongest expression’ of Catholic sentiments. Edward McWhinney, ‘The Courts and the Constitution in Catholic Ireland’, 29 *Tulane Law Review* (1954) 69, p.86.

<sup>162</sup> Edward McWhinney, ‘The Courts and the Constitution in Catholic Ireland’, 29 *Tulane Law Review* (1954) 69, p.86.

However, Gavan Duffy P's judicial activism drew on the confessional culture which was dominant at the time in contrast to the later post-Vatican II examples of judicial innovation which tended to undermine the Church's influence. During this period of history Church and State operated in a bipolar manner, between government and Church. The judiciary was not an active participant because it was weak relative to the other branches of power and therefore there was not the same temptation on the Church to attempt to influence the legal process. The jurisprudence of the Courts did not have the potential to be socially transformative and therefore could neither support (with the notable exception of Gavan Duffy P) nor undermine the nation's Catholicity. The Church did not exert power for its own sake but to strengthen the influence of Catholic norms on society. The judiciary's unassertiveness meant it lacked the capacity for social change. In the 1960s as the Courts extended their powers and became more receptive to constitutional rights and litigants' arguments, Church-State relations were transformed as the sociological consequences of judicial activism at a time of cultural and religious change became clear.

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## Chapter 4 Old Ideas Challenged and Judicial Activism

*‘Therefore We base Our words on the first principles of a human and Christian doctrine of marriage when We are obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children. Equally to be condemned, as the magisterium of the Church has affirmed on many occasions, is direct sterilization, whether of the man or of the woman, whether permanent or temporary. Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation—whether as an end or as a means.’* *Humanae Vitae* (1968)

### Introduction

John XXIII’s pontificate and the Second Vatican Council were to have a profound effect on Irish society. Ecumenism, religious freedom and pluralism were perceived to have replaced the triumphalism of the pre-Vatican II Church thereby setting the seeds for a moral and sociological revolution as the Church’s moral teachings were increasingly challenged both within and outside the Church. In this chapter I argue that this sociological shift is exemplified by the Supreme Court’s judgments in *McGee v AG*<sup>1</sup>. I argue that the Court’s decisions in *McGee* need to be viewed in light of two related contextualising arguments. The first is that post-Vatican II laws which were perceived as being particularly influenced by Catholic thought would be subjected to a greater degree of scrutiny because of the emphasis which was placed on ecumenical dialogue. That fact is exemplified by the liberalism of the recommendations of the 1966 Committee on the Constitution.<sup>2</sup> A further reason for the increased scrutiny of laws which were perceived as being confessional was the fact that the non-plural polity in Northern Ireland was about to explode with profound political consequences south of the border. The emerging tectonic philosophical shift from nationalism to recognition of the

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<sup>1</sup> [1974] IR 284.

<sup>2</sup> See below.

Protestant/Unionist majority's constitutional wishes and cultural identity meant a growing awareness of the need not to antagonise Northern Unionist opinion through supporting laws which may be perceived as sectarian. The Second Vatican Council, the move towards ecumenism, and the emerging troubles meant that laws viewed as being Catholic had a precarious future.

I further argue that in the context of the move to ecumenism the Catholic hierarchy redefined its relationship with the State in declaring that it did not necessarily expect civil laws to mirror Church laws. This apparent philosophical shift meant that the majority judgments in *McGee* while morally wrong in the eyes of the Church did not actually contravene the rules of the Church. That is that the judges were not expected by the Church to arrive at decisions that would reflect the teachings of the Church. While individual citizens would contravene Catholic thought by using contraceptives, a judge was not 'necessarily' expected to mould the law to reflect Catholic norms. Therefore, the majority judges in *McGee* were, arguably, not contravening Catholic thought because of the Church's redefinition of its relationship with the State. Furthermore, the fact that there was an emerging wing of liberal Catholic thought within the Church which was prepared to reform the Church's laws on contraception meant that the majority judgments were in line with a liberal current of Catholic thought within mainstream Catholicism.

The judicial activism which was a pre-requisite for the Courts to be receptive to *McGee*'s arguments was informed by a belief in natural law and the textually supported doctrine of unenumerated rights based on a belief in the existence of extra-constitutional rights. Natural law functioned as a mechanism for allowing Catholic thought to enter the legal sphere but was used (by Walsh J in *McGee*) as a means of striking down legislation which reflected the Catholic ethos of the 1930s.<sup>3</sup> The emergence of judicial activism in

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<sup>3</sup> The natural law theory which is most associated with the Catholic Church is Aquinian natural law. Ó Hanlon J has written that 'Article 6 and the preamble [of the Irish Constitution] unambiguously identify "the most Holy Trinity" as the ultimate source of this higher law...The State is founded on a Constitution which acknowledges that all authority comes from the Most Holy Trinity to Whom, as our final end, all actions both of men and States must be referred, and which states that all powers of government derive under God from the people. It would appear to follow...that no law could be enacted and no judicial decision could lawfully be given, which conflicted with the Natural Law (which we recognise as being of divine origin).' O' Hanlon J, 'Natural Rights and the Irish Constitution', (1993) 11 *ILT* p. 8. Pope Paul VI

the post-Vatican II reformist climate and at a time of the emergence of a strand of secularism which would compete with the old order represented a threat to Ireland's Catholic sociology. The emergence of a more activist judiciary meant that the Courts were now active participants in Church-State relations. If the judiciary continued to display a deferential attitude to parliament and continued to follow the path of the British tradition of parliamentary supremacy, it would have represented far less of a threat to the status quo and decreased the likelihood of the Courts striking down laws which were perceived as confessional. I first turn to examine evidence of an emerging challenge to Catholic norms in the post-Vatican II period.

### **Challenges to Traditional Norms**

The growing strength of liberal and secular values in Irish society was reflected in events such as the opening of Ireland's first family planning clinic in Dublin in 1969<sup>4</sup> and in 1970 the open violation of the ban on the importation of contraceptives by women travelling from Belfast by train to purchase contraceptives (what became known as the 'contraceptive trains').<sup>5</sup> In 1972 a government appointed Commission on the Status of Women reported that parents should have the right to choose what means to use in planning their families, and recommended that 'information and expert advice should be available....to families throughout the country'.<sup>6</sup> Further evidence of this societal shift was the campaigning of Independent Trinity Senator Mary Robinson who, in her failed attempt to introduce liberal family planning legislation in 1974, stated: 'we must ensure that the laws of the State do not reflect the morality of a particular religious denomination.'<sup>7</sup>

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wrote in *Humanae Vitae* that the teaching of the Church was founded on the natural law, which was illuminated and enriched by divine revelation. When the Church speaks of natural law then it is referring to the moral law as ordained by God. Thus Pius XI, in the encyclical *Quadragesimo Anno* speaks of God as the author of nature. The modern ethic of human rights was embraced by the Catholic Church with Pope John XXIII's 1963 encyclical *Pacem in Terris* which contains arguments in favour of a series of specific human rights. This appears to break with the view that there is a conflict between the Catholic common good tradition and the liberal idea of democratic rights.

<sup>4</sup> By 1979 there were five clinics in Dublin, and one each in Cork, Limerick, Galway, Bray and Navan. 'Contraception 1979', *Irish Times*, 5 January 1979.

<sup>5</sup> The customs officers allowed the women to pass.

<sup>6</sup> *Commission on the Status of Women* (Dublin, 1972), p.225.

<sup>7</sup> 77 *Seanad Debates* 216, 20 February 1974.

Whyte writes that there were 'other forces besides those directly challenging traditional Catholic values, which were altering the climate of opinion in which Church and State must operate. One such was the growth in Ireland, from about 1969, of a women's movement.'<sup>8</sup> Whyte does not view the Women's Movement as challenging the Catholic hierarchy when campaigning on issues such as equal pay and better provisions for deserted wives. He writes that only a 'radical fringe of the movement has pursued such contentious causes as easy abortion or divorce. But a much wider section of it pressed for relaxation of the anti-contraception laws.'<sup>9</sup> Whyte cautions against exaggerating the extent to which social changes affected Irish society. He argues that generally the Ireland of the 1970s was still largely conservative: 'by the standards of advanced industrial societies, Ireland in the seventies remained a conservative country. Abortion and divorce were prohibited; laws against contraception, although increasingly a dead letter, remained on the statute book. Education remained preponderantly in the control of the Churches. Almost the whole active population continued to go to church on Sundays. But traditional standards were being increasingly questioned.'<sup>10</sup> There was also still a high level of religious attendance: a survey of 2,000 adults in 1971 found that 95.5 per cent of Catholics claimed to have attended mass the previous Sunday.'<sup>11</sup> Therefore, while there was evidence of new approach to social issues amongst the general population, it is still likely that the Supreme Court in *McGee* was adopting a position which many people would have opposed.

In the 1970s it was argued the Southern government needed to de-confessionalise the State in the interest of attracting Northern Protestants into a united Ireland.<sup>12</sup> This resulted in the deletion of Article 44.1.2 and 44.1.3 of the Constitution (recognising the special position of the Catholic Church). This amendment was supported by the Catholic hierarchy<sup>13</sup> and received the support of 84% of the electorate. Further evidence of reform took place in the institutional changes taking place within the Church as a result of

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<sup>8</sup> John Whyte, *Church and State in Modern Ireland*, p.384.

<sup>9</sup> Campaigning in support of such issues would certainly not be described as 'radical' today.

<sup>10</sup> John Whyte, *Church and State in Modern Ireland*, p.387.

<sup>11</sup> *Ibid.* p.382.

<sup>12</sup> See Garret Fitzgerald, *Towards a New Ireland*, C. Knight, London, 1972 especially p.86-101.

<sup>13</sup> Although Bishop Lucey of Cork campaigned against the amendment.

Vatican II, particularly in the form of the ecumenical movement and a commitment to religious freedom which led to the Catholic hierarchy's expression that it did not expect civil law to mirror Church law.

### **Divorce and the 1966 All Party Committee on the Constitution**

The establishment of the All Party Committee on the Constitution in 1966 was influenced by developments in the Church as a result of the second Vatican Council's Decree on Religious Liberty (*Dignitatis humanae*) with its emphasis on protecting and promoting the inviolable rights of the individual. Daly described the Declaration on Religious Freedom as 'reversing a long tradition of ecumenical triumphalism' and that a consequence of the declaration was that Catholics could argue 'that in religious matters the state is a radically secular institution and has only one function in respect of religion, namely to ensure its freedom.'<sup>14</sup> In a letter to Brian Lenihan, the Minister for Justice, Séan Lemass wondered if the decree obliged the State to change the law 'so as to allow divorce and remarriage for those of our citizens whose religion tolerates it?'<sup>15</sup> In its report the committee highlighted the potential legal conflict between the recognition of a marriage in church and civil law where a valid marriage was nullified by the Catholic Church. The Committee also stated that the 'Constitution was intended for the whole of Ireland and that the percentage of the population of the entire island made up of persons who are Roman Catholics though large, is not overwhelming.'<sup>16</sup> The Committee emphasised the Northern dimension to the divorce issue describing it as a 'source of embarrassment to those seeking to bring about better relations between North and South since the majority of the Northern population have divorce rights under the law applicable to that area'.<sup>17</sup>

Accordingly, the Committee suggested changing the divorce provision in the Constitution to read:

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<sup>14</sup> Gabriel Daly, 'Irish Catholicism: A Monolith?' in *Cultural Identity and Tolerance*, Cultures of Ireland, 1996, p.46.

<sup>15</sup> Quoted in Daithí O Corráin, *Rendering to God and Caesar*, p.100.

<sup>16</sup> *Report of the Committee on the Constitution* (Dublin, 1967), p.1.

<sup>17</sup> *Ibid* p.43.



‘In the case of a person who was married in accordance with the rites of a religion, no law shall be enacted for the grant of a dissolution of that marriage on grounds other than those acceptable to that religion.’<sup>18</sup>

Ó Corrain writes that ‘the committee did not consult the churches’. This he suggests signified ‘a genuine and unprompted concern that public law should not be used to impose private religious morality’.<sup>19</sup> Martin suggests that the failure to consult was a mistake: ‘Its [the Committee’s] views on reform of the divorce laws were, in retrospect, pragmatic and its failure to undertake extensive consultations with the various religious denominations was a major error.’<sup>20</sup> In response to the report the hierarchy were astonished at not being consulted and amazed that the ‘authority of Vatican Council II, which describes divorce as a “plague” and which teaches that the marriage relationship...is a lasting one’<sup>21</sup> should be invoked in favour of the proposal. However, Ó Corrain argues that in fact the churches were united against divorce in 1937. McQuaid believed that the demand for divorce among churches other than the Catholic Church was ‘v. unlikely’.<sup>22</sup> McQuaid responded to the committee’s report stating that he regarded: ‘civil divorce...[as] contrary to the law of God...The experience of other countries has proved that civil divorce produces the greatest of evils in society...The effort, even if well intentioned, to solve hardships within marriage by civil divorce had invariably resulted in a series of greater sufferings and deeper evils.’<sup>23</sup> While divorce was introduced thirty years after Vatican II, the seeds for its introduction were laid with the institutional reforms which took place within the Church itself as a result of the council. This was recognised by the All-Party Committee on the Constitution in 1967 albeit the Church itself still bitterly opposed divorce. Nonetheless, the move towards ecumenism meant that laws which were viewed as being solely inspired by Catholic social teaching would be subjected to greater scrutiny.

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<sup>18</sup> Ibid p.43-44.

<sup>19</sup> Daithí Ó Corráin, *Rendering to God and Caesar*, p.100.

<sup>20</sup> Frank Martin, ‘The Family in the Constitution – Principle and Practice’, *Ireland’s Evolving Constitution 1937-1997*, Murphy and Twomey (eds) Oxford, Hart Publishing, 1998, p.82.

<sup>21</sup> DDA, *McQuaid Papers*, AB8/B/XV/b/07, 9 January 1968.

<sup>22</sup> Ibid. AB8/B/XVIII/10. Note by McQuaid, 14 February 1966.

<sup>23</sup> *Irish Times*, 26 Feb. 1968.

### *Humanae Vitae* and Church Authority

In September of 1968, a conference took place in Wexford in which *Humane Vitae* was discussed. Following the conference a report was issued which 'stressed the great problems the encyclical created for a significant number of people in relation to contraception itself, in relation to ecclesiastical authority, and in relation to developing ideas about the nature of the church.'<sup>24</sup> The report also expressed concern that a document that demanded internal and external obedience to its teachings should contain inadequacies and inconsistencies. Fitzgerald describes the reaction of some members of the clergy to the report as positive but that the reply from Archbishop McQuaid was 'characteristically brief and pungent': 'I thank you for your manifesto. I feel sure that you would prefer to go to your judgment with the knowledge that you had done all in your power to secure full assent to the teaching of the Vicar of Christ.'<sup>25</sup>

There was general agreement between the main churches on the issue of contraception until the 1930s when the Anglican Church broke with the Vatican in offering a limited form of support for contraception for married couples. At this time the Vatican issued the papal encyclical *Casti Connubii* which reiterated the Church's teaching that contraception was intrinsically evil. John Noonan, in his book on the history of the Catholic Church's teaching on contraception, argues that the church has always maintained clear and constant opposition to the use of contraception.<sup>26</sup> During the 1960s there was a general change in public attitudes towards the use of contraceptives, particularly with the advent of the contraceptive pill and the influence of the feminist movement. In response to this, Pope John XXIII set up a commission of six theologians to advise him on the issue. Pope Paul VI took over the commission when John XXIII died and began adding new members with expertise from different fields, including married couples. The majority of the commission voted that the Church should change its teaching. A minority on the commission argued that the Church could not change its teaching regarding contraception because this was a matter of God's law and not man's

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<sup>24</sup> Garret Fitzgerald, *All in a Life*, Gill and Macmillan, Dublin, 1991, p.83.

<sup>25</sup> *Ibid.* p.84.

<sup>26</sup> See John Noonan, *Contraception: A History of Its Treatment by Catholic Theologians and Canonists*, Harvard UP, Cambridge MA, 1966.

law and therefore the Church could not declare it morally permissible.<sup>27</sup> The report of this vote and its recommendations as well as all other records of the commission were to be kept strictly confidential. The commission finished its work in 1966. In 1967, the commission's records, including the report on its recommendation, were leaked to both *The Tablet* in London<sup>28</sup> and to *The National Catholic Reporter* in the United States.

The view that a softening of the Church's position on contraception would lead to the undermining of the Church's position is supported by private correspondence between Archbishops Conway and McQuaid in 1965. Conway wrote to McQuaid, in what would prove to be prescient comments, as follows:

'As your grace will be aware, some moral theologians are now calling into question the whole of the church's teaching on this matter [contraception]. It is not simply a question of "the pill," which may be a difficult to decide, but of all of birth-control. It is quite certain that what is in mind is a revision of the Church's teaching even on coitus interruptus, condoms, pessaries, etc. It is I felt that any uncertainty in the future expression of the Church's official teaching on this matter which would allow such opinions to gather strength could be a very serious matter. It could lead many people to question not merely the traditional teaching on birth-control but the very foundations of the Church's ordinary teaching authority and, indeed, the very principle of the immutability of the Church's doctrine. Personally I feel that people may well say "If the Church can change her doctrine on birth-control, she can change her doctrine on anything" and I have been struck by the fact that during the past three weeks I have heard, quite accidentally, of three different young people in widely different circumstances who used the selfsame remark on this issue: "If the Church changes her doctrine on this it will shake my faith to its foundations. The Standing Committee did not contemplate a formal theological statement of the reasons for the immorality of contraception. What was in mind was a simple testimony that the understanding of

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<sup>27</sup> Noonan argues that John Henry Newman was the 'inventor of the idea that Christian doctrine develops...Newman pointed to transformations of doctrine as tangible and as organic, as many-sided and complex and real, as the passage from childhood to adulthood. An Anglican arguing his way into the Catholic Church, Newman saw that the anomalies and novelties of his spiritual home were the marks of vigor, of maturity, of being alive. What Newman noticed and defended were changes in the ways that piety was expressed, in the rules guiding the governance of the Church, in the understanding of the nature of Christ.' John Noonan, *A Church that Can and Cannot Change: the Development of Catholic Moral Teaching*, University of Notre Dame P, Notre Dame, 2006, p.1.

<sup>28</sup> Recently in an editorial in *The Tablet* it was stated that 'In 1968 the most persuasive reason advanced in favour of retaining the ban on artificial birth control was that to lift it would signal that the Church could change its mind, and hence undermine its teaching authority'. *The Tablet* 22 August 2009. In an article in *Catholic Studies*, George Weigel has criticized *The Tablet's* interpretation of *Humanae Vitae* stating that had adapted and 'developed its thought, practice, and doctrine – on many once hotly-disputed questions: the validity of concelebrated Masses; the use of the vernacular in the liturgy; the relationship of the Bible and the Church's tradition as sources of divine revelation; the diaconate; religious freedom and the juridical, limited state. The *Tablet's* take on the bottom-line rationale for *Humanae Vitae* is a myth. But it's a myth of a piece with the journal's longstanding misconception of the Church's teachings on marital chastity and family planning: a misconception which holds that these teaching are "policies" or "positions" that can be changed, rather like governments can change the income tax rate or the speed limit.' *Catholic Studies*, 6 June 2006.

the Irish Bishops was that the ordinary magisterium of the Church had taught that contraception was clear that we were not expressing an opinion on the question of “the pill”). If such a statement were to come from a wide range of Bishops it would carry very great weight as evidence of the simple fact that this is what the Church has been teaching and that the ordinary magisterium of the Church, which is infallible, was committed to it.<sup>29</sup>

McQuaid wrote in reply that he believed that ‘the magisterium ordinarium hitherto to have taught that contraception is contrary to the moral law. I should myself have put the natural law. I should not wish any reference whatever to be made to the progestational steroids, and I should avoid the use of the word birth-control, because the lawful use of the so-called sterile period is a form of control, rather than of prevention.’<sup>30</sup> This correspondence would appear to indicate a difference between Conway and McQuaid on the issue of the contraceptive pill but general agreement concerning other forms of contraceptives. When *Humanae Vitae* in 1968 was released it reaffirmed the Catholic Church’s absolute opposition to artificial forms of birth control stating: ‘to be condemned, as the magisterium of the Church has affirmed on many occasions... is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation—whether as an end or as a means.’ Janet E. Smith writes on the effect that *Humanae Vitae* had on its release:

‘When *Humanae Vitae* was released in July, 1968, it went off like a bomb. Though there was much support for the encyclical, no document ever met with as much dissent...It was a historic and pivotal moment in Church history. Dissent became the coin of the day. This had not been true prior to *Humanae Vitae*. Dissenting theologians had never before made such a public display of their opposition on any given issue. The open dissent to *Humanae Vitae* is a real watershed in the history of the Church. One can view the phenomenon as either a crystallization of something that had been bubbling under the surface for some time, or as catalyst for everything that was yet to come.’<sup>31</sup>

Kennedy writes on change that had taken place in society at the time of the release of *Humanae Vitae*: ‘...by the time *Humanae Vitae* was published in 1968, a sea change had taken place among clergy and laity. By degrees the laity came to disregard the encyclical while the bulk of the clergy fell silent.’<sup>32</sup> While this was certainly a transformative period, Kennedy appears to overstate the extent to which Irish society had changed in

<sup>29</sup> DDA, *McQuaid Papers*, Conway to McQuaid, 23 January 1965.

<sup>30</sup> *Ibid.* dated 30 January 1965.

<sup>31</sup> Janet E. Smith, *Humanae Vitae: A Generation Later*, Catholic University of America, 1991, p.161. Smith is conservative Catholic philosopher and commentator.

<sup>32</sup> Finola Kennedy, *Cottage to Creche*, p.165.

1968. Despite evidence of opposition to the Church's ruling on contraception the Vatican held to its position and it was a cornerstone of the pontificate of John Paul II and continues to be central to the Church's teachings under Benedict XVI<sup>33</sup>. Whyte emphasises the growth in ecumenism in Ireland which received increasing support amongst the Church hierarchy in the 1970s. Whyte states that Archbishop McQuaid's successor Archbishop of Dublin, Dr. Dermot Ryan 'made a gesture which one could scarcely imagine coming from his predecessor...he held an interdenominational service at the pro-cathedral, in which leaders of the six Christian took part. The following year, the hierarchy decided for the first time to send representatives to the General Synod of the Church of Ireland.'<sup>34</sup> This growth in ecumenism meant that those campaigning on issues such as contraception 'could argue that to maintain the traditional Catholic position in these areas, regardless of what others might want, meant damaging the ecumenical spirit which the hierarchy itself approved.'<sup>35</sup>

However, there was a fear amongst certain members of the Catholic hierarchy that the reforms taking place within the Church itself would lead to the undermining of the Church's position in Irish society. This may have been the reason that the Irish hierarchy contributed very little to theological and doctrinal debates in the course of Vatican II.<sup>36</sup> MacRéamoinn writes that Cardinal Conway's conservatism was qualified by his recognition that the reforms coming from Rome were 'no passing blast and that the Church in Ireland must bend to it.'<sup>37</sup> The fear that Vatican II would lead to the questioning of Catholic dogmas previously viewed as immutable was to prove correct. Garret Fitzgerald's view following the release of *Humanae Vitae*, that the moral argument against the use of contraceptives was no longer sustainable exemplifies the sceptical

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<sup>33</sup> Recently, on a trip to Africa Benedict described contraceptives as increasing the problem of AIDS in the continent. *The Tablet* has supported the use of contraceptives stating: 'the Church would gain much public credit by admitting that condoms should not be ruled out as a protection against HIV-Aids.' *The Tablet*, 22 August 2009.

<sup>34</sup> John Whyte, *Church and State in Modern Ireland*, p.385.

<sup>35</sup> *Ibid.* p.386.

<sup>36</sup> By contrast Cardinal Cullen played an important role in Vatican I in 1869. Cullen was central to the formulation of the doctrine of papal infallibility which was promulgated by Pope Pius IX in 1870. See Desmond Bowen, *Paul Cardinal Cullen and the Shaping of Modern Irish Catholicism*, Gill and Macmillan, Dublin, 1983.

<sup>37</sup> Seán MacRéamoinn, 'Renewal or revision?,' Alan Falconer, Enda McDonagh and Seán Mac Réamoinn (eds), *Freedom to Hope? The Catholic Church in Ireland Twenty Years after Vatican II*, Columba P, Dublin, 1985, p.9.

stream of thought which was emerging concerning the Catholic Church's opposition to contraception. I now turn to examine the development of more activist judiciary as the Courts became more active participants in Church-State relations.

### Ryan v AG

There was very little engagement by the Irish courts with the natural law ideas clearly present in the 1937 Constitution in the 1940s and 1950s,<sup>38</sup> although there were signs of support within academic circles. Writing in 1962 before he was appointed to the bench, Henchy wrote that the 'Preamble makes clear that the Constitution and the laws which owe their force to the Constitution derive, under God, from the people and are directed to the promotion of the common good. If a judicial decision rejects the divine law or has not as its object the common good, it has not the character of law.'<sup>39</sup> The 1960s was to herald a departure in judicial philosophy from the bench in terms of engagement with the natural law elements to the Constitution.<sup>40</sup> In *AG v Ryan*<sup>41</sup> both the High Court and the Supreme Court agreed that the personal rights mentioned in Article 40.3.1<sup>42</sup> are not exhausted and that the High Court and the Supreme Court can infer rights from this

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<sup>38</sup> However, in *The State (Burke) v Lennon* [1940] IR 136, 154 Gavan Duffy J rejected Fitzbiggon J's positivism in *(State) Ryan*: 'In my opinion, the saving words in the declaration that "No citizen shall be deprived of his liberty save in accordance with law" cannot be used to validate an enactment conflicting with the constitutional guarantees. The opinion of Mr Justice Fitzgibbon in Ryan's case is relied on by counsel for the Attorney General but it does not apply, in my judgment, to a Constitution in which fundamental rights and constitutional guarantees effectively fill the lacunae disclosed in the polity of 1922. The Constitution, with its most impressive Preamble, is the charter of the Irish People, and I will not whittle it away.'

<sup>39</sup> Seamus Henchy, (1962) 25 *Modern Law Review* 544, p.557. The author also wrote '...the recognition by the Constitution of an inalienable and imprescriptible natural law, antecedent and superior to all positive law, precludes the Supreme Court from adopting the positivist approach of the House of Lords. A decision of the Supreme Court which would have the necessary result that citizens were deprived of any of the natural rights guaranteed by the Constitution would do violence to the Constitution by asserting the superiority of the positive law over the natural law.' See also Vincent Grogan, 'The Constitution and the Natural Law,' (1954) *Christus Rex* 8, p.201-218; Declan Costello, 'The Natural Law and the Irish Constitution,' (1956) *Studies* 45, p.403-414; and the same writer's view in 'Legal and Social Studies', (1962) *Studies* 51, p.201 that '...the rights which are couched in language clearly attributing human rights to the natural law are those rights which experience has shown are most effectively safeguarded by the Constitution.'

<sup>40</sup> However, Sheehy argues that natural law was an integral part of the common law tradition and that 'the lesson of history is...that the principle enunciated in [*Ryan*] was a pithy description of a tide which, in Irish law, had been uninterruptedly incoming since the twelfth century'. See 'The Right to Marry in the Irish Tradition of the Common Law' in O'Reilly (ed), *Human Rights and Constitutional Law: Essays in honour of Brian Walsh*, Round Hall P, Dublin, 1992, p.13.

<sup>41</sup> [1965] IR 294.

<sup>42</sup> Article 40.3.1 of the Constitution states '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.'

Article which are not explicitly stated in the Constitution. Kenny J in the High Court disagreed with the plaintiff's assertion that there had been a violation of her right to bodily integrity but agreed that this right was impliedly protected as an unenumerated personal right by Article 40.3.

Kenny J used three separate arguments to justify his doctrine of unenumerated rights: firstly, the textual justification contained in use of the words 'in particular' in Article 40.3.2; secondly, citizens have rights which flow from the Christian and Democratic nature of the State; and thirdly, Catholic social teaching in the form of the Papal Encyclical *Pacem in Terris* recognised a right to bodily integrity. While *State (Ryan)* advocated a position whereby the Courts would operate solely on the basis of what was mandated by the Constitution, Kenny J incorporated extrinsic non-legal norms (Papal Encyclical/Catholic social teaching) into his judgment 'thereby collapsing any distinction between positive law and morality.'<sup>43</sup> However, there is also a textual basis to the enumeration of new rights, namely the words 'in particular' in Article 40.3.2. This would appear to mandate, or indeed oblige judges to enumerate new rights.<sup>44</sup> The plaintiff's appeal to the Supreme Court was also dismissed. The Court agreed with Kenny J's dicta in the High Court stating:

'the "personal rights" mentioned in Article 40.3.1 are not exhausted by the enumeration of "life, person, good name and property rights" in Article 40.3.2 as is shown by the use of the words "in particular"; nor by the more detached treatment of specific rights in the subsequent sections of the Article. To attempt to make a list of all the rights which may properly fall within the category of "personal rights" would be difficult and, fortunately, is unnecessary in this present case.'<sup>45</sup>

The *Ryan* case led the Courts to enumerating a plethora of personal rights which are not explicitly stated in the Constitution. These included the right to travel<sup>46</sup>, the right to earn

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<sup>43</sup> Oran Doyle, *Constitutional Law: Texts, Cases and Materials*, Clarus Press, Dublin, 2008, P.86

<sup>44</sup> Hogan writes that the 'language and structure of Article 40.3 and 45 strongly suggest that the rights protected in Article 40.3 are not confined to the rights expressly enumerated elsewhere in the Constitution.' Gerard Hogan, 'Unenumerated Personal Rights: *Ryan*'s Case Re-Evaluated' (1990-1992) 25-27 *Irish Jurist*, p.114. However, for an exegetical critique of Kenny J's interpretation of Article 40.3 in *Ryan* see Gerard Casey, 'The "Logically Faultless" Argument for Unenumerated Rights in the Constitution,' (2004) *ILT* 22, p.246

<sup>45</sup> [1965] IR 294, 345.

<sup>46</sup> *The State (M.) v Minister for Foreign Affairs* [1979] IR 73.

a livelihood<sup>47</sup>, the right to privacy<sup>48</sup>, the right to found a family<sup>49</sup>, and the right of access to the courts<sup>50</sup>. Kenny J's reliance on the papal encyclical, *Pacem in Terris* in arriving at his judgment in *Ryan* is an explicit example of a member of the Irish judiciary being influenced by Catholic thought. Kelly is critical of Kenny J's use of *Pacem in Terris*<sup>51</sup> seeing it as the judge essentially bringing in Article 45 into the jurisprudence of the courts by the back-door as both Article 45 and the papal encyclical are very similar. Kelly writes:

'No one, Christian or not, would find fault with the humane inspiration of a declaration like this; but its use as a ground for judicial invalidation of legislation is questionable in the context of our Constitution, which must after all be looked at as a whole. The ideals set out in this Encyclical are very similar to those contained in Article 45 of the Constitution...If Papal Encyclicals such as *Pacem in Terris* are going to be relied on as a source for ascertaining the personal rights guaranteed by Article 40 so as to test the validity of legislation, the situation will have been reached that the general ideas of Article 45 will have been introduced into the machinery of judicial review by the back door.'<sup>52</sup>

*Ryan* was indicative of a more assertive judicial philosophy. It indicated that the Courts were more receptive to constitutional judicial review and would view the Constitution as organic and capable of development. The development of the power of judicial review meant that citizens who felt they were discriminated against had a remedy. This meant that there was greater potential for the Courts to act as a vehicle for social change than had been the case when the principle of parliamentary supremacy rather than constitutional judicial review was the jurisprudential bedrock of the Courts. Kenny J's creation of the unenumerated rights doctrine in *Ryan* further strengthened the potential of the Courts to effect social change. This represents a move away from the Church-State relationship as existing solely between the government and the hierarchy, to what Whyte refers to as a 'triangular'<sup>53</sup> relationship which now included the judiciary. This

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<sup>47</sup> *Cox v Ireland* [1992] 2 IR 1.

<sup>48</sup> *Kennedy v Ireland* [1987] IR 553.

<sup>49</sup> *Murray v Ireland* [1991] ILRM 465.

<sup>50</sup> *M.C. v Legal Aid Board* [1991] 1 IR 43.

<sup>51</sup> In *Pacem in Terris* it is stated 'Beginning our discussion of the rights of man, we see that every man has the right to live, to bodily integrity and to the means which are necessary and suitable for the proper development of life; these are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services.'

<sup>52</sup> John Kelly, *Fundamental Rights in the Irish Law and Constitution*, p.44.

<sup>53</sup> John Whyte, *Church and State in Modern Ireland*, p. 399.



development coincided with institutional changes within the Church as a result of Vatican II and a new emphasis on pluralism which would result in increased political and judicial scrutiny of laws which were perceived as confessional. These developments were evident in the striking down of Section 17 of the Criminal Law Amendment Act, 1935 in *McGee* to which I now turn.

### **The McGee Case: The Facts**

The advent of a more activist judiciary and the increased scrutiny of non-plural legislation meant that the Criminal Amendment Act, 1935 (proscribing the sale and importation of contraceptives) was at risk of being struck down by the Courts as it reflected the influence of the socially dominant and triumphalist pre-Vatican II Church. Following Vatican II while there was evidence of the hierarchy taking an incremental shift towards a less dogmatic role, there was no ambiguity in its view of the morality of contraception:

‘Experience elsewhere indicates that where the sale of contraceptives is legalized, marital infidelity increases, the birth of children outside of wedlock (surprising as it may seem) increases, abortions increase, there is a marked increase in the incidence of venereal disease and the use of contraceptives tends to spread rapidly among unmarried young people...

Once the gift of sex is seen as something that can be separated altogether from child-bearing people begin to ask what is the point of restricting it to marriage at all? Why should it be confined to a situation which is obviously designed for looking after children? The corrosive effect on the very concepts of marriage and the family which this contraceptive mentality has had in some Western societies, even in the few short years since the anovulant pill came to be used, is quite remarkable’.<sup>54</sup>

The *McGee* Case concerned a challenge made by a twenty-nine year old married woman to the constitutionality of s.17 of the Criminal Law Amendment Act 1935.<sup>55</sup> Under s.17

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<sup>54</sup> Statement of Bishops cited in John Whyte, *Church and State in Modern Ireland*, p.407.

<sup>55</sup> Section 17 of the Criminal Law Amendment Act, 1935, provided as follows: ‘(1) It shall not be lawful for any person to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import into Saorstát Éireann (Ireland) for sale, any contraceptive. (2) Any person who acts in contravention of the foregoing sub-section of this section shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for any term not exceeding six months or to both such fine and such imprisonment and, in any case to forfeiture of any contraceptive in respect of which such offence was committed. (3) contraceptives shall be deemed to be included among the goods enumerated and described in the Table of Prohibitions and Restrictions Inwards contained in section 42 of the Customs Consolidation Act, 1876, and the provisions of that Act (as amended or extended by subsequent Acts) relating to the importation of prohibited goods shall apply accordingly. (4) In this section the word ‘contraceptive’ means any appliance, instrument, drug, preparation or thing, designed, prepared, or intended to prevent pregnancy resulting from sexual intercourse between human beings.’

of the 1935 Act it was unlawful for any person to sell or keep for sale or import or attempt to import into Ireland for sale, any contraceptive. Any breach of this provision was a summary offence; in addition the customs had the power to seize items coming into the country. Mrs McGee had given birth to four children between December 1968 and November 1970. After her last pregnancy she was told by her doctor that her life and health would be endangered if she became pregnant again. Mrs McGee and her husband therefore decided not to have any more children. They decided to use contraceptives rather than abstain from sexual intercourse. Her doctor believed that the use of the contraceptive pill would involve a high risk of thrombosis, and she decided to use a diaphragm with a spermicidal jelly. Her doctor provided her with a diaphragm and gave her a small supply of spermicidal jelly, and a prescription for a further supply of jelly. Mrs McGee sent this prescription to England but when the jelly was sent to her through the post it was seized by customs. Following the seizure of the jelly, representations were made by the plaintiff to the customs officers to retrieve the jelly, but they considered themselves unable to release the jelly by reason of the prohibition imposed by s.17 of the 1935 Act. Mrs McGee then took proceedings seeking a declaration that the provisions of s.17 of the 1935 Act was unconstitutional and that it was not continued in force by Article 50 of the Constitution, and that it no longer formed part of the law of the state. Mrs McGee claimed that the provisions of the 1935 Act were inconsistent with Articles 40, 41, 42, 44 and 45 of the Constitution.

### **The High Court Judgment**

In the High Court, O' Keefe P having rejected the argument that Article 45 was relevant to the case turned to Article 44. Counsel for Mrs McGee had argued that freedom of conscience meant freedom to decide on a particular course of action and to act accordingly. However, O' Keefe P disagreed with this interpretation of Article 44, stating that the reference in Article 44 to freedom of conscience means the freedom to choose a religion and to act in accordance with its precepts and that 'it does not mean freedom to arrive at decisions on matters of one's private welfare and to act accordingly.'<sup>56</sup> The judge then stated he considered that Article 44 had no relevance to the case before him. This would appear to be a reasonable interpretation of Article 44.

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<sup>56</sup> [1974] IR 284, 291.

Given mention of freedom of conscience comes in the context of an article headed 'Religion' it is to be reasonably assumed that it was intended to refer to freedom of religious conscience rather than broader non-religious moral beliefs.<sup>57</sup> It was submitted that the section was inconsistent with the authority of the family guaranteed by Article 41.1.2 and for that reason it was not part of the law of the state. O'Keeffe P dismissed this argument stating it 'does not appear to me to be one of real substance'.<sup>58</sup>

Counsel for Mrs McGee submitted that the right to privacy was one of the unenumerated rights guaranteed to citizens under Article 40, and that s.17 of the 1935 Act was inconsistent with that right citing in support of this argument the American case *Griswold v Connecticut*<sup>59</sup>. In that case, the United States Federal Supreme Court held that the right to privacy was a fundamental right guaranteed by the United States Constitution and that legislation which made it illegal to use contraceptives was an infringement of that right. The legislation did not make the sale of contraceptives illegal, but interfered with the privacy of marital relations by making their use unlawful. Accordingly, the legislation was unconstitutional. O'Keeffe P posed the question whether the right to privacy is one of the personal rights guaranteed by the Irish Constitution. He stated:

'In my view, one must look at the state of public opinion at the time of the adoption of the Constitution in order to determine whether the effect of its adoption was to remove from the statute book a section of the Act of 1935...If the submission of the plaintiff is correct, then public opinion as to what were fundamental rights must have been such as to require that the rights guaranteed to individuals by the Constitution were inconsistent with the continued legality of the section. I consider that the best test of the position is to be found in the views expressed when the section was being passed into law since, in point of time this was so close to the enactment of the Constitution by the people. I find that the section was adopted without a division, although it was technically opposed. I cannot think that this reflects a public opinion in favour of the existence of such a right of privacy as is alleged by the plaintiff to be guaranteed under the Constitution.'<sup>60</sup>

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<sup>57</sup> The *Constitutional Review Group* (Dublin, 1996), p.380 took a different view, arguing that those who drafted the Constitution must be presumed to have intended every word and phrase to carry a specific and separate meaning. So 'freedom of conscience' must be taken to import something additional to the guarantee of free practice and profession of religion. In the Canadian case *Morgenthaler v The Queen* (1988) 44 DLR (4<sup>th</sup>) 385 Wilson J in the Supreme Court held that the Canadian Charter of Rights and Freedoms encompassed both religious and secular morality.

<sup>58</sup> [1974] IR 284, 292.

<sup>59</sup> (1965) 381 U.S. 479

<sup>60</sup> [1974] IR 284, 292.

One might question whether a judge in 1973 should be bound by what people thought in 1935. It is unclear on what O’Keeffe P is basing his view of what the public mood was in 1935. He appears to have examined the Dáil debates from the period (though he does not explicitly make this clear), found that there was only what he describes as ‘technical’ opposition to the Bill and come to the conclusion that on that basis Mrs McGee did not enjoy a right to privacy under the Irish Constitution. Finally, O’Keeffe P distinguished *Griswold* on the ground that s.17 of the 1935 Act did not outlaw the use of contraceptives, rather their sale or importation, whereas in *Griswold* the effect of the impugned legislation was to make it illegal to use contraceptives.

### **The Supreme Court Judgments**

Mrs McGee appealed to the Supreme Court. Her counsel argued, *inter alia*, that the court in deciding whether a piece of legislation should be struck down should have regard to the Constitution as a whole and not public opinion in 1937; that s.17 represented an attack on the family contrary to Article 41; that the plaintiffs had a right to decide how to arrange their marital relations according to their conscience; and that the plaintiffs had a right to privacy which s.17 1935 Act violates. It was further argued that if the provisions of s.17 of the 1935 Act were inconsistent with the provisions of the Constitution, the section would then be inoperative no matter what circumstances may have existed, or what the state of public opinion was in 1935. Counsel for Mrs McGee submitted that the State’s duty to respect the personal rights of its citizens is absolute and that the personal rights to which Article 40.3 refers include rights not expressly mentioned in the Constitution. Counsel went on to argue:

‘The right to marry involves necessarily the right of each spouse to the society of the other and the right to decide whether to have a family or not; it also involves a right to decide the extent or size of the family. For these rights to be capable of being exercised fully it is necessary that contraceptive methods are available for use by married couples. It is submitted that these rights are vested in every married citizen (including the plaintiff) irrespective of the citizen’s state of health and that, *a fortiori*, these rights are vested in citizens having particular health problems such as those of the plaintiff.’<sup>61</sup>

Counsel then argued that ‘no question of public morality or the common good arises in this case. The plaintiff made a considered and serious decision to import a contraceptive

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<sup>61</sup> Ibid. 296-297.

for her own use and with the agreement of her husband. That decision was made in accordance with her judgment as an adult wife and mother, and in conformity with her rights under the Constitution.<sup>62</sup>

Counsel for the Attorney General argued that Mrs McGee's health was not relevant to the proceedings and that s.17 of the 1935 Act was enacted because it reflected the social policy of the legislature. Counsel went on to distinguish the American case law referred to from the instant case, as the 1935 Act did not forbid the use of contraceptives and argued that Article 44 referred to religious conscience rather than incorporating a broader idea of conscience. It appears that representatives of both the Catholic Church and the Church of Ireland were invited to give evidence regarding their views on contraception by the Attorney General however both declined the offer.<sup>63</sup>

Walsh J, in allowing McGee's appeal, emphasised the natural rights which citizens possess and with which the State cannot interfere:

'Articles 41, 42, and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family as the natural primary and fundamental unit group of society, has rights as such which the State cannot control. However, at the same time it is true, as the Constitution acknowledges and claims, that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society. It is important to recall that under the Constitution the State's powers of government are exercised in their respective spheres by the legislative, executive and judicial organs established under the Constitution...the power of the State to act for the protection of the common good or to decide what are the exigencies of the common good is not one which is peculiarly reserved for the legislative organ of government, in that the decision of the legislative organ is not absolute and is subject to and capable of being reviewed by the Courts. In concrete terms that means that the legislature is not free to encroach unjustifiably upon the fundamental rights of individuals or of the family in the name of the common good, or by act or omission to abandon or to neglect the common good or the protection or enforcement of the rights of individual citizens.'<sup>64</sup>

Walsh J is directly contradicting a quote from Jeremy Bentham in this dicta, namely, 'there are no rights without law, no rights contrary to the law, no rights anterior to the

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<sup>62</sup> Ibid. 297

<sup>63</sup> See Daithí Ó Corráin, *Rendering to God and Caesar*, p.104.

<sup>64</sup> [1974] IR 284, 310.

law.’<sup>65</sup> In doing so he is endorsing Thomistic natural law to reject legal positivism. Writing extra-judicially Walsh J asserted the right of the Supreme Court to intervene in deciding an issue which concerns the public interest. Therefore, if the State invades a citizen’s zone of privacy, the Supreme Court can decide whether such an invasion is justified by the common good. The judge wrote that:

‘...various justifications are offered for invasions of privacy such as the public interest...Questions of national security and public security or the prevention of crime present difficult problems to a judge and leave him in many cases with the task of deciding a conflict between the individual’s rights and the State’s rights. The State’s rights as such can only be upheld if they can be equated with the common good and again a delicate balance has to be preserved between the power of the Oireachtas to decide what is the common good and the powers of the judges to so decide. In Ireland it has been held by the Supreme Court on more than one occasion that the question of what is in the public interest is not exclusively for the Oireachtas but is an area in which the courts can intervene.’<sup>66</sup>

In his judgment in *McGee*, Walsh J asserted the rights of the family against intrusion from the state and the right of a married couple to privacy:

‘It is a matter exclusively for the husband and wife to decide how many children they wish to have; it would be quite outside the competence of the State to dictate or prescribe the number of children which they might have or should have. In my view, the husband and wife have a correlative right to agree to have no children. This is not to say that the State, when the common good requires it, may not actively encourage married couples either to have larger families or smaller families. If it is a question of having smaller families then, whether it be a decision of the husband and wife or the intervention of the State, the means employed to achieve this objective would have to be examined. What may be permissible to the husband and wife is not necessarily permissible to the State. For example, the husband and wife may mutually agree to practise either total or partial abstinence in their sexual relations. If the State were to attempt to intervene to compel such abstinence, it would be an intolerable and unjustifiable intrusion into the privacy of the matrimonial bedroom. On the other hand, any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.

The sexual life of a husband and wife is of necessity and by its nature an area of particular privacy. If the husband and wife decide to limit their family or to avoid having children by use of contraceptives, it is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion can be justified by the exigencies of the common good. The question of whether the use of contraceptives by married couples within their marriage is or is not contrary to the moral code or codes to which they profess to subscribe, or is or is not regarded by them as being against their conscience, could not justify State intervention. Similarly the fact that the use of contraceptives may offend against the moral code of the majority of the citizens

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<sup>65</sup> See Jeremy Bentham, *Works*, Vol. III, (John Bowring ed.) William Tait, Edinburgh, 1843, p.221.

<sup>66</sup> Walsh J, ‘The Judicial Power and the Protection of the Right to Privacy’ (1977) *DULJ* 1, p.9.

of the State would not per se justify an intervention by the State to prohibit their use within marriage'.<sup>67</sup>

This would indicate that Walsh J did not view the fact that something is proscribed by Catholic social teaching as meaning that it is in the common good for the Courts to uphold its proscription. Walsh J was saying it was necessary to show something more than that the provision was contrary to one's moral code in order for it to be regarded a contrary to the common good. The judge then stated:

'The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common good requires it... It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire. In my view, Article 41 of the Constitution guarantees the husband and wife against any such invasion of their privacy by the State. It follows that the use of contraceptives by them within that marital privacy is equally guaranteed against such invasion and, as such, assumes the status of a right so guaranteed by the Constitution. If this right cannot be directly invaded by the State it follows that it cannot be frustrated by the State taking measures to ensure that the exercise of that right is rendered impossible. I do not exclude the possibility of the State being justified where the public good requires it (as, for example, in the case of a dangerous fall in population threatening the life or the essential welfare of the State) in taking such steps to ensure that in general, even if married couples could not be compelled to have children, they could at least be hindered in their endeavours to avoid having them where the common good required the maintenance or increase of the population. That, however, is not the present case and there is no evidence whatever in the case to justify State intervention on that ground...In my opinion, s17 of the Act of 1935, in so far as it unreasonably restricts the availability of contraceptives for use within marriage, is inconsistent with the provisions of Article 41 of the Constitution for being an unjustified invasion of the privacy of husband and wife in their sexual relations with one another.'<sup>68</sup>

Article 41 of the Constitution was largely drafted by Archbishop John Charles McQuaid and represents the views expressed in a number of papal encyclicals, in particular, Pius XI's Papal Encyclical *Quadragesimo Anno*. That Walsh J should use Article 41 to justify the decriminalisation of the sale and importation of contraceptives is to interpret the Article in an entirely new manner which disregards the intention of the drafters and represents the first major split between the judiciary and the Catholic Church. While it may be accepted that the wording of Article 41 may be used to justify a right to marital privacy, its effect, the declaration that s.17 of the 1935 Act was unconstitutional would doubtless have been anathema to the drafters.

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<sup>67</sup> [1974] 284 IR 311.

<sup>68</sup> Ibid. 311-315.

Article 41 incorporates the Catholic principle of subsidiarity into the Constitution. Its purpose is to protect the family unit from intrusion by the State. Walsh J used the Catholic inspired philosophical basis of Article 41 to strike down s.17 of the 1935 Act. The principle of subsidiarity was used to sanction a course which was diametrically opposed to Catholic morality. If the family was to remain autonomous regarding issues such as education and personal health, it could also be protected from State interference concerning contraception. Walsh J could have asserted that Article 41 was inspired by Papal Encyclicals and that the Catholic Church opposed contraception and therefore McGee's case must fail. He could further have argued that it was clear that the state of public opinion in 1935 and 1937 was opposed to contraception and that on that basis the appeal must be rejected. However, he chose not to take this approach but to adopt a position which he was aware directly opposed the teachings of the Catholic Church in *Humanae Vitae*. John XXIII's movement towards ecumenism, the fact that the Church did not necessarily expect civil laws to reflect Church law, and the emergence of support for a change in the Church's position on contraception all arguably contributed towards the creation of a space within which change and non-conformity emerged as an option. The certainty of the Church's position in *Humanae Vitae* was not reflected within a liberal strand within the Church nor among many lay Catholics. There was a division in the Church and Walsh J (consciously or subconsciously) chose the reformist side. This took place during the early phase of what was to be, culturally and socially, a transformative period for Irish society. There remained considerable opposition to this approach not least within the Church itself. However, Walsh J was arguing that if the common good required it, then the State could intervene into the family unit, such as in the case of abortion. As the common good is based on society's interests Walsh J, was asserting that it would not be damaging to society to allow married couples to use contraceptives. The common good, according to Walsh J, did not require that s.17 of the 1935 Act remain in force.

Walsh J then turned to submissions made on behalf of Mrs McGee relating to Article 40 of the Constitution. He stated that a prohibition on the availability of contraceptives for use in marriage generally may be justified on the grounds of the exigencies of the



common good. Article 40.1 would justify and permit the State to discriminate between some married persons and others in the sense that, where conception might endanger the life of a particular person, the law could have regard to this difference of physical capacity and make special exemptions in favour of such persons. This exemption, according to Walsh J, could also be justified under the provisions of Article 40.3 on the grounds that one of the personal rights of a woman in the plaintiff's state of health would be a right to be assisted in her efforts to avoid putting her life in jeopardy. Walsh J went further in defining both sections as imposing a positive obligation on the State to ensure by its laws there would be made available to a married woman in Mrs McGee's condition the means whereby a conception, which was likely to put her life in jeopardy, might be avoided. Walsh J rejected the argument that Article 44.2 when referring to conscience included the concept of conscience outside of a religious context. He stated that 'what the Article (Article 44.2) guarantees is the right not to be compelled or coerced into living in a way which is contrary to one's conscience and, in the context of the Article, that means contrary to one's conscience so far as the exercise, practice or profession of religion is concerned.'<sup>69</sup>

Walsh J then referred to the case of *Quinns Supermarket v AG*<sup>70</sup> and the reference in that case to the fact that religiously speaking 'the society we live in is a pluralist one.' He then states:

'Both in its preamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority. The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law. There are many to argue that natural law may be regarded only as an ethical concept and as such is a re-affirmation of the ethical content of law in its ideal of justice. The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the acknowledgment of Christianity in the preamble and in view of the reference to God in Article 6 of the Constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgment of the ethical content of law in its ideal of justice. What exactly natural law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not yet fully agreed.'<sup>71</sup>

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<sup>69</sup> [1974] 284 IR 317.

<sup>70</sup> [1972] IR 1.

<sup>71</sup> [1974] 284 IR 317.

Walsh J is placing natural law in the context of the Christian influences on the Constitution. He is therefore adopting a harmonious approach to interpreting the Constitution. This approach led the judge to reject natural law as an ethical concept only. Walsh J distinguishes ethical from legal concepts and in doing so gives legal effect to the ideals of justice. Walsh J's description of natural law as God's law promulgated by reason is based on a Thomistic view of natural law.

Walsh J then stated:

'In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from natural law; the Constitution speaks of one of them when it refers to the inalienable duty of parents to provide according to their means for the religious, moral, intellectual, physical and social education of their children: see s1 of Article 42. In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s3 of Article 40 expressly subordinate the law of justice. Both Aristotle and the Christian philosophers have regarded justice as the highest human virtue. The virtue of prudence was also esteemed by Aristotle as by the philosophers of the Christian world. But the great additional virtue introduced by Christianity was that of charity – not the charity which consists of giving to the deserving, for that is justice, but the charity which is also called mercy. According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.'<sup>72</sup>

It may be argued that Walsh J is taking a contradictory position in relying on a natural law argument to sanction what is clearly contrary to the Church's teachings, given that he draws a link between the references to God and Christianity in the Constitution and the natural rights which the Constitution protects. However, clearly implicit in Walsh J's position is the view that the Courts are not bound by the theological views expressed by one particular faith in determining whether the natural rights of a person under the Constitution have been violated. It should also be noted that natural law can have a

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<sup>72</sup> [1974] 284 IR 316-17.

secular basis such as is found in Rousseau, whose ideas McQuaid explicitly rejected. Unlike Walsh J the other judges did not rely on natural law arguments or Article 41 in their judgments. Budd J allowed the appeal on the basis that the right to privacy was universally accepted with only the rarest of exceptions and that the matter of a marital relationship ranks as one of the most important in the realm of privacy. He also stated that the 1935 Act was in particular conflict with the personal rights of the citizen which the state guarantees to respect, defend and vindicate as far as practicable in Article 40.3.1.

Henchy J in his judgment examined the 1935 Act and described it as being aimed at the suppression of vice and the amendment of the law relating to sexual offences, rather than population control. Section 17 of the Act, he pointed out, follows immediately on a section directed against the practice of prostitution in public and immediately precedes a section making criminal certain acts which offend modesty or cause scandal or injure the morals of the community. The section, the judge stated, creates a criminal prohibition in an area in which the legislature had thought fit to intervene in the interests of public morality. Henchy J stated: 'Section 17, in my judgment, so far from respecting the plaintiff's personal rights, violates them. If she observes this prohibition (which in practice she can scarcely avoid doing and which in law she is bound under penalty of fine and imprisonment to do), she will endanger the security and happiness of her marriage, she will imperil her health to the point of hazarding her life, and she will subject her family to the risk of distress and disruption. These are intrusions which she is entitled to say are incompatible with the safety of her life, the preservation of her health, her responsibility to her conscience, and the security and well-being of her marriage and family. If she fails to obey the prohibition in s.17, the law, by prosecuting her, will reach into the privacy of her marital life in seeking to prove her guilt.'<sup>73</sup> Henchy J focused on Mrs McGee's personal circumstances and the practical effects of the prohibition on her life as wife and mother. Article 40.3 is based on rational and secular thought as opposed to Article 41 which is clearly inspired by Catholic thought. Therefore, the majority's reliance on Article 40.3 is philosophically reconcilable with the thought underpinning

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<sup>73</sup> [1974] 284 IR 328.

that Article. However, Walsh J's interpretation of Article 41 is difficult to reconcile with the philosophical thought underpinning it.

Griffin J expressed support for the argument that there is a constitutional right to privacy which Mrs McGee enjoyed and which protected her from the state's intrusion on her attempt to import contraceptives in contravention of the 1935 Act. He stated 'In my opinion the right to marital privacy is one of the personal rights guaranteed by sub-s. 1 of s.3 of Article 40 and so the nature of that right possessed by the plaintiff must be considered.'<sup>74</sup> The individual predicament in which Mrs McGee found herself (living in a mobile home with four children and expected to maintain a non-sexual marriage with her fisherman husband) should not be underestimated in swaying the Court in her favour. While the broader cultural shift towards liberalism and ecumenism were important, the risk to Mrs McGee's life should the law remain in force must also have weighed heavily on the judges' minds.

Fitzgerald CJ (dissenting) argued that because s.17 of the 1935 Act did not prohibit the use of contraceptives it did not contravene Article 40. There was, the judge argued, nothing preventing Mrs McGee from making the product herself.<sup>75</sup> This would appear to be an overly narrow technical view of the matter. In reality the 1935 Act, by banning the importation and sale of contraceptives, was in practical terms banning their use. Therefore the effect of the Act, in preventing people from accessing contraceptives, was an unjustified encroachment into the private lives of citizens. Fitzgerald CJ rejected the argument that s.17 of the 1935 Act contravened Article 41 and 42 of the Constitution. With regard to Article 41, counsel for Mrs McGee had argued that Mrs McGee's children were entitled to constitutional protection in having an interest in seeing that the family was not further enlarged but this was rejected by Fitzgerald CJ. With regard to Article 42 he stated: 'While s.3, sub-s. 1, of Article 42 provides that parents shall not be obliged "in violation of their conscience" to send their children to a State school, or any particular

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<sup>74</sup> Ibid. 333.

<sup>75</sup> The suggestion that Mrs McGee make the product herself appears to be an odd suggestion. In purely practical terms it would surely take specialised knowledge to make such a product and would be potentially hazardous to one's health to manufacture such a product without that knowledge.

type of school, it is quite unjustifiable, in my opinion, to take the word “conscience” out of its context and seek to apply it to the wish of the parents as to whether they would have children or not.’<sup>76</sup> With regard to Article 44, Fitzgerald CJ stated: ‘In my opinion the freedom of conscience referred to in that sub-section relates to the choice and profession of a religion, and to it alone; the word “conscience” can not be taken out of its context and applied to the decision of the plaintiff and her husband, or any other married couple, as to whether they should or should not have children.’<sup>77</sup> He also rejected the argument that Article 45 was cognisable by the Courts.

Fitzgerald CJ concluded by stating:

‘It appears to me that the fact that the plaintiff professes a particular religion, or that she and her husband have agreed upon the course which they wish to adopt, is quite irrelevant. To hold otherwise, would be to distinguish between citizens of different religions; and to distinguish between cases where the spouses were of the same mind and cases where one or other, for reasons of health, economics or social considerations, might wish to avoid a further pregnancy independently of the other spouse...One must naturally be sympathetic with the plaintiff in the dilemma in which she finds herself and which is attributable to her own physical health. It surely, however, must be recognised that the physical and mental health of either spouse in a marriage may effectively preclude a pregnancy either temporarily or, in some instances permanently. Having regard to the provision in the Constitution prohibiting divorce, the physical or mental illness of one spouse necessarily has its repercussions on both, perhaps for their joint lives. These appear to me to be natural hazards which must be faced by married couples with such fortitude as they can summon to their assistance.’<sup>78</sup>

It should be noted that while Fitzgerald CJ upheld the ban on the importation or sale of contraception, he did not address the morality of using contraceptives or whether it was contrary to Christian or Catholic thought. He also did not use the historical mode of interpretation as O’Keeffe P did. Indeed, the judge’s position that there was nothing preventing McGee from manufacturing and using a spermicidal jelly does not conform with Catholic social teaching and therefore it can not be stated that the judge was influenced by the Catholic Church’s opposition to the use of contraceptives in rejecting McGee’s appeal. While the Catholic Church would have welcomed Fitzgerald CJ’s

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<sup>76</sup> [1974] 284 IR 302.

<sup>77</sup> Ibid. 305.

<sup>78</sup> Ibid.

dissent it would not have accepted the reasoning underlying his judgment anymore than it would have accepted the views of the majority.

### **McGee and Constitutional Interpretation**

Walsh J believed that the Constitution should be interpreted as ‘speaking always in the present tense.’ John Kelly is quoted as advocating the present tense approach as ‘appropriate to *standards* and *values*. Thus elements like ‘personal rights’, ‘common good’, ‘social justice’, ‘equality’, and so on, can (indeed can only) be interpreted according to the lights of today as the judges perceive and share them. The same would go, as Walsh J, says in the context of the private property guarantee of Articles 40.3 and 43, for concepts like ‘injustice.’<sup>79</sup> Kelly’s formula for constitutional interpretation supports Walsh J’s dicta in *McGee* as Walsh J was referring to issues relating to personal rights and the common good, which, according to Kelly, must be interpreted according to societal values at the time of interpretation.

Gerard Hogan writing on the issue of different modes of constitutional interpretation criticises O’Keeffe P’s High Court judgment in *McGee* as the judge took an historical approach which tended to ‘fossilise’ the Constitution by applying 1937 values.<sup>80</sup> Hogan writes that ‘any Constitution must remain flexible and capable of adapting to change. That is at least one reason why certain fundamental constitutional values are as relevant today as they were in 1937, while other provisions, such as Article 41.2 (role of mother in the home) and Article 45 (directive principles of social policy), now seem out of place. The reason why these latter provisions seem some-what dated is because they tend to reflect the values of 1937, rather than eternal truths about personal rights in a free society.’<sup>81</sup>

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<sup>79</sup> John Kelly, ‘Law and Manifesto’ *The Constitution of Ireland 1937-1987*, Litton (ed.), IPA, Dublin, 1988, p.215.

<sup>80</sup> See Gerard Hogan, ‘Constitutional Interpretation’ in *The Constitution of Ireland 1937-1987*, p. 173-191.

<sup>81</sup> *Ibid.* p.175. Given that Article 45 contains principles such as the promotion of the welfare of the people, controlling resources in the interest of the people, protecting people from the malign effects of free competition and concentration of ownership, and a commitment to protecting the weaker elements of society, one might question Hogan’s view that such principles are in some sense dated or no longer relevant, particularly in an era of gross inequality and concentrated private ownership of resources.

Hogan is also critical of the use of natural law as an extra-constitutional principle in interpreting the Constitution. Walsh J relied heavily on a particular idea of natural law in his judgment in *McGee*. Desmond Clarke commented on *McGee* that there ‘was at least one interpretation of the natural law available to the court – that recently defended by the Roman Catholic Church – which clearly implied that the use of contraceptives is against the natural law, and hence the State might reasonably have argued that by making contraceptives unavailable to citizens it was enforcing the natural law. The reason why such an argument was rejected by the Court was that it represented only one from among a number of competing interpretations of the natural law. However, it follows...that any possible interpretation of natural law would suffer from a similar defect.’<sup>82</sup> Walsh J writing extra-judicially stated that it is in the context of unenumerated rights that ‘...the judge’s attitude and his conclusions will be very largely influenced by the legal philosophy which he accepts.’ Walsh J goes on to say ‘Ireland and the United States are common law countries where the doctrine of legal positivism has been rejected by judges. Consequently, there is very great scope for the exercise by the judge of what I have already referred to as legal humanism and for the development of the judge’s concept of the natural rights of human beings. The best known example of intervention by Irish judges to protect the right of privacy was the decision of the Supreme Court in *McGee v The Attorney General*.’<sup>83</sup>

Lee states that when the ban on divorce is:

‘...considered in conjunction with section 17 of the Criminal Law (Amendment) Act 1935, which prohibited the sale and importation of contraceptives, it was difficult to avoid the impression that the State considered it a duty to impose specifically Catholic doctrine on all citizens, irrespective of their personal convictions. Critics might be excused for dismissing as hypocrisy in these circumstances the apparently comprehensive guarantee in Article 44.2.3 that ‘the State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.’<sup>84</sup>

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<sup>82</sup> Desmond Clarke, ‘The Role of Natural Law in Irish Constitutional Law’ (1982) *Irish Jurist* 17, p.204.

<sup>83</sup> Walsh J, ‘The Judicial Power and the Protection of the Right to Privacy’ (1977) *DULJ* 1, p.9.

<sup>84</sup> Joe Lee, *Ireland 1912-1985*, p.203.

Hogan rejects Lee's comments on the ground that 'the legislation in question did not *as such* seek to discriminate against non-Catholics.'<sup>85</sup> He also states that when it was put to the test s.17 of the 1935 Act was held to be unconstitutional. However, this was forty years after the Act was introduced. The Supreme Court of 1935 would, it is likely, have been in line with the general ethos of society which viewed contraception as morally wrong. Similarly, in 1974 the Supreme Court was adjudicating in a different societal context in terms of the common view of the morality of contraceptives. The case needs to be viewed in the context of the institutional reform within the Church as a result of the Second Vatican Council and particularly, disagreement within the Church concerning contraceptives. As a result of the council there was greater openness to ideas of reform and questioning and therefore, judges who one might have expected to take a more orthodox Catholic line were in a position to allow Mrs McGee's appeal because they were following a strand of thought which existed within the Church itself. Therefore, *McGee* is not so much a challenge from secularism against Catholic thought as a dispute between two strands of Catholicism: that is the strand represented by John XXIII against that represented by Pius XII and more recently, John Paul II and Benedict XVI. The institutional reforms within the Church led to a division within Catholic thought and it was inevitable that the Supreme Court would eventually have to take sides and they chose individual conscience over nineteenth century dogma.

Whyte states that McGee's case appeared to be an 'unpromising one' as the 1937 Constitution was 'framed on the basis of Catholic social principles.' The 1935 Act was also based on Catholic principles. Therefore, he argues 'it was difficult to see how one could be inconsistent with the other'. Whyte therefore wonders 'how was this judgment wrung out of a Constitution so specifically Catholic as the 1937 document had been?'<sup>86</sup> Whyte states the two primary reasons were: the creation of the unenumerated rights doctrine in *Ryan* and the enumeration of the right to privacy by the American Supreme Court. One can add to that the institutional reforms within the Church itself which led to the hierarchy declaring that it was not suggesting that everything it regarded as immoral

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<sup>85</sup> Gerard Hogan foreword in Keogh and McCarthy, *The Making of the Irish Constitution 1937*, p.16.

<sup>86</sup> John Whyte, *Church and State in Modern Ireland*, p.409.



should be declared illegal. This meant that the Courts could strike down s.17 of the 1935 Act, without actually appearing to condone contraception as morally right.

John Kelly (in his political rather than academic capacity) condemned s.17 of the 1935 Act in the Dáil, stating:

‘I believe section 17 of the 1935 Act, in its entirety, to be an unwarranted intrusion on individual privacy. To me the fact that this Bill has been rendered necessary by the McGee judgment is entirely secondary. I think the McGee judgment, I say this with respect, was long delayed. I think it might have been obtained many years ago but the legislation which was in force and necessitated Mrs. McGee bringing her case never ought to have been enacted. It was enacted in 1935 with the minimum of discussion and the reason why it got such little discussion then, in spite of the fact that there were very well qualified people in both Houses, was that this section was, as it were, smuggled through both Houses masked by a large number of other sections dealing with matters of sexual morality but of much greater immediate concern at the time’.<sup>87</sup>

While Kelly is correct in stating that the 1935 Act contained many issues relating to sexual morality other than contraception, the parliamentary debates would indicate that at least some of the deputies were aware that they were voting to proscribe the sale and importation of contraceptives.<sup>88</sup>

The *Irish Times* editorial of the same day emphasised the importance of legislating in the area of contraception following the *McGee* judgement. Under the heading ‘Over to the legislators’ the editorial stated:

‘Our legislators can now come out from behind the robes of the Supreme Court. A basic decision has been taken for them. T.D.s and Senators will be able to explain that the judicial process, cannot be denied: some perhaps will feel slightly ashamed that they did not get more on the record beforehand to show that their heart was always in the right place etc...Mrs McGee won her case, and her case is all that their lordships had before them. The courts, academic reservations aside, do not make the law. They administer it and they interpret it. Laws are made in Leinster House, and if there is one area in which the credibility of the present coalition is to be tested, it is in this area of rights which some call civil, others material, but which can also be survival rights...No one who enters this debate is ever quite dispassionate; but some of the arguments against legalising contraception have been patently contrary to the evidence...The people of the Republic have daily insights in the North through the newspapers, the radio and television, and in many cases by personal experience. To say that the availability of contraceptives over 50 years has led to permissiveness in that society is not

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<sup>87</sup> 274 *Dáil Debates* 322, 4 July 1974. Kelly went on to state that he did not view it as the role of the criminal law to enforce a code of morality on all citizens and that there are many acts which Christian teaching regards as a sin and are not punishable by law.

<sup>88</sup> See chapter 1.

only insulting but beyond belief. Or are the clergy afraid that the moral fibre in the Republic is less tough than that of our Northern fellow-countrymen?’<sup>89</sup>

### **Churches Reactions to *McGee***

The General Synod of the Church of Ireland sent a letter to Members of the Seanad dated 1st February, 1974 setting out their views on contraception. In their letter they made clear that they were following the public discussion on the Family Planning Bill, 1973 with ‘keen interest’. They stated that their views on the issue are embodied in the resolution passed by the General Synod of the Church of Ireland in 1971 without any dissenting votes. The resolution stated:

‘That this house welcomes the efforts being made to amend the legislation concerning contraception in the Republic and fully supports the Archbishop of Dublin in his affirmation of the declaration of the Lambeth Conference of Anglican Bishops in years 1958 and 1968 which concluded that “the responsibility of deciding the number and frequency of children has been laid by God upon the consciences of parents everywhere; that this planning, in such ways as are mutually acceptable to husband and wife in Christian conscience, is a right and important factor in Christian family life.”’<sup>90</sup>

In their letter it was made clear that the views expressed ‘must be regarded by Members of this House as the official view of the Church of Ireland on the subject of family planning legislation in Ireland’ and they were requesting that ‘their attitude towards family planning be given equal consideration and respect by our laws. This should not be a matter on which they find their normal viewpoint is in conflict with the criminal law of the State. Because that is really what we are talking about: the use to which we put the criminal penal law of the State. In these circumstances the official view of the Church of Ireland body is that the criminal law is in conflict with their moral outlook, their moral attitude on family planning.’<sup>91</sup>

The above letter was read out by Mary Robinson in the Seanad when she was attempting to have her family planning bill passed in February 1974.<sup>92</sup> On 20 December 1973 (the

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<sup>89</sup> Ibid.

<sup>90</sup> See 218 *Seanad Debates* 77, 20 February 1974.

<sup>91</sup> Ibid.

<sup>92</sup> The Presbyterian Church also approved of the legalisation of contraceptives on the basis that they were necessary because of over-population; were necessary as persistent abstinence is fraught with dangers for married couples; and the use of contraceptives should not be regarded as a wrong in itself but nor should their use be taken lightly or as a means of avoiding parenthood for purely selfish ends. The Quakers approved of individual conscience and choice in relation to the use of contraceptives and welcomed the introduction of a family planning bill. See 220 *Seanad Debates* 77, 20 February 1974

day following the *McGee* judgment) John Cooney had an article in the *Irish Times* in which he outlined how the Catholic hierarchy's position had not altered as a result of the Court's decision. Cooney wrote:

'The Supreme Court's decision that the law forbidding the importation of contraceptives for non-commercial purposes is unconstitutional does not alter the hierarchy's view that contraception is immoral. This was stated last night by the Bishop of Meath and the secretary of the Episcopal Conference, the Most Reverend Dr. McCormack. He reemphasised the recent statement of the Hierarchy that no change in the state's law could make the use of contraceptives moral... The Bishop of Ossory, the Most Reverend Dr. Birch, said the church ought not to tie up legality with morality. People would have to decide on the morality of the use of contraceptives apart from the legal position. The church, he added, ought to be able to teach without being dependent on the law to support its teachings. The Rev James Good, a theologian said in Limerick that he welcomed the Supreme Court's decision. He was pleased that contraceptives could now be legally available to married couples. In Catholic Church circles there was mixed reaction to news of the Supreme Court's decision. Some priests and laity felt disappointment that the decision would make it difficult for a change in the anti-contraceptive law to be stopped; others were pleased that the ruling should give further impetus to the public criticism of the Bishops' views and should therefore encourage to go ahead and legislate. The Supreme Court decision is likely to be well received by the Church of Ireland, the Presbyterian and Methodist Churches. The Archbishop of Dublin the Most Reverend Buchanan said last night: "I should like time to study the judgment carefully, but it seems a first step towards a more liberal way of life. I believe it will contribute towards the wellbeing of many marriages."<sup>93</sup>

The path towards the repeal on the ban on contraceptives was a long and tortuous one with the legislature proving reluctant to approve legislation in the area. This even included the Taoiseach, Liam Cosgrave voting against his own government's family planning bill. It was not until 1979 that the sale of contraceptives to married couples was allowed. In 1985 the marriage limitation was abolished. Garret Fitzgerald was of the view that the extent to which Catholic Church teaching influenced State policies turned out to be counter-productive. He argues that the Catholic Church held back change for too long stating: 'but what was not foreseen was if you build up pressure behind a dam, and the dam bursts, you get a flood whereas previously you would have had a stream and the flood destroys in the process, and that's what happened. I can see why that was not foreseen by the Church, and it wasn't, certainly not, by the State either. But it has created a very real problem for us.'<sup>94</sup> Fitzgerald argues that the problem was intensified by the fact that the dam burst at the same time as the Church issued *Humanae Vitae* a position which Fitzgerald describes as non-credible in human terms: 'And once the Church took

<sup>93</sup> *The Irish Times*, 20 December 1973.

<sup>94</sup> Quoted in Finola Kennedy, *Cottage to Creche*, p.165.

up a position which was non-credible in rational terms its authority over the whole sexual area disintegrated. At the worse moment for us, when pressure on the dam was great already, you suddenly put a hole in the dam...Everything fell.' Fitzgerald then writes that 'the extent to which the Irish value system depended on the Catholic Church and had no great independent backing in civil society and rational backing, turned out to be a major problem. When Church authority disappeared a rational basis for some ordered way of controlling sexual relationships wasn't there. Where there had been reliance on Catholic teaching to inform legislation, it can be argued that, as that reliance wanes a problem arises as to what alternative values can or should inform legislation. Resolving this problem is not helped by positing 'rational' and Catholic values as opposed, alternatives when in fact Catholic values have in large measure been interpretations of rational values, sometimes perhaps, over-elaborated.'<sup>95</sup>

The institutional reforms which took place in the Catholic Church as a result of the Second Vatican Council were perceived to have opened the Church up to new ideas and to have ushered in a new era in ecumenical relations and in the relationship between priest and congregation. While there were important changes in the Church, such as the introduction of the vernacular mass and the move towards ecumenism, the Church chose not to state its position on contraception until after the Council with the publication of *Humanae Vitae* in 1968. The post-Vatican II emphasis on pluralism and an increasing consciousness of Northern Protestants' view of the Southern State as overly deferential to Rome increased the likelihood of laws which were viewed as confessional being struck down by the increasingly more activist Courts.

While there was pressure within the Church for a softening in its position on contraception, Paul VI chose to take a more dogmatic approach in condemning the immorality of contraception. This had the effect of ostracising many Catholics who felt that the Church should have been more prepared to reform Catholic thought in light of modern cultural and social mores. McQuaid's fear that debating the Church's immutable teachings concerning contraception would lead to the undermining of the Church's

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<sup>95</sup> Ibid.

authority was proven correct. The Church has positioned itself against the reform based agenda of John XXIII in the pontificates of John Paul II and Benedict XVI and continue to condemn the use of contraceptives as immoral. McQuaid would be more comfortable with today's Church than at the time of his death.

The Supreme Court in *McGee* implicitly rejected the Church's teachings in *Humanae Vitae*. Because the Church did not 'necessarily' expect civil laws to mirror Catholic morality the Court in *McGee* may not have been contravening Catholic teaching concerning the State's relationship with the Church. According to the Church contraception was immoral and the civil law position did not change that fact. Furthermore, while the use of contraceptives may be morally wrong according to the Church the decisions of the majority in *McGee* were in line with those within the Church who felt that Catholic teaching on contraception ought to be changed in light of modernist norms. Therefore, it is arguable that it represents a 'liberal Catholic' perspective.

#### **M v An Bord Uchtála and S.12 Adoption Act, 1952**

Just a year after *McGee* there was further evidence of increased judicial scrutiny of non-plural statutory laws. In *M v An Bord Uchtála*<sup>96</sup> s.12 of the Adoption Act, 1952 was challenged on the basis that it was contrary to Article 44.2.3. In that case an Anglican woman and her Catholic husband wanted to adopt the wife's non-marital child from a previous relationship. The Adoption Board had to refuse their application on the ground that they were not of the same religion as the child. The couple went to the High Court where Pringle J accepted the plaintiffs' arguments and the State did not appeal the case to the Supreme Court.<sup>97</sup> Section 12 of the 1952 Act was replaced with a provision (s.4 Adoption Act, 1974) that permits adoptive parents irrespective of their religion(s) to adopt provided the person whose consent to the adoption is required is aware of their

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<sup>96</sup> [1975] IR 81

<sup>97</sup> Counsel for the plaintiffs had argued that s. 12 of the 1952 Act imposed a disability and discriminated in respect of the plaintiffs as a group, the plaintiffs individually, and the child, on the ground of religious profession or belief contrary to Articles 40.1, 40.3, 41 and 44.2.3. Pringle J accepted counsels' arguments in respect of Article 44.2.3 and therefore did not feel it was necessary to examine their arguments in respect of Article 40.1, 40.3 and 41.

religion (if they have any religion).<sup>98</sup> The High Court found the provision that the Church hierarchy had so successfully lobbied for unconstitutional. Section 12 reflected the deference of those in power towards the Catholic Church at the time of its enactment. As s.12 clearly discriminated against a Protestant-Catholic married couple it appeared increasingly anomalous in light of the post-Vatican II ecclesiastical and societal changes.

Whyte describes the striking down of s.12 of the 1952 Act as:

‘...not a clash between Church and State but a shifting consensus involving them both. What had been impossible in 1970 was achieved in 1974. A fresh factor in this episode was the role of the courts. During the sixties and early seventies the courts became increasingly adventurous in using their power of judicial review. The Church-State relation was no longer simply a bilateral one between bishops and ministers. Judges could sometimes change the relationship into a triangular one. Their decisions could create a new situation, sometimes helping bishops and ministers to move from old positions, sometimes forcing them to do so when they would rather stay where they were. In the case of contraception...the courts played an even more decisive role.’<sup>99</sup>

In *Re Article 26 and the Adoption (No.2) Bill 1987*<sup>100</sup> the Supreme Court confirmed the constitutionality of the Bill which allowed for the adoption of marital children in extremely limited circumstances. Under the Bill a marital child could be adopted in circumstances where, *inter alia*, for a period of twelve months preceding the application the parents of the child have ‘for physical or moral reasons’ failed in their duty towards the child. Finlay CJ delivering the Court’s judgment stated:

‘The Court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights, makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he has been deprived by a method which disturbs or alters the constitution of the family if that method is necessary to achieve that purpose. The guarantee afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of

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<sup>98</sup> At a political level there had been objections to s.12 of the 1952 Act from Labour deputy Barry Desmond in 1970 but the Minister for Justice Michael Moran had described attempting to change the Act as ‘an exercise in futility, running my head against a stone wall.’ Mary Robinson attempted to repeal the section but this was opposed by Moran’s successor Desmond O’Malley, although he agreed to introduce a bill to permit religiously mixed couples to adopt, if one of them was the same religion as the child. O’Malley lost office shortly after this and was succeeded by Patrick Cooney whose legislative path was cleared by the High Court’s judgment in *M v An Bord Uchtála* [1975] IR 81. See John Whyte, *Church and State in Modern Ireland*, p.398-399.

<sup>99</sup> John Whyte, *Church and State in Modern Ireland*, p.399.

<sup>100</sup> *Re Article 26 and the Adoption (No.2) Bill 1987* [1989] IR 656

that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family.<sup>101</sup>

The Court's judgment indicated an acceptance of limited State interference in the marital family notwithstanding the importance which Catholic thought placed on the autonomy of the family. The striking down of s.17 Criminal Law Amendment Act, 1935 and s.12 Adoption Act, 1952 are indicative of this transformative period. If Gavan Duffy's judgment in *Tilson* could only have taken place during that period of Irish history and is indicative of the high water mark of the Catholic Church's influence, then it may also be stated that the decisions in *M* and *McGee* could equally only have happened during this period in Irish history as the Church found its position being increasingly undermined by a society in moral and sociological flux. Those supporting the Catholic view would not passively accept the undermining of Catholic norms and the counter revolution came in the 1980s and was exemplified by a constitutional amendment to the right to life, a defeated referendum on divorce and the majority judgments in *Norris*. It would also become clear that Rome was strongly opposed to the reform based agenda which stemmed from Vatican II. The mainstream of Catholic thought was not open to reform but appeared to long for a return to the pre-Vatican II Church. The Courts in the areas of education, the family and in allowing statutory exceptions for religious groups displayed a high degree of deference to religion and to Catholic and inter-religious beliefs. The only judge during this period who appeared receptive to Catholic norms in a manner redolent of Gavan Duffy P's non-ecumenical approach was O'Hanlon J. It is to these developments that I turn in the next chapter.

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<sup>101</sup> Ibid 663.

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## Chapter 5 Judicial Deference to Religion and the Catholic Counter Revolution

### Introduction

In this chapter I examine, pro-religious lines of post-Vatican II jurisprudence in the context of what might be defined as a conservative counter revolution against the liberal tide which it was feared would undermine Ireland's 'Catholic sociology'. I will therefore examine the Supreme Court's decisions in *Norris v AG*<sup>1</sup>, the Court's position that religious groups have a right to be exempt from certain laws of general application and the Courts' interpretation of Articles 41 and 42. I argue that these lines of jurisprudence represent a philosophical position which is deferential to religion but does not amount to support for Catholicism over other religions. As I argued in the previous chapter the growing consciousness of the divisive nature of laws which were perceived as being underpinned philosophically by the non-plural confessional pre-Vatican II tradition meant that laws which stemmed from the period during which the influence of the Catholic Church was at its most pervasive, were at risk of being struck down. This appears to have been a factor in *McGee v AG*<sup>2</sup> and *M v An Bord Uchtála*<sup>3</sup> as the laws that were struck down were capable of being perceived as being confessional in character. The Courts appeared prepared to strike down laws that favoured one religious view but not laws that favoured religion generally.

The Courts have interpreted Articles 41 and 42 in a manner which is in line with Catholic thought. The Courts have upheld positions which are in line with the Catholic Church's views on familial autonomy and denominationalism in education<sup>4</sup> as these are principals that are deeply entrenched in Ireland's constitutional structure. However, in recent years the Supreme Court has emphasised the fact that Articles 41 and 42 are coincidentally

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<sup>1</sup> [1984] IR 36.

<sup>2</sup> [1974] IR 284.

<sup>3</sup> [1975] IR 81.

<sup>4</sup> It should be noted that the Protestant Churches have also supported denominational education.



analogous with non-religious philosophical positions concerning familial autonomy. This fact, combined with the deletion of the Catholic inspired prohibition on legislating to provide for divorce, has tended to deemphasise the influence of Catholicity on the Constitution and the Courts. Therefore, while the Courts have shown a willingness to favour religious views they have tended to emphasise religiously plural norms and resisted sectarianism. The relative activism of the Courts from the 1960s coincided with a growing consciousness of the need for a pluralist polity and this has tended to inform the underlying policy underpinning the judiciary's approach to judicial review and contentious social issues.<sup>5</sup> However, the influence of pluralism on the Courts has not undermined the judiciary's belief that religious groups may be exempted from certain laws of general application on the basis that religion can contribute to the common good and because it is mandated by the Constitution.<sup>6</sup> The influence of religiosity on the majority in *Norris* reflects the influence of Christianity on the Courts rather than a specifically Catholic tradition. The minority were also influenced by Christian thought but did not feel bound by the rules of the Christian churches. I now turn to examine how conservatives concerns at a perceived liberal shift in law and politics post-Vatican II led to the Eighth Amendment to the Constitution.

### **Conservative Concerns and Abortion**

The political climate after Vatican II was characterised by the liberalising effect of the decriminalisation of contraceptives, the striking down of s.12 of the Adoption Act, 1952, the deletion of Article 44.1.1, the fact that the Church hierarchy did not necessarily expect civil laws to mirror Church laws and later, the introduction of divorce and the acceptance by the Supreme Court that abortion was permissible in exceptional circumstances. These were developments which were viewed with concern by many Catholics. The fact that the Catholic hierarchy did not expect civil laws to necessarily reflect Church laws indicated that, as Hornsby-Smith argues: 'in the maintenance of its

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<sup>5</sup> An exception to this was O'Hanlon J's religiously non-plural reliance on the Vatican II document *Gravissimum Educationis* in *Donoghue v Minister for Health* [1996] 2 IR 20.

<sup>6</sup> Therefore, Walsh J in *Quinn Supermarket v AG* [1972] IR 1, 24 stated that the Constitution reflects a firm conviction that 'we are a religious people' and that Article 44.1 'acknowledges that the homage of public worship is due to Almighty God but it does so in terms which do not confine the benefit of that acknowledgment to members of the Christian faith.' The fact that the Jewish congregation was given constitutional recognition in the 1937 Constitution tends to support the view that the Constitution protects non-Christian traditions.

“moral monopoly”, the Church has shifted its strategy from one of coercion to one of being the “conscience of the nation”.<sup>7</sup> The hierarchy’s redefinition of its relationship with the State meant that the Catholic mobilisation was becoming more rooted amongst certain sections of the laity than the clergy. This indicates that the movement towards a more ‘passive’ Church was not accepted by many lay Catholics. It was felt by a section of Irish society that traditional Catholic norms would be completely eroded without a conservative reaction. This largely lay Catholic counter revolution was organised around opposition to abortion, divorce and homosexuality. Inglis argues that in the 1980s in the struggle to ‘know, understand and represent the minds and hearts of the Irish people, the Church won out over the state and the main political parties.’<sup>8</sup> This Catholic reaction was to experience victories in the referenda on abortion (1983) and divorce (1986). These victories were to be temporary as the movement was to face defeat in the X-case and with the introduction of divorce in 1995. At the same time as this Catholic revolution was taking place there was also a growing unease amongst the political class with Catholic inspired laws which was exemplified by Garret Fitzgerald’s ‘constitutional crusade’, which was essentially an attempt to rid the Constitution of its more Republican and Catholic influences in the interest of appeasing Northern Protestant opinion.<sup>9</sup> These opposing political and cultural forces, one confessional the other receptive to secularism, clashed at a time of political and economic instability and the tension between these two forces was to define the 1980s and 1990s. Despite the growing strength of secularising forces, the Catholic hierarchy’s continuing dominance in the education system has to some extent helped to lessen the impact of these changes.

During the 1970s and 1980s there was a fear that the Courts might extend the right to privacy to allow for abortion. This fear was augmented by the fact that the American Supreme Court had interpreted the right to privacy as allowing for contraception<sup>10</sup> and

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<sup>7</sup> M. Hornsby-Smith, ‘Social and Religious Transformation in Ireland: A Case of Secularisation?’ in *The Development of Industrial Society in Ireland*, Goldthorpe and Whelan (ed.), Oxford UP, 1992, p.265.

<sup>8</sup> Tom Inglis, *Moral Monopoly The Rise and Fall of the Catholic Church in Modern Ireland*, UCD Press, Dublin, 1998, p.220.

<sup>9</sup> See Garret Fitzgerald, *Towards a New Ireland*, C. Knight, London, 1972.

<sup>10</sup> *Griswold v Connecticut* 381 US 79 (1965)

abortion<sup>11</sup>. This concern is exemplified by a debate which took place in the pages of the Jesuit periodical *Studies* in the 1970s between William Binchy and James O'Reilly. It was argued by O'Reilly that those who criticised the *McGee* judgment as a move towards abortion failed 'completely to understand how the court has developed its jurisdiction in this area. There are limits to judicial review and it is not a jurisdiction that the court exercises flippantly. It follows from this, as I read the cases, that the establishment of a right to abortion by judicial review, cannot be constitutionally justified...it is not possible to rely on any provision of the Irish Constitution as allowing such a departure.'<sup>12</sup> O'Reilly does however concede that in creating a zone of privacy the Courts were leaving open the possibility of widening the parameters of such a right to include for example the sale of contraceptives. O'Reilly dismisses the claim that the American decision in *Roe v Wade*, which legalised abortion in America, might have consequences for Irish jurisprudence, describing it as an example of 'judicial excess'.<sup>13</sup> O'Reilly writes that in that case 'Justice Blackmun's majority opinion held that '...the word "person", as used in the Fourteenth Amendment does not include the unborn.'<sup>14</sup> Nothing could be further from the observation of Walsh J in *McGee* where the unborn life was singled out as having 'guaranteed personal rights' under the Irish Constitution. While only an *obiter dictum*...it shows clearly the way the Supreme Court was thinking on this issue.'<sup>15</sup>

William Binchy in a reply to O'Reilly contended that in fact the *McGee* judgment constituted 'live ammunition' for the Courts, which would be ahead of public opinion on the issue of abortion as the Courts were in *McGee*. He argued that it was 'precisely because *McGee* was not concerned with abortion – and therefore is not a legal precedent against abortion, Mr Justice Walsh's remarks on the subject being *obiter* – that the

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<sup>11</sup> *Roe v Wade* 410 U.S. 113 (1973). The roots of much of the controversy surrounding abortion and the law in Ireland may be found in Blackmun J's judgment in *Roe v Wade*. The judge's decision in which a woman sought relief from Texan state abortion laws was founded on two essential premises: that the right of privacy could be construed broadly enough to incorporate a right to an abortion and that where certain fundamental rights were involved the Court held that regulations which limit these rights may only be justified by a 'compelling state interest.' See Gerard Carey, 'Justice Blackmun's Irish Constitutional Legacy', (1999) *Irish Law Times* 16, p. 250-253. See also Kingston and Whelan (with Bacik), *Abortion and the Law*, p. 249-286.

<sup>12</sup> James O'Reilly, 'Privacy and Family Law', (Spring, 1977) *Studies* 66, p.16.

<sup>13</sup> *Ibid.* p.18.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

dangerous seeds sown in the decision may bear fruit in the future.’<sup>16</sup> Binchy described ‘the concept of the right to marital privacy as being of such a pliable nature that it may readily be bent, as has happened in the United States, to accommodate the recognition of the ‘right’ to abortion. He argued that privacy ‘is a word loaded with emotive self-justification.’ He stated that in the United States ‘the concept proved amenable to being applied in a wide variety of areas far removed from its “port of entry,” extending beyond abortion to such matters as euthanasia and homosexual conduct.’<sup>17</sup> Binchy was critical of O’Reilly for conceding that the passage of time might lead the right to privacy to extend to confer ‘constitutional protection on unmarried adults engaging in sexual intercourse’<sup>18</sup> and concluded by stating that the concept of privacy as defined in *McGee* was a ‘time bomb which, with changing attitudes, may yet explode in a manner which most of our citizens...would deeply regret.’<sup>19</sup>

In an article published in *Studies* (1979) Binchy, commenting on pluralism in Irish society questioned the argument that ‘in respect of divorce and contraception...it is unfair for the majority to impose its moral and social views on the minority, and that those who oppose either divorce or contraception are free not to avail themselves of either facility but that they should not deprive others, who do not share their views, of access to them.’<sup>20</sup> Binchy refers to this argument as perceiving issues such as divorce and contraception only as a matter for ‘practicable’ accommodation between ‘the zone of personal freedom’ and the common good. He argues that it fails to consider the possibility that a society with such ‘optional extras’ may be ‘transformed in some important respects and that the assumption that some practicable accommodation is necessarily possible may be misplaced.’<sup>21</sup> Binchy is rejecting the idea of a plural society which provides a framework ‘which allows and takes into account as far as practicable diversity of views, beliefs, culture and patterns of behaviour, so that the zone of personal freedom is maximized to the limit compatible with the common good and the upholding

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<sup>16</sup> William Binchy, ‘Marital Privacy and Family Law: A reply to Mr. O’Reilly’ (Winter, 1977) *Studies* 66, p.321.

<sup>17</sup> *Ibid.* p.331.

<sup>18</sup> *Ibid.* p.332-333.

<sup>19</sup> *Ibid.* p.333.

<sup>20</sup> William Binchy, ‘Pluralism in Ireland: A Comment’, (Spring/Summer, 1979) *Studies* 68, p.4.

<sup>21</sup> *Ibid.*

of public order.’<sup>22</sup> He argues that this definition fails to define what is meant by public order and the public good and can, as stated above, lead to major shifts in certain fundamental aspects of society.

The argument may be advanced that accommodating a woman’s right to choose to have an abortion is achievable within Brady’s definition of pluralism. However, it depends on one’s definition of the common good, as clearly the position of the Catholic Church would be that the practice of abortion is morally wrong, contrary to Catholic thought and contrary to the common good. However, this may leave open the possibility of a shift in our interpretation of the ‘common good’ which can only take place if it is accepted that the teachings of the Church can be influenced by extrinsic cultural conditions. Therefore, Walsh J decided that the prohibition on the sale and importation of contraceptives for married couples was not in the common good in *McGee*. Binchy’s approach to pluralism leaves little room for normative and cultural shifts in society. Instead, it seeks to protect what is a subjective perception on normative standards and argues that such standards must be maintained in order to maintain certain fundamental desirable aspects (or basic goods) in society. Binchy appears to be suggesting that there are ‘non-negotiable’ issues and these would include issues such as divorce and abortion. The manner in which the Irish Courts have interpreted the Constitution has led to important social changes in the areas mentioned in Binchy’s article. These developments fit uneasily with Binchy’s ideas on pluralism and viewed from the perspective of his interpretation of pluralism have effected fundamental socio-legal changes which have transformed the basic and fundamental nature of Irish society. Binchy was a significant conservative voice during the cultural battles of the 1980s and 1990s and his views are representative of those who viewed the rise of liberalism, and its consequent undermining of traditional values, with concern. These concerns led to a lobbying campaign that resulted in the Eighth Amendment to the Constitution in 1983.

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<sup>22</sup> This is Father John Brady, S.J.’s definition of pluralism in ‘Pluralism and Northern Ireland’ (Spring/Summer, 1978) *Studies* 67, p.88-99.

### **Eighth Amendment to the Constitution**

The Eighth Amendment to the Constitution states: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.' The wording of the Amendment was proposed by Fianna Fáil and initially approved by Fine Gael.<sup>23</sup> Prior to the approval by the electorate of the amendment unborn fetuses were protected by sections 58<sup>24</sup> and 59 of the Offences against the Person Act 1861.<sup>25</sup> The Eighth Amendment resulted from intense lobbying from the Pro-Life Amendment Campaign (PLAC).<sup>26</sup> While the Catholic laity appeared to have been more vocal than the hierarchy on this issue the Church also played an important role in mobilising a yes vote in the 1983 referendum with many priests giving sermons urging a yes vote. In the Dublin diocese (containing almost one-third of the electorate) Archbishop Ryan had a pastoral letter read at all masses on the Sunday before the referendum urging a yes vote.<sup>27</sup> The fact that it was the Catholic laity which took the

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<sup>23</sup> Fine Gael was to have misgivings about the wording of the Eighth Amendment and proposed an alternative wording: 'Nothing in this Constitution shall be invoked to invalidate, or to deprive of force or effect, any provision of a law on the ground that it prohibits abortion.' 339 *Dáil Debates* 1353, 9 February 1983. Following X Garret Fitzgerald wrote that in 1983 'The Attorney General of the day warned... that the amendment contained ambiguities that could, among other consequences, lead to the legislation (sic) of abortion. The Director of Public Prosecutions warned that this amendment would create grave difficulties in maintaining a prosecution in many abortion cases. Once those views were conveyed to me as Taoiseach and the unwisdom of my earlier acceptance of this wording was clear, I and my colleagues in government, supported by the overwhelming majority of Oireachtas members of both government parties, and regardless of the political consequences, publicly rejected this fatally-flawed wording... I pointed out that the passing of the amendment would be an unforgivable act and described as astonishing the determination of proponents of the amendment... these problems were either ignored or summarily dismissed, even by the Church hierarchy in its statement on the issue.' *The Irish Times*, 7 March 1992.

<sup>24</sup> Section 58 of the Offence Against the Person Act, 1861 states; 'Every woman, being with child, who, with intent to procure her own miscarriage shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with like intent, and whosoever, with intent to procure the miscarriage of any women, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with like intent, shall be guilty of felony.' Section 59 criminalised the supply of any poison or instrument to a woman, knowing that she intends to use such poison or instrument with intent to procure the miscarriage of any woman.

<sup>25</sup> While a prohibition on abortion is clearly in line with the teachings of the Catholic Church, the 1861 Act reflects the values of 19<sup>th</sup> century British Victorian society.

<sup>26</sup> The referendum was passed with two thirds of the 55% turn out voting for the amendment. The proportion of 'yes' votes was as high as four to one in rural constituencies such as Mayo and Donegal while there was a lower 'yes' vote in urban areas.

<sup>27</sup> The Catholic hierarchy issued a collective statement asserting that according to the moral law abortion was wrong in all circumstances but it recognised 'the right of each person to vote according to conscience'. The statement urged people to vote yes to the amendment stating that defeat in the referendum 'could well be represented as a victory for the abortion cause'. Quoted in Tom Inglis, *Moral Monopoly*, p. 84.

lead on this issue may cause a re-evaluation of the traditional view of the relationship between the laity and the institutional church as one in which the laity are docile and subservient to the Church's power.<sup>28</sup> It should also be noted that the lobbying campaign from PLAC took place at a time of exceptional political instability (with three separate governments in the space of eighteen months), and because of this it is likely that PLAC had more influence over political representatives than might ordinarily have been the case.<sup>29</sup>

### ***Dudgeon v UK: Walsh J's Dissenting Judgment***

Those who opposed the liberalisation of abortion laws had experienced a victory in the form of the Eighth Amendment to the Constitution. A challenge was also to arise in the area of homosexuality. Before *Norris* was decided the European Court of Human Rights ruled that the criminalisation of homosexual acts between consenting adults in Northern Ireland was a violation of Article 8 of the European Convention of Human Rights. While Walsh J was prepared to strike down s. 17 of the Criminal Law Amendment Act, 1935 in *McGee*, he displayed a more traditional view in dissenting in *Dudgeon v UK*. Walsh J asserted that *Dudgeon* did not come within the parameters of Article 24 of the Convention as he could not be classified as a 'victim' since he had not been prosecuted under the impugned statutes. He stated the Court had no jurisdiction to make a declaration unrelated to an injury actually suffered or alleged to have been suffered by the applicant. He stated that as *Dudgeon* had not established that he was a victim within the

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<sup>28</sup> Tovey and Share write that the Church 'now appears not to be dependent on the passive obedience of the laity but perhaps more on the active work of lay members as they repair and redevelop the vulnerable power resources of the church as an institution' and that the 'fundamentalist campaigns of the last twenty years can be seen as mobilisations by certain sections of the Irish Catholic laity to defend and promote a world view and a set of values.' Tovey and Share, *A Sociology of Ireland*, Gill and MacMillan, Dublin, p.468.

<sup>29</sup> John Kelly, *The Irish Constitution*, p.1498 states that the enactment of the Eighth Amendment was 'a unique example, in the Irish experience, of a constitutional amendment being proposed and pioneered outside the party political system and to that extent, came close to resembling the old device of the initiative in the Constitution of the Irish Free State, which was designed to allow the electorate to promote proposals for legislative and constitutional change.' Inglis writes that 'the success of PLAC was that it was able to make use of the thousands of committed Catholics already involved in lay organisations and parish work to do the canvassing. This enormous physical organisation through-out the country, which had existed for many years but which had never previously been mobilised as a unified force, was central to PLAC's victory.' Tom Inglis, *Moral Monopoly*, p.84.

meaning of Article 24 of the Convention, he was not entitled to the ruling that his rights under Article 8 of the Convention had been breached.<sup>30</sup>

Walsh J then asked whether the interference with the life of Dudgeon was permitted by the law as necessary in a democratic society in the interests of the protection of health or morals or the rights and freedoms of others. He stated:

‘This raises the age-old philosophical question of what is the purpose of law. Is there a realm of morality which is not the law's business or is the law properly concerned with moral principles? In the context of United Kingdom jurisprudence and the true philosophy of law this debate in modern times has been between Professor H. L. A. Hart and Lord Devlin.’<sup>31</sup>

Walsh J appeared to be broadly supportive of Lord Devlin's position regarding the relationship between morality and law, stating:

‘If it is accepted that the State has a valid interest in the prevention of corruption and in the preservation of the moral ethos of its society, then the State has a right to enact such laws as it may reasonably think necessary to achieve these objects. The rule of law itself depends on a moral consensus in the community and in a democracy the law cannot afford to ignore the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt. Virtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult the struggle after virtue. Such a situation can have an eroding effect on the moral ethos of the community in question. The ultimate justification of law is that it serves moral ends. It is true that many forms of immorality which can have a corrupting effect are not the subject of prohibitory or penal legislation. However such omissions do not imply a denial of the possibility of corruption or of the erosion of the moral ethos of the community but acknowledge the practical impossibility of legislating effectively for every area of immorality. Where such legislation is enacted it is a reflection of the concern of the "prudent legislator".’<sup>32</sup>

This is also similar to the Catholic Church's position on the relationship between civil law and morality in that he does not envisage all forms of immorality as being contrary to the law. Walsh J appears to be saying that while it may not always be possible to conform civil laws with morality owing to practical difficulties, the Courts should not be out of line with the moral ethos of society. This may be interpreted as meaning that Northern Ireland as a society would not approve of homosexual behavior, and that the European Convention on Human Rights did not require legislation decriminalising homosexual sex. The majority in the case had emphasised the fact that there appeared to

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<sup>30</sup> Similarly, Walsh J dissenting in *Norris v Ireland* (1991) 13 EHRR 186 concurred with the opinion of Valticos J that Norris did not come within the definition of victim under Article 24 of the Convention and therefore there had been no breach of his rights under Article 8 of the Convention.

<sup>31</sup> (1983) 5 EHRR 573, para. 9.

<sup>32</sup> *Ibid.* para. 14.



be a movement towards uniformity amongst member states to the Convention in their laws on homosexuality, while Northern Ireland had more restrictive statutes in place than those of other member states. However, Walsh J emphasised the fact that the member states to the Convention were culturally heterogeneous and that diversity of thought and ideas should be respected. In particular he emphasised the centrality of religion to the lives of the people in Northern Ireland:

‘Religious beliefs in Northern Ireland are very firmly held and directly influence the views and outlook of the vast majority of persons in Northern Ireland on questions of sexual morality. In so far as male homosexuality is concerned, and in particular sodomy, this attitude to sexual morality may appear to set the people of Northern Ireland apart from many people in other communities in Europe, but whether that fact constitutes a failing is, to say the least, debatable. Such views on unnatural sexual practices do not differ materially from those which throughout history conditioned the moral ethos of the Jewish, Christian and Muslim cultures.’<sup>33</sup>

Walsh J then chose to adopt a more deferential approach to the British government stating that they would be in a better position to evaluate the effect of the legislation on the people of Northern Ireland<sup>34</sup> than the Court:

‘Even if it should be thought, and I do not so think, that the people of Northern Ireland are more "backward" than the other societies within the Council of Europe because of their attitude towards homosexual practices, that is very much a value judgment which depends totally upon the initial premise. It is difficult to gauge what would be the effect on society in Northern Ireland if the law were now to permit (even with safeguards for young people and people in need of protection) homosexual practices of the type at present forbidden by law. I venture the view that the Government concerned, having examined the position, is in a better position to evaluate that than

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<sup>33</sup> Ibid. para. 17. There is a similarity here with O’Higgins CJ’s reliance on Christian history and theology in his judgment in *Norris*.

<sup>34</sup> It had been proposed to change the law relating to homosexuality in Northern Ireland, which led to a survey of public opinion on any potential changes to the law. The outcome of that survey was described by the European Court of Human Rights as follows: ‘Those opposed to reform included a number of senior judges, District Councils, Orange Lodges and other organisations, generally of a religious character and in some cases engaged in youth activities. A petition to "Save Ulster from Sodomy" organised by the Democratic Unionist Party led by Mr. Ian Paisley, a Member of the United Kingdom House of Commons, collected nearly 70,000 signatures. The strongest opposition came from certain religious groups. In particular, the Roman Catholic Bishops saw the proposal as an invitation to Northern Irish society to change radically its moral code in a manner liable to bring about more serious problems than anything attributable to the present law. The Roman Catholic Bishops argued that such a change in the law would lead to a further decline in moral standards and to a climate of moral laxity which would endanger and put undesirable pressures on those most vulnerable, namely the young. Similarly, the Presbyterian Church in Ireland, whilst understanding the arguments for the change, made the point that the removal from the purview of the criminal law of private homosexual acts between consenting adult males might be taken by the public as an implicit licence if not approval for such practices and as a change in public policy towards a further relaxation of moral standards.’ (1983) 5 EHRR 573, para. 25. In light of public opinion and inter-Church opposition it was decided not to continue with a process of reform.

this Court, particularly as the Court admits the competence of the State to legislate in this matter but queries the proportionality of the consequences of the legislation in force.<sup>35</sup>

While Walsh J had been prepared to strike down legislation proscribing the sale and importation of contraceptives in *McGee*, he did not view the 1861 Act as being incompatible with the European Convention on Human Right in *Dudgeon*. Despite examining different legal instruments both judgments are indicative of the judge's judicial philosophy. Walsh J believed that the moral ethos of the community should be reflected in the law. Walsh J's judicial philosophy would confer equal legitimacy on Gavan Duffy P's judgments in the 1940s and 1950s as on Hardiman J's secular approach in contemporary times. The Catholic influence on Gavan Duffy P's judgments reflects the ethos of the community in which he adjudicated. Hardiman J's secular approach is also indicative of the moral ethos of contemporary society. However, society is not monolithic and therefore any definition of the moral ethos of a community will reflect the dominant ethos rather than all streams of morality within any society.<sup>36</sup>

#### Norris v AG

In *Norris v AG*<sup>37</sup> both the High Court<sup>38</sup> and the Supreme Court rejected Norris's claim that s.61 and s.62 of the Offences Against the Person Act, 1861<sup>39</sup> were repugnant to the

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<sup>35</sup> (1983) 5 EHRR 573, para. 19.

<sup>36</sup> Recently, in *MR v TR* [2006] IEHC 359 McGovern J in refusing to accept that frozen embryos were protected by the Eighth Amendment to the Constitution asserted that the Courts role was to apply the laws which govern society and not to enforce any one concept of morality. However, he accepted that laws reflect society's values, but the Court's function he stated is limited to applying those laws. The judge stated 'Laws should, and generally do, reflect society's values and will be influenced by them. But at the end of the day it is the duty of the Courts to implement and apply the law, not morality.'

<sup>37</sup> *Norris v Attorney General* [1984] IR 36.

<sup>38</sup> McWilliam J in the High Court in dismissing Norris's case referred, *inter alia*, to the fact that the Christian Churches have condemned homosexual behavior and that if it is accepted that the primary purpose of sexual organs is reproduction 'it seems to follow that there are some grounds for reasonable people to believe that sexuality outside of marriage should be condemned, and that sexuality between people of the same sex is wrong. This is an attitude which has been adopted over the years by the Christian Churches and the evidence given before me makes it clear that this is still the general attitude of the Churches, although it is now being questioned within them.' [1984] IR 36, 45.

<sup>39</sup> S.61 of the 1861 Act stated: 'Whoever shall be convicted of the abominable crime of buggery, committed with mankind or with an animal, shall be liable to be kept in penal servitude for life.' S. 62 stated: 'Whoever shall attempt to commit the said abominable crime, or shall be guilty upon any assault with intent to commit the same, or of any indecent assault upon a male person, shall be guilty of a misdemeanour, on being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years.' The 1861 Act did not cover many sexual acts which were regarded as homosexual so s.11 of the Criminal Law Amendment Act, 1885 was added which stated: 'Any male person who, in public or in private, commits or attempts to procure the commission by any male person of, any act of gross

Constitution. Norris had claimed that he was congenitally and irreversibly homosexual, that he was not sexually attracted to women and that heterosexual marriage was not an option for him. He stated that his realisation of his sexuality and of the public attitude to homosexuals, as well as the possibility of sanctions from the criminal law caused him extreme anxiety and led him to requiring protracted medical care and counselling. Following his recovery from his illness Norris decided he would declare himself publicly to be homosexual and formed the Irish Gay Rights Movement of which he was chairman. Despite publicly admitting to engaging in homosexual activities Norris was never prosecuted under the 1861 Act.<sup>40</sup>

Norris based his case on Art.40.1<sup>41</sup> and Art.40.3 of the Constitution. Under Art.40.3, Norris claimed that amongst the unenumerated rights stemming from that Article there was a general right to privacy. He contended that it was a right which inheres in every citizen and which places a limit on the power of the State to control his personal conduct where neither the exigencies of the common good, the protection of public order or morality necessitates such control.<sup>42</sup> Norris further contended that his right to bodily

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indecently with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.' Sodomy was not a crime in England until 1536 when Henry VIII in an effort to blend the functions of church and state enacted 'The Punishment of the Vice of Buggery' which made the 'detestable and abominable Vice of Buggery committed with Mankind or Beast' a felony punishable by death. See David Norris, 'Homosexual People and the Christian Churches in Ireland: A Minority and its Oppressors' in Hederman and Kearney (eds.) *The Crane Bag Book of Irish Studies*, 1982, p.770-776.

<sup>40</sup> However, it appears that his mail was opened by the authorities for a time.

<sup>41</sup> In his claim under Article 40.1 Norris contended that the offence of gross indecency between homosexual males only, constituted discrimination contrary to Article 40.1 which was invidious and unfair. Norris contended that such a prohibition ignores the sexual conduct involved in adultery, seduction and fornication, which are outlets open to heterosexual male citizens, and therefore place homosexual males in a position of inequality before the law. It was further contended that even if it were accepted that homosexual citizens have different capacities from heterosexuals and that the law can have regard to such differences, the regard which the law must have is 'due regard' and this could not include the designation as criminal of the very expression of the difference in capacity which is inherent in such citizens. Norris also claimed that gross indecency as an offence, is confined to sexual conduct between males. Similar or associated sexual conduct between female citizens who have a homosexual disposition is not prohibited. On this account Norris complained that the section creating the offence discriminates against male homosexuals solely on the ground of their sex and in a way which is unrelated to any difference in capacity, physical or moral, or of social function. Norris's argument under Article 40.1 was rejected by the majority.

<sup>42</sup> In particular Norris relied on the following passage from Budd J in *McGee v AG* [1974] IR 284, 322 where he stated: 'Whilst the "personal rights" are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognized and accepted with possibly the rarest of exceptions, and that the matter of marital relationship must rank as one of the most important of matters in

integrity had been infringed as the prohibition on sexual acts between male homosexuals threatens both the physical and mental health of homosexuals like him. The right to bodily integrity had been enumerated in *Ryan* based on the Christian and democratic nature of the state and with reference to the Papal Encyclical, *Pacem in Terris*. In light of the Catholic Church's opposition to homosexuality, the argument that Norris's right to bodily integrity had been infringed seems difficult to reconcile with the philosophical basis of *Ryan* in so far as *Ryan* is based on Catholic thought. However, Walsh J's reliance on Article 41 to strike down s.17 of the Criminal Law Amendment Act, 1935 in *McGee* indicated that the judiciary would not necessarily view Catholic influences on the Constitution as binding the Courts to the moral teachings of the Catholic Church. In that sense Norris's claim regarding his right to bodily integrity could be reconcilable with jurisprudential developments subsequent to *Ryan*.

#### **Judgment of the Chief Justice: Judicial Function**

O'Higgins CJ,<sup>43</sup> giving the majority judgment, stated that Norris was involved in a campaign which sought the repeal of all laws criminalising homosexuals. The judge rejected any idea that the court should involve itself in a process of social reform stating 'The sole function of this Court, in a case of this nature, is to interpret the Constitution and the law and to declare with objectivity and impartiality the result of that interpretation on the claim being considered. Judges may, and do share with other citizens a concern and interest in desirable changes and reform in our laws; but, under the Constitution, they have no function in achieving such by judicial decision.'<sup>44</sup> This is a

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the realm of privacy. When the preamble to the Constitution speaks of seeking to promote the common good by the observance of prudence, justice and charity so that the dignity and freedom of the individual may be assured, it must surely inform those charged with its construction as to the mode of application of its Articles.'

<sup>43</sup> Chief Justice O'Higgins was born in Cork in 1916 and was the nephew of the Minister for Justice Kevin O'Higgins who was shot in 1927. His father was Dr. T F O' Higgins who was a member of Sinn Féin and the Irish Volunteers. His father was also a leader in the Blueshirts movement in the 1930s. Tom O' Higgins was educated at St. Mary's College Rathmines, Clongowes, and UCD. He twice ran unsuccessfully for the presidency being defeated in 1966 and 1973 by Eamon de Valera and Erskine Childers respectively. He served as Chief Justice from 1974–1985 and on the European Court of Justice from 1985–1991. Interestingly, O'Higgins was associated with the more liberal wing of Fine Gael although it may be difficult to reconcile that fact with his judgment in *Norris*. Although it may demonstrate that even for a 'liberal' (he advocated Declan Costello's 'Just Society' programme) in Ireland at the time the decriminalisation of homosexuality was a bridge too far. He died in February 2003. (Obituary – *The Irish Times* 26 February 2003)

<sup>44</sup> [1984] IR 36, 53.

rather prosaic interpretation of the judiciary's function. O' Higgins CJ's characterisation of judicial functions would appear to imply that law and the process of adjudication is hermetically sealed from extrinsic influences and thereby 'objective'. O' Higgins CJ's judgment is based on an acceptance of religious dogma. He is basing this view within the context of the influence of Christianity on the Constitution and he is rooting it in a historical form of constitutional interpretation. Judges must interpret a Constitution which reflects a Christian view therefore the manner in which they interpreted the concept of Christianity would be vital to the case i.e. as bound by the rules of the Christian Churches or as an ethical concept which protects citizens rights and dignity as human beings.<sup>45</sup>

O'Higgins CJ set out the standard that Norris must reach in order for the legislation to be repealed. Because the legislation came into operation prior to 1937 there was no presumption of constitutionality as there is with post-1937 legislation. In order for Norris to have the legislation declared unconstitutional, the judge stated 'it is not sufficient to show that the legislation is out of date, is lacking public support or approval, is out of tune with the mood or requirements of the times or is of a kind impossible to contemplate now being enacted by the Oireachtas.'<sup>46</sup> O'Higgins CJ appears to be rejecting the influence of contemporary mores on constitutional interpretation in favour of a form of interpretation which seeks to set the impugned provisions against the Constitution as it was intended to be interpreted by its drafters.<sup>47</sup> This form of interpretation could only lead to one conclusion given the general attitude towards homosexuality in 1937. While

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<sup>45</sup> The function of the judiciary is of course to interpret the Constitution but because Christianity is capable of different interpretations it was possible to refer to it to both approve and reject Norris's case. But as Costello states even an atheist judge would have to interpret the Constitution in light of natural law given its clear influence on the text of the Constitution. See Declan Costello, 'The Natural Law and the Irish Constitution,' (1956) *Studies* 45, p.403-414.

<sup>46</sup> [1984] IR 36, 54.

<sup>47</sup> Rory O'Connell is critical of the majority's approach given the fact that the majority in *McGee* appeared to advocate a present tense interpretation of the Constitution. O'Connell argues that the majority in *Norris* should have stated explicitly that they were over-ruling *McGee*. See Rory O'Connell, *Legal Theory in the Crucible of Constitutional Justice*, Ashgate, Dartmouth, 2000. The failure of the majority to over-rule *McGee* raises the possibility that *Norris* was decided *per incuriam*.

there was still considerable opposition to homosexuality in 1984, it was becoming more acceptable within the framework of pluralist and egalitarian ideas of forming society.<sup>48</sup>

### Morality and Law

The Chief Justice attributed Norris's argument that the legislation represented the imposition of a particular private morality to John Stuart Mill. Mill's argument was essentially that the law should not concern itself in the realm of private morality except to the extent necessary for the protection of public order and the guarding of citizens against injury or exploitation. This view was expressed in the Wolfenden Committee on Homosexual Offences and Prostitution<sup>49</sup> whose report the Chief Justice quoted from as follows:

'There remains one additional counter argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice in action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality, which is, in brief and crude terms not the law's business. To say this is not to condone or encourage private immorality.'<sup>50</sup>

O' Higgins CJ stated that at the core of Norris's case was a challenge to the impugned legislation in which he was asserting that the State had no business in the field of private morality and has no right to legislate in relation to the private sexual conduct of consenting adults. It was, he stated, Norris's claim that 'to attempt to do so is to exceed the limits of permissible interference and to shatter that area of privacy which the dignity

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<sup>48</sup> However, an example of the intolerance which gay people were subjected to arose in 1983 when a group of men killed a gay man because of his sexuality in Fairview Park, Dublin. The men pleaded guilty but were given suspended sentences. Subsequent to the case supporters of the men held a 'victory march' in Fairview Park. See Diarmaid Ferriter, *Occasions of Sin*, Profile Books, London, 2009, p.499.

<sup>49</sup> Michael McLoughlin writes that the findings of the *Wolfenden Report* discredit the non-rational arguments historically used to deny legal equality to gay and lesbian people everywhere: that legalising homosexuality will lead to gay youth fleeing from family life into a life of immorality; gay people form socio-cultural groups separate from 'real' society and thus are isolated and unhappy and therefore homosexual people would be a danger to it if they held legal equality; homosexual people are a national security risk in government and military employment; and gay men are responsible for the spread of disease. McLoughlin writes that these arguments 'are still taken seriously by many courts, governments, and societies, so the establishment of the *Wolfenden Report* through *Dudgeon*, *Norris*, and *Modinos* was an important achievement.' Michael McLoughlin 'Crystal or Glass?: A review of *Dudgeon v UK* on the Fifteenth Anniversary of the Decision', (December, 1996) *Murdoch University Electronic Journal of Law* 3, p.36.

<sup>50</sup> [1984] IR 36, 60-61.

and liberty of human persons require to be kept apart as a haven for each citizen.<sup>51</sup> Underpinning Norris's case was a philosophical argument that morality must be kept separate from law and that by legislating to reflect a particular moral point of view there was an impermissible invasion of his personal autonomy. Ultimately, the Chief Justice refused to adopt the Millian approach of the Wolfenden Committee.<sup>52</sup>

Rev. Patrick Hannon<sup>53</sup> writing on the relationship between law and morality argues that while the Catholic bishops have intervened in debates on contentious social issues and in doing so have set out the Church's moral teaching on a particular issue, it does not follow that because something is immoral, it must be proscribed by law. Nor, he states, do the bishops believe this to be the case, as some contraventions of the moral order are not appropriate for legislative prohibition. Hannon states that what is decisive is the 'social impact of the permission of this or that piece of behaviour.'<sup>54</sup> Hannon states that when the hierarchy intervenes regarding a social issue they will set out arguments in favour of a

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<sup>51</sup> Ibid.

<sup>52</sup> The Wolfenden Committee recommended that homosexual practices between consenting adults in private should no longer be criminal. The words in private placed such behaviour within the realm of morality which was according to the committee not the concern of the law. The committee did not regard it as the function of the law to intervene in the private lives of citizens as this would lead to an equation between law and sin. Lord Devlin opposed the findings of the Wolfenden Committee on the basis that society had a right to enforce a public morality rather than simply limiting the concept of morality to the private sphere. Devlin argues that without a shared morality society can not exist. Devlin believed that society had a right to pass judgment on matters of morality and that in deciding when morality can be enforced through law there must be toleration of the maximum individual freedom that is consistent with the integrity of society, nothing should be punished by the law that does not lie beyond the limits of tolerance, and to the extent that it is possible the individual's right to privacy should be respected. Professor Hart represents the alternative view on this issue, by emphasising the rights of the individual. Hart relies on Mills' argument that the 'only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right.' JS Mills, *On Liberty*, Cambridge Texts in the History of Political Thought, Cambridge, 1989, p.13. Although Hart argues that there can also be circumstances where the prevention of physical harm to oneself justifies legal coercion of the individual. Hart does not accept the proposition that the prevention of moral harm to oneself justifies legal coercion of the individual. Hart believes that it is not clear that forcing a person under threat of legal penalty to conform to certain moral norms should be regarded as securing the common good. It should be noted that Mills' harm principle appears to be based on a value judgement which is itself moral in nature.

<sup>53</sup> Rev. Patrick Hannon 'Law and Morality in Ireland', (Winter, 1992) *Dli*, p.26.

<sup>54</sup> Ibid.

particular side i.e. they supported the pro-life amendment to the Constitution in 1983 on the basis that it appeared to offer maximum protection of the right to life of the unborn.<sup>55</sup>

However, Hannon writes it may be difficult to reconcile this position with the Church's stance that legislators and citizens must make up their own minds on these issues. The answer, Hannon suggests, is to be found in the theology of the Church which makes allowance for what the second Vatican Council called the 'autonomy of the secular', and a distinction between what belongs to the core of the Catholic faith and what is a matter of legitimate difference of opinion. A key principle to be found in the Council's teaching about religious freedom was expressed in its Declaration on Religious Freedom of 1965 in which it was stated that religion and morals should not be distinguished as the two go together. Hannon argues that though related the two are distinct but that the arguments and conclusions which the Council makes concerning freedom of religious belief and practice hold also in the sphere of morality.

Hannon states that it is possible to say according to contemporary Catholic teaching that people should not be made to go against their consciences; nor should they be prevented from acting according to conscience – 'within due limits' as the Council's declaration put it. The meaning of this expression is crucial as later in the Declaration the limits are specified to be the requirements of the 'common good.' A standard enumeration of these requirements is summarised in the formula 'peace, justice and public morality'. Hannon argues that this constitutes a key principle within Catholic theology concerning the debate on the relationship between law and morality. The principle states that people should not be forced by law to act contrary to their moral conscience. People should only be restrained by law from acting according to their conscience if what they have in mind is contrary to the requirements of public peace, justice or public morality.<sup>56</sup> It may then be possible to reconcile the dissenting judgments in *Norris* with the post-Vatican II idea that

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<sup>55</sup> Recently the hierarchy stated that people could vote either yes or no in the second referendum on the Lisbon Treaty. However, there was opposition to the treaty amongst lay Catholics who feared that abortion might be introduced into Ireland through the treaty.

<sup>56</sup> See *DPP v Draper*, *Irish Times*, March 1988 in which the Court of Criminal Appeal dismissed the appeal of a man convicted of malicious damage to a religious statute who had claimed that he was told to do it by God. McCarthy J stated that the free practice and profession of religion is limited by the requirements of public order.



morality and civil law do not have to mirror one another all of the time. If Norris was acting according to his conscience and his behaviour did not constitute a breach of public peace and morality the chasm between post-Vatican II thought and McCarthy and Henchy JJ's dissenting judgments may not be as vast as one would assume.

### **Christian Teaching on Homosexual Conduct**

O'Higgins CJ set out his perception of the historical Christian attitude to homosexual activity:

'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 both to society and to God. With the advent of Christianity this view found clear expression in the teachings of St. Paul, and has been repeated over the centuries by the doctors and leaders of the Church in every land in which the Gospel of Christ has been preached. To-day, as appears from the evidence given in this case, this strict view is beginning to be questioned by individual Christian theologians but, nevertheless, as the learned trial judge said in his judgment, it remains the teaching of all Christian Churches that homosexual acts are wrong.'<sup>57</sup>

This is evidence of a member of the judiciary explicitly relying on Christian social teaching to support the argument that homosexual conduct is morally wrong. But it does not solely reflect a Catholic view. This may be contrasted with Gavan Duffy P's reference to the influence of the 'great Papal Encyclicals' on Articles 41 and 42 in *Re Tilson* and Kenny J's reliance on *Pacem in Terris* in *Ryan*, which are more explicitly Catholic than O'Higgins CJ's more broadly Christian view. O'Higgins CJ's arguments regarding homosexuality and its possible consequences were that Christian teaching has always condemned homosexuality as morally wrong and contrary to nature; homosexuality can result in great distress and unhappiness for the individuals concerned; those who are homosexually orientated can be importuned into a homosexual lifestyle which can become habitual; male homosexual conduct can result in the spread of forms

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<sup>57</sup> [1984] IR 36, 61. It should be noted that scholars such as Boswell disagree with the view that Christian theology has always condemned homosexuality. See Boswell's *Christianity, Social Tolerance and Homosexuality* Chicago University Press, Chicago, 1981 and *Same Sex Unions in Premodern Europe*, Villard Books, New York, 1994 by the same author. It should also be noted that a Catholic priest gave evidence for Norris stating that there was a school of thought within the Church which did not condemn homosexuality as immoral.

of venereal diseases; and homosexual conduct can be harmful to marriage as an institution.<sup>58</sup>

O'Higgins CJ then referred to the Preamble of the Constitution stating:

'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 obligation to "our Divine Lord, Jesus Christ." It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult of acceptance.'<sup>59</sup>

O'Higgins CJ appears to be arguing that when the people voted for the Constitution in 1937, they were not only voting for the content of the Constitution but also for a set of pre-existing and historic Christian beliefs. The Chief Justice supported this position by reference to the Preamble with its reference to 'Our Divine Lord, Jesus Christ'. The Constitutional Review Group described the Preamble as reflecting the ethos of the 1930s and as being 'overly Roman Catholic'<sup>60</sup>. Gavan Duffy P also referred to the preamble in *Maguire v Attorney General*<sup>61</sup> as being 'of more specifically Catholic import.' In contrast Walsh J writing extra-judicially stated that while the Constitution had opted for the theological origin of natural law 'It is not correct to claim that the preamble to the Constitution in effect declares the people to be "a Catholic nationalist people." The Preamble undoubtedly proclaims the acceptance of Christianity and of the Christian ethic as the basis of the government of the state...If the people of the state wish to live according to the Christian ethic (and one does not necessarily have to be a Christian to do that) and to have the social and legal structure of the state ordered accordingly, then the

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<sup>58</sup> [1984] IR 36, 63.

<sup>59</sup> Ibid 64.

<sup>60</sup> *Report of the Constitutional Review Group* (1996) p.4.

<sup>61</sup> [1943] IR 238.

Constitution reflects the political and social structure of the people.’<sup>62</sup> Walsh J’s comments exemplify the philosophical view that O’Higgins CJ takes, namely that he is referring to his view that homosexuality is immoral because of Christian teaching and not based solely on the teachings of the institutional Catholic Church. This argument is supported by the inter-ecclesiastical condemnation of homosexuality that existed. It is argued that Christianity exists as a universal ethical concept and in that sense is capable of being pluralist. This view may be contrasted with Gavan Duffy J’s pre-Vatican II judicial philosophy which tended to reflect a non-plural and triumphalist Church.

### **The Right to Privacy**

O’Higgins CJ argued that the right to privacy<sup>63</sup> is not absolute and that many acts which are committed in private are proscribed such as abortion, suicide, incest, euthanasia and mercy killing. He described these as prohibited simply because they are morally wrong and regardless of the fact that in certain instances, no harm is done to others. With regard to homosexual activity he stated, ‘such conduct is, of course, morally wrong, and has been so regarded by mankind through the centuries. It cannot be said of it, however, as the plaintiff seeks to say, that no harm is done if it is conducted in private by consenting males.’<sup>64</sup> He then stated:

‘On the ground of the Christian nature of our State and on the grounds that the deliberate practice of homosexuality is morally wrong, that it is damaging to the health both of individuals and the public and, finally, that it is potentially harmful to the institution of marriage, I can find no inconsistency with the Constitution in the laws which make such conduct criminal. It follows, in my view, that no right of privacy, as claimed by the plaintiff, can prevail against the operation of such criminal sanctions.’<sup>65</sup>

The Chief Justice writing in his autobiography stated that in *Norris*

‘The issue before the court was whether such provisions had been carried over into the law of the state. If these provisions were found to be in conflict with the Constitution, then they were not carried over and were not part of the law enforceable in the state. Otherwise they were – and that in fact was the decision of the court arrived at by the majority. This case has often been referred to

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<sup>62</sup> Brian Walsh ‘The Constitution and Constitutional Rights’ in *The Constitution of Ireland 1937-1987*, Litton (ed.) IPA, Dublin, 1988, p.94-95.

<sup>63</sup> A right to marital privacy was established in *McGee v AG* [1974] IR 284; however, it wasn’t until *Kennedy v Ireland* [1987] IR 587 that a general right to privacy was established in Irish law.

<sup>64</sup> [1984] IR 36, 64.

<sup>65</sup> *Ibid.*

as one in which the Supreme Court condemned homosexuality. This is not so, because the issue simply did not arise.<sup>66</sup>

This is a disingenuous analysis. It would appear that the Chief Justice's judgment is heavily influenced by a moral view which perceives homosexuality as unacceptable. The Chief Justice was in a position to adjudicate on an indeterminate legal and social issue and a number of legal arguments and modes of interpretation could be regarded as equally valid. The Chief Justice gave the impression that he chose the mode of interpretation that justified his moral view that homosexuality was wrong.<sup>67</sup> In doing so O' Higgins CJ was influenced by Christian thought. He was also reflecting the influence of a Catholic culture which condemned homosexuality as immoral. He was reflecting the influence of a Constitution which, as Chubb states, promotes 'Catholic ideological and social values'.<sup>68</sup> Kelly wrote, in the context of an examination of different modes of interpretation, that 'One needs to emphasise, however, that the courts have shown no consistency with regard to any particular approach and this gives rise to the suspicion that individual judges are willing to rely on any such approach as will offer adventitious support for a conclusion which they have already reached.'<sup>69</sup> Hogan offered a nuanced criticism of the majority judgment in *Norris* on the basis that 'the rather sanctimonious references to Christian morality only served to weaken the judgment, and gave the impression of a decision based largely on personal beliefs rather than on sound constitutional principles'.<sup>70</sup> Hogan emphasised the 'impression' which the majority's

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<sup>66</sup> TF O'Higgins, *A Double Life*, Town House, Dublin, 1996, p.282.

<sup>67</sup> It should however be noted that Colm Toibín has suggested that O'Higgins CJ was not personally opposed to the striking down of the impugned legislation. However, he does not elaborate on this point or offer any support for this view. Colm Toibín, *Magill*, February 1985.

<sup>68</sup> Basil Chubb, *The Government and Politics of Ireland*, Longman, London, 1992 (3<sup>rd</sup> ed.), p.16.

<sup>69</sup> John Kelly, *The Irish Constitution*, p. 3.

<sup>70</sup> Gerard Hogan, 'Law and Religion: Church State Relations in Ireland from Independence to the Present Day' (1987) *The American Journal of Comparative Law* 35, p.82. More controversially the author also argues that it is clear 'the State has an interest in regulating the activities of homosexuals – if only to control matters such as the spread of disease – and it would have been open to the Supreme Court to uphold the legislation on that ground alone.' *Ibid.* If the Supreme Court followed that particular line of argument it would have been an extremely regrettable precedent to set. For a tendentious critique of the majority in *Norris* see John Quinn, 'The Lost Language of the Irish Gay Male: Textualisation in Ireland's Law and Literature (or The Most Hidden Ireland)' (1995) *Columbia Human Rights LR* 26, p.553. John Finnis, 'Law, Morality and "Sexual Orientation"', (1999) 69 *Notre Dame L. Rev.* p.1049 argues that deliberately contracepted sex is on a moral par with homosexual sex and compares homosexual acts with prostitution. In response Michael Perry, 'The Morality of Homosexual Conduct: A Response to John Finnis', (1995) *Notre Dame J.L. Ethics and Public Policy* 9, p.41 argues that the fundamental problem with Finnis's theory

judgment caused. He was not arguing that the judgment was based on personal beliefs and not on constitutional principals as such. Gearty argues that the Chief Justice was suggesting that the State has a positive obligation to criminalise homosexual conduct and any statute doing otherwise would be repugnant to the Constitution. Gearty describes this reasoning as remarkable because of the view it takes of the:

‘State’s relationship to the Church, it links the law indelibly to Catholic moral teaching, making the latter the yardstick against which the former is judged. If there is no law whatever on a moral question (e.g. masturbation), then there seems to be no requirement for legislation. If there is an old law, it will be above constitutional challenge if it reflects Catholic teaching. If there is to be a new law then it will have to be in compliance with it...The State has transferred to the Church much of its legislative and adjudicative authority on moral issues. All that is needed to complete the abdication is an obligation to legislate.’<sup>71</sup>

Gearty appears to go beyond the evidence here as the Chief Justice’s judgment is based more on Christian teaching than solely Catholic teaching. Therefore, he was not just reflecting the views of one Church but of a particular historical perspective on Christian thought. Naturally, Catholic thought is an element within that, but not the sole element as Gearty appears to be implying. The importance of Henchy and McCarthy JJ’s judgments should also be emphasised. It is perhaps regrettable that there is only one majority judgment as it would give a more nuanced ratio regarding the effect of the case were there more, indeed, given the wide breath and contentious nature of O’Higgins CJ’s judgment, it seems surprising that Finlay P and Griffin J could have agreed with all elements of the Chief Justice’s judgment.

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is his belief that homosexual conduct can never do any more than provide each partner with an individual gratification. Perry argues that on the contrary both homosexual and heterosexual conduct are capable of serving both one’s sexual and emotional well being, as such sexual conduct can express in a bodily way one’s love and can be part of a truly, fully human life. Perry further defends the position of homosexuals arguing that just because homosexual conduct may not be natural to a heterosexual, it does not follow that it is unnatural to everyone. Finnis’s argument regarding the morality of sexual conduct is similar to that of O’ Higgins CJ in *Norris* in so far as they arrive at the same conclusion i.e. that homosexual conduct is morally unacceptable. However, while O’Higgins CJ’s position is grounded in religious belief and which he supports through a historical view of Christian theology, Finnis attempts to frame his argument in more secular terms by relying on arguments which he claims stem from Aristotle and Plato, but which also happen to be in line with the official teachings of the Catholic Church. The debate is important in the context of the *Norris* case as it exemplifies that opposition to homosexuality, in a moral sense, is not limited to religious arguments.

<sup>71</sup> Conor Gearty, ‘Homosexuals and the Criminal Law – The Right to Privacy’, (1983) *DULJ* 5, p.271.

### Henchy J's Dissent

Henchy J in his dissenting judgment stated that the Court had to decide whether the challenged sections were so inimical to Norris's personal human rights under the Constitution that they 'weighted against other and more generalised considerations expressed in or postulated by the Constitution.'<sup>72</sup> Henchy J focused much of his judgment on the negative effects which the legislation had on the plaintiff's life and particularly, on the harmful psychological impact of the legislation: He described Norris as having been cast unwillingly into the role of living furtively because of his sexuality. The judge described the effect on Norris as involving:

'...traumatic feelings of guilt, shame, ridicule and harassment and countless risks to his career as a university lecturer and to his social life generally. Those risks are not the normal lot of the fornicator, the adulterer, the sexually deviant married couple, the drunkard, the habitual gambler, the practising lesbian, and the many other types of people whose propensities or behaviour may be thought to be no less inimical to the upholding of individual moral conduct, or to necessary or desirable standards of public order or morality, or to the needs of a healthy family life, or to social justice, or to other expressed or implied desiderata of the Constitution.'<sup>73</sup>

Henchy J having rejected Norris's claim under Article 40.1, then examined his arguments under the right to privacy. The judge described this as the essence of Norris's case. The question to be posed, he stated, was whether the right of privacy, construed in the context of the Constitution as a whole and given its true evaluation or standing in the hierarchy of constitutional priorities, excludes as constitutionally inconsistent the impugned statute:

'Having regard to the purposive Christian ethos of the Constitution, particularly as set out in the preamble ("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"), to the denomination of the State as "sovereign, independent, democratic" in Article 5, and to the recognition, expressly or by necessary implication, of particular personal rights, such recognition being frequently hedged in by overriding requirements such as "public order and morality" or "the authority of the State" or "the exigencies of the common good", there is necessarily given to the citizen, within the required social, political and moral framework, 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.'<sup>74</sup>

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<sup>72</sup> [1984] IR 36, 67.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid. 71.

Henchy J is using the Preamble (which O' Higgins CJ used to argue for the proposition that the Irish people had voted for an existing set of Christian beliefs) to support an argument that the Constitution should be interpreted in such a manner so that the individual dignity of each citizen should be respected as vital to the moral order conceived in the Constitution. Henchy J is arguing that the moral order which the Constitution promotes is contravened by the impugned legislation based on the negative effect of the legislation on a minority group. Clearly, Henchy J's view of what that moral order consists is fundamentally different to the Chief Justice's view – yet both judges are using the same sources to arrive at fundamentally contradictory conclusions. Similarly, Walsh J in *McGee* referred to the influence of Christian values on Ireland's constitutional structure in arriving at a conclusion that diametrically opposed that of the Catholic Church.<sup>75</sup> This exemplifies the indeterminate nature of Christian values and, most significantly, the fact that some judges did not accept the authority of the Magisterium on what these values require. The institutional reforms which took place as a result of Vatican II were vital in creating the context in which this philosophical shift took place.

Henchy J described the essence of citizens' constitutional rights as inhering 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. Amongst those rights there is a right to privacy, which is evident in Article 16.1.4 of the Constitution regarding voting by secret ballot in elections. Henchy J defined the right to privacy as: 'a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of the common good.'<sup>76</sup> Henchy J reasoned that the onus of justification lay on the Attorney General to demonstrate that to allow Norris the degree of privacy which he seeks would be inconsistent with the maintenance of public order and morality. Because the Attorney General had not called any witnesses, while counsel for Norris had called ten witnesses

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<sup>75</sup> See chapter 4.

<sup>76</sup> [1984] IR 36, 72.

all of whom had attested to the beneficial effects of decriminalising homosexuality, it followed that counsel for the Attorney General had failed to discharge the burden placed on them. Amongst those who gave evidence at the trial there included Fr. Michael MacGriell S.J., lecturer in sociology at Maynooth. Fr. MacGriell in his evidence supported the decriminalisation of homosexual conduct stating that while he was morally opposed to sexual activity outside of marriage, he felt that that was a separate moral issue, which was quite different from that of the legitimacy of a criminal ban on homosexuality. Referring to the evidence of theologians Fr. Joseph O' Leary and Archdeacon Wake, Henchy J stated:

'Recognising that law and morality are not severable, indeed that there must be an interdependence between them, that while the end of law is not the enforcement of morality or the proscription of immorality, both witnesses were at one in concluding that legal restraints, particularly those compounded by criminal sanctions for their breach, are justified only when the common good requires them. They were in agreement that the impugned laws were not only unnecessary for the common good but were positively at variance with the elements of prudence, justice, charity, tolerance, social justice, fairness and the other attributes inherent under the Constitution in the concept of the common good.'<sup>77</sup>

Henchy J emphasised the fact that the case had to be decided based on the evidence before the Court and that owing to counsel for the AG's failure to conduct any examination-in-chief the evidence given was entirely to one effect. Henchy J explicitly criticised the judgment of the High Court stating that the judge had substituted his own conclusions on the personal and societal effects of the impugned legislation for those of the Christian Churches. He then stated his belief that standards of morality which are advocated by the Christian Churches should not influence judges in the process of adjudication. This clearly directly contradicts O'Higgins CJ's reliance on Christian theology. As Henchy J stated, the High Court judge: '...in substituting his own conclusions on the personal and societal effects of the questioned provisions, seems to have laid undue stress on the fact that the prohibited acts, especially sodomy, are contrary to the standards of the morality advocated by the Christian Churches in this State. With respect, I do not think that should be treated as a guiding consideration.'<sup>78</sup>

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<sup>77</sup> Ibid. 76.

<sup>78</sup> Ibid. 77-78.



Henchy J then referred to the seven deadly sins which are anathematised as immoral by the Christian Churches. He stated that:

‘it would be neither constitutionally permissible nor otherwise desirable to seek by criminal sanctions to legislate their commission out of existence in all possible circumstances. To do so would upset the necessary balance which the Constitution posits between the common good and the dignity and freedom of the individual. What is deemed necessary to his dignity and freedom by one man may be abhorred by another as an exercise in immorality. The pluralism necessary for the preservation of constitutional requirements in the Christian, democratic State envisaged by the Constitution means that the sanctions of the criminal law may be attached to immoral acts only when the common good requires their proscription as crimes. As the most eminent theologians have conceded, the removal of the sanction of the criminal law from an immoral act does not necessarily imply an approval or condonation of that act. Here the consensus of the evidence was that the sweep of the criminal prohibition contained in the questioned provisions goes beyond the requirements of the common good; indeed, in the opinion of most of the witnesses it is inimical to the common good. Consequently, a finding of unconstitutionality was inescapable on the evidence.’<sup>79</sup>

Henchy J takes a more narrow view than the majority in deciding the case based on the evidence which had been given in Court rather than a broader subjective view of the moral nature of homosexuality. The judge allowed the appeal on the basis that the common good did not require the impugned legislation in a Christian, democratic State. However, Henchy J stated this was not to be interpreted as either approval or condemnation of homosexual behaviour. Therefore, while people within society were entitled to be morally opposed to homosexuality, it did not follow that it should be illegal. This line of reasoning is not necessarily out of line with that advocated by the Catholic Church as, despite having condemned homosexuality as immoral, the Church did not necessarily expect civil laws to reflect its laws. Therefore, the Church had recognised that the reach of morality may stretch further than the State’s laws. The same could also be said for McCarthy J’s dissenting opinion.

### **McCarthy J’s Dissent**

McCarthy J accepted Walsh J’s view in *McGee* that the Constitution is intended to be interpreted in light of prevailing ideas and concepts. McCarthy J described the difficulty of interpreting what the mores of society at any given time are or were. He describes it as a legal fiction to set out a test which asks the question whether or not the people of Saorstát Éireann considered an offence created during the Victorian era as having been

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<sup>79</sup> Ibid. 78.

repealed by the 1937 Constitution. The judge stated that the only thing considered by those who voted for or against the Constitution in 1937 was whether or not they wanted a new Constitution and an examination of the Dáil debates on the draft Constitution does not encourage any contrary view. McCarthy J rejected the Chief Justice's approach to the case in so far as he attempted to interpret historical social mores rather than examining the constitutional provisions in light of contemporary mores. Nonetheless, McCarthy J accepted that the Chief Justice's interpretation of Christian teaching regarding homosexuality was correct 'I have no doubt but that Christian teaching is to be found which would declare sexual conduct of the kind contemplated by s. 61 of the Act of 1861 between husband and wife to be gravely sinful.'<sup>80</sup>

McCarthy J rejected reliance on Christian theology as a means of enumerating constitutional rights: rather he favoured 'Christianity itself, the example of Christ and the doctrine of charity which He preached':

'Jesus Christ proclaimed two great commandments — love of God and love of neighbour; St. Paul, the Apostle to the Gentiles, declared that of the great virtues, faith, hope and charity, the greatest of these is charity (1 Cor. 13, 13). I would uphold the view that the unenumerated rights derive from the human personality and that the actions of the State in respect of such rights must be informed by the proud objective of the people as declared in the preamble "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." The dignity and freedom of the individual occupy a prominent place in these objectives and are not declared to be subject to any particular exigencies but as forming part of the promotion of the common good.'<sup>81</sup>

McCarthy J is relying on the provisions of the Preamble and on St. Paul (both of which O'Higgins CJ also relied on) to argue a position which clearly contradicts that of the Chief Justice and of the Catholic Church. McCarthy J stated he had to decide on the scope of Norris's right to privacy. The judge stated that the State needed to demonstrate compelling reasons to justify encroaching on Norris's right to privacy. He stated that counsel for the Attorney General had not discharged the burden of proof necessary to establish a compelling state interest. He went on to say:

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<sup>80</sup> Ibid. 99.

<sup>81</sup> Ibid. 100.

'I join with Mr. Justice Henchy in the observation he has made in his judgment on the failure of the Attorney General, with all the resources at his disposal, to call any evidence whatever to displace the impressive body of evidence called on behalf of the plaintiff. Subject to the matters that I have already instanced, in my opinion a very great burden lies upon those who would question personal rights in order to justify state interference of a most grievous kind (the policeman in the bedroom) in a claim to the right to perform sexual acts or to give expression to sexual desires or needs in private between consenting adults, male and female.'<sup>82</sup>

The extent to which Irish society had become liberalised in the 1980s should not be overstated as it could not be said that there was the same social appetite for conflict on the issue of homosexuality as there was on issues such as divorce and contraception. Therefore, the extent of popular support for Norris at this time is questionable.<sup>83</sup> The majority judgments in *Norris* show that the Supreme Court was willing to draw on religious sources in rejecting Norris's claim. These sources may be defined as 'Christian'. However, the minority also drew on Christian thought in arriving at an opposite view. While the *McGee* judgments appeared to indicate that the Courts were shifting away from a position which was in line with the Church's teachings on certain contentious social issues, in *Norris* there was a realignment, albeit by a three-two majority, with the teachings of the Christian Churches in opposing homosexual

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<sup>82</sup> Ibid 102. McCarthy J went on to make clear that he did not envisage the right to privacy as extending to the right of a woman to have an abortion as the provisions of the Preamble lean heavily against the view that the right to life of the unborn child is anything other than 'a sacred trust to which all the organs of government must lend their support. The right of the adult male citizen *privately* to express his sexual orientation or with another such person free from State interference is an entirely different matter.' Ibid 104. McCarthy J did not consider it necessary to examine Norris's claim under Article 40.1 or under the European Convention on Human Rights. *The Irish Times* reported that Norris had responded to the judgment of the Supreme Court by stating: 'Although the verdict was three-two it raises serious questions regarding the value of the Irish Constitution in that it failed to vindicate my rights as a homosexual citizen.' He said 'what use is the Constitution to me? What use is the 1916 declaration we hear so much about – to cherish all the children of the nation equally? I don't feel particularly cherished by the Supreme Court this afternoon.' *The Irish Times*, 23 April 1983. On the same day the *Irish Times* reported the comments of Professor Kevin Boyle, who was counsel for Mr Dudgeon in *Dudgeon v UK* in the European Court of Human Rights, stating that 'Our government should realise that it is obliged under the convention to change the law. I do not think David Norris should be required to go to Strasbourg to vindicate his rights. The Strasbourg decision was made on exactly the same statute on the same island. The Supreme Court said that the prohibition was not unconstitutional; that is not to say necessarily that a law permitting homosexuality should be unconstitutional. It is absolutely incompatible with international obligations under the European Convention, in light of the Dudgeon case. I would like to see the government moving now to change the law.' Subsequently the government chose to obfuscate on the matter forcing Mr Norris to challenge the legislation at the European Court of Human Rights who, naturally held that the impugned legislation contravened the European Convention.

<sup>83</sup> Following the case there appeared to be only minimal support for Norris's position: one would expect an editorial in the liberal *Irish Times* excoriating the judgment, but there was none, and the letters pages of the same paper remained strangely silent in the face of the Court's illiberal stance. This may indicate a certain discomfort amongst people in expressing outright support for Mr Norris. However, there was some criticism of the majority by Michael Farrell, *The Sunday Tribune*, 1 May 1983.

behaviour. This is not to argue that that alignment was necessarily deliberate but simply than in the case of *Norris* the majority judgment would be favoured by the Catholic Church and indeed by many other Christian and non-Christian Churches. It is particularly significant that in *Norris* O' Higgins CJ specifically relies on Christian teaching on the morality of homosexual conduct to decide that homosexual conduct should not be decriminalised.<sup>84</sup> O' Higgins CJ's judgment displays a strong religious influence. While Gavan Duffy P appeared to display a strong degree of deference towards the Catholic Church<sup>85</sup>, O' Higgins CJ appears to be more influenced by Christian theological history and thought. The majority rejected the present tense form of constitutional interpretation favoured by the majority in *McGee* in favour of an historical form of interpretation which given the confessional culture of the 1930s could never favour *Norris*.

The primary distinction between the minority and the majority lies in whether they view Christianity as bound by the doctrine of the Churches or as breaking loose from that doctrine and capable of interpretation on the basis of 'the example of Christ and the great doctrine of charity which He preached.'<sup>86</sup> The minority, by breaking the link between Christianity and the institutional Churches did not feel bound by those Churches condemnation of homosexual behaviour. By contrast the majority emphasised the fact

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<sup>84</sup> Pope John Paul II in *Congregation for the Doctrine of the Faith: Considerations Regarding Proposals to give Legal Recognition to Unions between Homosexuals Persons* described homosexuality as 'a troubling moral and social phenomenon,' 'intrinsically disordered' and contrary to the natural moral law and scripture. Nonetheless, according to the teaching of the Church, men and women with homosexual tendencies should be treated with compassion. Homosexuals are called on to live a life of chastity. It is then stated that the scope of the civil law is certainly more limited than that of the moral law, but civil law cannot contradict right reason without losing its binding force on conscience. Every humanly-created law is legitimate insofar as it is consistent with the natural moral law, recognised by right reason, and insofar as it respects the inalienable rights of every person. The question is then posed how can a law be contrary to the common good if it does not impose any particular kind of behaviour, but simply gives legal recognition to a *de facto* reality which does not seem to cause harm to anyone. A distinction is made between homosexual behaviour in private and as a relationship in society to the point where it becomes one of the institutions in the legal structure of the State. The later is viewed as more serious as it would result in changes to the entire organization of society, contrary to the common good, it is argued. While Catholic thought may view homosexual behaviour as morally wrong, the Catholic Church does not necessarily expect civil law to reflect what it describes as the moral law.

See:[http://www.vatican.va/roman\\_curia/congregations/cfaith/documentsrc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documentsrc_con_cfaith_doc_20030731_homosexual-unions_en.html)

<sup>85</sup> See chapter 2.

<sup>86</sup> [1984] IR 36, 99.

that Christianity (or the Christian Churches) had condemned homosexual behaviour for millennia and on that basis rejected Norris's case. Ultimately, the European Court of Human Rights was to rule that the impugned legislation was contrary to the European Convention in upholding its own judgment in the previous case of *Dudgeon v UK*<sup>87</sup> in *Norris v Ireland*<sup>88</sup>. Legislative reform was extremely slow in coming and the legal position for homosexuals in Ireland in 1988 remained anomalous as there was no recognition or protection of any sort, as gay men faced a total ban on any type of sexual activity. Eventually the offences of gross indecency and buggery were removed from the statute books under the Sexual Offences Act, 1993 which was passed through the Oireachtas with general approval from deputies.<sup>89</sup>

The fact that the Church did not expect civil laws to mirror Church laws indicates that the minority opinions in *Norris* are reconcilable with the Church's post-Vatican II perspective of its relationship with the State. The impugned legislation was not drafted during the period in which the Catholic Church had been a pervasive influence on the political sphere. It was therefore underpinned by a different set of moral presuppositions and could not be described as religiously sectarian. Indeed, as stated previously many Ulster Protestants were vociferously opposed to homosexuality. The issue of increased judicial scrutiny of perceived confessional or sectarian legislation was not an issue in *Norris*. O'Higgins CJ's reasoning in *Norris* is questionable in so far as it would appear to imply that to understand the Constitution it is necessary to revert back to attitudinal norms at the time the Constitution was adopted. This would appear to imply that the Constitution is a static document and that the understanding of law and morality is fixed. The fact that condemnation of homosexuality was not limited to the Catholic Church indicates that the majority's opposition to Norris' argument can not be described as

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<sup>87</sup> *Dudgeon v United Kingdom* (1983) 5 EHRR 573.

<sup>88</sup> [1984] IR 36.

<sup>89</sup> The majority of deputies who spoke on the proposed legislation supported its provision. There was support across party lines with deputies from Fianna Fail, Fine Gael, the Labour Party and the Progressive Democrats speaking in favour of the bill. However, Deputy McGahon of Fine Gael spoke out against the bill stating that while he had 'never discriminated against any person on the basis of their sexual orientation. I regard homosexuals as being in a sad category, but I believe homosexuality to be an abnormality, some type of psycho-sexual problem that has defied explanation over the years. I do not believe that the Irish people desire this normalisation of what is clearly an abnormality.' 2028 *Dail Debates* 432, 23 June 1993.

upholding Catholic doctrine but as supporting the broader idea of Christianity's historical opposition to homosexual behaviour. *Norris* is therefore evidence of judicial deference to Christianity but not to a uniquely Catholic view. I now turn to examine further evidence of judicial deference to religion in the manner in which the Courts have exempted religious groups from certain laws of general application.

### **Religion and Laws of General Application**

The Courts have shown a willingness to support religion when having to define the relationship between institutional religions and the law when there is a conflict between the enforcement of laws of general application and the maintenance of a particular religion's rules and ethos. The question has arisen whether or not the Courts, or indeed the legislature, ought to exclude religious groups from certain laws.<sup>90</sup> The position of the Irish courts is that they accept the principal that religious groups may in certain circumstances be excluded from laws of general application. The legislature has also chosen the preservation of religious norms against a principle of formal legislative equality. The principal argument against this judicial and legislative approach is that it is damaging to the principal of formal equality and it is harmful to the principles of liberal democracy for government to adopt a position which favours the religious over the non-religious.<sup>91</sup> The counter argument to this, in terms of political philosophy, is that the

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<sup>90</sup> While it would appear to be the case that the Irish State is obliged to legislate for religious exemptions from certain laws of general application in contrast the United Supreme Court held that the Free Exercise clause did not prohibit the application of drug laws to the ceremonial use of peyote in *Employment Division v Smith* 494 US 872 (1990). Following *Smith* the Religious Freedom Restoration Act 1993 was enacted, it required the State to show that a burden on religion imposed by a law of general application was in furtherance of a compelling government interest and the least restrictive means of furthering that interest was used. Similarly, S.3 of the Religious Land Use and Institutionalized Persons Act 2000 prohibited the government from imposing a substantial burden on the religious exercise of a person residing in or confined to, an institution unless the burden was in furtherance of a compelling government interest and the least restrictive means of furthering that interest. In *Cutter v Wilkinson* 544 U.S. 709 (2005), the constitutionality of s.3 was upheld by the Supreme Court. In *Gonzales v O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 US 418 (2006) the Supreme Court granted a preliminary injunction preventing the federal government from arresting any member of a small sect based in Brazil (with about 130 members in the United States) who used a tea that contained an illegal hallucinogenic drug in practicing their religion, on the basis that the State had not established the existence of a compelling interest in preventing the use of the particular drug. Roberts CJ stated that the federal government allowed the use of peyote in religious ceremonies for 'hundreds of thousands of Native Americans practicing their faith...it is difficult to see how these same findings alone can preclude any consideration of a similar exception for the 130 or so American members of UDV who want to practice theirs.' 546 US 418 (2006), 433.

<sup>91</sup> In the United Kingdom in *McFarlane v Relate Avon* (29 April 2010) Laws J ruled that religious beliefs should not be privileged over other beliefs as to do so does not advance the public good on objective grounds but gives effect to the force of subjective opinion.

concept of liberal democracy is adequately flexible to incorporate an approach to religion which is one of active support rather than passive institutional neutrality, on the basis that religious groups can contribute to the common good. While post-Vatican II the Courts have favoured the religious over the non-religious they have not privileged Catholicism over other religions.<sup>92</sup> While there was a greater level of scrutiny of legislation which was perceived as being confessional there was an acceptance that religion could contribute to the common good. Therefore, while the post-Vatican II climate was reformist, it did not indicate a move away from judicial support for religion generally: rather the new political climate meant that laws which appeared to be attributable solely to one Church had a precarious future. The Courts' approach to the relationship between religion and the law was in line with that advocated by the Church in the Declaration on Religious Liberty in which it was argued that it was the State's duty to ensure freedom of religion.<sup>93</sup> Those elements of Catholic social thought which were entrenched in the Constitution could only be reformed by means of judicial innovation, political action or the popular will as they were resistant to judicial scrutiny.

### **The Exemption of Religious Groups from Laws of General Application**

The Courts have displayed a willingness to exempt religious groups from certain laws of general application. The Catholic Church has reserved its right to protect its ethos and therefore the position of the Courts is in line with that advocated by, *inter alia*, the Catholic hierarchy.<sup>94</sup> While the position which the Courts have adopted would be

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<sup>92</sup> An arguable exception is O'Hanlon J who relied on the Vatican II document *Gravissimum Educationis* in *Donoghue v Minister for Health* [1996] 2 IR 20.

<sup>93</sup> See Gabriel Daly, 'Irish Catholicism: A Monolith?' in *Cultural Identity and Tolerance*, Cultures of Ireland, 1996, p.46.

<sup>94</sup> This position is not limited to the Catholic Church as the Church of Ireland, and the Presbyterian and Methodist Churches have all asserted their right to be exempt from equality legislation. The four Churches issued a joint response to the Single Equality Bill (UK) 2004 in which they supported the inclusion of exemptions for 'faith organisations on the grounds of religious discrimination in employment.' The Churches stated they 'believed that these must extend to include exemptions from legal challenges on lifestyles which would contravene the doctrine and ethos of the organisations concerned.' See 'Response of Four Churches to Single Equality Bill (UK) 2004'. See: <http://www.ofmdfini.gov.uk/churches.pdf> Recently, Lord Carey, former Archbishop of Canterbury was critical of the English judiciary for refusing to accept that a marriage counsellor had been unfairly dismissed because of his refusal to perform psychosexual therapy with same sex couples on the basis of his religiously inspired belief that marriage should be solely between a man and a woman. See *McFarlane v Relate Avon* (29 April 2010) and *Ladelle v*

welcomed by the Catholic Church it should not be viewed as evidence of Catholicity but of deference to religion generally. Naturally this includes but is not limited to the Catholic Church. This evidence of deference to religion is relevant to the topic under consideration because of the relatively homogenous nature of Irish society which means that judicial deference to religion may confer a particular benefit on the Catholic Church. In *Quinn Supermarket v AG*<sup>95</sup> provisions<sup>96</sup> which exempted Kosher meat shops from restrictions on closing times to accommodate the Jewish Sabbath were declared to be unconstitutional. The majority recognised the need for an exemption for Friday evenings but the exemption in this case was too broad as it allowed Kosher shops to remain open on weekdays and Sundays. Walsh J (with whom Ó Dálaigh CJ and Budd and Fitzgerald JJ agreed) asserted that the Irish Constitution ‘reflects a firm conviction that we are religious people’.<sup>97</sup> However, the recognition of other religious denominations, including the Jewish congregation, was recognition of the fact that no religion was privileged over the others. The judge stated that the primary objective of Article 44 was freedom of conscience and the free profession of religion subject to public order and morality.<sup>98</sup> The judge then stated that if:

‘...the implementation of the guarantee of free profession and practice of religion requires that a distinction should be made to make possible for the persons professing or practising a particular religion their guaranteed right to do so, then such a distinction is not invalid having regard to the provisions of the Constitution. It would be completely contrary to the spirit and intendment of the provisions of Article 44, S. 2, to permit the guarantee against discrimination on the ground of religious profession or belief to be made the very means of restricting or preventing the free

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*London Borough of Islington* [2009] EWCA Civ 1357. See also Lord Carey’s comments quoted in *The Guardian*, 29 April 2010.

<sup>95</sup> [1972] IR 1.

<sup>96</sup> It was argued that Articles 2, 3 and 4 of the Victuallers’ Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoighaire and Bray) 1948 (Amendment) Order, 1968 were ultra vires the Shop (Hours of Trading) Act, 1938.

<sup>97</sup> [1972] IR 23. Walsh J was influenced by Brennan J’s view in *Abington School District v Schempp* (1963) 374 US 203, 231 that ‘... the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.’ [Emphasise added] In *Reynolds v US* (1878) 98 US 145, Waite CJ stated that laws could not interfere with religious opinions but could interfere with religious practice. While in *Braunfield v Browne* 366 (1961) US 599 Warren CJ found that the fact that a criminal statute put Jewish traders at a commercial disadvantage did not constitute an interference with their right to religious practice.

<sup>98</sup> In this context *DPP v Draper, Irish Times*, 24 March 1988 should be noted, in which a man who damaged religious statues because he claimed he was told to by God was prosecuted on the basis that his conduct was contrary to public order.



profession or practice of religion. The primary purpose of the guarantee against discrimination is to ensure the freedom of practice of religion. Any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion by any person or persons would be invalid having regard to the provisions of the Constitution, unless it contained provisions which saved from such restriction or prevention the practice of religion of the person or persons who would otherwise be so restricted or prevented.<sup>99</sup>

Kenny J (dissenting) referred to the fact that the origin of the rules relating to the Jewish ritual method of preparing meat for consumption are set out in Leviticus and described the exemption in the Order as one based on religious profession and belief. He stated:

‘We are in religion a pluralist society made up of people of many persuasions and beliefs and so it is likely that parts of legislation will occasionally indirectly affect the practice of some religion. If the State has to abstain from law-making on matters which indirectly affect the practice of religion by some of the citizens, the scope of legislation will be seriously reduced. Yet this will be the result if the State cannot exempt from the application of some of its legislation those whose practice of their religion will be affected by it. But the State cannot do this if a literal interpretation of Article 44.2, is adopted, for this would prohibit any difference in the application of the laws on the ground of religious beliefs.’<sup>100</sup>

*Quinn Supermarket* has the effect of legitimising the principle that religious groups may be excluded from laws of general application in the interest of upholding the rules of a particular religion. It also stands for the principle that the primary objective of Article 44.2 is to secure and guarantee to every citizen freedom of conscience and the free profession and practice of religion. A discrimination within the meaning of Article 44.2.3 was not invalid if the implementation of the primary object of Article 44.2 required the making of that discrimination. The Supreme Court has adopted a position which views religion as contributing to the common good and on that basis it is in the interest of society that religious groups should not have their right to freedom of practice limited by the non-discrimination clause in Article 44.2. While this has the effect of privileging the religious over the non-religious, it does not privilege any one religion over other religions.<sup>101</sup> It would also appear to be the case that it is the Courts, based on expert theological evidence, who will decide what constitutes a practice which is essential to the character and ethos of a particular religion. Furthermore, it would appear to be the case

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<sup>99</sup> [1972] IR 1.

<sup>100</sup> Ibid. 34.

<sup>101</sup> See Oran Doyle, ‘Privileging the Rights of the Religious’ in Doyle and Carolan (eds) *The Irish Constitution: Governance and Values*, Thomson Hall, Dublin, 2008, p.476-489.

that if it is necessary to discriminate in order to uphold the free practice of religion there is a positive obligation on the State to legislate accordingly.<sup>102</sup> The fact that post-Vatican II, laws which were perceived to be inspired by Catholic thought would be the subject of greater scrutiny was not a factor in *Quinn Supermarkets* as the exemption from laws of general application of religious groups was in line with a pluralist view of religion. As stated previously the Catholic Church and other Christian Churches would have welcomed the majority judgments as they advocated the exemption of faith organisations from certain laws of general application.

### Supporting the Religious

The Courts also showed a willingness to buttress religious groups in *McGrath and Ó Ruairc v The Trustees of Maynooth College*<sup>103</sup> which involved two plaintiffs both of whom were lecturers and priests at Maynooth College. The first plaintiff, Mr McGrath, had published an article which the trustees of Maynooth College considered to be prejudicial to the college. Despite being instructed by the college authorities not to publish any more articles he continued to publish material which the college authorities considered prejudicial. In 1975 Mr McGrath returned from a year's sabbatical leave and told the college authorities of his intention to seek laicisation and he adopted lay, non-clerical dress. The college authorities directed that he resume clerical dress but he rejected this claiming that the wearing of clerical dress was not required under the college statutes. The second plaintiff, Mr Ó Ruairc, returned from sabbatical leave in 1975 wearing lay attire and also informed the college authorities of his intention to seek laicisation. He informed them of his intention to reside outside the college. The authorities instructed Mr Ó Ruairc to resume clerical dress and told him he was required to live within the college under the college statutes. Mr Ó Ruairc refused to accept these instructions. The trustees then instituted the procedure for dismissing the plaintiffs from the college and as a result of this the plaintiffs were dismissed from their posts. Counsel

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<sup>102</sup> Daly argues that the effect of *Quinn supermarket* is that religious groups may be exempted from laws of general application where it members are disadvantaged as opposed to actually prevented from practicing their religion. It is argued that the aim of the impugned legislation was to compensate Jews who had been put at a disadvantage because Kosher meat shops were closed on the Jewish Sabbath and would also have had to close on Sundays had they not been exempt. This did not *per se* prevent Jewish people from practicing their religion rather it inconvenienced them. See Eoin Daly, 'Religious Discrimination Under the Irish Constitution: A Critique of the Supreme Court Jurisprudence,' (2008) *Cork Online Law Review*.

<sup>103</sup> *McGrath and Ó Ruairc v The Trustees of Maynooth College* [1979] ILRM 166.

had submitted that Mr Ó Ruairc had been discriminated against on religious grounds contrary to Article 44.2.3. Hamilton J in the High Court held that the dismissal of Mr McGrath was invalid on the basis of bias but that the dismissal of Mr Ó Ruairc was valid. The plaintiffs appealed to the Supreme Court (O'Higgins CJ, Henchy, Griffin, Kenny and Parke JJ) which allowed the defendants' appeal and dismissed the second plaintiff's appeal.

In the Supreme Court O'Higgins CJ set out the four articles which the trustees believed were prejudicial to the ecclesiastical authority.<sup>104</sup> These appeared in *The Irish Times*, *The Furrow*, *Concilium*, and *The Maynooth Express*. Following the publication of the article in the *Irish Times*, the plaintiff was reprimanded as he did not seek permission before publishing the article. Despite this he subsequently published the three other articles without permission. The article in *The Furrow* appeared in December 1971. Mr McGrath dealt with the publication of a book by theologian Hans Kung entitled 'Infallible?' and the subsequent publication of a document issued by the Episcopal Commission on Doctrine:

'It is an open secret that the statement was drafted by the Irish Theological Commission. But who are the people who compose this group and why have their names not been revealed to the public? If the faithful are expected to take account of its findings, then they are entitled to know who its members are and what are their credentials. All that is known up to now is that a panel of twelve names was submitted to the bishops by the Irish Theological Association, of which seven were removed and three episcopal nominees inserted in their place; and that a panel of six names were submitted by the Catholic Biblical Association, of which four were removed and two episcopal nominees inserted in their place. It is not easy to see the necessity for these manoeuvres. The nominees of the I.T.A. and the C.B.A. were hardly lacking in competence. Were they perhaps thought to be insufficiently reliable? The Irish have enough of a sense of history to be suspicious of anything resembling a packed jury — an institution designed to give an air of objectivity to verdicts which had been arrived

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<sup>104</sup> Counsel for the plaintiffs had argued that the defendants could be regarded as agents of the state as they received financial support from the government. In rejecting this argument O'Higgins CJ examined the history of the college. Maynooth was set up as a seminary exclusively of persons professing the Roman Catholic Religion. In 1800 Maynooth opened and admitted both clerical and lay students until 1817 when the admission of lay students was discontinued. From 1817 until 1967 Maynooth catered exclusively for clerical students. Maynooth was under the auspices of the National University of Ireland and was in receipt of state funding which was administered by the Higher Education Authority. O'Higgins CJ stated that regard must be had to the fact that Maynooth is a seminary and therefore is a religious institution. Article 44.2.5 specifically confers on every religious denomination the right to manage their own affairs and to maintain institutions for religious purposes. O'Higgins CJ stated that academic freedom in any institution is necessarily qualified and curtailed by the rules and regulations which apply. The judge also stated the fact that the defendants were bishops of the Catholic Church was irrelevant in law.

at in advance.<sup>105</sup>

In his article in *Concilium* Mr McGrath discussed the issue of infallibility and expressed views against its existence:

‘Even if we overlook the other difficulties here — and this is to overlook a great deal — does this not deprive infallibility of any real meaning? What assurance can a claim of infallibility give if the validity of the claim is dependent on a whole series of propositions whose truth is not vouched for by infallibility? The conclusion of an argument cannot be more certain than the premises on which it depends. So what is to be gained by calling a doctrine infallible if its infallibility is so dependent on the non-infallible teaching of the Church? In any event if the non-infallible teaching of the Church can provide certainty on so many difficult matters, then what use is infallibility? It seems to provide no compensation for the many difficulties it creates.’<sup>106</sup>

In the *Maynooth Review* published in November 1976 Mr McGrath was critical of the church’s teachings on the indissolubility of marriage:

‘The Church’s teaching on the indissolubility of marriage appears to me to suffer from inconsistencies which are so serious as to be quite incapable of being cleared up without recasting the entire doctrine.’<sup>107</sup>

Kenny J, having rejected the argument that Maynooth should be regarded as an agent of the State, stated that Maynooth was entitled to expect its staff to observe canon law:

‘Maynooth is primarily a Roman Catholic seminary as I have already demonstrated. The trustees are reasonably entitled to require that any of the staff who are Roman Catholic priests should observe the canon law of the Roman Catholic Church. How can students for the priesthood be expected to have any regard for that law if priests of that Church who are professors or lecturers in Maynooth openly break it and continue the violation of it when they have been requested to observe the part of the law which they are violating by the president of the college? This is but one of the ludicrous results (there are many others) which would follow from the plaintiffs’ contention in relation to the Constitution.’<sup>108</sup>

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<sup>105</sup> [1979] ILRM 166, 178.

<sup>106</sup> Ibid. 179.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid. Kenny J then turned to the issue of whether Mr Ó Ruairc was guilty of ‘a grave delinquency against clerical obligations’ and whether his argument that he had ceased to be a priest was valid. He refers to the fact that an expert in canon law was called to give evidence and he stated his view as being ‘once a priest, always a priest.’ Kenny J then referred to a Psalm in support of this contention: ‘Yahweh has sworn an oath which he never will retract. ‘You are a priest of the order of Melchizedek and for ever’ and this, Kenny J states, is quoted with approval by St. Paul in the Letter to the Hebrews.

Similarly, Henchy J rejected the argument that the plaintiffs had suffered a religious discrimination under Article 44.2.3. He stated that it is inevitable that in religious institutions such as Maynooth at least some of the academic staff must not alone be priests but priests with particular qualifications and ‘with a required measure of religious orthodoxy and behaviour.’<sup>109</sup> Henchy J stated that even if it is said that the statutes are an emanation of the State, the distinction drawn in them between priest and layman, in terms of disabilities or discriminations, is not part of what is prohibited by Article 44.2.3.<sup>110</sup> He stated that in fact they amounted to an implementation of the guarantee in Article 44.2.5. Henchy J, echoing Walsh J’s comments in *Quinn Supermarkets*, stated:

‘The constitutional provision invoked here must be construed in terms of its purpose. In proscribing disabilities and discriminations at the hands of the State on the ground of religious profession, belief or status, the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion. To construe the provision literally, without due regard to its underlying objective, would lead to a sapping and debilitation of the freedom and independence given by the Constitution to the doctrinal and organisational requirements and proscriptions which are inherent in all organised religions. Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasion recognize and buttress them. For such disabilities and discriminations do not derive from the State; it cannot be said that it is the State that imposed or made them; they are part of the texture and essence of the particular religion; so the

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<sup>109</sup> [1979] ILRM 166.

<sup>110</sup> The provisions of Article 44.2.3 were also considered in *Mulloy v Minister for Education* [1975] IR 88 where the Supreme Court had to consider a set of Departmental Rules which stated that Irish teachers who spent time teaching in certain developing countries could count that service for the purpose of salary and pension increments when they returned home. However, this only applied to lay teachers. Father Mulloy, who was a member of the Holy Ghost Congregation and had taught abroad, brought an action for a declaration that the rule in question was unconstitutional. He claimed that his exclusion was a violation of Article 44.2.3. In the High Court Butler J stated: ‘It seems to me to be clear beyond argument that the terms of the scheme confining it to lay teachers do create a difference and do distinguish between them and teachers of a different religious status, namely clerics such as the plaintiff. It is also clear that the ground of such discrimination is the difference in religious status.’ [1975] IR 88, 92-93 The Supreme Court also held in his favour stating that the scheme made a distinction on the ground of religious status, by enabling a person who was not a religious to obtain greater financial reward for the same work than one who was and could not be regarded as necessary to implement the constitutional right to the full and free practice of religion. Walsh J stated ‘There may be many instances where, in order to implement or permit of the full and free exercise of the freedom of religion guaranteed by the Constitution, the law may find it necessary to distinguish between ministers of religion or other persons occupying a particular status in religion and the ordinary lay members of that religion or the rest of the population..’ [1975] IR 88, 96. Casey points out that Walsh J gave no guidance as to what kind of provision would fall within this principle. He states ‘presumably evidential privileges – such as freedom from compulsion to testify in certain circumstances – may be covered.’ (See Gavan Duffy J in *Cook v Carroll* [1945] IR 515 in which he recognised the right to sacerdotal privilege in a civil action.) Casey also points out that the Juries Act, 1976 provides for the exclusion from jury service of persons in holy orders, ministers of any religious denomination or community, and ‘vowed members of any religious order living in a monastery, convent or other religious community.’ Casey writes: ‘Such persons are thus *automatically* excused, while lay individuals must show cause to be excused-section 9(2). This is plainly a distinction but no doubt it is constitutionally justifiable.’ Casey, *Constitutional Law in Ireland*, Sweet and Maxwell, Dublin, 2000, p.699.

State, in order to comply with the spirit and purpose inherent in this constitutional guarantee, may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion.’<sup>111</sup>

The *Maynooth Case* reflects the view in *Quinn Supermarket* that the constitutional duty not to discriminate on the grounds of religion is diluted by the constitutional duty to respect freedom of religion. This position is in line with the Catholic Church’s belief in the State’s responsibility to ensure religious freedom as stated in the Vatican II document Declaration on Religious Liberty. Glendenning states that ‘given the freedom and independence that the Constitution has conferred on organised religion, the spirit and purpose of the liberal provisions in Article 44 must be read in terms of their underlying objectives and the State may support and even occasionally buttress what appear to be disabilities and discrimination deriving from a particular religion.’<sup>112</sup> The Court has clearly chosen to favour the religious over the non-religious in the interest of preserving the particular ethos and character of religious groups. The Court has also encroached on the principle of freedom of expression drawing a distinction between religious and non-religious academic institutions. This value judgment between competing constitutional rights may be interpreted as evidence of judges preferring the religious over competing rights based on a substantive moral preference for religious institutions. It is clear that the Courts have adopted a philosophical position which views religion as a basic good which can contribute to the common good. The judiciary as an organ of the State is not neutral regarding religion but is prepared to buttress and support religious groups even if this involves upholding discriminations.<sup>113</sup> The pro-monotheistic religious stance of the Constitution appears to mandate the Supreme Court’s support for religion.<sup>114</sup>

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<sup>111</sup> Ibid. 180.

<sup>112</sup> Dymna Glendenning, *Education and the Law*, Butterworths, Dublin, 1999, p.63.

<sup>113</sup> The *Irish Times* in an editorial after the Maynooth case was critical of the judgment which it viewed as an infringement on academic freedom. It was questioned whether or not Maynooth could be regarded a seminary and that given the numbers of lay students the same level of academic freedom ought to be present in Maynooth as in other academic institutions. It was stated that ‘it would seem difficult, if not impossible, to have a university – cum – seminary, in which the rules are common to both functions.’ The editorial goes on to say that ‘The two staff members have lost much, but they may, in the future, see considerable gain for their colleagues. This is often the faith of the advanced thinker.’ However, the editor rejected the argument that Maynooth ought to be regarded as an agent of the State. *The Irish Times*, 5 November 1979

<sup>114</sup> Article 44.1 states ‘The State acknowledges that the homage of public worship is due to almighty God. It holds His Name in reverence, and shall respect and honour religion.’

This raises an irresolvable clash between two values: firstly, a belief in State support for religious groups and secondly, the right of citizens to freedom of expression.<sup>115</sup> In the context of a consideration of the challenge which pluralism poses to liberalism, Whyte examines *Flynn v Power*<sup>116</sup> in which Costello J in the High Court ruled that a teacher in a Catholic school who was in a relationship and had a child with a married man was lawfully dismissed from her position as her behaviour undermined the ethos of the school. Costello J did not regard an employee's sexual life as completely separate from her professional life if it affected her employer.<sup>117</sup> The judge was also influenced by the fact the Flynn was living in a small town and was openly living with, and had a child by, a married man. The judge particularly relied on the Canadian decision *Re Caldwell and Stewart*<sup>118</sup> in which a Catholic teacher in a Catholic school did not have her contract of employment renewed after she married a divorced man.<sup>119</sup> Counsel for Flynn relied on the Unfair Dismissals Act, 1977 and therefore Costello J did not refer to any provisions of the Constitution in his judgment but, as Whyte states, constitutional provisions such as freedom of religion, the right to privacy, and the right to earn a livelihood would be relevant. Whyte further argues that exceptions to laws of general application should be upheld where they are necessary to protect the free practice and profession of religions, unless there are compelling reasons to do otherwise. He contends that religious bodies should be protected from employees who deliberately set out to undermine the religious ethos of their employers. As far as one can tell Flynn did not deliberately set out to undermine the school's ethos and therefore had Whyte's formula been used it is likely to have resulted in Flynn's favour.<sup>120</sup> Both *Flynn* and the *Maynooth* case indicate judicial

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<sup>115</sup> This clash between two liberal values may be defined, as Isaiah Berlin argues as the limits of liberalism. See Isaiah Berlin, *Four Essay on Liberty*, Oxford UP, London, 1969.

<sup>116</sup> *Flynn v Power* [1985] IRLM 336.

<sup>117</sup> See Gerry Whyte, 'Protecting Religious Ethos in Employment Law: A Clash of Cultures' (2005) 12(1) *DULJ* 169.

<sup>118</sup> *Re Caldwell and Stewart* (1985) 15 DLR (4<sup>th</sup>).

<sup>119</sup> The Court ruled that 'religious conformance including acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school.' *Ibid.* 18.

<sup>120</sup> I would submit that the idea that Flynn should have engaged in a form of amorous abstinence to preserve her job represents an unwarranted intrusion on her 'right to be left alone' and would in itself constitute a 'compelling reason' to find in her favour. It exemplifies the difficulty in attempting to reconcile the protection of religious values with lived reality and the hardship which any attempt to do so can cause, as was apparent in *McGee, Norris* and *X. Cohen* suggests that employees should not do anything which

deference to the religious but not in a manner that amounts to preference for any one religion.

### ***Employment Equality Bill, 1996 and Constitutionally Permissible Discriminations***

The Supreme Court examined Article 44.2 of the Constitution in *Re Article 26 Employment Equality Bill, 1996*<sup>121</sup> in which the Court had to decide whether the Employment Equality Bill, 1996 was repugnant to the Constitution. The central provision of the Bill stated that discrimination was to be taken to have occurred where one person was treated less favourably than another because of, *inter alia*, religious background (including not holding religious beliefs). The Court examined the validity of the Bill under *inter alia*, the heading of religious freedom.

The Court came to the conclusion that it is generally not permissible to make any discrimination or distinction between citizens on the grounds of religious profession, belief or status. However, the Court stated, it is constitutionally permissible to make distinctions and discriminations on such grounds if they are necessary 'to give life and reality to the guarantee of free profession and practice of religion contained in Article 44.2 of the Constitution.'<sup>122</sup> The Court referred to s. 37(1) of the Bill which permitted the favouring of an employee on religious grounds in certain circumstances.<sup>123</sup> The Court viewed this as representing a reasonable balancing between the right of free profession and practice of religion on the one hand and the right to equality before the law and the right to earn a livelihood on the other hand. The Court also stated that each religious denomination must, to some extent, define its own ethos but the final decision in this respect must rest with the courts. This confers a considerable degree of power onto the Courts to the extent that they are the ultimate arbiters of what constitutes the ethos of

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could be perceived as undermining the ethos of their employers but that they should be free from scrutiny in their private lives. See Mark Cohen 'Religious Ethos and Employment Equality: A Comparative Irish Perspective', (2008) 28(3) *Legal Studies* 452. It is arguable that Flynn was the victim of indirect discrimination given the fact that as a pregnant woman in a small town her actions would have been more apparent than in the case of a man. The allegedly gender neutral principle of preserving the ethos of a Catholic school in the context of sexual behavior does in fact affect females disproportionately.

<sup>121</sup> [1997] 2 IR 321.

<sup>122</sup> *Ibid*

<sup>123</sup> 'Where it is reasonable to do so in order to maintain the religious ethos of the institution' or to take action 'which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.'



a religious institution. It is not clear how the Courts would decide this issue but presumably they would be guided by expert theological evidence and scriptural and canonical evidence.<sup>124</sup>

The Court accepted that while it is not generally permissible to make any discrimination, or make a distinction, between citizens on the grounds of religious belief or status, the Court 'had to accept that occasions may arise when it is necessary to make distinctions in order to give life and reality to the constitutional guarantee of the free profession and practice of religion.'<sup>125</sup> The Court referred to *Quinn Supermarket*<sup>126</sup>, *Mulloy v Minister for Education*<sup>127</sup>, and *McGrath and O'Ruairc v Maynooth College*<sup>128</sup> as supporting this argument.<sup>129</sup> The Supreme Court concluded that it appears it is constitutionally permissible to make distinctions or discriminations on grounds of religious profession, belief or status but only in so far as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution.

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<sup>124</sup> Therefore, in *Quinn supermarkets* the Court heard evidence from a rabbi on Jewish rules concerning Kosher meats.

<sup>125</sup> [1997] 2 IR 22.

<sup>126</sup> [1972] IR 1.

<sup>127</sup> [1975] IR 88.

<sup>128</sup> [1979] ILRM 166.

<sup>129</sup> The Court also relied on the decision of the US Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v Amos* 483 US 327 (1987) in which a building engineer had been employed for 16 years by the Mormon Church to work in a gymnasium. He was dismissed because he failed to produce a certificate to show that he was a member of the Mormon Church. The *American Civil Rights Act of 1964* outlawed religious discrimination in employment. However, paragraph 702 of the Act exempted religious organisations from this prohibition. The Court upheld the constitutionality of paragraph 702 as not violating the guarantees of freedom of religion contained in the first amendment of the American Constitution. Brennan J stated: 'For many individuals, religious activity derives meaning in large measure from participation in a large religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organisation's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organisations often furthers individual religious freedom as well. The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights, since a religious organization is able to condition employment in certain activities on a subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital, that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.' 483 US 327 (1987), 34.

It may be taken that the Irish courts have adopted a position which favours religious groups over non-religious groups in society. The Supreme Court has concluded that it is constitutionally permissible to make distinctions or discriminations on grounds of religious profession, belief or status but only in so far as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion. However, the Courts have not favoured the Catholic Church over other Churches. Laws which favoured all religions were acceptable but laws which appeared to favour one religious view would be subject to a greater degree of scrutiny. This line of jurisprudence indicates a pro-religious but also religiously pluralist view. It is different to the liberalism of judgments such as *McGee, M*, the minority in *Norris*, and majority in *X* as the Courts were prepared to rule in a manner which would be difficult to reconcile with Catholic morality. Therefore, while the Courts are prepared to accommodate religion to protect the ethos of religious groups, they have also adapted civil laws in a manner that is contrary to Catholic morality as stated in Papal Encyclicals. However, as stated previously the fact that the Church did not necessarily expect civil laws to mirror Church laws indicates that cases in which the judiciary has ruled in a manner that the Church would have fundamentally opposed may be reconcilable with the Church's more passive role as the 'conscience of the nation'. That is the outcome may be repugnant to Catholic morality but the judiciary, in the eyes of the Church, was not 'wrong' to change the civil law in a manner that does not mirror Catholic thought. Therefore, while the Catholic Church maintains it has a right to be excluded from certain laws it would not necessarily be contrary to Catholic thought were the Courts to rule that religious groups did not possess such a right. The Courts' deference to religion is also evident in the approach which the Courts have taken in their interpretation of Articles 41 and 42. It is to this area that I now turn.

### **The Family**

Because of the clear influence of Catholic thought on Articles 41 and 42 it is unsurprising that the Court's jurisprudence in this area is in line with a Catholic view of the family and of education. In more recent years the Courts have attempted to distance themselves from the Catholic influence on the Articles in viewing the provisions as coincidentally

reflecting non-Catholic ideological views. Therefore, while the historical roots of Articles 41 and 42 may be found in Catholic social teaching of the 1930s, the ideology underpinning those Articles may be embraced beyond those holding Catholic views albeit any analogy with other ideological perspectives is coincidental. The Court's interpretation of Article 42 has had a liberalising effect to the extent that the paternal supremacy rule was judged to be repugnant to its provisions.<sup>130</sup> The judiciary continue to be constrained by the Catholicity clearly present in the wording of the Articles.<sup>131</sup> This stems from the influence of papal encyclicals during the drafting process.<sup>132</sup> The Courts have resisted a sectarian interpretation of Articles 41 and 42 by emphasising the fact that they coincide with non-Catholic positions concerning familial autonomy. Articles 41 and 42 appear to be straining under the weight of societal changes as family structures have diversified and society has become increasingly secularised. Despite these societal changes, the Courts must interpret Articles which reflect the ethos of the 1930s. The most fundamental divergence between Catholic thought and constitutional law took place with the introduction of divorce in 1995. While the Courts have recognised the family as a natural institution rather than one created by positive law, this position has now been qualified by the introduction of divorce.

The Courts have therefore generally interpreted the constitutional provisions in a manner in line with Catholic thought e.g. the family structure which Articles 41 and 42 protects is based on marriage<sup>133</sup> and the courts have sanctioned legislative discrimination against non-marital children.<sup>134</sup> Gavan Duffy P in *Re Tilson*<sup>135</sup> referred to 'Articles 41 and 42, redolent as they are of the great papal Encyclicals *in pari materia*, formulate first principles with conspicuous power and clarity...'<sup>136</sup> In contrast, fifty years later

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<sup>130</sup> *Re Tilson* [1951] IR 1.

<sup>131</sup> Therefore, in *N v HSE* [2006] IR 374, 501 McGuinness J in ordering the return of a child to her natural parents expressed her unhappiness at the constitutional position of the child stating however the case must be 'decided under the Constitution and the law as it now stands.' The judge stated that she would allow the appeal with 'reluctance and some regret.'

<sup>132</sup> See chapter 2.

<sup>133</sup> *State (Nicolau) v An Bord Uchtála* [1966] IR 567.

<sup>134</sup> *O'B v S* [1984] IR 316.

<sup>135</sup> [1951] IR 1.

<sup>136</sup> *Ibid* 15.

Hardiman J in *North Western Health Board v HW*<sup>137</sup> referred to his belief that Articles 41 and 42 did not solely reflect a Catholic philosophical position:

‘It has been observed that Article 41 and 42 of the Constitution “are generally thought to have been inspired by papal encyclicals and by Catholic teaching”...Counsel for the Respondents in this case have submitted, in my view convincingly, that the same approach can be grounded otherwise and have referred us to an American academic authority, Professor Joseph Goldstein. The latter suggests that the common law “reflecting Bentham’s view, has a strong presumption in favour of parental authority free of coercive intrusions by agents of the State”. I would endorse this as a description of the Irish constitutional dispensation, even if any reflection of the views of Jeremy Bentham is coincidental. I do not regard the approach to the issue in the present case mandated by Articles 41 and 42 of the Constitution as reflecting uniquely any confessional view.’<sup>138</sup>

Keane CJ dissenting in *North Western Health Board v HW*<sup>139</sup> recognised the natural law influence over Article 41 but did not regard such a view of the family as being uniquely influenced by natural law thought:

‘Article 41.1 acknowledges the primary role of the family in society. In philosophic terms, it existed as a unit in human society before other social units and, in particular, before the unit of the State itself. The philosophical origins of the modern system of democracy are to be found in the beliefs of Locke and Rousseau that civil government is the result of a contract between the people and their rulers: the family existed before that unit and enjoys rights which, in the hierarchy of rights posited by the Constitution, are superior to those which are the result of the positive laws created by the State itself. As the trial judge noted, this is an express recognition by the framers of the Constitution of the natural law theory of human rights, but the belief that the family occupies that philosophic status in contrast to the role of the State is by no means confined to those thinkers who subscribe to that particular philosophy...I believe that Article 41, although couched in the language of “rights”, should not be seen as denying the truth to be derived from the experience of life itself, that parents do not pause to think of their “rights” as against the State, still less as against their children, but rather of the responsibilities which they joyfully assume for their children’s happiness and welfare, however difficult the discharge of those responsibilities may be in the sorrows and difficulties almost inseparable from the development of every human being.’<sup>140</sup>

Keane CJ’s position is similar to Hardiman J’s as both judges accept the ideological influences on Articles 41 and 42 but do not feel bound by those philosophies i.e. Catholic

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<sup>137</sup> [2001] 3 IR 622.

<sup>138</sup> Ibid. 757. [Emphasis in original] Hardiman J re-emphasised this position in *N & Another v Health Service Executive* [2006] IR 374, 504: ‘There is, of course, no doubt that the form and content of our constitutional dispensation in regard to the family and children was significantly influenced by Christian, and specifically Catholic, teaching on those subjects. But that is not to say that the preference for the natural parents as carers for a child is exclusively referable to those sources. In my judgment in *North Western Health Board v HW* I expressed the view that this preference for the parents as the natural and primary guardians was equally consistent with quite different strands of thought, even a Benthamite one.’

<sup>139</sup> [2001] 3 IR 622.

<sup>140</sup> Ibid. 686.

thought and Thomistic natural law. In the same case Murphy J referred to the Thomistic influence on Article 41 which was exemplified by the preference for the principle of subsidiarity in the context of family law:

‘The Thomistic philosophy - the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Mr Justice Walsh - confers an autonomy on parents which is clearly reflected in these express terms of the Constitution which relegate the State to a subordinate and subsidiary role. The failure of the parental duty which would justify and compel intervention by the State must be exceptional indeed.’<sup>141</sup>

The judicial view would appear to be that while Articles 41 and 42 were clearly influenced by Catholic thought, the wording may also be interpreted to reflect other ideological views such as liberalism. Therefore, it would appear to be the case that the judiciary are prepared to go beyond the intention of the drafters in their interpretation of Articles 41 and 42. However, it is only where other ideological views happen to coincide with Catholic thought (e.g. the principle of subsidiarity is similar to laissez-faire ideas of limited government intervention<sup>142</sup>) that the Courts are prepared to go beyond the philosophical influences underpinning the drafters’ intentions in the 1930s. The fact that the wording of Articles 41 and 42 is capable of being interpreted as incorporating non-Catholic, indeed secular views, tends to indicate a religiously non-sectarian judicial perspective on the said Articles. This non-sectarian or pluralist view of Articles 41 and 42 has been strengthened since the introduction of divorce as the constitutional proscription on legislating to provide for divorce had been perceived as confessional and non-plural.

### **Parental Authority**

In *Ryan v Attorney General*<sup>143</sup> the plaintiffs had argued that their parental authority had been interfered with because of the fluoridation of the water supplies. However, Ó Dálaigh CJ speaking for the Court rejected this argument stating that there was nothing in the Constitution recognising the right of parents to refuse to allow the provision of measures that are designed to secure the health of their child and there was ‘nothing in the Act which can be said to be a violation of the guarantee on the part of the State to

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<sup>141</sup> Ibid. 732.

<sup>142</sup> However, they differ in their conception of equality.

<sup>143</sup> [1965] IR 294.

protect the family in its constitution and authority.’<sup>144</sup> More recently the Supreme Court offered a stronger view of parental authority in *North Western Health Board v HW* in which the plaintiffs sought an order permitting them to carryout a PKU test<sup>145</sup> on an enfant against the wishes of the parents. Hardiman J in his judgment did not view the *Ryan* case as ‘providing any authority for the proposition that a duty to submit a child for the PKU test can be derived by the Courts from the provisions of the Constitution.’<sup>146</sup> While Hardiman J accepted that State intervention was appropriate in limited circumstances, he appeared to indicate that such intervention should be based on statute:

‘The presumption to which I have referred is not, of course, a presumption that the parents are always correct in their decisions according to some objective criterion. It is a presumption that where the constitutional family exists and is discharging its functions as such, and the parents have not for physical or moral reasons failed in their duty towards their children, their decisions should not be overridden by the State and in particular by the Courts in the absence of a jurisdiction conferred by statute. Where there is at least a statutory jurisdiction, the presumption will colour its exercise, and may preclude it. The presumption is not of course conclusive and might be open to displacement by countervailing constitutional considerations as perhaps in the case of an immediate threat to life.’<sup>147</sup>

While Hardiman J’s judgment is influenced by the fact that the PKU test was not provided for by statute, the judge still clearly placed greater emphasis on familial autonomy rather than the best interests of the child. Murray J offered a narrow set of circumstances in which he envisaged the State interfering to protect a child:

‘It would be impossible and undesirable to seek to define in one neat rule or formula all the circumstances in which the State might intervene in the interests of the child against the express wishes of the parent. It seems however to me that there must be some immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically morally or socially, deriving from an exceptional dereliction of duty on the part of parents to justify such an intervention.’<sup>148</sup>

In comparing the *Ryan* judgment with *North Western Health Board* it seems paradoxical that Hardiman J, in rejecting the idea that Article 41 solely reflects a confessional view, should emphasis the family’s autonomy in stronger terms than Kenny J in *Ryan* when he

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<sup>144</sup> Ibid. 350.

<sup>145</sup> This is also known as the heel-prick test. Its purpose is to screen new born infants for conditions that may result in brain damage if left untreated. It involves the infant’s heel being pricked with a lancet and the drops of blood are then collected on a testing card.

<sup>146</sup> [2001] 3 IR 622, 761.

<sup>147</sup> Ibid. 755.

<sup>148</sup> Ibid. 740-741.

had relied on a Papal Encyclical in the course of his judgment. A further example of the Courts upholding the concept of familial autonomy is *Re Article 26 and the Matrimonial Home Bill, 1993*<sup>149</sup> in which the impugned Bill vested an equitable interest in the matrimonial home in both parties. The Supreme Court viewed such statutory intervention as beyond the State's powers and repugnant to Article 41 and as violating the family's autonomy. Finlay CJ delivering the Court's judgment stated:

'This Bill...constitutes a quite impermissible invasion into the authority of the family and a failure to protect that authority. It goes beyond the encouragement of joint ownership [and] constitutes a mandatory imposition of the State's decision on this family question...such provisions do not constitute reasonably proportionate intervention by the State with the rights of the family'<sup>150</sup>

The Courts were prepared to uphold familial autonomy against State intervention. This coincides with the principle of subsidiarity but that is not to argue that it necessarily deliberately reflects Catholic thought. It also reflects the idea that State intervention into the realm of the family must be viewed with suspicion.

#### **The Limits of Articles 41 and 42 and Non-Marital Children**

The Courts have regarded Article 41 as permitting discrimination in favour of marital families. It has been established in Irish law that the family as defined in the Constitution is based on marriage and that non-marital families are not protected by Articles 41 and 42 of the Constitution.<sup>151</sup> In *State (Nicolaou) v An Bord Uchtála*<sup>152</sup> Walsh J rejected the argument that non-marital families were protected by Article 41 stating it was clear that the family referred to in the Constitution refers to the marital family.<sup>153</sup> Walsh J stated that while the mother of a non-marital child does not come within the ambit of Articles

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<sup>149</sup> [1994] 1 ILRM 241.

<sup>150</sup> Ibid. 253-254.

<sup>151</sup> In *M, an Infants Case* [1946] IR 334 Gavan Duffy P stated that the constitutional guarantee for the family in Article 41 did not apply to the mother of an 'illegitimate' child. Under Article 29.1 of the Italian Constitution the family is recognised 'as a natural association founded on marriage'. The Italian Constitution also provides protection for large families, Article 31.1 states 'The republic furthers family formation and the fulfillment of related tasks by means of economic and other provisions with special regard to large families'.

<sup>152</sup> *State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

<sup>153</sup> Ibid. 643. In the same case Henchy J stated: 'For the State to award equal constitutional protection to the family founded on marriage and the "family" founded on an extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41.3.1, to guard with special care the institution of marriage...' Ibid 622. It should be noted that while the natural mother does not come within the scope of Articles 41 and 42 she has a constitutional right to the care and custody of her children under Article 40.3. See Walsh J's comments in *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567, 644. No similar constitutional protection exists for natural fathers.

41 and 42, her 'natural right to the custody and care of her child, and such other natural personal rights as she may have' are protected by Article 40.3. The judge rejected the argument that the Adoption Act 1952 was 'invalid in as much as it permits the mother of an illegitimate child to consent to the legal adoption of her child'.<sup>154</sup>

Costello J in *Murray v Ireland*<sup>155</sup> stated that the 'Constitution makes clear that the concept and nature of marriage which it enshrines are derived from the Christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship'.<sup>156</sup> Costello J also stated that a married couple without children was also protected by the Constitution and was a 'moral institution'<sup>157</sup> as defined in the Constitution. Costello J's definition of marriage in *Murray v Ireland*<sup>158</sup> was accepted by the Supreme Court in *TF v Ireland*.<sup>159</sup> The Supreme Court ruling in *Nicolau* that the family protected by Articles 41 and 42 is that based in marriage led to the courts legitimising discrimination against non-marital children. Therefore, in *O'B v S*<sup>160</sup> the Supreme Court stated that ss 67 and 69 of the Succession Act 1965, which prevented a non-marital child from succeeding on intestacy to her father's estate were not contrary to the guarantee of equality in Article 40.1. Walsh J delivering the

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<sup>154</sup> Ibid. 644.

<sup>155</sup> *Murray v Ireland* [1985] IR 532

<sup>156</sup> Ibid. 545.

<sup>157</sup> Ibid. 548.

<sup>158</sup> [1985] IR 532

<sup>159</sup> *TF v Ireland* [1995] 1 IR 321. The Court also referred to the necessity of judicial separations in certain circumstances which had been recognized by the ecclesiastical courts in the interest of the common good: 'However, in many cases the common good will require that spouses should be separated notwithstanding the nature of the indissoluble bond of marriage between them. It has always been accepted that the provision of grounds for a judicial separation does not *per se* constitute a failure to guard with special care the institution of marriage or a failure to protect it against attack. The Ecclesiastical Courts recognised this and in certain circumstances granted a decree *a mensa et thoro*, which was in effect a decree of judicial separation.' (at 350) In *Johnston v Ireland* (1987) 9 EHRR 203 the European Court of Human Rights declared it did 'not consider that it is possible to derive from Article 8 [of the European Convention on Human Rights which provides for respect for one's private and family life] an obligation on the part of Ireland to establish for unmarried couples a status analogous to that of married couples.' However, the Court also held that under the Convention the concept of the family encompasses the non-marital family. The European Court of Human Rights found that Ireland was in breach of Article 8 of the European Convention in *Keegan v Ireland* (1994) 18 EHRR 342 in that it failed to respect the family life of an unmarried father who had had a stable relationship with the mother of his child, in permitting the placement of the child for adoption without his knowledge or consent. As a result the Irish state must give natural fathers a legal opportunity to establish a relationship with the child, including the entitlement to be consulted before the child is placed for adoption.

<sup>160</sup> [1984] IR 316.



Court's judgment accepted that 'It cannot be contested that a person born outside marriage is, as a human person, equal to one born within marriage. The Constitution provides that all citizens shall, as human persons, be held equal before the law'.<sup>161</sup> However, the judge stated that a law aimed at maintaining 'the primacy of the family as the fundamental unit group of society'<sup>162</sup> does not have to come within the 'proviso to Article 40.1' in order for it to be valid.

The line of jurisprudence initiated with Walsh J's judgment in *Nicolau*, justifying discrimination against non-marital children and families, is in line with a conservative and Catholic ethos which viewed the distinction between marital families and non-marital families through a moral prism. The members of non-marital families would not be afforded the same rights as those of marital families because of the constitutional preference for the family based on marriage. The Church also had a history of discriminating against non-marital children (non-marital birth was a canonical impediment to ordination<sup>163</sup>) and the Supreme Court's jurisprudential position appears to be in line with Catholic thought and broader cultural norms at the time. Therefore, legal discrimination against non-marital families could not be described as uniquely reflecting a Catholic view. As familial demographics and cultural norms have diversified this position now appears anachronistic.

### **Judicial Interpretation of Article 41.2**

Article 41.2 states that the State 'recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved' and that the State shall 'endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.' Perhaps, ironically in light of the fear amongst women's groups that Article 41.2 (and also Article 40.1) would lead to discrimination against women, the provision was to be relied on by the Courts to uphold discriminations against men. Therefore, in *Lowth v Minister for*

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<sup>161</sup> Ibid. 332.

<sup>162</sup> Ibid. 335.

<sup>163</sup> Under the 1983 Code of Canon Law 'illegitimacy' is no longer a canonical impediment to ordination. The 1983 Code is a result of the changes which John XXIII initiated to the 1917 Code in Vatican II. This process was not completed until the Pontificate of John Paul II.

*Social Welfare*<sup>164</sup> Costello J referred to Article 41.2 to support the view that the failure of the State to treat deserted husbands in the same way as deserted wives for the purposes of social security was not contrary to the guarantee of equality contained in Article 40.1. Costello J stated 'the provisions of the Constitution dealing with the family recognise a social and domestic order in which married women are unlikely to work outside the family home.'<sup>165</sup> The High Court judgment was upheld in the Supreme Court on the basis of statistics that showed relatively few married women participated in the labour force and that women in employment were at a financial disadvantage relative to men. The onus was on the plaintiff to rebut these statistics through statistical evidence demonstrating that his circumstances were analogous to those of a deserted wife. Hamilton CJ stated that Article 41.2 recognises a 'social and domestic order in which married women are unlikely to work outside the family home.'<sup>166</sup>

In *Sinnott v Ireland*<sup>167</sup> Denham J stated she did not regard Article 41.2 as assigning to women a domestic role:

'Article 41.2 recognises the significant role played by wives and mothers in the home. This recognition and acknowledgement does not exclude women and mothers from other roles and activities. It is a recognition of the work performed by women in the home. The work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles fall to be analysed.'<sup>168</sup>

Murray J in *DT v CT*<sup>169</sup> appeared to view Article 42.1 as potentially applying to men stating *obiter dicta*:

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<sup>164</sup> *Lowth v Minister for Social Welfare* [1998] 4 IR 321. Similarly, in *Dennehy v Minister for Social Welfare* (26<sup>th</sup> July) HC Barron J upheld social welfare provisions that favoured deserted wives against deserted husbands.

<sup>165</sup> *Ibid.* 341.

<sup>166</sup> *Ibid.* 342.

<sup>167</sup> *Sinnott v Ireland* [2001] 2 IR 545. Denham J (dissenting) relied on Article 42.1, inter alia, in concluding that Sinnott as the mother of the plaintiff was entitled to damages as her son's right to free primary education had not been vindicated by the State.

<sup>168</sup> *Ibid.* 665. The Irish Catholic Bishops Conference in their submission to *All -Party Oireachtas Committee on the Constitution (Tenth Progress Report: The Family)* (Dublin, 2006) p.A120 referred to Denham J's dicta in support of their view that Article 41.2 may be seen as a 'pedestal rather than a cage.'

<sup>169</sup> *DT v CT* [2003] 1 ILRM 321.

'The Constitution views the family as indispensable to the welfare of the State. Article 41.2.1 recognises that by her life in the home the woman gives to the State a support without which the common good cannot be achieved. No doubt the exclusive reference to women in that provision reflects social thinking and conditions at the time. It does however expressly recognise that work in the home by a parent is indispensable to the welfare of the State by virtue of the fact that it promotes the welfare of the family as a fundamental unit in society. *A fortiori* it recognises that work in the home is indispensable for the welfare of the family, husband, wife and children, where there are children...I would observe in passing that the Constitution, as this court stated on a number of occasions, is to be interpreted as a contemporary document. The duties and obligations of spouses are mutual and, without elaborating further since nothing turns on this point in this case, it seems to me that it implicitly recognises similarly the value of a man's contribution in the home as a parent.'<sup>170</sup>

It was certainly not within the intention of the drafters of Article 41.2 to have its provisions extended to men and fathers. However, even in viewing the Article in the context of modern Ireland, it appears to stretch the meaning of the wording of the Article to breaking point to interpret it as applying to both sexes. However, Murray J's belief that the Constitution should be interpreted as a contemporary document indicates that the Courts can move beyond the philosophical thought underpinning the Constitution. Therefore, Article 42.1 is interpreted (albeit questionably) in light of modern cultural norms to be defined as gender neutral. This was not McQuaid's or de Valera's intention in drafting the Article. The Article reflects Catholic social teaching regarding the role of women in society but not uniquely so, as it also reflects the ethos of the 1930s. The mode of interpretation which Murray J adopts has the effect of eschewing Catholic thought in favour of a view which places the Article in the context of contemporary social and cultural norms. This has the effect of diminishing the influence of 1930s Catholic social teaching on the Courts' jurisprudence.

### **State Intervention and the Kilkenny Incest Report (1993)**

Under Article 42.5, the State is obliged to substitute the place of parents in those exceptional cases where for physical or moral reasons, they fail in their duty towards their children. It also appears to be the case that the State may also be obliged to act to protect the interests of children where no prior failure of parental duty has been

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<sup>170</sup> Ibid. 376. The Irish Catholic Bishops Conference in Tenth Progress Report: The Family p.A120 refer to Murray J dicta to support their view that 'A revision of this Article [Article 41.2] in more gender neutral form as suggested by the Review Group might be appropriate but perhaps unnecessary.'

established. Therefore, in *Re JH, an infant*<sup>171</sup> the Supreme Court, (per Finlay CJ), held that the constitutional presumption that the welfare of a child is to be found within the family could be rebutted where there is a failure of parental duty or where there are compelling reasons why this cannot be achieved.<sup>172</sup> However, in *Re JH* the Court did not view the possibility of long term psychological harm to the child in question as a compelling reason for the child to remain with its adoptive parents (with whom the child had lived for two years).<sup>173</sup>

The Kilkenny Incest Investigation arose after a forty-eight year old County Kilkenny father of two received a seven year jail sentence, having pleaded guilty to six charges of rape, incest and assault from a total of fifty-six charges covering the period 1976-1991. It was stated in the report: ‘...it emerged that the victim [referred to as Mary] had had a number of hospital admissions over the years for the treatment of serious injuries and had been in contact with health professionals including general practitioners, social workers and public health nurses’.<sup>174</sup> Despite the clear evidence of abuse there appeared to be a

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<sup>171</sup> *JH, an infant* [1985] IR 375. In *G v An Bord Uchtála* [1980] IR 32, 55-56 O’Higgins CJ stated a child’s rights included the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. The Chief Justice viewed these rights as stemming from Article 40.3.

<sup>172</sup> The State also had the power to take children into care under the Children Act 1908. This has since been replaced by Children Act 2001. See Kelly, *The Irish Constitution* p.1933-1935. The State has of course the power to intervene into the family in ‘exceptional circumstances’. In *Re O’Brien, an Infant* [1954] IR 1,10 the Supreme Court refused to regard as ‘exceptional’ a case in which the father had been ill and absent for a long period and sought custody of his child (the mother had died and the child was in the care of a grandparent). O’Byrne J stated that Article 42.1: ‘...seems to contemplate and require that the children should be members of the family and attached to the parental home. The sanctity of the family and the enduring existence of parental authority seem to me to be guaranteed by these provisions and I consider that I am entitled to say that the framers of the Constitution considered, and enacted, that the best interests and happiness of the child would be served by its being a member of the parental household.’

<sup>173</sup> Recently in *N v HSE* [2006] IR 374 Hardiman and Geoghaghan JJ emphasised the importance of the biological link between child and parents. Geoghaghan referred to the importance of ‘family and marriage and quite frankly the biological link should not be minimised...Many people, I suspect, would consider that there is an appreciable advantage for a child to be reared with a natural family and having real parents and real aunts and uncles.’ Hardiman J stated in reference to a custody dispute between married natural parents and putative adoptive parents ‘it would be wrong to conclude that but for the marriage the child would be left in the custody of the adoptive parents.’

<sup>174</sup> *Kilkenny Incest Investigation*, Dublin Stationary Office, Dublin, 1993, p.9. The facts of the case as reported in the investigators’ report are as follows. Mary was born in England 28 November 1965. In 1976 her family moved to Ireland and it was in late January of that year that the first incidence of sexual and physical abuse occurred perpetrated by her father. In Christmas 1981 Mary was told she was pregnant with her father’s child. Her child was born 20 May 1982. This sexual and physical abuse was to continue until 1992 when Mary and her child moved to a refuge for battered women. Throughout the period of

reluctance on the part of a number of State agencies to intervene into the realm of the family. In the report reference is made to the first time Mary told a social worker of the familial violence she was suffering:

‘The more significant issues arising during this time were the first references to violence and to incest by Mary to the senior social worker. No detailed exploration of the incest or family violence was made at this time. The record of this information is not on the social work files.’<sup>175</sup>

The report goes on to state:

‘We accept that the senior social worker’s powers in relation to adults were limited [Mary was eighteen at this stage] to persuasion and the offering of options. While the evidence was that the child was physically well cared for and was well bonded with Mary, the child was nevertheless living in a household where both violence and incest had occurred. This would now be considered an appropriate point for the senior social worker to request a case conference to consider the position and welfare of the child.’<sup>176</sup>

In their report the members of the investigation team stated regarding Articles 41 and 42:

‘While we accept that the courts have on many occasions stressed that children are possessed of constitutional rights we are somewhat concerned that the “natural and imprescriptible rights of the child” are specifically referred to in only one sub article (Article 42.5) and then only in the context of the State supplying the place of parents who have failed in their duty. We feel that the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the right of parents than to the rights of children. We believe that the Constitution should contain a specific and overt declaration of the rights of born children. **We therefore recommend that consideration be given by the Government to the amendment of Articles 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children. We do not ourselves feel competent to put forward a particular wording and we suggest that study might be made of international documents such as the United Nations Convention of the Rights of the Child.**’<sup>177</sup>

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Mary’s familial abuse she had been in contact with social workers, doctors, and nurses. [for a detailed account of Mary’s contact with the health services see p.55-71 of the report].

<sup>175</sup> Ibid p.78.

<sup>176</sup> Ibid p.78-79.

<sup>177</sup> *Kilkenny Incest Investigation*, p.96 [Emphasis in original]. Recently, a case of familial abuse took place in Co. Roscommon. A mother of six children who had forced her thirteen year old son to have sex with her was found guilty of incest, neglect and sexual assault. In January 2009 Reynolds J sentenced her to seven years in prison, which was the maximum she could impose under the Punishment of Incest Act, 1908 (under the Act a man could receive a life sentence.) *Irish Times*, 22 January 2009 reported that ‘The judge also heard that the children who were shunned at school because they smelled and were covered with lice and fleas, were forced to live in squalor, in a freezing, filthy home, over- run with mice and rats, where there was often no food, no heat and where rubbish was dumped in every room.’ Health authorities in Co Roscommon had tried to have the children removed from the family home in October 2000, but were prevented from doing so after the children’s mother secured a restraining order from the High Court.

David Quinn, a Catholic commentator and founding member of Catholic lobby group the Iona Institute, challenges the views expressed in the Kilkenny Incest Case.<sup>178</sup> Quinn asserts that the problem is not an overly traditional view of the family but the absence of traditional values. Having quoted the criticism of Articles 41 and 42 in the report, he argues that the Constitution allowed social services to intervene in cases of abuse and neglect and if there was a failure to intervene fault lay with social services and not the Constitution. Quinn further rejects the argument:

‘...that it wasn't so much the Constitution that was to blame, but a set of conservative social attitudes that makes neighbours and professionals reluctant to interfere in family life. This is what Judge McGuinness meant by people 'unconsciously' deferring to the fact that the Constitution seems to prefer parents over children. But this doesn't work either. For starters, and as Justice Adrian Hardiman pointed out in the 'Baby Ann' case, the Constitution doesn't prefer parents over children, it prefers them over some third parties such as the Church or the State...[these cases] show[...] that attempts to blame Irish abuse cases on traditional morality and the Constitution are blinkered, ideologically self-serving and very wide of the mark.’<sup>179</sup>

The Irish Catholic Bishops Conference has recognised that tensions may arise between families and outside agencies in determining a child's best interest. The Bishops stated: ‘The question may arise as to whether the family or the state is best positioned to safeguard the rights of children. Not all families are good environments for rearing children. They may be affected by the personal and moral weaknesses and limitations of parents. Children may be exposed to sexual abuse, violence or neglect. In these and similar circumstances, the state may clearly intervene.’<sup>180</sup> The Courts in upholding the principle of familial autonomy against State intervention are, whether consciously or not, upholding Catholic thought. Catholic thought as seen in the statement of the Bishops appears to be more receptive to State intervention than in earlier periods of the State. The suspicious attitude towards State intervention from the hierarchy was seen in the

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<sup>178</sup> On its website the Iona Institute is described as ‘a non-governmental organisation dedicated to the strengthening of civil society through making the case for marriage and religious practice.’ See: [www.ionainstitute.ie](http://www.ionainstitute.ie).

<sup>179</sup> *Irish Independent*, 21 November 2008. It is striking that Quinn should refer to Hardiman J to buttress his arguments given the judge is likely to have little time for the Iona Institute's ideological beliefs. It does however exemplify the coincidence in ideology between Catholic and liberal thought. The Constitution provides for state intervention ‘in exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children’. There can be no doubt that in the Kilkenny incest case (and similarly the Roscommon incest case) Mary's circumstances were ‘exceptional’ as defined in Article 42.5.

<sup>180</sup> *All-Party Committee*, Tenth Progress Report: The Family p.A120.

mother and child scheme controversy and its opposition to the welfare state. The emphasis on protecting the family from the State reflects this ethos. The Courts have not moved away from this norm which reflects Catholic thought in the 1930s because the text of the Constitution continues to reflect the suspicious attitude to State intervention that was central to Catholic social teaching in the 1930s. However, the Courts have emphasised the fact that Articles 41 and 42 coincidentally reflect non-Catholic philosophical positions on the family. The suspicious attitude to interference in the family by third parties is reflected in the Court's view that there is a presumption that the welfare of the child is to be found within the family.

### Custody Disputes

The test which the Courts favour in deciding custody disputes between natural parents and strangers is that adopted by the Supreme Court in *Re JH, an infant*<sup>181</sup> in which Finlay CJ stated there was a constitutional presumption that the welfare of the child is found within the family unless there are compelling reasons why this cannot be achieved or exceptional circumstances exist where the parents have, for moral or physical reasons, failed and continue to fail, to provide education for the child.<sup>182</sup>

Recently, in *N and Others v Health Services Executive*<sup>183</sup> (known as the 'Baby Ann' case) the Supreme Court accepted the test set out in *Re JH* as the law in this area. The Court held that a two year old adopted baby (Ann) should be returned to her natural and

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<sup>181</sup> *Re JH, an infant* [1985] IR 375.

<sup>182</sup> The judicial preference for parental rights was evident in the early case *Re O'Brien, an infant* [1954] IR 1 in which the Supreme Court in ruling that a child should be returned to its natural father who had been ill but had recovered stated that Article 42.1 '...seems to contemplate and require that the children should be members of the family and attached to the parental home. The sanctity of the family and the enduring existence of parental authority seem to me to be guaranteed by these provisions and I consider that I am entitled to say that the framers of the Constitution considered, and enacted, that the best interests and happiness of the child would be served by its being a member of the parental household.' Ibid. 10. A more child centered approach is evident in *PW v AW* (21 April 1980) HC in which Ellis J viewed the entire family, including the children as possessing inalienable and imprescriptible rights. The judge also stated that if 'there is a conflict between the constitutional rights of a legitimate child and the prima facie constitutional right of its mother to its custody, I am of opinion that the infant's rights, which are to be determined by regard to what is required for its welfare, should prevail, even if its welfare is to be found in the custody of a "stranger"...' Ibid. 71.

<sup>183</sup> *N and Others v Health Services Executive* [2006] IR 374, 502.

now married parents.<sup>184</sup> Ann had been living with her adopted parents from her birth but her natural parents, after having had a change of mind decided to initiate *Habeus Corpus* proceedings to reclaim Ann. The High Court had ruled that there were compelling reasons for Ann to remain with her adopted parents (namely the psychological harm the separation would cause her). However, the Supreme Court allowed Ann's parents appeal on the basis that there was no evidenced of parental failure or compelling reasons for Ann to remain with her putative adoptive parents. Hardiman J in his judgment refers to the Old Testament<sup>185</sup> and finds that history and the Bible show that the interests of the child are 'very generally found in natural parents':

Both according to the natural order, and according to the constitutional order, the rights and duties necessary for those purposes are vested in the child's parents. Though selflessness and devotion towards children may easily be found in other persons, it is the experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict the interest of the child will usually be preferred. A graphic and ancient example of this may be found in I Kings 3:16-28.<sup>186</sup>

Hardiman J also recognised that the preference for the marital family was not unique to Irish social and cultural life and that it is: '...equally illustrated by the widespread legal recognition given to the family, even in instruments whose social and cultural context is different from, and perhaps more varied than, those of the Constitution of Ireland.'<sup>187</sup> Hardiman J then refers to the English case *Re G. (Children)*<sup>188</sup> where the Court also viewed the child's best interest as laying with his or her natural parents unless there are compelling reasons rebutting this presumption. Hardiman J asserted that: 'it is most interesting to see that, in a jurisdiction lacking the specific social and cultural context which has led Ireland to protect the rights of the family by express constitutional provision, the interest *of a child* in being reared in his or her biological family is nonetheless fully acknowledged.' In reference to Article 41 Hardiman J comments that:

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<sup>184</sup> In September 2006, the High Court found there were compelling reasons why Ann's welfare was not best served by returning her to her natural parents. Ann had become highly attached to her adoptive parents with whom she had lived for almost two years. It was also felt that the transfer of custody would cause her lasting emotional and psychological harm.

<sup>185</sup> Hardiman J has been secular in his judicial attitude, therefore his reference to the Bible is a little surprising, but should not be viewed as evidence of the influence of Catholic thought on the judge.

<sup>186</sup> [2006] IR 374, 502. I Kings 3:16-28 is the famous biblical story of King Solomon and his false threat to cut a child in two in order to discover the identity of the child's mother.

<sup>187</sup> [2006] IR 374, 502.

<sup>188</sup> *Re G. (Children)* [2006] 4 AER 241.



'The applicants are the natural parents of the child and are now married to each other. These persons constitute a family within the meaning of Article 41 of the Constitution. The institution of the family is there defined "as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law". Moreover, by Article 42, this family possesses the status of "the primary and natural educator of the child", extending to the right and duty to provide religious and moral, intellectual, physical and social education. This plainly involves the proposition that the parents have, and are entitled to have, the custody and society of the child on a day to day basis. These provisions clearly put the applicants in a strong position.'

<sup>189</sup>

McGuinness J allowed the appeal in the Baby Ann case and expressed grave reservations about the position of the child in the Constitution admitting that she was one of those: '...who have voiced criticism of the position of the child in the Constitution. I did so publicly in the report of the Kilkenny Incest Inquiry in 1993. The present case must, however, be decided under the Constitution and the law as it now stands. With reluctance and some regret I would allow this appeal.'

<sup>190</sup> It is clear that the preference for placing children with their biological parents is not unique to Catholic thought. However, the reasons for this position in the Irish context are reflective of a Catholic ethos and any similarity with other jurisdictions is coincidental. McGuinness J has questioned its suitability in protecting children but is still bound to uphold it. In contrast, Hardiman J upholds the provisions, not because he believes in Catholic thought, but because the principle of subsidiarity happens to coincide with an idea of minimalist government which he appears to find attractive. Therefore, the view that government has a minimalist role is employed not to protect the family's morality but to provide it with freedom from the State. According to this liberal idea familial independence is necessary to protect it from excessive State interference. But the difference between this idea and subsidiarity is that instead of freeing the individual from state interference to be subjected to Church control, the individual is freed to follow her own conscience.

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<sup>189</sup> [2006] IR 374, 501.

<sup>190</sup> Ibid. 498. Kilkelly argues that the constitutional position of the family, based on marriage, made it 'virtually impossible for baby Ann to be adopted regardless of the benefits of that decision for baby Ann herself. While it is difficult to say with certainty whether the Supreme Court would have reached the same conclusion were it required to give due consideration to the rights of baby Ann as part of its decision-making process, it would nonetheless have resulted in a judgment that at least recognised that the child involved also had rights that are worthy of consideration...the Baby Ann case makes clear that the current constitutional provision involves the operation of a strong presumption in favour of respect for the integrity of the marital family as opposed to any decision based on the merits of what is in the individual child's interests.' Ursula Kilkelly, 'Children's Rights and the Family: Myth and Reality', (Spring, 2008) *Studies* 97, p.15.

In the context of the family the most fundamental change in the Constitution which contravenes Catholic thought has been to provide for divorce in Article 41.3.2. Article 41 now reads uneasily as it claims to protect marriage as a moral institution possessing inalienable rights, but yet the next provision provides for divorce. This provision is the only change that has taken place in the Constitution in relation to the family. The incongruity between the text of the Constitution and the reality of modern Ireland is particularly clear in the fact that the Courts are unable to grant the same constitutional rights to non-marital families as marital ones. Because of the clear influence of Catholic thought on the Articles, the Courts could not but be influenced by Catholic thought in their interpretation of Articles 41 and 42. McGuinness J has expressed her reservations regarding Articles 41 and 42 but her role is limited to interpreting the Constitution. Walsh and Gavan Duffy JJ tended to adopt a stronger view of the family which closely resembles Catholic thought. Generally, the judiciary has tended to interpret the text of Articles 41 and 42 in a manner which is in line with Catholic thought, particularly the line of jurisprudence since Walsh J's judgment in *Nicolau*. Therefore, with regard to the definition of the family and judicial opposition to same sex marriage<sup>191</sup>, it may be said that the judiciary has adopted a position of which the Catholic hierarchy would approve.

There was evidence of a weakening of the judicial view of the autonomy of the family unit in *Re Article 26 and the Adoption Bill, 1987*<sup>192</sup> (at least in the context of adoption) and in the striking down of s.12 of the Adoption Act, 1952 in *M* the Courts followed a jurisprudential line which is more difficult to reconcile with Catholic social teaching.<sup>193</sup> Familial autonomy and a preference for biological and married parents are principals that are not unique to Catholic thought. While the drafters of Articles 41 and 42 were

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<sup>191</sup> Civil Registration Act 2004, s. 2(2) (e) provides '(2) For the purposes of this Act there is an impediment to a marriage if – (e) both parties are of the same sex.' In *Zappone and Gilligan v Revenue Commissioner* (High Court, 14 December 2006) Dunne J rejected the plaintiffs attempt to have their Canadian same-sex Canadian marriage recognized in Irish law. The judge rejected the argument that the definition of marriage as a union of an opposite sex couple was a 'fossilised' understanding of marriage; the judge also rejected the argument there was evidence of a changing consensus on same sex marriage despite the fact that it was legal in countries such as Canada, South Africa, and the Netherlands; and the judge also expressed surprise that counsel for the plaintiffs had not challenged the constitutionality of s.2(2) of the 2004 Act.

<sup>192</sup> [1985] IR 656.

<sup>193</sup> See chapter 3.

influenced by Catholic thought, the judiciary have viewed the provisions through the prism of secular ideological views and thereby a judge can arrive at a conclusion that is in line with Catholic thought but which does not uniquely reflect a Catholic view. A judicial shift has taken place from Gavan Duffy J's confessional interpretation of Articles 41 and 42 to the broader contemporary interpretation which embraces non-Catholic ideological views. The judicial emphasis on the coincidence of views between Catholicism and other philosophical positions on the family tends to eschew Catholicity and deemphasise a non-pluralist interpretation of Articles 41 and 42.

### Education

The Catholic Church's dominant role in education has been closely guarded by the hierarchy from State interference. It exemplifies what J. Whyte describes as the Church's unique power over the nation's conscience.<sup>194</sup> The centrality of the education system in mediating cultural norms to generations was recognised by the Catholic hierarchy and the State's acceptance of the Church's control of education ensured denominationalism formed the backbone of the education system. Opposition to non-denominationalism was not limited to the Catholic Church, as the Church of Ireland also opposed a multi-religious scholastic system. This ceding of control from the people to a religious authority raises broader questions regarding pluralism and democracy.<sup>195</sup> The Courts have upheld denominational education which is provided for in the Constitution (albeit not explicitly) through the State's obligation to provide for free primary education and to endeavour to supplement and give reasonable aid to private and corporate educational initiative.<sup>196</sup> These provisions helped to maintain the continuity which exists in education

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<sup>194</sup> Similarly, Clarke writes that the Church's control of education may be explained by 'the timidity of state authorities, for almost two centuries, in facing up to the political power and astuteness of the churches... It is fundamentally explained by the success of the churches in controlling, not only the relatively meagre educational resources which were available at first and second level in recent times, but also the *beliefs* of the citizens on which their tolerance of church control ultimately rests.' Desmond Clarke, *Church and State*, Cork University Press, Cork, 1985, p.196 [Emphasis in original].

<sup>195</sup> These are beyond the scope of this thesis.

<sup>196</sup> As Hardiman J stated in *O'Keefe v Hickey* [2008] IESC 72 'The distinction between "providing for" and "providing" lies at the heart of the distinction between a largely State funded but entirely clerically administered system of education on the one hand and a State system of education on the one hand'. The state's refusal to provide for free secondary education copper-fastened existing social inequalities as secondary education was seen as the exclusive domain of the better off. Entry to secondary education was dependent on economics more than academic merit.

policy in Ireland since the nineteenth century.<sup>197</sup> There is however a clear dichotomy in Articles 42 and 44 between liberal and Catholic thought.<sup>198</sup> Article 42 also disingenuously claims to be parent-centred, when in reality education is largely controlled by the Catholic hierarchy with little parental involvement, with the result that the references to parents' rights in Article 42 'could be regarded as constitutional protection, by proxy as it were, for the interests of the churches.'<sup>199</sup> Therefore, the role of Church and State in education has been marked by continuity and considerable deference on the part of the State to the wishes of the Catholic hierarchy. While according to constitutional theory parents have a wide choice of primary schools, in reality there are few alternatives to denominational schools.

The view that Article 42 invokes the principle of denominationalism and a minimalist view of the role of the State in educating children was supported in *Crowley v Ireland*.<sup>200</sup> The case involved a dispute over the appointment of a principal to Drimoleague National School which led to disruption in the education of children in three schools in the parish. Initially, the department of education did not attempt to provide alternative education for the children but in January 1978 it provided buses to transport children to national schools in adjoining parishes. An order was sought directing the State to provide free primary education for the children. While the High Court ruled that the State had acted unconstitutionally in failing to provide the children with free primary education up to January 1978, this ruling was overturned by the Supreme Court. Kenny J noted: 'the enormous power which control of education gives was denied to the State; there was interposed between the State and the child the manager or the committee or the board of management.'<sup>201</sup> As the patron to the school would invariably be a member of the clergy this vesting of 'enormous' power may also be defined as securing the Church's

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<sup>197</sup> See chapter 1.

<sup>198</sup> The influence of liberal thought is evident in the references to the prohibition on discrimination on denominational grounds in the provision of state assistance for schools, the right not to receive religious instruction in school and the ban on state endowment of religion. Catholic thought is evident in the central role of the family in educating children, the role of the State is limited to providing for education, and the State will only intervene in the family in exceptional circumstances. See Gerry Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis', (1990-92) *Irish Jurist* 25-27, p.69.

<sup>199</sup> *Ibid.* p.73.

<sup>200</sup> [1980] IR 102.

<sup>201</sup> *Ibid.* 127.

controlling role in education. As the State did not control education the Constitution recognised the historical reality that the education system was denominational and clerically controlled. O'Higgins CJ stated that Article 42.4:

'...was intended to avoid imposing a mandatory obligation on the State directly to provide free primary education. Such, if imposed, might have led to the provision of free primary education in exclusively State schools. Rather was it intended that the State should ensure by the arrangements it made that free primary education would be provided. When one remembers the long and turbulent history of the church schools in Ireland, and the sustained struggle for the right to maintain such schools by the religious authorities of all denominations in all parts of Ireland, one can well understand the care with which the words used must have been selected.'<sup>202</sup>

The Courts in upholding parental autonomy indirectly benefit the Catholic hierarchy in providing for education as in reality it is largely the Catholic Church which controls primary education. The more the Courts emphasised parental choice, the more they buttressed the denominational system. The Constitution to which judges are bound implicitly provides for a denominational system therefore judicial support for such a system, whether indirect or otherwise, is unsurprising. A further effect of this constitutional structure is that the interests of the family exist as a unit rather than being conferred on individual children. Ryan refers to the parent-centred focus of this constitutional scheme and the effect that this has on children: 'the dichotomy posed is one of parent and State, the emphasis being very much on the entitlements of adults *vis-à-vis* the State rather than on the best interests of the child. The centerpiece of this constitutional philosophy focuses on family autonomy, the main purpose being to limit State intervention in the family. The result of this philosophy is a legal framework that in its most fundamental form views children simply as an adjunct of the family, the object of an ideological struggle between the family, on the one hand, and the State on the other.'<sup>203</sup>

The position of teachers in relation to denominational education was considered in *Greally v Minister for Education*<sup>204</sup> wherein Geoghegan J upheld the constitutionality of a recruitment system for secondary school teachers that gave priority to the recruitment

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<sup>202</sup> Ibid. 122.

<sup>203</sup> Fergus Ryan, 'Children, One-Parent Families and the Law' (2006) *IJFL* 1, p.5-6.

<sup>204</sup> [1999] 1 IR 1.

of teachers to Catholic secondary schools who had taught for at least two years or more in the same Catholic school or three years or more in a different Catholic school. Geoghegan J asserted there was a constitutional obligation on the State to provide for denominational education:

‘The State could not adopt a funding scheme for secondary teachers which had the effect of destroying the denominational nature of schools requiring funding. I believe that this particular view is warranted by a reading of Article 42 of the Constitution as a whole. It is true that by its express terms the Constitution only requires funding of primary education... But if the State in fact decides to fund secondary education by paying the salaries of teachers it cannot impose conditions to that funding which would effectively destroy the denominational nature of schools requiring such funding.’<sup>205</sup>

Geoghegan J’s interpretation of Article 42 and his support for denominational education would be welcomed by the Churches in that it buttresses the status quo regarding educational policy.

### **State Endowment and Education**

While the Constitution prohibits direct State endowment of religions and the establishment of one religion (though not explicitly) there are grey areas in the provision of education where the State indirectly finances the churches. This issue arose in *McGrath and Ó Ruairc v Trustees of Maynooth College*<sup>206</sup> where the plaintiffs, who were laicised priests, argued that the statutes of Maynooth College violated Article 44.2.3 and that as Maynooth received State funding the Article applied to the college. The plaintiffs had argued that they were being discriminated against on the grounds of status under the statutes. In the Supreme Court, Henchy J in rejecting the plaintiffs’ claim stated that the State may support and buttress what appear to be disabilities and discriminations deriving from a particular religion. *McGrath* was approved in *Campaign to Separate Church and State Ltd v Minister for Education*<sup>207</sup> where the Court accepted the constitutionality of denominationally controlled secondary education. CSCS was an organisation which opposed State involvement with religion. They challenged the constitutionality of the State funding of school chaplains in community schools. CSCS asserted that the payment

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<sup>205</sup> Ibid 10-11.

<sup>206</sup> [1979] ILRM 166.

<sup>207</sup> [1998] 3 IR 321.

by the State of the salaries of chaplains appointed by religious denominations to community schools was in breach of the guarantee by the State in Article 44.2.2° ‘not to endow any religion’. They further argued that since the duties of the chaplains are, for the most part, pastoral or sacerdotal (in the case of Catholic chaplains this included the celebration of mass and the hearing of confessions), they are not confined to religious instruction in the sense in which that phrase is used in Article 44.2.4 and so the payments were unconstitutional.

Keane J (with whom Hamilton CJ and O’Flaherty J agreed) started his judgment by referring to the centrality of religion in the history and fabric of Irish society. He viewed this in a pluralist sense, to the extent that it applied to all religions equally (however given the still relatively homogenous nature of Irish society this has particular importance for Catholicism):

‘As in many other countries throughout the world, religion plays an important part in Irish life and has done so for many centuries. That unquestionable fact is reflected in the provisions of *Article 44* of the Constitution. Even were such provisions absent from the Constitution, however, courts could not disregard, at least in a context where it becomes relevant, the fact that religious beliefs and practices are interwoven through the fabric of Irish society.

It is for that reason that our law of charities, for example deriving from the statute law and common law of a former era, continues to treat trusts established for the advancement of religion as entitled to charitable status without any proof that they are for the public benefit: it is presumed that such trusts are for the public benefit. The same public policy underlies the exemption as of right of ministers of religion and others from the obligation of jury service: (see *Juries Act 1976, First Schedule, Part II*). Even had *Article 44.1*, requiring the State to ‘*respect and honour religion*’ never been enacted — and it had no counterpart in the *Constitution of the Irish Free State* — there is little reason to doubt that Irish jurisprudence would have acknowledged, as it should in a democratic society, the importance of the part played by religion in the lives of so many people.

Accordingly, if one leaves to one side for the moment the question of the ‘*endowment*’ of religion, there is no reason in principle why the State, through its different organs, should not confer benefits on religious denominations, provided — and it is, of course, a crucial proviso — that in doing so it remains neutral and does not discriminate in favour of particular religions.’<sup>208</sup>

Keane J stated that the State’s payments to school chaplains did not constitute direct endowment but relieved ‘the churches concerned of a financial burden to which they would otherwise be subject.’ He stated that:

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<sup>208</sup> Ibid.

‘...at the time the Constitution was enacted, the vast majority of secondary schools in this country were under the control and management of religious denominations. The functions of those religious who were members of the staffs of such schools extended beyond the imparting of religious instruction: they were also manifestly concerned, as are the chaplains in the present case, with ensuring that the children under their care conformed to the practices of the particular religion to which they belonged, whether through attendance at mass or other religious services or in other respects’.<sup>209</sup>

Keane J stated that a non-endowment clause was included in the proposed Home Rule legislation. The motivation behind this clause was the protection of the property of the minority Protestant religion. This provision was maintained in the 1937 Constitution. On the basis of this historical interpretation, Keane J took the view that:

‘Article 44.2.2° was thus intended to render unlawful the vesting of property or income in a religion *as such* in perpetual or quasi-perpetual form. It was not designed to render unlawful the comprehensive system of aid to denominational education which had become so central a feature of the Irish schools system and the validity of which was expressly acknowledged by the Constitution.’<sup>210</sup>

Keane J also stated that the payments were constitutionally sanctioned, having regard to the recognition in Article 42.4 of the rights of parents in relation to the religious and moral formation of their children. Keane J stated that Article 44.2.4 ‘makes it clear beyond argument, not merely that the State is entitled to provide aid to schools under the management of different religious denominations, but that such schools may also include religious instruction as a subject in their curricula.’<sup>211</sup> There may also be methodological difficulties with Keane J’s approach in the *CSCS* case as gauging the intention of the drafters of the Constitution in 1937 is fraught with difficulties. This historical form of interpretation can involve either gauging public opinion from the time or assessing the intention of the drafters based on an historical analysis.<sup>212</sup> The difficulties with this

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<sup>209</sup> Ibid. 364.

<sup>210</sup> Ibid. 365.

<sup>211</sup> Ibid. 360.

<sup>212</sup> McCrea argues that the historical approach adopted by Barrington and Keane JJ was unjustified in contemporary times and that the Court failed to address the rights of members of a minority religion to have provision made for instruction in their faith. McCrea, ‘The Supreme Court and the School Chaplains Case’, (1999), 2 *Trinity College Law Review* 19. Similarly, Glendenning criticises the judgments in *CSCS* because they failed to ‘reconcile or harmonise the tensions which arise between the right of the denominational schools to protect their ethos and the rights of children of minority religions not to be indoctrinated in denominational schools.’ Dympna Glendenning, *Religion, Education and the Law*, p.319.



approach were averted to by McCarthy J in *Norris v AG*<sup>213</sup> wherein he stated: ‘It would plainly be impossible to identify with the necessary degree of accuracy of description the standards or mores of the Irish people in 1937 – indeed, it is no easy task to do so today.’<sup>214</sup> Hogan views the personal rights in the Constitution as being deliberately vague and argues that this was done intentionally by the drafters of the Constitution. He argues that on that basis the Constitution appears to warrant a flexible approach to constitutional interpretation in light of prevailing social and cultural norms. However, the difficulty with this reasoning is that Hogan is invoking a historical form of interpretation (i.e. the intention of the drafters) to advocate interpreting the Constitution in light of contemporary norms.<sup>215</sup> However, what is important here is that Keane J’s mode of interpretation benefited a religious view against that of the *CSCS*.

Barrington J held that the Constitution distinguishes between religious ‘education’ and ‘instruction’ and that a child who did not wish to attend religious instruction at a publicly funded school could not be protected from the religious ethos of that school. This appears to qualify a child’s right under Article 44.2.4 to refuse to attend religious instruction by maintaining an artificial distinction between religious instruction and education. This has practical implications since the school curriculum is permeated by the religious ethos of the denominational school concerned. It is therefore more difficult for a child to avoid religious influence.<sup>216</sup> The integrated curriculum was introduced in 1971 because ‘the separation of religious and secular subjects into differentiated subject compartments serves only to throw the whole educational function out of focus.’<sup>217</sup>

Glendenning writes that this ‘curriculum met the long-term demands of the Catholic Church for the full integration of religious instruction with secular education for the first

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<sup>213</sup> [1984] IR 36.

<sup>214</sup> *Ibid.* 96.

<sup>215</sup> See Gerard Hogan, ‘Constitutional Interpretation’ in *The Constitution of Ireland 1937-1987* in Litton (ed.) IPA, Dublin, 1988, 191.

<sup>216</sup> See Desmond Clarke, ‘Education, the State and Sectarian Schools’ in Murphy and Twomey (eds), *Ireland’s Evolving Constitution 1937-1997: Collected Essays*, Hart, 1998, p.74. It may be the case that the integrated curriculum is an unconstitutional encroachment on a child’s right under Article 44.2.4 not to attend religious instruction at school receiving public money.

<sup>217</sup> *Curriculum na Bunscoile*, Teachers’ Handbook, Government Publications, Dublin, 1971, p.19.

time in the history of the state.’<sup>218</sup> The diversification of familial structures has placed strain on religious norms and practice and has impacted on the capacity of denominational schools to maintain their ethos. A further difficulty for religious orders is the decline in vocations which has further diluted their ability to maintain their denominational ethos. This has also led to a huge decrease in the number of teachers from religious orders. Therefore, while the Courts have upheld the right to a denominational education and the protection of a school’s religious ethos, the changes in the social and cultural structure of Irish society are likely to have a more profound effect on schooling than the jurisprudence of the Courts. The Courts’ support for the *status quo* has to some extent been overtaken by curricular and pedagogical changes which Fuller describes as having:

‘...altered fundamentally the nature of Catholic schooling in the 1960s and 1970s. The very fact, that lay Catholics, be they parents or teachers, were demanding a say, and that schoolchildren were encouraged to question, implied that Catholic culture had changed significantly and would change further in the years ahead. These developments heralded the end of the conformity which had typified Catholicism in the 1950s. The ethos of education had changed fundamentally in a way that no amount of structural concessions could assuage.’<sup>219</sup>

The Courts’ preference for a historical form of interpretation in relation to Article 42 tends to fossilise the role of education in society and is blinkered from broader cultural and social attitudinal changes in contemporary society. The Courts have tended to favour the interests of the religious in relation to education and placed an intrinsic value on religion as a basic good. This has conferred a particular advantage on the Catholic Church because of the relatively homogenous nature of Irish society. However, the Protestant Churches, whether wishing to maintain denominationalism or the in-direct State endowment of religions, have also benefited from the Courts’ support.

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<sup>218</sup> Dymna Glendenning, *Religion, Education and the Law*, Tottel Publishing, Dublin, 2008, p.320.

<sup>219</sup> Louise Fuller, *Irish Catholicism since 1950*, p.162. Despite these changes there was still a strong emphasis on religious instruction evident in the *Rules for National Schools (1965)* which stated: ‘Of all parts of a school curriculum Religious Instruction is by far the most important, as its subject-matter, God’s honour and service, includes the proper use of all man’s faculties, and affords the most powerful inducements to their proper use. Religious instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school.’ *Rules for national schools (1965)* Rule 68, p.38.

The Courts have tended to decide cases in the area of education in a manner which is in line with Catholic thought. The Courts have upheld denominational education<sup>220</sup>; they have protected the religious ethos of schools against an individual's right to privacy<sup>221</sup>; they protected the rights of parents in educating their children and thereby indirectly supported the Catholic Church's role in education<sup>222</sup>; and they have upheld parental authority in the religious education of their children<sup>223</sup>. There is no evidence of the Courts deciding a case in the area of education in a manner which could be defined as directly contravening the Church's moral teachings. However, while the above cases have benefited the Catholic Church owing to its demographic position, the other Churches have also benefited. Therefore, the Courts could not be described as having privileged the rights of Catholics above those of other religions in its interpretation of the education provisions in the Constitution. It is also clear that the Constitution provides for denominational education because of the emphasis placed on parental choice.<sup>224</sup> While there has been evidence of a move away from denominational education in recent years the Catholic hierarchy has maintained a dominant role in the provision of education in Ireland.<sup>225</sup> The Courts' role has been modest in this area. The system of denominationalism is deeply entrenched in Irish society and is difficult to reconcile with changing cultural mores and pluralist ideas based on ecumenical dialogue and diversity. While the Courts have played an important transformative role, vis-à-vis Church-State relations, in areas such as contraception and abortion, change in education is more likely to come from social and political organisation than from judicial initiative.

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<sup>220</sup> See *Crowley v Ireland* [1980] IR 102.

<sup>221</sup> See *Flynn v Power* [1985] ILRM 336. See Chapter 7.

<sup>222</sup> See *Re Article 26 School Attendance Bill, 1942* [1943] IR 334.

<sup>223</sup> See *Burke and O'Reilly v Burke and Quail* [1951] IR 216.

<sup>224</sup> In a 1995 White Paper on Education it was concluded that the State was restricted in the scope of any new legislation concerning education as the Constitution recognises the rights and duties of parents as the primary and natural educators of their children and because of the property rights of religious denominations. See Government White Paper, *Charting Our Education Future Together*, Government Publications, Dublin, 1995.

<sup>225</sup> At the time of writing there have been calls for the introduction of a state run primary school system. These calls come in the light of Ryan J's (previously Laffoy J's) report into the abuse of children in industrial schools run by various religious congregations. See the *Commission to Inquire into Child Abuse* (2009) and the comments of government chief whip, Pat Carey that this may be the time for the State to 'take on its responsibilities for delivering an education system.' See *Irish Times*, 6 June 2009.

The Courts have been prepared to support religious groups within society on the basis that religion can contribute to the common good. The Courts have also upheld elements of the Constitution that stem, philosophically, from Catholic social teaching. Therefore, the Courts have upheld the constitutional protection for the family based on marriage, the right of parents to educate their children, the right to familial autonomy and the denominational education system. These lines of jurisprudence are different to the liberalism evident in the majority in *McGee*, minority in *Norris* and majority in *X*. They demonstrate that while laws which were viewed as enforcing a particular religious view would be subjected to a greater degree of scrutiny, laws which privileged religion generally would not be subjected to the same degree of scrutiny. The majority in *Norris* represents a more traditional view. However, the moral presuppositions underpinning the 1861 Act do not stem from the period in which the Catholic Church was at the peak of its powers as was the case with the legislation that was struck down in *McGee* and *M*. The legislation in question was not as politically sensitive as e.g. the Criminal Law Amendment Act, 1935 which is influenced by the confessional culture in which it was drafted.<sup>226</sup> The judiciary's interpretation of Articles 41 and 42 has tended to be in line with Catholic thought. However, the fact that Articles 41 and 42 also reflect non-Catholic ideological views deemphasises their confessional character in favour of a more pluralist view. There is evidence of the Courts privileging the rights of the religious in excluding religious groups from certain laws of general application. This is not evidence of Catholicity but of a belief that religion can contribute to the common good.

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<sup>226</sup> In contrast there is no evidence of Catholicity in the judiciary's interpretation of Article 43 despite being influenced by Catholic thought.

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## Chapter 6 The Right to Life and the Decline of the Catholic Counter Revolution

In June 1993 the Irish Conference of Bishops issued a statement in which they asserted that ‘...the Church is independent of State law. No change in State law can change the moral law. New civil laws cannot make what is wrong right...*laws which bear on moral issues, should not be seen in terms of the State’s upholding or not upholding Church teaching. The Church does not expect that acts which are sinful should, by that very fact, be made criminal offences.* All such laws bearing on moral issues must be assessed in the light of the way in which they contribute or fail to contribute to the common good of society.’<sup>1</sup> This statement reflects the shift which had taken place in the Church’s definition of its relationship with the State, from an assertive and coercive one, to a role which is more passive, reflecting a difference in approach since Vatican II as the Church became more influenced by ideas such as social justice and ecumenism. The Church would render unto Caesar what was Caesar’s and in doing so, while maintaining a right to criticise, allow the institutions of the State to adopt a more secular approach in both policy and law. However, during the Pontificates of John Paul II and Benedict XVI there has been a conservative counter revolution against the Vatican II reforms, as it was felt these had undermined traditional Catholic values which had previously been viewed as immutable.<sup>2</sup>

In the 1990s it appeared that the position of those advocating that civil laws in Ireland should resemble the moral teachings of the Catholic Church was becoming increasingly more precarious. The State’s laws appeared to be becoming more secular as bans on homosexual acts, contraception and divorce were lifted and in the wake of *X* it was legal for a woman to have an abortion in certain limited circumstances. Even had the Church continued to adopt an interventionist approach, the likelihood is that this process of secularisation which was in train would still have happened. The Church, arguably, recognised the shifting social and cultural

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<sup>1</sup> *The Irish Times*, 23 June 1993. (Emphasis added)

<sup>2</sup> Recently, Benedict XVI in a letter to Irish Catholics concerning the clerical abuse of children, which was read by priests to their congregations on 19 March 2010 criticised the secularisation of society and the Vatican II reforms which were ‘sometimes misinterpreted and indeed, in light of the profound social changes that were taking place, it was far from easy to know how best to implement [them].’ *Pastoral Letter to the Catholics of Ireland*, 10 March 2010.

[http://www.vatican.va/holy\\_father/benedict\\_xvi/letters/2010/documents/hf\\_ben-xvi\\_let\\_20100319\\_church-ireland\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland_en.html).

climate and accordingly adopted a position which would best protect it against this new reality.<sup>3</sup> However, as cultural and social paradigms shifted dramatically, the Church's position on issues such as contraception, divorce, and homosexuality appeared to be increasingly anomalous.<sup>4</sup> However, on the issue of abortion there was greater support for the position of the Church hierarchy and for this reason it remains an unresolved, socially divisive issue, which was central to a number of legal cases over the last twenty years, as well as three separate referendums and much debate and political division.<sup>5</sup> In this chapter I examine how the Courts initially interpreted the Eighth Amendment in a manner which the Catholic Church would have approved but this was to change dramatically in the X-Case. I examine these cases within the context of an increasingly more liberal, secular and culturally divided society. I argue that while the Eighth Amendment was the result of lay Catholic lobbying the Courts since the X-Case have interpreted it in a manner that is not in line with that advocated by the Catholic Church. However, while the Courts' interpretation of Article 40.3.3 is not in line with Catholic morality the fact that the Church recognised that civil laws could not always mirror Church laws indicates that the Courts' position may be reconcilable with the post-Vatican II Church.

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<sup>3</sup> Maire Nic Giolla Phadraig points to the mass media, public administration, and business as important areas of life in Ireland in which the Church does not participate. She also states that 'There has been a growing distance between bishops and politicians with regard to social policy and family law. In the final analysis, the surrender of sovereignty by joining the European Community has interposed a set of institutions and higher courts which can repulse attempts to retain a traditional Catholic approach to legislation. The direct sphere of influence is also limited in many respects, to a declining constituency of orthodox Catholics.' Maire Nic Giolla Phadraig 'The Power of the Catholic Church in the Republic of Ireland' *Irish Society Sociological Perspectives* IPA, Dublin, p.617. Christopher Whelan connects processes of secularisation with higher standards of education arguing that 'those with longer educational exposure to rationalising influences' would be expected to diverge more from traditional values and behaviour. Christopher Whelan, *Values and Social Change in Ireland*, Gill & Macmillan, Dublin, 1994, p.9

<sup>4</sup> Certain statements on abortion from the Holy See could also be viewed as anomalous e.g. in March 1993 Pope John Paul II called on Bosnian rape victims not to have abortions but to 'transform the act of violence you have suffered into an act of love and welcoming'. In response to the Pope's statement Italian anthropologist, Ida Maglia stated that 'this is an absurd call from the Pope. He should limit himself to condemning the Serb rapists and not judge the decisions of the women.' Quoted in *The Irish Times*, 6 March 1993.

<sup>5</sup> In a survey conducted in 1990 (two years before X) respondents were asked whether they approved or disapproved of abortion under the following circumstances: (a) where the mother's health is at risk by pregnancy, (b) where the child is likely to be physically handicapped, (c) where the woman is not married, and (d) where the married couple do not want to have more children. According to the survey the only circumstance where a majority of people approved of abortion was where there was a risk to the life of the mother (65% while the European average was 92%). 32% accepted abortion under heading (b), and 8% under headings (c) and (d). This appears to indicate that the position of a majority of the Irish population at this time would have been broadly in line with that advocated by the Catholic hierarchy. Christopher Whelan, *Values and Social Change in Ireland*, p.36.

### When Life Begins

It is not clear from the Eighth Amendment when the Constitution envisages life as beginning.<sup>6</sup> If life begins at conception it may be argued that the unborn foetus has the same constitutional rights as the mother.<sup>7</sup> In *MR v TR*<sup>8</sup> McGovern J refused to decide on the issue of when life begins. The plaintiff had claimed that three embryos, created using in vitro fertilisation technology, should have been afforded the protection given to the unborn under the Constitution. However, the High Court decided that the three frozen embryos were not 'unborn' for the purpose of Article 40.3.3 of the Constitution and it is a matter for the Oireachtas to decide on their legal status. Despite having heard expert evidence from scientists concerning the issue, he ruled it was not for the Court to decide on what was a complex social and moral issue. However, the judge asserted 'It seems to me that in the absence of any rules or regulations in this jurisdiction embryos outside the womb have a very precarious existence'<sup>9</sup> and that 'it is a matter for the Oireachtas to decide what steps should be taken to establish the legal status of embryos in vitro.'<sup>10</sup> The Catholic Archbishop of Dublin, Dr Martin, expressed concern about the ruling stating it was the clear teaching of the Catholic Church that 'human life must be respected and protected absolutely from the moment of conception. From the first moment of his or her existence, a human being must be recognised as having the rights of a person.'<sup>11</sup> The case was

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<sup>6</sup> Michael Woods, TD in debating the proposal to amend the Constitution stated that 'Despite what would undoubtedly have been the wish of the promoters of this amendment and the majority church in this island, there is no attempt in the wording of the amendment to define the moment in which the life of the unborn begins. The amendment does not attempt to make this definition. Most, of course, would argue that it begins at the time of conception, but this is a matter of theological and scientific argument and in preparing the wording of the amendment we felt it was not appropriate to the Constitution to have such definitions.' 339 *Dáil Debates* 1386, 9 February 1983. In Kelly it is argued that the term unborn is not qualified by 'reference to any standard of viability and so it is submitted that Article 40.3.3 applies to new human life from its inception.' It is then argued that life may begin (i) when conception is complete; (ii) when the fertilised egg is implanted in the womb and (iii) human life begins with the emergence in the embryo of the primitive streak some 15 days or so after fertilisation, after which point it is no longer possible for the embryo to divide into two or more separate embryos. John Kelly, *The Irish Constitution*, p.1511.

<sup>7</sup> In *Roe v Wade* 410 US 113 (1973) Blackmun J stated that if the personhood of the foetus could be established 'the appellant's case, of course, collapses, for the foetus' right to life is then guaranteed specifically by the [Fourteenth] Amendment.' In the *Dáil* in 1983 the Attorney General argued that '...having regard to the equal rights of the unborn and the mother a doctor faced with the dilemma of saving the life of the mother knowing that to do so will terminate the life of the 'unborn' will be compelled by the wording to conclude that he can do nothing. Whatever his intentions, he will have to show equal regard of both lives, and his predominant intent will not be a factor.' This interpretation of the wording of the Eighth Amendment turned out to be incorrect. 340 *Dáil Debates* 473, 17 February 1983.

<sup>8</sup> [2006] IEHC 359 (15 November 2006).

<sup>9</sup> *Ibid.* 23.

<sup>10</sup> *Ibid.* 26.

<sup>11</sup> *Irish Independent*, 16 November 2006.

appealed to the Supreme Court who unanimously confirmed the High Court judgment. The Supreme Court ruled that frozen embryos did not come within the parameters of the protection which the 'unborn' received under Article 40.3.3. Denham J stated that 'The concept of the unborn envisages a state of being born, the potential to be born, the capacity to be born, which occurs only after the embryo has been implanted in the uterus of a mother.'<sup>12</sup> The Court recognised that Article 40.3.3 is based on balancing the right to life of the mother against that of the unborn. Geoghegan J stated that in the case of a clash between the right to life of the unborn and the mother, the mother's life has priority. The Supreme Court's views on the parameters of Article 40.3.3 are not in accordance with those of the Catholic Church that human life must be 'absolutely protected from the moment of conception'.

### **The Right to Privacy and Post-Eighth Amendment Jurisprudence**

The position of the Irish courts appeared to be that the right to privacy did not extend to a right to have an abortion. In *McGee* Griffin J emphasised that his judgment was confined to contraceptives and did not apply to abortifacients, while Walsh J stated: '...any action on the part of either the husband and wife or of the State to limit family size by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.'<sup>13</sup> Similarly, in *G v An Bord Uchtála*<sup>14</sup> Walsh J stated that the unborn foetus had: 'a right to life itself and the right to be guaranteed against all threats directed to its existence whether before or after birth.'<sup>15</sup> In *Norris*<sup>16</sup> McCarthy J described abortion as 'an act which would involve depriving the unborn of the most fundamental right of all – the right to life.' He also said '...I am content to say that the provisions of the preamble...would appear to lean heavily against any view other than that the right to life of the unborn is a sacred trust to which all the organs of government must lend their support.'<sup>17</sup> In *Re Article 26 and Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*<sup>18</sup> the Supreme Court acknowledged that prior to 1983, the

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<sup>12</sup> [2009] IESC 82

<sup>13</sup> *McGee v AG* [1974] IR 284, 312.

<sup>14</sup> *G v An Bord Uchtála* [1980] IR 32.

<sup>15</sup> *Ibid.* 69.

<sup>16</sup> *Norris v AG* [1984] IR 36.

<sup>17</sup> *Ibid.* 103.

<sup>18</sup> *Re Article 26 and Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.



right to life of the unborn was clearly recognised by the Courts as one of the unenumerated personal rights protected by Article 40.3.

The first case relating to abortion after the Eighth Amendment was *The Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open Door Counselling Ltd*<sup>19</sup> in which the Supreme Court relied on the Eighth Amendment in granting an injunction restraining two counselling agencies from assisting women to travel abroad to obtain abortions by referral to a clinic, by making travel arrangements or providing them with information on abortion clinics. Finlay CJ stated that the issue which the Court had to determine was whether or not the defendants were assisting in the destruction of the life of the unborn. He stated he was satisfied that the defendants were assisting in the ultimate destruction of the life of the unborn by abortion in that they were helping the pregnant woman who had decided upon the option to 'get in touch with a clinic in Great Britain which would provide the service of abortion'.<sup>20</sup>

In *SPUC v Grogan (No.1)*<sup>21</sup> the plaintiffs sought an injunction restraining members of three students' unions from distributing information relating to abortion services available outside the

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<sup>19</sup> *The Attorney General (Society for the Protection of Unborn Children (Ireland) Ltd) v Open Door Counselling Ltd*. [1988] IR 593.

<sup>20</sup> Ibid. 624. The defendants appealed to the *European Court of Human Rights in Open Door Counseling Ltd and Dublin Well Woman Ltd v Ireland* (1993) 15 EHRR 244 claiming that the injunction granted by the Supreme Court violated Art.10 of the Convention (freedom of expression). The Court agreed with their argument by an eight-five majority stating that the restriction on applicant's freedom to impart information was 'prescribed by law' within the meaning of the proviso to the guarantee of freedom of expression contained in Art. 10(2) of the Convention. While the court stated it was acceptable for the Irish government to seek the protection of morals, the court held that the impugned restriction was disproportionate to the aim pursued and therefore violated Art. 10.

<sup>21</sup> *SPUC v Grogan (No.1)* [1989] IR 753. It should be noted in *SPUC v Coogan* [1989] IR 548 the members of SPUC sought an injunction preventing students from publishing the names and addresses of abortion clinics in the United Kingdom. Carroll J rejected their application in the High Court on the grounds that they did not have the necessary *locus standi*. The plaintiffs appealed to the Supreme Court where they successfully established their *locus standi*. Finlay CJ giving the majority judgment stated that the Courts should respond to a request that the right to life of the unborn be protected when their jurisdiction was invoked 'by a party who has a *bona fide* concern and interest' for the protection of that right. In the case of the right to life of the unborn 'there can never be a victim or potential victim who can sue'. If the Attorney General alone was entitled to act, there would be 'a major curtailment of the duty and power of the courts to defend and uphold the Constitution'. Ibid. 742. The appeal was therefore allowed. McCarthy J in a dissenting judgment asserted that if the State itself were to act so as to be in breach of Article 40.3.3 of the Constitution, 'it must *a priori* be open to any citizen to call the judicial organ of government in aid. If the feared breach is through the act of some other body, immediacy may require a personal initiation of the suit.' The only requirement in such circumstances would be *bona fide* interest. But McCarthy J believed that only the Attorney General could pursue such a claim to judgment. The only consideration setting the Plaintiff society apart from other citizens with a *bona fide* concern was its participation in the earlier *Open Door (No.1)* case, which he stated was not material. He then asserted his concern at the private enforcement of the Constitution by any

jurisdiction.<sup>22</sup> The Supreme Court granted the injunction on appeal. Finlay CJ rejected the attempt to distinguish the *Open Door* case from the case before him on the grounds that 'it is clearly the fact that such information is conveyed to pregnant women, and not the method of communication, which creates the unconstitutional illegality.'<sup>23</sup> Walsh J asserted that the provision of assistance by way of information 'in a broadcast manner to all pregnant women whether married or unmarried' was 'not a lesser infringement of the Constitution than was impugned in the 'one to one' form of assistance and by its nature is greater and more indiscriminate'. The Court was saying that the application for the injunction referred to an activity which had already been declared to be unconstitutional.

In *Grogan (No.1)*<sup>24</sup> Walsh J set out his own opposition to abortion apparently on grounds that it would be contrary to public morality:

'The fact that abortion is virtually available on demand in some of the member states can scarcely be regarded as a criterion. Although the provision of abortions within the law in particular Member States provides profit for those engaged in it that could scarcely qualify it to be described as a service of economic significance of a type which must be available in all Member States of the Communities, especially when it is manifestly contrary not only to the public morality of the Member State in question and to the *ordre public* but also destructive of the most fundamental of all human rights, namely, the right to life itself. The fact that particular activities, even grossly immoral ones, may be permitted to a greater or lesser extent in some Member States does not mean that they are to be considered to be within the objectives of the treaties of the European Communities.'<sup>25</sup>

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person or group, 'however, well intentioned', through seeking undertakings from other individuals. He stated that the 'implications for a free society of such a claim are alarming.' Ibid. 751.

<sup>22</sup> Carroll J, in the High Court, exercised her discretion pursuant to Article 177 of the Treaty of Rome, to refer the case to the Court of Justice for a preliminary ruling. It was while the parties were awaiting the ruling that the Supreme Court granted the injunction. The preliminary ruling of the Court of Justice stated that a lawful abortion could constitute a service within the meaning of Art 60 of the Treaty of Rome (*Society for the Protection of Unborn Children (Ireland) Ltd v Grogan (No. 2)* [1992] IRLM 46.) However, the Court ruled that it was lawful for the Irish Courts to prohibit the defendants from disseminating information on abortion clinics where those clinics have no involvement in the distribution of the information. The implication of the ruling was that agencies having a commercial relationship with foreign abortion clinics were entitled, under European law, to circulate information in Ireland about the services provided. In *The Society for the Protection of Unborn Children (Ireland) Ltd v Grogan (No 4)*, [1994] 1 IR 46 the defendants had claimed that the right under EC law to travel to the UK to obtain an abortion meant the existence of a collateral right to receive information relating to the abortion clinics and therefore the defendants had a right to provide women with this information. This contention was rejected by Morris J on the basis that it completely ignored the earlier finding of the European Court of Justice that a prohibition on students' associations disseminating information about abortion services did not contravene EC law. In *Grogan (No.4)* [1994] 1 IR 46 Morris J on the basis of the preliminary ruling in *Grogan (No.2)* granted a permanent injunction to SPUC.

<sup>23</sup> [1989] IR 753, 764.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid. 769.

Judges frequently make moral distinctions and presuppositions that are influenced by non-legal influences such as political views, class, and religious beliefs or non-beliefs. Law itself is based on certain moral presuppositions e.g. murder is morally wrong therefore it is a crime. This is an uncontested moral belief. The morality or otherwise of abortion on the other hand is contested. Walsh J hinted that he viewed abortion as ‘grossly immoral’ and that it is contrary to ‘public morality’. Walsh J bases his moral condemnation of abortion on the fact that he views it as a violation on the right to life. Walsh J’s strong personal opposition to abortion was to be echoed some years later when O’Hanlon J, in March 1997, then retired from the High Court, called for a referendum to outlaw abortion ‘in all circumstances’ and criticised *X* as providing no restraint on when abortions could be performed as ‘it could take place right up to full term’.<sup>26</sup> He also criticised the Abortion Information Act which provided for the free communication of information on abortion ‘regardless of how barbaric’ the laws might be in a particular country.<sup>27</sup> While the Courts had shown favour towards those who opposed abortion the Supreme Court was to resile from that position in *X* and in doing so angered many and further exposed the divisions in Irish society.

#### Attorney General v X: The Facts

If it was accepted that a woman had a limited right to an abortion the question which arose prior to *X* was the scope of that right.<sup>28</sup> It was unclear whether the right to life meant only the right to stay alive or whether quality of life was a factor to be considered as well.<sup>29</sup> Viewing the Eighth

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<sup>26</sup> *The Irish Times*, 1 March 1997.

<sup>27</sup> It should be noted that as a result of lobbying from anti-abortion groups and in reaction to the judgment of the European Court of Justice in *SPUC v Grogan (No.2)* the government lobbied other member states of the European Union for the inclusion of what was to become Protocol No 17 to the Treaty on European Union (Maastricht Treaty) which states: ‘Nothing on the Treaty on the European Union or in the Treaties establishing the European Communities or in the Treaties or Acts modifying or supplementing those Treaties shall effect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.’ While doubts have been expressed as to the legal validity of the protocol it would appear to shield any domestic prohibition on abortion from the effects of EC law.

<sup>28</sup> It may be that what was being protected was the common law right for a woman to have an abortion in certain limited circumstances. In *R v Bourne* [1938] 3 All ER 612 Macnaughten J instructed the jury not to convict a gynaecologist of an offence under section 58 of the 1861 Act if they were satisfied that he had acted in good faith to preserve the life of the woman. The judge stated that a surgeon would be obliged to carry out an abortion where the consequence of the pregnancy would be to make the mother a physical and mental wreck. It unclear whether or not *Bourne* ever constituted the law in Ireland, although in *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan (No.5)* [1998] 4 IR 343, 381-82 Keane J commented that ‘the preponderance of judicial opinion would suggest that the *Bourne* approach could not have been adopted in this country consistently with the Constitution prior to the Eighth Amendment.’

<sup>29</sup> In *G v An Bord Uchtala* [1980] IR 32, 69 Walsh J stated *obiter* that ‘The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing, and habitation’ Walsh J was applying these human

Amendment in the context of other constitutional rights, such as the right to bodily integrity, would appear to indicate the presence of a constitutional right beyond merely a narrow right to live, but also a right to a certain quality of life. The provision does not require that in the case of a conflict the right to life of the unborn foetus and the mother be treated as equals (this despite the confusing use of the word 'equal' right to life of the mother) as clearly the life of the foetus is dependant on the mother. Therefore, where there was a conflict the right to life of the mother had to prevail over the right to life of the unborn foetus.

The X-Case has been described as the 'most controversial ever to come before an Irish court.'<sup>30</sup> X was a fourteen year old girl who had become pregnant after she was raped by a forty-one year old married man, who was a friend of X's family. The offence was one of a series of sexual offences committed against X by the man. X decided that she would terminate her pregnancy. The family informed the Gardaí that it was their intention to go to England to obtain an abortion and asked if tissue could be taken from the foetus and used as forensic evidence in any prosecution of the offender. The Gardaí sought legal advice from the offices of the Director of Public Prosecutions and were advised that such evidence would be inadmissible in any future criminal trial. The defendant then travelled to England but before the abortion could take place they were informed by the Gardaí that the Attorney General had obtained an *ex parte* interim injunction restraining her from obtaining an abortion. X and her family then returned to Ireland where *inter partes* proceedings commenced.

X was devastated at the prospect of having a child and there was clear evidence from a psychologist that she was suicidal. Prior to travelling to England she had told a Garda of her wish that it was all over and that she felt like throwing herself down a stairs. X had also commented that her death would be preferable to the situation in which she found herself. After X returned from England a clinical psychologist prepared a report stating that X had expressed a desire to kill herself and that in her current mental state she was capable of doing so, because she believed that death would be the best solution to her predicament and her death would end the

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standard rights to children and it is therefore unclear whether they would also apply to the mother of a child. It is also unclear which would prevail if there was a conflict between the child's right to be born and the mother's basic human standards. For a critique of Walsh J's reasoning in *G v An Bord Uchtala* see Desmond Clarke, 'The Role of Natural Law in Irish Constitutional Law', (1982-83) *Irish Jurist* 25-27. p. 187- 220, in particular p.207-209.

<sup>30</sup> John Kelly, *The Irish Constitution*, p.1503.

problems which she faced. The psychologist described the psychological damage that would be suffered by X if she continued her pregnancy as ‘devastating’.

### High Court

In the High Court, Costello J held that if he did not grant an injunction the life of the unborn would be in ‘real and imminent’ danger, and that the risk to X’s life ‘is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made’.<sup>31</sup> On this basis, *inter alia*, he granted the injunction to the Attorney General preventing X from leaving the jurisdiction for an abortion. X appealed to the Supreme Court.

### Supreme Court: The Majority Judgments

Peter Shanley counsel for the State had argued that an abortion would only be lawful if the death of the pregnant woman was almost inevitable and that risk was all but inevitable. Crucially, counsel accepted that there was a right to an abortion under the Eighth Amendment and therefore what was at issue was the scope of that right. Shanley accepted that ‘the mother’s life may be superior to the right to life of the unborn because of her other constitutional rights and duties’.<sup>32</sup> The State’s acceptance that the mother’s life could be interpreted as being superior to the life of the unborn increased the likelihood of the Court allowing X’s appeal.

Finlay CJ held that the correct interpretation of the Art. 40.3.3 was:

‘...if it can be established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40.3.3.’<sup>33</sup>

Finlay CJ interpreted Article 40.3.3 in the context of the ‘...position of the mother within a family group on whom she is dependant, with, in other instances, persons who are dependant upon her and her interaction with other citizens and members of society in the area in which her activities occur.’<sup>34</sup> Finlay CJ concluded, based on the psychologist’s evidence, that the threat to X’s life could not be monitored and that X satisfied the test he had set out. Similarly, Egan J held that the correct interpretation of Art. 40.3.3 was whether there was a risk to the life of the

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<sup>31</sup> [1992] 1 IR 1, 12.

<sup>32</sup> *Ibid.* 35.

<sup>33</sup> [1992] 1 IR 54-55.

<sup>34</sup> *Ibid.*

mother. O'Flaherty J held that danger had to represent a substantial risk to the life of the pregnant woman, although risk of imminent or immediate death was not required. He held that X was entitled to an abortion under this test. McCarthy J held that while the life of the unborn was life contingent, X was a life in being. He stated that in classifying the right to life of the woman and of the unborn in this way, he was not setting the right to life of the former above that of the latter. He stated that while he was having due regard to the equal right to life of the mother, he was 'vindicating as far as practicable, the right to life of the unborn.'<sup>35</sup> McCarthy J further accepted that abortion was permissible in certain circumstances under Art.40.3.3 as he had previously stated in *Grogan No.1*<sup>36</sup>. He also held that the purpose of the Eighth Amendment was to preclude the legislature from 'an unqualified repeal of section 58 of the Act of 1861 or otherwise, in general legalising abortion.'<sup>37</sup>

### Hederman J's Dissent

Hederman J in his dissenting judgment held that each provision of the Constitution was to be interpreted in light of the ordinary meaning of its words with due regard to the other provisions. He stated that in order for an abortion to be lawful 'the evidence required to justify the choice being made must be of such a weight and cogency as to leave open no other conclusion but that the consequences of the continuance of the pregnancy will, to an extremely high degree of probability, cost the mother her life and that any such opinion must be based on the most competent medical opinion available.'<sup>38</sup> Hederman J then questioned the strength of the evidence of the psychologist who claimed that X was suicidal. Hederman J stated that if X was suicidal then that must be guarded against by taking X into care. He then asserted 'I do not think the terms of the Eighth Amendment or indeed the terms of the Constitution before the Amendment would absolve the State from its obligation to vindicate and protect the life of a

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<sup>35</sup> Ibid. 79.

<sup>36</sup> [1989] IR 753.

<sup>37</sup> [1992] 1 IR 81. It had been submitted on appeal that the word 'laws' contained in the Eighth Amendment should be construed to mean laws enacted by the Oireachtas, and that as no laws had been enacted by the Oireachtas to vindicate or defend the right of the unborn the Court had no jurisdiction to intervene. The five members of the Supreme Court held that the absence of legislative action did not mean that the Court had to refrain from interpreting and applying constitutional provisions. The fact that the legislature had failed to legislate in the area did not mean that the Court should not determine how conflicts between the right to life of the unborn and the pregnant woman should be reconciled. O'Flaherty J held that 'Until legislation is enacted to provide otherwise...the law in this State is that surgical intervention which has the effect of terminating pregnancy bona fide undertaken to save the life of the mother where she is in danger of death is permissible under the Constitution and the law.' Ibid. 87.

<sup>38</sup> [1992] 1 IR 75.

person who had expressed the intention of self-destruction. This young girl clearly requires loving and sympathetic care and professional counselling and all the protection which the State agencies can provide or furnish.<sup>39</sup> He continued 'There could be no question whatsoever of permitting another life to be taken to deal with the situation even if the intent to self-destruct could be traced directly to the activities or the existence of another person.'<sup>40</sup>

He expressed his belief that the threat of suicide could be 'contained' as 'the duration of the pregnancy is a matter of months and it should not be impossible to guard the girl against self-destruction and preserve the life of the unborn child at the same time. The choice is between the certain death of the unborn life and a feared substantial danger of death but no degree of certainty of the mother by way of self-destruction.'<sup>41</sup> This is very similar to Costello J's reasoning in the High Court where he balanced the risk to life of the unborn against what he viewed as the lesser risk to the life of the mother. Hederman J's contention that it would be possible to supervise the mother for the duration of her pregnancy, thereby preventing her from taking her life, appears to ignore the basic difficulty in maintaining a continuous watch on her for that period, the intense emotional distress this would cause X and the possibility of a continued threat of suicide following the birth of the child.<sup>42</sup> Hederman J dismissed the appeal holding that X had not reached the high standard which he set. He also stated *obiter* that in his opinion where the continuation of the pregnancy would cause a pregnant woman to become a physical wreck, abortion would not be permissible.

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<sup>39</sup> Ibid. 82-83.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid. 83.

<sup>42</sup> David Gwynn Morgan has suggested that there was no debate regarding the possibility of a mother becoming suicidal owing to her pregnancy during the debates on the Eighth Amendment as 'perhaps it was assumed that a mother threatening suicide in effect renounced her right to life.' *Irish Times*, 10 March 1992. T.K. Whitaker asks whether in circumstances where there is clear evidence of a real and substantial danger to the life of the mother 'should a termination of pregnancy be denied by law? Would moral grounds for a denial be unequivocal?' He then writes that 'Most people would be extremely uncomfortable if the result were the loss of two lives. Ending the life of the unborn is also abhorrent but, in this agonising dilemma, would it be the lesser of two evils? If, even in such circumstances, the moral law forbids abortion, is this, perhaps, an instance where the civil law and the moral law may have to part company? That immoral actions cannot always be prohibited by the State is recognised explicitly in the bishops' statement. This seems destined to be a point of growing importance. Which law individuals should observe will remain a matter of conscience.' *Irish Times*, 15 August 1992

### **Catholic Thought and X**

The views of the majority were not influenced by the Catholic Church's opposition to abortion. While the majority in *Norris* felt bound by Christian thought and the historical condemnation of homosexual conduct, in *X* by contrast no reference was made to Christian (or specifically Catholic) opposition to abortion. Nor was there any mention of the philosophical influence of both Catholic and Christian thought on the text of the Constitution. This philosophical influence was not viewed as a potential obstacle to providing for abortion in extremely limited circumstances. Hederman J did not refer to Christian or Catholic thought in rejecting X's appeal. The judge relied on secular reasons in arriving at a position which would have been welcomed by the Catholic Church. The fact that the Catholic Church no longer necessarily expected its moral laws to be reflected in civil laws raises the possibility that the majority was not contradicting the Church hierarchy's post Vatican II perception of the State's relationship with the Church.

However, clearly the Church would assert that the position of the majority was morally wrong. The statement of the bishops did not change the Church's view that abortion was immoral. It merely recognised the practical difficulties in having civil laws reflect Church law. While the Church did not expect civil laws to reflect its laws, it did expect its member to abide by its laws. Therefore, a Catholic judge could interpret the Constitution to allow for abortion in limited circumstances without contradicting Church law. If the Church recognises that civil laws can not always mirror Church laws, the actual final result can not be 'wrong' but in fact in line with the Church's view of its relationship with the State. It is only when Catholic citizens support or procure an abortion that they are acting morally 'wrong'. If a judge decided that abortion was permissible in 1950 she would be perceived as breaching the pre-Vatican II non-ecumenical Church's rules. But following the important philosophical shift in clerical thinking as a result of Vatican II this was no longer the case.

The fact that laws which were viewed as being confessional in nature were subject to a greater degree of scrutiny following Vatican II was not an explicit factor in *X*. Opposition to abortion could not be described as uniquely reflecting a Catholic view. However, the fact that the Eighth Amendment was the result of intense lobbying from lay Catholic groups and vocal condemnation



of abortion by the Catholic hierarchy indicate Catholicism was one influence on the amendment. However, the Eighth Amendment could not be described as sectarian. It would not have antagonised Northern Protestant opinion to the same extent as the proscription on the sale and importation of contraceptives and divorce would have antagonised many within the broad Protestant tradition. Therefore, there were not the same contextualising political factors which might potentially influence the judiciary in its interpretation of the Eighth Amendment as in cases such as e.g. *McGee* and *M*. Despite this the rise of secularism and liberalism increased the likelihood of the judiciary interpreting the amendment to provide for abortion as it was seen as a legitimate if divisive option in a way that was not the case during the earlier period of greater clerical influence and interference in society. The rise of secularism and the process of deconfessionalisation meant that there was not the same moral pressure on the judiciary to remain in line with the ethos of a community that was strongly Catholic. This factor, and as stated previously the fact that the Church did not necessarily expect civil laws to mirror Church laws, increase our understanding of the broader contextualising societal changes which were taking place at the time of the judgments in *X*.

#### After *X*

Following *X*, three separate proposals to amend the Constitution were put to the electorate on 25 November 1992. Two of the proposals, inserting new paragraphs guaranteeing freedom to travel and freedom of information into Article 40.3.3, were adopted. A third proposal, to permit abortion where it was necessary to save the life, as distinct from the health, of the mother where her life was at risk from an illness or disorder other than a risk of suicide, was defeated.<sup>43</sup> Immediately following the judgments in *X* a spokesman for the hierarchy, the Bishop of Clogher, Dr Duffy, said the bishops needed time to reflect on the implications of the Supreme Court judgments and that legal provisions and the teaching of the Church did not always coincide. Des Hanafin, a leading proponent of the Eighth Amendment declared his outrage at the judgment and said that the Court had removed the constitutional protection from the unborn. Therefore it

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<sup>43</sup> This was defeated largely due to the fact that certain pro-choice and anti-abortion groups opposed the measure, the former on the basis that the proposal would dilute the principle established in *X*, and the later on the basis that it allowed for direct abortion. In 1996 the Constitutional Review Group recommended the introduction of legislation to regulate the provision of abortion in Ireland within the terms set out in *X*. *Report of the Constitution Review Group* (1996), p. 273-9. A further attempt to modify the constitutional principle stated in *X* (to exclude suicide as a ground for lawful abortion) was narrowly defeated by referendum in 2002, again due in large part to the fact that both certain pro and anti-abortion groups opposed the proposed amendment.

appears that the initial response among lay Catholic anti-abortion groups to *X* was more vocal and stronger than that of the Church hierarchy.<sup>44</sup> It is clear from the majority judgments in *X* that the conclusion that *X* was entitled to have an abortion was based on the wording of Article 40.3.3 and on a legitimate interpretation of that Article. It seems likely that societal changes which were more receptive to the idea of personal choice influenced the majority.

As Kelly has stated, the idea of the Supreme Court in 1940 ruling in favour of Mrs McGee would have been unimaginable. Similarly had the Supreme Court of 1940 examined the Eighth Amendment (had it existed at the time) it would have been unthinkable that the Court would have offered a modicum of support to the idea that abortion might be permissible in certain circumstances. Therefore, while the majority opinions represent a persuasive form of constitutional interpretation they also indicate that while divisive, abortion was now being debated as a legitimate option. This shift may be explained by reference to the influence of events such as Vatican II and secular norms on Irish society. The Court at no point felt constrained by the Catholic Church's condemnation of abortion. Costello J's judgment and Hederman J's dissent were based on the view that the threat to the life of the unborn was greater than the threat of suicide. There is no textual evidence that their position was coloured by religiously based opposition to abortion.

It should be noted that just three years after *X* in *Re Ward of Court*<sup>45</sup> Lynch J in the High Court ruled that woman who was in a near persistent vegetative state could have her gastrostomy tube removed thereby causing her to die, on the basis that it was in her best interest<sup>46</sup> and that the right to life must be viewed subject to the right to privacy, dignity and autonomy. This position was upheld by a majority in the Supreme Court. However, the Court emphasised the right of the hospital to protect its ethos<sup>47</sup> and emphasised that the ruling did not mean that the Court sanctioned 'steps to take life' and that having regard for Article 40.3.2 even in the case of the most 'horrendous disability, any course of action or treatment aimed at terminating life or

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<sup>44</sup> These comments were reported in *The Irish Times*, 7 March 1992 and in the same edition there were reports of protests outside the Dáil following the judgments in *X* by anti-abortion groups.

<sup>45</sup> *Re Ward of Court* [1996] 2 IR 79.

<sup>46</sup> See *Airedale NHS v Bland* [1993] AC 789.

<sup>47</sup> It had been accepted by both sides that the hospital could not be legally required to any act contrary to its philosophy and code of ethics. See [1996] 2 IR 79, 110

accelerating death is unlawful.’<sup>48</sup> Similarly, Flaherty J stated the case was not ‘about euthanasia’ which ‘in the strict proper sense relates to the termination of life by a positive act.’<sup>49</sup> Hamilton CJ viewed the right to die as a corollary of the right to life. Egan J dissenting, considered that the inevitable result of removal of the gastrostomy tube ‘would be to kill a human being.’ The judge viewed the right to life as the highest in the hierarchy of rights and one would require a ‘strong and cogent reason to justify the taking of life.’<sup>50</sup> During the High Court hearing two Roman Catholic theologians gave evidence expressing the view that the course which the family wished to follow was morally acceptable in the eyes of the Roman Catholic Church. Another Roman Catholic theologian called on behalf of the institution took the opposite view.<sup>51</sup> Lynch J stated that what he had ‘to decide is not the morality or otherwise of the course sought to be followed by the family but the lawfulness or otherwise of the course under the Constitution and the laws of this State’.<sup>52</sup> The judge viewed the evidence of the moral theologians as of assistance as they showed that the family was not contravening its own ethic and as the matter was *res integra* their views helped the Court to apply right reason to the issue. In the Supreme Court Denham J upheld Lynch J’s position concerning theological evidence stating: ‘The Ward and her family profess the Roman Catholic faith. Evidence was given on their behalf by two theologians. This is a Court of law, and the Constitution and law are applied, not moral law. However, the religious beliefs of the ward and her family are one of several factors for the Court to consider when evaluating the *bona fides* of the family...’<sup>53</sup> I now turn to examine how

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<sup>48</sup> [1996] 2 IR 79, 120.

<sup>49</sup> *Ibid.* 130.

<sup>50</sup> *Ibid.* 136.

<sup>51</sup> The judge was also provided with a copy of a working paper prepared by the Church of Ireland discussing a statement issued in October, 1992, by the bishops of the Church of England on euthanasia.

<sup>52</sup> [1996] 2 IR 79, 136.

<sup>53</sup> *Ibid.* 155. The issue of the Courts deferring to moral theologians’ expert evidence arose in *Conroy v Attorney General* [1965] IR 411, 419 in which having heard evidence from a moral theologian on the subject of the moral gravity of drunk driving Kenny J asserted that ‘from the ethical standpoint, every individual as an individual has certain inherent rights of which the right to life is the most fundamental; after it comes the right to bodily integrity...’. In *Norris v Attorney General* [1984] IR 36 [1984] IR 36 expert evidence was given by a Catholic priest and theologian and a Church of Ireland Archdeacon both of whom argued that the impugned legislation was unnecessary for the common good and in fact harmful to the Christian nature of the State. The Archdeacon asserted that ‘in so far as the basic criteria for a Christian concept of society is love and charity...they [the impugned laws] show a lack of love and a lack of charity towards homosexuals’ (at 76). In *TF v Ireland* [1995] 1 IR 321, 333-34 Murphy J refused to admit in evidence the testimony of theologians regarding the natural moral law and the essential features of a Christian marriage on the ground that he could not abdicate his judicial duty to interpret the Constitution to any other person. The judge stated ‘It may well be that “marriage” as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws and...it falls to me as a

O'Hanlon J displayed a high level of deference to Catholic norms in his interpretation of natural law and his view on the morality of abortion.

### **The O'Hanlon Thesis**

O'Hanlon J in a debate on natural law with Tim Murphy and Desmond Clarke published in the *Irish Law Times* in 1993 defined his view on the issue, which might be described as a confessional approach to natural law. O'Hanlon J argued that the Constitution cannot be amended and judicial decisions can not be handed down which 'conflict with natural law (which is of Divine origin)'.<sup>54</sup> He then states that the State could not bind itself by any international agreement or convention which involved the State in undertaking commitments which conflicted with our obligations to respect natural law.

Tim Murphy in a reply to O'Hanlon J's views argued that 'in terms of constitutional law and constitutional theory Mr Justice O'Hanlon's analysis is flawed and anti-democratic.'<sup>55</sup> Murphy differs fundamentally with O'Hanlon J's assertion that legal measures which conflict with natural law are 'unlawful', that there is one clear natural law, and he asserts that case-law on the matter does not support O'Hanlon J's view. Murphy describes O'Hanlon J's belief that law which does not conform with natural law does not have the character of law as a 'legal fiction of the highest order'. He goes on to say '...it is surely not acceptable for him to second guess the will of the people in reaction to, for example, the constitutional amendment on the right to travel, by asking '[w]as it a lawful amendment? [d]id the people realise what they were voting about?'<sup>56</sup> Murphy argues that there are two different types of natural law theory: one secular and based on human reason, the other theocratic and based on faith in the existence of a deity. He argues there are differences of opinion within the Christian view of natural law and when they conflict the question should be posed which interpretation of natural law prevails. Murphy quotes from Reverend Kearon who wrote in the *Irish Times*: 'The difficulty for all of us is to know what is the divine law...Even a concept like Natural Law cannot provide an infallible guide to the will of

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Judge of the High Court to interpret these provisions and it is not permissible for me to abdicate that function to any expert, however distinguished.' The Supreme Court endorsed this position on appeal. In *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404 the plaintiffs had a theologian give expert evidence which was briefly referred to by Dunne J as 'not advancing the Plaintiffs' case to any extent.' (at 12).

<sup>54</sup> O'Hanlon, 'Natural Rights and the Irish Constitution, (1993) *ILT* 11, p.8.

<sup>55</sup> Tim Murphy, 'Democracy, 'Natural Law and the Irish Constitution' (1993) *ILT* 11, p.81.

<sup>56</sup> *Ibid.*

God on these subjects. Natural Law is, according to Aquinas, our human understanding of God's plan for us. It is of its nature human and therefore can't be an infallible guide to God's will'. Murphy argues that the Constitution does not endorse a theological doctrine based on one religion's interpretation of natural law. Nor, he argues, do the judicial pronouncements on the matter support such a view. Murphy describes O'Hanlon J's reference to Kenny J's dicta in *Ryan* as misleading as while he refers to Kenny J's use of the word 'Christian', he does not mention that he also used the word 'democratic' nature of the State, which reflects a different set of values and shows that it is not clear that the Constitution advocates theocratic natural law. Murphy goes on to say that contrary to O'Hanlon J's assertion, there have not been uniform pronouncements on, and interpretations of natural law by, the courts.

Desmond Clarke in his contribution to the debate describes O'Hanlon J's reference to members of the judiciary striking down legislation by reference to an appeal to a particular understanding of natural law as a *reduction ad absurdum*; as it essentially justifies members of the court using their own philosophical or religious convictions to rule that an amendment to the Constitution is unconstitutional, this despite the fact that it is enacted by the people by referendum, on the grounds that it is inconsistent with provisions of an unwritten law which was implicitly enacted into the Constitution by those who voted for it in 1937.<sup>57</sup> Gabriel Daly described O'Hanlon J's views as 'singularly free of the influence of the Second Vatican Council' and that the judge goes further than 'merely proposing the constitutional embodiment of Catholic moral teaching. He actually argues in effect that the Irish state is a theocracy.'<sup>58</sup>

In *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*<sup>59</sup> counsel for the unborn relied in on O'Hanlon J's confessional interpretation of natural law in arguing that the Fourteenth Amendment to the Constitution was itself unconstitutional because it infringed the right to life of the unborn which as a natural law right superseded the Constitution.<sup>60</sup> However, this argument was rejected by the Court as

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<sup>57</sup> Des Clarke, 'The Constitution and Natural Law: A Reply to Mr Justice O'Hanlon' (1993) *ILT* 17, p.177.

<sup>58</sup> Gabriel Daly, 'Irish Catholicism: A Monolith?' in *Cultural Identity and Tolerance* (1996), P.47

<sup>59</sup> *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.

<sup>60</sup> It should be noted that in April 1992, O'Hanlon J (then retired) was dismissed as President of the Law Reform Commission, just one month after being appointed to the post. O'Hanlon J had commented that he would favour

Hamilton CJ stated that the organs of State are subject to the Constitution and its law. Hamilton CJ stated that the ‘Courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution.’ In light of the clear influence of natural law thinking on Walsh J’s judicial thinking and his rejection of Benthamite positivism, Hamilton CJ’s judgment would appear to misrepresent the position of the Irish courts regarding natural law.<sup>61</sup> The Supreme Court rejected the idea that the power to amend the Constitution was restricted by the principles of natural law. The court stated:

‘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.

The people were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended by the Fourteenth Amendment is the fundamental and supreme law of the State representing as it does the will of the people.’<sup>62</sup>

The judgment of the Court may be criticised because of its failure to properly interpret precedents and even to have distorted them. Whyte has argued that the judgment is unsatisfactory as ‘Essential premises are not properly established; judicial precedents and constitutional provisions which appear to endorse natural law theory are not properly engaged (and, indeed, in the case of Mr Justice Walsh’s remarks, are perversely cited in support of a

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abandoning membership of the European Union if it meant allowing abortion into Ireland. The then Taoiseach, Albert Reynolds, said it was inappropriate for him as President of the LRC to express publicly views which tend to suggest to the Government how the policy of the State should be formulated. O’Hanlon J agreed to comply with the Taoiseach’s demands that he should withdraw from the Presidency, although he stated he felt he was under no obligation to do so.

<sup>61</sup> See Walsh J dicta in *McGee v AG* [1974] IR 284 where he emphatically denies Bentham’s theory on law and criticism of Hamilton CJ’s judgment in Kelly, *The Irish Constitution*, p.1258 in which the judge is accused of having ‘perversely’ relied on Walsh J’s remarks in *McGee*.

<sup>62</sup> [1995] 1 IR 1, 43. During the course of legal submissions, Peter Kelly SC on behalf of the unborn argued that ‘natural law is the ultimate governor of all the laws of men. For as long as the present Constitution remains in force nothing in it or in any laws passed by the Oireachtas, or any interpretation thereof by the judiciary can run counter to the natural law. The natural law is clear – nobody can directly or intentionally take human life either born or unborn.’ [1995] 1 IR 1, 8-9. Counsel for the unborn also relied on Hamilton P’s view in *SPUC v Open Door Counselling* [1988] IR 593 that the right to life of the unborn was not created by law but was a natural right and the Constitution merely acknowledged its existence and gave it protection.

positivist understanding of the Constitution which he would never endorse); and there is a failure to address obvious questions raised by the judgment, such as whether there is any residual role for natural law theory under the Constitution and, if so, for which variants of that theory. Ultimately, it must be said, the Supreme Court's reasoning is somewhat simplistic and lacking in sophistication.<sup>63</sup> Binchy is also critical of the judgment describing it as having 'dispatched the philosophical basis of human rights expressly identified in the Constitution and replaced it by an unashamedly positivist model, where rights are creatures of the law, always subject to legal modification or extinction at the hands of the law-maker'.<sup>64</sup> Binchy puts the Supreme Court's judgment down to pragmatism and an anxiety to 'divest the Constitution of any "taint" of a Catholic ethos, especially in light of developments north of the border.'<sup>65</sup>

There is a sense that the Courts have gone full circle since *State (Ryan) v Lennon* as they have now returned to a position which appears to owe more to legal positivism than natural law. However, the unenumerated rights doctrine has been a fertile source of constitutional rights and may have reached its natural terminus. The movement away from natural law owes much to the uncertainty and subjectivity inherent in any definition of natural law which tends to render it undemocratic. In this context John Kelly's view in 1967 appears prescient: 'I think, that in all those who make or administer laws all we can hope for is an honest conscience, and that to assert that natural law provides a clear set of rules beyond and above a Constitution (as distinct from providing its theoretical basis, and forming the hearts of those who frame and interpret it) is to imagine a vain thing...'<sup>66</sup> However, it is unfortunate that the Supreme Court adopted a position which disingenuously interprets precedent with an apparent eye towards political expediency. As the Courts have never articulated a single coherent account of natural law (whether confessional, secular or otherwise), the Courts recent apparent rejection of natural law is not a rejection of the Catholic Church's view of natural law but of the different judicial expressions of acceptance of natural law. The Courts are not opposed solely to Catholic natural law. They are opposed to all forms of natural law as a basis for litigation and the enumeration of constitutional rights.

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<sup>63</sup> Gerry Whyte, 'Natural Law and the Constitution', (1996) *ILT* 14, p.8.

<sup>64</sup> *The Irish Times*, 8 January 1996.

<sup>65</sup> *Ibid.*

<sup>66</sup> John Kelly, *Fundamental Rights in the Irish Law and Constitution*, (2<sup>nd</sup> ed.) Allen Figgis, Dublin, 1967, p.73.

It appeared initially in the right to information cases that the judiciary was taking a line with which the Catholic Church would have been broadly in agreement. The Supreme Court's ruling in *X* was reaffirmed in *A and B*<sup>67</sup> and in *MR v TR*<sup>68</sup> in which the High Court and Supreme Court ruled, contrary to the moral teachings of the Catholic Church, that frozen embryos were not protected by the Eighth Amendment. The judiciary was obliged to interpret provisions which had a Catholic influence, but did not feel obliged to decide the cases in line with the teaching of the institutional Church. While the Supreme Court did not exhibit any deference to the Church's teachings concerning the morality of abortion, it was reacting to the traditional hegemonic normative power of the Church in Irish cultural and social life. The absence of judicial deference to the Catholic Church was indicative of the limitations on the influence of the Catholic counter revolution and followed the liberalising trend, which began with *McGee*, *M* and the dissenting judgments in *Norris* rather than the traditionalism evident in the majority in *Norris*.

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<sup>67</sup> *A and B v Eastern Health Board* [1998] 1 IR 464. The facts of *A and B* were broadly similar to those in *X*. The child at the centre of the case was pregnant as the result of having been raped. However, her case differed from *X* in that she was subject to an application for an Interim Care Order under s 17 of the Child Care Act 1991 under which the District Court gave directions to the Health Board to allow the child travel abroad for an abortion and permitting the Board to make the necessary arrangements. In response to this the parents of the child, who were opposed to her having an abortion, brought an application for judicial review in order to have the District Court order quashed. Geoghegan J held that where a psychiatrist gives strong evidence to the effect that a child is likely to commit suicide unless she has an abortion, this can be regarded as a medical treatment for her mental condition. The judge rejected the argument that if s 13(7) did cover abortion then it was unconstitutional on the ground that it was an unjust attack on the right of the unborn child and on the constitutional authority of the family and also because it was a breach of the State's guarantee to respect the inalienable right and duty of the applicants to provide for the moral education of their daughter. It was also argued by the applicants that the District Judge did not find that there was a real and substantial risk to the life of the pregnant girl, as required by the *X*, but instead sought to derive the authority to issue the directions she had made from the Thirteenth Amendment to the Constitution dealing with the freedom to travel. In this regard it is stated in Kelly that 'it is worth noting, that this paragraph refers to a *freedom*, rather than a *right*, to travel. A possible implication of this wording is that while the State and, for that matter, anybody else, cannot prevent a woman from travelling, it may not necessarily be under any duty positively to assist her in going abroad, by, e.g. providing travel information.' Kelly, *The Irish Constitution*, p.1533. Geoghegan J stated in *A and B* that 'I do not think [the Thirteenth Amendment] was ever intended to give some new substantial right. Rather, it was intended to prevent injunctions against travel or having an abortion abroad.' (at 482) In *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan (No5)* [1998] 4 IR 343, 395 Keane J asserted that the State does not have a duty to protect freedoms but rather that that duty may be limited to one of non-interference and that the State has no duty actively to assist a person who wishes to exercise his or her freedom. Geoghegan J concluded that, as a matter of probability, there was a real and substantial risk to the life of the rape victim and he did not interpret the District Judge as having coming to a different conclusion.

<sup>68</sup> [2006] IEHC 359 (15 November 2006), [2009] IESC 82 (15 December 2009).



However, the prohibition on abortion also reflects the Protestant values of nineteenth century Victorian society, which is reflected in the 1861 Act which banned abortion. Therefore, there is a duality of historical and religious-philosophical ideas which influenced the legal and political debate on abortion. Viewed historically these disparate ideologies have flown into the legal and social debate on abortion, a debate which has increasingly tended to reflect processes of secularisation in Irish society. The current legal position on abortion in Ireland is not in line with that advocated by the Catholic Church. The fact that post Vatican II the Church does not appear to expect that civil laws should necessarily be aligned with the Church's law, has provided greater space for the judiciary to draw on purely secular ideas in adjudicating. Nonetheless, the Church has reserved its right to criticise developments which are regarded as contrary to the Church's moral laws. The Courts at the time of *X* were moving away from a position which was in line with Catholic thought as the proscription on the sale and importation of contraceptives was struck down and the Courts were prepared to allow for abortion in extremely exceptional circumstances. While *Norris* indicated a more traditional view (albeit with two strong dissenting judgments), the European Court of Human Rights was to overrule the Supreme Court leading to the decriminalisation of homosexuality. Therefore, by the time of *X* traditional Catholic social values were under massive strain. The Catholic Church and lay Catholic groups had lost the battle concerning contraception and homosexuality. There had also been a defeat on abortion. The Catholic counter revolution had experienced a major failure at the hands of the Supreme Court in *X*.

This failure is indicative of the increase in the influence of secularism in the nation's polity. The rise of secularism has been influenced by developments such as emigration, the mass media, internal migration to urban areas, membership of the European Union, and legal and attitudinal changes to family planning practices which have undermined the social framework which facilitated the Church's influential role in Irish life. Evidence of a stronger form of secularism based on a feeling of anger towards the Catholic Church is clear from the following speech made by Liz O'Donnell TD in a Dáil debate on the Ferns Report which outlined the horrific child abuse that had taken place in the diocese. Referring to the report she stated:

‘I hope it will change forever the special relationship that has existed for many decades between church and State. This report must be the starting point for the State’s response to all contained in it. But this new beginning cannot happen unless the old relationship ends. The unrelenting deference, which constituted the relations between church and State, must end. It was given for many decades and expected for many decades. This special deference and relationship was extremely influential in terms of outcome, and it must end. Only then can the State act as it should, which is objectively...In a democracy, all views can be articulated but the special relationship must be over. The deference must be over. The cosy phone calls from All Hallows to Government Buildings must end.’<sup>69</sup>

It has been argued that there are three types of secularism present in society. The first is the classic liberal definition which involves the separation of Church and State; the second involves a decline in religious participation leading to a vicarious religious experience performed by an active minority on behalf of the majority; and the third involves optional consumption patterns between a diversity of religious and non-religious belief systems.<sup>70</sup> Gillespie writes that ‘Ireland has gradually made the transition to “secularism 1” after the painful experience of church domination from the 1920s to the 1960s. The transition to “secularism 2” is now well under way – readily seen at funerals where Catholic rituals are preferred to non-religious ones even by those who no longer belong or believe. “Secularism 3” is more typical of the United States than Europe, but is potentially a universal experience’.<sup>71</sup> Gillespie views pluralism and tolerance as central norms in Ireland in contrast to the French model of religious privatisation and cultural assimilation.<sup>72</sup>

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<sup>69</sup> 609 *Dáil Debates* 1347-50, 9 November 2005. In contrast, former Taoiseach Bertie Ahern was critical of those who ‘feel that the modern era is one with a shrinking role for religion, religious belief and religious identity. Our own experience over recent years demonstrates that this is not the case...There is a form of aggressive secularism which would have the State and State institutions ignore the importance of this religious dimension. They argue that the State and public policy should become intolerant of religious belief and preference, and continue, at best, to the purely private and personal, without rights or a role within the public domain. Such illiberal voices would diminish our democracy.’ *Irish Times*, 29 March 2008, p.13. O’Donnell’s remarks while understandable in light of revelations concerning the Church’s failures in dealing with cases of child abuse seemed to be based on the view that Church-State relations had not evolved and changed utterly since the 1940s. O’Donnell’s remarks are representative of current societal norms and may be juxtapositioned with the remarks of Attorney-General, Patrick Casey in 1951, who was also reflecting his own contemporary ethos: ‘This country is predominately a Catholic country. That does not mean that parliament should penalise any other creed, but it does mean this, that parliament cannot surely be asked to introduce legislation contrary to that great Church.’ *Irish Times*, 14 February 1951.

<sup>70</sup> See Charles Taylor, *A Secular Age*, Harvard UP, Cambridge Mass., 2007.

<sup>71</sup> Paul Gillespie, ‘Church-State relations face changing times’, *Irish Times* 2008, 29 March, p.13.

<sup>72</sup> A poll in the *Irish Examiner* 20 March 2007 reported that 84 per cent of people in Ireland believed in God, while only 45 per cent attended weekly Church, compared with 97 and 82 per cent in 1981. 53 per cent said they believed in hell and 41 per cent disagreed with the Catholic Church’s position on abortion. 50 per cent disagreed with the Church’s opposition to same sex unions, 57 per cent disagreed concerning divorce and 66 per cent disagreed concerning contraception.

The exposure of clerical attempts to impede civil investigations into allegations of acts of paedophilia committed by clerical figures has further eroded public confidence in the Catholic Church. This has further strengthened the secularity of the State and has led to calls for a completion to the process of deconfessionalisation leading to a completely secular state.<sup>73</sup> Walsh J believed that the law should be in harmony with the ethos of the community. In light of the dominance of secularism today it would be impossible to reconcile an overtly Catholic judge redolent of Gavan Duffy J with the ethos of contemporary society. There continues to be considerable opposition to abortion and the political sphere has shown a reluctance to deal with the issue precisely because it remains divisive. Contraception, divorce and homosexuality are largely part of the agreed norms of Ireland's modern polity. The divisive cultural battles of 1980s and 1990s have been replaced by a majoritarian agreement on secular norms and the marginalisation and decline of Catholicity. The Supreme Court's interpretation of Article 40.3.3 is in conflict with the Catholic Church's view that life must be protected at all stages and has thereby contributed to the process of secularisation and deconfessionalisation of Irish society. This exemplifies the view that as the Court's have become more assertive and receptive to constitutional arguments they have played a more active role in Church-State relations. In recent times the Court's relative activism has tended to undermine Catholic values. In contrast the most activist judge in the early years of the State, Gavan Duffy J, supported Catholic norms through judicial innovation.

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<sup>73</sup> Recently in England in *McFarlane v Relate Avon* (29 April 2010) the Civil Court of Appeal upheld its decision in *Ladelle v London Borough of Islington* [2009] EWCA Civ 1357 in ruling that a marriage counsellor who had refused to conduct psycho-sexual therapy with same sex couples on the basis of his Christian belief that same sex sexual activity was sinful had not suffered religious discrimination or been dismissed unfairly contrary to the Employment Equality (Religion or Belief) Regulations 2003. Former Archbishop of Canterbury, Lord Carey criticised the judgment as a move towards a purely secular state. Lord Justice Laws in his judgment rejected the suggestion made by Lord Carey that a panel be formed consisting of judges with an understanding and sensitivity towards religious issues to decide cases in which religion was central.

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## Conclusion

In this thesis I have examined evidence of Catholicity in judicial decisions on the Constitution from the confessional atmosphere of the early years of the State to more secular contemporary times. The process of secularisation is exemplified by the contrast between Gavan Duffy P's reference in *Re Tilson* to 'Articles 41 and 42, redolent as they are of the great papal Encyclicals'<sup>1</sup> and Hardiman J's comments in *North Western Health Board v HW* that he did not regard Articles 41 and 42 as 'reflecting uniquely any confessional view.'<sup>2</sup> In the early years of the State there was evidence of resistance to Catholic norms in the Courts' rejection of natural law, the recognition of foreign divorces and Black J's strong opposition to the conferral of any privilege on the Catholic Church in *Re Tilson*. Hardiman J's secular approach in recent years was preceded by a process of secularisation in society and ecclesiastical reforms within the Church as a result of Vatican II. In examining the jurisprudence of the Courts I have argued that in the early years of the State there was little evidence of Catholicity amongst the judiciary, with significant exceptions particularly Gavan Duffy P. The development of a more assertive judiciary coincided with Vatican II and the growth of secularism. While previously the judiciary had been weak relative to the other organs of power, in the 1960s there was a much more active judiciary that was receptive to constitutional arguments. This development coincided with a growth in public and political consciousness of the need for religiously plural legal norms and there was a reaction against the confessional laws which were introduced during the period of Catholic hegemony. While the judiciary was prepared to favour religion, it was not prepared to favour any one religious view above other religions. Therefore, while the Courts struck down laws which could be perceived as sectarian in *McGee* and *M*, they upheld the impugned legislation in *Norris* which, while favouring a Christian view concerning the morality of homosexuality, did not uniquely reflect a Catholic view. I have argued that the Courts, while being prepared to privilege religious beliefs above non-religious beliefs, have not favoured Catholic beliefs above other religious beliefs. The fact that post-Vatican II the Church did not expect civil laws to mirror Church law meant that a judge in ruling in a manner repugnant to

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<sup>1</sup> *Re Tilson* [1951] IR 15.

<sup>2</sup> *North Western Health Board v HW* [2001] 3 IR 622, 757.

Catholic morality may not have been contravening the post-Vatican II rules of the Catholic Church.

The process of secularisation was paralleled within the Church in a shift towards ecumenism and doctrinal debate as a result of the Second Vatican Council that is exemplified by the statement of the Irish Conference of Bishops in which they asserted that ‘...the Church is independent of State law. No change in State law can change the moral law. New civil laws cannot make what is wrong right...*laws which bear on moral issues, should not be seen in terms of the State’s upholding or not upholding Church teaching. The Church does not expect that acts which are sinful should, by that very fact, be made criminal offences.* All such laws bearing on moral issues must be assessed in the light of the way in which they contribute or fail to contribute to the common good of society.’<sup>3</sup> This contrasts with the pre-Vatican II statement of Archbishop D’Alton of Armagh wherein he stated ‘While leaving to Caesar the things that are Caesar’s, they [Catholic Hierarchy] must, however, concern themselves with the things that are God’s. From the nature of their office they have the right and the duty to intervene when religious or moral issues are involved.’<sup>4</sup>

These developments set the context for the current state of Irish constitutional jurisprudence in relation to religion which is broadly supportive of religion but wary of laws or policies with a sectarian edge. In advancing this proposition in the first chapter I examined the history of Church-State relations and the growing confessionality which existed in the new State following independence. In the second chapter I examined how the growing Catholicity in the State influenced the drafting of the 1937 Constitution. In the third chapter I examined the early jurisprudence of the Courts and concluded that there was not as significant a level of Catholicity evident in the Courts’ jurisprudence as one would expect given the confessional atmosphere at the time. There were however exceptions to this, in particular Gavan Duffy P’s judgments and Kennedy CJ’s correspondence with Archbishop Byrne. I argued that because of the unassertiveness of the judiciary during this period, the judiciary did not have the potential to be socially transformative. It follows that this may have removed any temptation for the Church to

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<sup>3</sup> *The Irish Times*, 23 June 1993. (Emphasis added)

<sup>4</sup> Quoted in Conor Cruise O’Brien, *States of Ireland*, p.103.

attempt to influence the legal process. In the fourth chapter I examined the growing assertiveness of the Courts in the 1960s. The judiciary relied on natural law in enumerating new constitutional rights but did not articulate a single coherent interpretation of natural law whether confessional, secular or otherwise. I further argued that ecumenical reform within the Catholic Church as a result of Vatican II, a growing awareness of Northern Protestants' unease at confessional legislation, and the fact that the Church did not necessarily expect civil laws to reflect the moral laws of the Church created the context in which the increasingly more active judiciary struck down laws which were viewed as being inspired by Catholic thought in *McGee* and *M*. However, I argued that the Church's redefinition of its relationship with the State meant that a judge in deciding a case in a manner that did not conform with Catholic morality was not necessarily breaching the rules of the Catholic Church as the Church recognised that civil laws could not always mirror Church laws. In the fifth chapter I examined four lines of jurisprudence which were more traditional and deferential to religion. In *Norris* the majority adopted a deferential approach to the teachings of the Christian Churches on the perceived immorality of homosexual conduct. However, the minority felt that the impugned legislation was itself unchristian and thereby appeared to sever the link between Christianity and the rules of the Christian Churches. I argued that *Norris* was decided at a time of unease amongst many Catholics at the growth of liberalism and secularism since Vatican II. There was particular unease at the potential for the judiciary to undermine Catholic inspired laws and this was to lead to the Eighth Amendment to the Constitution. The Courts have also displayed deference to religion in exempting religious groups from certain laws of general application. However, this has not amounted to a preference for any one religion. In the areas of the family and education, the Courts have decided cases in a manner which is in line with Catholic thought. This is unsurprising given the influence of Catholic social teaching on the text of Articles 41 and 42.<sup>5</sup> Therefore the Courts have supported the denominational education system, protected the family based on marriage, and allowed discriminations against non-marital children. In the sixth chapter I argued that while the Catholic movement had experienced victories in the Eighth Amendment, the majority decisions in *Norris* and the defeat for the referendum on divorce in 1986, these would prove temporary as homosexuality was decriminalised in 1993, divorce

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<sup>5</sup> In contrast the Courts have been secular in their interpretation of Article 43. I argued in chapter 3 that this has been due to the indeterminate language used in Catholic social teaching concerning property rights which has been of little assistance to the Courts.

introduced in 1996 and in 1992 the Supreme Court stated that abortion was permissible in exceptional circumstances in *X*. I concluded by arguing that since *X* there has been a growth in secularism which has further undermined the Church's authority and there has been no evidence of Catholicity in the judgments of the members of the judiciary in recent years with the exception of those of O'Hanlon J who retired in 1995.

In the early years of the State the judiciary was heavily influenced by the British tradition of parliamentary supremacy. The 1922 Constitution contained the power of judicial review but this was not seized on by the Courts as a means of expanding its powers. The 1937 Constitution was largely ignored by judges prior to the 1960s. An exception to this was the judgments of Gavan Duffy P which I explored in Chapter 2. Gavan Duffy P was an innovative jurist who, in his determination to create an indigenous jurisprudence, moved beyond the English common law to the provisions of the Constitution when they were ignored by many on the bench. Gavan Duffy P's judgments are heavily influenced by Catholic thought and no other judge was as committed to creating a line of jurisprudence that reflected the Catholic moral code. Gavan Duffy P's judicial philosophy is coloured by the pre-Vatican II highly assertive Romanised Church which had cast its shadow over Irish society starting with Cardinal Cullen and the Synod of Thurles in 1850 and lasting until around the end of Pius XII's pontificate. After independence the Catholic Church was confident, assertive and influential and the judiciary was weak relative to the other branches of power. However, with the appointment of judges such as Cearbhall Ó Dálaigh as Chief Justice and Brian Walsh to the Supreme Court in 1961 the judiciary became more assertive and active, a development coinciding, with a waning of the Church's role within society and a questioning of Church doctrine in the aftermath of Vatican II. It was these developments that created the context in which the judiciary was to decide cases in a manner that was contrary to Catholic morality (particularly in *McGee*). It is possible that had there been an assertive judiciary coinciding with an assertive Church, there would have been more judgments resembling those of Gavan Duffy P. I have argued in this thesis that the institutional reforms which took place within the Catholic Church as a result of Vatican II influenced the judiciary as the Church adopted a less assertive position, just as the Courts were becoming more assertive.

In the 1960s the Courts came to recognise the full potential of the Constitution as a source of un-enumerated rights and judicial review. The advent of a more assertive judiciary heralded the development of a tripartite relationship between government, Church and judiciary which replaced the bipartite Church-State relationship. As Whyte states:

During the sixties and early seventies the courts became increasingly adventurous in using their power of judicial review. The Church-State relation was no longer simply a bilateral one between bishops and ministers. Judges could sometimes change the relationship into a triangular one. Their decisions could create a new situation, sometimes helping bishops and ministers to move from old positions, sometimes forcing them to do so when they would rather stay where they were. In the case of contraception...the courts played an even more decisive role.<sup>6</sup>

Because of the influence of Catholic thought on the text of Articles 41 and 42, judges have as a consequence been influenced by Catholic doctrine (particularly concerning the principle of subsidiarity and denominational education) in their interpretation of those Articles but the Courts have also viewed the Articles through the prism of secular ideologies which resemble Catholic thought in advocating a minimalist view of government. Evidence of the influence of Catholic thought on the judiciary beyond Articles 41 and 42 has tended to stem from individual judicial initiative, particularly in the case of Gavan Duffy P. The Courts have taken a more secular approach in interpreting Article 43. The Courts are confined to interpreting a Constitution that continues to reflect the dominant Catholic ethos of the 1930s, particularly in the Preamble and Articles 41 and 42. Judges such as Kennedy CJ<sup>7</sup>, Gavan Duffy P<sup>8</sup>, Maguire P<sup>9</sup>, Kenny J<sup>10</sup>, and O' Hanlon J<sup>11</sup> have all shown a willingness to rely on Catholic concepts in deciding cases. On the other hand in the early years of the State the Supreme Court rejected the argument that the 1922 Constitution could not be altered contrary to the natural law in

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<sup>6</sup> John Whyte, *Church and State in Modern Ireland*, p.399.

<sup>7</sup> The judge accepted the argument that the 1922 Constitution could not be amended contrary to natural law in *State (Ryan) v Lennon* [1935] IR 170. While natural law is not a uniquely Catholic concept its influence, particularly in the nineteenth century owes much to Catholic thought.

<sup>8</sup> The judge referred to the 'right of Catholic Church to guard the faith of its children, the great majority, is registered in our fundamental document...' *Re Tilson* [1951] IR 1, 14. The effect of this dicta was to 'convert the special position of the Catholic Church into a "right"' Kelly, *The Irish Constitution*, p.2038.

<sup>9</sup> In *Re Tamburrini* [1944] 508 the judge ruled that a child at the centre of a custody battle should remain with his grandparents rather than his natural mother as she was living with a divorced man contrary to the teachings of the Catholic Church.

<sup>10</sup> The judge relied on a papal encyclical in *Ryan v AG* [1965] IR 294.

<sup>11</sup> In *Donoghue v Minister for Health* [1996] 2 IR 20 the judge relied on the Vatican II document *Gravissimum Educationis* and was actively involved in supporting anti-abortion and anti-divorce groups in referenda.



*State (Ryan) v Lennon*<sup>12</sup> and Kingmill Moore J recognised foreign divorces as valid in Ireland in *Mayo-Perrott*<sup>13</sup>. In *AG v X*<sup>14</sup> the Supreme Court's view was not fettered by Catholic thought as the majority accepted that abortion was permissible in extremely limited circumstances. Hardiman J in *North Western Health Board v HW*<sup>15</sup> emphasised the influence of the nineteenth century British liberal tradition on Articles 41 and 42 over Catholic concepts. The Supreme Court (per Hamilton CJ) rejected the natural law thesis (which O'Hanlon J had argued extra-judicially) in the *Abortion Information Reference*<sup>16</sup> case. In the recent case *MR v TR*<sup>17</sup> the Supreme Court upheld the High Court's decision that frozen embryos were not protected by the right to life amendment in the Constitution, a decision which provoked criticism from the Church hierarchy. The Supreme Court has tended towards a more deferential view towards government in recent times just as it has chosen to reject natural law. The advent of a Supreme Court which seems determined to put limits to its activist powers has coincided with a more aggressive form of secularism in society after the experience of Catholic hegemony from the 1920s to the 1960s. The Constitution continues to bear to some extent the influence of the hegemonic Catholic culture of 1930s Ireland. Judges must continue to interpret a document which reflects a dichotomous view which sways between classic liberalism and Catholic social teaching in the contest of an increasingly secularised society.

A persuasive piece of archival evidence which constitutes evidence of judicial deference to Catholic thought is the letter sent by the first Chief Justice Hugh Kennedy to Archbishop Byrne of Dublin, in which he seeks his advice as to whether he should send wards of court to Trinity College.<sup>18</sup> The Archbishop replied that the hierarchy's ban on Catholics attending the university was still in place. It should be noted that this correspondence was not prompted by

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<sup>12</sup> *State (Ryan) v Lennon* [1935] IR 170.

<sup>13</sup> *Mayo-Perrott v Mayo-Perrott* [1958] IR 336. In *Re Tilson* [1951] IR 1 Black J categorically rejected the view that Article 44 conferred an advantage on members of the Catholic Church.

<sup>14</sup> [1992] 1 IR 1.

<sup>15</sup> *North Western Health Board v HW* [2001] 3 IR 622.

<sup>16</sup> *Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill* [1995] 1 IR 1. This was certainly not a rejection of a confessional interpretation of natural law but a more general rejection of the plurality of natural law concepts enumerated by the Courts. The Supreme Court's judgment does nonetheless appear to fit uneasily with the centrality which natural law plays in Catholic social teaching. The same may be said of *State (Ryan) v Lennon*.

<sup>17</sup> *MR v TR* [2006] IEHC 359 (15 November 2006).

<sup>18</sup> See chapter 3.

the Archbishop but by the Chief Justice. It was Kennedy CJ who sought the Archbishop's advice and was prepared to allow his views to influence him in his judicial role.

There is little doubt but that a seismic shift took place between the Supreme Court of 1940s and that of the 1970s. As Kelly put it:

'The Supreme Court, in several cases, has taken the line that the Constitution is a living, developing organism, and that its elements – for instance, the standard of what is an inherent "personal right" – change over the years. This indeed was an unavoidable line for the court to take if, for instance, it was to give Mrs McGee a favourable decision in her case about what she said was her personal right to import contraceptives for her own marital use, because nothing is more certain than that the Supreme Court of 1950, let alone that of 1940, although looking at the very same constitutional Article, would have thrown her case out.'<sup>19</sup>

A number of elements combine to explain the contrast between the Supreme Court of 1940 and 1970: the Courts viewing the Constitution as a living document which should be interpreted in light of prevailing ideas<sup>20</sup>; the influence of social and cultural secularising norms distancing the Courts from the teachings of the Church; the development of a more assertive and activist judicial philosophy; and the weakening of the Catholic Church's influence particularly as doctrinal issues which were previously viewed as immutable were challenged in the wake of Vatican II. However, in a case such as *McGee* it is likely that the Supreme Court was adopting a position at the time which was more liberal than a majority of the population would have approved. One might pose the question could *McGee* have been decided as it had been had Vatican II not taken place? There is a strong likelihood that the Court would have been persuaded by Mrs McGee's tragic personal circumstances. Those circumstances perhaps exemplified the difficulties with the Church's teaching on contraception. But the institutional reforms within the Church created a context in which existing beliefs were debated and the certainties of old were open to challenge. A further element which should be noted is the development of a growing awareness amongst citizens of their rights under the Constitution, as Walsh J has written:

'From 1961 onwards the Constitution became very much part of life and its impact could be felt among ordinary people, who suddenly became conscious of the fact that they had a Constitution, that it could be

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<sup>19</sup> John Kelly, 'The Constitution: Law and Manifesto' in Litton (ed.) *The Constitution of Ireland 1937-1987*, IPA, 1988, p.211.

<sup>20</sup> However, this form of constitutional interpretation was rejected by the majority in *Norris*.

implemented and that, in fact, many parts of it were self-executing and did not require any supporting legislation. The consciousness of this suddenly burst upon the public and it just happened to be that, in the years commencing around about 1960-61, the court, for a variety of reasons, became very active. The most important reason was that it got the cases. The Court is not self-starting and depends on cases. So it was a happy coincidence of the right cases coming along at a time when the court was most receptive to new ideas.<sup>21</sup>

It is clear from tracing the development of Catholicism as an influence on the judiciary that the high water mark of Catholicity was Gavan Duffy J's judgments. This coincided with the period during which the Catholic Church's political influence was most pervasive. In more recent years O'Hanlon J has also displayed deference to Catholicism redolent of Gavan Duffy J. The dominance of secularism in contemporary times is exemplified by Hardiman J's secular interpretation of Articles 41 and 42. The dominance of secularism in contemporary society leaves little space for judicial deference to Catholicism. If, as Kelly stated, it would have been unimaginable for the Supreme Court of the 1940s or 1950s to have been receptive to McGee's case, it would similarly be unimaginable today for a judge to adopt a confessional interpretation of the law. Progressive interpretations of the law have tended to arise in the context of non-plural statutory laws. Secularism and pluralism have become central norms leading to the marginalisation of coercive forms of Catholicism in society. This process of secularisation and marginalisation of Catholic thought has been reflected in the influence of pluralism and liberalism on the jurisprudence of the Courts since Vatican II. The pre-Vatican II jurisprudence of the Courts reflects the residual influence of the principle of parliamentary supremacy and a judiciary which was unreceptive to constitutional arguments and innovation with some significant exceptions, particularly Gavan Duffy J's Catholicity which reflected a culture of confessionalism and the hegemonic position of the pre-Vatican II triumphalist Church.

As the Courts have found themselves at the vanguard of a socially transformative jurisprudence and as society breaks loose of Catholic hegemony, one might reflect on Walter Benjamin's description of Paul Klee's *Angelus Novus* in which an angel is depicted:

'This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed.

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<sup>21</sup> Garry Sturgess and Philip Chubb, *Judging the World: Law and Politics in the World's Leading Courts*, Butterworths, London, 1988, p.420.

But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.’<sup>22</sup>

Benjamin’s Angel of History has the capacity for both progression and regression. Similarly, Irish society could never resist the storm Benjamin calls progress. The storm propelled Irish society towards a new set of ideas despite resistance and despite a desire by many to remain facing the past. Change came in the form of divorce, contraception, and a right to abortion in exceptional circumstances. Resistance still lies in areas such as abortion, the denominational education system, and opposition to same sex marriage. Whether these areas can continue to resist Benjamin’s storm will be dependant largely upon the political sphere and attitudinal changes as today the Church’s influence over the political process is extremely limited. But ultimately just as Benjamin’s Angel of History is driven irresistibly into the future, so too the Courts will be pushed further into the storm.

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<sup>22</sup> Quoted in Esther Leslie, *Walter Benjamin: Overpowering Conformism*, Pluto, London, p.202.

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