

## Religion and the State in Ireland<sup>1</sup>

### I. SOCIAL CONTEXT

The 2011 Census records that there are now more Catholics living in Ireland than there have been at any time since 1881 when records began. That figure of 3,861,335 Catholics among a total population of 4,588,252 represents 84 percent, which is simultaneously the lowest percentage recorded since 1881.<sup>2</sup> Since the previous census in 2006 (which the original version of this report was based on) there is an increase of 179,889 “new” Catholics living in the country, although the percentage of Catholics per total population has fallen from 86.8 percent.<sup>3</sup> The number of adherents to the faith of the Church of Ireland has also increased, albeit much more modestly, to 134,365, and represents 2.9 percent of the total population. There are 49,201 Muslims, 45,223 Orthodox Christians and 1,984 Jews registered on the census, which represent 1 percent, 0.99 percent and 0.04 percent respectively of the total population. The number of atheists is registered at 3,905 and agnostics at 3,521 which represent 0.085 percent and 0.077 percent respectively.<sup>4</sup>

Since some of these figures are heavily influenced by immigration, it is worth noting that of the Catholics, 3,525,573 (92 percent) are Irish whereas 282,799 (7.4 percent) are non-Irish (233,827 of whom come from other EU countries; mostly Poland and the UK); of the members of the Church of Ireland 93,056 (75 percent) are Irish whereas 30,464 (24 percent) are non-Irish; of the Muslims 18,223 (38 percent) are Irish whereas 29,143 (61 percent) are non-Irish; and of the Orthodox Christians 8,465 (19 percent) are Irish whereas 34,854 (79 percent) are non-Irish.<sup>5</sup> Based on these numbers, it can be understood that immigration has accounted for the rise of the minority religious denominations and also accounts for about a third of the “new” Catholics registered by the 2011 Census.<sup>6</sup>

Given that the numbers of non-Catholics living in Ireland are still comparatively small, the Census reveals that there not been a radical alteration in the religious faith of the people of Ireland, since Catholics still make up the largest group of adherents by far. The census records those who self-identify as Catholics, however, and not those who practise their faith or adhere to the teachings of the Scripture and Magisterium. It is undeniably true that the numbers of those who practice their faith are not as high, and that there are legal and societal trends that show a distancing of faith and culture. On 20<sup>th</sup> July 2011, the Taoiseach (Prime Minister) spoke in Parliament condemning the Vatican for “dysfunction, disconnection, elitism ... the narcissism that dominate the culture of the Vatican” in relation to complaints about child abuse taking place in Ireland during previous decades.<sup>7</sup> In that speech he also stated that “the historic relationship between

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CARMEN GARCIMARTÍN is Profesora Titular de Universidad (Associate Professor in Law) School of Law, University of La Coruña, Spain.

Dr. MARIA CAHILL is Lecturer in Law, University College Cork.

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1. This report will deal only with the Republic of Ireland.

2. 2011 Census, Profile 7: Religion, Ethnicity and Irish Travellers, Table 1, at 47, [http://cso.ie/en/media/csoie/census/documents/census2011profile7/Profile\\_7\\_Education\\_Ethnicity\\_and\\_Irish\\_Traveller\\_entire\\_doc.pdf](http://cso.ie/en/media/csoie/census/documents/census2011profile7/Profile_7_Education_Ethnicity_and_Irish_Traveller_entire_doc.pdf).

3. 2011 Census, Profile 7: Religion, Ethnicity and Irish Travellers, Table 2, at 48.

4. 2011 Census, Profile 7: Religion, Ethnicity and Irish Travellers, Table 1, at 47.

5. 2011 Census, Profile 7: Religion, Ethnicity and Irish Travellers, Table 5, at 52.

6. There were 213,412 non-Irish Catholics recorded in the 2006 census, and since the number of non-Irish Catholics is 282,799 in the 2011 Census whereas the total increase in numbers of Catholics is 179,889 that means that there 110,502 “new” Irish Catholics and 69,387 “new” non-Irish Catholics.

7. See <http://www.rte.ie/news/2011/0720/303965-cloyne1/>.

church and state in Ireland could not be the same again” and on 3<sup>rd</sup> November the same year, the Minister for Foreign Affairs announced the closure of the Irish embassy in the Vatican.<sup>8</sup> In January 2014, it was announced that a very modest embassy would re-open, and on 6<sup>th</sup> May an ambassador to the Holy See was appointed, there having been no ambassador for the three intervening years since June 2011.<sup>9</sup>

## II. HISTORICAL APPROACH

The history of Ireland is a key element in understanding the current relationship between the State and various religious denominations.<sup>10</sup>

*a. The “Island of Saints and Scholars”* – Having never come under the authority of the Roman Emperor, the island was divided into about 150 smaller regional units, governed by local kings, during the period of customary Brehon law from the 4<sup>th</sup> century until the arrival of the Normans in 1169 (and, in reality, for about 400 years thereafter). The arrival of Christianity in the 5<sup>th</sup> century did not disrupt this customary order; in fact, some sources hold that it was St. Patrick who, having arrived to Ireland to bring the message of Christ in 432 AD, initiated the codification of the customary laws, in order to strengthen their clarity and consistency in application. Under Brehon law, after the arrival of Christianity, a special regard was afforded to monks and priests in every regional unit as non-citizens but *deorad Dé* (an outsider belonging to God). This system of regional units favored the development of the vibrant monastic system that endured until the 12<sup>th</sup> century (and the comparative weakness of the diocesan structure), which accounts for the great influence that Irish monasteries and abbeys had during that period in Ireland, and that monks from those monasteries had in Europe as a whole.

*b. The Anglo-Norman Domination* – Although officially King Henry II announced the acceptance of Norman law in Ireland in 1171, in fact Brehon law continued to be applied and the incoming Normans inter-married with the natives and became, as the saying goes, “more Irish than the Irish themselves.” The co-operative and relatively peaceful co-existence of civic and religious authorities in Ireland was to come to an end in the aftermath of the Act of Supremacy of King Henry VIII in 1534, in which the King established himself as ruler over the newly-established-by-legislation Church of England and required allegiance of his subjects to his temporal and spiritual authority. The securing of allegiance to Henry rather than the Pope, and conformity to the Church of England in the ensuing years (by means of legislation requiring attendance at Church of England services, and payment of tithes thereto, as well as punishment for non-attendance, non-payment, and non-adherence ranging from exclusion from employment in the public service to the death penalty) was largely successful in England, and the Catholic population was significantly reduced. However, although many of the same laws were passed in Ireland, a mass conversion of the population to the state religion of the Church of Ireland was not achieved.

*c. The Establishment of the Church of Ireland* – In 1536, the Irish Parliament declared Henry VIII the Supreme Head of the Church on earth and Head of the Church of Ireland. No compensation was given to Roman Catholic clergy by the state who suffered loss because of the consequent seizure of church property by the state. The Church of Ireland remained the established church until 1 January 1871 having been legislatively

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8. Ostensibly the decision was a cost-cutting exercise, following “a review of overseas missions carried out by the Department of Foreign Affairs and Trade which gave particular attention to the economic return from bilateral missions” although this reason was widely discredited. See, for example, <http://www.independent.ie/opinion/analysis/jody-corcoran-closing-vatican-embassy-to-cut-costs-doesnt-add-up-26818316.html>.

9. See, for example, <http://www.irishtimes.com/news/social-affairs/religion-and-beliefs/new-ambassador-to-the-holy-see-appointed-1.1785493>.

10. See broadly Jean Blanchard, *The Church in Contemporary Ireland* (Dublin: Clonmore & Reynolds, 1963), xv ff.

disestablished by the Irish Church Act 1869<sup>11</sup> after 333 years. At its disestablishment, state endowment ceased as well as parliament's role in its governance, and the government also took ownership of much church property although compensation was provided to members of the Church of England for loss suffered. Throughout the period of establishment, the Church of Ireland was funded by tithes collected from all Irish subjects of the Crown, the vast majority of whom, of course, were Catholic. This requirement of 10 percent of agricultural income to be given to the Church of Ireland came at a time when Irish farmers who were Catholic were trying to contribute to the building of new Catholic churches (their churches having been confiscated by the state) and also when the penal laws seriously affected their land ownership. There was a Tithe War 1831-1836 when Catholics resisted payment, but full relief from the tithes was only achieved at dis-establishment in 1869.

*d. Religious Persecution* – The “Penal Laws” in Ireland were a comprehensive and cumulative series of legislative acts designed to legally subjugate those who remained faithful to the Catholic Church.<sup>12</sup> The 1695 *Disarming Act* required all Catholics to surrender their arms and ammunition – even those licensed – as well as any horses which were potential war horses, in order to foreclose the possibility of insurrection.<sup>13</sup> The 1697 *Marriage Act* striped Protestant women who married Catholic men of their land and property rights, and provided that a Protestant man who married a Catholic woman would be treated as a Catholic in law if he failed to convert her within one year of marriage.<sup>14</sup> The 1695 *Education Act*, 1704 *Popery Act* and 1709 *Popery Act* prohibited the education of children in the Catholic faith in schools, in private homes or even abroad.<sup>15</sup> The 1704 *Popery Act* provided that no Catholic could purchase or inherit land, or take a lease except for a term of less than 31 years and further that if the eldest son of Catholic parents would convert within one year of their death he could inherit their entire estate irrespective of any testament, subject only to some small maintenance payments to his siblings.<sup>16</sup> Archbishops, bishops, Jesuits, monks and friars were all banished on 1<sup>st</sup> May 1698 under the 1697 *Banishment Act*, with the threat that if they returned they would be imprisoned and be guilty of high treason.<sup>17</sup> The 1704 *Registration Act* required that all other priests should register with the authorities and give sureties for good behavior, and provided significant financial incentives for their conversion.<sup>18</sup> The 1709 *Popery Act* established the profession of priest-hunter and allowed the authorities to detain anyone suspected of having attended a Catholic Mass.<sup>19</sup> The legislation does not appear in its provisions to be deficient for the purposes towards which it was directed; nonetheless, there was widespread disobedience and (consequent) non-enforcement of its provisions.<sup>20</sup>

Catholic emancipation was achieved between the end of the 18<sup>th</sup> and middle of the 19<sup>th</sup> centuries. One indicator of this was the foundation of St. Patrick's College of Maynooth – both a university and a Catholic seminary – in 1795.<sup>21</sup> However, the land crisis (begotten by the prohibition on Catholic ownership) could not be “undone” by

11. <http://www.legislation.gov.uk/ukpga/1869/42/enacted>.

12. An online compilation of the legislative acts promulgated for the purpose of suppressing Catholicism in Ireland (known as the “penal laws”) is available, sorted by date and subject matter at: <http://library.law.umn.edu/irishlaw/index.html>.

13. 7 Will III c.5 An Act for the better securing the government, by disarming papists.

14. 9 Will III c.3.

15. 7 Will III c.4; 2 Ann c.6; 8 Ann c.3.

16. 2 Ann c.6.

17. 9 Will III c.1.

18. 2 Ann c.7.

19. 8 Ann c.3.

20. Maureen Wall, Gerard O'Brien, Tom Dunne, eds. *Catholic Ireland in the Eighteenth Century: Collected Essays of Maureen Wall* (Dublin: Geography Publications, 1989).

21. Nevertheless, it should be noted that, by then, the ideals of the French Revolution were spreading all over the continent. British authorities feared more the French ideals than Catholicism. If they allowed clergymen to be educated in France, revolutionary ideas could also widespread in Ireland. So, British not only enable the foundation of Maynooth; it even got public funding. See Blanchard, *The Church in Contemporary Ireland*, supra n. 10 at xx.

legislative decree and contributed to the famines that were almost yearly events in Ireland in the first half of the 19<sup>th</sup> centuries.

However, political freedom did not accompany this new religious freedom and in 1800, the *Act of Union* was approved, sealing the two islands as one united political entity governed by Westminster. According to the *Act of Union*, the Churches of England and Ireland should also be united as one Church – the United Church of England and Ireland – which officially became the established Church.<sup>22</sup>

*e. Political Independence* – This was the core issue in the beginning of the 20<sup>th</sup> century. As the separation from Britain took place, hallmarks of the Irish identity were prompted; and, precisely, one of the factors that most set apart the two countries was the religion. The Declaration of Independence was proclaimed on the Easter Monday 1916 and placed “the cause of the Irish Republic under the protection of the Most High God.” Similarly, the 1919 Declaration of Independence ended with the words: “In the name of the Irish people we humbly commit our destiny to Almighty God who gave our fathers the courage and determination to persevere through long centuries of ruthless tyranny, and ... we ask His divine blessing on this the last stage of the struggle.”

The 1921 *Articles of Agreement for a Treaty between Great Britain and Ireland* (commonly known as the Anglo-Irish Treaty) provided in Article 16 that “[n]either the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status ...” and the 1922 Constitution of the Irish Free State similarly provided in Article 8 that “[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status....”<sup>23</sup> The principles of non-endowment and non-discrimination are therefore common to both texts, but the Constitution, understandably given the legal and social history of Ireland, underscores first freedom of religion. The 1922 Constitution offered only limited independence within the British Commonwealth, however, and in 1936, during the abdication crisis in Britain, Ireland took the opportunity to establish a new republican Constitution.

### III. CONSTITUTIONAL CONTEXT

The 1937 *Constitution of Ireland* was enacted on 1 July 1937. The Preamble commences with an invocation of the “Name of the Most Holy Trinity, from whom is all authority and to whom, as our final end, all actions both of men and States must be referred” and proclaims that “we, the people of Éire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, who sustained our fathers through centuries of trial ... do hereby adopt, enact, and give to ourselves this Constitution.”<sup>24</sup> With such a preamble, one might expect that the Constitution would go on to establish and endow a

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22. “That if be the fifth article of union that the churches of England and Ireland, as now by law established, be united into one protestant episcopal church, to be called “The United Church of England and Ireland”; and that the doctrine, worship, discipline and government of the said united church shall be, and shall remain in full force for ever, as the same are now by law established for the Church of England; and that the continuance and preservation of the said united Church, as the Church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the union; and that in like manner the doctrine, worship, discipline and government of the Church of Scotland shall remain, and be preserved as the same are now established by law, and by the acts for the union of the two kingdoms of England and Scotland.”

23. The full text of both the Treaty and the Constitution are available at <http://www.irishstatutebook.ie/1922/en/act/pub/0001/print.html>.

24. An endnote to the text, only in Irish, dedicates it to the Glory of God and the Honour of Ireland (*Dochum Glóire Dé agus Onóra na hÉireann*). The Preamble bears striking similarity to that of the 1921 Polish Constitution, as noted by Gerard W. Hogan [Gerard W. Hogan, *The Origins of the Irish Constitution, 1928-1941* (Dublin: Royal Irish Academy, 2012), 210ff].

Christian church. Indeed, since, in 1936, Catholics numbered 2,773,920 out of a total population of 2,968,420 or 93 percent,<sup>25</sup> it would not have been an inconceivable proposition. In fact, as we shall see the provisions of the Constitution do not establish any religion.

First, however, what is the value of this Preamble? Clearly it is not enforceable on its own terms, since it makes no proposition of law other than the express adoption of the Constitution as the Constitution. The Irish courts have occasionally referred to the Preamble to support sociological claims about the nation; for example, in *Quinn's Supermarket Ltd. v. Attorney General* Walsh J referred to the Preamble to support the "firm conviction" that Irish people are "a Christian people,"<sup>26</sup> and in *Norris v. Attorney General*, O'Higgins, CJ understood the Preamble to express a "deeply religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs."<sup>27</sup> Nonetheless, the *Report of the Constitutional Review Group* of 1996<sup>28</sup> recommended the amendment of the Preamble, avoiding references that could be divisive nowadays.<sup>29</sup>

The Constitution of 1937 devotes Article 44 to religion. The Article states, in its entirety that:

1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion.

2. 1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2° The State guarantees not to endow any religion.

3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious and charitable purposes.

6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.<sup>30</sup>

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25. According to the 1936 Census, represented in Table 1 of the 2011 Census, Profile 7: Religion, Ethnicity and Irish Travellers, at 47. See *supra* n. 2.

26. *Quinn's Supermarket Ltd v. Attorney General* [1972] IR 1, at 23.

27. *Norris v. Attorney General* [1984] IR 36, at 64. Other references to the Preamble can be found in *Maguire v. Attorney General* [1943] IR 238; *McGee v. Attorney General* [1974] IR 284; *Attorney General v. Open-Door Counselling Ltd* [1988] IR 593. On no occasion has it been the sole basis for a decision.

28. The *Report* was prepared by an all-party Committee appointed by the Government of Ireland in 1994. Its target was reviewing the Constitution and defining the areas that should be modified. The *Report* was finalized in 1996, and it aroused a great interest in the political arena. Nevertheless, opinions regarding the *Report* were not unanimous. For example, according to Barrett, discussions about the religious issue were brief, shallow, and a bit too defensive with regard to accusations of separatism. (See Richard Barrett, "Church and State in the Light of the Report of the Irish Constitution Review Group," 20 *Dublin University Law Journal*, n.s., (1998): 51 ff.)

29. See James Casey, "Church and State in Ireland 1997," *European Journal for Church and State Research* (1998): 24. Casey also mentions the sharp critic to this proposition made by the Archbishop of Dublin.

30. Note that the Irish Constitution is written both in English and Irish; in case of contradiction, the Irish text prevails. A study on the differences between the Irish and the English text can be seen in the Report, Micheál Ó Cearúil, *Bunreacht na hÉireann. A Study of the Irish Text* (Dublin: The Stationery Office, 1999), 634 ff.

A proper understanding of this article requires a brief explanation about its making. Eamon de Valera was President of the Executive Council and Constituent Assembly at the time and a key instigator of the new Constitution. Having collaborated with representatives of the Catholic Church as well as representatives of all of the other denominations represented on the island in the drafting process, he sought an unofficial approval of the text from the Vatican. Although the Holy See had some doubts regarding the first draft of Article 44, it did not want to interfere in Irish domestic policies and so Pope Pius XII said that he neither approved nor disapproved the Constitution; simply *tacebat*.<sup>31</sup>

A preliminary draft of 10 March 1937 had recognized “that the Church of Christ is the Catholic Church,” but, conscious of the disastrous consequences which renewed religious strife would have in the new republic, extensive discussions followed with the leaders of the Catholic Church, the Church of Ireland, and Methodist and Presbyterian churches, after which, to the satisfaction of all, a formula was devised for two subsections (44.1.2° and 44.1.3°) which read as follows:

The State recognizes 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.

The State also recognizes the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.<sup>32</sup>

These two provisions were in the Constitution as originally enacted and adopted, and were criticized both for being too Catholic and for not being Catholic enough. The concept of “special position” was very loose – though it indicated that with regards to religion and atheism, the State was not neutral; and with regards to different denominations, the State was not neutral either, as far as the Catholic Church was singled out from the others by being granted a “special position” – and it was not easy to see what kind of practical effect, if any, it might have.<sup>33</sup> Perhaps it was a compromise between establishing the Catholic religion as the new state religion and honoring the sociological reality that 93 percent of the Irish people were Catholic, as well as the historical fact that they had suffered religious persecution under previous regimes.<sup>34</sup> In any case, the other denominations welcomed this provision, and indeed, it was most remarkable in 1936-7 for the fact that it offers constitutional recognition of and protection for the rights of the Jewish people to practice their faith at a time when those rights were not so well recognized in other European countries. Nonetheless, Articles 44.1.2° and 44.1.3° were removed by constitutional referendum in the 1972 Fifth Amendment of the Constitution.

31. See Dermot Keogh, “The Constitutional Revolution: An Analysis of the Making of the Constitution,” in *The Constitution of Ireland, 1937-1987*, ed. Frank Litton (Dublin: Institute of Public Administration, 1988), 43 ff. Nonetheless, the Vatican appreciated De Valera’s efforts to draft a Constitution according to the Catholic principles. It is worth noting that the Holy See had been reluctant to De Valera’s policy, because of his leaning to lower the religious differences between North and South Ireland; so, certain secularism was expected. However, Fianna Fáil – De Valera’s political party – was not hesitant to the enactment of legislative acts that reflected the principles of the Catholic morality.

32. The similarity between Article 44.1.2 and the 1801 Napoleonic Concordat (“The Government of the [French] Republic recognises that the Catholic, Apostolic and Roman religion is the religion of the great majority of the French citizens”) is obvious, although Eamon de Valera officially denied that the Concordat was the inspiration for this section. See Hogan, *The Origins of the Irish Constitution, 1928-1941*, supra n. 24 at 216ff.

33. John Henry Whyte, *Church and State in Modern Ireland, 1923-1979* (Dublin: Gill & Macmillan, 1980), 54-55.

34. See generally, Gerald W. Hogan, “Law and Religion: Church-State Relations in Ireland from Independence to the Present Day,” 35 *American Journal of Comparative Law* 1 (1987): 55.

As it currently stands then (as laid out above) Article 44 of the Constitution enshrines six principles: *recognition, freedom of religion, non-endowment, non-discrimination, autonomy, and co-operation regarding education*. These will be briefly outlined here, before being developed more fully in the relevant subsequent sections.

1. *The Principle of Recognition*, as opposed to establishment, is provided for in Article 44.1 which states that “the State acknowledges that the homage of public worship is due to Almighty God” and was a necessary compromise both for theological reasons and for political reasons. The former pertained to the fact that the Catholic Church is not capable of being established by any state authority, having other and older origins. The latter pertained to the need to avoid creating an insurmountable obstacle to union between the Republic and Northern Ireland. Nevertheless, it remains significant that, having endured the establishment and endowment of the Church of Ireland for 333 years, together with significant religious persecution during that time, the new Constitution (which, unlike the 1922 Constitution, came into operation in the absence of the controlling influence of the Anglo-Irish Treaty) did not provide for establishment or endowment of the Catholic Church. The significance of the acknowledgement that “homage of public worship is due to Almighty God” has proved troublesome for scholars<sup>35</sup> as well as the judiciary.<sup>36</sup> In practical terms, it may be seen to be supported in the Constitution by the requirements that the President<sup>37</sup> and the judges<sup>38</sup> should swear an oath “in the presence of Almighty God” as they take up their office. By convention it has also meant that the Defense Forces form honor guards at highly important religious ceremonies, however the Minister for Justice, Alan Shatter, who resigned amidst a sea of controversy in May 2014 broke with convention by prohibiting the Defense Forces from taking part in the International Eucharistic Congress in July 2012<sup>39</sup> and also from taking part in the commemorations of the 1916 Rising in May 2014<sup>40</sup> despite their desire to do so. The provision seems to be capable of being understood to mean that public authorities should not only allow but even also occasionally participate in Divine worship in public. Moreover, it may prohibit any restriction on the use of religious symbols in public, as will be discussed below in Section X, Religious Symbols in Public Places.

Article 44.1 provides in its second sentence that the State “shall hold His Name in reverence, and shall respect and honor religion.” It therefore imposes an obligation on the State to refrain from engaging in atheistic propaganda, and prevents the State from taking any hostile measure to religion. It may also be understood that, although not expressly stated, that legal or statutory restrictions to proselytism – besides those based on public order reasons – are not constitutionally permissible.<sup>41</sup> Further, this provision may be read together with Article 40.6.1.i which prohibits blasphemy, stating in the third paragraph that: “the publication or utterance of blasphemous, seditious, or indecent matter is an offense which shall be punishable in accordance with law,” and which will also be discussed in Section XI, Freedom of Expression and Offenses against Religion.

35. Gerard Whyte, “On the Meaning of ‘Religion’ under the Irish Constitution,” in *The Irish Constitution: Governance and Values*, ed. Oran Doyle and Eoin Carolan (Dublin: Thomson Round Hall, 2008), 449-452.

36. *Quinn’s Supermarket Ltd v. Attorney General*, supra n. 26. See also *McGee v. Attorney General*, supra n. 27; *Norris v. Attorney General*, supra n. 27. The current interpretation of this provision is summarized in a more recent case, *Corway v. Independent Newspapers (Ireland Ltd)*, [1999] 4 IR, at 484: “The effect of these various guarantees is that the State acknowledges that the homage of public worship is due to Almighty God. It promises to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be the Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists. But Article 44-1 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality.”

37. According to Article 12.8 of the Constitution.

38. According to Article 34.5.1 of the Constitution.

39. <http://www.ionainstitute.ie/index.php?id=2276>.

40. <http://www.irishcatholic.ie/article/1916-families-appeal-mass-ban-be-lifted>.

41. See James Casey, *Constitutional Law in Ireland*, 3rd ed. (Dublin: Round Hall, 2000), 690.

2. *The Principle of Freedom of Religion* is guaranteed by Article 44.2.1<sup>o</sup>, and although the text states that “freedom of conscience and free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen,” the courts have interpreted “freedom of conscience” for the purposes of that provision as being almost co-extensive with freedom of religion. In *McGee v. Attorney General*, Walsh J interpreted the provision to mean that “no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned and, subject to public order and morality, is free to profess and practice the religion of his choice.”<sup>42</sup> The 2013 *Protection of Life during Pregnancy Act*, which legalizes abortion during all nine months of pregnancy in circumstances of suicidal ideation by the mother, provides for conscientious objection to carrying out an abortion by a “medical practitioner, nurse, or midwife,”<sup>43</sup> although that same person is then legally obliged to make the arrangements for somebody else to carry out the abortion.<sup>44</sup> Obviously, a Catholic could not make arrangements for an abortion to be carried out for the same reasons that a Catholic could not carry out an abortion, so this provision is ripe for a constitutional challenge. As the legislation was being passed through Parliament, Members of Parliament were threatened with expulsion for their political parties if they voted against the legislation, and eight parliamentarians were subsequently expelled, including the Minister for European Affairs, Lucinda Creighton, who was forced to resign. Judicial interpretation of this provision will be discussed below in Section IV, Legal Context, and a recent controversy surrounding respect for the seal of confession and will be discussed under the heading Legal Regulation of Religion as a Social Phenomenon (Section VI).

3. *The Principle of Non-Endowment* is assured in Article 44.2.2<sup>o</sup> which provides that “the State guarantees not to endow any religion.” The choice of non-establishment in Article 44.1 is here matched by non-endowment, in the same way that between the 16<sup>th</sup> and 19<sup>th</sup> centuries the establishment of the Church of Ireland was matched by its endowment. This subsection is consistent with Article 8 of the 1922 Constitution and Article 16 of the 1921 Anglo-Irish Treaty, the latter of which required the former to refuse to endow any religion. However, the Constitution of 1937 goes further than the former texts and marks a positive affirmation that the State *guarantees* not to endow any religion, empowering itself as a defender of the neutrality of its own institutions. This will be below in Section VII, State Financial Support for Religion.

4. *The Principle of Non-Discrimination* is expressed in Article 44.2.3<sup>o</sup> as “the State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.” It is also more specifically entrenched with regard to education, under Article 44.2.4<sup>o</sup> which provides that “State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.” This principle of non-discrimination is the principle which is most clearly expressed in the Constitution, according to Clarke.<sup>45</sup> The State must remain neutral with regard to the different religious denominations. It can neither favor nor persecute any of them, and there cannot be discrimination on grounds of religious belief, whether such a distinction appears invidious, benign or otherwise.<sup>46</sup> In the case law, this principle of non-discrimination has

42. *McGee v. Attorney General* [1974] IR 284, at 291-2.

43. According to s. 17(1) of the Protection of Life during Pregnancy Act 2013. <http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0035.pdf>.

44. *Id.*

45. Desmond Clarke, *Church and State: Essays in Political Philosophy* (Cork: Cork University Press, 1984), 226.

46. *Quinn's Supermarket v. Attorney General*, supra n. 26 at 16. The fact that discrimination on grounds of religion is specifically banned outside the framework of Article 40.1 [regarding principles of equality and non-discrimination] can be assumed to be of some significance, particularly given that the anti-discrimination



been interpreted alongside the principle of freedom of religion since there are some circumstances in which the State must discriminate in order to protect freedom of religion. These will be examined in Section IV, Legal Context. Meanwhile, the co-operative relationship between the Church and the State in the field of education will be discussed further as the sixth constitutional principle and also in Section IX, Religious Education of Youth.

5. *The Principle of Autonomy* is provided for in Article 44.2.5° which explicitly affirms that “every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.” This is a key and deeply rooted principle in Ireland. Although it is perhaps ambiguous to characterize this as the separation of church and state, it is certainly a policy of non-interference by the state in the affairs of religious congregations. It replicates the pre-constitutional position of the Catholic Church, rather than that of the Church of Ireland. The latter (naturally, being an established church) did allow state involvement in its internal governance prior to dis-establishment, including approval of episcopal appointments. In the 19<sup>th</sup> century, with the advent of Catholic emancipation, Catholic bishops did not grant the State the power to veto an episcopal appointment, and rejected funds from the State, thereby refusing to take the space which lay vacant upon dis-establishment of the Church of Ireland. To this day, canon law is not recognized as having any civil legal effects. It might be surprising that given the history of Ireland, and the religious map of the population, there has not been any official entanglement and mutual interference in governance between the Catholic Church and state.<sup>47</sup> Their distant and troublesome relationship during all those centuries of foreign rule and religious persecution is perhaps the best context within which to understand this principle of non-interference<sup>48</sup> and autonomy, which will be discussed below in Section V, The State and Religious Autonomy.

6. *The Principle of Co-operation regarding Education* is endorsed implicitly in Article 44.2.4°, since it has already been laid down in Article 42.4. Under the terms of this latter provision, the State undertakes responsibility for providing for the education of children within the sociological reality (as a result of the historical context in which the religious congregations took upon themselves the task of establishing schools and providing primary and secondary schooling to children in the absence of state initiatives in that area during the 19<sup>th</sup> and 20<sup>th</sup> centuries) that the vast majority of primary schools are denominational schools managed by religious congregations. Article 42.4 provides specifically that: “the State shall provide for free primary education and shall endeavor to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.” This provision and its implications will be examined below in Section IX, Religious Education of Youth.

#### IV. LEGAL CONTEXT

There is little specific legislation on religion,<sup>49</sup> but the development of constitutional principles has taken place through case law. The three major cases regarding freedom of religion are *Quinn’s Supermarket Ltd. v. Attorney General*,<sup>50</sup> *McGrath v. Trustees of*

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provision effectively reiterates what is already protected by Article 40.1, which has been held as prohibiting the State from discriminating upon religious grounds.

47. See J. H. Whyte, *Church and State in Modern Ireland*, supra n. 33 at 16.

48. Gerard W. Hogan and Gerry F. Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed. (United Kingdom: Bloomsbury Professional/Tottle Publishing, 2003), 2045.

49. It must be remembered that Irish Law is a system of common law.

50. [1972] IR 1.

*Maynooth College*<sup>51</sup> and *In Re Article 26 and the Employment Equality Bill, 1996*.<sup>52</sup> All of them involve interaction between the principle of freedom of religion and the principle of non-discrimination.

In *Quinn's Supermarket*, several regulations that exempted Jewish Kosher shops from compliance with commercial trading hours were challenged. The plaintiff, a supermarket's representative, considered that differential treatment contrary to Article 44.2.3° of the Constitution, as it imposed discrimination on grounds of religion. The Supreme Court accepted that Article 44.2.3° of the Constitution precludes all distinctions based upon religious belief, profession or status. Thus, the aforementioned regulations were *prima facie* unconstitutional for being discriminatory. However, the Supreme Court recalled that Article 44.2.1° guarantees the free practice and profession of religion. In order to resolve the potential clash between the two sections, the Court looked to ascertain the "overall purpose" of Article 44. Looking to the Preamble as well as the historical context of the provision, the overall purpose was deemed to be "the freedom of practice of religion." And, as Walsh J. pointed out, "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 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>53</sup> It was therefore held that the interaction between the principles of freedom of religion and non-discrimination can sometimes mean that discrimination on religious grounds can sometimes not only be permissible but also positively required by the Constitution if necessary to uphold the free practice of religion.<sup>54</sup>

The judgment in *McGrath v. Trustees of Maynooth College* confirmed this position; in the words of Henchy J: "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."<sup>55</sup> In *Re Article 26 and the Employment Equality Bill* the Supreme Court, again, ruled that while it was not generally permissible to make any discrimination on grounds of religion, that distinction would be valid where necessary to preserve the constitutional guarantee of free practice and profession of religious freedom.<sup>56</sup> The Bill challenged in this case exempted from a statutory ban on religious discrimination in employment any "religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values." Effectively, these institutions were permitted, when recruiting employees, to give favorable treatment on grounds of religion if it were necessary to uphold the ethos of the institution. (The Supreme Court did not provide a definition of "ethos" however.)

The rationale of the rulings is plain: the ban of religious discrimination is to be read in the light of the guarantees of free practice and profession of religion. As a further implementation of this principle, the *Equal Status Act 2000* enabled publicly-funded denominational schools to discriminate on grounds of religion in enrolment policy where necessary to uphold a denominational ethos.<sup>57</sup>

51. [1979] ILRM 166.

52. [1997] 2 IR 321.

53. [1972] IR 1, at 24.

54. See a fuller account of this ruling in Eoin Daly, "Religious Discrimination Under the Irish Constitution: A Critique of the Supreme Court Jurisprudence," *Cork Online Law Review* 7 (2008): 28-44, article available at [http://corkonlinelawreview.com/editions/2008/2008\\_COLR\\_28.pdf](http://corkonlinelawreview.com/editions/2008/2008_COLR_28.pdf)

55. [1979] ILRM 166,

56. See, on this item, James Casey, "Church Autonomy and Religious Liberty in Ireland," in *Church Autonomy: A Comparative Survey*, ed. Gerhard Robbers (Frankfurt am Main: Peter Lang, 2001), 8-9; Daly "Religious Discrimination under the Irish Constitution, supra n. 54.

57. Daly, id.

There are no formal relations bilateral between State and religious denominations and there has never been any serious attempt to sign an agreement.<sup>58</sup> Although the Catholic ethos of the country would make an agreement with the Catholic Church logical, the principle of autonomy explains its non-existence.

## V. THE STATE AND RELIGIOUS AUTONOMY

As noted above, autonomy is one of the key constitutional principles and, as regards the relationship between the state and the Catholic Church, it has a long history, which is now preserved in Article 44.2.5°. According to the *Report of the Constitutional Review Group*, this subsection is designed to preserve the autonomy of religious denominations, and it seems to do so satisfactorily.<sup>59</sup> The *Report* acknowledges that a strict interpretation of this subsection might not cover certain issues, like property held on trust for a religious body. However, the subsection should be accorded a purposive interpretation so that it covers property that, directly or indirectly, comes under the aegis of a religious denomination.

The Constitution does not define the religious denominations. The Supreme Court, in *Re of Article 26 and the Employment Equality Bill*, stated that this term “intended to be a generic term wide enough to cover the various churches, religious societies or religious congregations under whatever name they wished to describe themselves.” This description would include the long-standing denominations, but it is not so clear if others would be included in the term.<sup>60</sup>

The principle of autonomy might collide with the principle of non-discrimination protected in Article 44.2.3°. The Supreme Court, in *McGrath v. Trustees of Maynooth College*<sup>62</sup> considered the interaction between these two principles, and re-iterated the position in *Quinn’s Supermarket* that the principle of non-discrimination must be construed according to its purpose, namely to protect freedom of religion and the independence of religious denominations. According to Henchy J, this means that “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.”<sup>63</sup> In the particular case, the Court recalled that Maynooth College was and always had been a Catholic seminary, with the purpose of educating students for the Roman Catholic priesthood. Therefore the College was entitled, in its internal statutes, to require that academic staff, or at least a certain proportion of staff, would be priests with certain qualifications and loyalty to the teachings of the Catholic Church. The conclusion of the case was that the distinction drawn between priests and laymen in the internal

58. Unless, perhaps, the first draft of Article 42 of the Constitution of 1937. It stated that when Church and State powers required coordination, the State could sign agreements regarding civil, politic and religious issues with the Catholic Church or other religious denominations. See Keogh, “The Constitutional Revolution,” supra n. 31 at 22.

59. *Report*, supra n. 28 at 387.

60. Colton reports a statement made by the then Prime Minister, Bertie Ahern, when asked about the Government’s intention to institute arrangements with churches and other non-confessional organizations. The Prime Minister said that there were prospects of conversations with some religious denominations, and mentioned up to 22. However, it cannot be considered as a closed checklist of the accepted denominations [Paul Colton, “Religious Entities as Juridical Persons – Ireland,” in *Churches and Other Religious Organisations as Legal Persons*, ed. Lars Friedener (Leuven: Peeters, 2007), 134. See also G. Whyte, “On the Meaning of ‘Religion’ ...,” supra n. 35 at 452-453].

61. See a comment on this issue in C 2.

62. [1979] ILRM 166. The plaintiffs, former priests, had been dismissed from their teaching posts at Maynooth (that is both a seminary and a recognised college of the National University of Ireland; as this latter, it receives State funding). The ground of the dismissals was that the plaintiffs had violated some college statutes. They claimed that those statutes discriminated between clerical and lay teachers and thus infringed Article 44.2.3° of the Constitution (See also Casey, “Church Autonomy and Religious Liberty in Ireland,” supra n. 56 at 2-3).

63. [1979] ILRM 166, at 187.

governance of Maynooth College was not prohibited by means of the prohibition on non-discrimination in Article 44.2.3, but to the contrary were permissible and deserving of respect by the State as part of the guarantee of autonomy in Article 44.2.5.

Thus, we can conclude that the Constitution recognizes and protects the autonomy of religious congregations and their internal organization. Each denomination is entitled to have its own jurisdiction over internal matters; to create internal rules and establish tribunals, but their decisions do not have civil effects.<sup>64</sup>

## VI. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

Consistent with the requirements of the principle of autonomy, discussed above, the legal regulation of religion is also traditionally minimal. Generally, churches and religious bodies have the status of unincorporated associations.<sup>65</sup> Although there appears to be nothing to prevent churches from acquiring corporate status, there is no legal procedure for making churches corporate bodies under public law. This lack of juridical personality does not usually pose any practical problem. The only difficult issue would be church property, but it is usually vested in trustees, for a parish of a diocese.<sup>66</sup> There is not, either, a register of churches in Ireland.

Public authorities may state procedures to enlist buildings for preservation on grounds of its interest. Those buildings cannot be altered or demolished without permission. Also, any monument associated with the local religious history constitutes a "historic monument" under the 1930-1987 *National Monument Acts*.

Broadcasting of religious advertisements is forbidden by the 1988 *Radio and Television Act*.<sup>67</sup> However, the 2001 *Broadcasting Act* enables the broadcasting of notices or events related to a particular denomination, provided they do not promote adherence to any religion or belief.<sup>68</sup>

Persons in Holy Orders, religious ministers, and vowed members of a religious community may be excused to serve on a jury according to the 1967 *Juries Act*.

There is no general exemption from Valued Added Tax for churches and religious bodies. However, churches that have a charitable status are exempt from payment of taxes. There are also other exemptions of taxes, such as for lands or buildings exclusively dedicated to worshipping.<sup>69</sup>

Finally, the seal of confession<sup>70</sup> is traditionally respected by the civil law, according to the decision of *Cook v. Carroll*,<sup>71</sup> in which Gavan Duffy J held that "the exception allowed in Ireland for the secrets of the confessional was adopted tacitly and from sheer necessity"<sup>72</sup> and that the constitutional protections for freedom of religion together with the sociological reality that the vast majority of Irish people are Catholics made it "intolerable" that the English common law rules of evidence should be taken to exclude an exemption for the seal of confession.<sup>73</sup> In recent years, however, the former Minister

64. However, Casey maintains that the proceedings of any such tribunals would be open to review by the High Court, for example to ensure that they do not exceed their jurisdiction and that they observe fair procedures. See Casey, "Church Autonomy . . .," supra n. 56 at 3.

65. See a wider account on this issue in Colton, "Religious Entities as Juridical Persons – Ireland," supra n. 60 at 130 ff.

66. An exception is the Church of Ireland. As part of the disestablishment, the Church of Ireland created the Representative Church Body to hold his properties. This body was incorporated by Royal Charter of October 15th, 1870. See Casey, "Church and State in Ireland 1997," supra n. 29 at 193-194.

67. In the same sense, *Murphy v. Independent Radio and Television Commission* [1999] 1 IR 12.

68. See Colton, "Religious Entities as Juridical Persons – Ireland," supra n. 60 at 137.

69. See a wider account of financial benefits in Colton, id., at 137 ff.

70. Canon 983 provides that "the sacramental seal is inviolable. Accordingly it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion." Canon 984 provides that "any knowledge obtained by the confessor during a confession cannot be used at any time later to the detriment of the penitent". Punishment for breaking this seal includes excommunication from the Catholic Church.

71. [1945] 1 IR 515.

72. [1945] 1 IR 515, at 522-3.

73. [1945] 1 IR 515, at 519.

for Justice Alan Shatter suggested on several occasions that he would legislate for the removal of the exemption with regard to information about children.<sup>74</sup> The consistent reaction of the clergy was that they would necessarily have to disobey this law<sup>75</sup> and some commentators remarked that it would potentially be unconstitutional.<sup>76</sup> The 2012 *Criminal Justice (Withholding Information on Offences against Children and Vulnerable Persons) Act* provided that a person could be guilty of an offense if he or she knew or believed that one of a particular type of offenses had been committed by another person against a child and that that offense of withholding information was punishable by up to ten years in prison. In its final draft it provided an exemption in s.4(2) which reads that the offense is “without prejudice to any right or privilege that may arise in any criminal proceedings by virtue of any rule of law or other enactment entitled a person to refuse to disclose information.” Whilst this provision does not specifically mention the seal of confession or the necessity to discriminate in order to protect the autonomy of the Catholic Church in its internal rules as well as the freedom of religion of penitents, at least it appears to cover that situation. However, the 2014 *Children First Bill* which is currently being promulgated in Parliament and which requires mandatory reporting by specified persons of knowledge, belief or suspicion that a child is suffering or is at risk of suffering harm (assault, ill-treatment, neglect or sexual abuse, whether by act omission or circumstance) and does not mention any exemption for the seal of confession although priests are listed among the specified persons.

## VII. STATE FINANCIAL SUPPORT FOR RELIGION

As noted above, Article 44.2.2<sup>o</sup> guarantees that the State will not endow any religion. The main challenge with regard to this provision is defining the meaning and extent of the non-endowment clause. The first point to be made here is that endowment typically refers to permanent income,<sup>77</sup> meaning that the constitutional guarantee preclude the State from enriching a religion by transferring property to it or by providing it with such a permanent income. Second, and particularly in the light of Article 42.4, it must be understood that the principle of non-endowment does not prevent the state from providing public funds for equipment or salaries or structural improvements to schools (as is specifically constitutionally mandated in Article 42.4 and will be discussed below in Section IX, Religious Education of the Youth), hospitals and other social services that are run by religious bodies. Indeed the vast majority of schools and hospitals were originally established by and continue to be run by religious congregations. As Casey explains, the guarantee of non-endowment prohibits the provision of public funding for exclusively religious purposes.<sup>78</sup> The Supreme Court confirmed this point in the case of *Campaign to Separate Church and State v. the Minister for Education*.<sup>79</sup> The plaintiff had argued that State funding of chaplaincies – both Catholic and Church of Ireland – contravened the non-endowment clause of Article 44.2.2<sup>o</sup>. The Court, to the contrary, held that the impugned funding system was consistent with the Constitution, whenever the support for

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74. See for example <http://www.thejournal.ie/shatter-insists-mandatory-reporting-will-apply-to-priests-despite-cardinals-comments-212267-Aug2011/>.

75. See, for example, <http://www.independent.ie/irish-news/priests-we-wont-break-seal-of-confession-to-report-sex-abuse-26847067.html>.

76. <http://www.ionainstitute.ie/index.php?id=2130>.

77. The Oxford Dictionary, cited in several cases and official documents, understands *endow* as “to enrich with property; to provide (by bequest or gift) a permanent income for a person, society or institution.” In the case of *Campaign to Separate Church and State* [1998] 3 IR 321, at 365, Keane J adopted this definition, stating that “Article 44.2.2<sup>o</sup> was thus intended to render unlawful the vesting of property or income in a religion *as such* in perpetual or quasi-perpetual form.”

78. Casey, *Constitutional Law in Ireland*, supra n. 41 at 696. Similarly, in *McGrath v. Trustees of Maynooth College* the Supreme Court understood that the public funding of Maynooth was not unconstitutional, because this College is not only a seminary, but also a constituent College of the National University of Ireland.

79. [1998] 3 IR 321.

salaried chaplains was available to all community schools of whatever denomination on an equal basis, in accordance with their needs.<sup>80</sup>

Thirdly, again the principle of non-endowment must be read together with the principle of non-discrimination, meaning that if the State confers certain economic benefits on institutions run by religious bodies, it must do so on a non-discriminatory basis. The *Campaign to Separate* case is the Supreme Court's effort to honor and balance both of these principles, simultaneously. According to the *Report* of the Constitutional Review Group, there is "something of a discordance between the constitutional prohibition on the endowment of religion and no discrimination on religious grounds by the State on the one hand and the maintenance of a religious ethos in a publicly funded institution on the other."<sup>81</sup> A better balance might be achieved by a new clause to provide that institutions which retain a religious ethos should not be debarred from public funding, provide that they do not discriminate on grounds of religious belief or practice, save where this can be shown, in any given case, to be necessary in order to maintain their own religious ethos.

Finally, it is pertinent to note the link between non-endowment and non-establishment. Although there is a close relation between both concepts, and although historically the Church of Ireland was both established and endowed, the two concepts are different, and the non-endowment clause does not necessarily preclude establishment.<sup>82</sup> Further, in the context of the strong wording of the non-endowment clause it is relevant to note that the Constitution does not expressly guarantee not to establish any religion, although it quite patently does not establish any religion at constitutional level and such establishment at legislative level would certainly be constitutionally invalid for amounting to discrimination on the ground of religious belief or status.<sup>83</sup>

#### VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

The principle on this issue is quite clear: the civil law does not recognize effects to religious acts, whether they stem from a religious court, a religious body or a religious authority.

When the Church of Ireland was disestablished, jurisdiction in matrimonial matters was transferred to the civil courts. Indeed, the *Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870* required the civil courts to adopt the rules and principles that the ecclesiastical courts had followed. However, the civil courts have over the years departed from those principles. The Law Reform Commission declined in 1984 to recommend that decrees of nullity of marriage by an ecclesiastical court of the Catholic Church be given legal recognition.<sup>84</sup>

80. See James Casey, "Church and State in Ireland in 1998," *European Journal of Church and State* 6 (1999): 60; Oran Doyle, "Article 44: Privileging the Rights of the Faithful," in Doyle and Carolan, *supra* n. 35 at 484.

81. See *Report*, *supra* n. 28 at 382. It continues: "For example, there seems to be no constitutional objection to the State funding a hospital run by religious orders (on the basis that such funding was not primarily designed for the advancement of religion), but there might well were a publicly funded hospital to discriminate on religious grounds with regard to either employment or admissions policies. Thus, for example, if a publicly funded hospital were to give preference in its employment policies to adherents of a particular religious belief, this might well amount to a form of religious discrimination by the State. At the same time, if a hospital could not give preference to its own co-religionists, it might find it difficult to maintain its own religious ethos."

82. For example, there are, among the European states, examples of states with an established church, but without state endowment – like Great Britain – and states with concurrent endowment of religions, but without an established Church – like Germany.

83. This point was made by the Supreme Court which held that while there is no explicit provision in the Constitution banning the establishment of a religion, it is obvious that any such decision "would be impossible to reconcile with the prohibition of religious discrimination." *Campaign to Separate Church and State v. the Minister for Education*, [1998] 3 IR 321 at 85. See also *Report*, *supra* n. 28 at 384. Ultimately, the Constitutional Review Group recommends not amending the Constitution to introduce a non-establishment clause, because it might lead to some extreme undesirable results.

84. See Henry Murdoch, "Bell, Book and Candle," 98 *Law Society Gazette* (Ireland) 10 (2004): 8-11. There is neither any reported case in which religious factors have grounded a civil decree of nullity, civil separation or

In *O'Callaghan v. O'Sullivan*<sup>85</sup> the Supreme Court held that canon law 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 the proof of foreign law, but only where it governs a relationship that is at issue.<sup>86</sup> It would not be correct to imply that this gives canon law precedence over civil law. In other circumstances, it may have no status and civil law may rule supreme, as is the case in ecclesiastical decrees of nullity of marriage.<sup>87</sup>

According to the *Civil Registration Act, 2004*, religious bodies may nominate solemnisers of marriages, for this specific purpose. They will be recorded in a Register of Solemnisers.

Tribunals of the Catholic Church exercise jurisdiction over the annulment of marriages, but their rulings have no civil effects.

## IX. RELIGIOUS EDUCATION OF THE YOUTH

The Constitution recognizes, in Article 42.1 that “the primary and natural educator of the child is the Family and [that the State] 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.” Parents may choose to homeschool their children, according to the terms of Article 44.2 and 44.3.1<sup>o</sup>, which provide that “parents shall be free to provide ... education in their homes or in private schools or in schools recognized or established by the State” and “the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.”

The school system is organized according to the principle of co-operation between the various religious denominational groups and the State. Catholic Church always had a great influence in education, having founded many schools and running them on a voluntary basis for decades. When the state assumed responsibility for providing for education, according to the terms of Article 42.4, it did not attempt to dismantle the education system that was already in place, but rather provided public funds to pay teachers at schools that were already being run by religious congregations. As a result, primary education is mainly provided in national schools.<sup>88</sup> Despite their name, these schools are not publicly owned, but rather owned and run by denominational bodies.<sup>89</sup> This state of affairs was accepted by the Catholic Church and Church of Ireland on the one side and by the State, and it was not highly controversial, as it happened in other European countries.<sup>90</sup>

This state of affairs is the practical manifestation of the constitutional principle of co-operation contemplated in Article 42.4, which provides that “the State shall provide for free primary education.” A first draft of this provision had read: “The State shall provide free primary education,” and the amended version reflects the desire that the state should

divorce. It appears that failure to fulfil a confessional obligation to go through a religious marriage could not invalidate a marriage valid under civil law. See James Casey, *State and Church in Ireland*, cit., 206.

85. [1925] 1 IR 90. A similar case was held before High Court in Northern Ireland in 1991, in the legal battle between Bishop Cathal Daly and his curate (now bishop) Pat Buckley (*Buckley v. Daly*, 1991 ITLR).

86. That is what happened in *Connolly v. Byrne* (1997 IEHC, 195). In this widely publicised case, the court refused injunctive relief to parishioners who sought to restrain the bishop from altering the sanctuary of Carlow Cathedral. The defendants successfully contended that the property was held subject to canon law and that they had the right under canon law to carry out the alterations.

87. See Murdoch, “Bell, Book and Candle,” supra n. 84 at 11.

88. The *Education Act 1998* does not use the term “national school” and instead uses “primary” school. The name is not particularly significant except that national school clearly denotes that the school is state aided while a primary school can be private or state aided.

89. In practice, the Catholic and Church of Ireland bishops are the patrons of the schools within the diocese, with the parish priest usually carrying out the functions on behalf of the bishop.

90. W. Niall Osborough, “Education in the Irish Constitution,” in *The Irish Jurist*, vol. XIII (Dublin: University College, 1978). See a historical approach to religious education in Fergel McGrath, *Education in Ancient and Medieval Ireland* (Dublin: Studies Special Publications, 1979).

financially support those who are already providing education. In the case of *Crowley v. Ireland*<sup>91</sup> the meaning of this provision was clarified: the Supreme Court understood that the State is not obliged to educate in public schools, but only to adopt all means needed to guarantee that all children receive free primary education.<sup>92</sup>

The most controversial issue is State funding of religious education.<sup>93</sup> As noted above, Article 44.2.2° of the Constitution prohibits endowment but does not prevent the state from providing economic aid to religious bodies which fulfill a social need. Article 42.4° asserts that the State will give “reasonable aid” to private schools, although it must be done on a non-religious-discriminatory basis, according to Article 44.2.4°. All these constitutional provisions must be interpreted together. This integrated interpretation confirms that the State can fund religious education, if the following requirements are met.<sup>94</sup>

The first one is that funding must have been established by legislation. The only Acts that authorize public funding of denominational education are the *Appropriation Acts*, on a yearly basis. Although drafters of Article 44 of the Constitution probably envisaged that this legislation would be specific in character and establish a permanent statutory scheme whereby such aid might be disbursed, this is the legislative framework and it conforms to the letter, if perhaps not the spirit of Article 44.<sup>95</sup>

Secondly, there must be no discrimination in the allocation of funding. This requirement may pose some difficulties. The State established some specific conditions for a school to get financial aid. Any group of parents, with or without a religious background, can apply for public help to create a school if they demonstrate there are a potential number of students. These requirements are identical for all private schools, be they denominational or non-denominational.

The third requirement stems from the principle of non-discrimination, and is explicitly recognized in Article 44.2.4° which provides that “State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.” Parents who desire that their children attend a denominational school, may request – and the school must accede to their request – that their children are exempted from religion classes. This is the compromise between the principle of non-discrimination that must be honored for the sake of these particular children and the principles of freedom of religion and co-operation which mean that it is not possible to prevent a denominational school from giving religious education to students in general.

The final point to make is that, from a constitutional perspective, such State funding does not amount to endowment of religion. As the primary formators of their children, parents are free to decide which kind of education they want for their children, and the State, under Article 42.4 must both defer to their choice “especially in the matter of

91. [1980] IR 102.

92. The judgment also highlights the historical reasons for this arrangement, recalling how “the history of Ireland shows how tenaciously the people resisted the idea of State schools. The Constitution must not be interpreted without reference to our history and to the conditions and intellectual climate of 1937 when almost all schools were under control of a manager or of trustees who were not nominees of the State. That historical experience was one of the State providing financial assistance and prescribing courses to be followed at the schools. But teachers, though paid by the State, were not employed by and could not be removed by it; this was the function of the manager, of the school who was almost always a clergyman (...). The effect [of Article 42.4] is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager of trustees, to provide means of transport to the schools if this is necessary to avoid hardship, and to prescribe minimum standards.” Some years later, in the National Education Convention (October 1993), the representative of the Secretary for Education said that the State fulfils its constitutional obligation providing for the biggest part of the capital and school maintenance, paying for the teachers’ expenses and providing for free transport when needed. See *Report*, supra n. 28 at 343.

93. A general approach to the matter can be found in K. Williams, “State Support for Church Schools: Is it Justifiable?” in 11 *Studies in Education* (1995): 37 ff.

94. See *O’ Shield v. Minister for Education*, [1999] 2 IR 321.

95. See *Report*, supra n. 28 at 373-374. The Constitutional Review Group understands the situation is likely to change in a forthcoming Education Bill.



religious and moral formation” and *provide for* this education, but this cannot be considered endowment of religion. The Supreme Court affirms that funding denominational education is permissible under the Constitution, and it does not entail endowment of that denomination.<sup>96</sup> Indeed, if it were otherwise – if *providing for* education according to parental choice, particularly with regard to religious education, was to be considered as endowment of religion then Articles 42.4 and 44.2.2° would be irreconcilable.

In January 2014, the European Court of Human Rights ruled in the case of *O’Keeffe v. Ireland* which concerned the liability of the state for the criminal sexual abuse of children by a lay school teacher who was employed by the school manager who was a Catholic priest, acting on behalf of his Bishop. Although the Government argued that the applicant’s case was inadmissible because she had not exhausted domestic remedies, the applicant argued that the State had failed in its positive obligation under Article 3 “to put in place an adequate legal framework of protection of children from sexual abuse, the risk of which the State knew or ought to have known,”<sup>97</sup> even though the State was not in any sense involved in the day-to-day management of the school. The Grand Chamber held that “the State must be considered to have failed to fulfill its positive obligation to protect” the applicant from sexual abuse and that there had therefore been a violation of Article 3 of the European Convention on Human Rights, which provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Secondary schools are privately owned and managed. They are under the trusteeship of religious communities, boards of governors or individuals. Since 1964, the State funds 80 percent of the building costs, teacher’s wages and maintenance of these schools.<sup>98</sup> Furthermore, the State gives Catholic schools a specific amount for pupil every year. The Protestant schools receive that State aid not directly, but through the Funding Committee of the Protestant Education, that receives state funds and distributes them.<sup>99</sup> Religious education will be imparted by the religious denomination, under its responsibility; the school shall guarantee that those students who do not want to attend religious instruction will not be compelled to do it.<sup>100</sup>

There are also vocational schools, with a more technical orientation. They are non-denominational, although there is (optional) religious formation and usually there is a member of the Catholic Church in the board.

At university level, Trinity College in Dublin was founded under the reign of Queen Elizabeth I in 1592, in order to provide for the educational needs of the Protestant ascendancy. Catholics were permitted for the first time to apply for admission in 1793 (as part of the limited measures to allow Catholic emancipation at the end of the 18<sup>th</sup> century), although the Bishops of the Catholic Church discouraged Catholics from attending until 1970. In 1850, Queen’s University of Ireland was formally established by royal charter, recognizing the three constituent colleges in Belfast, Galway, and Cork which had been established by the 1845 Universities Act. Although Queen’s University was formally open to students of all denominations, including Catholics, the Irish bishops at their first formal Synod in Thurles in 1850 called for the establishment of a Catholic university. The Catholic University of Ireland was established in Dublin in 1851, and Cardinal John Henry Newman was invited from Oxford to be its chancellor. Now, the former Catholic University of Ireland, which is now University College Dublin, together

96. See *Campaign to Separate Church and State v. Minister for Education*, cit., at 88-89, 99-100.

97. *O’Keeffe v. Ireland*, no. 35810/09 (Judgment of the Grand Chamber, 28 January 2014).

98. Until 1964, the then known as *intermediate schools* could only apply for grant aid through a system of payment by results: the schools were paid on the basis of the success of their students at yearly examinations conducted by a Government body, the Intermediate Board. See *Report*, supra n. 28 at 341.

99. The main reason for this difference is that there are areas of the country where no protestant schools are available. The Committee, then, may use the funds to provide for boarding grants in protestant schools (See James Casey, “State and Church in Ireland,” in *State and Church in the European Union*, 2nd ed., ed. Gerhard Robbers (Baden-Baden: Nomos, 2005), 199.

100. See John Coolahan, *Irish Education: History and Structure* (Dublin: Institute of Public Administration, 1981), 159.

with the colleges at Cork and Galway form the National University of Ireland, which is non-denominational.

#### X. RELIGIOUS SYMBOLS IN PUBLIC PLACES

There is a close link between this and the principle of recognition under Article 44.1. As a general rule, it could be said that no problem would arise if there were not any kind of State funding of the religious symbol. (Otherwise, it could be considered an endowment of religion.)<sup>101</sup> However, there has been some controversy in recent years over the non-display the traditional Christmas at the headquarters of the Defense Forces.<sup>102</sup>

#### XI. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

As noted above, Article 44.1 provides that the State “shall hold His Name in reverence, and shall respect and honor religion,” and Article 40.6.1°i which guarantees “the right of citizens to express freely their convictions and opinions” also prohibits blasphemy, stating that: “the publication or utterance of blasphemous, seditious, or indecent matter is an offense which shall be punishable in accordance with law.” The Constitutional Review Group recommended by majority to delete Article 44.1, or alternatively to reformulate it as follows: “The State guarantees to respect religion.”<sup>103</sup> However, no action has been taken since 1996 to amend the Constitution in this way. The recent Constitutional Convention also recommended by majority that the offense of blasphemy should be replaced.<sup>104</sup>

The 1961 *Defamation Act* made blasphemy a statutory crime,<sup>105</sup> although in practice it was unenforceable because it did not contain a definition of what blasphemy consists of.<sup>106</sup> A Report on the Law Reform Commission of 1991 concluded that Ireland’s blasphemy laws were in need of reform and were unlikely to withstand a challenge before the European courts<sup>107</sup> for want of legal certainty about the scope of the offense and for discriminating in favor of the Judeo-Christian tradition. Although the Commission preferred that the offense should be abolished entirely, the Constitution itself requires that blasphemy should be an offense, and therefore it recommended a redefined offense of outrage to the adherents of a religion, by reason of its insulting content concerning matters held sacred by that religion. The prosecution would, however, have to show that the publisher knew that the material was likely to cause outrage and that this was its specific intent.<sup>108</sup>

The 2009 *Defamation Act* provides in section 36 that: “A person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction

101. That happened when the State financed a statue of F. Pio di Pietrecina, placed in a hospital run by a Catholic order. See *Moloney v. Southern Health Board*, cited in *The Irish Jurist* n.s., 21 (1986), 146 ff. The case settled on terms favourably to the plaintiff, although it might be questioned whether the erection of a statue can constitute, as the plaintiff argued, an endowment of religion (Hogan and Whyte, *J.M. Kelly: The Irish Constitution*, supra n. 48 at 1103).

102. <http://www.cinews.ie/article.php?artid=9421>.

103. *Report*, supra n. 28 at 378.

104. <https://www.constitution.ie/AttachmentDownload.ashx?mid=b7d9c660-a044-e311-8571-005056a32ee4>.

105. It stated: “Every person who composes, prints or publishes any blasphemous or obscene libel shall, on conviction thereof on indictment, be liable to a fine not exceeding five hundred pounds or imprisonment for a term not exceeding two years or to both fine and imprisonment or to penal servitude for a term not exceeding seven years.”

106. See *Corway v. Independent Newspapers*, [2000] 1 ILRM 426 SC and [1999] 4 IR 484 SC. Lacking a statutory definition, the common law definition of blasphemy was inadequate because it presupposed an established church.

107. The Law Reform Commission, Thirteen Annual Report (1991), 5. (This can be found at [http://www.lawreform.ie/publications/data/volume10/lrc\\_70.html](http://www.lawreform.ie/publications/data/volume10/lrc_70.html)).

108. See Michael Kealey, “Publish and Be Damned,” *Law Society Gazette* (April 2006): 20-23, available at <http://www.lawsociety.ie/Documents/Gazette/Gazette%202006/april2006.pdf>

on indictment to a fine not exceeding 25,000 Euros,” specifying that blasphemous matter is that which is “grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion” and requiring also that the person “intends, by the publication or utterance of the matter concerned, to cause such outrage.”<sup>109</sup> It can be plainly seen that this represents a re-orientation of the offense of blasphemy as an one which concerns subjective interpersonal relations (the offender intends to and in fact causes outrage among religious adherents), rather than constituting an offense against God which is punishable on the basis that the State, according to Article 44.1, “acknowledges that homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion.”

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109. A defense is available if the defendant can prove that “a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offense relates.”