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RELIGION AND THE IRISH CONSTITUTION

GERARD WHYTE*

INTRODUCTION

As we approach the third millennium, Irish society is undergoing profound changes. The influence of institutionalised religion is on the wane and, in a related development, communal views of society are increasingly challenged by a growing emphasis on the rights of the individual.¹ This debate is already resonating in the area of Irish constitutional law. Recent referenda have liberalised the law in relation to both abortion and divorce, while the courts have been asked to deal with such issues as the right to die and State support for denominational education. In this article, I attempt to provide readers who are coming to Irish constitutional jurisprudence for the first time with an overview of the relationship between religious values and the Irish constitutional order. I begin by sketching, very briefly, the historical development of Ireland, including its constitutional history, before focusing, in more detail, on the treatment of religion under the Irish Constitution.

I. IRELAND AND ITS CONSTITUTION: A BRIEF INTRODUCTION

Ireland is a small island in the westernmost part of the European continent with a total population of approximately five million people. A country with a very long history,² Ireland is unique among contemporary European states in that it is the only one to have suffered colonisation during the age of European Imperialism which began in the fifteenth century. This gives Ireland a special role in international affairs as a bridge between the developed and developing countries. It also provides the matrix for a proper un-

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1. See Tom Garvin, *Democracy in Ireland: Collective Somnambulance and Public Policy*, 39 *ADMINISTRATION* 42 (1991).

2. Ireland's first settlers probably came from Scotland around 8000 B.C. and the oldest buildings in the world, predating the Egyptian pyramids, are to be found in Newgrange, just 30 miles from the Republic's capital, Dublin.

derstanding of Irish history and contemporary society, and of the enduring conflict in Northern Ireland.

The story of Ireland's earliest inhabitants is shrouded in mythology. We do know that they were farmers and craftsmen. Between 250 B.C. and 400 A.D., the Celts displaced these peoples. The conquering Celts remained the politically dominant group on the island until as late as the early seventeenth century. During this time, the Celts were converted to Christianity, largely through the efforts of St. Patrick who began his mission to Ireland in 432 A.D.

The Celts successfully absorbed Norse and Viking invaders from Scandinavia and some Norman invaders from France, all of whom became "more Irish than the Irish themselves." However, the Norman influx, which began in 1169, contained a number of families who remained loyal to the English monarchy and who established a foothold for English rule in Ireland, centred on Dublin. The defeat and exile of the native Celtic, or Gaelic, aristocracy in the early seventeenth century resulted in the entire island passing under English control. The English monarchy, which by now was Protestant, attempted to settle parts of the country, especially the northeast, with British colonists—the Scotch-Irish of U.S. history. In the absence of a political elite, the native population had to look to the Catholic clergy for leadership, hence the dominant position of the Catholic Church among Irish nationalists.

A recurring theme running through the subsequent history of Ireland is the desire on the part of the native Irish—and the Scotch-Irish until the early nineteenth century—to achieve a measure of self-government from England. On various occasions, this resulted in armed rebellions which were invariably futile.

The late nineteenth century, however, witnessed the emergence of a strong nationalist movement whose political objective was Home Rule, a limited form of self-government within the British Empire. Home Rule was opposed by the Scotch-Irish Protestant minority located in the northeast of the island because of their fears of domination by the Catholic majority. Thus, this minority began to organise themselves along paramilitary lines to defend their link to Britain. Some elements of the nationalist movement followed suit, and in 1916 the more militant nationalists launched an armed rebellion in Dublin in support of a fully independent Irish Republic. This Easter Rising, or Insurrection,³ was another military failure. However, the harsh treatment of the rebel leaders swung the entire nationalist community behind them

3. Certain superficial parallels between this event and the first Easter—the terms used to describe the rebellion, the notion that the leaders of the rebellion were laying down their lives to "redeem" the Irish nation—helped to give the Easter Rising and its leaders a quasi-mythical place in the history of Irish nationalism.

and led to the guerrilla War of Independence 1919-21, from which the twenty-six counties of the South emerged as a self-governing Dominion within the British Empire. The remaining six counties of Northern Ireland obtained their own Parliament within the United Kingdom of Great Britain and Northern Ireland in 1920.

Both political entities reflected the religious division on the island. However, while the South was overwhelmingly Catholic, Northern Ireland contained a sizable Catholic minority who aspired to union with the South and who were generally not trusted by their Protestant neighbours. The next seventy years or so witnessed systematic discrimination against this Catholic minority in relation to voting rights, employment and housing. Periodically, militant republicans launched terrorist campaigns in support of a united Ireland but each of these invariably petered out after a number of years. During the 1960's, however, a new generation of Catholic nationalist politicians emerged who had been educated under the British welfare state and who were inspired by the civil rights movement in the United States. State repression of their campaign for civil rights led to the re-emergence of the militant republicans in 1969 and a subsequent terrorist campaign which has lasted for more than twenty-five years and cost more than 3000 lives. Ostensibly based on religious differences, in fact the conflict in Northern Ireland is primarily a classic post-colonial conflict where religion, and not colour or language, is the only dividing line between the natives and the colonists.⁴

Having thus provided a broad account of the evolution of modern Ireland, let us consider briefly the history of constitutional law in the South, before addressing in more detail the question of religion under the Irish Constitution.

Since 1919, the nationalist community in Ireland has had three written Constitutions. The first of these, the Constitution of Dáil Éireann and the Democratic Programme 1919, was drafted at the height of the War of Independence and was designed, in part, to win international support for the independence movement. In an attempt to appeal to the international socialist movement, the Democratic Programme reflected the influence of the Irish Labour Party. However this constitutional order was quickly overtaken by events. In 1921, the moderate wing of the Independence movement concluded an agreement, or Treaty, with the U.K., whereby the South would become a self-governing Dominion within the British Empire. This led to a civil war with the more militant wing of the independence movement which was won by the moderates. The Constitution of the Irish Free State of 1922 reflected

4. Though it must be acknowledged that for the fundamentalist section of the Unionist population, whose principal spokesman is the Rev. Ian Paisley, a perceived threat from Catholicism is a very real part of their world-view.

this compromise on the part of the moderates by including 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. This document also reflected the liberal democratic tradition in its protection of such rights as freedom of religion, freedom of speech, and freedom of assembly. In 1932, eleven years after Independence, the largest bloc of militant republicans, committed to constitutional politics since 1927, formed the government and began to amend the 1922 Constitution by weakening the links to the British Empire. Eventually they decided to replace that Constitution with a completely new one which was adopted by the people in 1937—a rare example of the making of a Constitution by evolution rather than revolution. Two significant philosophical influences operated here—the inherited liberal democratic tradition of the Free State, and now, explicitly for the first time, the social teaching of the Catholic Church in relation to such areas as the family, education and private property. For quite some time, the potential for conflict between these two ideologies was not realised because of the all-pervading influence of the Catholic Church in Irish society. Since the 1960s, however, the Church's power has been in decline, a phenomenon which has accelerated during the past five years or so with the revelation of a number of sex scandals, including cases of child sexual abuse and mistreatment, involving Catholic clergy. Thus the backdrop against which I turn now to consider the role of religion in the Irish constitutional order is one in which the position of organised religion is coming increasingly under question, something which is reflected in some, at least, of the recent constitutional jurisprudence.

II. RELIGION AND THE CONSTITUTION

Article 44 of the Constitution, entitled "Religion", reads as follows:

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 honour religion.
- 2.1. Freedom of conscience and the free profession and practise of religion are, subject to public order and morality, guaranteed to every citizen.
- 2.2. The State guarantees not to endow any religion.
- 2.3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
- 2.4. 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.

2.5. 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 or charitable purposes.

2.6. 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.

In considering the role of religion in the Irish constitutional order, I will focus on (a) the extent to which Article 44 guarantees religious freedom for the individual, (b) the restrictions that Article 44 imposes on the State in relation to discrimination and endowment of religion, (c) the influence of religious values on judicial decision-making and (d) the role of Thomistic natural law in contemporary Irish constitutional law.

A. *Guaranteeing Religious Freedom for the Individual*

There are very few cases dealing with the Irish free exercise clause, Article 44.2.1, reflecting the fact that free exercise of religion is secured in practice for all citizens. In *McGee v. Attorney General*,⁵ the Supreme Court held that the clause did not encompass freedom of social conscience, as opposed to freedom of religious conscience, for the plaintiff who wished to import artificial contraceptives for her personal use.⁶ In *Merriman v. St. James' Hospital*,⁷ a Circuit Court judge ordered the reinstatement of a hospital worker who had been dismissed for refusing, on grounds of conscience, to bring a crucifix and candle to a dying patient. While the judge stated that the religious views of the employee must be respected, he does not appear to have explicitly considered the terms of Article 44.2.1, rather basing his decision on § 6 of the Unfair Dismissals Act 1977 which provides that a person cannot be dismissed on account of religious or political beliefs.

Both the profession and practice of religion are subject to public order and morality but there is no example of State regulation of the former. In *Director of Public Prosecutor v. Draper*,⁸ the Court of Criminal Appeal dismissed an appeal against conviction of a man convicted on two counts of malicious damage to religious statues. Referring to the man's motivation—he believed that he had been sent by God—Justice McCarthy said that the court was

5. [1974] IRISH REPORTS [I.R.] 284, 298.

6. *Id.* at 316. Plaintiff won on other grounds. *Id.*

7. IRISH TIMES, 25 Nov. 1986.

8. IRISH TIMES, 24 Mar. 1988.

not questioning the sincerity of his beliefs. However, the free exercise clause was expressly subject to public order and morality. The instant case was one of public order, rather than morality. The defendant had damaged property and the law said that this was an offence.

A striking feature of the original text of the Irish Constitution was the recognition of the special position of the Roman Catholic Church and the explicit recognition of the various religious denominations, including the Jewish Congregations, existing in Ireland at the date of the coming into operation of the Constitution.⁹ The "special position" clause did not, in fact, confer any privileged status on Roman Catholicism in the Irish constitutional and legal order and was eventually repealed in 1974. However, it was used by some judges, notably Justice Gavan Duffy, to protect some Catholic practises which were not protected by the common law, influenced as it was by the Protestant Reformation. Justice Gavan Duffy held that a gift to a contemplative order was a valid charitable bequest, contrary to previous authority which required some element of practical benefit to the community.¹⁰ He also extended the categories of communications which a witness is privileged from being obliged to disclose to include communications between a priest acting in a pastoral capacity and a parishioner.¹¹

One major difference between the Irish and United States experience in this context relates to public funding of denominational schools. It is quite clear from both Articles 42¹² and 44 that the State may legitimately finance denominationally-controlled schools, provided at least two conditions are satisfied: first, that

9. Art. 44.1 originally had two other sub-sections which read:

2. The State 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.

3. The State also recognises 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.

IR. CONST. Art. 44.1 (repealed 1974).

As far as I am aware, the explicit constitutional recognition of the Jewish Congregations had no parallel in any other Constitution prior to the establishment of the State of Israel in 1947.

10. *Maguire v. Attorney Gen.* [1943] I.R. 238.

11. *Cook v. Carroll* [1945] I.R. 515.

12. Art. 42.4 provides as follows:

The State shall provide for free primary education and shall endeavour 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.

IR. CONST. Art. 42.4.

the State does not discriminate between schools under the management of different religious denominations, and second, that the State does not affect prejudicially the right of any child to attend a school receiving public money without having to attend religious instruction at that school. Thus *Lemon v. Kurtzman*¹³ would have been decided differently in Ireland. That is not to suggest that the State has an unbridled power to finance denominational education. In addition to the two conditions mentioned above, there is some controversy as to how the non-discrimination and non-endowment principles in Article 44 affect the State's power in this context, a point to which I return below.

B. Principles of Non-Discrimination and Non-Endowment

The Irish Constitution does not have the direct equivalent of the U.S. Constitution's establishment clause,¹⁴ and consequently there is not quite the same barrier to State involvement with religion. It is worth emphasising, however, that Ireland does not have an established religion and, moreover, that any attempt to establish a particular religion as the State religion would be unconstitutional, having regard to the State's obligation not to discriminate on grounds of religious profession, belief or status. Thus, the non-discrimination clause, together with the non-endowment clause, may be taken as Ireland's approximate equivalent of the establishment clause in the United States.

The prohibition of discrimination has been relied on in six cases, three of which were successful. In *Schlegel v. Corcoran*,¹⁵ Justice Gavan Duffy upheld the right of a landlord to refuse to consent to the assignment by a tenant of his interest to a Jewish assignee.¹⁶ By viewing the plaintiff's anti-Semitism as racist, rather than religious, in origin, the judge managed to dispose of Article 44.2.3.¹⁷ However, it is extremely unlikely that this decision would be followed today—and indeed it is arguable that Justice Duffy himself was wrong in 1942—having regard to the guarantee of equality in Article 40.1 which arguably precludes the State, acting through its judicial arm, from lending its weight to racial discrimination between private parties.

13. 403 U.S. 602 (1971). The Court applied an aggregate test in striking down a Rhode Island statute providing funding to non-secular schools where "the statute [had] a secular legislative purpose, . . . its principal or primary effect [was] one that neither advance[d] nor inhibit[ed] religion, [and did] not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13.

14. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion . . ."

15. [1942] I.R. 19.

16. *Id.* The late John Kelly, one of Ireland's leading constitutional scholars, commented that this case revealed "the dark side of a remarkable judge." See JOHN M. KELLY, *THE IRISH CONSTITUTION* 1105, n.16 (3d ed. 1994).

17. [1942] I.R. 19 at 25.

In *State (O'Connor) v. Ó Caomhánaigh*,¹⁸ the Supreme Court rejected an argument that an Act of 1831, pursuant to which the applicant had been convicted of sending threatening letters, was motivated by anti-Catholic policies and consequently contrary to Article 44.2.3.¹⁹ During the 1970's, three cases provided occasions for exploring more thoroughly the rule against religious discrimination. *Quinn's Supermarket Limited v. Attorney General*,²⁰ concerned a Ministerial order made in 1948 which restricted the hours of opening for meat shops in Dublin but which specifically excluded kosher shops from its operation.²¹ Such shops were thus free to open at times other than those generally prescribed. The plaintiff company was prosecuted for a breach of the order and sought a declaration that the order was unconstitutional because it discriminated on religious grounds (in favour of kosher shops).²² The Supreme Court held that Article 44.2.3 forbade any type of religious discrimination, whether hostile to or in favour of the targeted group so that, on its face, the order was unconstitutional.²³

However Article 44.2.3 had to be read in the light of Article 44.2.1 guaranteeing free practice of religion.²⁴ A failure to provide some exemption for kosher shops from the order would have worked against the free profession and practice of religion—members of the Jewish community unable to buy meat on the Sabbath would either have to go without or break the strict dietary laws of their religion.²⁵ According to Justice Walsh, who delivered the leading judgment in this case, “[t]he conclusion of fact is that between the hours of sunset on Friday afternoons and sunset on Saturday afternoons it would not be possible for any practising member of the Jewish religion to obtain any meat for consumption save that which, by the commandments of his religion, he is forbidden to eat If by law the hours of trading in kosher meat is confined to hours which present a member of the Jewish religion with the choice I have mentioned, then that law interferes with the free profession and practice of that religion.”²⁶ Relying heavily on United States cases such as *Sherbert v. Verner*,²⁷ and *School District of Abington Township v. Schempp*,²⁸ Justice Walsh held that an exemption for kosher shops from the restricted trading

18. [1963] I.R. 112.

19. *Id.* at 117-18.

20. [1972] I.R. 1.

21. *Id.* at 11-12.

22. *Id.* at 13.

23. *Id.* at 15-16.

24. *Id.* at 17.

25. *Id.*

26. *Quinn's Supermarket, Ltd. v. Attorney Gen.*, [1972] I.R. 1, 17.

27. 374 U.S. 398 (1963).

28. 374 U.S. 203 (1963).

hours on Saturday was not invalid.²⁹ In the instant case, however, the exemption was overbroad because it applied to every other day of the week as well and so the order was invalid.³⁰

Quinn's Supermarket displays great solicitude for free exercise rights, subordinating the State's obligation not to discriminate to those rights — a phenomenon we will see repeated in other decisions — and logically accepts the proposition that a perfectly general law may be invalid because it fails to take account of sectional religious interests. United States jurisprudence, in contrast, appears to reject the proposition that religiously motivated actions should be protected from a law of general applicability, except in relation to payments of unemployment benefit,³¹ and compulsory school attendance.³²

In two other cases decided after *Quinn's Supermarket*, the Supreme Court held that the State could not discriminate against priests in granting salary increments in respect of work in Africa to recognised lay teachers only,³³ and that the Adoption code could not require that adoptive parents be of the same religion as the adoptive child as this had the effect of precluding adoption by parties to a mixed marriage.³⁴

The last case which I wish to mention in relation to the non-discrimination clause is that of *McGrath v. Trustees of Maynooth College*.³⁵ Here, while priests, the plaintiffs had been appointed as professors in Maynooth College, the leading Catholic seminary in Ireland. On leaving the priesthood, they were dismissed. They argued that this constituted discrimination on grounds of religious status, contrary to Article 44.2.3. The Supreme Court unanimously rejected this argument on the ground that Article 44.2.3 applied only to the State, not to private bodies. Moreover, Justice Henchy held that, in order to give vitality, independence and freedom to religion, the State must, on occasion, recognise and but-

29. [1972] I.R. 1 at 19-26.

30. *Id.* at 27.

31. See *Sherbert*, 374 U.S. at 410. In *Sherbert*, the Court held that the state could not constitutionally apply eligibility provisions of unemployment compensation statute so as to deny benefits to a claimant who refused employment, because of her religious beliefs, which would have required her to work on Saturdays. *Id.* See also *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). In *Smith*, the Court held that the Free Exercise Clause did not prohibit application of drug laws to ceremonial ingestion of peyote. *Id.* Thus, the state could thus deny claimant's unemployment compensation for work-related misconduct based on the use of peyote. *Id.* But see Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994) (rendering *Smith* powerless).

32. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that state could not compel Amish parents to require their children to attend formal high school through age 16).

33. *Mulloy v. Minster for Educ.*, [1975] I.R. 88.

34. *M. v. An Bord Uchtála*, [1975] I.R. 81.

35. [1979] I.L.R.M. 166 (Ir.).

gress the internal disabilities and discriminations which flow from the tenets of a particular religion. It seems likely that the U.S. Supreme Court might have reached a similar conclusion in *McGrath* as the old decision in *Watson v. Jones*³⁶ indicates that, where a dispute involving a hierarchical church comes before the courts, the ruling of the highest ecclesiastical authority must be enforced by the courts in order to avoid excessive entanglement of the state in matters of religion.³⁷

In contrast to the non-discrimination clause, the non-endowment clause of the Irish Constitution has been considered in detail on only one occasion by an Irish court. This was in the case of *Campaign to Separate Church and State Ltd. v. Minister for Education*.³⁸ As I have already mentioned, state funding of denominational education has been accepted as constitutionally legitimate in Ireland. However, there is still room for debate on the allowable extent of such funding and, in particular, how the state's powers might be qualified by the constitutional principle of non-endowment of religion. This debate has centred on two aspects of educational policy—first, the public funding of chaplains in community schools and, second, the public funding of the “integrated curriculum”, i.e. where religious values infuse the entire curriculum. On this last point, in the United States case of *Board of Education v. Allen*,³⁹ a majority of the U.S. Supreme Court refused to assume that religious schools were so permeated by religion that even classes in secular subjects advanced religion.⁴⁰ In the Irish context, however, the handbook for primary school teachers issued by the Department of Education makes it quite clear that official policy on primary schooling endorses a holistic approach to religious instruction.

In *Campaign to Separate Church and State Ltd. v. Minister for Education*, the plaintiff company, a lobby group, challenged the constitutionality of the state funding of chaplains in community schools on the ground that this constituted endowment of religion.⁴¹ They relied on a number of United States authorities, in particular, *Illinois ex rel. McCollum v. Board of Education*⁴² and *School District of Abington Township v. Schempp*.⁴³ However, Justice Costello distinguished these cases on the ground that they were concerned with the establishment of religion, not the endow-

36. 80 U.S. (13 Wall.) 679 (1871).

37. *Id.* at 733-34; see also *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (discussing lack of NLRB jurisdiction over teachers employed by church-operated schools).

38. [1996] 2 I.L.R.M. 241.

39. 392 U.S. 236 (1968).

40. *Id.* at 248.

41. [1996] 2 I.L.R.M. 241

42. 333 U.S. 203 (1948).

43. 374 U.S. 398 (1963).

ment of religion, and the Irish Constitution has no equivalent to the United States establishment clause.⁴⁴ In addition, the prohibition on endowment of religion in the Irish Constitution had to be construed by reference to other constitutional provisions—notably Article 42 relating to education—which have no counterparts in the U.S. Constitution.

Dismissing the plaintiffs' claim, Justice Costello pointed to Article 42.4⁴⁵ of the Constitution which he interpreted as meaning that the State may provide educational facilities and that, in so doing, it should be particularly supportive of the rights of parents, especially in regard to religious and moral formation. Accordingly, the judge concluded that the public financing of school chaplains fell within this power of the State. I disagree with the judge's decision. I read Article 42.4 as saying that while the State may provide educational facilities, it should not trench on the rights of parents, especially in matters of religious and moral formation. I do not see this clause as offering constitutional protection for the public funding of chaplains for the following reasons: first, my interpretation does less damage to the non-endowment clause and achieves a better reconciliation of Article 42.4 and Article 44.2.2; second, Justice Costello is using a power in Article 42.4 to dilute an obligation in Article 44.2.2; third, historically, the payment of salaries to ministers of religion was seen as endowment of religion. On the third point, if one was to take an originalist approach to the interpretation of Article 44.2.2, payment of ministers' salaries is presumably one practice which the drafters of the Constitution had in mind when they included Article 44.2.2. Moreover, Justice Costello's approach has one further disturbing implication. By virtue of Article 44.2.3, the State cannot discriminate on grounds of religious profession, belief or status. Presumably it follows from Justice Costello's position that every religion in Ireland is now entitled to publicly funded ministers to assist with the religious and moral formation of their children.

In conclusion on this section, as I mentioned earlier, the non-endowment and non-discrimination clauses in Article 44 are Ireland's approximate equivalent of the United States establishment clause, and so one could say there is a similar tension in the Irish Constitution between these provisions and our free exercise clause

44. Though, as I argued above, the non-discrimination clause poses an insurmountable obstacle to the establishment of any State religion.

45. Article 42.4 reads as follows:

The State shall provide for free primary education and shall endeavour 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.

IR. CONST. Art. 42.4.

as there is in the U.S. Constitution between the establishment and free exercise clauses. Significantly, however, the Irish courts have, on three occasions, down-graded, as it were, the non-discrimination and non-endowment clauses in order to facilitate the practice of religion. Thus in *Quinn's Supermarket Ltd. v. Attorney General*,⁴⁶ and *McGrath v. Trustees of Maynooth College*,⁴⁷ the Supreme Court read the non-discrimination clause in the light of the free exercise clause while in the *School Chaplaincy* case,⁴⁸ Justice Costello effectively amended the non-endowment clause to facilitate State support for religion. This last case is currently under appeal to the Supreme Court and it remains to be seen whether the current generation of Supreme Court judges are prepared to continue this trend set by their predecessors.

C. Influence of Religious Values on Judicial Decision-Making

Of course the influence of religious values on judicial decision-making is not limited to cases involving the interpretation of Article 44 but may also be detected in the judicial resolution of issues arising from abortion policy, aspects of sexual morality, the status of charities and the law on euthanasia. However, there are signs that this influence may be on the wane.

This influence was especially marked during the first thirty five years of the Constitution's existence. One judge in particular, Gavan Duffy, used the Constitution to amend aspects of the common law which were not very accommodating of Catholicism. We already noted how he departed from earlier authority in holding valid as a charitable bequest a gift for contemplative prayer.⁴⁹ In addition, he also indicated, in *In re Estate of Burke*,⁵⁰ that the courts would take judicial notice of Catholic practice while in *Cook v. Carroll*⁵¹ he held that a witness was privileged from being obliged to disclose conversations with a priest acting in a pastoral capacity.⁵² Of course, this tendency was not restricted to Justice Gavan Duffy. The seminal judgment of Justice Kenny on the existence of implied constitutional rights in Irish constitutional law invoked, *inter alia*, the Papal Encyclical *Pacem in Terris* in support of the conclusion that the list of rights in Articles 40 to 45 of the Constitution did not exhaust all of the citizen's constitutional rights.⁵³ The earlier decision by a majority of the Supreme Court

46. [1972] I.R. 1.

47. [1979] I.L.R.M. 166.

48. [1996] 2 I.L.R.M. 241.

49. *Maguire v. Attorney Gen.* [1943] I.R. 238.

50. [1951] I.R. 216.

51. [1945] I.R. 512, 515.

52. By virtue of the non-discrimination clause, this privilege must apply to pastors of all religious denominations.

53. *Ryan v. Attorney Gen.* [1965] I.R. 294. An isolated echo of this invoca-

in *In re Tilson*⁵⁴ displaced the old common law paternal rule in favour of a policy of enforcing ante-nuptial agreements governing the religious upbringing of children.⁵⁵ This decision was also perceived as lending judicial support to Catholicism which, at that time, required its members who wished to marry non-Catholics to enter into such agreements ensuring that any children of the marriage were reared as Catholics. In fact, however, the majority's reasoning in this case does not display any explicit influence of religious values, for it was based on the undoubted fact that the Constitution endorsed a policy of *joint* parental rights in respect of children, in the light of which the old common law preference for the rights of the father could no longer stand.

The Supreme Court decision in *McGee v. Attorney General*,⁵⁶ is a significant landmark in this story insofar as it was the first occasion on which the courts adopted a position which was in conflict with Roman Catholic teaching. The issue was that of a married couple's right of access to artificial contraception.⁵⁷ In holding that such a right was inherent in the constitutional right to marital privacy, the Supreme Court majority created the first major fissure between public policy and Roman Catholic teaching in the area of sexual morality since Independence.⁵⁸

However, this decision did not herald the complete demise of the influence of religious values on judicial decision-making. Delivering the majority decision in *Norris v. Attorney General*,⁵⁹ Chief Justice O'Higgins rejected the argument that laws criminalising homosexual conduct between males were contrary to the constitutional right to privacy, saying that he could not accept that "in the very act of [adopting the Constitution] the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful."⁶⁰ Similarly, in relation to abortion, on at least

tion of Papal Encyclicals can be seen in the more recent decision of O'Hanlon J. in *O'Donoghue v. Minister for Health*, 1992 No. 75 JR (Ir.), (transcript) 27 May, 1993, in the course of which the judge invoked, *inter alia*, the Vatican II Declaration on Christian Education and a statement from the Holy See welcoming the International Year of Disabled Persons in 1981 in support of his conclusion that severely mentally handicapped children had a right to free primary education. *Id.*

54. [1951] I.R. 1.

55. *Id.*

56. [1974] I.R. 284.

57. *Id.* at 289-90.

58. *Id.* at 314.

59. [1984] I.R. 36.

60. *Id.* Two strong dissents were delivered by Henchy and McCarthy JJ., and their position was subsequently vindicated when the European Court of Human Rights held that the legislation challenged in *Norris* infringed Art. 8 of the European Convention for the Protection of Human Rights: *Norris v. Ireland* (1991) 13 Eur. Ct. H.R. (ser. A) at 186 (1993). This legislation was eventually repealed by § 14 of the Criminal Law (Sexual Offences) Act 1993.

three occasions, individual members of the Supreme Court made it abundantly clear that the Constitution as enacted in 1937 protected the right to life of the unborn, with the consequence that a woman had no right to terminate her pregnancy.⁶¹

More recent cases, however, suggest that contemporary judges are less likely to be influenced by religious values in deciding cases. Thus, in the extraordinary and very tragic case of *Attorney General v. X*,⁶² the Supreme Court held that abortions could be performed lawfully in Ireland, albeit in very limited circumstances.⁶³ In *T.F. v. Ireland*,⁶⁴ a case dealing with the constitutionality of legislation providing for no-fault marital separation, the Supreme Court upheld the decision of the High Court judge in refusing to hear testimony from theologians as to the essential features of Christian marriage.⁶⁵ In *In re A Ward of Court*,⁶⁶ a majority of the Supreme Court authorised the withdrawal of artificial nourishment and hydration from a patient who had been in a "near persistent vegetative state" for more than twenty years.⁶⁷ The philosophical values underpinning the majority judgments vary from judge to judge and, consequently, one should be wary of attempting to pigeon-hole this particular case in the context of the present discussion. However, the outcome led one commentator to observe that

[i]n keeping with the evolving pluralism and secularism in Irish society and in the wake of the court's recent rejection of natural law interpretation, this decision underlines the dynamic nature of the Constitution with a further move away from the theological trappings of the Constitution *circa* 1937 (sic).⁶⁸

The Supreme Court's rejection of natural law theory, to which the above quote refers, is a very vivid demonstration of the waning influence of religious values in contemporary jurisprudence and I turn now to consider this particular case in more detail.

61. See the remarks of Walsh J. in *McGee v. Attorney Gen.* [1974] I.R. 284 and *G. v. An Bord Uchtála* [1980] I.R. 32 and the comments of McCarthy J. in *Norris v. Attorney Gen.* [1984] I.R. 36.

62. [1992] 1 I.R. 1.

63. See *id.* at 10 (holding that where continuation of the pregnancy presented a "real and substantial risk" to the life of the mother, termination of the pregnancy was permissible).

64. [1995] 2 I.L.R.M. 321.

65. *Id.*

66. [1995] 2 I.L.R.M. 401.

67. *Id.*

68. Dermot Feenan, *Death, Dying and the Law*, IRISH L. TIMES, Apr. 1996, at 90, 91.

D. Natural Law⁶⁹

From the point of view of jurisprudence, the most striking change effected by the present Constitution is the break with the positivist character of the common law which had been developed in comparatively modern times . . . The Irish Constitution rejects such a basis for law. Its 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. This idea is no strange addition to the common law; it is as old as Coke.⁷⁰

Thus wrote Mr. Justice Seamus Henchy in 1962, shortly before he was appointed a judge of the High Court. A review of the text of the Constitution reveals that this was hardly a startling conclusion to draw. Apart from the Preamble cited by Henchy, Article 41 referred, *inter alia*, to the Family having rights which were "antecedent and superior to all positive law"; Article 42 spoke of the "natural and imprescriptible rights of the child"; while Article 43 described the right to private property as a "natural right, antecedent to positive law." Statements acknowledging the existence of some higher law, antecedent to the Constitution itself, were also made from the bench on a number of occasions.⁷¹

But of course natural law theory is not without its problems. Some object to its use in constitutional interpretation because of

69. See generally Gerard Whyte, *Natural Law and the Constitution*, IRISH L. TIMES, Jan. 1996, at 8. For this section, I have drawn heavily on this earlier article of mine.

70. Seamus Henchy, *Precedent in the Irish Supreme Court*, 25 MOD. L. REV. 545, 549-50 (1962).

71. See *Ryan v. Attorney Gen.*, [1965] I.R. 294 (noting that both the High and Supreme Courts have accepted that some personal rights were derived from the Christian and democratic nature of the State.) See also *McGee v. Attorney Gen.*, [1974] I.R. 284. In *McGee*, Mr. Justice Walsh said:

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. . . . 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 § 3 of Article 40 expressly subordinate the law to justice.

Id. Earlier in the same judgment, he said:

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.

Id. See also *Finn v. Attorney Gen.*, [1983] I.R. 154 (endorsing natural law theory); *Northants Co. Council v. A.B.F.*, [1982] I.L.R.M. 164 (remarking on Irish courts' acceptance of natural law theory).

its close association with the Roman Catholic Church. While that association cannot be denied, the use of natural law by the Irish judiciary has not, however, resulted in the judicial endorsement of any specifically Roman Catholic teaching—indeed the decision in *McGee v. Attorney General*⁷² proves quite the contrary. In that case, Mr. Justice Walsh, who based his decision partly on natural law, concluded that the plaintiff had a legal right of access to artificial contraception, a conclusion clearly at variance with Roman Catholic teaching on birth control. In addition, he also stated that the Constitution acknowledges the religious pluralism of Irish society and that the courts cannot be asked, as a matter of constitutional law, to choose between the different views, where they exist, of the different denominations on the nature or extent of natural law rights.⁷³

There is also the difficulty of knowing quite what natural law demands in a given situation. We have just noted the conflict in the *McGee* case between Mr. Justice Walsh's views and those of the Roman Catholic Church on the impact of natural law in relation to artificial contraception. In the same case, Mr. Justice Walsh inferred from the Preamble and Article 6 that the understanding of natural law in the Constitution was the Thomistic concept of that part of the law of God which is discoverable by reason. However, Professor Desmond Clarke from the University College, Cork, has argued that the term "natural" can be understood, in the context of this tradition, in as many as five different ways.⁷⁴

Uncertainty as to the content of natural law leads to the next problem: the fear that natural law may simply act as a cloak for judicial law-making. That fear is heightened by the radical argument, first propounded by Mr. Justice O'Hanlon as an inevitable corollary of natural law theory, that the power of the people to amend the Constitution, conferred by Article 46, is implicitly limited to making amendments which are compatible with natural law theory.⁷⁵ The premise for this argument, that natural law is

72. [1974] I.R. 284.

73. Insofar as this policy of judicial neutrality might apply only in respect of the various Christian denominations, it is still possible to argue that reliance on Thomistic natural law may not adequately respect the diversity of beliefs in Irish society which includes small but significant non-Christian minorities, a point made by my colleague, Professor William Duncan in *Can Natural Law be used in Constitutional Interpretation?*, 45 DOCTRINE AND LIFE 125 (1995).

74. Desmond M. Clarke, *The Role of Natural Law in Irish Constitutional Law*, 17 IRISH JURIST 187, 197-213 (1982).

75. Rory O'Hanlon, *Natural Rights and the Irish Constitution*, IRISH L. TIMES, Jan. 1993. This article provoked replies from: Tim Murphy, *Democracy, Natural Law and the Irish Constitution*, IRISH L. TIMES, Apr. 1993, at 81; Desmond Clarke, *The Constitution and Natural Law: A Reply to Mr. Justice O'Hanlon*, IRISH L. TIMES, Aug. 1993, at 177; *Natural Law and Constitutional Consistency*, in JUSTICE AND LEGAL THEORY IN IRELAND 22, 35-36

superior to positive law, carries with it a number of problems for the Irish constitutional order which have never been addressed by the courts. As far back as 1977, Professor Desmond Clarke argued that the assumption of the superiority of natural rights over all positive law was contradicted by the terms of Article 28.3.3 which purported to make all fundamental rights subject to emergency legislation.⁷⁶ More recently, Professor Duncan has identified a problem in relation to the source of the legal justification for the assumption of the superiority of the natural law. As he put it,

[t]he difficulty here is 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 the natural law. The Constitution cannot be both subject to the natural law and the legal justification for that subjection. One or other, the natural law or the Constitution, must finally have priority over the other as the ultimate source of legal validity in any potential area of conflict. If indeed the natural law stands above the Constitution, it is necessary to find authority for this proposition outside the Constitution, perhaps within the natural law itself.⁷⁷

He went on to argue that natural law theory leads to a logical conclusion which undermines the exclusive authority of the judges as the arbiters of what constitutes valid law on the ground that "[i]t is not a self-evident principle of natural law that a judge has any more right to interpret and apply the natural law than has any other private citizen."⁷⁸

But of course the major problem with the argument advanced by Justice O'Hanlon is that it conflicts with the constitutional value of democratic decision-making by allowing judges to set

(Gerard Quinn et al. eds., 1995).

A not dissimilar position actually obtains in India where on three occasions during the 1970s, the Indian Supreme Court ruled that the power of Parliament to amend the Indian Constitution was subject to the implicit limitation that it could not be used to amend the "basic structure of the Constitution." Admittedly here there was no reliance on natural law theory; moreover in India, constitutional amendments are effected by the federal Parliament (sometimes acting in conjunction with state legislatures) rather than by the people voting by referendum. Nonetheless the Indian situation has in common with the argument presented by Justice O'Hanlon that the judges are identified in both cases as the final arbiters of the validity of constitutional rules, taking precedence over the democratic wishes of the people whether expressed directly (as in the case of Ireland, in referenda) or indirectly (as in India through Parliament.)

76. See generally Desmond M. Clarke, *Emergency Legislation, Fundamental Rights and Article 28.3.3 of the Irish Constitution*, 12 IRISH JURIST 217 (1977). The same argument can also be made in respect of Art. 29.4.5 dealing with legislation and measures necessitated by membership of the European Community, and Art. 34.3.3 concerning legislation which had been upheld by the Supreme Court in the context of an Art. 26 reference.

77. Duncan, *supra* note 73, at 127.

78. *Id.*

aside legal norms which had been directly adopted by the People by way of referendum. The political implications of such a position meant that it was always unlikely that this argument would find favour with the courts. And so it proved to be in *In re the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*⁷⁹ when the Supreme Court rejected the contention that the exercise of the People's power to amend the Constitution had to comply with natural law in order to be valid.

As its title suggests, this Bill attempted to regulate the provision of information within Ireland about abortion services abroad. In challenging the Bill, counsel for the unborn had argued, *inter alia*, that any provision in the Constitution or in legislation permitting the communication of information which constituted assistance in the destruction of the life of the unborn was contrary to the natural law right to life; that the natural law ranked superior to the Constitution and that, therefore, no constitutional provision or legislation which is contrary to natural law can be enforced. Applied to the instant case, the argument was that the Fourteenth Amendment to the Constitution, which purported to safeguard the freedom to disseminate information about abortion services abroad and which ostensibly protected the 1995 Bill, was itself invalid because it was contrary to natural law.⁸⁰

Having summarised this argument, the Supreme Court immediately rejected it and then proceeded to explain its decision. This explanation has two distinct phases. In the first phase, the Court cited Articles 5, 6, 15, 26.1, 28.2, 34.1 and 35.2, together with a statement of Mr. Justice Budd in *Byrne v. Ireland*,⁸¹ in support of the proposition that the State and all its organs are subject to the Constitution and the law. Though this is never made explicit, the term "Constitution" appears to be understood exclusively in a positive law sense. Quite how the Court managed to expurgate the natural law influence on the Constitution is never made clear. This, of course, is a serious weakness in the Court's reasoning, for until such an exercise is carried out, the constitutional provisions cited do not necessarily support its ultimate rejection of Justice O'Hanlon's argument as they could just as well be understood to refer to the Constitution in a sense which encompasses natural law.

79. [1995] 2 I.L.R.M. 81. This decision was handed down pursuant to Art. 26 of the Constitution which empowers the President to seek an advisory opinion from the Supreme Court as to the constitutionality of a bill before it is signed into law. *Id.*

80. IR. CONST. amend. XIV. This amendment, adopted by the People in 1992, provides that the guarantee of the right to life of the unborn in Art. 40.3.3 "shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state." *Id.*

81. [1972] I.R. 241.

In the second phase of its reasoning on this aspect of the reference, the Court examined the role of the judiciary in interpreting the Constitution and, in particular, in identifying implied fundamental rights. This phase consists mainly of quotations from *Ryan v. Attorney General*,⁸² *McGee v. Attorney General*,⁸³ *The State (Healy) v. Donoghue*⁸⁴ and *Attorney General v. X*,⁸⁵ followed by certain conclusions set out tersely in three paragraphs. The extensive reliance on the judgment of Mr. Justice Walsh in *McGee* is one of the more inexplicable aspects of the Court's decision, given that court's ultimate rejection of the natural law argument advanced by counsel representing the interests of the unborn, for Walsh's comments cannot be understood in any sense other than as an acknowledgment of the significance of natural law theory on the constitutional understanding of human rights.⁸⁶

The Court then effectively ended this part of its decision with the following conclusions:

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.⁸⁷

Three comments may be made about these conclusions. First, if the term "Constitution" in the first paragraph has to be understood exclusively in a positive law sense, then the passage ignores the fact that some judges at least relied on natural law as a source of implied rights.⁸⁸ If the term is not to be understood in this re-

82. [1965] I.R. 294.

83. [1974] I.R. 284

84. [1976] I.R. 325.

85. [1992] 1 I.R. 1.

86. See *G. v. An Bord Uchtála*, [1980] I.R. 32 (noting the significance of natural law in Irish jurisprudence). *An Bord* is also cited by the Supreme Court elsewhere in its decision without demur.

87. *McGee v. Attorney Gen.*, [1974] I.R. 284.

88. See *Murphy v. P.M.P.A. Insurance Co.*, [1978] I.L.R.M. 25 (discussing,

stricted sense, then it is difficult to see how it bolsters the Court's ultimate decision. In fact, given the resonance with Mr. Justice Walsh's comments in *McGee*, the passage can easily be read as consistent with natural law theory. Second, the comment in the second paragraph that the courts have "at no stage recognised the provisions of the natural law as superior to the Constitution" can be explained on the ground that on no previous occasion was an Irish court ever asked to address this issue. However, Mr. Justice Walsh's remarks in *McGee* could be construed as affirming the superiority of natural law even over the Constitution. Third, the equation of the fundamental and supreme law of the State with the will of the people arguably amounts to a judicial repeal of that part of Article 41.1 which describes the rights of the family as "superior to all positive law."⁸⁹

In conclusion, the manner in which the Supreme Court deals with Justice O'Hanlon's argument is defective in two significant respects. First, the restricted meaning of the Constitution as a document free from any natural law influence, which is an essential premise for the first phase of this part of the judgment, is never properly established. Second, the Court fails to engage in any meaningful way those judicial precedents or constitutional provisions which appear to endorse natural law theory.⁹⁰ Indeed, citing Mr. Justice Walsh's remarks in support of the Supreme Court's conclusion is almost perverse, given that they so clearly reflect his support for the primacy of natural law over positive law. Moreover, the manner in which the Court's terse conclusions are simply tacked on to selected quotations, without any meaningful attempt by the Court to defend those conclusions, completely fails to resolve the intellectual complexities of this issue.

CONCLUSION

As Ireland approaches the third millennium, it has to confront the task of constructing a set of social values for a new era. The power of institutionalised religion is clearly in decline and secular, liberal values appear to be in the ascendant. A fundamental question which needs to be asked now is, what role, if any, should religion have in this new order? My own fear is that this issue will

in a decision written by Mr. Justice Doyle, an acceptance of natural law as a source of implied human rights).

89. This is the only emphatic subordination of positive law to natural rights in the text of the Constitution. See IR. CONST. Art. 41.1. While Art. 43 describes the right to private property as a natural law right, it does not unequivocally accord it primacy over positive law and it could only acquire that status if the reader invests the term "natural right" with a specific meaning. *Id.*

90. In particular, the Supreme Court did not expressly reject Mr. Justice Walsh's opinion in *McGee* that the Constitution was informed by the Thomistic understanding of natural law.

not be directly confronted but, rather, that the matter will be resolved by default.⁹¹

But if such a debate was to occur, how might it proceed? Defenders of the status quo might argue that an affirmation of theistic belief is the only intelligible bedrock for the idea of the universal nature of human rights and that to purge the Constitution of all religious influence could undermine belief in the intrinsic worth of every human being.⁹² They might further contend that it is reasonable for a society, 95.8% of whose members profess some religious beliefs, to reflect this shared tradition in the Constitution and that such an affirmation would undergird the commitment of the vast majority of the citizenry to the State.⁹³ Finally, they might argue that to change the Constitution in the manner proposed would be to signal that religious beliefs should have no place in public debate and so deny the public dimension to religious convictions.

On the other hand, proponents of change might contend that any religious reference is divisive insofar as it alienates those of different religious beliefs, and of no belief at all. They could certainly argue, specifically in relation to the present Constitution, that the existing Preamble fails to embrace non-Christian religions and that its political rhetoric is offensive to the Protestant minori-

91. It is very regrettable, for example, that the *Report of the Review Group on the Constitution* failed explicitly to consider this important question, even though the effect of a number of the Report's recommendations is arguably to purge the Irish Constitution of any religious dimension. See REPORT OF THE REVIEW GROUP ON THE CONSTITUTION 2632 (1996)

92. For a defence of the idea that the concept of universal human rights is ineliminably religious, see Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?* in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 205 (Austin Sarat & Thomas R. Kearns eds., 1996).

93. RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 17 (1997). Commenting on the Preamble, Michael Perry, a U.S. constitutional scholar, says:

Given the religious commitments of the vast majority of the people of Ireland, it is not at all surprising that the Irish Constitution affirms Christianity. In so doing, the Irish Constitution violates no human right. Three things are significant here. First, the religious convictions implicit in the Irish Constitution's affirmation of Christianity in no way deny—indeed, they affirm—the idea that every human being, *Christian or not*, is sacred; they affirm, that is, the very foundation of the idea of human rights. Second, the Irish Constitution's affirmation of Christianity is not meant to insult or demean anyone; it is meant only to express the most fundamental convictions of the vast majority of the people of Ireland. Third, and perhaps most importantly, the Irish Constitution protects the right, which is a human right, to freedom of religion; moreover, it protects this right not just for Christians, who are the vast majority in Ireland, but for all citizens . . . Therefore, the conclusion that in affirming Christianity the Irish Constitution violates a human right—or that in consequence of the affirmation Ireland falls short of being a full-fledged liberal democracy—is, in a word, extreme.

Id.

ties. In addition, they could point to the discriminatory nature of the constitutional declarations which have to be made by the President and by judges upon taking office.

This debate is not theological—its resolution should significantly affect the values which the Ireland of the next millennium will espouse. Will that society retain any trace of the communal values, rooted in religious tradition, which were dominant for so long? Or will the growing emphasis on individualism continue apace? Commenting on this relationship between faith and culture, one prominent Irish historian has written,

[t]he church is a bulwark, perhaps now the main bulwark, of the civic culture. It is the very opportunism of the traditional value system that leaves religion as the main barrier between a reasonably civilised civil society and the untrammelled predatory instincts of individual and pressure-group selfishness, curbed only by the power of rival predators. Evidence of a sharp decline in formal religious observance among the younger urbanised generation has deeply disturbed some observers, who detect 'shallow' religious roots and a church suffering from 'spiritual malnutrition'. The more comforting conclusion that 'what the church is experiencing is less a crisis of faith than a crisis of culture' may be optimistic in a society where faith and culture are so intimately intertwined. It is precisely this close connection that leaves the civic culture so vulnerable to a rapid decline in the role of institutional religion. If religion were to no longer fulfill its historic civilising mission as a substitute for internalised values of civic responsibility, the consequences for the country no less than for the church could be lethal.⁹⁴

The stakes for Irish society are very high and what is needed is an informed, reflective debate on the proper role of religion in society. It remains to be seen, however, whether such debate will occur or whether we will have to endure the sloganising and knee-jerk reaction which sometimes passes for debate on these sensitive issues.

94. J.J. LEE, *IRELAND 1912-1985: POLITICS AND SOCIETY* 657 (1989).