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INTRODUCTION

Long a bastion of traditional Roman Catholicism, modern Ireland has witnessed significant changes in religious affiliation and practice during the past quarter century. The hegemonic position of the Catholic Church is now a thing of the past. One has a sense of Ireland being at a crossroads. While the old consensus surrounding religious, moral, and social values is increasingly challenged by a more secular perspective, at the same time, the relatively significant growth in recent years of certain religious groups, such as Christian Evangelicals and Muslims, may offer renewed support to traditional views on the family and sexual morality.

The religious consensus for the first fifty years or so of the State’s existence meant that issues of religious freedom did not often come before the courts and it still remains the case that litigation in this area is relatively rare. However, the past three decades have witnessed a number of cases, dealing with such questions as contraception, homosexuality, health care, and publicly funded education, in which the courts have had to consider issues of more than passing interest to religious communities.

In considering the foundations and frontiers of religious liberty in Ireland, this Article will begin by providing background information on religious affiliation in Ireland, the nature of the Irish constitutional order (in particular, as it relates to religion), and important texts in Irish law dealing with freedom of religion. It will then consider freedom of religion in Ireland, the principle of non-discrimination on grounds of religion, and the rights of the family in relation to religious and moral formation. Finally, it will conclude with some comments relating the Irish situation to the 1981 U.N. Declaration on the

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Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 U.N. Declaration). \(^1\)

I. BACKGROUND INFORMATION

A. Religious Affiliation

The past quarter century has witnessed a pronounced decline in the influence of the Roman Catholic Church in Ireland. Two factors account for this. First, the emergence of the "Celtic Tiger" economy during the 1980s has encouraged unprecedented rates of immigration into Ireland, which has led to an increase in the number of religions present in Irish society and the number of persons professing religious beliefs. In the 1981 Census, Roman Catholics amounted to just over 93% of the population (3,204,476 out of 3,443,405), the Anglican, Methodist, and Presbyterian Churches combined constituted approximately 0.033% (115,411), while those professing no religion or not stating their religion accounted for 0.032% (110,548). \(^2\) However, the official census figures for 2002 show that, despite an increase of 7.3% in the overall number of Catholics in Ireland since 1991, the proportion of Catholics in the population declined from 91.2% in 1991 (3,226,327 out of 3,525,719) to 88.4% in 2002 (3,462,606 out of 3,917,203). \(^3\) Non-Catholic Christians now constitute 5% of the population (196,675), \(^4\) of which the Orthodox are the fastest growing group, \(^5\) while non-Christians now comprise 0.8% of the population (31,034). \(^6\) Those who could be identified as not belonging to any religion total 5.6% of the population (219,466). \(^7\)


\(^3\) Id. at 24. A census of the population was carried out in April 2006 showing an increase in the overall population of more than 300,000 since 2002 but the figures in relation to religious affiliation and practice were published too late for incorporation into this Article. See now http://beyond2020.cso.ie/Census/TableViewer/tableView.aspx?ReportId=1852. See also Desmond A. Gilmor, Changing Religious Affiliations: A Census Perspective, 95 STUDIES 153 (2006) (analyzing the 2002 figures).

\(^4\) GOV'T OF IR. CENT. STATISTICS OFFICE, supra note 2, at 23.

\(^5\) The number of Orthodox increased from 358 in 1991 to 10,437 in 2002. Id. at 17. Recent research indicates that the number of evangelical Christian churches in Ireland has increased from 150 in 1980 to 400 in 2006, with membership growing from less than 10,000 to more than 30,000 during that same period. Patsy McGarry, Surge in Membership of Evangelical Churches, IRISH TIMES, Jan. 31, 2006, at 8.

\(^6\) GOV'T OF IR. CENT. STATISTICS OFFICE, supra note 2, at 17.

\(^7\) This category includes those who identified themselves as atheists, agnostics, lapsed Roman Catholics, and a group of just under 80,000 who did not answer the religion question. Id. at 23.
The second factor contributing to the change in religious affiliation and practice has been the growing secularization of Irish society. This trend began in the 1960s when growing affluence resulted in improved contact with more secular societies through television and travel. What began as a slow decline in religious practice among Roman Catholics accelerated during the 1990s, a phenomenon arguably triggered by a series of sexual scandals involving Catholic clergy. Thus, the European Values Survey of 1999 showed that more than a third of Catholics attended religious services about once a month or less, while more than 41% of respondents had little or no confidence in the Church. This fall off in religiosity is especially marked among young adults and shows no signs of abating.

While the Catholic Church wielded great political power in Ireland following Independence in 1922, the increasing secularization of Irish society means that this is no longer the case. The past three and a half decades have witnessed the decriminalization of homosexuality and the liberalization of the law in relation to contraception, divorce, and, to a much lesser extent, abortion. The State is currently considering reform of the law to offer improved protection to non-marital households, including same-sex couples.

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10 For the definitive, if now somewhat dated, account of this aspect of modern Irish history, see generally J.H. Whyte, CHURCH AND STATE IN MODERN IRELAND: 1923–1979 (1980).

11 Judicial interpretation of Article 40.3.3 of the Constitution protecting the right to life of the unborn has indicated that abortion is lawful in Ireland when it is necessary to save the life of the mother, and that this principle would cover a situation in which the mother was suicidal because of the pregnancy. See Ait'y Gen. v. X, [1992] 1 I.R. at 1. Amendments to Article 40.3.3 following this decision recognize that constitutional protection of the right to life of the unborn does not limit freedom to travel to another State or to obtain or disseminate (subject to legislative regulation) information about abortion services lawfully available in another State.

12 However, the High Court recently ruled that the right to marry under the Constitution is confined to heterosexual couples. See Zappone v. Revenue Comm'rs, [2006] H. Ct. (I.), available at http://www.lawcase.org.
Furthermore, in 2005 the government-appointed Commission on Assisted Human Reproduction called for, among other things, the legalization of surrogacy and various medical and scientific practices, including embryonic stem cell research, which would entail the deliberate destruction of \textit{in vitro} embryos.\footnote{See \textit{Gov't of Ir.}, \textit{Report of the Comm'n on Assisted Human Reproduction} (2005) (the present writer wrote a dissenting report in relation to the recommendations affecting the embryo). The High Court recently ruled that \textit{in vitro} embryos do not enjoy the constitutional protection of the right to life of the unborn provided for in Article 40.3.3. \textit{See R v. R}, [2006] I.E.H.C. 359 (H.Ct.) (Ir.).} Thus, contemporary Ireland is rapidly becoming a post-Christian society. However, vestiges of Church power still remain, most notably in relation to the educational and health systems where schools and hospitals remain largely under denominational control.\footnote{Other examples of a lingering Christian heritage include: the Angelus is broadcast on the public television and radio stations; Sunday is regarded as a day of rest for social welfare purposes and public holidays are provided at Easter and Christmas. A challenge under the Equal Status Acts of 2000–2004 to the ringing of Angelus bells from a church building that, for reasons of conservation, was in State ownership, was unsuccessful. \textit{See Sheeran v. Office of Pub. Works, Office of the Dir. of Equality Investigations}, DEC-S2004-015 (2004), \textit{available at} http://www.equalitytribunal.ie/index.asp?locID=91&docID=520.} With the growing secularization of Irish society, this religious control is increasingly subject to challenge.\footnote{A harbinger of this trend was \textit{Flynn v. Power}, in which a teacher who had been dismissed from a Catholic secondary school because she was having an affair unsuccessfully challenged her dismissal under the Unfair Dismissals Act of 1977. \textit{See Flynn v. Power}, [1985] I.R. 648 (H. Ct.) (Ir.). More recently, controversy was generated by the objection of a Catholic hospital to the wording of a patient information leaflet recommending various methods of artificial contraception for women participating in a cancer drug trial and by the policy of the State-appointed Crisis Pregnancy Agency of requiring counseling agencies that it funds to provide information about abortion services. \textit{See Eithne Donnellan, Mater Allows Postponed Drug Trial to Proceed, \textit{Irish Times}}, Oct. 19, 2005, at 9; Eithne Donnellan & Roadhan MacCormaic, \textit{Cancer Research Group Regrets Mater “Difficulties,” \textit{Irish Times}}, Oct. 7, 2005, at 7; Kitty Holland, \textit{Pregnancy Agency, Curá in Funding Dispute, \textit{Irish Times}}, Oct. 18, 2006, at 5.} 

\textbf{B. Nature of Irish Constitutional Order}

Dating from 1937, the Irish Constitution is one of the oldest functioning constitutions in Europe.\footnote{\textit{See generally James Casey, Constitutional Law in Ireland} (2000); J. Michael Forde, \textit{Constitutional Law} (2004); M. Kelly, \textit{The Irish Constitution} (2003).} Under the Constitution, the Irish State is a democracy\footnote{Ir. Const., 1937, art. 5.} and its citizens\footnote{While many of the fundamental rights provisions in the Constitution refer explicitly to "citizens" and while a number of judicial holdings or dicta cast doubt on the proposition that non-citizens enjoy the protection of these provisions, there is a conflicting line of judicial authority, influenced in part by a natural law understanding of fundamental rights as rights that are of universal application. \textit{See Kelly, supra} note 16, paras. 7.1.31-44.} enjoy the protection of express and implied
fundamental rights. These rights are enjoyed not only as against the State, but also, where appropriate, as against private parties. The powers of government are broadly divided in accordance with the doctrine of separation of powers and an explicit power of judicial review of legislation is vested in the High and Supreme Courts.

In describing the Irish constitutional order, one must also take account of the State’s international obligations, in particular, with regard to the European Union and under the European Convention on Human Rights. Ireland has been a member of what is now referred to as the European Union since 1973 and Article 29.4.10 of the Constitution provides, inter alia, that the Constitution may not be invoked to invalidate any law enacted, acts done, or measures adopted by the State that are necessitated by the obligations of membership in the European Union. Ireland ratified the European Convention on Human Rights in 1953, recognizing at that time the right of individual petition, which allows individuals to bring proceedings against Ireland before the European Court of Human Rights. More recently, the European Convention on Human Rights Act of 2003 enables litigants to plead the provisions of the Convention before domestic Irish courts.

While the State is explicitly theistic and the Preamble to the Constitution is explicitly Christian in terminology and inspiration, there is no established Church in Ireland. The original version of the Constitution did acknowledge the special position of the Roman Catholic Church in Ireland, but went on to recognize a number of other Christian denominations, together with Jewish congregations and other religious denominations existing in Ireland at the promulgation of the Constitution. Far from conferring any special privileges

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19 Ir. Const., 1937, arts. 38, 40–44.
20 Id. art. 40.
21 Id. arts. 34.3.2, 34.4.4.
23 See Ir. Const., 1937, art. 44.1.
24 For an insightful article placing this provision in its historical context, see generally Gerard Hogan, De Valera, the Constitution and the Historians, 60 IR. JUR. 293 (2005).
26 Thus, Article 44.1.2-3 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
on Roman Catholicism, the Supreme Court relied upon these clauses to support the view that the Constitution endorsed religious pluralism.\textsuperscript{27}

Finally, it is worth noting that in November 2006, the Taoiseach,\textsuperscript{28} Mr. Bertie Ahern, T.D., announced that arrangements for formal dialogue between the State and faith-based communities\textsuperscript{29} were in the process of being finalized. What is envisaged is an annual meeting with all participants in the dialogue in attendance, an annual bilateral meeting with each representative body at which the State side would be led by members of the Government and include senior officials from appropriate Departments, and an ongoing channel of communication at an official level.\textsuperscript{30}

\subsection*{C. Legal Texts Relating to Religious Freedoms}

Religious freedom is addressed in a number of different legal texts in the Irish legal order.

\subsubsection*{1. The Constitution}

A number of constitutional provisions are relevant to our discussion of freedom of religion in Irish law. Chief among these is Article 44 which, following amendment in 1972, now 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. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

3. The State guarantees not to endow any religion.

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

\footnotesize

\begin{itemize}
\item Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.
\item These portions of Article 44 were deleted by the Fifth Amendment of the Constitution Act, 1972.
\item The Taoiseach is the equivalent of a prime minister. Nuala C. Johnson, Ireland, The Great War and the Geography of Remembrance 1 (2003).
\item These included the Humanist Association of Ireland. 627 DÁIL DEB. col. 1059 (Nov. 15, 2006).
\item \textit{Id.} col. 4.
\end{itemize}
5. 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.

6. 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.

7. 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.\(^{31}\)

As already noted, the Preamble to the Constitution is also redolent of a religious *Weltanschauung*. It reads:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.\(^{32}\)

The Preamble occasionally features in judicial reasoning, though, as Kelly puts it, "[o]n no occasion has a decision been based solely upon it"; rather "it has been used to lay the ground for the deployment of later parts of the Constitution, or to underpin judgments rhetorically and emotionally."\(^{33}\) The specifically religious dimension to the Preamble has been referred to in this way in a number of cases. Thus, it was invoked in support of various views: that a testamentary gift to promote contemplative prayer was a charitable object in law;\(^{34}\) that the Constitution was consistent with Christian beliefs (and

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\(^{31}\) *Ir. Const.*, 1937, art. 44.

\(^{32}\) *Id.* pmbl.


\(^{34}\) Maguire v. Att’y Gen., [1943] I.R. 238 (Ir.).
consequently, the criminalization of homosexuality was not unconstitutional);\(^{35}\) that the natural human rights protected by the Constitution are derived from divine law;\(^{36}\) that laws of general application must accommodate religious interests if that is necessary to ensure free practice of religion;\(^{37}\) and that the Constitution was careful to restrain the State and any other organization from usurping the functions of the individual in the right and duty of achieving his or her purpose and fulfilling his or her destiny to the best of his or her ability.\(^{38}\) One legitimate criticism that may be leveled at the Preamble is that it is somewhat sectarian in tone; the reference to the fathers who were sustained “through centuries of trial” is generally taken to mean Catholics.\(^{39}\)

Religion also features in Article 40.6.1.(iii) protecting freedom of expression inasmuch as that provision states, \textit{inter alia}, that the “publication or utterance of blasphemous . . . matter is an offence which shall be punishable in accordance with law.”\(^{40}\) Unfortunately, neither the Constitution nor legislation provides any definition of blasphemy.\(^{41}\) At common law, blasphemy consisted only of attacks on the doctrines of the established Church, Anglicanism, containing an element of vilification, ridicule, or irreverence likely to result in a breach of the peace,\(^{42}\) and so did not embrace attacks on other Christian denominations or other world religions.\(^{43}\) This differentiation between religions immediately raises a constitutional difficulty regarding the

\(^{35}\) See Norris v. Att’y Gen., [1984] I.R. 36, 64 (Ir.) (O’Higgins, C.J.). In Attorney General (Society for the Protection of Unborn Children) v. Open Door Counselling, President Hamilton also endorsed the proposition that it followed from the Preamble that the Constitution was consistent with Christian beliefs. [1988] I.R. 593, 614 (Ir.).


\(^{37}\) See Quinn’s Supermarket v. Att’y Gen., [1972] I.R. 1, 23 (Ir.).


\(^{39}\) Thus, a majority of the government-appointed Constitution Review Group recommended that the Preamble should be replaced by a simple formula of enactment of the Constitution by the People of Ireland, offering the view that “the language [of the Preamble] . . . is overly Roman Catholic and nationalist in tone, . . . gender-biased, and . . . objectionable to many in Ireland today.” Const. Rev. Group, Report of the Constitution Review Group (1996) (Ir.), available at http://www.constitution.ie/reports/crg.pdf.

\(^{40}\) Ir. Const., 1937, art. 40.

\(^{41}\) For a detailed analysis of this area of the law, see Neville Cox, Blasphemy and the Law in Ireland (2000) [hereinafter Cox, Blasphemy]. See also Neville Cox, Sacrilege and Sensibility: The Value of Irish Blasphemy Law, 19 Dublin U. L.J. 87 (1997).


\(^{43}\) See R v. Gathercole, (1838) 168 Eng. Rep. 1140. More recently, in R v. Chief Magistrate, (1991) 1 Eng. Rep. 306, the English High Court held that the common law of blasphemy was confined to protecting only the Christian religion and that, accordingly, the publication of Salman Rushdie’s \textit{The Satanic Verses}, considered by Muslims to be blasphemous, did not constitute a blasphemous libel.
prohibition on religious discrimination in Article 44.2.3°. This difficulty led the Supreme Court to hold in Corway v. Independent Newspapers (Ireland) Ltd.\textsuperscript{44} that, in the absence of a statutory definition of the offense, it was impossible to define the offense of blasphemy.\textsuperscript{45} Given its discriminatory nature, it is indeed difficult to see how the common law offense of blasphemy could have survived the enactment of the Constitution. However, it is at least arguable, pace the Supreme Court, that the Court should have made some attempt to give effect to the reference to blasphemy in Article 40.6.1°.i.\textsuperscript{46} Instead, the timidity of the Court in the face of this interpretative task has essentially neutralized this reference to blasphemy\textsuperscript{47} and also renders inoperable, at least in part, Section 13(1) of the Defamation Act of 1961, which stipulates the penalties for, inter alia, blasphemous libel, and Section 7(2) of the Censorship of Films Act of 1923, which provides for the withholding of a certificate from a film of blasphemous content, at least until such time as Parliament sees fit to provide a statutory definition of blasphemy.

Article 42, dealing with education, refers in two places to the religious education of children. It emphasizes the primary role of parents in this regard,\textsuperscript{48} and in line with this policy of acknowledging the primary role of parents in relation to the religious education of their children, the State's constitutional power, conferred by Article 42.3.2, to ensure that children receive a certain minimum education, extends only to moral, intellectual, and social education and does not encompass religious education.

\textsuperscript{44} [1999] 4 I.R. 484 (Ir.). See also S. Ranalow, Bearing a Constitutional Cross—Examining Blasphemy and the Judicial Role in Corway v. Independent Newspapers, 3 TRINITY COLL. L. REV. 95 (2000).

\textsuperscript{45} With regard to one important aspect of the offense of blasphemy, mens rea, Justice Barrington suggested that the constitutional guarantee of freedom of religion would preclude the courts from taking the view that the mere act of publication of blasphemous matter without proof of intention to blaspheme would be sufficient to support a conviction of blasphemy. This is in contrast to the majority decision of the House of Lords in R v. Lemon, holding that the mens rea for blasphemy is an "intention to publish material which in the opinion of the jury is likely to shock and arouse resentment among believing Christians" and that it is not necessary to prove an intention to blaspheme. [1979] A.C. 617, 632 (U.K.).

\textsuperscript{46} While, as Cox points out, the Court refused to define blasphemy, it nonetheless went on to conclude that the cartoon in the instant case was not blasphemous. COX, BLASPHEMY, supra note 41, at 57.

\textsuperscript{47} It is worth noting that, prior to Corway, no prosecution had been made for blasphemy since Independence. See generally P. O'Higgins, Blasphemy in Irish Law, 23 MODERN L. REV. 151 (1960).

\textsuperscript{48} See infra Part II.B.
Finally, Articles 12.8 and 34.5 require, respectively, the President and every person appointed to the bench to take an explicitly religious oath of office. 49

2. Legislation

Various pieces of legislation regulate issues of interest to faith communities. Thus, legislation protects the right of religious conscience in a number of specific situations. 50 The religious upbringing of children placed for adoption is addressed in various provisions of the Adoption Acts, 51 while a number of statutory provisions oblige or empower the State to facilitate certain classes of persons in the practice of their religion. 52 In the context of employment law, employees are protected against dismissal and other forms of discrimination on the basis of religious opinions. 53 Religious discrimination (which also includes discrimination on the ground of lack of religious beliefs) is one of the ten types of discrimination regulated by a sophisticated statutory


50 See Health Act, 1953, § 4(2) (Act No. 26/1953) (Ir.) (dealing with the rights of patients under the public health service); Criminal Justice Act, 1960, § 9(3) (Act No. 27/1960) (Ir.) (concerning the place of detention of a young person awaiting trial). Section 257 of the Mental Treatment Act, 1945 originally provided that a person in a mental institution could not be compelled to attend any religious service which was not of the religion to which he belonged. Mental Treatment Act of 1945 § 257 (Act No. 19/1945) (Ir.). However, this provision does not appear to have been re-enacted in the current legislation. See Mental Health Act, 2001 (Act No. 25/2001) (Ir.).

51 See Adoption Act, 1952, §§ 15(2)(a), 16(1) (Act No. 25/1952) (Ir.); Adoption Act, 1974, s.4, 13 (Act No. 24/1974) (Ir.).


A number of other statutory provisions offer protection against religious persecution.\footnote{See, e.g., Refugee Act, 1996, §§ 2, 3(2)(a)(iv), 5(1) (Act No. 17/1996) (Ir.); Extradition Act, 1965, §§ 11(2), 33(3) (Act No. 17/1965) (Ir.).} While legislation criminalizes hate speech directed against, \emph{inter alia}, religious groups,\footnote{Prohibition of Incitement to Hatred Act, 1989, §§ 1-2 (Act No. 19/1989) (Ir.). Sections 3(1)(a) and 7 of the Video Recordings Act of 1989 also empower the Official Censor to prohibit the distribution of a video likely to stir up hatred against a group of persons on the ground of, \emph{inter alia}, their religion. Video Recordings Act, 1989, §§ 3(1)(a), 7 (Act No. 22/1989) (Ir.).} there does not appear to have been any prosecutions under this heading.\footnote{The official crime statistics indicate that relatively few prosecutions are made under the Prohibition of Incitement to Hatred Act of 1989 and, moreover, do not distinguish between offenses targeting a group because of its religion and offenses targeting a group on the basis of any of the other grounds covered by the act (i.e., race, color, nationality, ethnic or national origin, membership in the Traveling Community, or sexual orientation). \textsc{Annual Report of An Garda Síochána 2005 31 (2005), available at http://www.garda.ie/angarda/statistics/report2005/annreport2005b.pdf.}} As already noted, Section 13(1) of the Defamation Act of 1961 stipulates the penalties for blasphemous libel and Section 7(2) of the Censorship of Films Act of 1923 prohibits the public display of a film of blasphemous content. However, in the absence of a statutory definition of blasphemy, these provisions are arguably inoperative.\footnote{See discussion supra Part I.C.1.} An older piece of legislation, the Profane Oaths Act of 1695, makes it an offense to swear or curse profanely in the presence of specified public officials. As the Law Reform Commission points out:

The Act does not define profanity, but it is elsewhere described as “the irreverent use in everyday speech of the name of God or Christ, distinguishable from blasphemy,” or as “irreverence towards sacred things, particularly an irreverent . . . use of the name of God [or] . . . vulgar, irreverent or coarse language.”\footnote{The Law Reform Comm’n, \textsc{Report on Oaths and Affirmations} 47 (1990), \textit{available at http://www.lawreform.ie/publications/data/volume8/lrc_59.html}. The Commission goes on to comment that “[t]he more secular content of modern law suggests that the 1695 Act has no place in it and this is borne out by the present dearth of prosecutions under the Act.” \textit{Ibid.} at 48.}

Section 20(4) of the Broadcasting Authority Act of 1960 and Section 10(3) of the Radio and Television Act of 1988 prohibited the broadcasting of, \emph{inter alia}, any advertisement “which [was] directed towards any religious . . .
end. However, in 2001 this ban was modified somewhat by Section 65 of the Broadcasting Act of 2001 to permit the broadcasting of advertisements for religious publications, religious events, and religious ceremonies. Such was permitted, provided the broadcasts did “not address the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation.”

A number of miscellaneous acts should also be noted in this context. Section 45 of the Charities Act of 1961 provides that, for the purpose of determining whether it is a valid charitable gift, a gift for the purpose of the advancement of religion is conclusively presumed to benefit the public. Section 45(2) further provides that “a valid charitable gift for the purpose of the advancement of religion shall have effect and, as respects its having effect, shall be construed in accordance with the laws, canons, ordinances and tenets of the religion concerned.” Thus, while one normally has to show that a gift benefits the public before it may be regarded as charitable in nature, this requirement is essentially dispensed with in the case of gifts for the advancement of religion.


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60 In contrast, the Video Recordings Act of 1989 exempts videos that, taken as a whole, are concerned with religion from the criminal prohibition on the possession of uncertified videos. Video Recordings Act, 1989, § 6 (Act No. 22/1989) (Ir.).


63 Charities Act, 1961, § 45 (Act No. 17/1961) (Ir.).

64 Id. § 45(2).

provide for the incorporation into domestic law of various rights protected by international law. Such rights are themselves guaranteed without religious distinction. By virtue of Part II of Schedule 1 to the Juries Act of 1976, members of the clergy are exempt from jury service. Companies established to promote religion are among the categories of limited liability companies that may dispense with the word "limited" in their names, provided they comply with Section 88 of the Company Law Enforcement Act of 2001. Part II of the Second Schedule to the Defamation Act of 1961 offers qualified privilege to the fair and accurate reporting of the findings of any association formed for the purpose of promoting religion.

By virtue of Section 28 of the Freedom of Information Act of 1997, a member of the public may not be given access to information held by a public body if the information relates to the religion of a person. Section 54 of the Civil Registration Act of 2004 allows religious bodies to apply to have one or more of their members appointed to solemnize marriages for civil law purposes. Similarly, Section 2 of the Health (Nursing Homes) Act of 1990 exempts from the scope of that act a premises in which a majority of the persons being maintained are priests or members of a religious order (unless the State is making a payment under the Health Acts to the owner of the premises for the support of any of the residents). Finally, Sections 98 and 247 of the Copyright and Related Rights Act of 2000 provide that it is not an infringement of copyright, or any right conferred by Part III of the Act, to play a sound recording for the benefit of a not-for-profit body, when the main objects of the body are charitable or otherwise concerned with religion, and when the proceeds of any admission charges are applied solely for the body's purposes.

Notwithstanding its repeal in 1972, a number of miscellaneous extant statutory provisions (including one enacted in 1986) contain references to Article 44.1.2-44.1.3. For example, Section 128(4)(c) of the Companies Act of 1963 exempts certain companies from the requirement to file audited accounts along with their annual returns. Such companies must be formed for charitable purposes and must be under the control of a religion recognized by Article 44. Section 2(1)(b) of the Companies (Amendment) Act of 1986 also continues

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66 A religious body is "an organised group of people[,] members of which meet regularly for common religious worship." Civil Registration Act, 2004, § 45 (Act No. 3/2004) (Ir.).
67 It is for the Registrar of the Civil Registration Service to determine whether a group is a religious body for the purpose of the Act and an appeal against the Registrar's decision lies initially with the Minister for Health and Children and ultimately with the Circuit Court. Id. §§ 53(4), 56(1), 56(5)(a).
this exemption in force in relation to the new filing requirements imposed by that act. The Street and House to House Collections Act of 1962, in Section 2(5), also purports to exempt house-to-house collections benefiting a charitable object under the control of a religion recognized by Article 44. Section 23(5) of the 1962 Act uses the same formula to exempt certain collections from the obligation to provide specified information about the proceeds of the collection.

The legal status of these provisions, however, is problematic. In the first place, they invoke a constitutional provision that is no longer in existence. It is also arguable that these provisions effect discrimination on the ground of religion as between recognized and unrecognized religions. Such discrimination would be contrary to the prohibition on religious discrimination in Article 44.2.3.⁶⁸

3. European law

It is also worth noting that Ireland ratified the European Convention on Human Rights, art.9 of which protects freedom of thought, conscience and religion and art.14 of which prohibits, inter alia, religious discrimination, in 1953 and also recognised the right of individuals to bring complaints against the State under the Convention to the European Court of Human Rights. Since the enactment of the European Convention on Human Rights Act 2003, the domestic Irish courts are now obliged, when interpreting any statutory provision or rule of law, to do so in a manner compatible with the State’s obligations under Articles 2 to 14 of the Convention and the first, fourth, sixth and seventh Protocols thereto.

Ireland is also subject to EU law. Three measures are relevant in this context. First, in the Eleventh Declaration appended to the Treaty of Amsterdam 1997, the European Union affirms that it “respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States” and that it “equally respects the status of philosophical and non-confessional organisations.” Second, Article 13 of the Treaty of Amsterdam empowers the Council of Ministers, acting unanimously on a proposal from the European Commission and after consulting the European Parliament, to take appropriate action to combat discrimination on ground of, inter alia, religion. Pursuant to this provision, Council Directive

⁶⁸ See discussion supra Part I.C.1.
prohibits, inter alia, discrimination on grounds of religion or belief in relation to employment and occupation. Finally, Article 12 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities provides, inter alia, that television advertising shall not be offensive to religious beliefs.

D. Freedom of Religion

I turn now to consider the substantive guarantee of freedom of religion in Article 44.2.1 of the Irish Constitution, which corresponds broadly to arts. 1 and 6 of the Declaration, and, in doing so, will consider two issues. First, what issues have arisen in Ireland in relation to the content of freedom of religion? Second, what constraints have been placed on freedom of religion in Ireland?

1. Content of Freedom of Religion

In considering the content of freedom of religion in Irish law, I will examine the scope of the guarantee and the obligation on the State actively to take steps to facilitate freedom of religion before referring briefly to Article 44.2.5-6.

As one would expect, the guarantee of freedom of religion is not limited to the Judeo-Christian tradition, notwithstanding the explicit references to those faiths in the Constitution as originally enacted. However, the Supreme Court has taken the view that Article 44.2.1 is restricted to freedom of religious conscience, as distinct from freedom of conscience generally. In McGee v. Attorney General, the plaintiff argued that a statutory prohibition on the importation of contraceptives infringed upon her freedom to decide how to plan her family. Though she successfully challenged the legislation on other grounds, this particular argument was rejected on the ground that Article

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70 The very difficult question of what constitutes a religion has not yet been authoritatively addressed in Irish law. As one might expect, it is not confined to the Christian faith–see the comments of Walsh J. in Quinn’s Supermarket Ltd. v. Attorney General [1972] IR 1 at 24. On the other hand, in Johnson v. Church of Scientology Mission of Dublin Ltd., High Court, 30 April, 1999, Geoghegan J. cast some doubt on the status of one specific belief system, the Church of Scientology, as a religion–see p.4 of the judgment.

71 See Quinn’s Supermarket v. Att’y Gen., [1972] I.R. 1, 24 (Ir.).

44.2.1 did not protect the exercise of what was referred to as social conscience. According to Justice Walsh:

It is not correct to say . . . that [Article 44.2.1] is a constitutional guarantee of a right to live in accordance with one's conscience subject to public order and morality. What the Article guarantees is the right not to be compelled or coerced into living in a way which is contrary to one's conscience and, in the context of the Article, that means contrary to one's conscience so far as the exercise, practice or profession of religion is concerned.\(^73\)

This position has been criticized\(^74\) and it is worth noting that in *Re A Ward of Court (No. 2).*\(^75\) a claim by a hospital looking after a patient that it could not legally be required to do any act contrary to its philosophy and code of ethics was accepted as correct by all of the other parties to the litigation.\(^76\)

In the majority of cases, the State's obligations under Article 44.2.1 will be discharged through a policy of non-interference with religious views and practices. However, the constitutional guarantee of freedom of religion may require the State to take positive steps to secure its vindication in two situations. The first and less controversial situation covers persons who, left to their own accord, would not be able to practice their religion and in respect of whom the State has a special responsibility. Here, the State may be required to adopt a more active policy of providing religious services. Obvious examples here include prisoners\(^77\) and patients in hospitals or homes maintained by the State. In this context, it is worth noting Section 39 of the Health Act of 1970 which obliges each health board to make arrangements for the performance of religious services in each hospital, sanatorium, and home maintained by it.

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\(^74\) See **CONST. REV. GROUP**, *supra* note 39, at 360 (stating that the comments of Justice Walsh did not form part of the *ratio decidendi* in McGee and that they are unlikely to be followed in a future case).

\(^75\) [1996] I.R. 79 (Ir.).

\(^76\) Id. at 110.

The second, possibly more controversial, situation in which the State is required actively to take steps to facilitate freedom of religion relates to situations in which the practice of religion may be adversely affected by laws of general application. The Irish Supreme Court has accepted that facilitating the practice of religion obliges the State, in appropriate cases, to exempt religiously motivated action from laws of general applicability. In *Quinn's Supermarket v. Attorney General*, the Court held that, in regulating trading hours, a ministerial order could make a special provision for kosher meat shops in order to facilitate Jewish observance of the Sabbath. According to Justice Walsh:

> [T]he primary object and aim of Article 44, and in particular the provisions of s. 2 of that Article, was to secure and guarantee freedom of conscience and the free profession and practice of religion subject to public order and morality; and to ensure that the practice of religion and the holding of particular religious beliefs shall not subject the person so practising religion or holding those beliefs to any disabilities on that account, or permit distinctions on the ground of religious profession, belief or status between persons in the State who are free to profess and practise their religion. If, however, the implementation of the guarantee of free profession and practice of religion requires that a distinction should be made to make possible for the persons professing or practising a particular religion their guaranteed right to do so, then such a distinction is not invalid having regard to the provisions of the Constitution. It would be completely contrary to the spirit and intendment of the provisions of Article 44, s. 2, to permit the guarantee against discrimination on the ground of religious profession or belief to be made the very means of restricting or preventing the free profession or practice of religion. The primary purpose of the guarantee against discrimination is to ensure the freedom of practice of religion. Any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion by any person or persons would be invalid having regard to the provisions of the Constitution, unless it contained provisions which saved from such restriction or prevention the practice of religion of

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78 *See generally Marci A. Hamilton, God vs. The Gavel: Religion and the Rule of Law* (2005) (arguing that religious entities should ordinarily be subject to the rule of law unless they can prove that exemption will cause no harm to others).


80 In the instant case, however, the discrimination in favor of such shops extended beyond what was required. As the shops were exempted from such regulation for every day of the week, not just Saturdays and Sundays, the ministerial order was held to be invalid because it was overbroad. *Id.* at 26–27.
the person or persons who would otherwise be so restricted or prevented.81

It is also arguable that the right of religious bodies to autonomy in Article 44.2.59 provides further support for the position taken by the Supreme Court in Quinn’s Supermarket on this issue.82

Turning more generally to Article 44.2.5-6, these provisions augment the protection afforded to religion by Article 44.2.1, specifically in relation to the internal affairs of religious denominations83 and the holding of religious property. In McGrath v. Trustees of Maynooth College,84 two members of the Supreme Court, Chief Justice O’Higgins and Justice Henchy, in upholding the right of Maynooth College, the national seminary for Catholic priests, to enforce its statutes, adverted to Article 44.2.5 and its guarantee of the right of every religious denomination to manage its own affairs. In a second case

81 Id. at 24–25 (emphasis added). The German Constitutional Court has also taken a similar approach to this issue. See, e.g., Bundesverfassungsgericht, [BVerfGE] [Federal Constitutional Court] 1968, 24 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 236 (F.R.G.) (holding that a Catholic youth organization was not subject to competition laws when engaged in rag dealing for charitable purpose); Bundesverfassungsgericht, [BVerfGE] [Federal Constitutional Court] 1971, 32 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 98 (F.R.G.) (setting aside a criminal conviction of a husband for refusing, on religious grounds, to urge his dying wife to submit to a blood transfusion). The U.S. Supreme Court initially considered such exemptions to be constitutionally obligatory. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). However, the Court has since moved to a position holding that the U.S. Congress may exempt religious interests from laws of general application, though it is not necessarily obliged to do so. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Cutler, 544 U.S. at 709; Employment Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). In contrast, in Casimiro v. Luxembourg, the European Court of Human Rights upheld a refusal to give Seventh-Day Adventists a general exemption on religious grounds from attending school on Saturdays on the ground that this was necessary to protect the rights and freedoms of others, notably the right to education. App. No. 44888/98, April 29, 1999, in Paul M. Taylor, Freedom of Religion: UN and European Human Rights Law and Practice 173 (2005) (unreported decision of the European Court of Human Rights). In similar fashion, the High Court of Australia has held that the guarantee of religious freedom does not exempt religious bodies from laws of general application. See Church of the New Faith v. Comm’r of Pay Roll Tax (Vic.) (1983) 154 C.L.R. 120 (Austl.).

82 In Germany, the Constitutional Court has held that appropriate exemptions from laws of general applicability may be justified by the constitutional right of religious bodies to self-government. See, e.g., Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1976, 42 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 312 (F.R.G.) (holding that the Evangelical Church could lawfully suspend a minister’s pastoral rights and duties while he served as a representative in the state or federal legislature).

83 In Re Article 26 of the Constitution and the Employment Equality Bill, 1996, [1997] 2 I.R. 321 (Ir.), the Supreme Court held, in the context of Article 44.2.5, that the term religious denomination was a generic term which covered the various churches, religious societies, or religious congregations under whatever name they wished to describe themselves. This interpretation presumably also applies to Article 44.2.6.

84 [1979] I.L.R.M. 166 (Ir.).
concerning an (unsuccessful) application for an interlocutory injunction to restrain the trustees and administrator of a Catholic Cathedral from interfering with the Cathedral’s altars, altar rails, or pulpit, Justice O’Flaherty remarked, obiter, that with regard to Article 44.2.5, “any Irish Court must approach questions of property rights, and so forth, of any religious denomination with great circumspection and sensitivity.”\(^85\) While these decisions and remarks are very deferential to religious autonomy, a somewhat different note was struck by the Supreme Court in \textit{Re Article 26 of the Constitution and the Employment Equality Bill, 1996}.\(^{86}\) Here, the Court held that, while it is implicit in Article 44.1 that each religious denomination should be respected when it says what its religious ethos is, the final decision on such matters rests with the courts.\(^{87}\)

\textbf{D. Regulation of Freedom of Religion}

The Irish courts have had to consider the regulation of religious beliefs in several different contexts.

A statutory ban on religious advertising was considered and upheld by both the Irish Supreme Court and the European Court of Human Rights in \textit{Murphy v. Independent Radio and Television Commission}\(^{88}\) and \textit{Murphy v. Ireland},\(^{89}\) respectively.

The Independent Radio and Television Commission banned a radio advertisement submitted by the plaintiff to an independent radio station concerning the public showing of a video on the evidence of the resurrection of Christ.\(^{90}\) The plaintiff alleged that this violated his right to free speech under Article 40.6.1.i and his right to receive under Article 40.3.\(^{91}\) Dismissing the case, the Supreme Court accepted that the ban affected the plaintiff’s rights under Article 40.6.1.i and Article 40.3, but took the view that these rights were lawfully restricted in the instant case in the interests of the common good.\(^{92}\)

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\(^{87}\) \textit{But see Manoussakis v. Greece}, 23 Eur. Ct. H.R. 387 (1996) (stating that the right to freedom of religion under the Convention on Human Rights excludes any discretion on the part of the State to determine whether religious beliefs, or the means used to express such beliefs, were legitimate).
\(^{90}\) \textit{Id.}
\(^{91}\) \textit{Murphy}, [1999] 1 I.R. at 12. He also contended, unsuccessfully, that the ban constituted religious discrimination contrary to Article 44.2.3. \textit{Id.}
\(^{92}\) \textit{Id.} at 23.
Speculating as to the policy behind the ban, the Court, per Justice Barrington, noted that Section 10(3) applied to advertisements directed towards any religious end, advertisements directed towards any political end, and advertisements related to any industrial dispute. The Supreme Court explained that:

All three kinds of banned advertisement relate to matters which have proved extremely divisive in Irish society in the past. The Oireachtas was entitled to take the view that the citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements, if permitted, might lead to unrest. Moreover the Oireachtas may well have thought that in relation to matters of such sensitivity, rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals.93

The Court concluded that the restrictions on the plaintiff’s rights were minimal, that the ban on religious advertising was rationally connected to the objective of the legislation, that the ban was not arbitrary, unfair, or based on irrational considerations, and that it complied with the principle of proportionality.94 However, one might well question whether the Supreme Court has been successful in its attempt at striking a proper balance between the plaintiff’s freedom of expression and the interests of the common good. Apart from the contention that the Court may have placed an excessive value on the perceived need to protect the listening public from advertisements of this nature, the Court failed to take into account the fact that the ban infringed on the right to communicate this type of information.

Nor is it necessarily the case that the ban on religious advertising protects poorer rivals from their wealthier counterparts, as it could be argued that larger (and wealthier) denominations, due to their existing, extensive network of contacts, have less need for radio advertising than less established (and possibly poorer) churches.95 That said, in Murphy v. Ireland,96 the European

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93 Id. at 22. This reasoning would appear to offer constitutional protection to legislation banning hate speech, such as the Prohibition of Incitement to Hatred Act of 1989. Id.
94 Id. at 23. The Court rejected counsel’s argument that it was possible to use a more selective ban (and that therefore the existing blanket ban was disproportionate) on the ground that the Oireachtas might well have decided that it was inappropriate to involve agents of the State in deciding which religious advertisements should be permitted and which should be banned. Id. at 27.
95 In this respect, the reasoning of the Court of Human Rights in the case of Vgl Verein gegen Tierfabriken v. Switzerland is particularly apposite. 34 Eur. Ct. H.R. 159 (2002). The Court accepted that a ban on political advertising could be justified by the need to prevent powerful financial groups from gaining undue influence over commercial radio and television stations, thereby undermining the fundamental role of freedom of expression in a democratic society. Id. at 18. However, as the applicant association in the instant
Court of Human Rights later held that Section 10(3) of the 1988 Act was a legitimate restriction on the plaintiff's freedom of expression under Article 10 of the European Convention on Human Rights. The Court held that member States had a wide margin of appreciation when regulating expression in relation to matters likely to offend personal convictions in the sphere of morals and religion and noted that Section 10(3) applied only to advertising in the audio-visual media.\textsuperscript{97} The plaintiff, therefore, could still advertise his meeting using the print media. In addition, he was entitled to participate in programs on religious matters and to have his church services broadcast in the audio-visual media.\textsuperscript{98}

Finally, in two cases, the Irish High Court twice overruled the religious objection of a patient to blood transfusion, though without citing public order or morality in either case.\textsuperscript{99} In the first case, \textit{JM v. Board of Management of St. Vincent's Hospital}, the Court overrode the views of the patient on the ground that she had not exercised fully independent judgment in the matter. President Finnegan held that because of her cultural background, the patient was preoccupied with her husband and his religion rather than with her medical treatment and the protection of her own welfare.\textsuperscript{100} Exercising his \textit{parens patriae} jurisdiction, the judge directed the respondents to provide the appropriate medical treatment. In the second case, however, the patient, a woman who had suffered catastrophic blood loss following the delivery of her baby, was considered to be fully competent. Nonetheless, Justice Abbott ordered that a blood transfusion be provided to her because she was the sole relative in Ireland of her new born son and also because, given the
circumstances, the court had to act to save life. The precedential status of this latter decision is slight, however, given that the decision is an ex tempore decision, handed down in the context of an ex parte application by the hospital for an order authorizing the blood transfusion, and the matter is now the subject of an appeal to the Supreme Court.

II. PRINCIPLE OF NON-DISCRIMINATION


A. Article 44.2.3

Perhaps the most striking feature of the jurisprudence on the constitutional prohibition of religious discrimination is the manner in which, in a number of cases, the courts have read this prohibition subject to the protection of religious interests. We have already noted, in Quinn’s Supermarket Ltd. v. Attorney General, the Supreme Court’s holding that the State was to fashion an exemption from general applicable law if the exemption was necessary to ensure the freedom of religious practice. Justice Henchy, of the Supreme Court, adopted a similar approach in the context of a challenge to the validity of a decision of ecclesiastical authorities. In McGrath v. Trustees of Maynooth College, former priests challenged the decision of the Trustees of Maynooth College, the national seminary for Catholic priests, to dismiss them from their lecturing positions when they were laicized. According to Justice Henchy, the State must, on occasion, recognize and buttress the internal disabilities and discriminations that flow from the tenets of a particular religion in order to ensure vitality, independence, and freedom of religion. In a third

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101 Eithne Donnellan, Woman in Court Transfusion Case Recovering in Hospital, IRISH TIMES, Sept. 22, 2006, available at http://www.ireland.com/newspaper/frontpage/2006/0922/1158590881290.html. Similar reasoning was employed in a Canadian case, H(B) (Next Friend Of) v. Alberta (Dir. of Child Welfare), in which the Alberta High Court, relying on the state’s overriding duty to preserve life, ordered that a sixteen-year-old Jehovah’s Witness undergo a blood transfusion, even though she was considered to be fully competent. [2002] 95 C.R.R. 333 (Can.).
102 See discussion supra note 78 and accompanying text.
103 [1972] I.R. 1 (Ir.).
104 McGrath v. Trs. of Maynooth College, [1979] I.L.R.M. 166 (Ir.).
105 Id.
case, *Re Article 26 and the Employment Equality Bill, 1996*, the Supreme Court accepted that the legislature *may* legislate to promote social conditions conducive to the fostering of religious beliefs, notwithstanding the constitutional prohibition on religious discrimination.\(^{106}\) In this case, the Court was asked to consider the constitutionality of Sections 12 and 37 of the Employment Equality Bill of 1996, which purported to allow certain vocational training and religious bodies operating religious, educational, or medical institutions to discriminate on grounds of religion in order to maintain the religious ethos of the institution. Upholding the validity of both sections, the Court stated that:

> It is constitutionally permissible to make distinctions or discriminations on grounds of religious profession, belief or status insofar—but only insofar—as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution.\(^{107}\)

Unconstitutional religious discrimination was identified in three cases. In *Quinn’s Supermarket Ltd. v. Attorney General*,\(^{108}\) the Supreme Court upheld the State’s right to exempt kosher butchers from trading hour regulations, thus protecting the right of Jews to observe the Sabbath. However, in the instant case, the exemption was overbroad\(^{109}\) and, to the extent that it was more than necessary, unconstitutional. In *Mulloy v. Minister for Education*, the Department of Education’s policy of recognizing teaching service in certain African countries for the purpose of determining salary increments was found to be unconstitutional because it applied only to lay teachers and not to priests, such as the plaintiff.\(^{110}\) In *M v. An Bord Uchtála*,\(^{111}\) the High Court held that Section 12(2) of the Adoption Act of 1952, which effectively ruled out adoption by a couple who was not of the same religion, was contrary to Article 44.2.3.

On the other hand, the courts rejected complaints of religious discrimination in *Schlegel v. Corcoran*,\(^{112}\) *State (O’Connor) v. Ó*

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\(^{107}\) *Id.* at 358. In a further case, *Grealley v. Minister for Educ. (No. 2)*, Justice Geoghegan read the constitutional prohibition on religious discrimination in light of parental rights. [1999] 1 I.R. 1 (Ir.).

\(^{108}\) [1972] I.R. 1 (Ir.).

\(^{109}\) The exemption covered every day of the week, not just Fridays and Saturdays. *Id.*


\(^{111}\) [1975] I.R. 81 (Ir.).

\(^{112}\) [1942] I.R. 19 (Ir.).
Caomhannaigh,113 Greally v. Minister for Education (No. 2),114 McGrath v. Trustees of Maynooth College,115 Re Article 26 of the Constitution and the Employment Equality Bill, 1996,116 and Murphy v. Independent Radio and Television Commission.117 This last case merits comment because the Supreme Court held that a statutory ban on religious advertising was directed at material of a particular kind, and not at people who professed a religious belief and therefore did not violate Article 44.2.3.118 It is questionable whether the constitutional prohibition on religious discrimination should be limited to instances of direct discrimination on grounds of religious profession, belief, or status.

As a final point, Article 44.2.3 clearly rules out the establishment of a State religion.

B. Non-endowment

The prohibition on endowment of religion contained in Article 44.2.2 has been considered by the courts on three separate occasions. In McGrath v. Trustees of Maynooth College, Supreme Court Justice Kenny took the view that State subvention of Maynooth College, the national seminary for Catholic priests, was not unconstitutional because, in addition to its status as a seminary, the College was also a college of the National University of Ireland.119

In Re Article 26 and the Employment Equality Bill, 1996,120 the Supreme Court appeared to suggest that Article 44.2.2 was directed against discriminatory endowment of religion, rather than endowment of religion per

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113 [1963] I.R. 112, 114–16 (Ir.). The Irish Supreme Court notes a provision of an Act of 1831, pursuant to which the applicant had been convicted of sending threatening letters, was inspired by anti-Catholic sentiment. Id.
114 [1999] 1 I.R. 1, 10–11 (H. Ct.) (Ir.). A collective agreement regulating recruitment of teachers to second-level Catholic schools, which gave preferential treatment to teachers with a record of service in such schools, was held to be based on degrees of experience in Catholic schools, and not on religious profession, belief, or status. Id.
115 [1979] I.L.R.M. 166 (Ir.). Provisions of Article 44.2.3 are not applicable to private bodies, even those in receipt of public funding. Id.
116 [1997] 2 I.R. 321, 356 (Ir.). The Supreme Court notes provisions of a proposed bill, which permits certain employers and bodies to discriminate on the ground of religion in order to protect their religious ethos, is protected as necessary to the guarantee of freedom of religion. Id. at 356.
117 [1999] 1 I.R. 12 (Ir.).
118 Id. at 22–23.
Thus, after affirming that, in light of Article 42, the State was entitled to support denominational schools, the Court continued:

This system does not involve the endowment of any religion. The endowment of a religion implies the selection of a favoured State religion for which permanent financial provision is made out of taxation or otherwise. This kind of endowment is outlawed by Article 44, s. 2, sub-s. 2 of the Constitution.\textsuperscript{122}

However, in the later case of \textit{Campaign to Separate Church and State Ltd. v. Minister for Education},\textsuperscript{123} the Supreme Court indicated that this passage was to be understood as referring to the establishment of a State religion, and that it had not been intended to convey the meaning that endowment of religions would be acceptable if all religions were endowed.\textsuperscript{124}

This latter case contains the first detailed judicial examination of Article 44.2.2, concerning, as it did, the contention that State funding of chaplains in the Roman Catholic and the Church of Ireland community and comprehensive schools amounted to State endowment of religion.\textsuperscript{125} This funding commenced in the early 1970s with the introduction of these schools, and was confined to the Roman Catholic Church and the Church of Ireland because they were the only denominations which had such schools.\textsuperscript{126}

After reviewing the historical background to Article 44.2.2, Justice Barrington, delivering the majority opinion of the Supreme Court, held that the payment of monies to a denominational school for educational purposes was not an endowment of religion within the meaning of Article 44.2.2.\textsuperscript{127} The fact that State payment of the chaplains’ salaries indirectly benefited the churches in question (inasmuch as they did not have to spend their own monies on such purposes) was discounted because the same argument could be made in relation to the State payment of teachers’ salaries at denominational schools,

\textsuperscript{121} See id. at 353.
\textsuperscript{122} Id. at 354.
\textsuperscript{123} [1998] 3 I.R. 321 (Ir.).
\textsuperscript{124} Id. at 335–37.
\textsuperscript{125} See id.
\textsuperscript{126} See id. at 326–27.
\textsuperscript{127} Id. at 343. Justice Keane delivered a separate, concurring judgment. Id. at 358–67 (Keane, J., concurring).
and clearly the framers of the Constitution did not consider the latter payments to constitute an endowment of religion.\textsuperscript{128}

Justice Barrington went on to point out that Article 42 contemplated children receiving religious education in schools recognized or established by the State, but in accordance with the wishes of the parents.\textsuperscript{129} Parents thus had the right to religious education provided in their children’s schools, and the role of the chaplain helped to provide this extra dimension to the religious education of children.\textsuperscript{130}

The judge concluded with two caveats. First, the system of salaried chaplains had to be available to all community schools of all denominations on an equal basis in accordance with their needs.\textsuperscript{131} Second, it was constitutionally impermissible for a chaplain to instruct a child in a religion other than its own without the knowledge and consent of his or her parents.\textsuperscript{132}

In addition to protecting the State funding of school chaplains, the reasoning in this case may also provide constitutional cover for the display of religious artifacts in publicly funded schools and for the public funding of a curriculum permeated by religious values.\textsuperscript{133} However, the reasoning is not without its difficulties. In the first place, it is at least as plausible an interpretation of the Constitution to argue that the non-endowment clause should be used to qualify the principle of State support for denominational education, as it is to argue that the principle of State support for denominational education should be used to qualify the non-endowment clause. At best, one would have to accept that the constitutional text is indeterminate on this point, and yet the Supreme Court decision does not offer any compelling reason for adopting its preferred interpretation over the alternative offered by the plaintiffs.

Moreover, Article 42.4, which, in the context of the State’s role in relation to the provision of education, refers to the “rights of parents, especially in the matter of religious and moral formation,”\textsuperscript{134} is construed by the Supreme

\textsuperscript{128} \textit{Id.} at 341–42 (majority opinion). The Supreme Court in \textit{Crowley v. Ireland} held that the Constitution endorsed the public funding of denominationally controlled primary education. [1980] I.R. 102, 108 (Ir.).

\textsuperscript{129} \textit{Campaign to Separate Church and State,} [1998] 3 I.R. at 341.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.} at 339.

\textsuperscript{132} \textit{Id.} at 332–34.

\textsuperscript{133} \textit{Contra id.} at 341.

\textsuperscript{134} \textit{Id.}
Court as actively obliging the State to assist parents through the educational system with the religious and moral formation of their children.  However, one could plausibly construe this reference to the rights of parents as a restraint upon, rather than authorization for, State activity. But even if the State is actively obliged to assist parents with the religious and moral formation of their children, it is arguable that the current system of funding chaplains in community and comprehensive schools is unconstitutional for two related reasons. First, the State does not assist all parents in this particular way, but only those whose children attend community and comprehensive schools (as distinct from other types of second-level school). Therefore, arguably the State is failing to adequately discharge its obligations under Article 42.4. Second, the selected schools belong to only two religious denominations, raising the possibility of unlawful discrimination contrary to Article 44.2.3. It is far from clear why, historical considerations apart, comprehensive and community schools should be singled out for such favorable treatment. If this arrangement is to be continued, it may be that in order to avoid constitutional difficulties, State funded chaplains will have to be provided to other denominationally controlled schools.

C. Legislation


The former acts prohibit religious discrimination in relation to employment. However, this is qualified in two particular situations. First, by virtue of Section 37(1) of the Employment Equality Act of 1998, a religious, educational, or medical institution under the control of a religious body may treat an employee or prospective employee more favorably on a religious ground where it is reasonable to do so “in order to maintain the religious ethos of the institution.” Such an employer may also take such action as is reasonably necessary to prevent an employee or a prospective

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135 Id.
136 See McGrath v. Trs. of Maynooth Coll., [1979] I.L.R.M. 166 (Ir.). In appropriate cases, provisions of the Irish Constitution may apply to private relationships, but Subsections 2 and 3 of Article 44.2 clearly refer only to the State.
138 Id. § 37(1)(a).
employee "from undermining the religious ethos of the institution."139 Measures taken pursuant to Section 37(1) may not, however, constitute gender discrimination.140 Second, by virtue of Section 12(4) of the 1998 Act, specified training institutions for nurses and primary school teachers may discriminate on ground of religion in allocating places in their courses.141 While these provisions offer some protection for the religious ethos of religious employers, they do not completely trump equality considerations.142 Specifically, Section 37 has to be read subject to Part III of the 1998 Act, which prohibits gender discrimination, while Section 12(4) protects only discrimination on the ground of religion and not discrimination on any of the other eight substantive grounds covered by the act.143

The compatibility of these qualifications of the principle of non-discrimination on the ground of religion with international law norms has been questioned, though they would appear to be constitutional.144 Thus, the U.N. Human Rights Committee has queried whether they are compatible with Article 26 of the Covenant on Civil and Political Rights.145 They may also be inconsistent with E.U. Council Directive 2000/78/EC146 inasmuch as the Directive permits religious discrimination in relation to employment provided that such discrimination does not also amount to discrimination on grounds of disability, age, or sexual orientation, a condition that Section 37 would not necessarily satisfy.147

The statutory code on equality is completed by the Equal Status Acts of 2000-2004, which prohibit religious discrimination in relation to the provision of goods and services, the provision of accommodation, the provision of education, and the operation of registered clubs.148 Religious discrimination is

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139 Id. § 37(1)(b).
140 See id.
141 Id.
142 See id.
143 Id. The other grounds include: gender, marital status, family status, sexual orientation, age, disability, race, or membership in the Traveling Community. Id. § 44(1)(c)(i).
144 See Re Art. 26 and the Employment Equality Bill, 1996, [1997] 2 I.R. 321, 334–36 (Ir.). The Supreme Court had upheld the constitutionality of the corresponding provisions in an earlier version of the 1998 Act, although it also held that this particular bill was repugnant to the Constitution on other grounds. Id. at 334, 385.
permitted, however, in relation to the provision of goods or services for a religious purpose; the provision of accommodation reserved for the use of persons in a particular category of persons for a religious purpose; the training of ministers of religion; admission to first and second level schools whose objective is to provide education in an environment that promotes certain religious values (provided that a refusal to admit a person who is not of the relevant religious denomination is essential to maintain the ethos of the school); and membership of a club whose principal purpose is to cater only to the needs of persons of a particular religious belief or of no religious belief.  

Certain aspects of the statutory code on equality are likely to generate tension with conservative faith communities. This is especially true in relation to the prohibition of discrimination on grounds of sexual orientation. A debate is currently under way in Ireland about reform of the law relating to cohabiting couples, including same-sex couples, but already the Equal Status Acts would appear to require the providers of services in relation to adoption and assisted human reproduction not to discriminate on grounds of sexual orientation or marital status. 

III. ROLE OF THE FAMILY IN RELIGIOUS AND MORAL FORMATION

Under the Irish Constitution, the marital family is recognized as the “natural primary and fundamental unit group of Society . . . possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.” Article 42, dealing specifically with education, reads as follows:

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

149 Id.
151 See Equal Status Acts, 2000–2004 (Act No. 8/2000) (Ir.). However, there is no evidence that these particular issues were explicitly considered by the legislators when enacting the 2000 Act. See Equal Status Bill, 1999 (Act No. 19/1999) (Ir.), available at http://www.oireachtas.ie.
152 Ir. CONST., 1937, art. 41.1. On November 3, 2006, the government announced that it intended to hold a referendum to increase protection of children’s rights under the Constitution. See, e.g., Carl O’Brien, Wide Welcome for Proposed Referendum, IRISH TIMES, Nov. 4, 2006, at 5.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3. 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 State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. 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.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.\textsuperscript{153}

   Thus, Irish law recognizes the primacy of the marital family in relation to the religious and moral formation of children, and indeed, this right has been relied upon by the courts in upholding the constitutionality of State payment of certain school chaplains\textsuperscript{154} and of a policy permitting the replacement of a clerical teacher by another clerical teacher.\textsuperscript{155}

   While the Supreme Court has held that the provisions of Articles 41 and 42 refer only to the marital family,\textsuperscript{156} it is arguable that a non-marital couple

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\textsuperscript{153} \textit{Ir. Const.}, 1937, art. 42.
\textsuperscript{154} Campaign to Separate Church & State, Ltd. v. Minister for Educ., [1998] 3 I.R. 321, 358 (Ir.).
\textsuperscript{155} Greally v. Minister for Educ. (No. 2), [1999] I.R. 1, 7 (Ir.).
\textsuperscript{156} In \textit{State (Nicolaou) v. An Bord Uchtála}, the Supreme Court held that the Family referred to in Articles 41 and 42 was the marital family, basing this conclusion on Article 41.3.1, which refers to the family, “which is founded on the institution of marriage.” [1966] I.R. 567, 643 (Ir.). This distinction has real consequences for the members of non-marital families in certain contexts. Thus, a natural father has no constitutional rights in relation to the custody of his children, while the constitutional rights of a natural mother in this regard are derived from Article 40.3 and, as such, are not inalienable nor imprescriptible. On the other hand, children in non-marital families enjoy the same constitutional rights as children in marital families because common law discrimination against non-marital children was abolished by the Status of Children Act of 1987. The
would enjoy equivalent protection of their role in relation to the education and welfare of their children by virtue of Article 40.3, which has been recognized by the courts as protecting the rights of the natural mother in relation to her children and also the personal rights of non-marital children.\textsuperscript{157} A natural father admittedly does not have any constitutional rights with respect to his children, but he may enjoy equivalent rights under Article 8 of the European Convention on Human Rights.\textsuperscript{158}

A corollary to the primary role of the family in relation to the upbringing of children is that the State’s role in education is essentially a supportive one. Thus, while the State provides the bulk of the funding for first and second level education in Ireland, parents are free to have their children educated at home or in private or in State schools. The State may, admittedly, insist that children receive a certain minimum of moral, intellectual, and social education (though note, not religious education) and, to that extent, the State may adopt reasonable criteria for identifying schools that qualify for public funding.\textsuperscript{159}

State funding of denominationally controlled schools is constitutionally legitimate but, by virtue of Article 44.2.4, must be done without discriminating between schools under the management of different religious denominations. That constitutional provision further protects the right of any child attending a school in receipt of public funding to refuse to receive religious instruction at that school. In Campaign to Separate Church and State, Ltd. v. Minister for Education,\textsuperscript{160} Justice Barrington said that the Constitution “distinguishes between religious ‘education’ and religious ‘instruction’” and that the right of a child “not to attend religious instruction at [a publicly funded] school” did not protect that child “from being influenced, to some degree, by the religious ‘ethos’ of the school.”\textsuperscript{161} This approach would clearly protect the display of

\textsuperscript{157} On the position of the non-marital family in Irish constitutional law, see Kelly, supra note 16, paras. 7.6.178–96.

\textsuperscript{158} See European Convention on Human Rights, supra note 153, art. 8. Article 8 gives all persons the right to a family life. Id.


\textsuperscript{160} Campaign to Separate Church & State, Ltd. v. Minister for Educ., [1998] 3 I.R. 321 (Ir.).

\textsuperscript{161} Id. at 357. A broadly comparable approach was taken by the German Constitutional Court in the interdenominational school cases. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1979, 52 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 223 (F.R.G.); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1975, 41 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 29 (F.R.G.).
religious artifacts in publicly funded schools and possibly also the public funding of the integrated curriculum, i.e., a curriculum permeated by religious values, provided that this does not constitute religious instruction as such. As against that, it has been argued that public funding of the integrated curriculum infringes the right to freedom of thought, conscience, and religion in Article 9 of the European Convention on Human Rights.

Historically, the educational system has largely been controlled by the major religious denominations, with the State essentially playing the role of paymaster. Now, however, there is a growing demand for inter-denominational and non-denominational schools to cater to those families who do not wish to send their children to denominationally controlled schools. Concern has also been expressed about the position of teachers in denominationally controlled schools who may be at risk of dismissal if they contravene the religious ethos of their school in any aspect of their private life.

IV. COMPLIANCE WITH 1981 U.N. DECLARATION

Because of our political history, Ireland is very supportive of freedom of religion and protective of religious interests. Such support and protectiveness stretches so far that the constitutional prohibitions on religious

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162 Writing extra-judicially, Justice Walsh argued that it is a corollary of Article 42, dealing with the family, that:

[T]here seems to be no objection to the state providing religious education, if the parents wish it for their children, and to the state providing the type of religious education requested by the parents. As taxpayers, parents should be free to require that some of their tax be devoted to the teaching of what they wish their children to learn. This is not a contravention of the provision in Article 44 whereby the state guarantees not “to endow any religion”. The teaching of religion, or of any particular religion, as a subject in education is not to be confused with the endowment of a religion.

Walsh, supra note 25 at 99, 100.

163 See Desmond M. Clarke, Freedom of Thought and Educational Rights in the European Convention, 22 IR. JUR. (NEW SERIES) 28 (1987). Others suggest that the integrated curriculum undermines the efficacy of the guarantee in Article 44.2.4 that a child has a right to attend a school in receipt of public money without attending religious instruction at that school. CONST. REV. GROUP, supra note 39, at 365. This issue is also discussed by the present writer in Gerry Whyte, Education and the Constitution, in Religion, Education and the Constitution 84, 98–108 (Dermot A. Lane ed., 1992).

164 Indeed, as holder of the Chair of the Third Committee (Humanitarian and Social Affairs) of the General Assembly of the United Nations, Ireland played an important role in securing the adoption of the 1981 U.N. Declaration and, for more than twenty years, has been the principal sponsor, at both the U.N. General Assembly and the U.N. Commission on Human Rights, of a resolution on the elimination of all forms of religious intolerance.
discrimination and endowment of religion have been read subject to the need to secure or encourage the free practice of religion; additionally, the State is constitutionally authorized to fund denominationally controlled schools. Accordingly, from the perspective of religious believers, Irish law relating to freedom of religion is broadly compliant with the 1981 U.N. Declaration and, more generally, with international norms in this area.

That being said, there are a number of shortcomings in the Irish situation. Certain Irish traditions are likely at odds with the Declaration. For example, Ireland’s constitutional requirement that the President and members of the judiciary take oaths of office that are religious in nature is very likely at odds with Article 1(2) of the Declaration. Additionally, the fact that Sunday is the prescribed day of rest for social welfare purposes also appears to be inconsistent with Article 6(h). It is less likely, however, that the religious, even sectarian, tone of the Preamble to the Constitution or the broadcasting of the Angelus on public television and radio infringe upon any human rights, though that is not to suggest that no change is needed.

The statutory ban on radio and television advertising that seeks to proselytize raises an interesting point in relation to the Declaration. While proselytizing is not explicitly covered by the Declaration, it is arguably implicit in freedom of religion and is explicitly referred to in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Moreover, it has been suggested that the State restrictions on proselytizing supported by the European Court of Human Rights, of which the Irish statutory ban is one, constitute a “fundamental departure from Universal standards.” However, given that the language of Article 1(3) of the Declaration is very similar to that of Article 9(2) of the European Convention on Human Rights, it may be that the Irish ban on religious advertising that seeks to proselytize is compatible with the

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165 Another possible shortcoming was the ex tempore High Court decision directing that a Jehovah’s Witness be obliged to undergo a blood transfusion against her will. It remains to be seen, however, whether this decision will be upheld on appeal. See text accompanying n.98.


168 TAYLOR, supra note 78, at 64.
Declaration, in which case, one might well ask whether, in this respect, the Declaration adequately vindicates freedom of religion.

While the religious believer might be broadly content with Irish law relating to religious freedom, the extent to which important aspects of Irish life, most notably the education and health systems, are subject to a religious ethos can present difficulties for those who do not subscribe to that ethos. Employees may feel compelled to comply, at least superficially, with the ethos in order to safeguard their employment, while certain services may not be provided if they are inconsistent with that ethos. This brings us to what is undoubtedly the most profound issue confronting Irish society in relation to religious matters as Christianity, and in particular, Roman Catholicism, fades from the scene as the primary source of moral and social values. In its place comes a more secular and liberal set of values that, in some respects at least, conflict with the more traditional values. In particular, the emphasis on tolerance, which is such a critical value in the drive for equality, is at odds, certainly in relation to such factors as sexual orientation and marital status, with traditional religious values. The key question now is whether the new regime will accommodate the more traditional perspective or whether it will seek to eliminate it. To date, the domestic statutory code on equality has sought to accommodate the traditionalists, in contrast to the message emanating from Europe. It is not clear to the present writer how the Declaration might affect this issue. However, Professor Malcolm Evans argues:

[The dominant understanding of freedom of religion in international law] does not include the right to adhere to a religion which is intolerant of the beliefs of others. On this view, ‘Human Rights’ has itself become a ‘religion or belief’ which is itself as intolerant of other forms of value systems which may stand in opposition to its own central tenets as any of those it seeks to address . . . . In seeking to assert itself in this fashion, the international community risks becoming the oppressor of the believer, rather than the protector of the persecuted.169

Whether future moves in international law to protect freedom of religion should continue to hold to this approach, or whether they should be more accommodating of traditional religious beliefs is surely a central issue in any project examining the frontiers of religious liberty.