

## CATHOLICISM AND THE JUDICIARY IN IRELAND, 1922-1960

*Abstract: This article examines evidence of judicial deference to Catholic norms during the period 1922-1960 based on a textual examination of court decisions and archival evidence of contact between Catholic clerics and judges. This article also examines legal judgments in the broader historical context of Church-State studies and, argues, that the continuity of the old orthodox system of law would not be easily superseded by a legal structure which reflected the growing pervasiveness of Catholic social teaching on politics and society.*

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### Introduction

The second edition of John Kelly's *The Irish Constitution* was published with Sir John Lavery's painting, *The Blessing of the Colours*<sup>1</sup> on the cover. The painting is set in a Church and depicts a member of the Irish Free State army kneeling on one knee with his back arched over as he kneels down facing the ground. He is deep in prayer, while he clutches a tricolour the tips of which fall to the floor. The dominant figure in the painting is a Bishop standing confidently above the soldier with a crozier in his left hand and his right arm raised as he blesses the soldier and the flag. To the Bishop's left, an altar boy holds a Bible aloft. The message is clear: the Irish nation kneels facing the Catholic Church in docile piety and devotion. The synthesis between loyalty to the State and loyalty to the Catholic Church are viewed as interchangeable in Lavery's painting.

This article examines evidence of judicial deference to Catholic norms during the period 1922-1960 by drawing on a textual examination of court decisions and archival evidence of contact between Catholic clerics and judges. The period between independence and the Second Vatican Council represents the apogee of the pervasive influence of Catholic norms in politics, society and law in Ireland. Legal judgments are examined in the broader historical context of Church-State studies while focusing on external influence and textual evidence of deference and not conscious or unconscious reasoning. Catholicity refers to Catholic thought, Catholic social teaching, clerical intervention in the legal process and evidence of judicial deference towards the Catholic hierarchy. Catholic morality is examined as an influence on the development of law and in broader society in the early years of the State and evidence of judicial deference to Catholic norms is shown, in particular the judgments of the first Chief Justice, Hugh Kennedy and the president of the High Court, George Gavan Duffy.

Different factors that might have influenced judges would be difficult if not impossible to trace: self-censorship, a discreet phone call, a word whispered into someone's ear, or the conscious or unconscious influence of the climate at the time. Therefore, determining the

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<sup>1</sup>Hugh Lane Municipal Gallery, Dublin.

extent of the influence of the Catholic Church and Catholic norms on the judiciary is problematic. The fact that judges do not have free moral choice also creates particular difficulties in defining both motive and influence. The aim of this article is to explain the extent to which judicial decisions on the Constitution are underpinned by Catholic thought. It does not purport to examine the underlying issue of judicial motive. When referring to 'influence' it is intended to mean evidence of Catholicity based on a textual examination of judicial decisions and from archival sources. At the outset it should be noted that in the vast majority of judicial decisions there would be no evidence of Catholicity. The primary reason for this is that the Church would simply not have been interested in the issues under question and Catholic norms would have been of no assistance in the process of adjudication. The Church's reach can be limited by an eschatological view which is capable of reducing its influence.

The influence of Catholicism on the Irish judiciary does not take place on a *tabula rasa*. This is particularly clear from the fact that the entire corpus of laws pre-dating independence continued in force following the enactment of the 1922 Constitution.<sup>2</sup> The development of an entire legal structure based on English law and the deeply rooted cultural and linguistic influence of colonialism would not be easily superseded by a new indigenous corpus of laws underpinned by Catholic social teaching and cultural nationalism. As W.T. Cosgrave in a circular to the Judiciary Committee set up to review the Irish legal system with Hugh Kennedy at the helm, dated 29<sup>th</sup> January, 1923, stated:

The body of laws and the system of judicature so imposed upon this Nation were English (not even British) in their seed, English in their growth, English in their vitality... Thus it comes about that there is nothing more prized among our newly won liberties than the liberty to construct a system of judiciary and an administration of law and justice according to the dictates of our own needs and after a pattern of our own designing.<sup>3</sup>

Ó Dálaigh J in *Melling v Ó Mathghabhna* in rejecting pre-1922 standards as a guide in interpreting the 1922 Constitution stated: "The framers of the Constitution of Saorstát Éireann had no particular reason to look with reverence or respect to the British statute roll in Ireland as affording them an example of standards which they would wish to enshrine in their new Constitution...".<sup>4</sup> Similarly, Lavery J in *Byrne v Minister for Finance* referred to the Irish courts as representing a 'new departure constituted under different ideas' and that 'far from being founded on British precedents or recognising British forms the Constitution of 1922 repudiated deliberately and consciously these institutions'.<sup>5</sup>

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<sup>2</sup> Article 72 of the 1922 Constitution stated: 'Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas'. The pre-1922 statute book has been revised dramatically by the Statute Law Revision Acts 2007-12, which repeal obsolete acts of parliament.

<sup>3</sup> Quoted in Joe Lee, *Ireland 1922-1985* (Cambridge University Press 1989) 128.

<sup>4</sup> [1962] IR 1, 46.

<sup>5</sup> [1959] IR 1, 43.

## Growing pervasiveness of Catholic norms

Following its important role in the struggle for Catholic emancipation the Catholic Church was to assume a hegemonic role in Irish society supported by a rise in vocations, increased ownership of property, a deferential political class, and the growing assertiveness of the Romanised Church; particularly from 1850 onwards, under the influence of Cardinal Paul Cullen.<sup>6</sup> Census figures show that the percentage of the population that was Catholic in 1911 was 89.6% growing to 94.9% in 1961.<sup>7</sup> The clergy's support for the anti-conscription campaign in 1918 extended the Church's influence as it placed the hierarchy at the 'head of a popular movement' that was at odds with 'the traditional theological imperative of support for the law of the land'.<sup>8</sup> The Church's political interventions during this period tended to be characterised by a commitment to social stability and orderly government culminating in the Episcopal support for W.T. Cosgrave's government in 1922 and the excommunication of those opposing it militarily.<sup>9</sup> The social background of priests tended to be rural and middle class with irreligious practices being associated with sub-alteran groups.<sup>10</sup>

John Whyte described Ireland in this period as being 'unusual in having a large majority, not just of Catholics, but of committed and practicing Catholics'. Whyte viewed Irish Catholics as paying 'public respect to what their bishops said, and, in appearance at least Irish Catholic opinion was remarkably monolithic on most matters where the Church's belief or practice was relevant'.<sup>11</sup> Nonetheless it is important not to adopt an overly monolithic view of the Catholic Church in Ireland; different political currents existed within the Church and, therefore, clerical influence and interference would not necessarily take place in a unified representative manner.

There was growing evidence of political interventionism and assertiveness in the statements of clerical figures in the early years of the State. In 1922 Jesuit, Peter Finlay asserted that 'local bishops were divinely-appointed teachers of the flock' and there was no 'authority on earth' which might contradict their teachings or 'defy their commands'.<sup>12</sup> In the same year, Bishop Cohalan of Cork, declared that 'one who is Catholic, who already believes in the Catholic Church, in the teaching office of the Catholic Church, does not set up his own subjective speculations or judgments in opposition to the teaching of the Church or of its pastors, whom he is bound to obey'.<sup>13</sup> Murray describes Cohalan's statement as evidence that in 'the eyes of the bishops...their pronouncements, even on political issues of the day, were not matters for

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<sup>6</sup>See Louise Fuller, *Irish Catholicism since 1950* (Gill & Macmillan 2004). Writing in 1904 Horace Plunkett emphasised the potent influence of Catholic clerics on Irish society and politics at the turn of the century in *Ireland in the New Century* (London: J. Murray, 1905), passim.

<sup>7</sup>Census of Population of Ireland, 1961, Volume II.

<sup>8</sup>Patrick Murray, *Oracles of God The Roman Catholic Church and Irish Politics, 1922-1937* (UCD Press 2000) 4.

<sup>9</sup>See John A Murphy, *Ireland in the Twentieth Century* (Gill & Macmillan 1975).

<sup>10</sup>Declan Kiberd, *Inventing Ireland* (Jonathan Cape 1995) 360.

<sup>11</sup>JH Whyte, *Church and State in Modern Ireland 1923-1970* (Dublin: Gill and Macmillan 1971) 7.

<sup>12</sup>Quoted in Murray (n 8) 14.

<sup>13</sup>Pastoral Letter from Bishop Cohalan of Cork (25 September 1922) quoted in *ibid.*

debate but for uncritical acceptance by the faithful to whom they were addressed'.<sup>14</sup> In 1923, Bishop Hallinan of Limerick, asserted that it was acceptable for the clergy to intervene in politics because of the unique position of the Catholic hierarchy in Ireland and that the active leadership of the clergy had earned them the right to such power 'when natural [political] leaders [had] failed' the people.<sup>15</sup>

There was evidence of clerical unease with the provisions of the 1922 Constitution with Patrick Daly, PP Castlepollard, Co. Westmeath describing it as a 'Godless Constitution for a Christian land'.<sup>16</sup> A deepened sense of Catholic religiosity between 1922 and 1937 meant that the 1937 Constitution was drafted at a time of a heightened confessional atmosphere within the Irish State. In particular, the Eucharistic Congress which took place in Ireland in 1932 served as the perfect opportunity for the newly elected Fianna Fáil government to prove its adherence to the Catholic hierarchy following the excommunication of anti-Treatyites during the civil war of 1922-3.<sup>17</sup>

The Catholic Church's influence in Irish politics was evident prior to independence in the 1920 Home Rule Bill which included provision that the Senate of an Irish parliament should include four Catholic bishops and two from the Church of Ireland. However, the government of the newly independent State chose to appoint no clerics to the Seanad. The early years of the State saw the enactment of statutory legislation that reflected, though not uniquely, Catholic moral norms. These included the Film Censorship Act 1923, the Intoxicating Liquor Act 1927 and the Censorship of Publications Act 1929. When Fianna Fáil came to power in 1932, this trend continued with the Public Dance Halls Act 1935, which laid down more stringent control of dances, a constant source of concern to the clergy<sup>18</sup> and s.17 of the Criminal Law Amendment Act 1935 prohibiting the sale and importation of contraceptives.

An example of the fear of State intervention arose in 1945 when Fianna Fáil introduced the Public Health Bill<sup>19</sup> which Whyte described as 'probably further away from Catholic social teaching than any scheme produced anywhere in the world at this time'.<sup>20</sup> The Bill included the compulsory inspection of schoolchildren and was criticised by *The Standard*:

...the responsibility that parents must exercise over their children is openly challenged [in the Bill]. The State, as the Constitution points out, only steps in "in exceptional cases,

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<sup>14</sup>Murray (n 8) 14.

<sup>15</sup>Quoted in Murray (n 8) 24.

<sup>16</sup>Quoted in Murray (n 8) 294. Article 8 of the 1922 Constitution provided for 'freedom of conscience and the free profession and practice of religion' subject to 'public order and morality' and 'no law may be made either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status...'

<sup>17</sup> Murray (no 8) 262-263. There was significant division within the Catholic Church over the civil war. See Murray (n 8) 139-152.

<sup>18</sup>This process of intervening in the private affairs of citizens and censoring works of literature, theatre and film during this period was not unique to Ireland. See Tony Judt, *Post-War: Europe since 1945* (William Heinemann 2005) 373.

<sup>19</sup>The Bill was not criticised by the Church hierarchy, indeed it appears that it may have been welcomed by Archbishop McQuaid. See Whyte (n 11) 137-138.

<sup>20</sup>Whyte (n 11) 134.

where the parents, for physical or moral reasons, fail in their duty towards their children". It is in the light of this moral principle that we must view the practice of submitting all school children to a periodical medical examination. Under the new regulations this examination will be compulsory and universal. It will be extended to schools hitherto exempt from its operation. This means that the State accepts the presumption that parents are unwilling or incompetent to safeguard the health of their own children.<sup>21</sup>

Both Church and State appeared more complacent regarding intervening into the realm of the family in sending children to industrial schools. The placement of children into industrial schools was evidence of how excessive deference by the State to the wishes of the Catholic Church could have deeply injurious consequences. Many of the children sent to these schools were savagely beaten, abused, raped and provided with no education.<sup>22</sup> The State colluded in this process by feeding children (primarily from poor backgrounds) to the industrial schools systems via District Court judges, frequently for trivial reasons. It seemed that the limitations on the powers of State intervention into the family unit did not apply to families who happened to be in a lower socio-economic group.

Between 1936 and 1970, 170,000 children were sent to industrial schools for various reasons.<sup>23</sup> The majority of children were committed because they came under the category of 'needy' meaning they were living in poverty although a significant number of children were also committed 'because of other social circumstances such as illegitimacy'.<sup>24</sup> Many children were committed because of non-attendance at school or because of involvement in criminal offences. Under s.58(1) of the 1908 Children's Act, a child could be committed to an industrial school for, *inter alia*, begging, lack of subsistence, parent or guardian missing, destitution, or if the parent or guardian was unfit to care for the child. According to the Commission to Inquire into Child Abuse the number of adjournments which were granted before a committal was made suggested a judicial reluctance to commit children to industrial schools.

In 1934, Edward Cahill SJ wrote to Eamon de Valera concerning the availability of contraceptives stating that '[c]ivil law and government cannot indeed make or even keep a nation moral. They can however keep a check on unfair temptations or allurements to vice'.<sup>25</sup> The perceived need for a stricter statutory basis to control moral norms was evident in the report issued by the Carrigan Committee which was formed on 17<sup>th</sup> June, 1930, which was appointed by James Fitzgerald Kenney, Minister for Justice in the W.T. Cosgrave-led Cumann na nGaedheal government. The committee's function was to consider if the Criminal Law Amendment Acts of 1880 and 1885 required modification, and to consider whether new

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<sup>21</sup> *Standard*, 14 Dec. 1945 quoted in Whyte (n 11) 137.

<sup>22</sup> See *Commission to Inquire into Child Abuse* (2009) and Diarmaid Ferriter, *The Transformation of Ireland 1900-2000* (Profile Books 2004) 512.

<sup>23</sup> Commission (n 22) 3.01-3.04.

<sup>24</sup> Commission (n 22) 3.05-3.08.

<sup>25</sup> UCDA, *De Valera Papers*, 1095, 7 July 1934.

legislation was needed to deal with issues concerning, *inter alia*, juvenile prostitution and certain sexual offences. The chairman of the committee was William Carrigan KC.<sup>26</sup>

The committee described its role as operating in the context of the ‘secular aspect of social morality’ heard oral evidence over 17 days from a variety of witnesses. The report was completed on the 20<sup>th</sup> August, 1931 and conveyed a dim view of moral standards at the time. Reference is made to commercialised dance halls and that ‘the opportunities afforded by the misuse of motor cars for luring girls are the chief causes alleged for the present looseness of morals’.<sup>27</sup> Archbishop Byrne of Dublin made a submission to the committee stating that ‘conduct that in other countries is confined to brothels is to be seen without let or hindrance on our public roads’.<sup>28</sup> The Rev. Canon Bruff deplored the decay of country morals stating ‘[i]t is common knowledge that immorality has developed to an alarming extent in recent years’. He described the dance halls as ‘Schools of Scandal’ and he urged the necessity for legislation to ‘stop the incoming tide that threatens the ruin, moral and material, of the country’.<sup>29</sup>

## Judicial recognition of canon law

Despite the growing pervasiveness of Catholic norms no special recognition was granted to canon law in civil law; albeit canon law may be admitted in cases of dispute between clerics. In the nineteenth century the House of Lords ruled in *O’Keefe v Cullen*<sup>30</sup> that the civil laws of Ireland as an English dominion were superior to the ecclesiastical laws of the Catholic Church. In independent Ireland the Supreme Court ruled in *O’Callaghan v O’Sullivan*<sup>31</sup> that canon law constituted foreign law in the eyes of the Court.

It had been argued in the case that as canon law was not confined to any one State and as it was universal it could not be regarded as foreign to the Courts. Kennedy CJ in rejecting these arguments stated:

[i]n my opinion all law is foreign to these courts other than the law which these Courts have been set up under the Constitution of Saorstát Éireann to administer and enforce, that is to say, other than laws given force and validity by Article 73 of the Constitution and the enactments of the Oireachtas made after the coming into operation of the Constitution. No other laws are known to us judicially; nor can we take judicial notice of any other laws, unless they are proved to us as facts. All other laws are extrinsic to these Courts of Justice...<sup>32</sup>

The Chief Justice also stated:

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<sup>26</sup>The committee also included three other men and two women - a Catholic clergyman, a Church of Ireland cleric, a surgeon, a matron and a commissioner of the Dublin Union.

<sup>27</sup>Carrigan Report, 2004/32/105, Department of Justice, 12.

<sup>28</sup>Carrigan Report (n 27) 12.

<sup>29</sup>Carrigan Report (n 27) 13.

<sup>30</sup>2 QB 1873 CL 7 319.

<sup>31</sup>[1925] 1 IR 90.

<sup>32</sup>*O’Callaghan v O’Sullivan* (n 31), 109.

[t]he Canon law of the Roman Catholic Church is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well-settled rules as to proof of foreign law...The corresponding position of members of the Church of Ireland after disestablishment of the Church was defined in s 20 of the Irish Church Act, 1869.<sup>33</sup>

## 1937 Constitution

Archbishop Lucey writing in 1937 offered an orthodox and seemingly non-confessional view of the purpose of a Constitution describing a constitution as:

Since neither God nor the natural law designates exactly who shall hold the reins of government or how they shall be moderated, men must do so for themselves. The instrument by which this is done for each country nowadays is known as the Constitution. A Constitution, therefore, is simply the collection of rules according to which the personnel of the government, the powers of the government and rights of the governed are decided in any country...a constitution really amounts to a law of laws standing above and limiting the authority of whatever government is in power at any given moment. It is a barrier against arbitrary action and tyranny on that government's part.<sup>34</sup>

This reflects the view that the Catholic hierarchy was represented by a number of different strands, with different ideological views on the relationship between religion and law: from orthodoxy to confessionalism. A number of ideological currents may be traced as influences on the 1937 Constitution which was drafted by a tight group of civil servants under de Valera's ultimate control and with the influence of a number of Catholic clerics. Such was the growing and pervasiveness at the time of Catholic social teaching it was unsurprising that it was influential. The primary concern of the drafters was the issue of national sovereignty and the Constitution as a vehicle for emphasising Irish separateness from Britain.<sup>35</sup>

Therefore, the process of constructing a new Constitution took place in the context of an underlying dispute concerning the identification of the polity itself. As a text representing the polity it sought to define and was influenced by the different currents that challenged for inclusion. In that sense, it represents a snap shot in time of both the pervasive influence of Catholic thought and clericalism, but also of the limits of its influence. While it is clear that much of the language of the fundamental rights articles is couched in the language of papal encyclicals; it is also evident from de Valera's refusal to establish the Catholic Church that there was a clear line of demarcation between Church and State albeit within a sociological, and to an extent a political context, of high levels of deference and influence.

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<sup>33</sup>O'Callaghan v O'Sullivan (n 31), 113.

<sup>34</sup>Cornelius Lucey, 'The Principles of Constitution Making'(1937) 49 Irish Ecclesiastical Record 17.

<sup>35</sup>Roy Foster, *Modern Ireland 1600-1972* (Allen Lane 1988) 543-545, 550 and see Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press 2007).

In that context it should be noted there is evidence of de Valera rejecting the wishes of the Church hierarchy just 6 years after the Constitution had been completed. In June 1943 the opening of the new Children Court in Smithfield is referred to in the files of the Department of Justice. Reference is made to the suggestion of MacCarthy J (who presided over the Children Court) that:

His Grace the Archbishop of Dublin should be invited to bless the Court before the first Sitting takes place. The Court will, of course, deal with persons of all religious denominations and the suggested ceremony might possibly not be welcomed by persons who think that the Court is being too closely associated with Catholic religious activities...On the other hand, the overwhelming majority of the children who will be dealt with in the Court are Catholics and the business of the Court as regards these children may be said to be, to a very large extent, the re-education of these children in the system of conduct and morals in which they were brought up as Catholics. His Grace the Archbishop has taken a great deal of interest in this work and it is due to his interest and energy that the Court has now the assistance of a large number of voluntary Probation Officers organised by the Legion of Mary, and of evening school facilities provided free, by the Christian Brothers.<sup>36</sup>

In a handwritten comment dated 28<sup>th</sup> June, 1943, on the above letter it is written that: having regard to McCarthy J's suggestion 'the Taoiseach thinks it would be better not to pursue the suggestion for the blessing of the Court'.<sup>37</sup>This document challenges the traditional view of the State blindly deferring to the Church during this period and demonstrates that the extent to which the State was prepared to follow Catholic orthodoxy during this period should not be overstated.

The Constitution's treatment of religion is based on a compromise between pluralism and religiosity. While there is much in the Constitution which could be described as Christian, it contains little which could be described as overtly Catholic. The reference in the Preamble to 'Humbly acknowledging all our obligations to Our Devine Lord, Jesus Christ, Who sustained our Fathers through centuries of trial' refers to the struggle which Catholics underwent for religious freedoms and which reached its peak with Catholic Emancipation. This is perhaps the single most non-plural reference in the Constitution. In general, the Constitution tends

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<sup>36</sup>NAI, Department of Justice, 1 June 1943, catalogue incomplete.

<sup>37</sup>Ibid. In the same year in which the Children Court was opened 35 children and an elderly woman died in a fire in an orphanage in Cavan town. The orphanage was run by the enclosed order of Poor Clare Nuns. This tragic event led to a tribunal of inquiry under the chairmanship of Judge Joseph McCarthy. The tribunal in questioning the Poor Clare Nuns had to enter the convent to avoid the nuns having to get a dispensation from their enclosure vows. (*The Irish Times*, 8 April 1943). The tribunal found that the nuns bared no responsibility for the fire but that a lay teacher, Miss O'Reilly 'committed a grave and critical error of judgment in failing to lead the children in two dormitories from the building'. (*The Irish Times*, 17 September 1943) The failure of the inquiry to find any of the nuns responsible was satirised by Myles na gCopaleen (who was secretary to the inquiry) writing: 'In Cavan there was a great fire, Judge McCarthy was sent to inquire. It would be a shame, if the nuns were to blame. So it had to be caused by a wire'. Mavis Arnold and Heather Laskey, *Children of the Poor Clares: the collusion between Church and State that betrayed thousands of children in Ireland's industrial schools* (Bloomington, Indiana, Trafford Publishing) 40.

towards orthodoxy in the protection of individualist liberal rights while also guaranteeing familial rights.

The Constitution that was enacted sought to reflect the prevailing and popular principles of Catholic social policy as expressed in certain Papal Encyclicals. The Constitution reflected Catholic social teaching in drawing on Catholic norms in relation to property rights, the family, and in referring to the Most Holy Trinity in the preamble and in giving the Catholic Church a special position. The fact that the Constitution did not establish the majority religion is largely because of de Valera's relative religious liberalism and fear of further antagonising the Protestant community on the island. The Constitution also reflected the influence of British liberalism to the extent that it protected fundamental personal rights such as freedom of conscience, expression, association and gender equality.

The Constitution also contained no establishment clause while the special position conferred on the Catholic Church appeared to be more a statement of demographic fact than theocracy. The ambiguity underlying much of the text of the Constitution left space for judicial moral choice in its interpretation. Furthermore, the ideological overlap between liberal and religious norms would allow judges to draw on different philosophical sources in arriving at the same constitutional principles. However, in truth the Constitution of 1937 had very little social impact as it was to receive little judicial attention for the first twenty-five years of its existence. The practice of citizens visiting the High Court seeking constitutional redress was considerably less common in 1937 than today. A local journalist writing in Tipperary for *The Nationalist* described the new Constitution as being 'of little interest' to the 'man-in-the street, who considers he has all the freedom he desires under the present form of government'. The writer felt its readers were far more concerned with the economic war with Britain than with 'high sounding oratory about the benefit of the new Constitution'.<sup>38</sup>

## Judicial deference to Catholic norms

The first chief justice of the new State, Kennedy CJ demonstrated a willingness to defer to the majority Church in the context of the ban placed by the Catholic Church on Catholics attending Trinity College, Dublin. The Catholic hierarchy was deeply suspicious of Trinity College owing to the emphasis which the college placed on its Protestant ethos. This ban was adverted to in a letter from Kennedy CJ to Archbishop Byrne of Dublin regarding the appropriateness of his sending Catholic wards of court to be educated in Trinity College. Kennedy CJ wrote:

As your grace knows perhaps, I am responsible for the education of a large number of minors of all ages, many of whom are Catholics, and I am bound – in the case of Catholic minors – to give them a Catholic education. As I understand, the Bishops have never raised the ban which they placed upon Trinity College as a place of education for Catholic wards entering Trinity

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<sup>38</sup>*The Nationalist*, "Election Issues", unattributed editorial, Saturday, 15 May, 1937.

College for the purpose of University studies. I have required them to proceed to the National University. I have recently had some vigorous protests on the subject. It has been pointed out to me that many Catholic boys are now proceeding direct from Catholic schools in Trinity College, apparently with the sanction of their school authorities (generally clerics) who prepare them for the entrance exams. It is urged upon me that this is clear evidence that TC has now become acceptable for the higher education of Catholic youth (male and female) and that the authorities of the Catholic Church in Ireland no longer object to the sending of Catholic boys and girls to pursue any of the University courses of study in that institution. I have been personally much surprised because it was on the ground of the ecclesiastical ban that I was myself diverted from Trinity, for which I was originally prepared, to the old Royal University; and, though I have always kept in pretty close touch with the current University history, I do not remember to have heard that the ban had been lifted, nor indeed, so far as I know, has there been any change in the teaching, the courses of study or the government or organisation of TC or Dublin University, which would substantially alter the state of affairs existing at the time when the ban was first imposed. As the matter is one of considerable importance for me in my care of Catholic wards, I take the liberty of asking Your Grace for guidance as to the present position of the Church in the matter.<sup>39</sup>

The Archbishop wrote in reply on the 14<sup>th</sup> May, 1928:

In reply to your letter about Trinity College allow me to express my appreciation of the thorough soundness of your views and the Catholic manner in which you put them into practice. As you very properly say you hold a heavy responsibility for the Catholic character of the education of Catholic Minors under your wardship and you are, of course, anxious to prevent their attendance at any educational institution which bears the mark of the Church's disapproval. Now I may state definitely that there is no change in the Church's attitude towards Trinity College. It is still an institution to which a Catholic can go only at grave peril to his Faith; its atmosphere still remains Protestant and unsafe for our young people at the susceptible and formative period of their lives.<sup>40</sup>

Kennedy CJ wrote in response to the Archbishop dated the 17<sup>th</sup> May, 1928:

I beg respectfully to thank you grace for your most helpful letter and very full advice. I am very happy to have such guidance in laying down a definite policy and rule in the administration of my office as regards the education of my Catholic wards. There is no doubt that a very loose mentality on this subject prevails in this country at the moment, fostered partly by social folly, partly by

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<sup>39</sup>DDA, *Byrne Papers*, 466, 22 April 1928.

<sup>40</sup>UCDA, *Hugh Kennedy Papers*, P4/1236(1), 14 May 1928.

ignorance: The ignorance is I believe due in some measure to our wretched press. Formally the Lenten Pastoral was published in full and was read and studied as a whole by the people, whereas now we are supplied with badly made clippings by newspaper sub-editors, who destroy the effect of the most impressive introduction by the manner of presentation.<sup>41</sup>

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

Non-Catholic Colleges, inasmuch as they are intrinsically dangerous to faith and morals, remain under the ban of the Church. Since there are within the Irish Free State three University Colleges sufficiently safe in regard to faith and morals, we, therefore, strictly inhibit, and under pain of sin, we forbid priests and all clerics by advice or otherwise, to recommend parents or others having charge of youth to send the young persons in their charge to Trinity College. Likewise, we forbid priests and clerics to recommend young people themselves to attend Trinity College.<sup>42</sup>

The principle of denominationalism was reinforced by Archbishop Byrne's successor, Archbishop McQuaid when he stated that parents have a:

most serious duty to secure a fully Catholic upbringing for their children...only the Church is competent to declare what is a fully Catholic upbringing...Those schools alone, of which the Church approves, are capable of providing parents and guardians [with a Catholic education]...Deliberately to disobey this law is a mortal sin and they who persist in disobedience are unworthy to receive the sacraments.<sup>43</sup>

However, the Archbishop was prepared to accept that the NUI colleges were acceptable to Catholics although they failed to acknowledge the one true faith. In 1956 the Maynooth Synod decreed: '[o]nly the Dublin Ordinary is competent to decide, in accordance with the

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<sup>41</sup>DDA, *Byrne Papers*, 466, 17 May 1928.

<sup>42</sup>Archbishop Byrne, Lenten pastoral, April 1930, quoted in Whyte, (n 11) 305.

<sup>43</sup>Quoted in Whyte, (n 11) 306.

instructions of the Apostolic See, in which circumstances and with what guarantees against the danger of perversion, attendance at that college [Trinity] can be tolerated'.<sup>44</sup>

While Kennedy CJ sought Catholic guidance the judiciary generally tended towards a more orthodox view of law. Alfred O'Rahilly recognised the influence of British legal philosophy on the Irish judiciary and voiced criticisms of British jurisprudence in 1937, viewing it as alien to Ireland's 'Catholic sociology':

...we do not know what principles of jurisprudence they [the judiciary] will employ. Without being a lawyer I know enough of British jurisprudence and law-principles – in which most of our legal men are saturated – to know that on many important points they differ from the presuppositions of Catholic sociology. Hence I see no use in registering new social principles (i.e. new in relation to British legalism) in the Constitution and then allowing them to be pared down with the knife of an alien jurisprudence.<sup>45</sup>

Alfred O'Rahilly's fear of 'British legalism' was to prove justified as the judiciary proved largely unreceptive to constitutional arguments in the early years of the State. Legal conventionalism and the common law and not the Catholic social values, which influenced the drafting of the Constitution, were central to the development of the common law during this period.

In *State (Ryan) v Lennon*, Kennedy CJ appeared to be an isolated figure on the bench in being receptive to natural law arguments as it appeared that natural law would have little role to play in Irish jurisprudence when a majority of the Supreme Court rejected the argument that certain rights were so fundamental as to be beyond the power of the Oireachtas to abridge by way of amendment of the written Constitution.<sup>46</sup> The Court held that the insertion of Article 2A into the 1922 Constitution, providing for internment without trial and military courts, was valid notwithstanding that its effect was to abrogate to some extent the constitutional guarantees of fundamental rights.

Natural law permeated much of the text of the 1937 Constitution as a foundational constitutional value. Kennedy CJ's strong dissent was the first sign that the courts might be receptive to natural law ideas. However, at the time of *State (Ryan)* the courts were adjudicating in the context of the 1922 Constitution, which could be loosely defined as positivist in

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<sup>44</sup>Quoted in Fuller, (n 6) 16. Trinity College's vice-chancellor, Thomas Moloney was unhappy with the Archbishop's attitude and in 1944 the Catholic vice-chancellor, fellows and staff of Trinity sent a declaration of devotion to the Pope and the Church. See Dermot Keogh, *Ireland: Nation and State* (Sweet and Maxwell 2000) 146.

<sup>45</sup>*Irish Independent*, 15 May 1937. Quoted in Dermot Keogh, Dr. Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hEireann* (Cork, Mercier Press, 2007) 6.

<sup>46</sup> [1935] IR 170. See Gerard Hogan 'A Desert Island Case Set in the Silver Sea *State (Ryan) v Lennon* (1934)' in Eoin O'Dell (ed), *Leading Cases of the Twentieth Century* (Round Hall 2000) 80. Kennedy CJ demonstrated his nationalistic aspirations for the Irish legal system in his thwarted attempt to introduce a legal costume based on that used by Brehon judges which would have replaced the wig and robe. See *History Ireland*, "Ocular Demonstration" or "Tremendous Treasure"<sup>18</sup> (May/June 2010).

substance, in contrast to the 1937 Constitution<sup>47</sup> The climate in which Irish lawyers and judges had been educated was heavily influenced by the 19<sup>th</sup> century British liberal tradition which viewed with derision the idea that rights could exist without law. While the majority in (*State Ryan*) represented the continuity which lingered on from independence, Kennedy CJ's dissent was a sign of future developments which would characterise Irish constitutional law beginning in the 1960s. The acceptance of natural law is more in line with Catholic thought than its outright rejection. However, there is no indication that Kennedy CJ was accepting a confessional view of natural law. Yet, the Church supported stability and the maintenance of the established order. The Church had expressed support for the military courts in the 1920s and had supported the provisional government's resistance against republicans.<sup>48</sup> Therefore, the judgments of the majority of the Court are in line with the Catholic Church's position to the extent that they support political stability and oppose the undermining of the established order.<sup>49</sup>

However, the majority of the Court appear to part from a position which the Catholic Church would welcome in their rejection of natural law. In 1935 the same people who had been attempting to undermine the State in 1922 were now in power and were viewed as the legitimate government by the Church hierarchy. Therefore, despite earlier Episcopal censure they were in the eyes of the Church legitimately protecting the established order from illegitimate destabilising forces. Kennedy CJ's preparedness to follow the Catholic Church's position concerning Catholic wards of court combined with his judicial nationalism are indicative of the common cause which both Kennedy CJ and Gavan Duffy P (examined below) shared. Both appeared to recognise that by facilitating Catholic norms in the judicial process it would assist in creating a distinctive and genuinely independent legal system.

The judiciary's rejection of natural law appeared to fit uneasily with the mainstream of Catholic thought. There were also indications that the Courts were prepared to recognise foreign divorces. This position is not in line with Catholic thought and was first stated in *Mayo-Perrott v Mayo-Perrott*<sup>50</sup> wherein Kingsmill Moore J stated:

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

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<sup>47</sup>Although the 1922 Constitution contained a reference to all lawful authority coming from God to the people, and Article 2 stated 'all powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland'.

<sup>48</sup>See Murray (n 8) 72.

<sup>49</sup>*Irish Independent & Freeman's Journal*, 3 January, 1922.

<sup>50</sup>[1958] IR 336.

persons...<sup>51</sup>

These *obiter dicta* in recognising foreign divorces are in conflict with Catholic social teaching which had unequivocally condemned divorce as a threat to the sanctity of the family and society. The judge was Protestant but there were many within the Protestant community who supported the prohibition on legislating to provide for divorce. Therefore, his comments do not indicate that he was necessarily supportive of divorce nor are they necessarily representative of broader Protestant opinion on the issue.<sup>52</sup>

In 1943, the Supreme Court upheld parental choice in education in striking down the School Attendance Bill, 1942 as a violation of parental rights. In 1942 President Douglas Hyde referred the School Attendance Bill, 1942 to the Supreme Court to test its constitutionality. The Bill proposed that parents would be obliged to send their children to certain prescribed schools if they could not show the children were receiving 'suitable education within the meaning of this Act in a manner other than by attending a national school, a suitable school or a recognized school.' In *Re Article 26 and the School Attendance Bill, 1942*,<sup>53</sup> the Court considered that s.4 of the Bill was repugnant to the Constitution, ruling that the Minister in construing the section might require a higher standard of education than could be properly prescribed as the minimum standard under Article 42.3.2. The Court also felt that the standard might vary from child to child and accordingly did not constitute the standard of general application contemplated by the Constitution. The Court stated that the State could not control the manner in which parents provide the child's education, once they are providing a minimum standard of education.<sup>54</sup> The Court stated:

[t]he State is entitled to require that children shall receive a certain minimum education. So long as parents supply this general standard of education we are of the opinion that the manner in which it is being given and received is entirely a matter for the parents and is not a matter in respect of which the State under the Constitution is entitled to interfere.<sup>55</sup>

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<sup>51</sup>ibid, 348. It should be noted that Maguire CJ took the opposite view of Kingsmill Moore J.

<sup>52</sup>Kurt Bowen, *Protestants in a Catholic State: Ireland's Privileged Minority* (Kingston: Dublin; New York: McGill-Queen's University Press; Gill and Macmillan, 1983) 61.

<sup>53</sup>[1943] IR 334. This was the first piece of legislation that the Supreme Court struck down under the 1937 Constitution. This fact may have been influential in the reluctance of the Department of Education to introduce new legislation until the Education Act 1998. The motivation underpinning the 1942 Bill was: to prevent parents sending their children to be educated in England and to ensure the teaching of Irish in all primary schools. See WN Osborough, 'Education in the Irish Law and Constitution' (1978) 13 *Irish Jurist* 145. It should be noted that the 1942 Bill did not benefit from the presumption of constitutionality as it would today.

<sup>54</sup>A similar approach was evident during the drafting of Protocol 1(2) of the European Convention on Human Rights in 1950 when the Irish delegation objected to the Protocol on education as it did not explicitly protect parental choice and the right to educate at home.

<sup>55</sup>*Re Article 26 and the School Attendance Bill, 1942* (n 53) 346. In *DPP v Best* [2000] 2 IR 17 the defendant was prosecuted under s.17 School Attendance Act 1926 for not sending her children to school without reasonable excuse. The Supreme Court stated that the absence of a statutory definition of 'suitable elementary education' did not preclude a conviction. The five judges provided general guidance on what would constitute 'a certain minimum education' and stated that the phrase 'suitable elementary education' could not be interpreted to require a level of education that exceeded the constitutional requirement of a 'certain minimum education, moral, intellectual and social'.

This exemplifies the constitutional emphasis which was placed on parental autonomy and the limits placed on State intervention reflecting Catholic social teaching as articulated in the Papal Encyclical *Quadragesimo Anno*.

Evidence of unease amongst Protestants at legal developments arose in 1945. Haugh J in the Central Criminal Court had to rule in a case of bigamy involving a Protestant man, Robert Hunt, who had married a Catholic woman in a registry office in London.<sup>56</sup> Hunt having experienced marital difficulties decided to remarry in Ireland having converted to Catholicism. He was informed by the local parish priest that as his wife was Catholic his marriage was not valid in the eyes of God or the Church. A Canon Dwyer told Hunt that there was no canonical obstacle to his marrying in a Catholic Church and he gave evidence at the trial to the same effect: stating he was aware of Hunt's position under civil law. The Archbishop of Cashel also gave his approval to the marriage. Haugh J stated that though there had been a calculated intention to break the law, the case, in all the circumstances could not be regarded as flagrant.<sup>57</sup> *The Irish Times* wrote regarding the case: '[h]ere the nation is faced with what would seem to be a deliberate challenge to the State by the Roman Catholic Church'. During the case defence counsel referred to the special position of the Catholic Church. However, in the same article in *The Irish Times* it was argued:

...no right is conferred on its [the Catholic Church's] bishops and clergy to ignore or even to defy the law of the land. The evidence of the Hunt case made it abundantly clear that the parish priest, acting under the direct authority of the Archbishop of Cashel and his coadjutor, encouraged Robert Hunt to break the Civil Law and commit what, in fact, was, and still is, a criminal offence. Manifestly, the matter cannot be allowed to rest where it is. The Civil Law either overrides Canon Law, or it does not. An appalling precedent has been set by the ecclesiastical authorities in the Archdiocese of Cashel...We are not concerned for the moment with the moral aspect of the case which, as we think, is sufficiently shocking. We are concerned, and deeply concerned, with its purely civil aspect, which raises all sorts of unpleasant, and even frightening, possibilities. From the political point of view, of course, the whole thing is deplorable. This open defiance of State by Church will be regarded, not unnaturally, in the North as an attempt to lay the foundations of a theocracy in the Twenty-Six Counties. So far, the government of Éire has had an exemplary record in religious affairs. It has never discriminated between the sects; but the Hunt case definitely is a danger sign.<sup>58</sup>

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<sup>56</sup>Reported in *The Irish Times*, unattributed author, 12 December 1945.

<sup>57</sup>Hunt was given a six month suspended sentence and ordered to pay £75 towards the prosecution's costs.

<sup>58</sup>*The Irish Times*, 12 December 1945. Chubb states that Lavery J at one point appeared to be: 'heading down the same road' as Gavan Duffy P (i.e. enshrining Catholic moral code on jurisprudence) when in 1945 'in a bigamy case where the ecclesiastical authorities in effect chose to regard as invalid a registry office marriage between a Catholic and a Protestant and knowingly sanctioned a second marriage, he imposed a trivial penalty. Holding that it 'could not be regarded as a flagrant type of case', he quoted Articles 42 and 44 of the Constitution'. Basil Chubb, *The Politics of the Irish Constitution* (Dublin: IPA 1991) 44.

It is clear from the above that there was a growing fear that the Catholic Church was becoming overly assertive and domineering and that the religious tolerance which the State had hitherto shown would be threatened by such a posture. While the writer fears theocracy there is no suggestion that Ireland resembled a theocracy at that point, though this period was in many respects the apogee of Catholic Church's influence on the State. The judge's reference to the offence as trivial is regrettable but the penalty does not seem overly disproportionate to the severity of the crime. However, the behaviour of the Catholic Church is unfortunate and reflective of a pre-Vatican II non-ecumenical view. Similar to Gavan Duffy P's judgment in *Tilson* (examined below) just five years later it was symptomatic growing unease in ecumenical relations. The *Irish Times* article exemplifies the sense of insecurity that existed amongst Protestants at the potential threat from a domineering Church.

The events which led to the passing of the Adoption Act, 1952 represent a particularly egregious example of governmental deference to Catholic clericalism. In March 1944, the Secretary of the Department of Justice, Stephen Roche, wrote to Archbishop McQuaid to gauge his reaction to a proposal to provide for the adoption of 'destitute children' as this would give 'illegitimate children a better status' and 'they would be registered as adopted children under the new name'. Roche also wanted to know McQuaid's attitude towards a provision in any Bill 'prohibiting the making of an adoption order in any case where it is not proved to the court that the religion of the adopter and the child are the same'.<sup>59</sup> McQuaid replied stating that legal adoption was not contrary to Catholic thought but that 'I should urge that no step be taken in respect of Catholic children - and you know what a proportion that category entails - without referring the matter to the Catholic hierarchy'.<sup>60</sup>

An Adoption Society was set up in 1948 to campaign for legal adoption. Despite a strong lobbying campaign, the Minister for Justice, General MacEoin refused to introduce legislation largely due to clerical opposition. Charles Casey, the Attorney-General to the inter-party government gave two reasons for the refusal to legislate. Firstly, he felt it might be contrary to Article 42 to allow a non-marital child to be adopted. Secondly, he stated that Ireland is 'predominantly a Catholic country. That does not mean that parliament should penalise any other creed, but it does mean this, that parliament cannot surely be asked to introduce legislation contrary to the teachings of that great church'. The AG envisaged circumstances in which a non-marital child was adopted and the mother then having '...rehabilitated herself' would be powerless to bring the child up in 'what she knows is the true faith'.<sup>61</sup> The main fear amongst the hierarchy appeared to be proselytizing aimed at non-marital children. The Catholic Protection and Rescue Society had been set up in 1913 in response to Protestant institutions which catered for unmarried mothers of all denominations.

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<sup>59</sup>*The Irish Times*, 3 March 1996.

<sup>60</sup>Quoted in John Cooney, *John Charles McQuaid: ruler of Catholic Ireland* (Dublin: O'Brien Press, 1999) 171.

<sup>61</sup>Quoted in Whyte, (n 11) 189-190 and Brian Girvin, Gary Murphy, *The Lemass Era: Politics and Society in the Ireland of Seán Lemass* (University College Dublin Press, 2005) 133.

In 1952, following consultation with McQuaid concerning proposed adoption legislation, the hierarchy set up an episcopal committee under McQuaid's chairmanship to examine the possibility of introducing legislation.<sup>62</sup> The committee issued a statement stating:

Legal adoption, if it be restricted within certain limits and protected by certain safeguards, is consonant with Catholic teaching. A child in respect of faith and morals must be protected by such safeguards as will assure his adoption by persons who profess and practice the religion of the child and who are of good moral character.<sup>63</sup>

Under s.12 (2) Adoption Act, 1952 it was required of the adopting parents that they be 'of the same religion as the child and his parents or, if the child is illegitimate, his mother'.<sup>64</sup> This had the effect of preventing spouses of different religions from adopting. The board also had to be satisfied that the applicant was of good moral character.<sup>65</sup> Cooney writes that 'each clause of the draft had been vetted by McQuaid and his chief adviser on adoption and social issues, Fr Cecil Barrett'.<sup>66</sup> Whyte notes that 'the minister for his part, did not even take the decision to legislate until the committee of the hierarchy had spoken and closely consulted the Archbishop during the drafting'.<sup>67</sup>

A further example of the reach of clericalism during this period was Catholic resistance to state intervention in the education of children when a dispute arose with the Irish National Teachers Organisation. The INTO had campaigned to secure the transfer of responsibility to local authorities for the cleaning, heating and sanitation of primary schools. This had been the responsibility of the clerical manager of each school since before independence and had left many schools in an extremely dilapidated state. The campaign had begun in 1926 and continued sporadically until Cardinal D'Alton rejected the proposal outright in 1952. Whyte wrote of the campaign that if 'so mild a proposal could meet with such firm [clerical] opposition, it is not surprising that more extensive reforms in the educational system were not even broached'.<sup>68</sup>

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<sup>62</sup>Paul Michael Garret, *Social work and Irish people in Britain: historical and contemporary responses to Irish children and families* (Policy Press 2004) 25.

<sup>63</sup>Quoted in John Cooney, 'Adopted child's religion McQuaid's main concern' *The Irish Times* (Dublin, 18 March 1996).

<sup>64</sup>S.12 (3) of the 1952 Act stated that '[t]he Board, may having regard to the special circumstances of a particular case, make an adoption order although the persons referred to in subsection (2) are not all of the same religion, provided that each of them is a member of one of the following denominations, namely, the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, the Baptist Union of Ireland and the Brethren, commonly known of the Plymouth Brethren'.

<sup>65</sup>The moral character of a mother arose in *Re Tamburrini* [1944] IR 508 in which Haugh J ruled in a custody dispute between the mother and the boy's grandparents, with whom he resided, that the fact that the mother was living with a divorced man 'in open defiance of the law of the Church' (at 513) constituted exceptional circumstances in which it would not be in the best interests of the child for the mother to be granted custody as to do so would be a 'radical and disturbing change' causing moral injury to the child as he would be reared in a home 'in which the conduct of his mother is regarded by her own clergy with disapproval'. (at 514)

<sup>66</sup>Cooney, (n 60) 297.

<sup>67</sup>Whyte, (n 11) 277.

<sup>68</sup>*ibid* 21.

## George Gavan Duffy

George Gavan Duffy was receptive to Catholic norms recognising the influence of Catholic social thought on the Constitution in his jurisprudence to a degree which was exceptional. The judge had been defence solicitor to Roger Casement in his trial for treason in 1916 and was a reluctant signatory to the 1921 Treaty; he was to change sides in 1922 resigning from his position as Minister for Foreign Affairs. The staunchly republican, Mgr John Hagan, Rector of the Irish Pontifical College, Rome (1919-1930) wrote to Bishop Mulhern of Dromore in 1922 warning of the threat posed to the Church by the signatories to the Treaty and he expressed his hope that ‘neither Collins nor Griffith nor Gavan Duffy will be allowed to indulge the luxury of anti-clericalism to which I fear they may have some inclination’.<sup>69</sup> In light of Gavan Duffy’s later contribution to Irish jurisprudence it appears that Hagan’s charge of anti-clericalism was misplaced. Following his return to legal practice Gavan Duffy was appointed to the High Court becoming president of the Court in 1946.

Along with Kennedy CJ, Gavan Duffy P proved an exception to the general lack of judicial engagement with the potential of Constitutional law during the early years of the State. John Kelly described Gavan Duffy P’s judgments related to Article 44 as displaying ‘unique adventurousness’.<sup>70</sup> John Whyte described Gavan Duffy P as ‘a single individual who, because of his position, was able to exert an important influence’ and that

[h]is judgments were noted for their trenchancy and originality, and he was one of the most important judicial innovators that Ireland has had. Where religious issues arose his policy was to use the provisions of the Constitution to override precedents built up by English and Protestant judges, and thus to give Irish law a more distinctly Catholic cast.<sup>71</sup>

Whyte also wrote that ‘Judge Duffy’s decisions looked as if they were opening a new era in the judicial interpretation of the Church’s legal position [but]...no other judge has shown any interest in extending the line of development which he initiated’.<sup>72</sup>

Bishop Newman when writing about Gavan Duffy, stated that:

[g]iven a judiciary composed of men like Gavan Duffy, the Catholic Church in Ireland could rest assured of receiving treatment, at least at common law, of a kind that would fully measure up to the requirements that Public Ecclesiastical Law lays down, while non-Catholics, conversely, would be assured that their rights and liberties would be respected.<sup>73</sup>

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<sup>69</sup>Quoted in Murray, (n 8) 202.

<sup>70</sup>JM Kelly, *The Irish Constitution* (Sussex: Totell Publishing, 2003) 2037.

<sup>71</sup>Whyte, (n 11) 167.

<sup>72</sup>ibid 194.

<sup>73</sup>Jeremiah Newman, *Studies in Political Morality* (Scepter 1962) 444. However, see *Attorney General v O’Ryan and Boyd* [1946] IR 70 for an example of Gavan Duffy J resisting clerical interference in the legal process.

Kennedy writes that Gavan Duffy attended the first meeting of Jesuit Edward Cahill's organisation An Ríoghacht whose objectives were to organise Irish society on the lines of Catholic social principles and to promote Catholic social action.<sup>74</sup>

Gavan Duffy wrote to de Valera in April, 1935, suggesting that he read the Portuguese Constitution which had been ratified the previous year under the dictator Salazar, describing the Constitution as 'highly original and most interesting in many respects'.<sup>75</sup> He wrote that the Constitution:

Undertakes to protect the family as the basic unit of the State; parish councils are elected by the families exclusively; above the parish councils there are municipal and above these provincial councils, and both sets of bodies are elected by the parish councils, representing the families, and by vocational and other guilds.<sup>76</sup>

Gavan Duffy made a number of significant contributions to Irish jurisprudence and at times appeared to be developing Irish law in light of Catholic thought and based on a nationalistic judicial philosophy. Therefore, he relied on the special position of the Catholic Church to create a new category of privilege, namely sacerdotal privilege,<sup>77</sup> rejected post-reformation English common law<sup>78</sup> and was prepared to interpret Article 44 of the Constitution as conferring an advantage on the Catholic Church. He also displayed a strongly nationalistic perspective in his rejection of judicial reliance on English precedent largely because he viewed English societal norms as alien to Irish society. Gavan Duffy's nationalism and religiosity became interchangeable in his jurisprudence as the more he emphasised Irish sovereignty the greater emphasis he placed on Ireland as a Catholic nation. Gavan Duffy also exemplifies the triumphalism and non-pluralist perspective of the Catholic Church in the period between Vatican I and Vatican II.

In *Maguire v Attorney General*,<sup>79</sup> Gavan Duffy J stated that his view that post-reformation common law ought to be revoked was in 'harmony with the Constitution enacted by the Irish people "in the Name of the Most Holy Trinity...to Whom as our final end, all actions both of men and States must be referred"'.<sup>80</sup> As stated previously the preamble to the Constitution contains reference to an exclusively Catholic conception of Irish history in its reference to 'our

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<sup>74</sup>Cahill wrote that "The country has lost touch with the traditional Catholic culture of Europe. The English literature upon which the mind of the people is largely founded is predominately Protestant". See Finola Kennedy, *From Cottage to Creche* (IPA 2001) 264.

<sup>75</sup>UCDA, *de Valera Papers*, P152/39(1).

<sup>76</sup>*ibid.* Gavan Duffy also wrote "With regard to the Second Chamber in particular I think the position may interest you:- The legislative body is the National Assembly, but side by side with it is a Corporative Chamber, consisting of representatives of local authorities and representatives of "social interests of an administrative, moral, cultural and economic character", chosen in manner prescribed by law".

<sup>77</sup>*Cook v Carroll* [1945] IR 515.

<sup>78</sup>*Maguire v Attorney General* [1943] 238 and *Re Howley* [1940] IR 119.

<sup>79</sup>[1943] 238.

<sup>80</sup>[1943] IR 238, 254.

Divine Lord, Jesus Christ who sustained our fathers through centuries of trial'. In *Cook v Carroll*<sup>81</sup> Gavan Duffy J stated that

...while common law in Ireland and England may generally coincide, it is now recognised that they are not necessarily the same; in particular, the customs and public opinion of the two countries diverge on matters touching religion, and the common law in force must harmonise with our Constitution.<sup>82</sup>

It was during this period in 1951 that the most celebrated event in Church-State relations took place in the mother and child scheme controversy. Dr. Noel Browne, who was made Minister for Health on his first day in the Dáil in the first inter-party government (1948-1951), attempted to introduce a scheme to provide free maternity care for all mothers and expectant mothers and free medical care for all children up to the age of sixteen. This entailed an extension of state control that was anathema to vocationalists and the Catholic Church.<sup>83</sup> The Irish Medical Association also opposed the scheme albeit for different reasons.<sup>84</sup> The hierarchy decided the scheme was indeed in opposition to Catholic social teaching in this area and requested that the government withdraw the scheme. Dr. Browne's cabinet colleagues refused to support him, the scheme was dropped, Dr. Browne resigned and subsequently the government fell.<sup>85</sup> Whyte states that this event 'could only have happened at this moment in Irish history', as it was only at this time that 'Catholic social principles were sufficiently distinctive, and held with sufficient assurance, for the hierarchy to base a condemnation upon them'.<sup>86</sup> Whyte's characterisation of the Mother and Child Scheme controversy as taking place at a time of heightened religiosity is important as perhaps the most religiously contentious court judgments in *Re Tilson* were handed down during this period.<sup>87</sup>

It was therefore in this ecumenically sensitive context that the case *Re Tilson* arose in which Gavan Duffy P ordered the return of the children of a mixed religious marriage to the Catholic mother on the basis of an ante-nuptial agreement signed by the couple vowing to raise the children as Catholics. The case hinged on Gavan Duffy P's interpretation of Article 42 of the Constitution. The judge ruled that the effect of the adoption of the new Constitution was to supersede the previously well-established principal of paternal supremacy. The judge went beyond merely accepting this important, though essentially narrow shift in the law, by employing religiously insensitive rhetoric and referring to Articles 41 and 42 as being "redolent...of the great papal encyclicals" and including Article 44 as the basis for ruling that the parties ante-nuptial agreement should be viewed "in a new setting." The judge did not explicitly emphasise the religious equality of the parties and created the impression that the effect of the judgment was to create judicial acceptance of the Catholic Church's *Ne Temere* decree. The case is correctly decided in terms of outcome yet it understandably caused concern

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

<sup>82</sup>[1945] IR 515, 517.

<sup>83</sup> Whyte (n 11) 196-238.

<sup>84</sup> *ibid* 205-208, 230.

<sup>85</sup> *ibid* 199-226.

<sup>86</sup> *ibid* 80.

<sup>87</sup> *ibid* 171 *Re Tilson* [1951] IR 1.

amongst many within the minority Protestant community. It would nonetheless be difficult to justify the retention of the paternal supremacy rule.<sup>88</sup>

While the case has suffered from some glib and politically opportunistic analysis, it is right to criticise Gavan Duffy P for having given the appearance of ecumenical insensitivity at a time of religious sensitivity and fear amongst Protestants, both North and South, at the increasing reach of the Catholic hierarchy. The Irish ambassador to the Vatican, Joseph Walshe, wrote to the Archbishop of Dublin John Charles McQuaid regarding *Re Tilson*, stating in his letter of 24 August 1950: 'I can echo your Grace's expression at the Gavan Duffy decision-and I am above all delighted that it was brought about by your patient and consistent work'. The ambassador informed the Archbishop that the Vatican had paid special attention to the case and whenever he met Monsignor Tardini (a Vatican official) he mentioned the case and the Monsignor's questioning made Walsh feel 'like a Protestant'. 'Thanks be to the Lord it is all over and has been done in the best way',<sup>89</sup> Walshe wrote. It is not clear from Walshe's comments whether McQuaid had any direct involvement in *Re Tilson*. Both *Tilson* and the Mother and Child Scheme would prove hollow victories for the Church as before long ecclesiastical reform, secularising influences and judicial innovation created a context in which constitutional and judicial reforms took place which would have been difficult to imagine in 1950.

The editorial writer in *The Irish Times* had feared the growing influence of Catholic thought on Irish law following the Robert Hunt case (see above). Similarly, following *Tilson* concern was expressed at Gavan Duffy P's judgment. The editor expressed the view that it is 'difficult to avoid the impression that the philosophy underlying Irish jurisprudence is tending, slowly but surely, to be informed by the principles of the Roman Catholic Church'.<sup>90</sup> The *Hunt* and *Tilson* cases and at a political level, the mother and child scheme controversy, combined exemplify the growing reach of the Catholic Church during this period. However, there is not the same evidence of the influence of Catholic clericalism at a judicial level as there is at a social and political level during this period.

In 1956, five years after *Tilson*, the preamble was referred to in the context of an assault and the seizure of literature from two members of the Jehovah's Witnesses in Clonlara, Co. Limerick. The case, *AG v Rev. Patrick Ryan*<sup>91</sup>, was heard before Hurley J in Limerick District Court and prompted the Bishop of Killaloe, Joseph Rogers to write to the then Taoiseach, John A Costello expressing his shock and disgust:

...that despite the fact that the preamble of our Constitution invokes and honours the Blessed Trinity, your Attorney-General should arraign in Court an excellent priest, of my diocese and the other loyal Catholics of Clonlara Parish, for their defence of the doctrine of the Blesses Trinity, a doctrine so nobly enshrined in our Constitution. Are we to have legal protection in future against

<sup>88</sup> Whyte (n 11) 169.

<sup>89</sup> DDA, *McQuaid Papers*, AB8/B/XVIII/6.

<sup>90</sup> *Irish Times*, editorial 'Church and State', 7 August 1951.

<sup>91</sup> *AG v Hurley* (1956) unreported.

such vile and pernicious attacks on our Faith? We censor literature: your Attorney-General prosecutes one of my priests for doing what I, and all good Catholics here, regard as his bounden duty and right. The matter cannot rest.<sup>92</sup>

Costello replied on the 14<sup>th</sup> August, 1956, rejecting the Bishop's attempt to interfere with the legal process stating that, if a priest or layman has reason to believe a person is blaspheming the 'proper course is to make a complaint to the Garda Síochána' and 'the action which they took was *prima facie* contrary to the law' and the authorities had no choice but to 'allow the machinery of the law to take its course'.<sup>93</sup> The Taoiseach concluded by remarking that should people take the law into their own hands 'not only would the public peace be threatened but the true interests of religion and morality would inevitably suffer'.<sup>94</sup> In a letter to Costello dated the 16<sup>th</sup> August, 1956, John Charles McQuaid refers to having had a meeting with Bishop Rodgers in which the incident was discussed and he assured the Taoiseach that there would not be 'a repetition of the incident'.<sup>95</sup>

## Conclusion

The cases examined above demonstrate there were circumstances in which the judiciary was prepared to defer to Catholic norms. However, in the vast majority of legal disputes there would be no reason for judicial deference to Catholic thought as it would not have been of assistance, given the expanding but nonetheless eschatological nature of Catholic social teaching. The expansion of Catholic philosophy to new areas of society and politics increased the likelihood of judicial deference or clerical interference in law to areas such as family and health. However, given the inherent limitations placed on the judicial arm of government the frequency of such cases was limited. Therefore, the limitations of Catholic social thought and the conventionalism of the jurisprudential philosophy which underpinned judicial thought in this period decreased the likelihood of clerical interference and judicial deference to Catholic norms. Furthermore, the residual influence of the orthodox British legal tradition on Irish law and lawyers limited the potential influence and reach of Catholic norms on Irish law. The continuance of the British system of common law would not be easily displaced by a stronger system of judicial review underpinned by Catholic social thought. The political sphere by contrast was receptive to Catholic norms and had the potential to cause sociological changes. Gavan Duffy's Catholicity reflected a culture of confessionalism and the pervasive influence and triumphalism of the pre-Vatican II Church. Gavan Duffy's jurisprudential philosophy was underpinned by a Catholic perspective which tended to undermine pluralist conceptions of constitutionalism and created unease amongst those advocating religious equality.

During the early years of the State there was little temptation for clerical figures to attempt to intervene in the legal process as the judiciary was, largely, philosophically orthodox because of the residual influence post-independence of the British principle of parliamentary supremacy

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<sup>92</sup>NAI, Department of An Taoiseach, catalogue incomplete, 27 June 1956.

<sup>93</sup>Ibid. 14 August 1956.

<sup>94</sup>Ibid.

<sup>95</sup>Ibid. 16 August 1956.

which limited the Court's power of judicial review. This led to the judiciary largely eschewing the 1937 Constitution and the principles of Catholic social teaching contained in the text.<sup>96</sup> In 1954 McWhinney wrote:

The positive law of the Constitution of 1937, from the opening remarks of the Preamble onwards through the Fundamental Rights and the Directive Principles of Social Policy purports to represent a society whose 'living law' is Roman Catholic and social democratic. But the actual approach of the Irish judges to the cases considered in detail above<sup>97</sup> has been but rarely innovative, and in general fairly conventional throughout. To this extent it is clear that the impact of modern Catholic political, social and economic ideas on legal development in present-day Ireland has been rather less significant or substantial than the adoption of the radically new Constitution of 1937 might have seemed at the time to foreshadow.<sup>98</sup>

Clericalism and increasing deference to Catholic norms in society and politics characterised the period of polity building following the revolutionary phase (1916-1923) in Ireland. The likelihood of clerical intervention in the legal process was decreased because the Courts did not have the potential to be socially transformative. As Murray wrote in the context of clerical political interventions:

The recurring political assertiveness of the Irish clerical church throughout the period [1922-1937] cannot be explained simply as a reflection of an impulse to exert power for its own sake. Clerical political power was an essential means to a greater end: to ensure that Irish society functioned in conformity with Catholic moral and social principles, which churchmen could not but regard as fundamental to individual and communal well-being.<sup>99</sup>

Therefore, the clergy would not intervene into the realms of law or politics for its own sake but only if it was necessary to maintain Catholic social and moral principles. The timidity and relative weakness of the judiciary lessened the likelihood of clerical intervention as the British common law was deeply imbedded in the legal system. Clerical intervention would take place through an agent of power that had a sociological impact on society. Therefore, while there is evidence of the Catholic hierarchy exerting its influence in the political sphere during this

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<sup>96</sup>Therefore in *O'Byrne v Minister for Finance* [1959] IR 1, 40 Lavery J commented: '...the judicial power is the weakest of the three organs of government, as it holds neither the sword nor the purse'. O'Dalaigh CJ is reported to have commented in 1961 'We have a Constitution but nobody knows what it means'. Quoted by Colm Toibín, *Magill*, February 1985. The author does not identify the case in which the comment was made.

<sup>97</sup>The main Irish cases the author examined were: *Pigs Market Board v Donnelly* [1939] IR 413, *Re Article 26 and the Offences Against the State (Amendment) Bill*, [1940] IR 470, *State (Walsb) v Lennon* [1941] IR 68, *Re McGrath and Harte* [1941] IR 68, *Re Article 26 and the School Attendance Bill*, 1943 IR 334, *National Union of Railwaymen v Sullivan* [1947] IR 77, *Buckley (Sinn Féin) v AG* [1950] IR 67 *Re Frost, Infants* [1947] IR 3 and *Re Tilson* [1951] IR 1. McWhinney described Gavan Duffy P's High Court judgment in *Tilson* as the 'strongest expression' of Catholic sentiments. Edward McWhinney, 'The Courts and the Constitution in Catholic Ireland' (1954) 29 *Tulane Law Review* 69, 86.

<sup>98</sup>Edward McWhinney, 'The Courts and the Constitution in Catholic Ireland' (1954) 29 *Tulane Law Review* 69, 86.

<sup>99</sup>Murray (n 8) 419.

period, there is only limited evidence of similar clerical influence in the legal sphere. This is not to argue that but for the fact that the judiciary was unassertive the Church would have intervened but rather that the unassertiveness of the judiciary should be viewed as a factor which lessened the potential for clerical intervention.

The legal orthodoxy and emphasis on continuity which characterised the judiciary during this period also lessened the likelihood of judicial figures turning to Catholic norms or clerics for guidance. The most prominent exception to the general unassertiveness of the judiciary was Gavan Duffy whose judgments represent the zenith of the influence of Catholic norms on the judiciary at a time in which the Catholic Church's political influence was at its most pervasive. While many judges clung to the orthodoxy of the common law, Gavan Duffy explored the Constitution emphasising its Catholic influence, particularly, in the preamble and the fundamental rights articles. Hugh Kennedy while receptive to the influence of Catholic norms did so with less vigour than Gavan Duffy. It is clear that the Catholic Church's influence was more pervasive in broader society and politics than at a judicial level. The continuity of the old orthodox system of law would not be easily superseded by a legal structure which reflected the growing pervasiveness of Catholic social teaching on politics and society.