

**IN THE NAME OF THE MOST HOLY TRINITY: RELIGIOUS ANACHRONISMS  
AND THE NEED FOR A SECULAR CONSTITUTION**

Brian O'Reilly \*

**ABSTRACT**

*This article critically analyses the religious references of the Irish Constitution, with particular focus on the effect these references have in relation to equality. It briefly examines the background to their inclusion in the text and, while conceding that this inclusion was both understandable and inevitable in 1937, argues that a secular Constitution would be more appropriate in the increasingly diverse Ireland of today. The article looks at various leading opinions and commentaries on the topic, as well as adding the author's own views, proposing that amendment or deletion of these religious references would be beneficial in the interest of equality.*

**A INTRODUCTION**

They always say that time changes things, but you actually have to change them yourself.

—Andy Warhol, *The Philosophy of Andy Warhol*<sup>1</sup>

We live in an increasingly secular society. In the 25 years from 1981 to 2006, the entire population of the Republic of Ireland has increased by 23%, whereas the number of people within that population professing “no religion” has increased by an astonishing 371%.<sup>2</sup> While still leaving the religious in the majority, this growing trend cannot be ignored. As well as this change in demographic, the majority, those professing a Catholic faith, have become much less publicly active in recent years. According to a ‘Red C poll conducted between October 19th and 21st [2009], for the Catholic Iona Institute ... weekly church attendance is now 46 per cent.’<sup>3</sup> As low as this figure is, it is in fact, unusually high when compared with previous years and is likely to be related to the recent economic downturn.<sup>4</sup> There is a growing demand for more secular schooling in the State and this too illustrates the change in public opinion, with even the Catholic Archbishop of Dublin, Diarmuid Martin, saying that ‘[t]he current almost monopoly is a historical hangover that doesn't reflect the realities of the times.’<sup>5</sup> However, does our legislation, and in particular our Constitution, reflect these modern views? And does it afford due equality to those who choose to express them?

---

\*Brian O'Reilly is a First Year BCL (Law and German) student in University College Cork.

<sup>1</sup> A Warhol *The Philosophy of Andy Warhol (From A to B & Back Again)* (Harcourt Brace Jovanovich New York 1975).

<sup>2</sup> Calculated from the 2006 census figures, *Census 2006 – Volume 13 – Religion; Table 1* <[http://www.cso.ie/census/census2006\\_volume\\_13.htm](http://www.cso.ie/census/census2006_volume_13.htm)> (10 November 2009).

<sup>3</sup> P McGarry ‘Mass Attendance in Ireland is Up’ *The Irish Times* (Dublin Ireland 2 November 2009) <<http://www.irishtimes.com/newspaper/ireland/2009/1102/1224257901174.html>> (10 November 2009). Based on telephone interviews with a random sample of 1,000 adults aged 18 and over.

<sup>4</sup> *ibid.*

<sup>5</sup> G Carbery ‘Catholic Control of Schooling not Tenable, says Archbishop’ *The Irish Times* (Dublin Ireland 17 June 2009) <<http://www.irishtimes.com/newspaper/ireland/2009/0617/1224248982529.html>> (29 November 2009).

With the recent amendments to the blasphemy laws, and the Murphy Report just published, the place of religion in our society and in our law is on the lips and minds of the people more than ever before. This article will firstly look into the reasons why our Constitution contains so many allusions to religion. It will then analyse the various aspects in which religion permeates the text of Bunreacht na hÉireann, with specific emphasis on the issue of equality. Furthermore, this article will propose possible amendments, with reference to national and international criticisms of the use of religion in legal texts, and set out the reasons why, in this author's view, it would be beneficial for Ireland to have an entirely secular Constitution. Judicial interpretations of the Constitution continue to reflect the Catholic ethos of its text. Is amendment by referendum the next step? Is it time we changed things ourselves?

## **B WRITTEN FOR THEISTS: A BRIEF HISTORY**

In order to properly understand the Ireland in which our Constitution was written, it is helpful to look at the religious composition of the population at the time. According to the census of 1936, there was a total population of 2,968,420 people in Saorstát Éireann in the time running up to the enactment of the Constitution of Ireland. Of these, 2,773,920 were Catholics. The remaining 194,500 was made up of Protestant Episcopalians, Presbyterians, Methodists, Jews, Baptists, and 7,290 "Others". It is worth noting then, when considering the place of "God" in the Constitution, that, at around the time of its enactment, at the *very least*, 99.75% of the population were Judeo-Christian Monotheists.

This religious demographic was specifically recognised in the original text of the Constitution, in article 44.1 which originally read 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. 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,<sup>6</sup> the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.<sup>7</sup>

The only denomination present in the census of 1936 which is not specifically named in the original text of article 44.1 is that of the Baptists. This is probably due to their small numbers, of only 715, in the country at the time. They are, however, obviously represented under the term 'other religious denominations.' The President at the time, Éamonn de Valera, made specific reference to the importance of the religious demographic, concerning the drafting of the Constitution. In June 1937, he stated:

There are 93 per cent of the people in this part of Ireland and 75 per cent of the people of Ireland as a whole who belong to the Catholic Church, who believe in its teachings, and whose whole philosophy of life is the philosophy that comes from its teachings.

---

<sup>6</sup> An autonomous province of the Episcopal/Anglican Communion.

<sup>7</sup> The *Fifth Amendment of the Constitution Act 1972* deleted Article 44.1.2° and Article 44.1.3°. Article 44.1.1° was correspondingly renumbered as Article 44.1.

Consequently it is very important that in our Constitution that fact should be recognised. ... [N]evertheless the State recognises the liberty of every citizen to practise his religion and to adore the Almighty in public and private.<sup>8</sup>

The question at the time then was not whether or not the Judeo-Christian God should have a place in the Constitution, but, rather, precisely how prominent His place should be. In May 1937, during the second stage of the Dáil debates on the Constitution, Deputy Fitzgerald-Kenney argued that, as it suggested that the people had the authority to elect their leaders, and ‘that all legislative, executive and judicial powers are derived from the people;’<sup>9</sup> the first statement of article 6.1<sup>10</sup> was ‘heretical,’<sup>11</sup> despite the fact that it contained the phrase ‘under God.’ Demonstrating the level of certainty and conviction with which the Constitutional references to ‘God’ were made, Éamonn de Valera replied:

I want everybody to realise what this Constitution states about authority. In the Preamble, and in the [a]rticle that refers to that, there is a clear, unequivocal statement that authority comes from God. That is fundamental. It does not matter what view a group of Catholic theologians may take as to how it comes to the immediate rulers. What we have here is clear at any rate—that authority is from God. That is fundamental Catholic doctrine, and it is here. It is true doctrine.<sup>12</sup>

It is clear from the language used in the Dáil Debates that the recognition of non-religious citizens was not of concern to the drafters of the Constitution. It was simply not an issue at the time, since the demographic was overwhelmingly religious. It is not difficult then to answer the question of why references to ‘Almighty God’ were originally included in the Constitution. It is much more apt to ask; why are they *still* included? It falls to us, in this increasingly diverse society, to make the recognition of non-religious citizens our own concern, and to hope that legislation does not lag too far behind in its provision of equality for *all*.

### C THE CONSTITUTION REVIEW GROUP

One invaluable source of opinion on the need for Constitutional reform, is the Report of the Constitution Review Group.<sup>13</sup> The Constitution Review Group (CRG) was established by the government in 1995:

to review the Constitution, and in the light of this review, to establish those areas where constitutional change may be desirable or necessary, with a view to assisting the all-Party Committee on the Constitution, to be established by the Oireachtas, in its work.<sup>14</sup>

The review group was composed of 15 members,<sup>15</sup> selected from varying backgrounds; administration, economics, education, law, political science and sociology, with lawyers

---

<sup>8</sup> Dáil Debates 4 June 1937 col 1890-1891.

<sup>9</sup> Dáil Debates 13 May 1937 col 340-341.

<sup>10</sup> Art 6.1 states that: ‘All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.’

<sup>11</sup> Dáil Debates 13 May 1937 col 340.

<sup>12</sup> Dáil Debates 13 May 1937 col 416-417.

<sup>13</sup> Constitution Review Group *Report of the Constitution Review Group* (Dublin Stationary Office 1996).

<sup>14</sup> Dáil Debates 3 May 1995 col 481.

being predominant. Their report, which was published in 1996, is viewed as one of the most comprehensive and authoritative commentaries on the Constitution to date. It is a document often cited by judges and legal commentators alike, specifically in reference to unclear or undesirable provisions of the Constitution.

The Report of the CRG recommends that the religious references in the Constitution—the Preamble, blasphemy, public worship, oaths, and minor references such as ‘under God’ in article 6.1—be heavily amended. In most cases the Report recommends deletion of these references, and this has been endorsed by subsequent All-Party Committees. These recommendations will be looked into in more depth in the relevant sections of this article.

## D THE PREAMBLE

The Preamble of the Constitution of Ireland is, perhaps, the most striking display of religious bias which remains in the document today. When one is new to the text of the Bunreacht, the explicit religiosity of the Preamble is likely to come as a surprise. The Preamble states as follows:

*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 State must be referred,  
We, the people of Éire,  
Humbly acknowledging all our obligations to our Devine Lord, Jesus Christ, ...*

*Do hereby adopt, enact, and give to ourselves this Constitution.*

As noted above, this form of wording is entirely understandable if read in the context of the times in which it was written. However, problems arise when one is to read this in the context of today’s Ireland. A fairly blunt, but important, point to make is that, currently, a substantial proportion of the ‘people of Éire’ do not even believe in the ‘Most Holy Trinity,’ nor would they acknowledge an “obligation” to the ‘Devine Lord, Jesus Christ.’ In 1972, Mr Justice Walsh said that ‘[t]he preamble to the Constitution acknowledges that we are a Christian people.’<sup>16</sup> And this it undoubtedly does. But are we? Maybe we were in 1972. We certainly were in 1937. However, at the time of writing, almost an entire decade into the twenty-first century, it seems clear that the people of Ireland do not fall neatly into this single category.

Some would argue that the Preamble is separate from the Constitution, and as such it is nothing more than a historical prelude making reference to the People as they were when it was enacted, holding no legal weighting. This position does seem desirable, however as noted by the CRG; ‘the Preamble has been cited in legal cases and has been taken into account in judicial decisions,’<sup>17</sup> which brings us to the conclusion that it does in fact have legal effect. The issue that follows from this is how the Preamble is interpreted in modern courts. As Mrs Justice Denham has pointed out, ‘we must bear in mind that the Constitution

---

<sup>15</sup> Namely: Dr T K Whitaker, Chairman, David Byrne SC, Dr Alpha Connelly, Mary Finlay SC, Dermot Gleeson SC, James Hamilton BL, Mahon Hayes, Gerard Hogan FTCD, BL, Professor Áine Hyland, Dr Finola Kennedy, Professor Michael Laver FTCD, Dr Kathleen Lynch, Diarmaid McGuinness BL, Dr Dermot Nally, and Dr Blathna Ruane BL.

<sup>16</sup> *Quinn’s Supermarket Ltd v Attorney General* [1972] IR 1, 23.

<sup>17</sup> *Report of the Constitution Review Group* (n 13) 4, citing *McGee v Attorney General* [1974] IR 284, *The State (Healy) v Donoghue* [1976] IR 325, *King v Attorney General* [1981] IR 233, *Norris v Attorney General* [1984] IR 36 and *Attorney General v X* [1992] 1 IR 1.

is a living document. It falls to be construed in our times.<sup>18</sup> However, it would seem that the courts retain the more old fashioned, literal interpretation of the Preamble. One case which epitomises this is *Norris v Attorney General*.<sup>19</sup>

In the *Norris* case, the plaintiff argued that the laws banning male homosexual acts<sup>20</sup> were unconstitutional. It was submitted on his behalf that the relevant sections were inconsistent with article 40.1's provision that '[a]ll citizens shall, as human persons, be held equal before the law.' It was also argued that they were an infringement of the personal rights of the citizen guaranteed by article 40.3. The case was dismissed by the High Court and was appealed. The Supreme Court held, *inter alia*, in disallowing his appeal, that having regard to the Christian nature of the State there was no inconsistency between any of the terms of the impugned sections and the provisions of the Constitution.<sup>21</sup> In his judgment, O'Higgins CJ states:

From the earliest days, organised religion regarded homosexual conduct, such as sodomy and associated acts, with a deep revulsion as being contrary to the order of nature, a perversion of the biological functions of the sexual organs and an affront both to society and to God. ... [I]t remains the teaching of all Christian Churches that homosexual acts are wrong. ... The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity ... It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs.<sup>22</sup>

Here we can see that the Preamble has been used to read a distinctly Christian ethos into the Constitution and to validate the learned judge's personal homophobic view that 'the deliberate practice of homosexuality is morally wrong.'<sup>23</sup> Finlay P and Griffin J both agreed with the Chief Justice's judgment, and added nothing further. It can be argued that a clear problem arises when legislation can be used to back up the personal and subjective opinions of judges. This problem was eloquently summed up by Thomas Jefferson in 1779, when he wrote:

[T]o suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own.<sup>24</sup>

The above was later made law in the State of Virginia, and has since become a part of the Virginia Constitution, ensuring that the religious beliefs of the judiciary can never interfere with the course of justice, and that judgments shall not be biased due to a judge's personal faith. However there has yet to be such a provision in Ireland despite the huge change, and growth of diversity, in the ethos of our society.

---

<sup>18</sup> The Hon Mrs Justice Susan Denham *Leadership in Human Rights Law, Past and Future* (Irish Human Rights Commission and Law Society of Ireland Public Conference 16 October 2004).

<sup>19</sup> *Norris v Attorney General* [1984] IR 36 [Hereinafter *Norris*].

<sup>20</sup> *Offences against the Person Act, 1861*, ss. 61, 62, and *Criminal Law Amendment Act, 1885*, s. 11.

<sup>21</sup> Henchy and McCarthy JJ. dissenting.

<sup>22</sup> *Norris v Attorney General* (n 19) 61-64 (O'Higgins CJ in argument).

<sup>23</sup> *ibid* 65.

<sup>24</sup> *Virginia Act for Establishing Religious Freedom, 1787* (USA).

Professor Gerard F Whyte, in considering the place of religious references in the Preamble, notes that ‘there may not be any neutral territory for the State to occupy between those who advocate the use of religious language in the Constitution and those who oppose such use ...’<sup>25</sup> This view is echoed by Joseph HH Weiler, professor of law at New York University, who has said that ‘[t]he preamble has a binary choice: yes to God, no to God. Why, I ask, is excluding a reference to God any more neutral than including God?’<sup>26</sup> However, it is the opinion of this writer that the exclusion of such references is the neutral ground. What the above commentators do not acknowledge is a third option. The Constitution currently affirms a positive belief in God, but it could also expressly deny such a belief. This would be the other extreme of the spectrum and would support an atheistic rather than a religious ethos. Thus there are really three options; religious, atheistic, and secular. The secular option is to neither affirm nor deny a belief in God, and as such is the middle ground between the other two options.

The CRG notes that ‘the 1972 Irish Theological Association working party unanimously agreed that ‘no one should be required, as a condition of citizenship, to endorse a basic belief or tradition which he does not share’ and was not satisfied that a religious strand was necessary or desirable in a Preamble,’<sup>27</sup> and considers that the Preamble as it stands is ‘inappropriate.’<sup>28</sup> Most of the members felt that ‘the language, reflecting the ethos of the 1930s, is overly Roman Catholic ... in tone ... and would be objectionable to many in Ireland today.’<sup>29</sup> The Group recommends ‘the replacement of the present Preamble by the basic formula of enactment of the Constitution by the people of Ireland.’<sup>30</sup> This writer agrees with their recommendation.

## **E THE OFFENCE OF BLASPHEMY IN IRELAND: THE CONSTITUTION, LEGISLATION AND THE COURTS**

The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.

–Thomas Jefferson, *Notes on the State of Virginia* <sup>31</sup>

Article 40.6.1<sup>o</sup> guarantees liberty for the exercise of ‘[t]he right of the citizens to express freely their convictions and opinions.’ However it is stated in the very same subsection that ‘[t]he publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.’ It would seem, then, that the Constitution giveth, and the Constitution taketh away. Up until 1937, blasphemy was a common law offence. The Constitution then explicitly made it an offence punishable by law. This offence was not provided for by legislation until the *Defamation Act, 1961*, which stated in section 13(1) that ‘[e]very person who composes, prints or publishes any blasphemous or obscene

<sup>25</sup> G F Whyte ‘The Role of Religion in the Constitutional Order’ in Murphy and Twomey (eds) *Ireland’s Evolving Constitution 1937-1997* (Oxford Hart Publishing 1998) 60.

<sup>26</sup> Interview with Sara Ivry Nextbook 23 June 2004, quoted in Patrick Hannon ‘In God’s Name, What Next? Religion, the Constitution and the New Ireland’ in Carolan and Doyle (eds) *The Irish Constitution: Governance and Values* (Dublin Thomson Round Hall 2008) 475.

<sup>27</sup> *Report of the Constitution Review Group* (n 13) 5.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.* 4.

<sup>30</sup> *ibid.* 6.

<sup>31</sup> T Jefferson ‘Notes on the State of Virginia’ (Lilly and Wait Boston 1832).

liable shall, on conviction thereof on indictment, be liable ...’ The Act, however, did not define the term ‘blasphemy,’ and this led to significant ambiguity in the law. This ambiguity did not go unnoticed in the Dáil Debates on the matter. One particular exchange between Mr Charles J Haughey and Mr Patrick McGilligan has been reproduced below, which can at least be viewed as humorous, if rather frustrating at the same time.

**Mr. McGilligan:** There is no definition anywhere of blasphemy in this Bill. Is there in any of the old Acts?

**Mr. Haughey:** Not so far as I am aware.

**Mr. McGilligan:** Where are we then? The offences take in various things, including blasphemous libel. What does it mean?

**Mr. Haughey:** “Blasphemy” is a common law term. It is defined by common law.

**Mr. McGilligan:** Has it anything to do with the established Church and does nonconformity come into it?

**Mr. Haughey:** No.

**Mr. McGilligan:** Is there a definition of it?

**Mr. Haughey:** Blasphemy is a common law offence. There is no statutory definition of it.

...

**Mr. McGilligan:** In any event, I understood the old common law definition was that blasphemy was subversion of the established religion. Surely, we are getting away from all that?

**Mr. Haughey:** It has nothing to do with the established religion.

...

**Mr. McGilligan:** What has it to do with?

**Mr. Haughey:** The common law concept of blasphemy.

**Mr. McGilligan:** Which was anything against the established religion.

**Mr. Haughey:** Not necessarily.

**Mr. McGilligan:** It was.

...

**Mr. Haughey:** Everybody knows what blasphemy is.

**Mr. McGilligan:** I should like to see that put into the definition section — blasphemy is what everybody knows it to be.<sup>32</sup>

Due to this apparent reluctance to define ‘blasphemy,’ the offence, in practice, proved unenforceable. In 1999, in the case of *Corway v Independent Newspapers (Ireland) Ltd.*<sup>33</sup> the Supreme Court held that:

[T]he Defamation Act, 1961, assume[s] that the crime exists without defining it. It would appear that the legislature has not adverted to the problem of adapting the common law crime of blasphemy to the circumstances of a modern State which embraces citizens of many different religions and which guarantees freedom of conscience and a free profession and practice of religion. ... The task of defining the crime is one for the legislature, not for the courts. In the absence of legislation and in the present uncertain state of the law the [c]ourt could not see its way to authorising the institution of a criminal prosecution for blasphemy.<sup>34</sup>

<sup>32</sup> Dáil Debates 26 July 1961 col 1928-1929.

<sup>33</sup> *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.

<sup>34</sup> *ibid* 501-502 per Barrington J [Hamilton CJ, Murphy, Lynch and Barron JJ agreeing].

Since the Constitution provides that the publication or utterance of blasphemous material is to be an offence ‘punishable in accordance with law,’ the Supreme Court’s ruling that the offence was unenforceable left two options. Either the offence could be defined in a new Act, or a referendum could be held to delete the constitutional reference to blasphemy. Dermot Ahern, Minister for Justice, Equality and Law Reform, said, ‘[m]y personal position is that church and state should be separate, but I do not have the luxury of ignoring our constitution.’<sup>35</sup> Faced with choosing between a pricey referendum and reform which would help judges address the 1999 Supreme Court ruling, he said, ‘I chose reform.’<sup>36</sup> It was widely argued that the blasphemy referendum could conveniently have been held on the same day as the second Treaty of Lisbon referendum, but this ultimately did not happen. Thus, the offence of blasphemy in Ireland was finally defined in the *Defamation Act, 2009*, 72 years after the Constitution had originally required it. Section 36(2) of the Act provides that:

- For the purposes of this section, a person publishes or utters blasphemous matter if—
- (a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and
  - (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.

However, the Act also provides for new defences, such as the ‘defence of truth’ in section 13 and the ‘defence of honest opinion,’ in section 20. This limits the offence of blasphemy to cases where the sole intent was to cause ‘outrage.’ In the opinion of this writer, the protection of religious beliefs and sensibilities is best left to the provisions of the *Prohibition of Incitement to Hatred Act, 1989*, which do not afford religious opinions a special position above the opinions of the non-religious, or indeed opinions on non-religious subject matter, but treat all opinions equally. A similar sentiment was expressed by Senator David Norris during the Seanad Debates on the *Defamation Act, 2009*, where he stated:

On the question of blasphemy, my view is that God, assuming he or she exists, is quite able to sustain slings and arrows of mere mortals in terms of his or her reputation. What people are usually doing when talking about blasphemy is protecting their own feelings. It is understandable that people have strong feelings, but this is covered by incitement to hatred. A number of columnists in one of the main daily newspapers regularly incite hatred against particular religious groups, particularly Muslims, but this can be covered by incitement to hatred.<sup>37</sup>

It is clear that the new blasphemy laws were brought in somewhat reluctantly, simply to satisfy the text of the Constitution. Notwithstanding this reluctance, the legislation has attracted international attention. Pakistan, on behalf of the Organisation of Islamic Conference, submitted a proposal to the UN Ad Hoc Committee on the Elaboration of Complementary Standards urging all UN member states to legislate against blasphemy. Their proposal lifted the definition of blasphemy, verbatim, from the 2009 Act. Sweden ‘on behalf of the European Union, The United States of America, Norway, Denmark, Poland and France expressed their opposition to defamation of religion being regarded as a human rights

---

<sup>35</sup> K Adam ‘Atheists Challenge Ireland’s New Blasphemy Law with Online Postings’ *Washington Post Foreign Service* (3 January 2010)

<<http://www.washingtonpost.com/wpdyn/content/article/2010/01/02/AR2010010201846.html>> (24 January 2010).

<sup>36</sup> *ibid.*

<sup>37</sup> Seanad Debates 11th March 2008 col 1773.

legal concept, explaining that human rights were relevant to individuals but not religions.<sup>38</sup> As one commentator has noted, '[i]t is ironic that the text to which the European Union is opposed is extracted directly from the law of a Member State.'<sup>39</sup> The CRG are of the opinion that 'the retention of the present constitutional offence of blasphemy is not appropriate. ... The contents of the offence are ... potentially at variance with guarantees of free speech and freedom of conscience in a pluralistic society.'<sup>40</sup> They also agree with the Law Reform Commission's views which state that they are 'of the view that there is no place for the offence of blasphemous libel in a society which respects freedom of speech.'<sup>41</sup>

The Joint Committee on the Constitution, a select committee consisting of members of both Houses of the Oireachtas, agreed with the recommendations of the CRG. In their first report, in July 2008, they stated that 'it is the Committee's view that the specific reference to blasphemy should be deleted from the Constitution. ... Furthermore, the Committee is of the view that in a modern Constitution, blasphemy is not a phenomenon against which there should be an *express* constitutional prohibition.'<sup>42</sup> It would seem too that the People would agree with this view. In a recent Irish Times poll, when asked '[w]ould you support a referendum to remove the provision in the Constitution that makes the publication of blasphemous statements a crime?' 64% of the respondents answered "Yes."<sup>43</sup>

To summarise, the 1991 Law Reform Commission, the 1996 Constitution Review Group and the 2008 All-Party Committee on the Constitution have all addressed the reference to blasphemy in the Constitution. All three have recommended its deletion, and it would appear that a majority of the People agree with this recommendation. This writer certainly does.

## F THE HOMAGE OF PUBLIC WORSHIP BEING DUE TO ALMIGHTY GOD

Though the *Fifth Amendment of the Constitution Act, 1972* has deleted the references to specific religious denominations, article 44.1 still reads:

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.

This provision has not received much judicial analysis, though Mr Justice Walsh has said that this section 'acknowledges that the homage of public worship is due to Almighty God but it does so in terms which do not confine the benefit of that acknowledgment to members of the Christian faith.'<sup>44</sup> However, the CRG notes that the reference to 'Almighty God' does appear to 'refer to God in terms which confine the reference to adherents of monotheistic faiths.'<sup>45</sup> So what does article 44.1 mean? The CRG suggests that one possible meaning of the first

<sup>38</sup> UN Human Rights Council 'Draft Report of the Ad Hoc Committee on the elaboration of complementary standards on its second session' (30 October 2009) A/HRC/13/55 <<http://www.article19.org/pdfs/publications/racism-racial-discrimination-xenophobia-and-all-forms-of-discrimination.pdf>> (24 January 2010).

<sup>39</sup> National Secular Society 'Irish Blasphemy Law being Used as a Lever by Islamic Countries' (8 January 2010) <<http://www.secularism.org.uk/irish-blasphemy-law-being-used-a.html>> (24 January 2010).

<sup>40</sup> *Report of the Constitution Review Group* (n 13) 297.

<sup>41</sup> *ibid* 296.

<sup>42</sup> Joint Committee on the Constitution *First Report of the Joint Committee on the Constitution: Article 40.6.1.i - Freedom of Expression* (Stationery Office Dublin 2008) para 5.22 [emphasis in original].

<sup>43</sup> <<http://www.irishtimes.com/polls/index.cfm?fuseaction=yesnopoll&pn=6&lastID=224401&subsiteid=356&pollid=9174>> (24 January 2010).

<sup>44</sup> *Quinn's Supermarket Ltd v Attorney General* (n 16) Walsh J.

<sup>45</sup> *Report of the Constitution Review Group* (n 13) 370.

sentence of the section is that ‘the State is under an obligation not only to permit but even to participate in divine worship in public.’<sup>46</sup> Professor James Casey quantifies this, observing:

[T]here are many public manifestations of religion – such as ceremonies at defence establishments, the daily broadcasting of the Angelus on radio and television – and these many people find objectionable ... It seems probable that any action [to challenge such practices] would fail, with the courts invoking [a]rticle 44.1 to uphold the impugned provisions.<sup>47</sup>

The CRG considers that ‘[i]n effect, this section imposes an obligation on the State to refrain from engaging in what might loosely be termed ‘atheistic propaganda’ and prevents the State from adopting a policy which is actively hostile to religion.’<sup>48</sup> However, this writer would go further. The State is explicitly required to hold the name of God in ‘reverence,’ and must ‘honour religion.’ This does not merely prevent the State from being hostile towards religion; it expressly prevents the State from being unbiased, impartial, non-discriminatory, and neutral. The CRG states that this overall interpretation of article 44.1 ‘would be objectionable to many,’<sup>49</sup> and that the second sentence ‘reflects views which are not now universally held.’<sup>50</sup> A majority of the CRG is in favour of the deletion of article 44.1, or if that is not deemed desirable, the rewording of the section to simply state: ‘The State guarantees to respect religion.’<sup>51</sup> This proposed amendment would allow the State to conduct itself in an unbiased and objective manner, without holding one belief system above another.

Dr. Oran Doyle addresses the issue of the currently present bias by contrasting article 44.1 with the considerably more neutral article 44.2.

Article 44 deals with religion, but its two provisions are markedly different from each other. Article 44.2 contains a set of constitutional guarantees that would not appear out of place in the constitution of any liberal democracy. The [a]rticle 44.2 guarantees can loosely be divided into two types: freedoms of religion and freedoms from religion. ... There is a rough balance between these two types of guarantee. On the one hand, people should be free to be religious. On the other hand, the state should not get too involved in religion. This suggests a neutrality between religions and non-religions.<sup>52</sup>

However, he states, article 44.1 ‘suggests a State that is decidedly non-neutral on the question of religion.’<sup>53</sup> He argues that ‘the courts, in their interpretation of article 44, have reflected the pro-religion ethos of article 44.1 and the Preamble, systematically privileging the freedoms of religion over the freedoms from religion.’<sup>54</sup>

It would seem, then, that the provisions of article 44.1 have marred the otherwise balanced provisions to be found in article 44.2. Dr. Doyle notes that ‘[i]f article 44.2 existed on its own, the balance therein between freedoms of religion and freedoms from religion would, I suggest, require state neutrality as between religions and pointedly non-religious

---

<sup>46</sup> *ibid.*

<sup>47</sup> J Casey *Constitutional Law in Ireland 2<sup>nd</sup>* ed (Sweet & Maxwell London 1992) 557 quoted in *Report of the Constitution Review Group* (n 13).

<sup>48</sup> *Report of the Constitution Review Group* (n 13) 371.

<sup>49</sup> *ibid* 377.

<sup>50</sup> *ibid* 378.

<sup>51</sup> *ibid.*

<sup>52</sup> O Doyle ‘Article 44: Privileging the Rights of the Religious’ in Carolan and Doyle (eds) *The Irish Constitution: Governance and Values* (Thomson Round Hall Dublin 2008) 478.

<sup>53</sup> *ibid* 479.

<sup>54</sup> *ibid.*

world views.<sup>55</sup> This neutrality can only be achieved through the deletion of article 44.1, since currently, as Doyle concludes, the courts ‘are probably constitutionally *required* to privilege the rights of the religious.’<sup>56</sup>

## G RELIGIOUS OATHS OF THE PRESIDENT, THE JUDGES AND THE COUNCIL OF STATE

In Ireland, the ordinary manner for swearing in a juror begins with the words ‘I swear by Almighty God that ...’<sup>57</sup> However, in the case of a non-religious juror, it is provided that a secular affirmation may be taken instead of an oath.<sup>58</sup> In accordance with the *Oaths Act, 1888*, this affirmation begins ‘I, AB, do solemnly, sincerely, and truly declare and affirm ...’<sup>59</sup> This is an example of a perfectly reasonable legislative provision which strives to ensure equality. Since the vast majority of jurors in this jurisdiction are likely to be Catholics, the default oath is a Christian one, and alternatives are provided for jurors of other religions,<sup>60</sup> and of no religion. It is also interesting to note the age of the *Oaths Act*, which predates our Constitution, as this would have been quite a progressive provision in 1888, since the population of non-religious people would have been far less substantial than it is today. It is with this in mind that we must look the oaths, the declarations, of our Constitution.

The Constitution provides, in article 12.8, that the President of Ireland shall only enter into office by “taking and subscribing publicly” to a declaration which begins; ‘[i]n the presence of Almighty God ...’ and ends: ‘[m]ay God direct and sustain me.’ The declaration prescribed for judges, in article 34.5.1<sup>o</sup>, begins and ends with the same aforementioned phrases, and is to be ‘made and subscribed ... in open court.’ Furthermore, article 34.5.4<sup>o</sup> states plainly that ‘[a]ny judge who declines or neglects to make such declaration as aforesaid shall be deemed to have vacated his office.’ Finally, article 31.4 requires every member of the Council of State (the body established to ‘aid and council the President’) to ‘take and subscribe a declaration’ which begins in the same manner as the President’s and the judges’ declarations, but does not contain their religious suffix. One wonders why the Council of State is not in need of God’s direction and sustenance.

What, then, do these declarations imply in real terms? Let us take, for example, the declaration to be made by a judge. Every judge is required to declare what amounts to a belief in ‘Almighty God’ and a wish to be directed by Him. This must be done in open court and in the presence of the Chief Justice, or in the case of the Chief Justice; in the presence of the President. This declaration is not optional, and a failure or refusal to make it deems the judge to have ‘vacated his office.’ The implication of this is severe. Nobody who does not believe in an ‘Almighty God’ can conscientiously become a judge in Ireland, as it would require making a declaration which they did not fully believe in. To do so would, in this writer’s view, be morally akin to perjury. This could effectively ban over 250,000 Irish citizens from being eligible for the position of judge.<sup>61</sup>

This exclusion is clearly not in line with article 40.1’s provision that all citizens are to be ‘held equal before the law,’ and this point has not gone unnoticed. As far back as August

---

<sup>55</sup> *ibid* 488.

<sup>56</sup> *ibid*, [emphasis added].

<sup>57</sup> *Juries Act 1976*, s. 18(1).

<sup>58</sup> *Juries Act 1976*, s. 18(2).

<sup>59</sup> *Oaths Act 1888*, s. 2.

<sup>60</sup> *Juries Act 1976*, s. 18(3).

<sup>61</sup> *Census 2006 – Vol 13 – Religion; Table 1* (n 2).

1993, the UN Human Rights Committee, in their report on Ireland, expressed their concern in relation to this Constitutional inequality:

With respect to freedom of expression ... the Committee notes with concern that ... [t]he Constitutional requirement that the President and judges must take a religious oath excludes some people from holding those offices.<sup>62</sup>

This form of exclusion is expressly forbidden in many modern Constitutions. It becomes clear, when comparing our Constitution to others currently in effect, that it falls short of the expected level of equality. In particular, the Constitution of the United States of America states:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but *no religious test shall ever be required as a qualification to any office or public trust under the United States.*<sup>63</sup>

The Constitution of Spain provides that: '[n]o one may be compelled to make statements regarding his or her ideology, religion or beliefs.'<sup>64</sup> Finally, the Commonwealth of Australia Constitution states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and *no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*<sup>65</sup>

In 1999, in their fourth progress report, the All-Party Oireachtas Committee on the Constitution stated that "[t]he majority of the committee ... takes the view that a judge should have a choice between a religious and nonreligious declaration."<sup>66</sup> The UN Human Rights Committee reiterated their disquiet in 2008, advising that the Constitution should be amended to allow for a non-religious declaration to be taken as well as a religious one.<sup>67</sup> However in the initial Report of the CRG it was stated:

A majority of the Review Group favours one declaration only without the religious references. It does not appear desirable that a judge be required openly to choose between two forms of declaration thereby indicating his or her religious beliefs. The daily exercise of the judicial function requires that a judge's impartiality should not be put in doubt by a public declaration of personal values. The same consideration does not

---

<sup>62</sup> UN Human Rights Committee (HRC) *UN Human Rights Committee: Comments: Ireland* 3 August 1993 CCPR/C/79/Add.21 <<http://www.unhcr.org/refworld/docid/3ae6b00c8.html>> (12 November 2009).

<sup>63</sup> Constitution of the United States of America Article VI (3) [emphasis added].

<sup>64</sup> Constitución Española de 1978 Division 1 Section 16(2) [emphasis added].

<sup>65</sup> Australian Constitution 1901 section 116 [emphasis added].

<sup>66</sup> The All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report: The Courts and the Judiciary* (Stationery Office Dublin 1999) 13.

<sup>67</sup> UN Human Rights Committee (HRC) *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: Ireland*, 30 July 2008, CCPR/C/IRL/CO/3, <<http://www.unhcr.org/refworld/docid/48c4ff452.html>> (28 November 2009).

apply to the President, in regard to whom the Review Group suggests a choice of alternatives.<sup>68</sup>

This author fully agrees with the CRG's original statement. The impartiality of the judiciary is of the utmost importance, and it would not be in the interest of this impartiality to require a judge to make any assertion of personal belief. Ideally, which judge presides over which case should not be an issue. The introduction of a public declaration of faith, or lack thereof, would introduce inherent presuppositions regarding any given judge's likely sway in a particular case. Suppose then a case on abortion is presided over by a judge who has publicly decided to take a religious declaration. It is likely that one side would request a new judge; one who has chosen the non-religious affirmation. This would clearly cast a shadow of doubt over judicial impartiality. A secular affirmation would ensure that nobody could be excluded from the position of judge on the basis of their personal beliefs, while at the same time ensuring that judicial impartiality is upheld, as no statement of personal, individual opinion would be made.

As regards the positions of President and Member of the Council of State, this author agrees that a choice, of religious declaration or non-religious affirmation, would be the more appropriate option. Impartiality does not come into question in this situation, as these positions are largely based upon personal opinion. Similar to the oaths or affirmations taken by jurors in court, it would be appropriate for the President and members of the Council of State to take whichever form of declaration held the most weight for them in accordance with their own beliefs. It is this writer's view that the current declarations required by the Constitution are the most overt of the provisions stipulating discrimination and inequality on the basis of religious belief. As Professor Whyte has argued, '[s]uch a requirement inhibits, for no good reason, non-believers from taking up these public offices and as such effects religious discrimination.'<sup>69</sup> Amendment in the manner discussed above is necessary for the equal treatment of all citizens.

## H CONCLUSION

This article has explored in depth the anachronistic religious aspects of the Constitution and has come to the conclusion that reform is necessary, in many areas, in order to uphold the fundamental right of equality for all citizens. One problem remains. When reforming the constitution, a referendum is required. It is necessary, therefore, that the People, the majority of whom still profess a religious faith, vote for the protection of the rights of the minority. In a democracy, the majority will always rule, and it might seem a logical progression that all must live by the decisions of that majority. However, that majority has the responsibility to afford equal rights to all. Professor of Jurisprudence, HLA Hart summed up this point as follows:

It seems feasibly easy to believe that democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live ...The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted.<sup>70</sup>

---

<sup>68</sup> *Report of the Constitution Review Group* (n 13) 179.

<sup>69</sup> *The Role of Religion in the Constitutional Order* (n 25) 59.

<sup>70</sup> H L A Hart *Law, Liberty & Morality* (Oxford University Press London 1963) 79.

Now, more than ever, it is essential that the People are given the chance to vote, and moreover that they *do* vote, in favour of a secular Constitution; a Constitution which views the religious and the non-religious as equals. Only then can all citizens, as human persons, truly 'be held equal before the law.'

