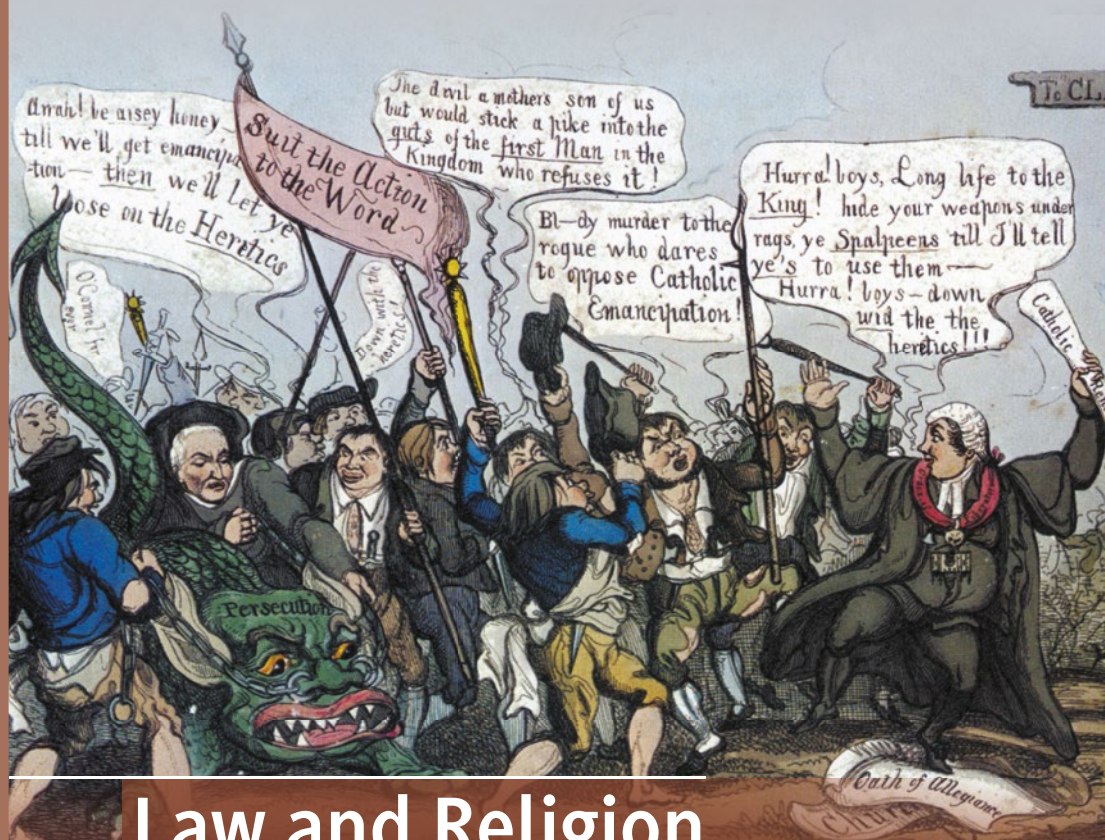




PALGRAVE MODERN LEGAL HISTORY



Law and Religion in Ireland, 1700–1970

Edited by
Kevin Costello · Niamh Howlin

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Palgrave Modern Legal History

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This collection is very much the result of collaborative effort. It has its origins in a roundtable workshop hosted by the UCD Legal History Research Group in 2017. A number of papers were delivered over the course of a day by both established and emerging scholars, from a variety of legal and historical perspectives.

The authors wish to express gratitude to those who participated in the roundtable and contributed to the lively and engaging discussions; as well as those whose work appears in this volume, we wish to thank, in particular, Dr. Phillip Walsh and Dr. Paul Colton for their enlightening papers. Dr. Noel McGrath, Dr. Sparky Booker, Dr. Karen Brennan and Professor Norma Dawson chaired the discussions at the various sessions, helping participants to explore both the limits and the synergies between papers. We are grateful to the anonymous reviewers who thoroughly and thoughtfully analysed the strengths and weaknesses of the project as it evolved.

We are grateful to the Sutherland School of Law for supporting both the event and the book, and we would like to thank the UCD Seed Funding Scheme for its generous financial support. Our colleague, Ms. Suzanne D'Arcy has provided invaluable support and advice for the project since its inception, and Ms. Rachel Minogue was very helpful in the final stages of editing the manuscript. We thank Mr. Rob Gibson for the excellent indexing.

The impact of the Covid-19 pandemic has been felt in the preparation of this volume, as with all aspects of life in recent times. Our friend and colleague Dr. Paul Colton is the Church of Ireland bishop of Cork, Cloyne

and Ross and as such has devoted himself to his pastoral work since March 2020. Unfortunately, his contribution to the original workshop in 2017 is not reflected in this volume, but we hope to see its publication elsewhere in the future.

We would also like to acknowledge the patience and flexibility shown by Palgrave Macmillan when we experienced the inevitable pandemic-related delays.

It is with sadness that we remember the passing of two of the contributing authors to this book. Professor Keith Robbins died in 2019 and Professor Nial Osborough died in early 2021. We are grateful for their contributions in this collection.

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predominantly of judicial figures of the early twentieth century, his study of *Lieutenant WE Wylie: The Soldiering Lawyer of 1916* was published in 2012 by the Irish Legal History Society of which he has been an officer since 1994, serving as President during 2012–2015. Reverend Marshall, a former president of the Irish Legal History Society, writes as an independent scholar. His views are personal and do not express any official position on behalf of the Church of Ireland.

Charles Ivar McGrath has published *The Making of the Eighteenth-Century Irish Constitution: Government, Parliament and the Revenue, 1692–1714* (2000); *Ireland and Empire, 1692–1770* (2012); (with J. Kelly and J. McCafferty) eds, *People, Politics and Power: Essays on Irish history 1660–1850 in honour of James I. McGuire* (2009); (with Chris Fauske) eds, *Money, Power and Print: Interdisciplinary Studies on the Financial Revolution in the British Isles* (2008); and (with M. Brown and T. Power) eds, *Converts and Conversion in Ireland, 1650–1850* (2005); and articles and chapters in a range of international peer-reviewed journals and edited collections.

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CHAPTER 1

The Legal History of Religion in Ireland

Kevin Costello and Niamh Howlin

Although much has been written about the history of religion in Ireland, little has been contributed by lawyers to debates about the penal code, disestablishment, minority churches or the place of religion in the emergent Irish state. Writing about the Church of Ireland in particular, Ford writes that there are

[H]istories of various kinds, shapes and sizes ... The authors of these histories approach their task from varying perspectives ... There are vertical histories ... and horizontal histories... There are political, economic, social, even theological histories.¹

Notably absent from this list are legal histories, which, alongside social, political, economic and cultural histories, can help to shed light on

¹ Alan Ford, “‘That Noble Dream’: Objectivity and the Writing of Irish Church History,” in *The Church of Ireland and its Past: History, Interpretation and Identity*, ed. Mark Empey, Alan Ford and Miriam Moffitt, (Dublin: Four Courts Press, 2017), 1.

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K. Costello, N. Howlin (eds.), *Law and Religion in Ireland, 1700–1970*, Palgrave Modern Legal History,
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different aspects of the past. This book is not a general history of the experience of religion in Ireland. Its unique contribution is that it is a legal history of religion in Ireland. This, therefore, is not a study of the history of religion in Ireland or of the social experience of persons practising religion in Ireland, or the popular responses to developments like disestablishment. The stress in this collection is narrower and technical. It is concerned with that series of legal events which make up some of the principal episodes in the legal history of religion in Ireland.

The collection is organised around four themes. It begins with three chapters on the penal laws covering the period 1691–1829, dealing, in particular, with the two ways in which the penal laws affected life in Ireland: their impact on religious liberty and their impact on the real property rights of Catholic landowners. A second theme is that of religious toleration. At the same time that the penal laws were at their most intense in the early eighteenth century, freedom of worship, and freedom from the penalties in the Uniformity Acts,² was conceded to the Presbyterian Church by the Toleration Act 1719.³ This was not a complete religious liberty. Presbyterians were disbarred from civil office by the Test Acts until 1780⁴ and, even then, residual disabilities on Presbyterians remained into the nineteenth century. Running concurrently, with toleration for Presbyterians, was the beginning, starting in the early 1770s,⁵ of the lifting of the anti-Catholic laws. The focus of the collection moves to that legislation. Religious toleration was not religious equality and the repeal of the remaining anti-Catholic penal laws in 1829⁶ did not usher in religious equality. Indeed parts of the Catholic Relief Act 1829, and the Ecclesiastical Titles Act 1851,⁷ were seen as enforcing the secondary status of the Catholic Church within the constitution. A third theme—the removal of religion from the constitution—is pursued in pieces related to the background to, and legal architecture of, the disestablishment of the Church of Ireland. A fourth theme includes studies of the three principal constitutional interventions in religious life in the 50 years between 1922 and 1972: the guarantee of religious liberty in the secular Constitution of 1922; the recognition of the special place of the Catholic Church under

² Uniformity Act, 1560, 2 Eliz. 1, c. 2 and Uniformity Act, 1666, 17 & 18 Ch. 2, c. 6.

³ Toleration Act, 1719, 6 Geo. 1, c. 5.

⁴ 19 & 20 Geo. 3, c. 6.

⁵ An Act to Encourage the reclaiming of Unprofitable Bogs, 1771, 11 & 12 Geo 3, c. 21.

⁶ The Roman Catholic Relief Act, 1829, 10 Geo. 4, c. 7.

⁷ 14 & 15 Vict., c. 40.

Article 44 of the Constitution of 1937 and the removal of Article 44 by the Fifth Amendment of the Constitution in 1972.

Corish's 1985 *The Irish Catholic Experience* suggested that by "about 1730 by the time the second Hanoverian had succeeded to the throne, the persecution [against the Catholic Church] had tapered off".⁸ While it is accepted that the enforcement of the Penal Laws was at its most intense in the late seventeenth and early eighteenth centuries, there was also a post-1730 enforcement phase. The survey of anti-Catholic legislation in the first essay in this collection, Charles Ivar McGrath's "The Penal Laws: Origins, Purpose, Enforcement and Impact" demonstrates that anti-Catholic laws were being enacted into the mid-eighteenth century and argues that the war years of 1743–5 saw the final significant crack down on the Catholic clergy. The absence of a comprehensive set of assize minute books for eighteenth century Ireland makes a reliable assessment impossible, but it is known that occasional prosecutions of priests under the Registration Act 1705 continued into the mid-eighteenth century. Corish argued that future studies needed to concentrate on the actual application of the law and its interpretation from day to day as opposed to the dead and abstract letter of the law. This work has begun to be undertaken. Emma Lyons' chapter "To 'Elude the Design and Intention' of the Penal Laws: Collusion and Discovery in Eighteenth-Century Ireland – A Case Study" is one of a number of very valuable case studies of the legal strategies used by Catholic families to evade the Catholic property laws of 1704 and 1709. The study of the Lattins of Morristown Lattin, County Kildare, shows how Catholic families used judgment enforcement under the statute staple legislation as a way of screening the purchase of estates from Protestants in excess of the estates allowed under the Popery Acts. The distinction between the letter of the law and law as it was actually practised is of particular importance in the context of the Penal laws: the Act to Prevent the Further Growth of Popery⁹ prohibited Protestants acting as trustees purchasing land on behalf of Catholics. But, as Emma Lyons shows, although illegal and at very high risk of exposure by private discoverers, that is what Catholic landowners like Patrick Lattin and Michael Moore, in practice, did.

⁸Patrick J. Corish, *The Irish Catholic Experience: A Historical Survey* (Dublin: Gill and Macmillan, 1985), 136.

⁹An Act to prevent the further Growth of Popery, 1703, 2 Anne, c. 6.

The drafting and enactment of the 1704 Act to Prevent the Further Growth of Popery was the subject in 1960 of a detailed study by Simms.¹⁰ James Kelly's chapter "Repealing the Penal Laws, 1760–95" provides accounts of the parliamentary and legislative history of the enactment of those laws which began the relaxation of the penal code: beginning with the Act to Encourage the Reclaiming of Unprofitable Bog 1772,¹¹ the Act to Enable His Majesty's Subjects to Testify their Allegiance to Him 1774,¹² and, most significantly the Catholic Relief Act 1778¹³ which modified the Catholic land acts of Queen Anne enabling Catholics to take significant estates and removing compulsory gavelkind. It also tells the story of one reform which failed to be enacted: the efforts between 1762 and 1774 to have a law enabling Catholics to take mortgages enacted.

Concurrent with the legal campaign against Catholics were the disabilities against dissenters, and, in particular, Presbyterians. In "Irish Presbyterians and the Quest for Toleration, c. 1692–1733", Robert Whan tells the story of how a constituency denied access to official office or parliament managed to organise its first significant constitutional victory, the Toleration Act 1719.¹⁴ But anti-Presbyterian disabilities remained. The most serious grievance, the invalidity of Presbyterian marriages, remained unreformed until 1844.¹⁵ One response to marginalisation by the state is to develop alternative legal structures outside the state. Leanne Calvert, in her chapter, "'I Am Friends Wt You & Do Entertain No Malice': Discord, Disputes and Defamation in Ulster Presbyterian Church Courts, c. 1700–1838", makes extensive use of primary materials, using eighteenth-century Kirk Sessions records to show how the Presbyterian Kirk Sessions became a highly successful, widely used unofficial judicature in eighteenth and early nineteenth century Ulster. While the Kirk Sessions were principally used for investigating and punishing sexual misdemeanours, the courts also diverted business from the official manorial and petty sessions courts, hearing cases involving matters involving neighbourhood and

¹⁰ J. G. Simms, "The Making of a Penal Law (2 Anne c. 6)," *Irish Historical Studies* 12, no. 46 (1960): 105.

¹¹ An Act to Encourage the reclaiming of Unprofitable Bogs, 1771, 11 & 12 Geo 3, c. 21.

¹² Act to Enable His Majesty's Subjects to Testify their Allegiance to Him, 1773, 13 & 14 Geo. 3, c. 35.

¹³ Catholic Relief Act, 1778, 17 & 18 Geo. 2, c. 49.

¹⁴ An Act for exempting the Protestant Dissenters of this Kingdom from certain penalties, to which they are now subject, 1719, 6 Geo. 1, c. 5.

¹⁵ Marriages (Ireland) Act, 1844, 7 & 8 Vict., c. 81.

family violence, theft from land and malicious injury to property. The Kirk Sessions courts can be seen as part of a tradition of unofficial judicatures in Ireland, a tradition which was maintained by the Repeal Association's system of arbitration courts in the early 1840s and by the Dáil Courts (1920–1924) of the early twentieth century.

The efforts at Catholic Relief made by the Irish Parliament in the late eighteenth century culminated with the Catholic Relief Act 1829. The Catholic Relief Act 1829¹⁶ did not bring a final end to anti-Catholic laws. In fact, as Kevin Costello's contribution demonstrates, the Catholic Relief Act 1829 contained a number of highly sectarian provisions: a prohibition on the establishment and the operations of the Jesuits and other regular orders in Ireland; rules against religious processions, and rules about the wearing of religious dress in public. The general view is that these measures were inserted as compensation to extreme Protestant opinion and were not enforced. Internal government files show that up to the 1850s there was an interest on the part of the law officers in Dublin and London in enforcing these provisions. While the provisions were not enforced directly by criminal prosecution, these laws did have an indirect effect in the law of charities and the law of conveyancing. The impact of the Catholic Relief Act 1829 on the ability of Catholics to make bequests to religious orders was taken up as a political cause by the Church in the early twentieth century.

Studies of the Irish Catholic Church in the early nineteenth century (such as Emmett Larkin's superb *The Pastoral Role of the Catholic Church 1750–1850*)¹⁷ detail the internal organisation of the Church. Less stress is devoted to church/state relations and to those legislative measures that renewed hostilities between the Catholic Church and Parliament. Oliver Rafferty's chapter, "The Legal and Constitutional Organization of the Catholic Church in Nineteenth-Century Ireland" looks at the response within the Catholic Church to measures like the Catholic Bequests Act 1844,¹⁸ the Queens Colleges Act 1845¹⁹ and the Ecclesiastical Titles Act 1851.²⁰ Parliamentary law was not the only form of law which regulated religious practice in Ireland. An interest in developing an internal Irish

¹⁶ Catholic Relief Act, 1829, 10 Geo. 4, c. 7.

¹⁷ Emmett Larkin, *The Pastoral Role of the Roman Catholic Church in pre-famine Ireland, 1750–1850* (Dublin: Four Courts Press, 2006).

¹⁸ Catholic Bequests Act, 1844, 7 & 8 Vict., c. 97.

¹⁹ Queens' Colleges Act, 1845, 8 & 9 Vict., c. 66.

²⁰ Ecclesiastical Title Acts, 1851, 14 & 15 Vict., c. 60.

ecclesiastical law of the Catholic Church only got under way in the mid-nineteenth century with the regular holding of national synods; canon law was not codified until 1917; and Irish ecclesiastical law harmonised with the Canon Law in 1927.

A shift from tolerance to something closer to equality was accomplished when the Church of Ireland was disestablished by the Irish Church Act 1869.²¹ While it is “not easy to sum up the consequences”²² of this Act, the financial, political and social impact of disestablishment have since attracted scholarly attention over the past 150 years. Until the twentieth century, most examinations of the history of the Church of Ireland were grounded in ecclesiastical history, generally written by scholars who were also members of the clergy.²³ In the mid-1960s, Archbishop Simms asked the historian RB McDowell to write an account of the post-disestablishment Church of Ireland. This was published in 1970,²⁴ and its analysis of disestablishment focused primarily on the political dimension. Short, accessible books on the history of the Church²⁵ and on disestablishment were also published around this time,²⁶ and a special issue of the journal *Theology* included several contributions on aspects of disestablishment.²⁷ A collection of essays was also presented to the Church of Ireland to mark the centenary,²⁸ which included one essay on disestablishment, focusing

²¹ Irish Church Act, 1869, 32 & 33 Vict., c. 42.

²² P. M. H. Bell, “Disestablishment in Ireland and Wales,” *Church Historical Society*, series 90, no. 90 (1969): 208.

²³ David Hayton “Concluding Reflections,” in *The Church of Ireland and its Past: History, Interpretation and Identity*, ed. Mark Empey, Alan Ford and Miriam Moffitt (Dublin: Four Courts Press, 2017), 307.

²⁴ R. B. McDowell, *The Church of Ireland 1869–1969* (London: Routledge and Kegan, 1975).

²⁵ Kenneth Milne, *A Short History of the Church of Ireland* (Dublin: Columba Press, 1966).

²⁶ For example, Hugh Shearman, *How the Church of Ireland was Disestablished* (Dublin, Church of Ireland Disestablishment Centenary Committee, 1970) and W. G. Wilson, *The Church of Ireland – Why Conservative? A Brief Review of Disestablishment and Some of its Effects* (Dublin: Association for Promoting Christian Knowledge, 1970).

²⁷ J. C. Beckett, “Disestablishment in the Nick of Time,” *Theology* 73, no. 559 (1970): 202–208; Robert Preston McDermott, “The Church of Ireland since Disestablishment,” *Theology* 73, no. 559 (1970): 208–14; A. R. Vidler, “The Lighter Side of Disestablishment,” *Theology* 73, no. 559 (1970): 214–17.

²⁸ Michael Hurley, *Irish Anglicanism, 1869–1969: Essays on the Role of Anglicanism in Irish Life, Presented to the Church of Ireland on the Occasion of the Centenary of its Disestablishment, by a Group of Methodist, Presbyterian, Quaker and Roman Catholic Scholars* (Dublin: Allen Figgis, 1970). It included “an ecumenical perspective on how the Church of Ireland was

primarily on the passage of the Irish Church Act 1869.²⁹ The following year saw the publication of Akenson's book focusing on the Church's finances and its internal administration.³⁰ In "The Disestablishment of the Church of Ireland", Keith Robbins considers the role and position of the Church of Ireland in the decades following the Act of Union. He also places Ireland's disestablishment in a comparative European context, providing a unique perspective on the build-up to the passing of the Irish Church Act.

As Shearman observed in 1970, disestablishment "had so many aspects in which the lawyer or the accountant might feel more happy than the general or ecclesiastic historian."³¹ Shearman's work focused on the processes and impact of disestablishment, including the implications for property ownership. In the 1940s, his unpublished doctoral thesis had explained the Irish Church Act 1869 as "a cardinal episode in the history of Irish land purchase legislation."³² Unfortunately, this aspect of disestablishment has attracted little scholarly attention since then. N. M. Dawson now takes Shearman's analysis further, focusing on legal aspects of disendowment in "Disendowment Under the Irish Church Act 1869". She describes the legal design of the 1869 Act and how it managed the transition from a church which was financed by the state to a church which would be dependent on voluntary support of its congregation. Her piece brings a legal

perceived from outside its ranks." Richard Clarke, "Foreword," in *Irish Anglicanism 1969–2019. Essays to Mark the 150th Anniversary of the Disestablishment of the Church of Ireland*, ed. Kenneth Milne and Paul Harron (Dublin: Four Courts Press, 2019), 14.

²⁹ Kevin B. Nowlan, "Disestablishment," in *Irish Anglicanism, 1869–1969: Essays on the Role of Anglicanism in Irish Life, Presented to the Church of Ireland on the Occasion of the Centenary of its Disestablishment, by a Group of Methodist, Presbyterian, Quaker and Roman Catholic Scholars*, ed. Michael Hurley (Dublin: Allen Figgis, 1970). The political intricacies of disestablishment have frequently been a focus of scholarship: for example, John D. Fair, "The Irish Disestablishment Conference of 1869," *The Journal of Ecclesiastical History* 26, no. 4 (1975): 379–94; P. M. H. Bell, "Disestablishment in Ireland and Wales," *Church Historical Society series* 90, no. 90 (1969): 110–57; Nowlan, "Disestablishment," 10–22; Hilary Larkin, *A History of Ireland, 1800–1922: Theatres of Disorder?* (London: Anthem Press, 2014), 138–40.

³⁰ Donald H. Akenson, *The Church of Ireland: Ecclesiastical Reform and Revolution, 1800–1885* (New Haven and London: Yale University, 1971).

³¹ Shearman, *How the Church of Ireland was Disestablished*, 6.

³² Hugh Shearman, *The Economic Results of the Disestablishment of the Irish Church* (unpub PhD thesis, Trinity College Dublin, 1944), 8. In *How the Church of Ireland was Disestablished*, Shearman described at 25 how the Commissioners of Church Temporalities "transformed overnight" into the Irish Land Commission.

lens to the work of the Ecclesiastical Commissioners as a quasi-judicial tribunal presided over by Lawson J, and examines the litigation pursued by Anglican clergy to enhance their claims to compensation for loss of tithe rentcharge and other sources of income such as surplice fees. Potential opposition to a measure which involved the appropriation of church revenues, and placing them into the hands of the state, was defused by the provision of generous compensation for the first generation of churchmen affected by the measure. One of the more unexpected long-term effects of the 1869 Act was in the law of cultural heritage. Dawson argues that the measure with the greatest impact ‘for the people of Ireland, then and now’ was section 25 which provided for the designation of ruinous or disused church as national monuments.

Religious governance is not just external in the form of regulation by parliamentary legislation. It is also internal in the form of regulation by an internal constitution. The internal constitutional design of the Catholic Church in the nineteenth and early twentieth centuries makes up the second theme of Oliver Rafferty’s chapter “The Legal and Constitutional Organization of the Catholic Church in Nineteenth-Century Ireland”. The Catholic Church had begun the process of modernising its internal constitutional structure at the Synod of Thurles in 1850 and the process was completed at the Plenary Synod of Maynooth in 1927 when the Irish bishops harmonised Irish ecclesiastical law with that of the Code of Canon Law of 1917. The Church of Ireland was also modernising its constitution. Following disestablishment, the Church of Ireland adopted the Constitution of the Church of Ireland in 1871. The operation of the Constitution of 1871 is the theme of Robert Marshall’s “The Constitution of the Church of Ireland in Action: Ritualist Litigation in a Disestablished Church 1871–1937”. The context is provided by the conflict between the dominant evangelical churchmanship and representatives of the high church tradition in Dublin and Belfast. Disapproval of the high church tradition led to litigation in the ecclesiastical courts (some of which spilled over into the High Court). Marshall’s study provides an account of the Church and its post-disestablishment judicature, reviewing the structure, personnel, rules of court and evidence of the internal Church courts.

Marking the publication of the draft Constitution of 1922, the *Catholic Register* wrote of the opportunity to “erect in Ireland a model Christian

state that shall be a light and an inspiration to a gross and sensual world".³³ Yet the Catholic Church firmly resisted the opportunity to influence or push for the implementation of Catholic values in the 1922 Constitution. The result was that the Constitution of 1922 was in John Whyte's famous phrase "a typical liberal-democratic document which would have suited a country of any religious complexion".³⁴ There have been various explanations as to why the Church stood back from involvement. Whyte himself saw the explanation in an "aloofness between church and state". Thomas Mohr's study sheds new light on the causes of the Church's abstentionist approach. It certainly was not aloofness on the part of the Church. The Catholic Church was satisfied by the completion of the nationalist project and had the political sense to know that this was not the time to be putting its own mark on the document. There was an awareness that this was a constitution that would have to be negotiated with the British government and that there was no way that the British government would abandon what remained of the Protestant and Southern Unionist populations to a triumphalist Catholic state. Rather than being haughty or "aloof", the Catholic Church, as Mohr points out, actively promoted the document as achieving independence and an effectively republican state. Dermot Keogh suggests that the Catholic Church's abstention was explained by the fact that there was "no real conflict of interest or ideology".³⁵ But the values which the Church shared were, in this phase of its relationship, for parts of the Constitution which were progressive rather than conservative in tone: universal suffrage; proportional representation; the referendum; female suffrage and free elementary education.

There was a change in tone between the Catholic Church of the 1930s compared with the Church of the 1920s. The Church of the 1930s had become more assertive than the Church of the 1920s. The 1930s marked a change in what Coffey and Ní Leathlobhair in their essay describe as church constitutionalism. By the 1930s, the Church took the opportunity to advance its agenda more aggressively. The archbishop of Dublin, John Charles McQuaid, and Edward Cahill, were deeply involved in the drafting of the Constitution. A draft of the 1922 Constitution was sent to Pope

³³ *Catholic Register*, June 22, 1922, 4.

³⁴ John H. Whyte, *Church and State in Modern Ireland, 1923–1970* (Dublin: Gill and Macmillan, 1971), 51.

³⁵ Dermot Keogh, *The Vatican, The Bishops and Irish Politics 1919–1939* (Cambridge: Cambridge University Press, 1986), 89–90.

Pius XI for consideration. As is well known, Pope Pius XI remained neutral: “*ni approvo ni non disapprovo; taceremo*”. Archival findings by Coffey and Ní Leathlobhair expose the role of Cardinal Pacelli, then Secretary of State (and later Pope Pius XII), and identify those aspects of the Constitution of which the Vatican approved and those which it disapproved. Pacelli was not happy with the quality of the drafting. He disapproved of the recognition of the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, and the Religious Society of Friends in Ireland as giving positive endorsement to what he described as “individual cults”. In what could have been, if they had known, an embarrassment to the clerics who had a hand in drafting the Constitution, Pacelli regarded some of the more explicit religious elements as not even Catholic, describing the wording of Article 44.1 (“the homage of public worship is due to Almighty God”) as theist.³⁶

Throughout the 1950s, a right-wing group, Maria Duce, took up the campaign to elevate the Catholic Church to the position of the One True Church. In response, Catholic liberal opinion took the position of defending the “special position of the Holy Catholic Apostolic and Roman Church”. This was superseded by a sudden change, first appearing between 1966 and 1967, in favour of a proposition for which there had never been significant support: removal of the special position of the Catholic Church from Article 44. The sheer speed in the change in values was remarkable. This was not a slow burning, gradual victory of a once minority liberal position. There had been little active pressure for the position in liberal circles. In fact, throughout the 1950s, from the famous *Irish Times* Liberal Ethic debate in 1950 onwards, Catholic liberals defended Article 44 and the special position of the Catholic Church. Even more remarkably, by 1969, the Catholic Church in Ireland had positively endorsed reform of Article 44 and the removal of the special position clause; it is unthinkable that it would have taken this position five years earlier. The approach of the Catholic Church of 1972 can be seen as redolent of the more constructive position in matters of constitutional reform adopted by the Church in 1922. The result was the Fifth Amendment. The Fifth Amendment is sometimes regarded as a slightly naïve attempt to win over a reluctant Unionist opinion to a United Ireland. Government thinking was more sophisticated. There was a recognition that Article 44 was being used diplomatically to embarrass the state particularly amongst the

³⁶Irish Const. art. XLIV § II.

member states in the European Economic Community; reform of Article 44 was seen as essential in order to win over European allies. The amendment of Article 44 marked an end to a tradition of enforcing religious preference through the Constitution in Ireland, a tradition which unites many of the studies in this volume. It did not, of course, bring an end to the tension between religion and law in Ireland; that is a source of conflict that is always likely to be a feature of Irish law and of Irish life.



CHAPTER 2

The Penal Laws: Origins, Purpose, Enforcement and Impact

Charles Ivar McGrath

I INTRODUCTION

This chapter provides an overview of the history of the penal laws in eighteenth-century Ireland. Public perception of these laws, and the people who enacted them, remains problematic even in the twenty-first century. The laws continue to resonate in popular memory, which feeds off two centuries of myth-making and political polemic. Nowadays, the starting point for the departure from fact and journey into folklore is often the online quotation of Edmund Burke's 1792 categorisation of the penal laws as "a machine of wise and elaborate contrivance; and as well fitted for the oppression, impoverishment and degradation of a people, and the debasement, in them, of human nature itself, as ever proceeded from the

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perverted ingenuity of man”.¹ Therefore, this chapter looks to overview existing academic knowledge on the key areas of the origins, purpose, enforcement and impact of the penal laws, while also assessing what research still needs to be carried out.

2 ORIGINS

Some historians talk of penal laws in Ireland in the sixteenth and early seventeenth centuries.² But the more traditional view of an Irish penal code—statutes enacted by parliament—is for the period 1695–1750. In Ireland, most of what occurred before the 1690s was based on proclamations which publicly declared in printed form the executive government’s decisions or orders in relation to particular matters at any given point in time. Proclamations in Ireland were issued by the Irish Chief Governor and Privy Council under the authority of the Crown’s prerogative rights—a powerful tool of government, but one that was becoming increasingly problematic and less useful in the long term in the early modern period.³

Some also view the Irish Acts of Supremacy of 1537⁴ and 1560⁵ and the Act of Uniformity of 1560⁶ as penal laws.⁷ These Acts were modelled upon, and imposed because of, the English Acts of Supremacy of 1534⁸ and 1559⁹ and Acts of Uniformity of 1552¹⁰ and 1559.¹¹ An associated oath of supremacy was first published in England in 1535 and later enshrined in law in clause 9 of the 1559 English version of the Act of

¹ *A Letter from the Right Honourable Edmund Burke, MP, ... to Sir Hercules Langrishe, ... on the subject of Roman Catholics of Ireland* (London, 1792), in *The Writings and Speeches of Edmund Burke*, ed. R. B. McDowell (9 vols, Oxford: Clarendon Press, 1981–2000), 9: 637.

² See for example R. Dudley Edwards, *Church and State in Tudor Ireland: A History of Penal Laws against Irish Catholics 1534–1603* (London: Longman, 1935), 192–303; S. A. Meigs, *The Reformations in Ireland: Tradition and Confessionalism, 1400–1690* (Dublin: Gill and Macmillan, 1997), 69–70, 90–1, 144.

³ See James Kelly and Mary Ann Lyons, eds., *The Proclamations of Ireland: 1660–1820* 5 vols (Dublin: Irish Manuscripts Commission, 2014), 1: xxxiii–xxxviii.

⁴ Act of Supremacy (Ireland), 1537, 28 Hen. 8, c. 5.

⁵ Act of Supremacy (Ireland), 1560, 2 Eliz. 1, c. 1.

⁶ Act of Uniformity (Ireland), 1560, 2 Eliz. 1, c. 2.

⁷ For these Acts being interpreted as penal laws, see, for example, Dudley Edwards, *Church and State in Tudor Ireland*, 14, 181–3; Meigs, *Reformations in Ireland*, 69–70, 90–1.

⁸ Act of Supremacy, 1534, 26 Hen. 8, c. 1.

⁹ Act of Supremacy, 1559, 1 Eliz. 1, c. 1.

¹⁰ Act of Uniformity, 1552, 5 & 6 Edw. 6, c. 1.

¹¹ Act of Uniformity, 1559, 1 Eliz. 1, c. 2.

Supremacy and clause 7 of the 1560 Irish version. The oath had to be taken by all public office holders and clergy and required the subscriber to acknowledge the royal supremacy over the Church and to renounce the spiritual and temporal jurisdiction and authority of the Pope. The Acts of Uniformity provided for the conformity of all subjects of the realm in their religious adherence and practice, with the 1559 and 1560 iterations including the imposition of a fine of 12d. for failure to attend Protestant religious service on Sundays and other holy days. These laws demonstrated in no uncertain terms the early modern concept of the church and state as an indivisible single entity and the understanding that those who were recusant in that respect were inherently problematic. It was the norm in the early modern world for the populaces of countries to be uniform in their religious adherence, replicating the confessional beliefs of the head of state. Those who adhered to other religions were seen as disloyal and a threat. Hence the Catholic kingdoms of Spain and France persecuted Protestants in the same manner that the Protestant sister kingdoms of England and Ireland persecuted Catholics.¹²

In one respect, however, Ireland was exceptional: it was the majority of the population, rather than the minority, who refused to conform to the state religion. As a result, Catholic political power remained stronger for longer and was able to resist the imposition of a penal code for many decades after such laws were enacted in England.

Following on from the various English Acts for Supremacy and Uniformity in 1534,¹³ 1552¹⁴ and 1559,¹⁵ a much more punitive and coercive corpus of laws was enacted by the English parliament from the 1570s through to the 1620s, targeting the minority Catholic populace of England and Wales.¹⁶ These laws were in part motivated by the belief in an international Catholic crusade against Protestant England, and hence

¹²For a more detailed consideration see C. I. McGrath, *Ireland and Empire, 1692–1770* (London: Pickering & Chatto, 2012), 15–23.

¹³Act of Supremacy, 1534, 26 Hen. 8, c. 1.

¹⁴Act of Uniformity, 1552, 5 & 6 Edw. 6, c. 1.

¹⁵Act of Supremacy, 1559, 1 Eliz. 1, c. 1.

¹⁶See, for example, an Act against the bringing in and putting in Execution of Bulls and other Instruments from the See of Rome, 1571, 13 Eliz. 1, c. 2; An Act to retain the Queen's Majesty's subjects in their due Obedience, 1581, 23 Eliz. 1, c. 1; An Act against Jesuits, Seminary Priests and such other like disobedient Persons, 1585, 27 Eliz. 1, c. 2; An Act against Popish Recusants, 1593, 35 Eliz. 1, c. 2. For extracts from and discussion of these Acts, see G. R. Elton, *The Tudor Constitution: Documents and Commentary* (2nd edition, Cambridge: Cambridge University Press, 1982), 419–42.

coincided with events such as the Papal excommunication of Elizabeth I in 1570, numerous Catholic plots to overthrow the English monarchy such as the Babington plot of 1586 and the Gunpowder plot of 1605, and the lengthy war with Spain in the last two decades of the sixteenth century. This penal code banished and outlawed Catholic clergy and imposed economic, religious and political restrictions upon English lay Catholics covering education, office-holding, property, the right to bear arms, place of residence, travel and religious worship.¹⁷ Further legislation was passed much later, including in 1673,¹⁸ 1678,¹⁹ 1689²⁰ and 1699–1700,²¹ in response to renewed fears of the perceived threat from Catholicism at home and abroad.²²

Owing to the continuing political power and influence of Irish Catholics during the seventeenth century, the norm in Ireland was for more fitful repression by temporary proclamations. These were usually issued in reaction to specific English crises or security concerns such as the Gunpowder and Popish Plots, and regularly reflected elements of existing English penal laws. For example, in 1605 a proclamation was issued for the banishment of all Jesuits and other regular clergy, while in 1673–4 and 1678–80

¹⁷M. A. Mullett, *Catholics in Britain and Ireland, 1558–1829* (Basingstoke: Macmillan, 1998), 1–2, 10, 13–14; John Morrill, “The Causes of the Penal Laws: Paradoxes and Inevitabilities” in *New Perspectives on the Penal Laws*, ed. John Bergin, Eoin Magennis, Lesa Ní Mhunghaile and Patrick Walsh (Dublin: Eighteenth-Century Ireland Society, 2011), 55–60, 64; John Miller, *Popery and Politics in England, 1660–1688* (Cambridge: Cambridge University Press, 1973), 52–6, 67–93, 100; Edward Norman, *Roman Catholicism in England* (Oxford: Oxford University Press, 1986), 12–15, 33–4.

¹⁸An Act for preventing Dangers which may happen from Popish Recusants, 1673, 25 Car. 2, c. 2 [First Test Act].

¹⁹An Act for the More Effectual Preserving the King’s Person and the Government by Disabling Papists from sitting in Either House of Parliament, 1678, 30 Car. 2, st. 2, c. 1 [Second Test Act].

²⁰An Act for removing Papists and reputed Papists from the Cities of London and Westminster and Ten Miles distance from the same, 1698, 1 Will. & Mar., c. 9; An Act for better securing the Government by disarming Papists and reputed Papists, 1689, 1 Will. & Mar., c. 15.

²¹An Act for the Further Preventing the Growth of Popery, 1698–9 [1700], 11 Will. 3, c. 4. Although a newly-elected Westminster parliament had commenced sitting in December 1698, sixty of the sixty-two Acts drafted during this parliament’s short life-time only received the Royal Assent in April 1700, including this latter penal law. See Henry Horwitz, *Parliament, Policy and Politics in the reign of William III* (Manchester: Manchester University Press, 1977), 268.

²²Miller, *Popery*, 90, 93, 121, 125, 163; Norman, *Catholicism*, 38–41; Mullett, *Catholics*, 145.

a series of orders were issued for the banishment of all regular clergy and bishops and the disarming of all Catholic laity.²³ The only exceptional period was in the 1650s, when the Protectorate Parliamentary Union meant that Irish Catholics fell under the rule of existing English penal laws. The Restoration of the monarchy in 1660, however, meant that there were still no actual penal laws on the Irish statute books.²⁴

The Irish government's regular re-issuing during the seventeenth century of many of these temporary proclamations demonstrated that governance by such measures was becoming less efficient. Local magistrates were less inclined to enforce such orders in the face of an overwhelmingly Catholic population, as evidenced in 1678 when a proclamation was issued "highly resenting the slackness of the justices ... in executing the late proclamation" for disarming Catholics.²⁵ It was for such reasons that the government on occasion toyed with the idea of legislating on the issue. For example, in 1613–15 proposals for bills banishing regular clergy and prohibiting foreign education were shelved in the face of forceful Catholic opposition in the Irish parliament.²⁶ In 1678–9 proposals were briefly considered for convening a parliament and presenting bills for banishing all Catholic bishops and regular clergy and for excluding Catholics and Protestant Dissenters from the House of Commons.²⁷

3 PURPOSE

It was not until the conclusion of the Irish war of 1689–91 that the way finally opened up for a wholly Protestant Irish parliament sitting in Dublin to follow the European and English examples and commence enacting a similar body of penal laws. The final collapse of Catholic power in Ireland in late 1691 was compounded by the enactment by the English parliament

²³ *Proclamation. By the King, James Rex, Dublin, 1605*, SP 63/217/127–8, the National Archives, London (TNA); Kelly and Lyons, *Proclamations*, 1: 306–10, 393–9, 403–4, 406–8, 418–19; C. I. McGrath, "Securing the Protestant Interest: The Origins and Purpose of the Penal Laws of 1695", *Irish Historical Studies* 30, no. 117 (1996): 27–8.

²⁴ Sean Connolly, *Religion, Law and Power: The Making of Protestant Ireland, 1660–1760* (Oxford: Clarendon Press, 1992), 17–24; Miller, *Popery*, 56, 67–93, 106, 121, 125, 163.

²⁵ Extract of letters, orders and proclamations, 1678, Add. MS 27382, ff 20–1, British Library, London (BL).

²⁶ John McCavitt, *Sir Arthur Chichester: Lord Deputy of Ireland 1605–16* (Institute of Irish Studies: Belfast, 1998), 178.

²⁷ J. E. Aydelotte, "The Duke of Ormond and the English Government of Ireland, 1677–85" (PhD thesis, Iowa University, 1975), 78.