

AN COIMBIANSIUN AR AN mBUNREACTH
THE CONVENTION ON THE CONSTITUTION

Sixth Report of the Convention on the Constitution

**The removal of the offence of
blasphemy from the Constitution**

January, 2014

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1. Chairman's Introduction

Introduction

On the weekend of 2nd and 3rd November 2013, the Convention held its seventh plenary meeting to discuss the final issue in the terms of reference as set out in the Resolution of the Houses of the Oireachtas. (Appendix A).

Background

Membership of the Constitutional Convention comprises 66 citizens, 33 parliamentarians and an independent Chairman. The 66 citizens were selected randomly by a polling company using the electoral register and on the basis of groups representative of Irish society and generally balanced in terms of gender, age, region, social class and occupational status.

Political parties and groups in Dáil Éireann and Seanad Éireann nominated representatives on the basis of their relative strengths in the Oireachtas. Political parties represented in the Northern Ireland Assembly were invited to nominate one representative each.

The Convention operates on the basis of the following principles; openness, fairness, equality, efficiency and collegiality.

The Convention continually strives to provide the best possible method of conducting its business in a manner which enhances the experience for Convention members and demonstrates that this model of deliberative democracy can achieve its ambitious objectives.

Over plenary weekends, the Convention receives a range of papers and presentations from academic and legal experts; and advocacy groups, in addition to the written submissions from members of the public.

At each meeting, the Convention aims to spend the greater proportion of its time in deliberations and discussion. This is primarily achieved through participation in round table discussions, supported by facilitators. Great effort is made to ensure that the briefing materials provide an appropriate level of information to enhance the quality of the discussions.

The Convention was given 12 months to complete its task.

For its part, the Government gave an undertaking to respond to the various recommendations of the Constitutional Convention within four months of the publication of its reports; to arrange a full debate in the Houses of the Oireachtas in each case; and if it accepts a recommendation that the Constitution be amended, to include a timeframe for the holding of the referendum.

Seventh Plenary Meeting

The purpose of this plenary meeting was to consider and make recommendations on the removal of the offence of blasphemy from the Constitution.

I think it would be reasonable to say that this topic was not an issue that would have been foremost in most people's minds. Indeed, many would not have been aware that such a clause existed in the Constitution.

From the very many submissions received by the Convention relating to blasphemy, two things were clear. Firstly, there seemed to be an overwhelming support for the removal of the clause. And secondly, the issue is regarded (by many of those who made submissions) as part of a much wider debate, including the role of God and religion in the Constitution and the separation of Church and State.

In line with the Convention's operating principles, including fairness and efficiency, it was important that Convention members were presented with both sides of this important debate – to remove or retain the clause – and that the fullest range of perspectives were heard and considered. In this regard the Convention was indebted to all those who participated in the 'external perspectives' panel.

The Convention received superb presentations from its experts on the blasphemy provision, covering its origins and historical context, its development over the years, what it was intended to do and how it actually operated in Ireland (and how this compares with other jurisdictions), and also how it relates to the existing legislation, specifically the Defamation Act 2009.

A range of options were discussed, from leaving the provision as it is, to removing it completely or replacing it with text more in line with current international norms. In addition to the legal perspective, the Convention was also presented with a philosophical approach to the issue, posing the question: what kind of society enables human beings to lead a good (ethical) life and to flourish individually and collectively?

Recommendations

The result of the ballot was that a clear majority of Convention members favoured the removal of the offence of blasphemy from the Constitution; its replacement by a general provision to include incitement to religious hatred; and the introduction a new set of detailed legislative provisions to include incitement to religious hatred.

This Report will be laid in the library of the Houses of the Oireachtas in due course and I look forward to the response of the Government within 4 months.

Acknowledgments

I would first like to congratulate all members of the Convention for their hard work and obvious commitment to the task at hand. The quality of the discussions, the openness to

the views expressed and the spirit in which they engaged with each other ensured the success of the weekend.

I am grateful to those many organisations and members of the public who sent submissions to the Convention, as well as those who watched the proceedings online from around the world.

I would like to thank the Academic and Legal Team, led by Prof. David Farrell, for assembling our advisory panel of experts and for their advice and support in advance of, and during, the meeting. The other members of the team are Dr. Jane Suiter, Dr. Clodagh Harris, Lia O’Hegarty and Dr. Eoin O’Malley. They were ably assisted in their work by two interns, Colm Byrne and Paul Deane.

The Convention members were greatly impressed by the presentations of Dr. Neville Cox, Dr. Eoin O’Dell and Prof. Maeve Cooke, all of whom willingly shared their impressive depth of knowledge in clear and concise language and fully engaged with members of the Convention.

I would also like to thank Mr. Michael Nugent, Mr. David Nash and Ms. Jane Donnelly (Atheist Ireland), Mr. Peter Ferguson (Humanist Association of Ireland), and Mr. Mark Kelly and Mr. Stephen O’Hare (Irish Council of Civil Liberties) who reflected views on one side of the proposal. A special thanks also goes to Dr. Ali Selim (Islamic Cultural Centre of Ireland) who provided an alternative perspective on the issue. And to Mr. Martin Gilligan, a member of the public who attended the Convention’s regional meeting in Galway and who subsequently and at short notice accepted an invitation to participate in the plenary meeting, presenting his views as a private citizen on why the clause should remain.

Tom Arnold
Chairman

2. Convention Recommendations

The result of the ballot was that a clear majority of Convention members favoured (a) the removal of the offence of blasphemy from the Constitution, (b) its replacement by a general provision to include a prohibition on incitement to religious hatred; and (c) the introduction of a new set of detailed legislative provisions to include incitement to religious hatred. The detailed ballot results were as follows:

1. Should reference to the offence of blasphemy in the Constitution be kept as it is?

Yes	No	Undecided/ no opinion
38%	61%	1%

2. In the event that the Convention favours change to the Constitution, should the offence of blasphemy be:

Removed altogether	Replaced with a new general provision to include incitement to religious hatred	Undecided/ no opinion
38%	53%	9%

3. Should there be a legislative provision for the offence of blasphemy?

Yes	No	Undecided/ no opinion
49%	50%	1%

4. In the event that the Convention favours a legislative provision, it should be:

The existing legislative blasphemy provision	A new set of detailed legislative provisions to include incitement to religious hatred	Undecided/ no opinion
11%	82%	7%

3. Convention Programme

AN COMBHANSIÚN AR AN AIBENREACTH
THE CONVENTION ON THE CONSTITUTION

Recommendations to the Houses of the Oireachtas on the removal of the offence of blasphemy from the Constitution.

Saturday

9.30 a.m. Welcome by Chair

Presentations by Experts

9.40a.m. Introduction and the Irish context – *Dr. Neville Cox (TCD)*

9.55a.m. Implications/options for change and a comparative study – *Dr. Eoin O'Dell (TCD)*

10.25 am Q&A

10.40am Democracy and Religion – *Prof. Maeve Cooke (UCD)*

10.55am Q&A

11.20 a.m. Roundtable discussion

1.45 p.m. Plenary session - participants to hear the emerging themes from the discussion at other tables

2.30 p.m. *External perspectives*
David Nash, Michael Nugent & Jane Donnelly (*Atheist Ireland*), Peter Ferguson (*Humanist Association of Ireland*), Mark Kelly & Stephen O'Hare (*Irish Council of Civil Liberties*), Dr. Ali Selim (*Islamic Cultural Centre of Ireland*), Mr. Martin Gilligan (*NUIG*)

3.30 p.m. Roundtable Discussion

4.30 pm Final Q&A

4.45 pm Agree ballot paper

5.30 p.m. Chair concludes proceedings for evening.

4. Amending the Constitution to remove the offence of blasphemy

Expert Presentations:

4.1 Introduction and the Irish context – Dr. Neville Cox (TCD)

Introduction

This paper presents a very brief history of the common law against blasphemy, It then considers the rationale behind the adoption into the Irish constitution of the 'crime' of blasphemy as well as the manner in which the constitutional term was interpreted in a Supreme Court case called *Corway v. Independent Newspapers*. Finally it looks at the legislative version of the constitutional crime in the Defamation Act 2009.

Defining Blasphemy: Historical Background

The Old Testament terms for blasphemy all stem from the words *Naats* and *Naqab* meaning to pierce or sting, and the word *Gadaph* meaning to cut into or revile, which suggests that within Judaism (and possibly Christianity) blasphemy involves an attack that causes pain. Moreover, the attack was one against God – not against believers. Similarly within Islamic thought, blasphemy involves a contemptuous or hostile attack (*Sabb*) either on God himself (*Sabb Allah*) or on the Prophet Mohammad (*Sabb al-Rasul*) or on other sacred things. In all cases, though, there must actually be an attack on the divine and not an attack on believers. The point is also worth making that, within Islam, this links with the more serious offence of *Riddah* (apostasy) namely moving or inducing others to move from the Islami faith.

What all of this means, is that, historically, properly understood, a *blasphemy law* is *one* which protects God; and probably therefore *where* a state has a law against blasphemy, what it is prohibiting is gross irreverence which offends against a fundamental element of public morality –the idea is that speech of this kind is intolerable for the state. Lest it be thought that this is a ludicrous *notion*, it is worth making *the point* that many societies have 'magic words' of this kind and prohibit their utterance because the speaking of such words, for whatever reason, is deemed by that society to be profoundly immoral and consequently profoundly offensive. Examples would include holocaust denial in *Germany* and, arguably, certain laws against hate speech with would prohibit the utterance of the so called 'N' word which is so powerful that people don't even like to have it come out of their mouths.

What it also means is that the various laws against blasphemy that have operated since the 17th century are not really blasphemy laws at all; rather they are laws against heresy and treason in one instance and laws aimed at protecting people from being offended on the other. In fact the nearest things to a blasphemy law which the 'west' has considered in about 500 years are the various resolutions passed by the United Nations between 1999-2011 seeking to counter so called 'defamation of religion'.

We now turn to consider the history of the common law offence of blasphemy, which is relevant from an Irish constitutional perspective in that it would appear to determine the meaning which the founders of the Constitution had in mind.

Early common law developments

The original rationale behind the first blasphemy statutes in England was the belief expressed within parliament that the great fire of London and the Plague were the result of an angry God smiting a society which had allowed the proliferation of unholy literature. Obviously also, in the early to mid 17th century, there was relatively little concern with the notion of individual rights nor was there the perception which currently exists, that in order for a particular act to be prohibited by the criminal law it must have some tangible negative impact on another person (as distinct from a possible impact on a possible entity – that is, God).

From 1676 it became clear (from a case called *Taylor*) that the rationale behind the blasphemy laws was, in large measure, to protect the Anglican religion which, as the established church, was part of the law of the land. In other words, the blasphemy laws at this point existed effectively as a form of law against treason. This had two main consequences. First, even simple and respectful denial of the fundamentals of the Anglican religion (including denial of the existence of God, cursing God, denying the Trinity etc) could constitute blasphemy and hence most of the defendants in blasphemy cases of the time were genuinely religious people who held an unorthodox view and expressed it in perfectly sensitive terms. Secondly, it was only the Anglican church that was protected; hence blasphemy against Roman Catholic doctrine or that of any other faith was perfectly fine. This wasn't simply sectarian discrimination. It was just that these faiths were not part of the law of the land and hence 'attacks' on these faiths would not raise the 'public order' concerns that would be raised if there was an equivalent attack on the established church.

By the late 19th century this position had changed for three reasons. First, there was a concern with the fact that a number of 'important' books such as Thomas Paine's *Age of Reason* had been targeted by the blasphemy laws. Secondly, there was an emerging view that the social order and the rule of law simply was not capable of being undermined by denials or even respectfully expressed criticism of aspects of Anglican doctrine. Thirdly there was an increasing concern with individual rights. Thus a new rationale was needed for the law and it was found to exist in the perceived need to protect religious sensitivities of devotees from scurrilous treatment of sacred things. This was the underlying justification of the English law of blasphemy (confirmed as such by the House of Lords in 1917) from this point until its apparent abolition in the last decade.

It is, of course, arguable that if the law was no longer focused on protecting the established church but was instead focused on protecting religious sensitivities, then, logically, it should no longer be confined to applying only to the established church. However in 1991, in a case involving Salman Rushdie's *The Satanic Verses*, the English High Court (wrongly, I would suggest) held that the old limitation – that blasphemy law only covered the established church – would still remain.

The Irish Constitutional Position

From an Irish perspective then, by the time the Constitution was promulgated in 1937, the understanding of blasphemy law was that it only covered speech likely to cause gross outrage to religious sensitivities. This is important because President de Valera stated that the constitutional offence simply replicated the old common law offence. Thus (and to the

extent his view is relevant) it may be taken that the constitutional offence of blasphemy was about protecting religious sensitivities and would only cover the publication of scurrilous material in such a way that religious sensitivities might be injured.

Since this time, there have been four important developments in so far as the Irish blasphemy laws are concerned.

First, various reform bodies, most notably the Law Reform Commission (LRC), suggested that the constitutionalisation of the crime of blasphemy is unwarranted. The LRC however suggested that because of its lack of practical application it would be a waste of money to hold a referendum exclusively to get rid of the blasphemy clause and hence such a referendum should only be held in conjunction with another referendum..

Second, the European Court of Human Rights (albeit using its 'margin of appreciation' doctrine)) held that it is not a violation of the right to freedom of expression to have an operative blasphemy statute on the books.¹

Third, the Defamation Act 1961 amongst other things provided a procedure whereby individuals could bring private prosecutions for blasphemy, although they would need to seek permission from the High Court to bring such a prosecution. Alternatively, the State could bring blasphemy prosecutions in the normal way.

Fourth, the final important development was the case of *Corway v. Independent Newspapers*. In this case, the applicant sought leave to bring a private prosecution for blasphemy. The High Court concluded that as the publication in question was unlikely to result in a breach of the peace, there were no grounds for granting the leave sought. The Supreme Court, on the other hand, took the view that the constitutional crime of blasphemy could not be applied by the courts because the concept of blasphemy evaded judicial definition. Thus the Court essentially called for legislative clarification of the term, and, in the absence thereof, the view was taken that the constitutional offence of blasphemy, while remaining intact, had become, in practical terms, unenforceable without legislation..

In 2009, the Defamation Act provided the legislative clarification of blasphemy sought in *Corway*. Importantly the Act did not 'create a new offence of blasphemy' in that, constitutionally, the offence existed since 1937. Rather it gave definition to the constitutional offence. Thus it is provided that a person who publishes or utters blasphemous matter shall be guilty of an offence (essentially a restatement of the constitutional provision) for which, on conviction on indictment, there is a maximum fine of €25,000. Significantly, there is no question of private (citizen) prosecution for the offence – a major change from the old dispensation and one which must surely be of benefit to publishers. The publication or utterance of blasphemous matter occurs where a publisher publishes or utters matter that is grossly abusive or insulting in relation to matters held

¹ At an international level, between 1999-2011 the United Nations passed a series of resolutions calling for the prohibition of defamation of religion. In 2011, however, it altered its approach, focusing on the need to protect individuals from religious discrimination rather than on protecting religion *per se*. Equally the Organisation of Islamic Conference (the second largest international organisation of this kind in the world after the United Nations) continues to pass resolutions and make calls for laws prohibiting defamation of religion

sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and intends, by the publication or utterance of the matter concerned, to cause such outrage. The requirement that the publisher be proven to have *intended* to cause such outrage will effectively mean that it will be very difficult successfully to prosecute the offence. Finally, it is a defence to the crime to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates. It may perhaps be argued that the terms of the statutory offence are so tightly drawn that it is highly unlikely to have any application in practice.

Conclusion

This then, is the current state of blasphemy law in Ireland. The Constitution continues to *prohibit* the publication of blasphemous material and the Defamation Act 2009 makes it clear what is meant by this: namely material which is grossly abusive or insulting on religious grounds –thus the law is aimed at protecting individuals from offense.

4.2 Implications/options for change and a comparative study – Dr. Eoin O'Dell (TCD)

1. Introduction

The last line of Article 40.6.1(i) of the Constitution provides that the “publication or utterance of blasphemous ... matter is an offence which shall be punishable in accordance with law” (the full text of the Article is set out in Appendix I). As my colleague, Prof Cox, has explained, this reflects the common law crime of blasphemous libel², but the decision of the Supreme Court in *Corway v Independent Newspapers* effectively rendered it a constitutional dead letter³, until it was revived by section 36 of the Defamation Act 2009 (notwithstanding the long line of official reports which have called for the abolition of the crime of blasphemy at Irish law or its excision from the Constitution⁴) (the full text of the section is set out in Appendix I). At this point, several questions arise, both Constitutional and statutory.

The Constitutional questions relate to Article 40.6.1(i); should it be

- (i) Left as it is;
- (ii) Amended by removing the reference to “blasphemous” matter;
- (iii) Amended by removing the last sentence; or
- (iv) Replaced in its entirety?

The Statutory questions relate to section 36 of the Defamation Act 2009; should it be

- (i) Left as it is;
- (ii) Amended to alter its scope;
- (iii) Repealed in its entirety; or
- (iv) Replaced in its entirety?

Of course, the answer to the Constitutional questions will likely have an impact on the answer to the Statutory questions. These answers may be influenced by the workability of Article 40.6.1(i), the compatibility of section 36 with Article 40.6.1(i) and with Article 10 of the European Convention on Human Rights (the full text of the Article is set out in Appendix I), and the experience in other jurisdictions.

In this submission, I will develop a standard structure of constitutional analysis (part 2), which I will then apply to the question of the compatibility of section 36 with the constitution (parts 3 and 4) and the European Convention on Human Rights (part 5). Against this background, I will sketch out routes to answer the above questions (parts 6 and 7).

² See the Law Reform Commission's *Consultation Paper on the Crime of Libel* (Dublin, 1991) and *Report on the Crime of Libel* (LRC 41-1991), and *Cox Blasphemy and the Law* (Edwin Mellen Press, NY, 2000).

³ [1999] 4 IR 484 (SC).

⁴ See, eg, Law Reform Commission *Report on the Crime of Libel* (LRC 41-1991) p 12, para 21; *Report of the Constitution Review Group* (The Stationery Office, Dublin, 1996) p 274; *Report of the Legal Advisory Group on Defamation* (Dublin, 2003) pp34-35, para 59.

2. Standard Structure

There is a reasonably standard structure of analysis to be applied when a provision such as section 36 is challenged as contrary to a Constitution or similar text such as the European Convention on Human Rights. It consists of four questions:

- First, is there a protected constitutional (or equivalent) right, such as the right to freedom of expression (as protected, for example, by Article 40.6.1(i) of the Constitution or Article 10 of the ECHR)?
- Second, does section 36 amount to a restriction upon it?
- Third, are there good reasons for the restriction?
- Fourth, if the reasons are subjected to review or scrutiny, are they sufficient to justify the restriction?

Hence, if there is a restriction upon the right to freedom of expression, the State must have a substantial reason to justify the restriction which can withstand scrutiny or review.

3. Section 36 and Article 40.6.1(i)

The four stages of this common pattern of analysis can be applied to Article 40.6.1(i) of the Constitution, though with difficulty. Consider, again, whether section 36 is compatible with Article 40.6.1(i).

First, as to the right to freedom of expression in Article 40.6.1(i), it is not at all as clearly stated as it is in other constitutional (or equivalent) documents. In particular, Article 10(1) ECHR says that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...”. However, Article 40.6.1(i) refers to “the right of citizens to express freely their convictions and opinions”; not to put too fine a point on it, this language has tied the courts up in knots, and decisions which confined its protection to a narrow literal reading of the article in general⁵ and of “convictions and opinions”⁶ in particular have only recently been transcended by a more purposive protection of freedom of expression.⁷

Second, if there is a right to freedom of expression in Article 40.6.1(i), is section 36 a restriction upon it? There is no doubt that it is.

Third, if so, then it will be for the State to establish its (substantial, pressing) reasons for the restriction. Unlike the ECHR (which iterates a closed list of such reasons), Article 40.6.1(i) provides a partial (or perhaps mixed, certainly neither completely closed nor completely open) list of substantial reasons for the restriction. On its face, the Article mentions public order (twice), morality (twice), the common good, the authority of the State, blasphemy, sedition, and indecency; and these could be presented as examples of specific reasons upon

⁵ *The State (Lynch) v Cooney* [1982] IR 337 (SC).

⁶ *AG v Paperlink* [1984] ILRM 373 (Costello J)

⁷ *Irish Times v Ireland* [1998] 1 IR 359 (SC), *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12 (SC), *Mahon v Post Communications* [2007] 3 IR 338, [2007] 2 ILRM 1; [2007] IESC 15 (29 March 2007), *Doherty v The Referendum Commission* [2012] IEHC 211 (06 June 2012).

which the State could rely to justify restrictions upon the right to freedom of expression. However, unlike the position with Article 10(2) of the ECHR, which contains a closed list of such reasons, the courts have shown no signs of treating this list from Article 40.6.1(i) as closed.⁸

As a consequence, it is – at best – a partial list of reasons which could justify restrictions upon speech. However, from among its stated reasons, morality and blasphemy will both easily provide textual reasons to justify section 36.

Even so, there are several problems with this analysis. The language in which Article 40.6.1(i) expresses its reasons for restrictions upon speech is, to say the least, unusual. For example, in similar provisions in other constitutional or similar documents, the rights are stated first, and the restrictions come afterwards. But, in the Irish context, before we even get to the rights protected by Article 40.6.1 (expression, assembly, and association), we are told that they are guaranteed to citizens “subject to public order and morality”. Again, the long second sentence of Article 40.6.1(i) reinforces these restrictions and adds another (“the authority of the state”). Moreover, in what must be a rare provision in a speech clause in the constitution of a democratic society, Article 40.6.1(i) concludes with three constitutional crimes.

All of this bears contrast with Article 10 of the ECHR, where the right is stated in Article 10(1) and the reasons for restriction are listed in a straightforward way in Article 10(2). Moreover, the Article 40.6.1(i) reasons are especially particular, whereas the Article 10(2) ECHR reasons are cast at a much higher degree of generality. Hence, since the matters iterated on the face of Article 40.6.1(i) which might be seen as reasons for restrictions are not really expressed in those terms, it is only with difficulty that the courts might come to see them in this way; and in the meantime, we must muddle through with a disorderly Article 40.6.1(i).

Fourth, if section 36 is an infringement upon Article 40.6.1(i), and if the references to morality and blasphemy provide (substantial, pressing) reasons for the restriction, then the Court will then subject that reason to review or scrutiny. The European Convention on Human Rights expressly requires that such restrictions be “necessary”, and the Court has held that restrictions will be necessary only if they are proportionate; that is to say:

(i) the restriction must be rationally connected with, and carefully designed to give effect to, the reason for the restriction; Indeed, in *Murphy v IRTC* (n6 above), the Supreme Court accepted reasons to justify restrictions which are not to be found in the text of Article 40.6.1(i).

(ii) the restriction must impair the right in question as little as possible; and

⁸ Indeed, in *Murphy v IRTC* (n6 above), the Supreme Court accepted reasons to justify restrictions which are not to be found in the text of Article 40.6.1(i).

(iii) there must be proportionality (an appropriate correspondence) between the effects of the restriction and the reason being relied upon to justify it.

Although there is no textual justification for the proportionality standard of review in Article 40.6.1(i), the Supreme Court has nevertheless recently adopted it.⁹ The question then becomes whether section 35 satisfies this test or not. One answer to this question is suggested by an application in the English courts to take a private prosecution for blasphemy arising out of the BBC's broadcast of Jerry Springer – The Opera. The application failed; and the Court held that the common law offence of blasphemous libel is necessary and proportionate in ECHR Terms only because “undermining society or occasioning civil strife or unrest” is an essential element of the offence:

The Article 10(2) basis for the crime of blasphemous libel is best found, as it seems to us, in the risk of disorder amongst, and damage to, the community generally.¹⁰

In short, therefore, as a matter of principle, if there is a restriction upon the right to freedom of expression, the State must have a good reason to justify the restriction which can withstand review (on a proportionality test). It is not easy to make Article 40.6.1(i) conform to this pattern, but it is possible; and if it is applied in a challenge to section 36, the question will be whether the section is proportionate.

However, it is unclear whether this pattern of analysis can be followed in the context of the last line of the Article, which makes blasphemy a crime.

4. Blasphemy and Article 40.6.1(i)

The specificity of the last sentence of Article 40.6.1(i) makes analysis difficult: constitutions generally speak at a relatively abstractly level, sketching headlines and general principles, rather than descending to specifics and detail, which are properly matters of legislation. That sentence sits rather uneasily with the rest of Article 40.6.1(i). Although the Article is not a particularly good example of a constitutional clause protecting freedom of speech, nevertheless, for all its faults, the Courts are increasingly explaining it as, in essence, a general protection of freedom of expression. However, the last sentence changes the Article, by shifting its focus away from the protection of freedom of expression and towards the language of undefined criminal offences. Moreover, it is not clear whether the nature of the last sentence, which mandates a blasphemy offence, can accommodate either the standard four-stage analysis set out above in general, or the proportionality stage of the analysis in particular.

⁹ *Murphy v IRTC* (n6 above). Indeed, in the earlier *State (Lynch) v Cooney* (n4 above), the Supreme Court did not perceive that Article 40.6.1(i) required any standard of review; and in *Carrigaline Community Television v Minister For Transport, Energy and Communications* (High Court, unreported, 10 November 1995) Keane J said that there was no room in Article 40.6.1(i) for a proportionality analysis.

¹⁰ *R (on the application of Green) v City of Westminster Magistrates' Court* [2007] EWHC 2785 (Admin) (05 December 2007) [17] (Hughes LJ and Collins J) (leave to appeal to the House of Lords refused: 5 March 2008). On the public order reasoning, see *Gündüz v Turkey* 35071/97, [2003] ECHR 652 (4 December 2003), where a conviction for expressing radical anti-secularist Islamic comments during a television debate was held to infringe Article 10, as the defence of sharia was unaccompanied by a call for violence to establish it.

5. Section 36 and Article 10

The four stages of the common pattern of analysis set out above can be applied to Article 10 ECHR with greater ease than it can to Article 40.6.1(i) of the Constitution. Consider, again, whether section 35 is compatible with Article 10 ECHR.

First, as to the right to freedom of expression in Article 10(1) – unlike Article 40.6.1(i) – is very clearly stated: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...”.

Second, is section 36 a restriction upon this clearly stated right? There is no doubt that it is.

Third, if so, then it will be for the State to establish its (substantial, pressing) reasons for the restriction. Unlike the messy Article 40.6.1(i), Article 10(2) ECHR provides a comprehensive, complete and closed list of such legitimate reasons for restrictions. They must be substantial – in the European Court of Human Rights, they are described as having to rise to the level of “pressing social needs”. According to Article 10(2), restrictions may be imposed (among other reasons) “... for the prevention of disorder ..., for the protection of ... morals, [or] for the protection of the ... rights of others ...”, and Member States have relied on public order, morality, and the rights of the religiously observant to the free exercise of their religion as justifications for blasphemy laws.

Fourth, because Article 10(2) requires that any such reason or justification be “necessary in a democratic society”, the court will review whether the reason is “necessary” or proportionate to the legitimate reason relied upon. There is no uniform European conception of intimate personal matters such as morality or religion, so the Court affords to the Member States some initial latitude to assess the proportionality of a restriction on these grounds.¹¹ The Court takes the view that national authorities are usually better placed to determine the particular circumstances of an individual case; and it often shows greater forbearance where important national interests and diverse social and moral convictions are at stake. The Court calls this latitude or forbearance a margin of appreciation; but it retains final oversight, and it is for the Court to give a final determination on whether a restriction is proportionate or not.

Against that backdrop, in blasphemy cases, the Court has held that, if the publication is a contribution to a wide-ranging and on-going debate, then any restriction is likely to be a disproportionate restriction on the right to freedom of expression.¹² On the other hand, if

¹¹ *Kokkinakis v Greece* 14307/88, (1994) 17 EHRR 397, [1993] ECHR 20 (25 May 1993); *Müller v Switzerland* 10737/84, (1991) 13 EHRR 212, [1988] ECHR 5 (24 May 1988); *Murphy v Ireland* 44179/98 (2003) 38 EHRR 212, [2003] ECHR 352 (10 July 2003).

¹² See *Gündüz v Turkey* (n above). In *Giniewski v France* 64016/00, [2006] ECHR 82 (31 January 2006), a conviction for the publication of an article which was virulently critical of Christianity infringed Article 10. In *Klein v Slovakia* 72208/01, [2006] ECHR 909 (31 October 2006), a conviction for vulgar criticism of an Archbishop infringed Article 10.

the publication is gratuitously offensive, or insulting, or is likely to incite hatred or disorder, then any restriction is likely to be proportionate.¹³

The analysis of blasphemy under Article 10 ECHR is much more straightforward than under Article 40.6.1(i) of the Constitution, and that raises the question whether the latter provision should be repealed and replaced by a provision modelled on the former provision.

6. The Constitutional Questions

As set out in part 1, above, the Constitutional questions relate to Article 40.6.1(i); should it be

- (i) Left as it is;
- (ii) Amended by removing the reference to “blasphemous” matter;
- (iii) Amended by removing the last sentence; or
- (iv) Replaced in its entirety?

(i) Leave Article 40.6.1(i) as it is

The argument in favour of this course of action is that the Courts are now developing clear principles for its interpretation and application.¹⁴ The argument against it is that, no matter how hard they try, they cannot make a silk purse out of a sow’s ear.

(ii) Amend Article 40.6.1(i) by removing the reference to “blasphemous” matter

The argument in favour of this course of action is that the removal of this contentious reference means that the debate on the Statutory questions (part 7, below) can be conducted in their own terms. The argument against it is that it is too limited an amendment, leaving the other constitutional crimes intact.

(iii) Amend Article 40.6.1(i) by removing the last sentence

The argument in favour of this course of action is that it removes a quite bizarre provision. On this view, it is extraordinary that a constitution of a democratic state should create a constitutional speech crime, but, in the last sentence of Article 40.6.1(i), Bunreacht na hÉireann creates not one but three of them (not merely blasphemy, but sedition and indecency as well)! It may very well be that there are good reasons for regulating such types of speech, but creating a constitutional crime is simply not the way to do so. On the other hand, the argument against removing the last sentence of Article 40.6.1(i) is that there are good social and political reasons for providing constitutional status for the principle that the publication or utterance of blasphemous, seditious, or indecent matter should be offences punishable in accordance with law.

¹³ In *Otto-Preminger-Institut v Austria* 13470/87, (1995) 19 EHRR 34, [1994] ECHR 26 (20 September 1994), the forfeiture of irreligious movie *Das Liebeskonzil* (*Council in Heaven*) by Werner Schroeter on the grounds that it disparaged religious doctrines did not infringe Article 10. In *Wingrove v UK* 17419/90, (1997) 24 EHRR 1, [1996] ECHR 60 (25 November 1996), the refusal to certify for distribution the movie *Visions of Ecstasy*, on the grounds that sexual imagery focused on the figure of the crucified Christ constituted blasphemy, did not infringe Article 10. In *IA v Turkey* 42571/98 [2005] ECHR 590 (13 September 2005), a conviction for an insulting and abusive attack on the Prophet of Islam did not infringe Article 10.

¹⁴ See n6 above.

(iv) Replace Article 40.6.1(i) in its entirety

The argument in favour of this course of action is that the text of Article 40.6.1(i) is ill-adapted to function as a free speech guarantee in a modern democratic society. On this view, the final sentence is just one symptom of a much wider malaise. Hence, for example, given how far Article 40.6.1(i) deviates from the standard pattern of analysis set out above, the Constitution Review Group recommended that it be deleted and replaced by most of the text of Article 10.¹⁵

In modern best practice, where the right ought to be stated first, and restrictions follow, it would be inappropriate to begin a modern restatement of a right to freedom of expression by making it subject to restrictions (such as “public order or morality”) before even stating the right. Hence, if Article 40.6.1(i) is to be deleted and replaced by text modelled on Article 10 ECHR, it would be more appropriate for that new text to be inserted as a new Article 40.6.3.

Having regard to Article 10 ECHR, to other international freedom of expression guarantees, and to the language of Article 40.6.1(i), a new Article 40.6.3 might go as follows:

Everyone has the right to freedom of thought, belief, speech, communication and expression. This right includes the freedom to seek, receive, hold and impart convictions, opinions, information and ideas of any kind in any form without interference by public authority. This right also includes the freedom of the press and of other organs of public opinion, and of other media of communication.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such necessary limits as are prescribed by law and proportionate only to the interests of national security, territorial integrity, public safety or the common good, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or the rights of others, preventing the disclosure of information entitled to a reasonable expectation of privacy or otherwise received in confidence, or maintaining the authority and impartiality of the judiciary.

The argument against replacing Article 40.6.1(i) in its entirety is that the Courts are now developing clear principles for its interpretation and application,¹⁶ and that specific problems (such as any associated with the final sentence) can be resolved on an issue-by-issue basis.

7. The Statutory Questions

As set out in part 1, above, the Statutory questions relate to section 36 of the Defamation Act 2009; should it be

(i) Left as it is;

¹⁵ See n3 above, pp268-281.

¹⁶ See n6 above.

- (ii) Amended to alter its scope;
- (iii) Repealed in its entirety; or
- (iv) Replaced it in its entirety?

(i) Leave section 36 as it is

The arguments here are largely matters of policy and politics than of law. In this respect, Appendix II sets out a table of European laws on blasphemy, religious insult, and incitement to religious hatred.

However, if it is decided that there should be no amendment to Article 40.6.1(i) of the Constitution, then the argument in favour of leaving section 36 untouched is that Corway points to a gap which that section fills. On the other hand, even if Article 40.6.1(i) remains unamended, and a blasphemy offence is required, the argument against leaving section 36 untouched is that legislation dealing with the civil law of defamation is no place for a criminal offence of blasphemy.

(ii) Amend section 36 to alter its scope

Again, the arguments here are largely matters of policy and politics than of law. However, there is one important legal argument here. We have seen above that in arguments relating to Article 10, blasphemy provisions have been justified on the grounds of public order, morality, and the rights of the religiously observant to the free exercise of their religion; and that whilst contributions to wide-ranging and ongoing debates are likely to be protected by Article 10, publications that are gratuitously offensive, or insulting, or likely to incite hatred or disorder, are not likely to be protected by Article 10. However, whilst section 36 is directed to “grossly abusive or insulting” publications which cause “outrage among a substantial number of the adherents of a religion, it makes no mention of the likelihood of public disorder. Recall, in particular, at this point, that the UK court in the Jerry Springer case considered that

The Article 10(2) basis for the crime of blasphemous libel is best found, as it seems to us, in the risk of disorder amongst, and damage to, the community generally.¹⁷

If section 36 is to be retained, it might therefore be thought prudent that it be amended to include a requirement of such a risk of disorder, perhaps as follows:

- (2) 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 sufficient outrage among a substantial number of the adherents of that religion that it gives rise to an imminent risk of public disorder, and
 - (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage and risk of public disorder.

(iii) Repeal section 36 in its entirety

One argument in favour of the repeal of section 36 is that the work is effectively already being done by the Prohibition of Incitement to Hatred Act, 1989, which prohibits hatred

¹⁷ See n9 above

against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.

Any repeal of section 36 would raise questions as to whether section 37 (relating to the seizure of copies of blasphemous statements) should be retained or amended. For example, if section 36 is to be repealed on the grounds that the Incitement to Hatred legislation already covers that ground, then the forfeiture power in section 11 of the that latter legislation would cover the same ground as section 37, and that could safely be repealed too.

(iv) Replace section 36 in its entirety

The Report of the Legal Advisory Group on Defamation¹⁸ is the basis for the Defamation Act 2009. The Report recommended the abolition of the common law crimes of libel, much as section 35 of the 2009 Act does. But the Report also recommended that matters such as blasphemy, sedition and indecency should not be dealt with in the context of a defamation statute even if they should be criminalised in their own terms in another statutory vehicle. The Report also went to recommend the enactment of an offence of publication of gravely harmful statements (see Head 66 of the Defamation Bill, 2003 in the Report; as set out in Appendix I, below). This offence could replace section 36. If so, then it would need to be considered whether section 37 ought to be amended or replaced.

A second means of replacing section 36 (and, if necessary, section 37) would be to expand on the reference to hatred on religious grounds to be found in the Incitement to Hatred legislation (above). One example is provided by the UK's Racial and Religious Hatred Act 2006. It is a comprehensive piece of legislation, and it is set out in full in Appendix III below.

¹⁸ See n3 above

Dr. Eoin O'Dell Presentation - Appendix I

Bunreacht na hEireann / Constitution of Ireland

Article 40 (Personal Rights) section 6

1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

i The right of the citizens to express freely their convictions and opinions

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

ii The right of the citizens to assemble peaceably and without arms.

Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

iii The right of the citizens to form associations and unions.

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

2° Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

[There is no subsection 3°; the next provision is Article 41 (The Family)].

European Convention on Human Rights and Fundamental Freedoms

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Part 5 of the Defamation Act 2009

Section 35 (Abolition of certain common law offences)

The common law offences of defamatory libel, seditious libel and obscene libel are abolished.

Section 36 (Publication or utterance of blasphemous matter)

(1) A person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on indictment to a fine not exceeding €25,000.

(2) 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.

(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates.

(4) In this section “religion” does not include an organisation or cult—

(a) the principal object of which is the making of profit, or

(b) that employs oppressive psychological manipulation—

(i) of its followers, or

(ii) for the purpose of gaining new followers.

Section 37 (Seizure of copies of blasphemous statements)

Head 66 of the Defamation Bill, 2003 proposed by the Legal Advisory Group on Defamation (2003) would have replaced the common law offences of defamatory libel, blasphemous libel, obscene libel and seditious libel with an offence of publication of gravely harmful statements, as follows:

- (1) A person who, without lawful authority or reasonable excuse:
- (a) intentionally and with malice publishes or causes to be published by any means whatsoever to one or more persons other than the natural person the subject of the matter published a false statement, and
 - (b) that statement was calculated to gravely damage and has gravely damaged the reputation of that natural person, and
 - (c) that statement was calculated to cause and has caused serious harm to the mind of the natural person the subject of the statement shall be guilty of an offence.

Appendix II

Collection of European national laws on blasphemy, religious insult and incitement to religious hatred¹⁵³

from "Blasphemy, insult and hatred: finding answers in a democratic society" (Venice Commission; Council of Europe Publishing; 2010)

Summary table

COUNTRY	Blasphemy	Insults to religious beliefs or doctrines	Interfering with religious worship and/or freedom of religion	Sacrilege against an object of worship	Inciting discrimination or religious hatred
Albania			x		x
Andorra		x	x	x	
Armenia					x
Austria	x		x	x	x
Azerbaijan			x		x
Belgium			x	x	x
Bosnia and Herzegovina			x		x
Bulgaria			x		x
Croatia		x			x
Cyprus		x	x		x
Czech Republic		x			x
Denmark	x	x		x	x
Estonia			x		x
Finland	x	x	x	x	x
France			x		x
Georgia			x		
Germany		x	x		x
Greece	x	x	x	x	x
Hungary			x	x	x
Iceland		x	x		x

¹⁵³ Non-official translation.

Blasphemy, insult and hatred

COUNTRY	Blasphemy	Insults to religious beliefs or doctrines	Interfering with religious worship and/ or freedom of religion	Sacrilege against an object of worship	Inciting discrimination or religious hatred
Ireland	x				x
Italy	x	x	x	x	x
Latvia			x		x
Liechtenstein	x		x	x	x
Lithuania		x	x		x
Luxembourg			x	x	x
Malta					x
Moldova					x
Monaco			x	x	x
Montenegro			x		x
Netherlands	x	x	x	x	x
Norway		x	x		x
Poland		x	x	x	x
Portugal		x	x	x	x
Romania			x		x
Russian Federation		x	x	x	x
San Marino	x		x	x	
Serbia					x
Slovakia		x			x
Slovenia			x		x
Spain		x	x	x	x
Sweden					x
Switzerland		x	x	x	x
"The former Yugoslav Republic of Macedonia"			x		x
Turkey		x			x
Ukraine		x	x	x	x
United Kingdom		x			x

Appendix III

Racial and Religious Hatred Act 2006

2006 CHAPTER 1

An Act to make provision about offences involving stirring up hatred against persons on racial or religious grounds.

[16th February 2006]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Hatred against persons on religious grounds

The Public Order Act 1986 (c. 64) is amended in accordance with the Schedule to this Act, which creates offences involving stirring up hatred against persons on religious grounds.

2 Racial and religious hatred offences: powers of arrest

In section 24A of the Police and Criminal Evidence Act 1984 (c. 60) (arrest without warrant by persons other than constables) after subsection (4) add—

“(5) This section does not apply in relation to an offence under Part 3 or 3A of the Public Order Act 1986.”

3 Short title, commencement and extent

- (1) This Act may be cited as the Racial and Religious Hatred Act 2006.
- (2) This Act comes into force on such day as the Secretary of State may appoint by order made by statutory instrument.
- (3) An order under subsection (2) may make—
 - (a) such supplementary, incidental or consequential provision, or
 - (b) such transitory, transitional or saving provision,as the Secretary of State considers appropriate in connection with the coming into force of this Act.
- (4) This Act extends to England and Wales only.

SCHEDULE

Hatred against persons on religious grounds

In the Public Order Act 1986 (c. 64), after Part 3 insert—

“Part 3A

Hatred against persons on religious grounds

Meaning of “religious hatred”

29A Meaning of “religious hatred”

In this Part “religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

Acts intended to stir up religious hatred

29B Use of words or behaviour or display of written material

- (1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.
- (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.
- (3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.
- (4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.
- (5) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

29C Publishing or distributing written material

- (1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred.

- (2) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

29D Public performance of play

- (1) If a public performance of a play is given which involves the use of threatening words or behaviour, any person who presents or directs the performance is guilty of an offence if he intends thereby to stir up religious hatred.
- (2) This section does not apply to a performance given solely or primarily for one or more of the following purposes—
- (a) rehearsal,
 - (b) making a recording of the performance, or
 - (c) enabling the performance to be included in a programme service;
- but if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purpose mentioned above.
- (3) For the purposes of this section—
- (a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,
 - (b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction, and
 - (c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;
- and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.
- (4) In this section “play” and “public performance” have the same meaning as in the Theatres Act 1968.
- (5) The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under section 2 of that Act—
- section 9 (script as evidence of what was performed),
 - section 10 (power to make copies of script),
 - section 15 (powers of entry and inspection).

29E Distributing, showing or playing a recording

- (1) A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening is guilty of an offence if he intends thereby to stir up religious hatred.
- (2) In this Part “recording” means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public.
- (3) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be included in a programme service.

29F Broadcasting or including programme in programme service

- (1) ~~If a programme involving threatening visual images or sounds is included in a programme service, each of the persons mentioned in subsection (2) is guilty of an offence if he intends thereby to stir up religious hatred.~~
- (2) The persons are—
 - (a) the person providing the programme service,
 - (b) any person by whom the programme is produced or directed, and
 - (c) any person by whom offending words or behaviour are used.

Inflammatory material

29G Possession of inflammatory material

- (1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to—
 - (a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or
 - (b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another,is guilty of an offence if he intends religious hatred to be stirred up thereby.
- (2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may reasonably be inferred that he has, in view.

29H Powers of entry and search

- (1) If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of written material or a recording

in contravention of section 29G, the justice may issue a warrant under his hand authorising any constable to enter and search the premises where it is suspected the material or recording is situated.

- (2) If in Scotland a sheriff or justice of the peace is satisfied by evidence on oath that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of section 29G, the sheriff or justice may issue a warrant authorising any constable to enter and search the premises where it is suspected the material or recording is situated.
- (3) A constable entering or searching premises in pursuance of a warrant issued under this section may use reasonable force if necessary.
- (4) In this section “premises” means any place and, in particular, includes—
 - (a) any vehicle, vessel, aircraft or hovercraft,
 - (b) any offshore installation as defined in section 12 of the Mineral Workings (Offshore Installations) Act 1971, and
 - (c) any tent or movable structure.

29I Power to order forfeiture

- (1) A court by or before which a person is convicted of—
 - (a) an offence under section 29B relating to the display of written material, or
 - (b) an offence under section 29C, 29E or 29G,shall order to be forfeited any written material or recording produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates.
- (2) An order made under this section shall not take effect—
 - (a) in the case of an order made in proceedings in England and Wales, until the expiry of the ordinary time within which an appeal may be instituted or, where an appeal is duly instituted, until it is finally decided or abandoned;
 - (b) in the case of an order made in proceedings in Scotland, until the expiration of the time within which, by virtue of any statute, an appeal may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned.
- (3) For the purposes of subsection (2)(a)—
 - (a) an application for a case stated or for leave to appeal shall be treated as the institution of an appeal, and
 - (b) where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned.

- (4) For the purposes of subsection (2)(b) the lodging of an application for a stated case or note of appeal against sentence shall be treated as the institution of an appeal.

29J Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Supplementary provisions

29K Savings for reports of parliamentary or judicial proceedings

- (1) Nothing in this Part applies to a fair and accurate report of proceedings in Parliament or in the Scottish Parliament.
- (2) Nothing in this Part applies to a fair and accurate report of proceedings publicly heard before a court or tribunal exercising judicial authority where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful.

29L Procedure and punishment

- (1) No proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General.
- (2) For the purposes of the rules in England and Wales against charging more than one offence in the same count or information, each of sections 29B to 29G creates one offence.
- (3) A person guilty of an offence under this Part is liable—
- (a) on conviction on indictment to imprisonment for a term not exceeding seven years or a fine or both;
 - (b) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

29M Offences by corporations

- (1) Where a body corporate is guilty of an offence under this Part and it is shown that the offence was committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

- (2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as it applies to a director.

29N Interpretation

In this Part—

“distribute”, and related expressions, shall be construed in accordance with section 29C(2) (written material) and section 29E(2) (recordings);

“dwelling” means any structure or part of a structure occupied as a person's home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose “structure” includes a tent, caravan, vehicle, vessel or other temporary or movable structure;

“programme” means any item which is included in a programme service;

“programme service” has the same meaning as in the Broadcasting Act 1990;

“publish”, and related expressions, in relation to written material, shall be construed in accordance with section 29C(2);

“religious hatred” has the meaning given by section 29A;

“recording” has the meaning given by section 29E(2), and “play” and “show”, and related expressions, in relation to a recording, shall be construed in accordance with that provision;

“written material” includes any sign or other visible representation.”

5. Convention Discussion

A range of arguments were advanced in favour of leaving the constitutional provision on blasphemy unchanged. A primary one was that it protects religious belief and sensibilities, and deters disrespect of religion. Thus its removal may imply an attack on religious beliefs, and might suggest the downgrading of religion as a value worth recognising. Keeping the provision makes people think before they act, some participants said. Some argued that the provision serves to protect Ireland's newly multicultural society, providing protection to multiple religious beliefs.

Another point was that the provision does not do any harm as it stands, and does not cause great offence to anyone, and so more harm could be done by removing it than by keeping it. Thus the status quo is preferable. In addition, if taken out, it would be difficult to have it reinserted into the Constitution. Removing it may have unforeseen consequences, and may 'open up a can of worms' as one participant put it. Some argued that it is best kept as a constitutional provision rather than merely as legislation, as the former affords higher protection than the latter. In addition, others said, the Preamble to the Constitution, with its religious references, leads logically to the provision. It gives recognition to the spiritual content to our lives, as one put it.

One of the main arguments in favour of removing the article from the Constitution was that it is unworkable, in that neither the courts nor the legislature have successfully defined what it means. As one participant put it, the provision and the word itself is too 'woolly' in its meaning. Others argued that the provision does not protect non-believers, yet makes it too easy to claim that offence is caused against religious belief. The increase in non-believers was cited in this context. Supporters of removing or amending the article voiced a general unease with blasphemy being a criminal offence. Instead, freedom of opinion for all should be respected.

Others suggested that sufficient legislation already exists in this area. Protections already exist. Some went further again and said that such a provision has no place in the laws of a country, citing separation of church and state as a key principle. The provision would not be included if the Constitution were written today, and the law belongs to a different time, and there are better ways in which to protect religion and religious belief, some said.. Others based arguments on the idea that the provision is exclusionary – it excludes certain sectors of society, and elevates religion over other forms of discrimination

In terms of amending Article 40.6 of the Constitution, the suggested amendment put forward by Eoin O'Dell received broad support from across the tables. Others suggested replacing the blasphemy clause with a new prohibition on incitement to hatred provision.

On the question of whether the legislation (as distinct from the constitutional clause) should be kept, deleted or amended, several participants said they simply did not understand enough about it to make a judgement. Arguments in favour of keeping the legislation unchanged included the idea that people know where they stand with it, and that one should not be permitted to grossly offend people. In addition, it protects all religions, and very little legislation on this area exists otherwise.

Some pointed out that the legislation is worth keeping only if the constitutional provision is also retained. Another point was that there is a reasonably high enough 'bar' for causing offence, and it allows for sufficient freedom and range of views. Some supported keeping the legislation from a different point of view, arguing that it is ineffective, but preferable to stronger alternatives.

A principle argument in favour of amending the legislation was that the word 'blasphemous' is too hard to define. It is simply too vague; even the word 'religion' is not sufficiently defined in the legislation. In addition, it is very difficult to prosecute, and proving intent is difficult. The legislation is practically untested.

Other types of arguments in favour of changing the legislation were that religion should not be elevated over other values in life, and that non-religious people should also be protected. A different means of achieving this was incitement to hatred legislation instead, which would include race, religion and gender.

Appendix A: Convention on the Constitution – Terms of Reference

<p>“Go gceadaíonn Dáil Éireann:</p> <p>Coinbhinsiún ar an mBunreacht a ghairm chun breithniú a dhéanamh ar na nithe seo a leanas agus chun cibé moltaí a dhéanamh is cuí leis agus chun tuairisciú do Thithe an Oireachtais:</p> <p>(i) téarma oifige na hUachtaránachta a laghdú go cúig bliana agus é a chur ar comhfhad leis na toghcháin áitiúla agus leis na toghcháin don Eoraip;</p> <p>(ii) an aois vótála a laghdú go 17 mbliana;</p> <p>(iii) an córas toghcháin don Dáil a athbhreithniú;</p> <p>(iv) an ceart a thabhairt do shaoránaigh a bhfuil cónaí orthu lasmuigh den Stát chun vótáil i dtoghcháin Uachtaráin in ambasáidí de chuid na hÉireann, nó ar shlí eile;</p> <p>(v) foráil maidir le pósadh comhghnéis;</p> <p>(vi) leasú a dhéanamh ar an gclásal i dtaobh ról na mban sa teaghlach agus rannpháirteachas níos mó ag mná sa saol poiblí a spreagadh;</p> <p>(vii) rannpháirteachas na mban sa pholaitíocht a mhéadú;</p> <p>(viii) an cion arb é diamhaslú é a bhaint as an mBunreacht; agus</p> <p>(ix) tar éis na tuarascálacha thuas a chríochnú, cibé leasuithe iomchuí eile ar an mBunreacht a bheidh molta aige; agus</p> <p>go dtugann sí dá haire:</p> <p>— gur 100 duine mar a leanas a bheidh i gcomhaltas an Choinbhinsiúin;</p> <p>— Cathaoirleach a bheidh le ceapadh ag an Rialtas;</p> <p>— 66 shaoránach atá i dteideal vótáil i reifreann, arna roghnú go hamasach sa chaoi go mbeidh</p>	<p>That Dáil Éireann:</p> <p>approves the calling of a Convention on the Constitution to consider the following matters and to make such recommendations as it sees fit and report to the Houses of the Oireachtas:</p> <p>(i) reducing the Presidential term of office to five years and aligning it with the local and European elections;</p> <p>(ii) reducing the voting age to 17;</p> <p>(iii) review of the Dáil electoral system;</p> <p>(iv) giving citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise;</p> <p>(v) provision for same-sex marriage;</p> <p>(vi) amending the clause on the role of women in the home and encouraging greater participation of women in public life;</p> <p>(vii) increasing the participation of women in politics;</p> <p>(viii) removal of the offence of blasphemy from the Constitution; and</p> <p>(ix) following completion of the above reports, such other relevant constitutional amendments that may be recommended by it; and</p> <p>notes that:</p> <p>— membership of the Convention will consist of 100 persons as follows:</p> <p>— a Chairperson to be appointed by the Government;</p> <p>— 66 citizens entitled to vote at a referendum, randomly selected so as to be broadly</p>
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<p>siad ionadaitheach do shochaí na hÉireann i gcoitinne;</p> <p>— comhalta de Thionól Thuaisceart Éireann as gach páirtí de na páirtithe polaitíochta sa Tionól a ghlacfaidh le cuireadh ón Rialtas; agus</p> <p>— comhaltaí de thithe an Oireachtais, chun ionadaíocht neamhchlaonta a dhéanamh ar na Tithe;</p> <p>— féadfar ionadaithe a cheapadh faoi réir na gcritéar roghnóireachta thuas, agus beidh na hionadaithe sin in ann páirt a ghlacadh sna himeachtaí agus vótáil faoina n-ainm féin;</p> <p>— comhaontóidh an Coinbhinsiún a rialacha níos imeachta féin d'fhonn a ghnó a sheoladh go héifeachtach ar shlí a bheidh chomh heacnamúil agus is féidir;</p> <p>— beidh aird chuí ag an gCoinbhinsiún ar Chomhaontú Aoine an Chéasta agus ar Chomhaontú Chill Rímhinn;</p> <p>— tráth nach déanaí ná dhá mhí tar éis dháta na chéad éisteachta poiblí a thionólfaidh an Coinbhinsiún tabharfaidh an Coinbhinsiún tuarascáil do Thithe an Oireachtais agus déanfaidh sé moltaí dóibh ar gach ceann de na nithe atá leagtha amach ag (i) agus (ii) thuas;</p> <p>- tuairisceoidh an Coinbhinsiún do Thithe an Oireachtais agus déanfaidh sé moltaí dóibh ar gach ní eile a luaite a bheidh a phléití críochnaithe aige agus, in aon chás, tráth nach déanaí ná bliain amháin ó dháta na chéad éisteachta poiblí;</p> <p>— féadfaidh an Coinbhinsiún aighneachtaí a iarraidh agus glacadh leo ó chomhlachtaí leasmhara agus lorgóidh sé cibé comhairle shaineolaíoch is dóigh leis is inmhianaithe;</p> <p>— déanfar gach ní a bheidh os comhair an Choinbhinsiúin a chinneadh trí thromlach de vótaí na gcomhaltaí a bheidh i láthair agus a</p>	<p>representative of Irish society;</p> <p>— a member of the Northern Ireland Assembly from each of the political parties in the Assembly which accepts an invitation from the Government; and</p> <p>— members of the Houses of the Oireachtas, so as to be impartially representative of the Houses;</p> <p>— substitutes may be appointed subject to the selection criteria above, who will be entitled to contribute to the proceedings and vote in their own name;</p> <p>— the Convention will agree its own rules of procedure for the effective conduct of its business in as economical manner as possible;</p> <p>— the Convention will have appropriate regard to the Good Friday Agreement and the St. Andrews Agreement;</p> <p>— not later than two months from the date of the first public hearing held by the Convention, the Convention will make a report and recommendation to the Houses of the Oireachtas on each of the matters set out at (i) and (ii) above;</p> <p>— the Convention will report and make recommendations to the Houses of the Oireachtas on each remaining matter as soon as it has completed its deliberations, but in any event not later than one year from the date of the first public hearing;</p> <p>— the Convention may invite and accept submissions from interested bodies and will seek such expert advice as it considers desirable;</p> <p>— all matters before the Convention will be determined by a majority of the votes of members present and voting, other than the Chairperson</p>
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vótálfaidh, seachas an Cathaoirleach a mbeidh vóta cinniúna aige nó aici i gcás comhionannas vótaí; agus

— tabharfaidh an Rialtas freagra san Oireachtas laistigh de cheithre mhí ar gach moladh a dhéanfaidh an Coinbhinsiún agus, má tá sé chun glacadh leis an moladh, cuirfidh sé an creat ama in iúl ar lena linn atá sé ag brath aon reifreann gaolmhar a sheoladh.

who will have a casting vote in the case of an equality of votes; and

— the Government will provide in the Oireachtas a response to each recommendation of the Convention within four months and, if accepting the recommendation, will indicate the timeframe it envisages for the holding of any related referendum.”

Appendix B: Rules and procedures

1. Timing, Frequency and Openness of meetings

Meetings of the Convention will generally take place in a hotel at weekends (Saturdays and Sundays) during 2013. At least one meeting will be held outside Dublin. It is proposed to hold one meeting per month, with the exception of July and August. Members of the public will not have access to the meetings but the plenary sessions will be streamed live at www.constitution.ie.

2. Role and duties of the Chairperson

The Chairperson shall be the sole judge of order and shall be responsible for the smooth running of the Convention in accordance with these rules and the terms of the Resolution of the Houses of the Oireachtas of 10 July, 2012. He shall engage such support services as are necessary for the effective administration of the forum and, from time to time, make such recommendations to the Convention on the management of business as he sees fit.

3. Work Programme

The work programme shall be agreed by the Convention on foot of a proposal by the Chairman. The programme shall be reviewed regularly but any subsequent changes shall only take effect with the agreement of the Convention.

4. Steering Group

A Steering Group shall be established to support the Convention in the efficient and effective discharge of its role and functions. In practice, the Group shall assist with planning and operational issues associated with the work programme. The Steering Group shall consist of the Chairperson and representatives from the political parties, the public members and such other representatives as the Convention sees fit.

5. Debates/speaking arrangements

The format and structure of speaking arrangements shall be agreed in advance and as a general principle, all contributions by members should be brief, respectful and non-repetitive. Any member wishing to speak should indicate and will be called upon by the Chairperson, who will endeavour to ensure fairness in the allocation of speaking time to all members. In an effort to make most efficient use of time in plenary session, members are encouraged to use the opportunity of roundtable discussions to express their views, ask further question of the experts and deliberate with one another. These discussions can be reflected in a brief report to the plenary session.

6. Tabling and Circulation of Papers

All documents received by the Convention secretariat shall be made available to all members of the Convention via the www.constitution.ie website. Alternative arrangements will be made for those members who are not in a position to access the site. Deadlines for receipt of submissions and circulation of documents in advance of plenary meetings should be agreed by the Convention.

7. Presentations to the Convention

Following receipt of submissions on any matter, the Convention may choose to hear oral presentations from any representative group or individual to assist in its deliberations. For the efficient administration of the process, the Steering Group may wish to make recommendations in relation to the selection of interested bodies to present to the Convention. Invitations shall be issued by the Chairperson on behalf of the Convention.

8. Voting

Votes, if required, shall be by secret ballot of the members present and voting. Votes shall be overseen by the Chair with the support of at least 2 members of the Convention.

9. Advisory Panel

The Convention shall establish an advisory panel of academics, constitutional lawyers and others with demonstrated expertise, for access to such expert advice as it considers desirable. The process for selection and appointment of any such advisers shall be agreed by the Convention, on the advice of the Steering Committee.

10. Irish language facilities

A simultaneous translation service from Irish into English will be available for all plenary sessions of the forum.

11. Press and Communications

Authorised members of the media shall be permitted to attend plenary sessions of the Convention, subject to such terms and conditions as may be laid down by the Convention. As a general principle, the Chairperson shall act as spokesperson in relation to administrative or procedural matters.

12. Reports

Reports of the Convention shall be published as soon as practicable after a decision has been reached at each meeting. It shall be possible to finalise the detail of the content of each report other than in plenary session, subject to the agreement of the Convention.

13. Review of Procedures

The Chairperson shall consult with members of the Convention and other interested parties and conduct such reviews of the procedures and administration of the Convention as he sees fit.

14. Convention secretariat

The Chairperson shall have direction and control over the staff of the secretariat and other supports and resources available, subject to the wishes of the Convention.