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Constitutionalism, religion, and education

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Introduction

Constitutions present themselves as new beginnings, as documents in which a political order is invented or reinvented. Of course, no constitutional document makes a political world out of nothing, nor can one be written that ignores all existing power relations. But the images that surround constitution writing—the nation assembled (in a convention or constituent assembly) and, more recently voting (in a referendum)—and the language contained in the general and the detailed clauses (suggesting that it is the constitution and the sovereign people that grant authority and do not rely on existing institutions) both produce the image of the constitution as not merely a political effect but also a cause.

At a minimum, then, constitutions are portrayed as steering politics in new directions even if they do not make completely new orders. Writing a constitution has been likened to revolution (Ackerman, 1992); the very word suggests that something new is being "constituted." Even a slightly more modest metaphor--"rebuilding the ship at sea"--while it allows that the process is carried out with whatever is already on hand, still sees the work as absolutely foundational; the post-1989 order was one in which "The question of the moment was not 'What is to be done?' but 'Is there anyone who might be able to do anything—including defining what needs to be done?'" (Elster et al, 1998, 25)

The idea that constitutions have deep effects is not merely a conceit of their drafters; scholarship on the meaning and impact of different constitutional arrangements is voluminous indeed. But despite high expectations surrounding them "constitutional moments" and the fact that the constitutions to which they give birth often succeed in provoking deep debate they often fail to inaugurate any significant change in important aspects of state-society relations.

Remarkably, for all their self-proclaimed status as a new start, the best indication of what is in a given constitution is generally what was in the one it is replacing (Elkins et al, 2009).

This is even the case in the critical area of relations between state authorities, religious bodies, and religious traditions where attitudes are often polarized. Our paper illustrates this claim as it relates to the field of education by examining three cases –Norway, the Irish Republic, and Egypt – where, despite the fact that the relevant constitutions attempted to mark the achievement of legislative independence, the entrenched interests of religious bodies remained largely unaffected and have remained so for long periods of time. The stakes surrounding the writing of a constitution can be tremendously high for religious institutions; this is, after all, when their relationship to the political order is defined. But we find that the documents tend to reflect existing arrangements and once written down, they become difficult to change because of the kind of deep consensus required for any subsequent change. This is especially so when it comes to clauses protecting religious education. In the push and pull of normal politics even those who might wish to redefine religion-state relations in this sphere find their efforts better invested elsewhere. Change does nevertheless occur, to be sure, but it tends to take place through non-constitutional processes. Textual settlements show impressive staying power because redrawing them is costly, contentious, and, ultimately, often unnecessary. When change to clauses providing for religious education takes place, it is often indeed after the fact with real institutional change typically preceding constitutional change.

The Surprisingly Widespread Constitutionalization of Religion

Almost all constitutions of the world (approximately 200 of them) make some reference to religion. On one count "there is only one constitution [in the world] for which religion is an irrelevant phenomenon: the [1993] Czech Constitution." (Iban 2013: 40)[1] Yet how do constitutions generally deal with religion? Many mentions are brief and formulaic, for example recognizing a constitutional right to religious freedom. In the United States constitution, the only initial reference was to bar the application of religious tests for public office. Even when amended, the text simply barred Congress from establishing a national religion, a formulation that left even existing establishment at the state level intact for a considerable period. Perhaps it is this early history that explains why much mainstream constitutional analysis has betrayed a strong secularist bias which does not do justice to the place of religion in constitutional systems. This is not surprising given that the USA can be said to have "invented" the modern secular state with its late 18th century constitution (Madeley 2009). Yet that specific path is much more the exception than the rule: most constitutions in the world have chosen a very different set of directions.

Reading constitutional texts and considering the political circumstances that brought them into being, it is the coexistence of religion and the state, and the openly accommodative (or collaborative) terms of the relationship between them, that are most striking. Far from a secular aversion to mentioning religion, most texts seem to approach the subject of religion by assuming that the document's role is to define the relationship between religion and state in a

[1] Neither the word religion nor any other related term appears in the Constitution of the Czech Republic, although according to the article 112 of the constitution it forms part of "the constitutional system." (See Madeley 2015a)

manner that accommodates the former. This accommodative type of constitutionalism has been obscured in much mainstream scholarship, especially that in the United States, for three reasons. First, constitutions are typically issued in the name of a sovereign, and most follow the US model of issuing them in the name of a sovereign people. But this fictitious category is very often a deeply religious people, and religious actors and institutions have a large investment in the attempt to draw a line in a document between the secular and religious spheres. It is not surprising therefore that constitutional orders should often be entangled in issues of religion, however much their authors might have sought to avoid that.

A second reason why this constitutional approach has been neglected is the intellectual influence of France and the United States. The French approach might generally be termed one of aggressive secularism by contrast with US separationism which took the ostensibly more religion-friendly form of the "twin tolerations" (Stepan, 2000). Seen from a global perspective, however, both cases are outliers. The French model has few followers and US political practice has been – at least with the decline of strict separationism from the 1980s - fairly friendly to religion in the public sphere (although campaigns in recent decades have continued to criticize the inherited arrangements in the fields of education and social welfare as inherently secularist and hostile to religion).

A third reason is that the focus of constitutional scholars has been mainly on either the structures of governance (such as judicial review) or on rights, (with religion considered a question primarily of freedom of religion). A fuller reading of constitutions, however, reveals many more direct and indirect references to religion—especially in preambles, occasional ideological provisions,

establishment clauses, and, not least, in clauses related to society, parental choice and education.

But if constitutions routinely try to accommodate religion, how do they do so? Preambular mentions give few indications of how politics is supposed to operate in practice. A more applied way of understanding the accommodative relationship between religion and the state in constitutions is to focus on the field of education. This article compares the modern experiences of Norway, Ireland and Egypt, where the principle of separation has existed neither in practice nor law, and where mutually accommodative relationships between religion and the state have survived for long periods of time.

Norway is a majority Protestant society, the Irish Republic is overwhelmingly Catholic, and Egypt is predominantly Muslim. Although their constitutional orders reflect these historic confessional linkages, the constitutional treatment of religion does not differ greatly between them. Each has strikingly different religious structures for determining and teaching religious truths, but the constitutional protection of religious education has been robust for long periods of time. In all three, constitutions have been written or amended to reflect changing social and political conditions. In Norway and Ireland, the constitutional text has been very slow to change; only in Egypt have there been greater changes to the formal text. What is common to all three cases however is that the clauses protecting religious education seem relatively immune to change and the changes that do occur tend to follow rather than produce changes in the actual structure and role of religious education. In Norway and Ireland secularization has led to a general redefinition of the relationships between Church and State; yet religious education stood out as the one area where

constitutional change, if it came at all, was slow to emerge. Thus there may be something about religion -specifically about religious education - that explains the way arrangements, once laid down, tend to remain difficult to change; in constitutional terms this steadiness makes them very immune to the breaks and transformation which otherwise characterize constitutional moments.

All three examples might be characterized as old societies with new states—or at least with states that newly established juridical sovereignty to a degree. They gained a formal independence in the first decades of the twentieth century and passed through a period of vigorous assertion of national identity. But in all three cases, the first constitution came before full juridical sovereignty was clearly established. The initial documents were drafted and adopted during episodes of international and domestic contention on a variety of issues. Religious structures and authorities—and populations in which national identity was connected with religion—were very much part of the political equation. Some sought to codify their role by constitutionalizing it, especially in the educational realm. If there was opposition to this role, it was at best obliquely expressed, meaning that the constitutions tended to accommodate existing religious arrangements in the educational realm.

The resulting constitutional approaches to religion are hardly unusual—they are far closer to international norms than those of France and the US. Although the place of religion in education has continued to excite vigorous debate up to the present time the mutually accommodative approach was remarkably resilient in all three cases. While there are obvious differences, the general patterns they jointly display on religion and education cannot be explained by particular sets of religious beliefs, institutions, or history and culture, since the patterns hold

even when these vary. They are better seen not as the product of Protestantism, Catholicism, or Islam but instead of a particular political configuration in which constitutional architects were willing (and many even insistent upon the need) to accommodate a religious element in constitutional provisions for education. While there has been great change – in the content of religious education, the curricula, institutional mechanisms, and indeed in national identities – the enthusiasm (or at least willingness) for accommodating the religious perspective in the constitution proved far more enduring.

Constitutions in this regard represent continuing social, political and religious outcomes more than producing such outcomes. Indeed, the texts, even though they are the product of major moments of change (such as independence), seem not to determine subsequent practice—they seem more often to mirror practice existing at the time prior to the drafting of the constitution. And that pattern continues after promulgation. The compromises and formulas drafted early on prove difficult to dislodge. The reason is not that there is no change; just the opposite. The three constitutional orders we focus on have undergone real changes in religion-state relations since their first constitutions were issued. And the educational systems have been the site of these changes. But while constitutional language is often strong on religious education, it is still somewhat general, admitting of a variety of institutional arrangements to implement it. As a result, substantial social change, often gradual in nature, could be incorporated without requiring textual amendment. Constitutional language in some cases could come to seem anachronistic, a product of an earlier era when prevailing religious sentiments were very different as was the array of political and religious forces. Textual formulas were generally capacious enough to allow for

such change and political forces that wish to reconsider founding formulas rarely find amendment—essentially a full frontal assault on entrenched positions that are sometimes eroding on their own—the most appropriate tactic.

Only in Egypt have constitutional formulas shown more continuous change; significantly it has generally been authoritarian regimes that have redrafted the governing documents and therefore done so with a bit of a freer hand (with religious forces ones that need to be considered but rarely in a position to mobilize large publics). But even in Egypt, textual changes have followed rather than produced actual changes on the ground of religion-state relations in the educational sector; those relations have shown just as much continuity and slow change as in Norway and Ireland.

Those who are familiar with the U.S. doctrine of separationism, or are accustomed to thinking of constitutional life in terms of antinomies (such as Church and State) would expect the field of religious education to be prime candidates for the eruption of constitutional conflicts. Members of religious communities often see education as critical to maintaining and reproducing their hold over the faithful; and in many, if not most, societies, religion is closely tied to issues of nationalism and identity. Challenges to these underlying assumptions might logically be expected to give rise to battles over constitutional texts. Yet in these cases, such challenges have emerged only rarely. Not only do the clauses change slowly, they have been less an arena for conflict than might be expected when other aspects of state-religion relations became contentious. Hence the constitutional protection of religious education has been remarkably immune both to legal transformation and to changes in the wider social environment. The narratives that follow show how this has been true for the three cases.

The case of Protestant Norway

Norway's experience with written constitutions began even before it became an independent state. That experience is continuous in two senses: the original constitution continues in force, and substantial textual changes have been very limited. The original constitutional provision for religious education was brief but very strong, and it was honored faithfully for decades. When social and political changes inside the country in the late nineteenth century and pressures from outside the country in the second half of the twentieth made themselves felt, the constitution was eventually amended. In 1814 the Eidsvoll constitution had simply codified longstanding arrangements that still existed in the field of religion when it was written; as those arrangements came under pressure and changed, the forces pressing for reform tended to shy away from constitutional amendment until their purposes had been secured through other means. At the time Norway's constitutional order was born it continued to bear the marks of the confessional state. And it continued to repudiate secularism (at least, as understood in terms of church disestablishment) on paper until secular political trends had deeply changed the nature of Norwegian society.

The 1814 constitution – the oldest written constitution in Europe still in force – came into existence during an attempt to establish the country's national independence from Denmark. While the constitution itself endured, the broader attempt at independence failed, and the country instead entered a union with Sweden, which was to last until 1905. The 1814 constitution was partly inspired by the American 1776 Declaration of Independence, the French Declaration of the Rights of Man and the Citizen of 1789 and the subsequent U.S. and French

constitutions. As such it was remarkably liberal, coming as it did before the reactionary backlash, which followed the final conclusion of the Napoleonic Wars in 1815. One important deviation from the American and French models was the retention of the institution of monarchy, although the king's power was to be markedly restricted. And in one other critical respect the constitution was curiously conservative—religion. There was a complete failure to decide whether or how to reform the restrictive, positively oppressive, regime of religious laws and regulations inherited from the Danish absolute monarchy. Indeed, the constitution's language on the subject simply reflected existing realities.

The Evangelical-Lutheran religion was to remain the state religion, and the use of "remain" in paragraph 2 was later taken to require that the confessional and legal standards applying in the field of religious regulation in 1814 should continue to apply. In the absence of a constitutional guarantee of religious freedom this meant that all the restrictive and coercive regulations inherited from the Danish era were to continue in force. These included the use of penalties attaching to those who failed to bring up their children in the Lutheran faith by having them baptized and then ensuring their attendance at confirmation instruction: those who refused or neglected to have their children baptized, instructed and confirmed were subject to potentially heavy fines.[2] Although the application of coercive rules varied in practice, in Weber's terms the Norwegian church remained a compulsory institution and induction into this

[2] As for the children or young persons who had for whatever reason failed to receive confirmation, they were prevented from marrying (this could of course only be undertaken in church) but also, from inheriting land, witnessing in court or enjoying other rights of citizenship. In fact, anyone who remained unconfirmed at the age of 19 could on discovery be put in the stocks or sent to prison.[2] (Thorkildsen 2014: 60).

institution was dependent on passing a religious test after a period of instruction. Unsurprisingly therefore, such primary education as was provided revolved around preparation for confirmation and first communion, as if this ecclesiastical *rite de passage* were a form of final matriculation and passage into adulthood.

The tradition of Lutheran religious education in Norway was not a product of the constitution: it dated back to the Reformation of the 1530s. Initially, the basic text was Luther's *Small Catechism*, and the local priest and his lay assistant were charged with the responsibility of taking children through it. In the 1730s during a period of religious enthusiasm, an attempt was made to improve such education as the clergy provided by giving it a more secure institutional form: a law of 1739 on confirmation required that candidates must attend formal classes in a school in each parish. It was intended that all Norwegian children should be able to read the *Small Catechism* and the Bible for themselves instead of relying on oral rote learning.

Around 1850 there was a relaxation of the more extreme rigors of the old church-state regime with the repeal in 1842 of the Conventicle Ordinance (which had made illegal the holding of public religious meetings without the approval of the relevant local minister), the 1845 Dissenter Law (which for the first time permitted exit from the church so long as it was in order to join a recognized Protestant denomination) and the 1851 constitutional amendment removing the ban on Jews entering the country. Yet these changes did not amount to the dismantlement of the old church regime and when in 1860 a law was passed to make the building of separate school buildings in each rural parish the norm, the local parish priest or minister were deputed to chair each local board of

education. The biggest change occurred however in the 1880s as part of a key constitutional episode known as Norway's "breakthrough to parliamentarism". So far as education was concerned, the Conservatives had been in favor of continuing the practice of church and government officials, under the leadership of the Department of the Church and Education, controlling the form and content of school instruction. The Liberals, on the other hand, favored spiritual freedom and democracy in the school as well as in politics and therefore argued for a wide-ranging set of reforms: school boards should be elected by the people; dissenters should also be allowed to teach (though not in the religious education classes) and be members of school boards; church ministers should no longer be the automatic chairmen of the boards; and any involvement of the higher clergy should be restricted to overseeing the field of Christian education. (Haraldsø 1989: 189) And in 1889 the Liberal model largely won out.

While the 1889 reforms and the associated broadening of the curriculum reduced the religious element in education, the school continued to be officially dedicated to "contributing toward the Christian upbringing of children" and the system of clerical supervision of religion classes remained in place. This continued to be the case even after the Norwegian Labor Party came to power in 1935. Even though the party had earlier been in favor of the disestablishment of the state church, in the new school law of 1936 the school's confessional linkage was maintained, although the number of hours dedicated to religious knowledge education was reduced. A series of rearguard campaigns were mounted aimed at resisting secularizing trends, fighting in particular against the reduction in the number of hours of religious instruction and contesting proposals that religious knowledge education should effectively be transformed into courses <u>about</u>

religion, instead of being effectively Lutheran confirmation classes. And with the introduction in the year of the 150th anniversary of the 1814 constitution of an amendment finally establishing a positive right to religious freedom, religious education continued to be a source of contention.

In 1969 Norway did finally abandon its historic commitment to the idea that religious education in the public schools could legitimately provide instruction in religion rather than education about religion and a parallel model was introduced by which pupils (or their parents) could chose between courses on Knowledge of Christianity (*Kristendomskunnskap)* or Ethics. (Andreassen 2013: 138) The object clause of the 1969 Education Act still however read that public schools should "with the understanding of and cooperation with the home, assist in providing pupils with a Christian and ethical upbringing." (ibid. 140) By the 1990s growing cultural and religious diversity, much of it associated with immigration, led to an increasing concern with the rights of religious minorities and in 1995 an expert report called for a much broader religious studies curriculum. Two years later a new compulsory school subject called Christianity, Religion and Ethics was launched, with the intention of promoting knowledge, tolerance and understanding between the holders of different religious and other worldviews. The course was to be mandatory on the grounds that allowing exemption would defeat the objective of promoting mutual understanding among pupils of different faith backgrounds.[3]

The new arrangements failed to achieve consensus however; they led instead to a prolonged episode of contestation, involving the highest legal bodies both in

[3] Exemption was to be allowed only from certain parts of the subject—for example, those that could be taken to involve religious practices. (Plesner 2013: 264)

Norway and internationally. Feeling that their rights to freedom of belief were being jeopardized, a number of groups representing adherents of minority religions and humanists, joined together in a "Campaign for Freedom of Belief in Norwegian Schools." (Eidsvåg et. al. 2004: 786). In 2001 a number of minor changes were made in response to the campaign, including renaming the course, but the right of exemption was not significantly expanded. In August 2001 Norway's Supreme Court unanimously found against the campaigners, only conceding that if the actual implementation of the arrangements for the new course failed to respect their human rights a further lawsuit could be brought. In 2004 however the UN Human Rights Committee concluded that Norway was in breach of Article 18 of the Human Rights Code on grounds of the "considerable burden" placed on parents wishing to exempt their children. (Andreassen 142) A year later the curriculum and rules for exemption were revised in order to meet this objection, although a right to full exemption was not introduced. The Folgerø group of humanist parents then took their case to Strasbourg and in 2007 the Grand Chamber of the European Court of Human Rights found by a narrow majority of 9 to 8 in favor of the claim that the course could not be deemed sufficiently "objective, critical and pluralistic."[4] The government reacted quickly and from 1 August 2008, a new course "Religion, Life Stances and Ethics" was launched. Since then the controversy has waned although the small Christian Democratic Party continues to argue for a change in the name and content of the course to reflect the special position of Christianity in Norway. In comparative

[4] The majority of the Grand Chamber found that the amount of time spent on Christianity was acceptable, since 86 per cent of Norway"s population are members of its established church but took the view that the curriculum favoured Christianity qualitatively over other religions, and that since this was neither neutral nor objective parents should be provided with the possibility of exemption. See *Folgerø et al v. Norway*, 2007. See also Leigh 2012.

terms what is most striking however is the resilience of the Norwegian educational policy of continuing to teach about religion – and in particular Christianity – in the public school at a time of widespread reform in church-state relations which has amounted to virtual disestablishment following a swathe of constitutional amendments which entered into force in 2012.[5]

The case of Catholic Ireland

In Ireland, as in Norway, constitution writing tended to concretize existing arrangements rather than seek to mold them. Ireland's independent constitutional history is however shorter and less continuous—the initial constitution of 1922 was replaced in 1937. But in neither document was there much of an effort to change the fundamentals of the educational system. Instead, constitutional language was crafted that supported existing arrangements. As Irish society has changed, particularly in recent decades, those arrangements have come under some pressure, though they remain surprisingly robust. The constitutional provisions have meantime remained untouched—and remarkably, even the changes that have been advocated and instituted have left the language crafted decades ago unchallenged.

Two principles enunciated by canon law are (1) that Catholic parents should send their children to schools that provide a Catholic education; and (2) that the State should provide the parents with the freedom to make such a choice. Both were expressed in the 1937 constitution, which continued to provide constitutional protection for "a system of public funding of private schools"

[5] On the constitutional changes introducing this reform of church-state relations from 2012 see Madeley 2015b.

(Clarke 1995: 66). The constitution recognized the family as "the natural and fundamental unit of Society" and also states that the State must "respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children." These clauses have never been amended.

The system implicitly recognized by the constitution was forged under the Union of Britain and Ireland (1800-1921) when a close identification between the Irish nation and the Catholic religion developed. The British Government had abandoned attempts at creating a unified public education system: a policy which, initiated first in 1831, was resisted not only on religious grounds, but on the basis that it would be a tool of colonial assimilation (Daly 2010, 205-06). After independence in 1921, the 1922 constitution had made primary education a constitutional right, but most schools, primary and secondary, remained owned and staffed by the Catholic Church. The only outstanding question in 1937 was how to secure the status quo by constitutional provisions (Clarke 1998, 66). The value of religious education was unquestioned: both Church and State propagated the view that a separate Irish identity had survived centuries of British rule because the people remained loyal to their Catholic faith. Neither did Irish nationalists believe that economic development required a reduced role for either the Catholic or Protestant Churches in education.

Since the 1960s nation-building has given way to an acceptance of the need for modernization, which in education began with the provision of universal free secondary education (up to Intermediate Cert), for the first time in 1967. Gellner (1987; 6-28), citing Durkheim, noted that nationalism can combine two sources of social solidarity; one stemming from the possession of a common culture, the

other, increasingly, coming from the opportunities and rights membership of an industrial society brings. The second has forced many states to intervene in education in order to have a work force that meets the demands of industry. Ireland has also seen the expansion, first of secondary, and then of university education. This huge expansion has upset the moral and intellectual dominance of Catholicism but the relationship between Church and State in this field remains accommodative. Legal changes, such as the liberalization of the divorce law, have followed, but with respect to education this has been layered change: new educational curricula, policies and institutions have been placed on top of the old.

The first half of article 42 reads:

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

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3. 1°. The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

Bunreacht na hÉireann: *Constitution of Ireland* (Dublin: Stationers Office, 2012).

The courts have generally assumed clarity of intent on the part of the drafters in the drafting of such clauses. In 1998, when the secular pressure group *The Campaign to Separate Church and State* challenged the constitutionality of the State funding of school chaplains, the judges ruled that article 42 obliged the

state to actively assist parents, through the educational system, with the religious and moral formation of their children (Hogan and Whyte 2006, 1942). Since discrimination on denominational grounds in the provision of State assistance for schools is also prohibited - as is the State endowment of religion - the ideological roots of article 42 may lie in nineteenth century liberalism (Hogan 2006, 1941-2). Yet there was a near-monopoly situation: as late as 1992-93 93.1% of primary schools were Roman Catholic and just under three quarters of second-level students attended denominational schools.

Nonetheless, Protestant schools have the same rights and autonomy as Catholic schools. The roots of the system lie in a period when the island was united under British rule and when co-existence was a huge challenge for the state, as it is today in Northern Ireland. Ireland still has a double-minority problem (Catholics in Northern Ireland, Protestants in the Republic). Any attempt to undermine denominational education in the Republic will weaken the rights of Protestant and other minorities, and send a negative message across the border. In this context it is perhaps unsurprising that Catholic and Protestant defenders of denominational schooling both now couch its virtues in the language of choice, pluralism and diversity, and the rights of all religions, rather than affirming the value of a religious education *per se* (Daly 2010, 252). Since the 1990s, the rate of growth of *gaelscoileanna* (private Irish language schools) and of multi-denominational schools has outpaced those of Catholic or Protestant schools. The State provides full funding for all types of school, including these. Yet the Catholic Church continues to resist the pressure for it to divest control of schools to other bodies, even though the sharp decline in religious vocations means that it cannot actually staff its schools or teach pupils directly. Under the 1998

Education Act responsibility for the protection of their ethos is "essentially devolved to a plurality of private "patron bodies", which are predominantly denominational in character and often appointed by Catholic or Protestant bishops (ibid, 202). The former Minister for Education Ruairi Quinn commented "we are the only country in Europe… where the primary school system is controlled by private organizations…. We are paying for them and funding them… We need to take these schools and our entire primary school infrastructure into public management" (quoted in ibid: 253).

In explaining the persistence of such an old system it is not enough to cite the strength of judicial review. Legal challenges to article 42 have actually been rare. Because of their conservative ideological basis both articles 41 (on the family) and 42, "are arguably under more strain than many other provisions of the constitution, given the increasing secularization of Irish society beginning in the 1960s" (Hogan 2006, 1829). Yet due to their stress on the married family, and their paternalist attitude towards women, this has been more true for the provisions on the family which in May 2015 was subject to a referendum allowing for same-sex marriage. Indeed, while there have been referendums on abortion, citizenship, divorce, the special status of the Catholic Church, same-sex marriage and Northern Ireland there has been no referendum on religious education. Reforming deeply embedded bureaucratic structures is not as easy as asking yes or no questions about abortion or divorce in referendums. The Irish constitution can only be changed by this means, and the referendum has frequently worked as "a conservative device." When in the early 1970s the Department of Education received legal advice concerning whether Church-run

schools' development of an integrated curriculum – in which religious and secular subjects were considered one – was constitutional, the Catholic authorities indicated that they would seek a referendum on the issue since they thought it essential to the concept of "a Catholic school" (Daly 2010: 214). None of the various reviews of the constitution (including that of a Constitutional Convention the majority of which consisted of randomly selected citizens and which met between 2013-2014), proposed changing article 42. The article remains invariant in the face of the turnover in governments, resilient in the face of legal challenges, and insulated from changes in public opinion.

Religious education has been central to primary education in Ireland since the early nineteenth century: independence has changed little in this respect. Until the 1960s its basic role included the strengthening of national identity and the moral formation of the person; there were few differences between Church and State in that regard. Since then secondary and university education have expanded and most school leavers now go on to "third level" education. This expansion has not necessitated constitutional change, one simple reason being that the drafters could not have foreseen it. At root, the basic idea that a child should receive instruction in a religion during its formative experiences is what has persisted. If religious education is ever to come under real pressure from the state, producing more schools that are genuinely owned and managed by the state, or a dominant state sector, one suspects that the protection of parental choice and denominationalism in the constitution will be the last front in the attack. The subject is too sensitive, the principles of article 42 (which are also found in European and international Conventions on Human Rights), are universal, and given the existence of broad support for moral and religious

education (also found in Egypt), politicians have no incentive to act. Hence we can expect Ireland to duplicate Norway's glacial experience of constitutional change.

The case of Muslim Egypt

Egypt's history of constitutional provisions linking religion and education is unlike Ireland and Norway in two relevant respects. First, its constitutional history is more discontinuous, with new documents being written on numerous occasions. Second, constitutional provisions on religious education have been the object of tinkering in each iteration. Yet for all the superficial change, Egyptian constitutional history, like Norwegian and Irish, shares the insistence on accommodating religious education in very strong terms but doing so in a manner that tends to reflect existing arrangements. And, like the other cases, when change in those arrangements come, the constitutional text is the last place that betrays any evidence.

In Egypt, education has been a central part of a state-building project now over two centuries old (Heyworth Dunne 1939). That project has been centralizing and ambitious but it has also been shaped by two features that have persisted despite significant changes in constitutional arrangements. First, education has always been built on a close relationship between religion and state; it constitutes a feature that predated the ambitious state-building project but deeply embedded itself within that project. Second, the construction of a nationwide educational system was closely related to battles over state sovereignty, national uniformity and centralization—in which Egypt's rulers attempted to assert central control but were compelled to accept a degree of

autonomy for important segments of the educational system, especially those which catered for minorities and cosmopolitan elites.

Egyptian constitutional texts would have seemed the obvious place to sort out and entrench the authority of the state, the role for religious institutions, and their mutual relationship with the educational system. Yet the provisions that were included are fairly skeletal and have rarely proved to be the subject of much political or legal controversy – only in the last few decades has the matter been hotly debated, and then with surprisingly limited effect on the textual outcome. Reading Egypt's constitutions over time, it is possible to detect a degree of "mission creep" regarding the degree to which educational and religious provisions began to meld together in an accommodative relationship. And there seems to be a consistent understanding that the state's duties are to foster and protect morality and religion in public life, fostering a generally unstated elision between education and faith. But despite this being a society with an official religion, the fundamental political text says very little about the meaning of that designation. The underlying continuity of institutional arrangements—ones which have only changed glacially and outside of the constitutional process—is perhaps the best explanation for the constitutional vagueness.

In the nineteenth century, Egypt was an autonomous province within the Ottoman Empire; the country was occupied by Great Britain in 1882 and unilaterally declared its independence in 1922. Egypt's first full constitution came in 1923, after the country's formal (if incomplete) independence. It has had a series of documents since then—a new constitution in 1956, a series of interim documents in the 1960s, a new "permanent" constitution in 1971 (amended

significantly on religious issues in 1980 and 2007), another new constitution in 2012, and a thoroughly revised document in 2014. The country's constitutional history is a series of discontinuous steps; its educational history on the other hand is one of recurring themes and underlying continuities.

Egypt's constitutions generally built on a foundation of European documents and the Ottoman constitution of 1876 (which did not govern Egypt, but still influenced political thinking). Article 16 of the Ottoman constitution proclaimed: "All schools are under state supervision. Proper means will be devised for harmonizing and regulating the instruction given to all the Ottomans, but without interfering with the religious education in the various districts." Egyptian rulers harbored ambitions similar to those of their Ottoman counterparts—they sought to build an educational system that was under their control and that served the economic, bureaucratic, and military needs of the state. But they did so in a context in which religious institutions still retained considerable autonomy. When the nineteenth century began, most education in the country was religious in nature and mosques or schools associated with them were the primary location for teaching. (The country's premier educational institution, al-Azhar, grew out of a mosque founded in 969.) In order to build educational systems that served their needs, Egypt's ambitious rulers of the nineteenth century preferred to build structures outside of the al-Azhar establishment. And citizens of European powers enjoyed extraterritorial status, leaving the Egyptian state powerless to govern the education of what emerged to be an economically and politically powerful set of residents—including ambitious Egyptian elite families that sought to send their children to European schools for the education, access, and prestige they provided. Such schools were

important thus important for several reasons: their ability to serve as links with foreign educational systems whose curriculum some followed; their legal and political autonomy from the Egyptian state; the manner in which they offered protected places for minority communities; and their attractiveness to members of various cultural, economic and political elites who often sent their children to such schools because of their perceived superior quality.

During British occupation (1882 to 1922), education was one of the most frequent flashpoints between the British (who maintained the form of Ottoman sovereignty and allowed a measure of Egyptian participation in governance and administration) and the Egyptian political elite: the former saw education as a fiscal burden and a luxury in an agricultural society while the latter saw education as a means for development and self-government. The result was very slow change if any at all, with the British lacking the political nerve to confront the religious establishment and the Egyptian political elite lacking the resources or the authority to build the system they wished.

Egyptian independence offered the possibility of major change and the newly independent leadership of the state saw an opportunity to construct a far more extensive educational system under its control. The constitution of 1923 provided for the freedom of education "provided it does not violate public order or contradicts morals. Public education shall be regulated by law. Primary education shall be compulsory for Egyptian boys and girls, and shall be free in public schools" (Article 19). It also made reference to religious institutions (most probably an intended reference to mosques and especially al-Azhar), but deferred the matters to legislation and the royal will: "The law shall regulate the means whereby the King exercises his power as per the principles stated herein

on religious institutes, appointing religious leaders, endowments administered by the Ministry of Religious Endowments, and on general matters of religions allowed in the country. Should there be no legislative provisions, the exercise of such power shall continue as per the rules and traditions currently in force. "

Thus, the independent Egyptian state worked to build primary, secondary, and post-secondary systems that spread the length of the country and presented itself to the citizenry as the primary provider of education at all levels. But it still confronted realities which limited those ambitions. The political leadership made no direct attempt to diminish the autonomy of religious institutions and fold them more clearly into the state structure. It did gradually extend the state educational system, but fiscal limitations mandated slow expansion. Just as significantly, foreigners retained extraterritorial status until mid-century, and Britain claimed the right to protect foreigners until it negotiated a comprehensive treaty with the Egyptian government in 1936. The result was that dreams of centralization, uniformity, expansion, and state control were greatly tempered by political realities.

These realities sparked resentment. Indeed, the Muslim Brotherhood was founded in part out of suspicion of the influence of missionaries, Western-operated orphanages, and Christian schools (Baron 2014). And the state educational system itself became a space for potential political opposition to work. Beginning in the 1920s, various movements (initially nationalist ones but then the Muslim Brotherhood and others) recruited among teachers and students. University campuses were sites of nationalist agitation in the 1940s. Only in the 1950s did a new regime come into power that was determined to implement more fully the centralizing and ambitious vision that had been

motivating generations of rulers. The program was clear: universal education for all citizens, control over religion (of an étatist but not secular variety—i.e. predicated on state regulation of religion with no wall of separation between religion and state), and elimination of the pockets of privilege and autonomy. Unsurprisingly, the 1956 constitution increased the level of state control over education and also explicitly mentioned its duty to provide for "moral education" (Article 49).

And the state asserted control even over religious institutions including schools—whether Christian, foreign, or fully Egyptian and Muslim in nature. As foreign-owned assets were nationalized and Egypt embarked on an autarchic development, foreigners lost all protected status. Their schools tended to limp along, tolerated but brought under closer bureaucratic oversight. Al-Azhar retained considerable autonomy until 1961 when the state asserted far more direct control while also building a full university with a range of disciplines and professional schools alongside the religious faculties. Yet, while al-Azhar may have lost autonomy it was allowed not only the lion's share of post-secondary religious education; it was also given oversight of an entirely separate set of primary and secondary schools (with a greater religious content in their curriculum). The result was that Egypt's patchwork system survived the regime's centralizing tendencies. To this day, the apparent existence of a clear, well-ordered, logical, and hierarchal system is complicated (or perhaps enriched) by this network of other schools—an Egyptian secondary school graduate might sit for the *thanawiyya 'amma* [general secondary school] examination or take the *thanawiyya' 'amma azhariyya* for Azhar students, with significant students from ambitious or elite backgrounds targeting instead the GSCE, an International

Baccalaureate, or a host of European credentials. Controversy over the role of international influence continues up the present (Sayed, 2006) but rarely takes constitutional form.

Indeed, it was not until 1971 that the topic of the diversity of educational institutions was addressed directly. Articles 18 and 19 of the 1971 constitution read: "Education is a right guaranteed by the State. It is obligatory in the primary stage and the State shall work to extend obligation to other stages. The State shall supervise all branches of education and shall guarantee the independence of universities and scientific research centers, with a view to linking all this with society and production requirements. Religious education shall be a principal topic of general education curricula." Yet the 1971 constitution, which finally codified this dedication to state oversight, was followed by a move in the opposite direction. An economic opening led to a greater willingness to tolerate foreign educational activities as expatriate communities returned, the Egyptian political and economic elite regained some cosmopolitan ambitions, and the severe authoritarianism of the 1960s gradually receded. A revival of religious sentiment led to the al-Azhar system allowing strongly religious parts of the public to form pockets of pious communities under the protection of the University—and under the generally tolerant but still watchful eyes of the security authorities. And alongside the al-Azhar religious system, a network of private schools also expanded, observing the required curriculum but also following their own practices and pedagogical techniques that imparted their distinctive messages. (Herrera 2000). The overall result was a far less coherent system than may have appeared simply from a top-down view (Starrett, 1998).

The 1971 constitution remained in force until 2011 when a popular uprising led the military to suspend it. An elected parliament, dominated by Islamists, designated a one-hundred-member committee to draft a new document, which was approved by a popular referendum in December 2012. It might be expected that Islamists would have devoted considerable attention to religious education, especially given that the Muslim Brotherhood and salafists (who dominated the drafting), stressed education within their own ranks and for the society as a whole. The drafters did not copy the 1971 constitution but they did emulate the way in which it inserted a provision on religious education with Article 58, which stated: "All educational institutions, be they public, private, communal, or a combination thereof, commit themselves to the state's educational plan and its goals. All this happens to enhance the linkage between education and the needs of both society and production. Religious education as well as national history form essential subjects at all levels preceding the university." The constitution also provided that "the universities commit themselves to teaching the norms and ethical foundations at the heart of their various scientific specializations." The tone of these provisions was potentially more intrusive, extending as they did explicitly to "all educational institutions" and saddling universities with the task of teaching unspecified but perhaps religious "ethical foundations."
That document governed Egypt only for six months before the military engineered a systematically reworked document that maintained the elision between moral development and education, the requirement for religious education, and the strong state role in shaping public primary and secondary but also private and university education. It provides that:

> Every citizen has the right to education. The goals of education are to build the Egyptian character, preserve the national identity, root the scientific method of thinking, develop talents and promote innovation, establish cultural and spiritual values, and found the concepts of citizenship, tolerance and non-discrimination. The State shall observe the goals of education in the educational curricula and methods, and provide education in accordance with international quality standards….
>
> The State shall supervise education to ensure that all public and private schools and institutes abide by its educational policies….
>
> Arabic Language, Religious Education and National History, in all its stages, are core subjects in public and private pre-university education. Universities shall teach human rights and professional values and ethics of the various academic disciplines.

The provisions for consulting al-Azhar were dropped.

What is remarkable is not the failure of the constitutional text to change—it did change. Instead what is striking is how vague the clauses were, how unconnected they remained from any implementing procedures or mechanisms, and how little constitutional jurisprudence centered on interpreting or applying their meaning. The most significant constitutional dispute concerning religion and education, for instance, involved none of the clauses to address the issue but instead the minister of education's edict prohibiting school girls wearing the full face veil. There were tremendous contests over state, religion, and education to be sure—but the true battles occurred in schools, campuses, unions, ministries, and mosques and not over text. And change came slowly in part because of the intensity of the struggles. The constitutional text was not often cited in the

growing public debates in Egyptian newspapers and various broadcast media except the very general article 2 (proclaiming the principles of the Islamic shari`a the "main source of legislation")—and that provision was cited more for its symbolic nod of obeisance to Islamic law than for its legal meaning. The texts seemed to be a place to proclaim principles but those principles showed remarkable consistency, in part because they were so vague.

CONCLUSION:

In new states, the mark of a truly constitutional moment is whether the new constitution creates and consolidates ("constitutes") a new regime. When it comes to the case of religious education, we have shown that the new regimes in Norway, Ireland and Egypt reproduced many of the features of the regimes they replaced; their constitutions in this respect at least amounting to little more than an endorsement of existing arrangements, even where - in Ireland and Egypt – the colonial power which established these relationships was of a different religion. These cases also have in common the degree to which the teaching of religion in the national curriculum has endured long after the relevant constitutional texts were written. Moreover, such changes in those arrangements which were later made have not been fought on a constitutional turf: the amendments seem to be byproducts of developments in the social and political realm rather than their drivers.

Why has this been the case? Why have what seem old-fashioned clauses been so immune to change, especially at a time when the demands placed on educational systems have grown so much? Clearly these states did not possess a secular

understanding of their respective nations when they became independent. The original clauses reflected very deeply embedded assumptions about the locally dominant religious tradition, and an unspoken consensus on the value of religious education existed which lasted long beyond the adoption of the first national constitutions. Since both the major religious institutions and state leaderships shared the view that religious education was an indispensable means of passing on ethical and social values, and since such values would promote an identification with the state, it was natural that they should co-operate in this sphere.

Yet the historical dominance of these religions does not explain why, as economic and demographic changes brought in their train a more secular and more pluralist culture, the constitutional privileging of religious education has continued. The second reason is that while the constitutional provisions had reflected the interests of powerful social and political actors, their relative brevity – indeed vagueness - has allowed both the state authorities and the religious authorities a great deal of flexibility when it comes to the provision of religious education. Hence formal amendments have not been necessary for those wanting secular change. In Ireland and Norway, the brief clauses admitted a host of social and institutional changes and because of their capaciousness remained oddly insulated from them. Egypt is slightly different, because the constitutional text did change far more, but in a manner that indicated that it was an afterthought, and that circumstance distanced it from any attempts to change institutional arrangements on the ground. In short, changes to the formal texts have generally been minimal, and when changes to educational policies have

occurred, these have not been primarily the product of major constitutional change. In Egypt and Ireland, the drivers are typically socio-economic; in Norway changes have come with secularization.

The result in all three is an increasing "disconnect" between the constitutional provisions for education and the actual situation on the ground. (Fox 2011). Ireland, where the relevant clauses reflect Catholic social teaching in the 1930s but most school leavers go on to study at a secular third level system, is a good example. Most Catholic schools have no religious personnel and lay teachers teach "religion" (not the Catholic Religion) as an examinable subject for the Junior Cert. in secondary schools.[6] The constitution aside, religious education has changed. Grace's conclusion that in the 1980s and 1990s the British state imposed a strong "framing regime" on all schools, regardless of their religious character, also applies to Ireland. This disconnect between the constitutional clauses and such increasingly technocratic framing regimes may provide an opportunity for secularists to launch a frontal attack on the constitutional provisions. Yet, contrary to the expectations and recommendations of separationist theory, the mutual accommodation between religion and state has continued. Here we encounter a third factor: clauses on religious education that have their origins deep in the past are now largely in conformity with international human rights laws on parental choice, minority rights and religious freedom. For example, article 26 section three of the 1948 UN Universal Declaration of Human Rights declared 'Parents have a prior right to

[6] Grace (2002: 46) argues that in England the pedagogy, even in Catholic schools, has become dominated by output measures of specific competences and skills, standardized tests, and measures of how the objectives of a National Curriculum have been delivered.

choose the kind of education that shall be given to their children' and this stipulation has always been claimed to cover parental choice in favour of educating their children in accordance with the religious commitments and beliefs of the home. Other international instruments and conventions have further expanded on this demand.With the notable exception of socially radical and some conservative Islamist regimes like Iran and Saudi Arabia patterns of religious establishment have been progressively reformed so as to protect these rights; accommodationism has become the most common frame of state-religion constitutional relations as separationism has waned.[7]

The combination in all three cases – modernizing change within older accommodative constitutional traditions - fits the theoretical framework put forward by Mahoney and Thelen (2010: 292), who argued that contrary to models which expect us to find big changes during historical breaks, we discover significant continuities through "unsettled" historical times, and ongoing contestation and negotiation in "settled" periods that nonetheless add up to significant change. No doubt this is because the accommodative practices are very old. 'Path dependence' - a concept often used to explain institutional persistence - requires the scholar to adopt a "branch like" perspective to legal outcomes, and raises the question of whether there have been significant deviations from the initial choices that were made in the nineteenth century. In Norway there have been changes: but they took two centuries to occur. The

[7] For Cole Durham and others the US should now be reckoned accommodationist despite the continuing proscription of religious education in the public school system. (Cole Durham 1996: 21)

Irish educational system was not based around any document: its denominational cast was the product of the political divisions of the 1830s, and the unwillingness of the Catholic Church and its members to become co-opted into the British state. This system remains in place. In Egypt more change has been attempted: yet despite the relatively instability of constitutional life, the constitutional protection of religious education has been no less enduring.

In her discussion of the persistence of personal status regulations after independence in Israel and India, Lerner (2014) shows that an institutional path was created during the formative stages of independence, but that personal status regulations survived largely because of unintended decisions and "the absent minded missing of historical opportunities by the founders" (410). In contrast, Künkler and Sezgin (this special issue) show a general trend in many African and Asian states towards increasing reliance on forms of legal pluralism and multiple jurisdictions. While Lerner stressed missed opportunities, Künkler and Sezgin show that even when the founders had "monist" ambitions, "the limits of monism" became apparent over time. Our cases show both the absence of genuine critical junctures, and how hard it is for the state to "get on top" in education. While Norway and Ireland are examples of missed opportunities, Egypt conforms to what Künkler and Sezgin see as a general limit of monism. Since in each case the path dependence in this area of state-religion relations spans two or three centuries, the role of deliberate design, and the ability of actors to get beyond past structures should not be exaggerated. (ibid, 14). Yet rather than explaining the persistence of religious education - or its constitutional protection – in terms of political will or lack of state capacity the

role of accommodative practices which now span three centuries has to be stressed.

It is worth considering the absence of critical junctures and the relative immunity of the constitutional provisions to the effects of social and economic change in the context of the modern state's alleged role in producing cultural homogenization. Conversi (2007) argues that the process began in early modern Europe, and stresses the role of armies in imposing measures: discipline, citizenship rituals, and language learning, we now associate with schooling. He defines homogenization as "a subtractive process" involving the negation of the existence of separate groups, languages, traditions and ideas within one polity (2007, 388). The language is very similar to Charles Taylor's (2007) depiction of the mainstream view of secularization as "subtraction stories" involving the losing, sloughing off, or removing of religion from public life. Had the modern state such a need for homogenization, and were the subtraction of distinct cultures required, one would expect it to apply especially to religious education. Yet in none of these cases has religion been subtracted from the curriculum. None adopted, at the time of state formation, the aggressive secularism that emerged in France and Turkey. Moreover, religious education has not been subtracted from the formal texts either.

Indeed, not only did the state gain no initial monopoly over education in general, the rights of minority groups in this sphere have also persisted, even where (in Egypt and Ireland) they were enjoyed by groups that were more privileged than the rest of the society. The outcome is paradoxical: while these cases have in

common large degrees of "ethnic" as well as religious homogeneity - the laws and institutional practices have a pluralist logic that reflect those of more 'divided' societies. These laws and practices reflect the experiences of political societies that were already old and well-established, when sovereign statehood was achieved. The constitutions which were adopted around the time of independence therefore made use of, and reflected, already deeply-embedded practices of blending religion and education, and were less acts of invention than of redirection and assertion. The logic since then of combining modernization with scant constitutional change is a very powerful one for the institutional leaderships of the religious communities—so powerful that they have sought to protect it and various other forces have avoided the temptation to re-open long settled issues. Those who want change have not needed to re-open the text since the true locus of change lay elsewhere. Constitutional texts do have meaning, of course, but the general constitutional formulas, strongly worded though they may be, that support a strong role for religion in education cannot resist longer-term social forces that change precise arrangements or gradually alter their effect and meaning. The comparison here has suggested that those wanting change recognize the constitutional limitations in this field more than in perhaps any other, but have in any case found alternative avenues for achieving it.

In terms of the theme of this special issue – how the legal boundaries between states and religions are drawn within formal constitutions – the drafters of the constitutions of these states recognized their limitations especially in the field of education. And the theoretical value of focusing on such cases has been that they illustrate the fact that these limitations conform to constitutional logics that are hard to explain if the theoretical lens used is the principle of separation, or the

over-simple use of “Church” and “State” as legal and institutional antinomies. This conclusion lends further support to the arguments of Ferrari, Monsma and Soper, and others, that, in fact, in this field if not more widely accommodationism is the overwhelmingly common pattern and that the American and French prohibitions on religious education in public schools represent exceptions rather than the norm (Cole Durham 1996,Monsma and Soper 1997, Ferrari 2008). The true exceptionalism in this field is the prohibition of religious education in public schools in a small number of cases, not its prevalence elsewhere.

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