

The moral challenge posed to religious about the cost of redress.

The Government and others assert that religious have a moral responsibility to pay millions of euro to the Government so as to share equally with the Government the costs of redress. Thus the Minister of Education, Mr Richard Bruton T.D., after telling the Seanad that it is the mission of the religious orders to protect and uphold moral values, went on to say:

“Many ordinary Catholics are dismayed we are not getting any closer to seeing these commitments honoured but instead are moving further away. Unfortunately, as a result of agreements put in place by previous governments, we have no legal mechanisms open to us to compel the congregations to meet these targets.”

“Unfortunately, after today’s report we have to ask questions as to why organisations with stated missions to serve the public and uphold moral codes apparently place so little importance on these values.” (Irish Times, Friday March 10, 2017)

Such a stance is a grave challenge to the religious congregations concerned. It is reported in *The Tablet* (18th March) that the Taoiseach Enda Kenny TD has added his voice to the call and called for a Vatican intervention. Is Minister Bruton right? Is there a case to answer? In the terms proposed by Minister Bruton, I do not think so. But if “*ordinary Catholics are dismayed*” over the failure of those religious congregations to respond, as Minister Bruton asserts, they have to explain their position. They are not caught unprepared: the apostolic visitation conducted by the Holy See in 2011 required the religious orders to examine themselves in the light of the Report.

The managers of several religious institutions had - for years - been responding to the needs of past residents in various ways, e.g. the Sisters of Mercy and the Sisters of Charity, but the moral question first entered the public arena in the late 1990’s with the voicing in the media of protests by persons who had been in Government care in various institutions. These led - on May 11, 1999, - to the Taoiseach Bertie Ahern TD apologising to them and accepting State responsibility. Many other bodies also issued apologies at that time. The moral question put to each and every agent involved in one way or another with children in institutions in the State, - the Dáil, the government, the managers of the various institutions, the Garda, the judiciary, and all the other people and groups and professions, was: what ought they to do for the past residents in the light of these protests?

The Dáil's first response was to set up the Laffoy/Ryan Commission through the *Commission to Inquire into Child Abuse, 2001*.

Then it set up a redress scheme in the *Residential Institutions Redress Act, 2002*.

In his personal evidence to the Laffoy/Ryan Commission in 2005, the Taoiseach Bertie Ahern TD set out to explain the Government's motivation for proposing this scheme. He said he saw this abuse as an issue for Irish society as a whole. The Taoiseach's extensive evidence is given in the *Ryan Report*. (Volume I at 1.55 – 1.62).

From this it is clear that, even before the investigation of abuse by the Commission had got underway, the Government - relying solely on the media exposés - had decided to compensate the protesters with awards fully-funded by the Government. Its hand was being forced by the refusal of victims' groups, with the support of their legal representatives, to cooperate with an investigation unless such a scheme was put into immediate effect. Both the Government and Ms Justice Mary Laffoy had wanted to wait until the investigation was completed. This was the logical thing to do perhaps, but events proved the wisdom of the victims' stand – seven years were to pass before the Commission's investigation was complete, and it was only ended then by being considerably truncated. Now however compensation was to be awarded without waiting for that. In this way, before the Commission of Investigation had published its report in May 2009, millions of euro had already been given out in awards and legal costs by the Redress Board. Clearly the awards were not related in any way to the investigation being conducted by the Commission. In fact a very clear line was drawn between the Commission's activities and the Redress Board's activities. The Commission kept out of the way of the Board, and vice versa. Information was not passed from one to the other. This was strictly forbidden. Yet the Government is now conflating the two operations, and adding the cost of both to the compensation bill. Has the State ever before in all its history demanded that the costs of a Dáil inquiry and compensation scheme be met by someone other than itself? I do not think so. I cannot understand how this is justified.

What was the Government asking of religious *in the beginning* by way of moral response?

The Government's expectation of the religious in June 2002 is evidenced in a *written reply* to a question put by Ms. Roisin Shortall TD in the Dáil. In this reply the Government said the scheme to compensate victims of institutional abuse was set up *without regard to whether*

the religious would be involved. It was done against a background of more than a 1000 cases pending in the High Court against both the State and various congregations. The statement said that ‘*the religious*’ then ‘*came on board*’ saying they wished to make a meaningful contribution to the scheme, and that after long negotiations they agreed to pay ‘*€128 million in ‘cash, counselling costs and real property*’. [See *Patsy McGarry, Irish Times 21 June 2002 page 6.*]

This is corroborated in the *Ryan Report*, in the place previously cited, in the State’s evidence to the Commission in 2005. State witnesses said the Government had felt it was desirable that the religious be involved, but that the scheme was going to go ahead even if they weren’t. In other words, it was the Government’s very own initiative, to meet the Government’s own moral obligations, and the Government would lay down all the provisions that governed it. The State witness also gave evidence that “in fairness to them [the religious] they said quite early on they would like to make a meaningful contribution to the scheme”. (I, 1.70). Clearly, the religious were ready to cooperate, but from the point of view of the Government their participation was not essential. They were adjuncts to the scheme, and certainly not partners. They were included only because the public would expect this. The Government was certainly not initially looking for the religious to pay a fifty-fifty share. This State evidence of cooperation seems now to be contradicted by sources close to government, as reported by columnist Pat Leahy in the *Irish Times* 11th March 2017, p. 2.

The redress scheme was generous. The awards were to be ‘full awards’, ‘full compensation’. However on second thoughts the Government became concerned about the size of the awards and decided on a fixed scale. The most generous feature of the scheme was that it would be made easy to get an award. Applicants had to prove they had been residents in a Government-sponsored institution. They had to show they were injured while so resident and that the injury came within the wide definition of abuse given in the *Residential Institutions Redress Act, 2002*. *They did not have to prove or give any evidence at all that this was because of any fault or negligence on the institution’s part.* These provisions may seem remarkable but - given the decision to go ahead with making awards before conducting any investigations - they make sense. There could hardly be two investigations going on simultaneously. It was also intended to spare the applicants as much as possible from confrontational distress.

A consequence of this procedure was that to save the redress scheme from being in flagrant breach of people’s constitutional rights to fair treatment, further provisions had to be put in

place. *The Board was not to make any finding of fact relating to fault or negligence on the part of the institution.* Furthermore, it was made an offence to say that an award made under the scheme was a finding that a person who was referred to in an application had carried out the acts complained of in an application. This is all in the *Residential Institutions Redress Act, 2002*. The tortuous expressions of the Act are due to the necessity of avoiding the language of the criminal law or indeed the language of the law of civil damage or tort. In an application for an award, there was no ‘accused person’, no ‘defendant’, and there was no ‘offence’ or ‘wrongdoing’ being investigated. There was no plaintiff, no claimant even, but ‘applicants’. This should alert everyone to take care: - not to abuse anyone’s constitutional right to fairness, - not to commit an offence, - not to use the awards of the Redress Board as a ground for imputing responsibility for abusive acts to any person or institution. Everyone has now to respect and honour the limitations imposed by the Dáil as a consequence of its adoption of this form of redress scheme.

The Government was not worried about the number of applicants. It did not think there would be too many and based its apparently naive projection of the cost of the fund on that assumption. This was before the financial crisis of 2007 and the Government was at that time relaxed about spending money. But unlike the Government, the religious *were* concerned about the number of applicants. Whether it realized it or not, the Government was opening the door to practically *any* past resident of an institution to make an application and obtain an award: so wide was the definition of abuse, so easy was it to apply. Surely no religious order could be an equal partner with the Government in such a fund! No religious order had a bottomless purse. At that time, the Government did seem to think it had a bottomless purse.

The negotiations between the religious and the Government resulted in an agreement. The *Ryan Report* gives a useful summary of this agreement:

The indemnity agreement between the Government and CORI provided for the 18 Religious Congregations to make a contribution of €128 million to the Residential Institutions Redress Fund. In return, the Government agreed to grant an indemnity to the Religious Congregations that were parties to the agreement. However, the indemnity agreement of 5th June 2002 was not based on any apportionment of responsibility for abuse.¹

Note the last sentence of this quotation:

¹ CICA Report 1.71.

“...the indemnity agreement of 5th June 2002 was not based on any apportionment of responsibility for abuse

This is significant because it has from time to time been asserted that there was such an apportionment. It has even been said that Mr. Justice Ryan recommended that the religious congregations be responsible on a fifty-fifty basis. This is of course quite untrue.

Under the *Residential Institutions Redress Act, 2002*, section 13 (6), the religious could have had an indemnity without any special agreement. Why was the ‘deal’ necessary? It was necessary because without it the religious would still be open to being sued by any past residents who chose not to accept an award. Without an extension of the statutory indemnity to cover this possibility, the religious would have had to keep all their financial reserves intact. To obtain this extension the religious presumably agreed to give a larger contribution to the scheme than they originally intended. We have learned recently from the Comptroller and Auditor General that - over its lifetime - the extension of the indemnity was invoked on 33 occasions and cost the Government a total €4.4m plus legal costs €5.7m. This bears out what was said in a written reply to a question put by Ms. Roisin Shortall TD in the Dáil. The statement pointed out that the indemnity given would apply to ‘*relatively few cases*’. It added that it was misleading to say that the indemnity deal with the religious had implications for the taxpayer. What implications there were arose from the fact that children were incarcerated in institutions by public bodies for decades and suffered injury, often serious injury, as a result. [See *Patsy McGarry, Irish Times 21 June 2002 page 6.*]

There has been a delay in the legal conveyance of some properties whose value is included in the agreement. The delay is understood to be due to a legal difficulty which it is hoped can be resolved.

It soon became clear that the forebodings of the religious about the number of the applicants and the spiralling of the cost of the scheme were fully justified. Paradoxically this reinforced public conviction that the religious orders had made a crafty deal. Public anger grew.

In strong contrast was the mood among religious. They were in a state of shock brought on by the wave of abuse in the media. They too had something to be angry about. They perceived a great injustice being done to them. In their minds their contribution to Irish society through their work in the orphanages, industrial schools and reformatories had been huge. They alone had been there to do something for the poor of Ireland, often at great personal cost to their

members, in the times of great poverty that marked the founding years of the State, and indeed long before that in the British era.

The report of the Commission of Inquiry (the *Ryan Report*) was published in May 2009. Its findings severely condemned chiefly the religious congregations and various departments of Government, not least the Department of Education. Angry calls were made to ‘reopen the deal’. A further torrent of abuse was leveled at religious. Not surprisingly it overwhelmed them. Their good name, that was so essential to them, was damaged. Their image of themselves as committed Christians was shattered. They were held up in public as failures in the mission to which they had dedicated their whole lives. This was very painful, especially to surviving staff members of the institutions.

Although the Taoiseach Brian Cowen, T. D. and the Minister of Education Mr. Batt O’Keeffe, T.D, quickly declared that the agreement with religious could not be reopened, the Government began steadily to exert ‘moral’ pressure on the religious congregations to reimburse the Government on a ‘fifty-fifty’ basis for its expenditure under the redress scheme. The Government had discovered by now (2009) that it did not have a bottomless purse and was looking for a bailout. The Government asserted that in the light of the *Ryan Report* the religious had a *moral* obligation to carry a half of the Government’s burden. This is ‘the target’ referred to by Minister Bruton in his words quoted above to the Seanad. It comprises not only half of the costs of the awards to applicants under the *Residential Institutions Redress Act, 2002*, together with half of the administration costs, but also half of the costs of the work of the Laffoy/Ryan Commission of Inquiry set up under the *Commission to Inquire into Child Abuse Act, 2001*.

The religious are being attacked now because they do not accept this. The religious argue that this spiraling of costs was precisely what they had warned the Government about in 2001 and in 2002. It was the reason they had insisted that their contribution to the redress scheme was a fixed, one-off contribution, not based on any agreed apportionment of liability, as we saw confirmed in the *Ryan Report* quoted above. There had been nothing immoral in this agreement. The parties acting for the religious had made it abundantly plain to the Government what they were letting themselves in for, but were ignored. Note that it is not the working of the indemnity that has cost the State over a billion euro. It was the structure of the redress scheme. Its generosity is praiseworthy, but it is a scheme of a kind that only a Government could propose and fund. The link of the scheme to actual abuse is very tenuous,

as has already been explained. The total of the sums awarded by the Redress Board is not and cannot be a measure of the harm done by any one individual or institution. The Dáil explicitly laid this down in the Act establishing the scheme. An applicant had to show 'harm' done but no evidence about blame was required, - and no findings were made about the blame attached to that harm. It is in fact an offence to say that they do.

In no way can the awards be taken as a benchmark to quantify the moral obligation of an institution like an industrial school or orphanage or reformatory or for its members. Yet this is what the Government is arguing.

At the same time it is clear that the findings of the *Ryan Report* 2009 heightened the moral challenge that had first emerged in the 1990's and been responded to by the Dáil and religious (were there any other responses?) at the turn of the century as already described. Not only religious orders but all school authorities as well as to the Government departments concerned, the Dáil, the judiciary, the Garda, all of which were an integral part of the system, condemned in the *Report*, had now in 2009 once again to make an appraisal of their moral position. It is noteworthy that the *Irish Times* 'Leader', in the 11 March 2017 edition previously cited, highlights the need to look wider than the church, while not letting the church off the hook.

So – what about this moral challenge? What is its substance and how is it to be assessed in monetary terms?

As to substance, so far as concerns the religious congregations, each had its own distinctive involvement in the Government system that had been introduced in the 19th century and which continued on practically unchanged until the later 1960's. Some congregations managed reformatories, some orphanages, some various kinds of special school, and some hospitals. Some had been in it for many decades, others for shorter periods. Each was autonomous. Each manager carried his or her own burden. Some were deeply involved. Some were on the fringes. Some had assets, some did not. Some had many members, some had few. Each was a separate religious family and charity, each had to take into account its other commitments. Faced with the *Ryan Report*, each congregation had to consider which of its many findings applied to it, and to what degree it accepted those findings. There are legitimate grounds for having serious reservations about the findings, without impugning the central message of the *Report*. Each congregation had then to make a fresh moral response in the light of its own separate identity and responsibility and resources. Minister Bruton in the

Seanad spoke of the hard work done by his predecessor Mr. Ruairi Quinn, “*engaging directly with the congregations to seek to put moral pressure on them to deliver*”. The truth is that the Government worked tirelessly to override the reality of the moral (and legal) situation as I have described it. On behalf of the Government, its aim was to coerce the orders involved to act as if they had a corporate moral responsibility for assuming a half of the Government’s financial burden, when the moral and legal reality was and is in fact quite different. This becomes even more evident when one remembers that there were other institutions directly involved in the Commission’s work and in the Redress Scheme that were quite unrelated to the religious congregations. They could not be dragooned in the way the Government was seeking to treat the religious orders. These other institutions were in effect, and still are, ignored. They were not of course major actors in the field. There are then many factors for each order to take into account when judging the substance of its moral responsibility. It has to decide for itself on its method. Questions to be asked would be:

- Did we fail in our Christian mission? Did we do our best? Was our best good enough?
- Have we considered which of the findings of the Commission apply to us, and do we accept them? A careful consideration and assessment of the findings of the *Ryan Report* are at the heart of the moral obligations of the religious orders and the other sectors of society who were involved. More is said of this below.
- Have we in our particular congregation made an adequate response to past residents?
- Did we make any commitments in the aftermath of the publication of the Ryan Report in 2009? Just promises are morally binding.
- So far as one can tell, no religious order made a promise to make a further contribution to the redress scheme, i.e., to the bill incurred by the Government. What many did was to make voluntary commitments for the benefit of the past residents. Some chose to do this through the newly-set-up Residential Institutions Statutory Fund, operating as “Caranua”.
- Have we really taken on board the lessons of this chastening experience?

Turning from the substance of the moral obligation to its monetary assessment, the religious orders must, as Archbishop of Dublin Diarmuid Martin has asserted, pay “a fair share of compensation” (*The Tablet 18 March 2017*). In the light of my reading of the story of the

redress scheme it is surely clear that the whole cost of the redress scheme is not one of the factors to be taken into account in this assessment. The bill incurred by the Government for the redress fund is not a benchmark of the responsibility of any of the others who were involved, including the religious. It was a bill incurred by a Government and Dáil on their own legal and moral responsibility. The linking by the Government of the moral responsibilities of the religious to the cost of the Redress scheme has caused damaging confusion in the minds of religious and of the public. This so-called ‘moral pressure’ should stop. There are other names for it. Morally speaking, the Government should be helping the public to understand a complex situation, not confusing it.

Similarly, the costs of the Commission of Inquiry conducted by Ms. Justice Laffoy and Mr. Justice Ryan are not a factor to be taken into account.

Like any examination of conscience, this is an internal process, not a public one. But, as intimated at the outset of our reflection, we have a duty to address the concerns of the *many ordinary Catholics* who are dismayed: to explain that we do not have a moral obligation to pay a share of the awards and costs of the redress scheme, - and that we do not have a moral obligation to pay a share of the costs of the Commission of Investigation. So far as I can see, such a demand has never been made on citizens in all the history of the State. In fact those involved had a right to their own costs from the Commission.

How does one respond to the argument that people may make that “it was the religious who did the actual abuse and who should be made to pay until it hurts”? One could point out that ‘it’ has already hugely hurt the religious. One could point out that the thinking behind this sentiment - while understandable – overlooks some salient factors:

- It overlooks the very real responsibility of society as a whole, and that the *Ryan Report* makes it clear that the real blame was widespread. Top of my list of culprits are those who held the purse strings (the *Ryan Report* lets these off too lightly) and starved the institutions of the capital and income to do an adequate job. Then there are the policy setters both of civil and church society who took so long to see that society was changing. Then there were the judiciary and the law-enforcers who presided over an outdated system. Finally there were the foot-soldiers. It is on the foot-soldiers that the ‘make them pay until it hurts’ party want to put the burden.
- It overlooks the fact that the awards made by the Redress Board were not made on the basis of any findings of abuse. If any one says that they do, he or she is confusing the

issue. At bottom the redress scheme was a massive operation of a kind that only a Government could engage in. The ‘make them pay until it hurts’ party fails to understand that the huge bill for awards is not due to any agreement made by the Government with the religious but to the design of the redress scheme.

- It assumes that the findings of the *Ryan Report* are immune to criticism. While the *Ryan Report* commands great respect as the fruit of a long and patient inquiry, its findings are not immune to challenge. The findings are opinions come to by the Commission on a basis that would not be sufficient in a court of law. Unlike a court’s findings, they may be based on no more than expressions of beliefs, opinions or intentions. We are not here in the zone of ‘*evidence beyond all reasonable doubt*’ or even of ‘*probabilities*’, certainly not ‘*cast-iron facts*’. There must always be serious reservations too in any context about evidence that is given long after the events described, or to a Commission with a statutory duty to adopt a therapeutic stance towards the complainants and in the shadow of a generous redress scheme, to mention just some factors. In an expert report prepared for the Commission, Richard Rollinson speaks of how little is known ‘*about the lived experiences of children in residential care across the period*’. A huge gap remains between the way the congregations have understood their own history and the way it is presented in the *Report*. The long-held understanding of the congregations about their past cannot be simply ‘rubbished’. This divergence will only be resolved when in the course of time academic historical studies have been completed. In the meantime, while the Dáil may sweepingly accept all the findings of the Commission for the purposes for which it was established, anyone who wants to rely on them for another purpose is not only entitled to quiz them but is morally bound to do so. Please note that, in saying this, one is not saying the findings were unfounded, but that they can and ought to be evaluated. In the present context, the religious congregations are constitutionally and morally entitled to form opinions of their own.

One may try to explain that there was no secret and immoral deal made between the religious orders and the Government, no ‘sweetheart deal’, nor did the religious pull the wool over the Government’s eyes: that the agreement was not a crafty piece of work but a sensible business transaction which benefited both parties and in the grand financial scheme of things was not a big affair, as the Comptroller and Auditor General has shown.

One may explain that other professions were involved in the State system condemned in the *Ryan Report* and face the same moral questions as religious: the judiciary, the political parties, civil servants, Garda, medical doctors and registrars, teachers, journalists, etc. These may very well say: ‘we have met any moral responsibility we have through our payment of taxes to the Government’. Well and good, but religious are tax-payers too. Some religious however have responded with voluntary contributions to the *Residential Institutions Statutory Fund* (Caranua) for the benefit of past residents. These donations would be regarded in any other context as being very substantial indeed. Others have and are still helping past residents in other ways. One could also mention the great efforts that have been made in the field of child protection.

To conclude then: Minister Bruton speaks about ‘*agreements put in place by previous governments*’ that hamper the present Government in its pursuit of the religious orders for millions of euro more. It has been argued above that the ‘agreement’ was irrelevant to the way the Redress Board ran up its huge bill. He speaks about ‘targets’ that have not been met: it has been argued that these Government targets are not justified. He speaks about commitments that have not been honoured. Since he does not specify these commitments, one cannot comment more.

The complex nature of this reflection makes it unlikely that it will bring about a massive swing in public opinion or a change in the way the Government has approached this issue. But it is one attempt to allay the public’s ‘dismay’ and may perhaps persuade some among them that the religious orders have tried and are still trying to address the moral issues and that the Government’s attempt to shift one-half of all redress costs onto the backs of the Orders has no merit.

Of all the spending that went into the making of the financial crisis of 2007/8, the spending on redress was something done for the very vulnerable in society. A journalist once commented that the redress scheme was an act of State generosity which should be celebrated.

The victim-centred, therapeutically-structured Laffoy/Ryan inquiry was also something to celebrate in that it helped to restore the dignity and morale of those abused in institutions and helped the Commission to advise the Dáil and others with recommendations for the future.

The fact that the Laffoy/Ryan inquiry constructed a story of the institutions that made an unforgettable impact on the public was something to celebrate – in so far as it was substantially true and led to such things never happening again! On both counts the story inevitably falls short. Bad things are still happening. And while, ‘in the old days’, bad things happened, it was not a desert waste. Surely, some balance has to be restored.

An Oblate of Mary Immaculate

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