

## Religion and the Secular State in Ireland<sup>1</sup>

### I. SOCIAL CONTEXT

From a sociological point of view, Ireland is usually considered a Catholic country. According to the findings from the Central Statistics Office shown below, an overwhelming proportion of Irish belong to the Catholic Church. In the latest decades, the proportion of Catholics diminished from around 93 percent to the present 87 percent. This has been due to two primary factors: first, a general trend in society to more non-religious attitudes; and second, a dramatic increase in immigration. On the one hand, there are increasingly less differences between the “Catholic Irish society” and continental countries, although the Catholic background is more easily perceived here than in other countries.<sup>2</sup> On the other hand, the inception of minority religious denominations, almost absent until now in the Island, ensued from immigration.<sup>3</sup>

However, there has not been a radical alteration in the religious pattern of Irish society, as far as Catholics are still a large majority. We could better say that there has been a change in lifestyle rather than a reshaping of the religious map.

Nationality	Irish	Non-Irish	Total
Total	3,706,683	419,733	4,172,013
Catholic	3,409,381	213,412	3,644,965
Church of Ireland (incl. Protestant)	86,990	31,197	118,948
Other Christian Religions	16,327	11,484	28,028
Presbyterian	13,628	7,741	21,496
Muslim (Islamic)	9,761	21,613	31,779
Orthodox	2,881	16,845	19,994
Methodist	5,077	5,612	10,768
Other Stated Religions	22,497	31,118	54,033
No Religion	105,356	68,444	175,252
Not Stated	34,785	12,267	66,750

Source: Central Statistics Office Ireland. Last Survey, 2006

Available at <http://www.cso.ie/statistics/popnclclassbyreligionandnationality2006.htm>

Although the Catholic Church was never established as the official church of the country, Ireland has always been deeply influenced by Catholicism. Moreover, there is a long tradition of separation between church and state that still remains today, as it will be conveyed in next sections.

### II. HISTORICAL APPROACH

The history of Ireland is a key element to understand the current Church-State relationship. Some particularly relevant events are described below.<sup>4</sup>

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1. The report will deal only with the Republic of Ireland.

2. We must also take into account that the revitalisation of religious life in Eastern countries since 1990 has changed the religious map in Europe. So, the Irish case will be faded away in a more heterogeneous context.

3. For a more detailed account on the minority churches in Ireland and its juridical status see COLTON, P., *Religious entities as juridical persons, Ireland*, in Friedener, Lars (ed.), “Churches and other religious organizations as legal persons,” Peeters, Leuven (2007), 131 ff.

4. See broadly Blanchard, J., *The Church in contemporary Ireland*, Dublin (1963), xv ff.

a. The *importance of Ireland in ancient Canon Law and its particular monastic organization* are well known. The Island, which never was under the Roman Emperor authority, was divided up into small political constituents. This favored the development of a strong monastic system that endured until the XII century, and a weakness of the diocesan structure. This fact explains the high level of culture, renown and influence of Irish monasteries and abbeys.

b. The *Anglo-Norman domination*. The long centuries of Catholic tradition in Ireland were abruptly ended by the breach between Rome and Henry VIII created in 1534, as well as the tough implementation of the reform by Queen Elizabeth I. Three hundred years of trouble began then for the Irishmen.<sup>5</sup> Military conquest and economic dominion accompanied the imposition of the Anglican faith in Ireland. Catholics were subjected to disabilities: they could not hold public office, sit in parliament or vote, and their power to acquire land was limited.<sup>6</sup>

The so-called “Catholic emancipation” began to bear fruit in the early decades of the XIX century. Some of the restrictions on Catholics were loosened by those years. Yet, it was possible the foundation of St. Patrick’s College of Maynooth – both a College and a Catholic seminary – in 1795;<sup>7</sup> since then, it has been a point of reference for Irish Catholicism.

In 1800, the *Act of Union* was approved, which was the end of the Irish independence. From that year on, until 1921, the British authorities governed Ireland. According to the *Act of Union*, the Churches of England and Ireland should also be united in an only Church, the United Church of England and Ireland, which was established as the official Church of the country.<sup>8</sup> Due to Daniel O’Connell’s intervention, there was a greater demand of religious liberty. It got shaped as the *Roman Catholic Relief Act* of 1829, which overturned most of the disabilities on Catholics.<sup>9</sup>

Another highlight on this period was the separation between the State and the Church of Ireland, through the *Irish Church Act* of 1869. In 1870, the *Matrimonial Causes and Marriage Law Amendment* gave the civil courts power over marriage.

*The fight for the independence*, fuelled by the nationalist movement, was the core issue in the beginning of the XX century. As the separation from Britain took place, hallmarks of the Irish identity were prompted, and, one of the factors that most set apart the two countries was the religion.

Both the *Treaty between Great Britain and Ireland* of 1921 and the *Free State Constitution*, of 1922, declared the separation of church and state, and the latter also recognized the freedom of religion.<sup>10</sup> Unfortunately, it was not the end of Irish political

5. This period is faintly mentioned in the Preamble of the Constitution, which in the second subsection states: “We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial (...) Do hereby adopt, enact, and give to ourselves this Constitution.”

6. Casey, J., *Constitutional Law in Ireland*, Dublin (2000), 2.

7. Nevertheless, it should be noted that, by then, the ideals of the French Revolution were spreading all over the continent. British authorities feared more the French ideals than Catholicism. If they allowed clergymen to be educated in France, revolutionary ideas could also widespread in Ireland. So, British not only enable the foundation of Maynooth; it even got public funding. See Blanchard, J., *supra* n. 4 at xx.

8. “That if be the fifth article of union that the churches of England and Ireland, as now by law established, be united into one protestant episcopal church, to be called ‘The United Church of England and Ireland’; and that the doctrine, worship, discipline and government of the said united church shall be, and shall remain in full force for ever, as the same are now by law established for the Church of England; and that the continuance and preservation of the said united Church, as the Church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the union; and that in like manner the doctrine, worship, discipline and government of the Church of Scotland shall remain, and be preserved as the same are now established by law, and by the acts for the union of the two kingdoms of England and Scotland”

9. However, certain disabilities continued until 1920 (*Government of Ireland Act*). For example, Jesuits could not be lawfully ordained in Ireland; donations and bequests in favor of that order were also invalid; and so on. See Casey, James, *State and Church in Ireland*, in “State and Church in the European Union,” Baden-Baden (2005), 188.

10. *Free State Constitution*, art. 8: “Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or

trouble. That same year the Civil War began. After it was ended, in 1923, Eamon de Valera led the drafting of the Constitution in force, approved on 1937.

### III. CONSTITUTIONAL CONTEXT

Two constitutional provisions must be considered in this section: the Preamble and Article 44.

The Preamble of the Constitution commences with an invocation of the "... Name of the Most Holy Trinity, from whom is all authority and to whom, as our final end, all actions both of men and States must be referred."<sup>11</sup> Although it appears to be a general statement in the Constitution of a denominational country, with an established Christian church and limited neutrality, it is not the Irish situation, as - will be proved below.

Generally, preambles of constitutions are not enforceable. However, Irish case law rested on the Preamble to support certain claims. *Quinn's Supermarket Ltd. v. Attorney General* referred to the Preamble to support the "firm conviction" that Irish people are "a Christian people."<sup>12</sup> Also, in *Norris v. Attorney General*, O'Higgins, CJ understood that the Irish people proclaimed in the Preamble a "deeply religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs."<sup>13</sup> The *Report of the Constitutional Review Group* of 1996<sup>14</sup> recommended the amendment of the Preamble, avoiding references that could be divisive nowadays.<sup>15</sup>

The Constitution of 1937 devotes Article 44 to the religious issue. It states:

1) The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion.

2) 1°. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. 2° The State guarantees not to endow any religion. 3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status. 4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. 5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious and charitable purposes. 6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.<sup>16</sup>

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indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denomination, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation".

11. An endnote to the text, only in Irish, dedicates it to the Glory of God and the Honour of Ireland (*Dochum Glóire Dé agus Onóra na hÉireann*).

12. *Quinn's Supermarket Ltd v. Attorney General* [1972] IR 1, at 23.

13. *Norris v. Attorney General* [1984] IR 36, at 64. Other references to the Preamble can be found in *Maguire v. Attorney General* [1943] IR 238; *McGee v. Attorney General* [1974] IR 284; *Attorney General v. Open-Door Counselling Ltd* [1988] IR 593.

14. The *Report* was prepared by an all-party Committee appointed by the Government of Ireland in 1994. Its target was reviewing the Constitution and defining the areas that should be modified. The Report was finalized in 1996, and it aroused a great interest in the political arena. Nevertheless, opinions regarding the Report were not unanimous. For example, according to Barret, discussions about the religious issue were brief, shallow, and a bit too defensive with regard to accusations of separatism. (See Barret R., *Church and State in the light of the Report of the Irish Constitution Review Group*, in 20 Dublin University Law Journal, n.s., 1998, 51 ff.)

15. See Casey, J., *Church and State in Ireland 1997*, in European Journal for Church and State Research, 1998, 24. Casey also mentions the sharp critic to this proposition made by the Archbishop of Dublin.

16. Note that the Irish Constitution is written both in English and Irish; in case of contradiction, the Irish text

A proper understanding of this article requires a brief explanation about its creation. De Valera followed up the drafting of the whole Constitution, but he specially oversaw everything related to religion. He wanted the Constitution to have a Catholic background, which reflected the Irish ethos, but he also wanted to avoid any kind of controversy with the Protestants. Finding the balance was a real challenge for the President.

De Valera sought an un-official approval of the text from the Vatican. Although the Holy See had some doubts regarding the first draft of Article 44,<sup>17</sup> it did not want to interfere in Irish domestic policies. Then, the Pope said that he neither approved nor disapproved the Constitution; simply *tacebat*.<sup>18</sup> The President also submitted the draft of the Constitution to the Irish Catholic hierarchy, and he had some conversations with the leaders of other religious denominations.<sup>19</sup>

Some scholars consider that the primary purpose of Article 44 was guaranteeing the freedom of religion.<sup>20</sup> However, when freedom of religion was first recognized in a Constitution, in 1922, it already had a long tradition in the Island, and its incorporation to the Constitution was logical. On the contrary, the other dispositions of Article 8 were a requirement of the Treaty of 1921; their aim was avoiding the establishment or the preference for any religious denomination —obviously the Catholic Church— which would have the undesirable consequence of a bigger breach between the North and the South. In 1937, it was even more necessary to define the position of the State with regard to the religious denominations, primarily the Catholic Church, which is the goal of the Article 44.

Three main questions arise from Article 44: what is the scope of the first subsection, the extent of the non-endowment clause, and the public funding of private religious schools? I will now address the first issue. For the others, see nn. 8 and 10.

Subsection 44-1 was one of the major innovations in the Constitution with regard to religious matters. This kind of declaration is unusual in European Constitutions. In the Irish case, it can be explained for sociological and historical reasons. However, its significance is far from clear.

There are two different statements in the subsection: the homage of public worship due to God, and the obligation of the State to honor and reverence Him.

Regarding the first one, it is not easy determining its exact nature and meaning. When it says that “Almighty God” deserves worship, it would be restricting that reference to monotheistic faiths. However, the Supreme Court considered that the Constitution states this duty in terms that do not confine the benefit of that acknowledgement to the Christian faiths.<sup>21</sup>

prevails. A study on the differences between the Irish and the English text can be seen in the Report *Bunreacht Na hÉireann. A study of the Irish text*, by the All-Party Oireachtas Committee on the Constitution, dir. Micheál Ó Cearúil, Dublin (1999), 634 ff.

17. See below.

18. See Keogh, D., *The Constitutional Revolution: an analysis of the making of Constitution*, in F. Litton (ed.), “The Constitution of Ireland, 1937-1987,” Dublin (1988), 43 ff. Nonetheless, the Vatican appreciated De Valera’s efforts to draft a Constitution according to the Catholic principles. It is worth noting that the Holy See had been reluctant to De Valera’s policy, because of his leaning to lower the religious differences between North and South Ireland; so, certain secularism was expected. However, Fianna Fáil -De Valera’s political party- was not hesitant to the enactment of legislative acts that reflected the principles of the Catholic morality.

19. He talked to Edward Cahill, a prominent Jesuit, John Charles McQuaid, Bishop of Dublin from 1940 onwards, Paschal Robinson, Nuntius in Ireland; and with authorities of the Anglican Church, the Religious Society of Friends (Quakers), Presbyterians, Methodists and Jews.

20. See, among others, Casey, J., *Constitutional Law in Ireland*, supra n. 6 at 692.

21. *Quinn’s Supermarket Ltd v. Attorney General*, supra n. 12. See also *McGee v. Attorney General*, supra n. 13; *Norris v. Attorney General*, supra n. 13. The current interpretation of this provision is summarized in a more recent case, *Corway v. Independent Newspapers (Ireland Ltd)*, [1999] 4 IR, at 484: “The effect of these various guarantees is that the State acknowledges that the homage of public worship is due to Almighty God. It promises to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be the Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists. But art. 44-1 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality.”

Another controversial issue refers to the obligation that this statement imposes on the State. The Constitutional assertion could be understood in the sense that the public authorities should not only allow but also even participate in divine worship in public. This interpretation would be borne out by the Irish Language version of the Constitution, according to the *Report of the Constitutional Review Group*, and it may provide constitutional authority for some involvement of the State in public worship.<sup>22</sup> Another interpretation considers that the statement would only imply that the State is obliged to permit individuals to engage in public worship. If that were the case, it would be desirable for the statement to be conveyed in more direct language. Or, as the *Report* also said, this can be dealt with (if necessary) by a suitable amendment of Article 44-2-1<sup>o</sup>.<sup>23</sup>

Regarding this issue, Professor Casey points out that the overwhelming allegiance to religion in Ireland is mainly a matter of private practice, but there are many public manifestations of religion. Some examples are the ceremonies at defense establishments or the daily broadcasting of the Angelus. The only clear limit to those manifestations comes from Article 44.2.2<sup>o</sup>, which bans State endowment of religion. Otherwise, that is to say, if those practices do not carry any State endowment, it seems likely that any action to challenge them would fail, with the courts invoking Article 44.1 to uphold the impugned provisions.<sup>24</sup>

The second statement of the Article 44.1 is less obscure in its meaning, although it can also pose some difficulties. It imposes an obligation on the State to refrain from engaging in atheistic propaganda, and it prevents the State from taking any hostile measure to religion. It may also be understood that, although not expressly stated, that legal or statutory restrictions to proselytism –besides those based on public order reasons– are not enabled.<sup>25</sup>

In view of these arguments, the recommendation of the majority of the Review group favored the deletion of Article 44-1. In case it was not deemed desirable, it might be reformulated as follows: “The State guarantees to respect religion.”<sup>26</sup> However, no action has been taken since 1996 to amend the Constitution in the aforementioned way.

But not only what Article 44.1 says is important. *What it does not say and what did not happen* is also interesting. The first version of Article 44 included two subsections which fuelled a sharp controversy both before they were approved and afterwards, until they were repelled in 1972. Article 44-2 and 3 read as follows:

2<sup>o</sup>. The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens. 3<sup>o</sup>. The State also recognizes the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation this Constitution.

These paragraphs were criticized for being too Catholic and for being not Catholic enough. The Constitution introduced a distinction between belief-systems that had not been in any other constitutional text before. Certainly, it was very loose, and it was not easy to see what kind of practical effect, if any, it might have.<sup>27</sup> But in fact, it indicated that with regards to religion and atheism, the State was not neutral; and with regards to different denominations, the State was not neutral either, as far as the Catholic Church was singled out from the others by being granted a “special position.” However, some Catholic authorities found the words extremely vague, and considered that these

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22. *Report*, supra n. 14 at 370.

23. *Report*, supra n. 14 at 377-378.

24. See Casey, J., *Constitutional Law in Ireland*, supra n. 6.

25. *Id.* at 690.

26. *Report*, supra n. 14 at 378.

27. Whyte, J. H., *Church and State in Modern Ireland, 1923-1979*, Dublin (1980), 54-55.

subsections did not give, *de facto*, any special position to the Catholic Church. Moreover, at some points the Constitution did not measure up to what the Catholic authorities might have desired, for example, Article 41, relating to marriage.<sup>28</sup>

Non-Catholic denominations welcomed this article, not because it granted them any advantage (it did not), but because, due to the historical context in 1937, the faint recognition of the Catholic Church and the explicit recognition of other denominations better than had been expected. When the Constitution was enacted, there was a remarkable consensus on religion and social issues, regardless any political affiliations. Ninety three per cent of the population was Catholic, and a vast majority followed the hierarchical guidance. Most of them supported the idea of enshrining the Catholic principles as part of the Law of the Land. If we take into account that the nationalist movement, which led to the establishment of an independent Irish state in 1922, derived its strongest support from the Catholic community, the surprising thing is that the 1937 Constitution did not establish the Catholic Church as the State religion.<sup>29</sup> The long oppressed Catholic majority did not take its revenge when it had the chance to do it.<sup>30</sup>

Those two subsections were overturned in 1972, through the Fifth Amendment of the Constitution, without any regard for the Catholic hierarchy.

According to the current version of the Constitution of 1937, there are three major principles that define relations between State and religion: freedom of religion, separation between church and state, and neutrality.

Freedom of religion is expressly mentioned in the Constitution. No special trouble usually arises from this principle. It must be noted that the *European Convention on Human Rights Act*, 2003, states in s. 2 that “in interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.”

Separation between church and state is the key principle, and a truly strong one, deeply rooted in Ireland. Perhaps *separation* is not the exact word to name this principle, assuming it has a precise meaning in Western countries that is not always accurate in Ireland. For example, state aid for denominational schools is not considered an entanglement between church and state. *Aloofness* is the word that would better reflect the relationship between church and state; it conveys the Church’s reluctance to become entangled with the state, even though there might be advantages attached.<sup>31</sup> Several events in the recent history of Ireland reveal this aloofness in government. In the 19<sup>th</sup> century, Catholic bishops did not grant the State the power of veto in Bishop’s name as a reward for the Catholic emancipation. Also, the Catholic Church rejected the funds other denominations received from the State. Besides, when the Church of Ireland was disestablished as the Church of the country, in 1869, the Catholic Church did nothing to hold that position; its attitude was the same in 1937, although Catholics had widely supported the nationalist movement. After the Constitution, the tradition of separation continued. For example, in the 1940s, Maynooth experienced a wide enlargement that was funded without any public help; Canon Law was not recognized at all, and it was viewed just the same as any foreign Law; the Government played no part in the nomination of that church’s bishops;<sup>32</sup> the Catholic Church forbid clergymen to take part in politics; and

28. See McDonagh, E., *Church and State in the Constitution of Ireland*, en “Irish Theological Quarterly,” XXVIII, 2, 1961, 131 ff.; Keane, R., *Fundamental rights in Irish Law. A note on the historical background*, in O’Reilly, J. (ed.), “Human rights and Constitutional Law,” Dublin (1992), 25. This author thinks that the clause would have reached the courts, it would have been considered it had not juridical effects.

29. Hogan, G. W., *Law and Religion: Church-State Relations in Ireland from Independence to the present day*, en 35 *American Journal of Comparative Law* (1987), 55.

30. According to Keogh, there is a risk to underestimate the conflict between the Catholic Church and the State that arose from the Constitution, because it did not hurdle to the public arena. If it did not, it was mainly due to De Valera’s diplomatic ability. See Keogh, D., *The Constitutional Revolution*, supra n. 18 at 118.

31. Whyte, J. H., *Church and State in Modern Ireland, 1923-1979*, supra n. 27 at 12.

32. In Whyte’s words, “I have been unable to find any case where it has made even informal presentations to the ecclesiastical authorities” (Whyte, J. H., *Church and State in Modern Ireland*, id. at 14).

so on.

Of course, this principle also implies that no religious denomination has any role or special power in the secular government of the country,<sup>33</sup> nor has special powers to control any other religious communities.

In summary, Article 44 would be discharged as a policy of non-interference.<sup>34</sup> It might be surprising that given the history of Ireland, and the religious landscape of the population, there has not been any entanglement between the Catholic Church and state. The relative lack of contact, as explained above, enables the understanding of the harmony in their relations. That means that a number of issues which caused trouble in other countries -interferences in the appointment of bishops, legal effects of canon law marriage, etc...- have never arisen in Ireland. The field of contact, and therefore of potential for conflict, was narrower.<sup>35</sup>

Indeed, Catholics might find a conflict, at several points, between faithfulness to the Church and allegiance to the State. The private and devotional nature of Irish Catholicism contributed to find a solution to the dilemma. A Catholic Irishman would surely defend that the priest's spiritual authority must be respected; but, at the same time, he will consider that politics was none of his business.<sup>36</sup> Because of that, unlike other European countries -Spain, Portugal, Italy, Austria, etc.-, Ireland is exceptional in that it has never produced an anti-clerical party. The Catholic Church in Ireland has not faced a proper anticlerical movement. Although some political factions (as Fenians, Parnellites, or Republicans) complained that the Church was exceeding the limits of its powers, they never dare to go so far as to say the Church had no claim in Ireland.<sup>37</sup>

It is worth noting that separation between church and state was not in accordance with the teachings of the Catholic Church during those years. The Popes had repeatedly condemned that doctrine.<sup>38</sup> In several European countries, the Catholic Church was then the Church of the State, or was funded by it, and when the separation of Church of State took place in France and Portugal, in the beginning of the 20<sup>th</sup> century, it was considered a breakup of the rights of the Church. Ireland follows the pattern of Anglo-Saxon separatism; it could be thought that it was an imposition of the British Government during the period of English supremacy, but facts showed the opposite. This principle is compatible with the strong influence of the Catholic Church in Irish life. Here we find an unparalleled pattern in Europe.

Neutrality, according to Clarke,<sup>39</sup> is the only principle clearly expressed in the Constitution. The State must remain neutral with regard to the different religious denominations. It can neither favor nor persecute any of them, and there cannot be discrimination on grounds of religious belief, whether such a distinction appears invidious or benign.<sup>40</sup> The issue of religious discrimination has been brought into sharp focus recently, with several media sources highlighting the operation by State-funded denominational schools of discriminatory enrollment procedures.<sup>41</sup>

33. No church is guaranteed representation on civil statutory bodies, such as the Broadcasting Commission of Ireland, the Arts Council, the Censorship of Publications Board, and so on. However, it would be usual to appoint at least one member of a minority church. See Casey, J., *State and Church in Ireland*, supra n. 9 at 200.

34. Hogan, G. W. and Whyte, G. F., *J. M. Kelly: The Irish Constitution*, Dublin (2003), 2045.

35. See Whyte, J. H., *Church and State in Modern Ireland*, supra n. 27 at 16.

36. *Id.* at 12.

37. See Larkin, E., *Church, State and Nation in modern Ireland*, in "The historical dimensions of Irish Catholicism," Dublin (1997), 123.

38. Gregorio XVI, *Mirari vos*, 1832; Pío XI *Syllabus*, 1864; León XIII, on several encyclicals. See about this NORMAN, E. R., *The Catholic Church and Ireland in the age of Rebellion*, New York (1965) 282 ff.

39. Clarke, D., *Church and State*, supra n. 28 at 226.

40. *Quinn's Supermarket v Attorney General*, supra n. 12 at 16. The fact that discrimination on grounds of religion is specifically banned outside the framework of art. 40.1 [regarding principles of equality and non discrimination] can be assumed to be of some significance, particularly given that the anti-discrimination provision effectively reiterates what is already protected by art. 40.1, which has been held as prohibiting the State from discriminating upon religious grounds. See Daly, E., *Religious Discrimination Under the Irish Constitution: A Critique of the Supreme Court Jurisprudence*, 2008 Cork Law Review, 28.

41. In early 2007, a number of children of Nigerian origin in an area of North Dublin could not gain access to

Paradoxically, cooperation is not mentioned in the Constitution. There are some types of cooperation – as in education – but it is not considered as a constitutional principle.

#### IV. LEGAL CONTEXT

There is not specific legislation on religion, except the aforementioned articles of the Constitution.<sup>42</sup> Issues directly related to religion are not among the preferential topics chosen by the Law Reform Commission to be considered in the next years.<sup>43</sup>

Regarding the case law, there are two major cases in religious freedom: *Quinn's Supermarket Ltd. v. Attorney General*<sup>44</sup> and *In Re Article 26 and the Employment Equality Bill*, 1996.<sup>45</sup> Although they are mentioned in other sections, I will give a brief account of both.

In *Quinn's Supermarket*, several regulations that exempted Jewish Kosher shops from compliance with commercial trading hours were challenged. The plaintiff, a supermarket's representative, argued that the differential treatment was contrary to Article 44.2.3° of the Constitution, as it imposed discrimination on grounds of religion.

The Supreme Court accepted that Article 44.2.3° of the Constitution precludes all distinctions based upon religious belief, profession, or status. Thus, the aforementioned regulations were “unconstitutional on [their] face.” However, the Supreme Court noted that Article 44.2.1° guarantees the free practice and profession of religion. In order to resolve the potential clash between the two sections, the Court looked to ascertain the “overall purpose” of Article 44. Looking to the Preamble as well as the historical context of the provision, the overall purpose was deemed to be “the freedom of practice of religion”. And, as Walsh J. pointed out, “any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion would be invalid having regard to the provisions of the Constitution, unless it contained provisions which saved from such restriction or prevention the practice of religion of the person or persons who would otherwise be so restricted or prevented.”<sup>46</sup>

It means that provisions for discrimination on religious grounds were not only permitted but also positively required by the Constitution if its aim is to uphold the free practice of religion.<sup>47</sup>

In *In Re Article 26 and the Employment Equality Bill* the Supreme Court, again, ruled that while it was not generally permissible to make any discrimination on grounds of religion, that distinction would be valid where necessary to preserve the constitutional guarantee of free practice and profession of religious freedom.<sup>48</sup>

The Bill challenged in this case exempted from the statutory ban on religious discrimination in employment any “religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values.” These institutions were permitted to give favorable treatment in recruitment of employees on grounds of religion if necessary to uphold the “ethos” of the

any local schools because they did not hold Catholic baptismal certificates, according to the press. A non-denominational school, catering almost exclusively for children of African origin, was subsequently established in that area (Guardian News & Media. Published <http://www.buzzle.com/articles/153701.html> 9/24/2007). See, on this issue, Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 28.

42. It must be remembered that Irish Law is a system of common law.

43. See the Third Programme of Law Reform 2008 - 2014. The Commission's Programmes of Law Reform are the principal basis on which it is carried out the statutory mandate to keep the law under review with a view to its reform. The Third Programme of Law Reform contains 37 law reform projects.

44. [1972] IR 1, at 23.

45. [1997] 2 IR 321

46. [1972] IR 1, at 24.

47. See a fuller account of this ruling in Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40.

48. See, on this item, Casey, J., *Church autonomy and religious liberty in Ireland*, in Gerhard Robbers (ed.), “Church autonomy: a comparative survey,” Frankfurt am Main (2001), 8-9; Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 9.



institution. However, it was widely criticized that the Supreme Court did not give any definition of what *ethos* is, entitling the Churches to decide on its meaning.

Therefore, the rationale of the two rulings is plain: the ban of religious discrimination if subordinated to the free practice and profession of religion. As a further implementation of this principle, the *Equal Status Act 2000* enabled publicly-funded denominational schools to discriminate on grounds of religion in enrolment policy where necessary to uphold a denominational ethos.<sup>49</sup>

There are not bilateral formal relations between State and religious denominations. Although the Catholic ethos of the country would make logical an agreement with the Catholic Church, the principle of separation and its particular understanding in Ireland explains its non-existence. Furthermore, there has never been any serious attempt to sign an agreement.<sup>50</sup>

Occasionally, public authorities expressed their conviction that no agreement with the Catholic Church would be needed to regulate issues of common interest.<sup>51</sup> Then reciprocal relations are mainly pragmatic, and this is considered, both by State and religious denominations, as a fair and legitimate way of relation. If there are any conflicts, they are solved through diplomatic negotiations. Moreover, signing an agreement with a denomination would raise some doubts on grounds of Article 44: granting some advantages to certain denominations, and not to others, could defy the ban on discrimination.

## V. THE STATE AND RELIGIOUS AUTONOMY

Article 44.2.5° of the Constitution deals with religious autonomy: “Every religious denomination shall have the right to manage its own affairs; own, acquire and administer property, movable and immovable; and maintain institutions for religious and charitable purposes.” According to the *Report of the Constitutional Review Group*, this subsection is designed to preserve the autonomy of religious denominations, and it seems to do so satisfactorily.<sup>52</sup> The *Report* acknowledges that a strict interpretation of this subsection might not cover certain issues, like property held on trust for a religious body. However, the subsection should be accorded a purposive interpretation so that it covers property that, directly or indirectly, comes under the aegis of a religious denomination.

The Constitution does not define the religious denominations. The Supreme Court, in *Re of Article 26 and the Employment Equality Bill*, stated that this term “intended to be a generic term wide enough to cover the various churches, religious societies or religious congregations under whatever name they wished to describe themselves.” This description would include the long-standing denominations, but it is not so clear if others would be included in the term.<sup>53</sup>

The guarantee of this subsection might collide with the non-discrimination clause of subsection 44-2-3°.<sup>54</sup> The Supreme Court, in *McGrath and Ó Ruairc v Trustees of*

49. Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 2.

50. Unless, perhaps, the first draft of art. 42 of the Constitution of 1937. It stated that when Church and State powers required coordination, the State could sign agreements regarding civil, politic and religious issues with the Catholic Church or other religious denominations. See Keogh, D., *The Constitutional Revolution*, supra n. 18 at 22.

51. During its mission to obtain the approval of the Constitution from the Vatican, Special Ambassador J. Walsh pointed out that Irish Government considered that no agreement would be needed because Irish people were deeply Catholic. More recently, the Secretary of Foreign Affairs said that religious denominations were free to express their points of view, and members of Parliament were free to vote according to their conscience. See Keogh, D., *The Constitutional Revolution*, supra n. 18 at 71.

52. *Report*, supra n. 14 at 387.

53. Colton reports a statement made by the then Prime Minister, Bertie Ahern, when asked about the Government’s intention to institute arrangements with churches and other non-confessional organizations. The Prime Minister said that there were prospects of conversations with some religious denominations, and mentioned up to 22. However, it cannot be considered as a closed checklist of the accepted denominations. (Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 134.)

54. See a comment in Casey, J., *Church autonomy and religious liberty in Ireland*, supra n. 48 at 2.

*Maynooth College*,<sup>55</sup> considered jointly the two guarantees and its potential clash. According to the Court, the non-discrimination provision must be construed in terms of its purpose: protecting and endeavoring freedom of religion and the independence of religious denominations. Therefore, the internal disabilities or differences of status that flow from the tenets of a particular religion are not a matter within the powers of the State. They do not derive from the State, so it cannot be said that it is the State that imposed or made them. As far as the State must protect the religious autonomy, “in order to comply with the spirit and purpose inherent in this constitutional guarantee, [public powers] may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion.”

In the *Maynooth* case, it must be taken into account that it is – and has always been – a Catholic seminary, where the students are educated and trained for the Roman Catholic priesthood, regardless of whatever academic or educational accretions it may have gathered over the years. Because of that, its academic staff, or at least a part of it, is constituted of priests with a certain qualification, religious orthodoxy and behavior. As its own statutes declare, due standards are to be observed by those of the academic staff who are priests. The distinction drawn between priests and laymen in *Maynooth* tenets are not part of the ban or Article 44-2-3° of the Constitution. On the contrary, they amount to an implementation of the guarantee that is to be found in subsection 44-2-5°. These statutes are what the designated authorities of the Roman Catholic Church in Ireland have deemed necessary for this seminary. Their existence or their terms cannot be blamed on the State as an unconstitutional imposition.

Then, we can conclude that the Constitution widely recognizes and protects the autonomy of religions. Matters such as a church’s teachings, their religious internal organization, or the number of ministers required for a certain task, do not fall within the powers of the State. It is fair to recognize that the State never claimed any such competences. Religious autonomy means that each denomination is entitled to create its own system: a church tribunal, with jurisdiction exclusively on internal affairs, like disciplinary matters. However, their decisions will not have civil effects.<sup>56</sup>

## VI. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

Generally, churches and religious bodies have the status of unincorporated associations.<sup>57</sup> Although no disposition appears to prevent churches from acquiring corporate status, there is not any legal procedure for making churches corporate bodies under public law. This lack of corporate personality does not usually pose any practical problem. The only difficult issue would be church property, but it is usually vested in trustees, for a parish of a diocese.<sup>58</sup> There is also not a register of churches in Ireland.

Public authorities may create procedures to enlist buildings for preservation on grounds of its interest. Those buildings cannot be altered or demolished without permission. Also, any monument associated with the local religious history constituted a “historic monument” under the *National Monument Act -1930-1987*.<sup>59</sup> Broadcasting of

55. [1979] ILRM 166, at 187. The plaintiffs, former priests, had been dismissed from their teaching posts at Maynooth (that is both a seminary and a recognised college of the National University of Ireland; as this latter, it receives State funding). The ground of the dismissals was that the plaintiffs had violated some college statutes. They claimed that those statutes discriminated between clerical and lay teachers and thus infringed art. 44.2.3° of the Constitution (Casey, J., *Church autonomy and religious liberty in Ireland*, supra n. 48 at 2-3).

56. However, Casey understands that the proceedings of any such tribunals would be open to review by the High Court, for example to ensure that they do not exceed their jurisdiction and that they observe fair procedures. See Casey, J., *Church autonomy and religious liberty in Ireland*, supra n. 48 at 3.

57. See a wider account on this issue in Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 130 ff.

58. An exception is the Church of Ireland. As part of the disestablishment, the Church of Ireland created the Representative Church Body to hold his properties. This body was incorporated by Royal Charter of October 15<sup>th</sup>, 1870. Casey, J., *State and Church in Ireland*, supra n. 9 at 193-194.

59. Id.

religious advertisements is forbidden by the *Radio and Television Act 1988*.<sup>60</sup> However, the *Broadcasting Act 2001* enables the broadcasting of notices or events related to a particular denomination, provided it did not promote adherence to any religion or belief.<sup>61</sup>

Persons in Holy Orders, religious ministers, and vowed members of a religious community may be excused to serve on a jury.<sup>62</sup> There is no general exemption from Valued Added Tax for churches and religious bodies. However, churches that have a charitable status are exempt from payment of taxes. There are also other exemptions of taxes, such as for lands or buildings exclusively dedicated to worshiping.<sup>63</sup>

## VII. STATE FINANCIAL SUPPORT FOR RELIGION

Article 44-2-2<sup>o</sup> guarantees that the State will not endow any religion. This subsection comes from Article 8 of the Constitution of 1922 and Article 16 of the Treaty of 1921. However, the Constitution of 1937 goes further than the former texts. Both in the Treaty and in the Irish Free State Constitution, the non-endowment was considered as a self-imposed limitation of the State. On the contrary, in the Constitution of 1937 the State *guarantees* not to endow any religion, empowering itself as a defender of the neutrality of its own institutions.

The main challenge with regard to this article is defining the meaning and extent of the non-endowment clause. Some remarks can be made on this issue.

First, the Constitution precludes the State to enrich a religion by transferring property to or by providing it with a *permanent* income.<sup>64</sup> It is not clear, however, whether this clause bans also occasional donations made by the State to religious entities.

Second, the State could confer economic benefits or certain funds to religious bodies, assumed it bestow them on *non-discriminatory* basis. It appears to be not so easy concealing the non-discrimination criterion and the right of religious bodies to maintain its ethos. According to the *Report* of the Constitutional Review Group, there is “something of a discordance between the constitutional prohibition on the endowment of religion and no discrimination on religious grounds by the State on the one hand and the maintenance of a religious ethos in a publicly funded institution on the other.”<sup>65</sup> The fair balance this subsection requires should be better addressed by a new clause to provide that institutions which retain a religious ethos should not be debarred from public funding, provided that they do not discriminate on grounds of religious belief or practice, save where this can be shown, in any given case, to be necessary in order to maintain their own religious ethos.

All this will apply, as Casey notes, only where the economic aid is for exclusively religious purposes. Providing public funds for equipment or salaries in hospitals or other social services run by religious bodies -as it happens in some of the largest hospitals in Ireland-, the State may not be acting contrary to Article 44.2.2<sup>o</sup>, even if only organizations belonging to a single church are engaged in this work.<sup>66</sup> The Supreme Court also clarified

60. In the same sense, *Murphy v. Independent Radio and Television Commission* [1999] 1 IR 12.

61. See Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 137.

62. *Juries Act 1976*.

63. See a wider account of financial benefits in Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 137 ff.

64. See *Report*, supra n. 14 at 381. The Oxford Dictionary, cited in several cases and official documents, understands *endow* as “to enrich with property; to provide (by bequest or gift) a permanent income for a person, society or institution”.

65. See *Report*, supra n. 14 at 382. It continues: “For example, there seems to be no constitutional objection to the State funding a hospital run by religious orders (on the basis that such funding was not primarily designed for the advancement of religion), but there might well were a publicly funded hospital to discriminate on religious grounds with regard to either employment or admissions policies. Thus, for example, if a publicly funded hospital were to give preference in its employment policies to adherents of a particular religious belief, this might well amount to a form of religious discrimination by the State. At the same time, if a hospital could not give preference to its own co-religionists, it might find it difficult to maintain its own religious ethos.”

66. Casey, J., *Constitutional Law in Ireland*, supra n. 6 at 696. Similarly, in *McGrath and Ó Ruaric v. Trustees of Maynooth College* the Supreme Court understood that the public funding of Maynooth was not

this issue in *Campaign to Separate Church and State v. the Minister for Education*.<sup>67</sup> The plaintiff considered that the State funding of chaplaincies – both Catholic and from the Church of Ireland – was against the non-endowment clause of Article 44.2.2°. The Court, on the contrary, understood that the impugned funding system was consistent with the Constitution, whenever the support for salaried chaplains was available to all community schools of whatever denomination on an equal basis, in accordance with their needs.<sup>68</sup>

Third, it raised some doubts whether concurrent endowment of religious denominations – that is to say, funding all religious denominations – should be allowed, assuming there was not discrimination. There is a precedent of this concurrent endowment in the history of Ireland. Before the disestablishment of the Church of Ireland, in 1869, the British Government partially funded two other denominations, granting the training of seminarians at Maynooth and part of the wages of the Presbyterian clergymen. When the Church of Ireland was disestablished, the concurrent endowment, funding all the religions on a non-discriminatory basis, was seriously considered, and finally rejected.<sup>69</sup>

In spite of its apparent rationale, the concurrent endowment would pose serious difficulties. For example, the Constitutional Review Group questioned how a non-discriminating method of allocating State funds could be achieved, or how would the religions with very small numbers of adherents be funded, apart from the unavoidable risk it would pose to the religious denominations autonomy. Because of those dire straits, the Group dismissed the concurrent endowment.<sup>70</sup>

Finally, the Constitution guarantees that the State will not endow any religion, but it does not expressly provide that the State will not establish a religion. Although there is a close relation between both concepts, they are different, and the non-endowment clause does not necessarily preclude establishment.<sup>71</sup> However, the establishment of a religion would almost certainly amount to discrimination on the ground of religious belief or status, and any such proposed establishment would be unconstitutional.<sup>72</sup> Also, the Supreme Court undoubtedly said that while there is not any explicit provision in the Constitution banning the establishment of a religion, it is obvious that such a decision “would be impossible to reconcile with the prohibition of religious discrimination.”<sup>73</sup>

### VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

The civil law does not recognize effects to religious acts, whether they stem from a religious court, a religious body or a religious authority. When the Church of Ireland was disestablished, jurisdiction in matrimonial matters was transferred to the civil courts. Indeed, the *Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870* required the civil courts to adopt the rules and principles that the ecclesiastical courts had followed. However, the civil courts have over the years departed from those principles. The Law Reform Commission declined in 1984 to recommend that decrees of nullity of marriage by an ecclesiastical court of the Catholic Church be given legal recognition.<sup>74</sup>

unconstitutional, because this College is not only a seminary, but also a constituent College of the National University of Ireland.

67. [1998] 3 IR

68. See Casey, J., *Church and State in Ireland in 1998*, in “European Journal of Church and State” 6 (1999), 60.

69. See *Report*, supra n. 14 at 383.

70. *Id.* In the same sense, the Supreme Court concluded that art. 44-2-2° bans the concurrent endowment, and that statement that “the State guarantees not to endow any religion” must be construed as *all religions*. See *Campaign to Separate Church and State v. the Minister for Education*, supra n. 67.

71. We can find, in European countries, examples of States with an established Church, but without State endowment, like Great Britain, and States with concurrent endowment of religions, but with non established Church, like Germany.

72. *Report*, supra n. 14 at 384. Yet, the Constitutional Review Group recommends not amending the Constitution to introduce a non-establishment clause, because it might lead to some extreme undesirable results.

73. *Campaign to Separate Church and State v. the Minister for Education*, supra n. 67 at 85.

74. See Murdoch, H., *Bell, book and candle*, in “Law Society Gazette,” vol. 98, n° 10 (2004), 8 ff. There is neither any reported case in which religious factors have grounded a civil decree of nullity, civil separation or

In *O'Callaghan v. O'Sullivan*<sup>75</sup> the Supreme Court held that canon law is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well-settled rules as to the proof of foreign law, but only where it governs a relationship that is at issue.<sup>76</sup> It would not be correct to imply that this gives canon law precedence over civil law. In other circumstances, it may have no status and civil law may rule supreme, as is the case in ecclesiastical decrees of nullity of marriage.<sup>77</sup> For example, according to the *Civil Registration Act, 2004*, religious bodies may nominate solemnisers of marriages, for this only purpose. They will be recorded in a Register of Solemnisers.

Tribunals of the Catholic Church exercise jurisdiction over the annulment of marriages, but their rulings have no civil effects.

## IX. RELIGIOUS EDUCATION OF THE YOUTH

Ireland has developed a complex education system, due to historical, cultural, and sociological reasons – see notes 1 and 3. It is shaped as a non-denominational system, but in practice the overwhelming number of schools is Catholic.

The Catholic Church always had a great influence in education. Since the independence of the Irish Free State, the Catholic Church struggled to preserve its prominent position in this field, and the State was careful when dealing with this issue, usually considered within the Church powers. This state of affairs was assumed both by church and state, and it was not highly controversial, as it happened in other European countries.<sup>78</sup>

The Constitution regulates education in Article 42.<sup>79</sup> There has never been a legal development of those provisions. As a consequence, there was a reliance on administrative circulars emanating from the Department of Education, but they lack the necessary coherence.<sup>80</sup> Major reforms were adopted in the 1960 and 1970 decades.<sup>81</sup> Currently, other reforms are proposed, but nothing definitive was decided.

Primary education is mainly provided in national schools.<sup>82</sup> Despite their name, they

divorce. It appears that failure to fulfil a confessional obligation to go through a religious marriage could not invalidate a marriage valid under civil law. See Casey, J., *State and Church in Ireland*, cit., 206.

75. 1 IR 90, 1925. A similar case was held before High Court in Northern Ireland in 1991, in the legal battle between Bishop Cathal Daly and his curate (now bishop) Pat Buckley (*Buckley v Daly*, 1991 ITLR).

76. That is what happened in *Connolly v Byrne* (1997 IEHC, 195). In this widely publicised case, the court refused injunctive relief to parishioners who sought to restrain the bishop from altering the sanctuary of Carlow Cathedral. The defendants successfully contended that the property was held subject to canon law and that they had the right under canon law to carry out the alterations.

77. See Murdoch, H., *Bell, book and candle*, supra n. 74 at 11.

78. Osborough, W. N., *Education in the Irish Constitution*, in "The Irish Jurist," 13 (1978), 150 ff. See an historical approach to religious education in McGRATH, E., *Education in Ancient and Medieval Ireland*, Dublin (1979).

79. It states: "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. 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social. 4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation. 5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

80. See Hogan, G. W. and Whyte, G. F., *J. M. Kelly: The Irish Constitution*, supra n. 34 at 1059-1060.

81. There were radical changes in the primary curriculum; compulsory education until 15 was imposed; vocational and training schools were open. It is a significant indication that in this period, public investment in education raised from 3'45% PIB till 6'29 (See Whyte, J. H., *Church and State*, supra n. 34 at 337 ff).

82. The *Education Act 1998* does not use the term "national school" and instead uses "primary" school. The name is not particularly significant except that national school clearly denotes that the school is state aided while

are not public, but mostly owned and run by denominational bodies.<sup>83</sup> Unlike many other countries, Ireland does not have a parallel public system of non-denominational schools organized by the State, which would have avoided most of the problems that arose regarding religious education.<sup>84</sup> However, this system was deemed consistent with the Constitution. The first draft of the Constitution stated: “*The State shall provide free primary education;*” the current version says: “*The State shall provide for free primary education.*” The Courts, in *Crowley v. Ireland*,<sup>85</sup> clarified the meaning of this provision; the Supreme Court understood that the State is not obliged to educate in public schools, but only to adopt all means needed to guarantee that all children receive free primary education.<sup>86</sup>

Parents may choose home schooling for their children. The origin of this provision is the clause of conscience in the XIX century, but the choice is not necessarily linked to religious reasons.<sup>87</sup>

The highest controversial issue is State funding of religious education.<sup>88</sup> As it has been seen above, Article 44-2-2° of the Constitution that bans endowment of religion is not clear enough in regard to the State economic aid to the religion bodies, which fulfill a social need. Article 42-4° asserts that the State will give “reasonable aid” to private schools, although it must be done on non religious-discriminatory basis, according to subsection 44-2-4°.

All these constitutional provisions must be interpreted together. This integrated interpretation confirms that the State can fund religious education, if some requirements are accomplished.<sup>89</sup> I will examine them.

The first one, funding must have been established by legislation. The only Acts that authorize public funding of denominational education are the *Appropriation Acts*, approved yearly, although drafters of Article 44 of the Constitution probably envisaged that this legislation would be specific in character and establish a permanent statutory scheme whereby such aid might be disbursed. So, this non-statutory rule conforms to the letter, but not the spirit, or Article 44.<sup>90</sup>

Secondly, there must not be discrimination between denominational schools. This requirement may pose some difficulties. The State established some specific conditions for a school to get financial aid. Any group of parents, with or without a religious

a primary school can be private or state aided.

83. In practice, the Catholic and Church of Ireland bishops are the patrons of the schools within the diocese, with the parish priest usually carrying out the functions on behalf of the bishop.

84. It is unrealistic, as the Constitutional Review Group recognizes, to expect that the State will provide such a system, at least in the near future. Apart from other reasons, there will be a wasteful of scarce resources. See *Report* supra n. 14 at 386.

85. [1980] IR 102.

86. The ruling appeals also to historical reasons, when remembers that “the history of Ireland shows how tenaciously the people resisted the idea of State schools. The Constitution must not be interpreted without reference to our history and to the conditions and intellectual climate of 1937 when almost all schools were under control of a manager or of trustees when were not nominees of the State. That historical experience was one of the State providing financial assistance and prescribing courses to be followed at the schools. But teachers, though paid by the State, were not employed by and could not be removed by it; this was the function of the manager, of the school who was almost always a clergyman (...). The effect [of art. 42-4°] is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager of trustees, to provide means of transport to the schools if this is necessary to avoid hardship, and to prescribe minimum standards.” Some years later, in the National Education Convention (October 1993), the representative of the Secretary for Education said that the State fulfils its constitutional obligation providing for the biggest part of the capital and school maintenance, paying for the teachers’ expenses and providing for free transport when needed. See *Report* supra n. 14 at 343.

87. The aim of this clause was guaranteeing that no child would receive a religious education that its parents rejected. See Keane, R., *Fundamental rights in Irish Law. A note on the historical background*, supra n. 28 at 22.

88. A general approach to the matter can be found in Williams, D., *State support for Church Schools: is it justifiable?*, in 11 “Studies in Education” (1995), 37 ff.

89. See *O’ Shield v. Minister for Education*, [1999] 2 IR 321.

90. See *Report*, supra n. 14 at, 373-374. The Constitutional Review Group understands the situation is likely to change in a forthcoming Education Bill.

background, can apply for public help to create a school if they demonstrate there are a potential number of students. Parents -or institution- will provide for the sole and 15 percent] of the building cost, and the State will fund the other 85 percent, the 80 percent of the total amount of running the school, and the teacher's wages.

These requirements are identical for all private schools, denominational or non-denominational. No legal barriers exist for the creation of schools running by religious denominations other than Catholic, funded by the State. Yet, its existence depends upon sociological and demographical elements. Due to the religious affiliation of Irish population, the Catholic Church will have much more chances to fulfill those requirements than any other religious denomination. On the other hand, this system enables the State to satisfy the real demand. It would not be attainable funding all kind of educational schools any group wanted to establish.

The ultimate conflict arises from the exigencies linked to receiving public funds, and the need of the denominational schools to adopt some measures to preserve its religious ethos. Some of the problems are the preference given to applicants of the religious denomination, the appointment of faithful only as teachers, and so on, will come out. There is not a definitive solution for this problem.<sup>91</sup>

The third requirement stems from Article 44-2-4°, which recognizes the right of any child to attend a school receiving public money without attending religious instruction at that school. Since the reform of education of 1971, religious education has been integrated in all the subjects that compose the *curriculum*.<sup>92</sup> Then, parents that desire that their children attend a denominational school may ask -and the school must grant it- that they were exempted of religious classes. However, it is not easy to attend a denominational school and not receive any religious education at all. It is not possible to ask a denominational school not to give an education with a religious background, because it will be contrary to their religious ethos.

Sometimes, the controversy might not be a question of choice: if the only available school nearby for a child is a denominational school, and parents reject the denominational education, the child might be deprived of the opportunity of attending the nearest and most convenient school or even (to take a more extreme case) denied any effective opportunity of attending school. As in the previous requirement, there is not a general solution. Actually, problems are not as frequent, and they have been avoided to date largely by *ad hoc* and pragmatic responses to particular situations.<sup>93</sup>

The last requirement is that State financial aid to denominational schools does not mean, in practice, endowment of religion. Both scholars and jurisprudence considered this requirement. Brian Walsh, former Chief Justice of the Supreme Court, stated in an extra-judicial statement that there is not a constitutional objection to State funding of denominational education if parents want it. As contributors, parents are free to decide which kind of education they want for their children, and this cannot be considered endowment of religion. He also appeals to the Irish tradition, with such a strong

91. See, more detailed, *Report*, supra n. 14 at 386 ff.; McCrea, R., "The Supreme Court and the School Chaplains Case," in 2 *Trinity Coll. L. Rev.* (1999) 26. Later developments did not apparently change anything. In the *Employment Equality Bill 1996* ruling, the Supreme Court upheld a bill allowing for religious discrimination in the employment of staff in denominational schools. Years after, the *Equal Status Act* of 2000 allowed publicly-funded denominational schools to discriminate on grounds of religion in enrolment policy where necessary to uphold a denominational ethos (Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 29).

92. Section 68 of the *Rules for National Schools* states: "Of all the parts of a school curriculum Religious Instruction is by far the most important, as its subject-matter, God's honour and service, includes the proper use of all man's faculties, and affords the most powerful inducements to their proper use. Religious Instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school. The teacher should constantly inculcate the practice of charity, justice, truth, purity, patience, temperance, obedience to lawful authority, and all the other moral virtues. In this way, he will fulfil the primary duty of an educator, the moulding to perfect form of his pupil's character, habituating them to observe, in their relations with God and with their neighbour, the laws which God, both directly through the dictates of natural reason and through Revelation, and indirectly through the ordinance of lawful authority, imposes on mankind".

93. *Report*, supra n. 14 at 386.

commitment to separation between church and state, and a long-standing system of denominational education, without identifying this aid with endowment of religion.<sup>94</sup>

The Supreme Court understands it the same way: funding denominational education is allowed by the Constitution, and it does not mean endowment of that denomination.<sup>95</sup> It would have been contradictory to include a provision on the Constitution – the ban of endowment – that precludes another one to be operative – State financial aid for denominational schools.

The Constitutional Review Group considers that Article 44-2-4° – regarding State aid to denominational schools – is something of an exception to the general rule contained in Article 44-2-2° – the State shall not endow any religion.<sup>96</sup> However, it says that if a denominational school accepts public funding, it must accept that this aid is not given unconditionally. Requirements that the school must be prepared in principle to accept pupils from denominations other than its own and to have separate secular and religious instruction are not unreasonable or unfair.<sup>97</sup> The Report does not add, as it would have been desirable, how it will be put into effect, because it seems unattainable. The truth is that this statement seems more of a wish that can not be achieved. No change in the Constitution has been proposed regarding this matter, and no other developments took place after the Report was published.

The secondary schools are privately owned and managed. They are under the trusteeship of religious communities, boards of governors or individuals. Since 1964, the State funds 80% of the building costs, teacher's wages and maintenance of these schools.<sup>98</sup> Furthermore, the State gives Catholic schools a specific amount for pupil every year. The protestant schools receive that State aid not directly, but through the Funding Committee of the Protestant Education that perceives the State aid and distributes it.<sup>99</sup> Religious education will be imparted by the religious denomination, under its responsibility; the school shall guarantee that those students who do not want to attend religious instruction will not be compelled to do it.<sup>100</sup> Surprisingly, religion is not an examinable subject.<sup>101</sup>

There are also vocational schools, with a more technical orientation. They are not denominational, but there is religious formation (non compulsory) and usually, there is a member of the Catholic Church in the board.

In the sixties, the State announced the creation of comprehensive schools, and in the seventies, as a further development, community schools. The latter, in some cases, stemmed from the unification of vocational schools and secondary schools. It began, then, a sharp debate between the Catholic Church and the State. The State wanted these new schools to be pluri-denominational, but no agreement was reached; actually, they are Catholic or protestant. Yet, the Catholic Church did not want to lose the control over or Catholic identity of those secondary schools that became community schools. The first regulation was modified, and the Catholic Church retained some chairs in the board of

94. Whyte, G. F., *Education and the Constitution: convergence of paradigm and praxis*, in "The Irish Jurist," 25-27 (1990-92), 103. See, against it, Farry, M., *Education and the Constitution*, Dublin (1996), 131.

95. See *Campaign to Separate Church and State v. Minister for Education*, supra n. 67 at 88-89, 99-100.

96. The *Report* (see 386) mentions art. 44-2-3°, but I assume it is a mistake.

97. *Report*, supra n. 14 at 386.

98. Until 1964, the then known as *intermediate schools* could only apply for grant aid through a system of payment by results: the schools were paid on the basis of the success of their students at yearly examinations conducted by a Government body, the Intermediate Board. See *Report...*, supra n. 14 at 341.

99. The main reason for this difference is that there are areas of the country where no protestant schools are available. The Committee, then, may use the funds to provide for boarding grants in protestant schools (See Casey, J., *State and Church in Ireland*, supra n. 9 at 199).

100. See Coolahan, J., *Irish Education. History and structure*, Dublin (1991), 159.

101. In March 1994, a statement of the Irish Catholic Bishops called for a change on this matter; they understood that religion was a very important part of people's lives, and it was not consistent that it was not recognised as an examinable subject in the secondary level. The Department of Education stated that there could be some legal difficulties, even constitutional, to do that. However, the Department did not give any hint about what legal obstacles banned that modification. See Casey, J., *Church and State in Ireland 1994*, in "European Journal of Church and State" 2 (1995), 25.



Directors, although less than in the draft.

This pattern was widely accepted. However, a lawsuit in 1998 challenged it.<sup>102</sup> The Supreme Court ruled that this model of management of the community schools was adequate; the only exigency was that those community schools that had Catholic education and Catholic acts of worship must be dubbed “Catholic community schools.”

This same decision dealt with the problem of funding of chaplaincies in community schools.<sup>103</sup> In the lawsuit, the plaintiff deemed the State funding of chaplaincies as a kind of endowment of religion, because their functions are related more to worshiping than to education (unlike religious teachers, whose funding were not controversial). Then, it would be against Article 44 of the Constitution. The Supreme Court upheld the funding of chaplaincies. It considered it is a way the State fulfills its duty of helping parents in their educational task; the economic aid to chaplaincies also contributes to the religious formation of children, mentioned in Article 42-1 of the Constitution, and that is different from the religious education, mentioned in Article 42-4.<sup>104</sup>

Ireland is the only European State where the Catholic Church called for separate education at university level. Until 1908, only protestant or non-denominational universities existed in Ireland. The Irish Catholic hierarchy was suspicious of those entities, and asked for the establishment of a University acceptable for Catholics. The Government accepted its demand, and established the National University of Ireland. Although non-denominational, it was designed to ensure an influence of the Catholic hierarchy in its governing bodies. The principle of separate education is not in force any more.<sup>105</sup>

#### X. RELIGIOUS SYMBOLS IN PUBLIC PLACES

There is a close link, again, between this issue and endowment. As a general rule, it could be said that no problem would arise if there were not any kind of State funding of the religious symbol. Otherwise, it can be considered an endowment of religion.<sup>106</sup>

#### XI. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Article 40-1-6° of the Constitution states: “1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: (...) 6. The right of the citizens to express freely their convictions and opinions. (...) The publication or utterance of blasphemous, seditious, or indecent matter is an offense which shall be punishable in accordance with law.”

The first *Defamation Act* was enacted in 1961.<sup>107</sup> It made blasphemy a statutory crime, although in practice it was unenforceable because it did not contain a definition of what blasphemy consists of.<sup>108</sup>

102. *Campaign to Separate Church and State v. the Minister for Education*, supra n. 67.

103. Chaplaincies in community schools were considered as a means of provide for the religious education in non-denominational schools. This problem did not arise before because most community schools were run by Catholic orders, and a number of professors were priests; so, professors could also act as chaplains. (See Forde, M., *Constitutional Law in Ireland*, Dublin (2004), 620; Whyte, G. F., *Education and the Constitution*, cit., 106-107).

104. The decision was unanimous, granting that there will not be any discrimination.

105. Whyte, J. H., *Church and State in Modern Ireland*, supra n. 27 at 19.

106. That happened when the State financed a statue of F. Pio di Peltrecina, placed in a hospital run by a Catholic order. See *Moloney vs. Southern Health Board*, cited in “The Irish Jurist” n.s., 21 (1986), 146 ss. The case settled on terms favorably to the plaintiff, although it might be questioned whether the erection of a statue can constitute, as the plaintiff argued, an endowment of religion (Hogan, G. W. and Whyte, G. F., *J. M. Kelly: The Irish Constitution*, cit., 1103).

107. It stated: “Every person who composes, prints or publishes any blasphemous or obscene libel shall, on conviction thereof on indictment, be liable to a fine not exceeding five hundred pounds or imprisonment for a term not exceeding two years or to both fine and imprisonment or to penal servitude for a term not exceeding seven years.”

108. See *Corway v. Independent Newspapers*, [2000] 1 ILRM 426 SC and [1999] 4 IR 484 SC. Lacking a legal definition, the common law definition of blasphemy was useless, because it presupposed an established church.

A Report on the Law Reform Commission of 1991 concluded that Ireland's blasphemy laws were in need of reform and were unlikely to withstand a challenge before the European courts.<sup>109</sup> The Commission said that it was "absurd" that a crime existed in Irish law, carrying a potentially lengthy term of imprisonment, whose component parts were "totally uncertain." It was believed that the law of blasphemy was discriminatory in that it only protected religions in the Judeo-Christian tradition. Accordingly, the Law Reform Commission concluded that the offense had no place in a society that valued free speech. It recommended that this crime should be abolished and religious adherents protected by incitement to hatred legislation.

The Commission's hands were tied because of the constitutional ban on blasphemy (there would have to be a referendum if the crime of blasphemy were to be abolished). The Commission, therefore, reluctantly recommended a redefined, and more limited, offense against outrage to the adherents to a religion by insulting content concerning matters held sacred by that religion. The offense would be extended to protect Christian and non-Christian religions. The prosecution would, however, have to show that the publisher knew that the material was likely to cause outrage and that this was the sole intent.<sup>110</sup>

The Seanad passed a new Defamation Bill on 11 March 2008 and by the Dáil on 8 July 2009. Report back to the Seanad on Dáil amendments took place on 9 July 2009. The Bill is awaiting signature by the President. It was scheduled to come into force in November 2009.<sup>111</sup> This new Bill defines blasphemy, and punishes it with a fine.

Section 36 states:

A person who publishes or utters blasphemous matter shall be guilty of an offense and shall be liable upon conviction on indictment to a fine not exceeding 25,000 Euros."A person publishes or utters blasphemous matter if (a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.

This Act will be applied equally to all religions or beliefs. However, as expressly stated, "religion does not include an organization or cult – (a) the principal object of which is the making of profit, or (b) that employs oppressive psychological manipulation – (i) of its followers, or (ii) for the purpose of gaining new followers."

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109. The Law Reform Commission, *Thirteen Annual Report (1991)*, 5. (It can be found in [http://www.lawreform.ie/publications/data/volume10/lrc\\_70.html](http://www.lawreform.ie/publications/data/volume10/lrc_70.html)).

110. See Kealey, M., *Publish and be damned*, in "Law Society Gazette," April 2006, 22 ff.

111. Editor's Note: The bill (S.I. No. 517 of June 2009) became law on 23 July 2009, and came into effect on 1 January 2010. See <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2006/4306/document1.htm>. Passage was followed by protests, including those by Irish atheists who published deliberately blasphemous statements on the internet to challenge the ban. On 14 March 2010 Dermot Ahern, Ireland's Minister for Justice, Equity and Law Reform, announced that he would propose a referendum to remove the reference to blasphemy from the law.