Theories of Religious Education in Ireland

Introduction

In this article I argue that an accommodationist approach to Church-State relations provides the most appropriate interpretation of the Irish Constitution. This accommodationist interpretation is however incompatible with Ireland’s system of almost exclusively denominational education, in which denominational schools of all the Churches are funded.

To present all the details of this argument requires a lengthy, at times detailed, at other times an only too brief summary of features of Irish law and the educational establishment. The key points to bear in mind during this presentation are the following.

The schools which educate most children until the age of 18 are usually owned by different religious bodies, and have a particular denominational ethos. In Ireland we term these denominational schools. Only a small number of schools are multi-denominational or non-denominational. All schools, provided they have adequate local support, and adhere to national curricula and standards, receive State funding on a non-discriminatory basis. Even though they are owned by private bodies, there is massive State involvement. The State pays for almost all of the current running costs of these schools, and makes a significant contribution to the capital costs. The State also plays a major role in designing curricula and syllabi for the courses.

This educational system, which has developed along these lines ever since 1831, has only recently come under sustained legal scrutiny. The 1937 Irish Constitution provides for judicial review and our judges have often been active in using constitutional rights and principles to correct public policy which strays from the constitutional path. However it offers no clear answer to the obvious moral issues raised by the educational system: the text recognises the right to education, the right to religious freedom, the principle of non-endowment of religion. However it also endorses state deference to parental wishes in the field of education, and explicitly sanctions state aid for denominational schools.

To untangle the constitutional web, it is important to identify three theories of state aid for denominational schools. All these theories have been articulated (however partially) in Irish public discourse, and offer normative perspectives through which to view the constitutional
tapestry. One perspective is the “State as supporter” which sees the State’s role in education as secondary. This would allow the State to support private education and specifically the system of denominational education and religious instruction, but deny it competence to lay down standards in the field of religion. A second perspective is the “positive rights” approach. This would identify the rights of education and religious formation as important enough to justify State support of both. It does not necessarily accept the subsidiary role of the State however.

Finally there is the “accommodation” perspective. This also sees a more active role for the State in the field of education, but rejects any direct involvement in the field of religious education. On this approach the State may only fund the secular activities of religious bodies which benefit the public. The accommodation approach thus strives for a balanced defence of several constitutional requirements. These include religious freedom and equality, and educational rights, and the honour due to religion in Irish society which are also respected by the other approaches. The accommodation approach also embodies respect for pluralism, separation of Church and State, and conscience rights, all of which are constitutionally mandated.

The “State as supporter” view was probably the dominant one of the people who created the intellectual environment in which educational policy was elaborated and the constitutional text was adopted in the period 1921 - 1937. The other two perspectives are more recent. The “accommodation” view is one articulated by various secular and civil rights interests groups. The “positive rights” approach seems to be the one endorsed by the courts in recent litigation initiated by a public interest group, the Campaign to Separate Church and State. The “State as supporter” view was probably the dominant one of the people who created the intellectual environment in which educational policy was elaborated and the constitutional text was adopted in the period 1921 - 1937. The other two perspectives are more recent. The “accommodation” view is one articulated by various secular and civil rights interests groups. The “positive rights” approach seems to be the one endorsed by the courts in recent litigation initiated by a public interest group, the Campaign to Separate Church and State. In what follows, I shall first elaborate on the normative perspectives mentioned above, and note their implications for the system of education (section one).

Before considering the argument for the accommodation position, some background information is then called for. It is necessary to consider some basic features of the educational system (section two) and the constitutional order (section three). In this context I focus on the provisions relating to religion and education, and the commonly accepted methods of constitutional interpretation. In this section I also explain the method of interpretation I find most appropriate when looking at the Irish Constitution.
Then section four argues that the accommodation interpretation is the approach which makes the best sense of the constitutional provisions, interpreted in the light of the relevant sources. Having presented this argument at length, I will then outline the judicial argument defending the denominational system on the basis of a positive rights approach (section six). I shall note some interpretative inadequacies in their defence, before concluding that the courts’ natural desire to protect educational and religious rights has lead them to ignore important elements of the constitutional order which also require judicial defence.
Section One: Normative Perspectives

As I mentioned at the outset, there are at least three normative perspectives on State aid for denominational education in Ireland. I label these the “supportive” “positive rights” and “accommodation” approaches. Before delving into the implications of each, it is important to note some common features.

First, all of these approaches are suggested by elements in the Irish constitutional text, tradition or public policy. Each of them is anchored in the Irish public arena and the debates on the Constitution and education. None of them can be accused of being abstract a priori conceptions, or conceptions which are simply “out of the interpretative ball-park” in an Irish context.

Second, these different perspectives share many things in common. They are all concerned with protecting educational rights, religious rights, and the right to equality. They all “reflect[s] a firm conviction that we are a religious people”. 5 They each endorse the concepts of pluralism and the separation of sacred and secular powers. However they interpret and balance each of these elements in very different ways, and so support institutions, structures and rules which are quite different.

Finally, none of these approaches are perfectly consistent articulations of principle. They cannot be because they are grounded in the actual practice and debate of the public arena where intellectual consistency is not the only or even the main criterion for debate and action. They claim to be principled explications of viewpoints partially articulated in the public arena, and therefore intellectual flaws are easily apparent.

Accommodation

On this approach the State provides only for secular education, but seeks to accommodate religious activities in such a way as to secure religious liberty and equality for all. The accommodation approach is rooted in thorough-going egalitarian principles.

This approach asserts the importance of education and believes that the State has a large role to play in ensuring its provision, either by itself, or through promotion of private initiative. It
must try to provide for suitable education for all on an equal basis. Education is a right which all children are entitled to receive; in addition it is a duty for them to receive it. The State may not condition the exercise of this right on the renunciation of other rights, nor may it impose a duty to receive education in circumstances which effectively compromise the conscience of the child.

The accommodation approach accepts the importance of pluralism, and consequently advocates that the State should provide or promote different types of educational establishment, so that parents have an effective choice as to where to send their children. In an Irish context that would include provision of denominational, multi-denominational and non-denominational schools. Further, it endorses a pluralistic goal which would deny the State or any other body a monopoly over the provision of education.

The accommodation approach accepts the importance of religion in Irish life. This is reflected in respect for the religious rights listed in Art. 44, and the provision the State makes to accommodate the religious beliefs and exercises of individuals and groups. This respect for religion though includes a recognition that the role of the State must be limited to secular matters. An accommodation approach generally accepts the “positive” aspect of rights (that after all is why it is concerned to provide and promote education), but it distinguishes among rights in this regard. It distinguishes among those rights which the State must respect in terms of non-interference, or even accommodation; those rights which the State may promote and fund; and finally those rights where the State may not itself directly promote and fund any activity.⁶

The accommodation approach believes that religious rights fall into the last category. Various reasons require that the State endorse a notion of separation in religious matters. First, the experience of history demonstrates that State involvement in religious matters tends to lead to dangerous inroads on important political values. To avoid this danger, some principle of State neutrality or separation of Church and State is called for. Irish history also provides some support for this - the extreme dissatisfaction with State support of the minority Anglican Church of Ireland in the 19th Century lead to a movement which saw the disestablishment of that Church,⁷ leaving Ireland the only part of the UK without an established Church.

Second, religions usually have a spiritual agenda which the State does not share: the State is simply incompetent to meddle in matters spiritual. There is something decidedly incongruous
about matters of transcendent truth being subject to a democratic vote or to bureaucratic administrative rule-making!

Third, religion usually involves extremely intimate choices of conscience and faith. If it is inappropriate for the State to interfere in matters of private morality, then it is even more so for it to get involved in these matters.\(^8\)

Fourth, once the State starts to meddle, the principle of non-discrimination will lead to it meddling in many different religions, that it may not wish to and may lead to complications. Whose religious practices deserve funding, and to what extent? How many people must adhere to a religion before it is entitled to a subvention so its members may practise their religion?

Fifth, State involvement and funding makes the difficult question of what is a "religion" even more delicate: it is one thing to allow mainstream denominations, minority sects, secular humanists, atheists and agnostics freedom - but are they all also religions for the purposes of State support?

Sixth, citizens belonging to minority religions, or professing no religion may come to feel oppressed by State funding or support of some or all religions - the pluralism of the State must extend to atheists and agnostics. For these reasons States usually endorse religious freedom and some separation of church and State.\(^9\)

The State must embrace the idea of separation and limit itself to secular matters. The precise contours of this principle are open to discussion, and must be decided in the light of a particular social and historical context.\(^10\) In the Irish context, the interpretation for which I shall argue is the principle that the State may not decide matters of religious faith, may not engage in religious proselytising or education, or fund such activities, even on a non-discriminatory basis.

However this should not be taken to mean that the State may not assist denominational schools. It may, provided the principles listed above are accepted. This would mean that the State may only pay for the secular elements of the education, thus requiring a clear demarcation between the secular and the religious. It follows from these that the State may not fund an educational institution where the curriculum is permeated throughout with a religious ethos; nor may it pay the salaries of religion teachers or chaplains, or establish syllabi or create tests in matters religious.
The State as the supporter of denominational education

This view has been the view traditionally articulated by the people who historically have provided much of the education in Ireland, that is the different Churches. Though supported by the main Protestant churches, the most prominent explications of this view have been associated with the Catholic Church.

Catholic teaching regarded the Church as the chief educator, exalted parental rights over state rights, and emphasised religion as the high point and pervasive element of education. It also insisted that the State should assist parents in their duty of educating their children. The governing slogan of this thought in Ireland was to become “parental rights all round”, i.e. the right of parents to send their children to denominational education, and the right of those denominational schools (at the primary level at any rate) to receive State funding.

On this view, the State’s role is secondary, indeed tertiary. It is for parents to determine how their children are to be educated - morally, intellectually, socially, physically and religiously. The choice of parents is to have primacy and the State may simply assist them in providing education for their children.

However this approach, although formulated on the non-discriminatory basis of “parental rights all round”, does have a special regard to the religious upbringing of children. This does not mean it insists on a religious upbringing for all children (that would conflict with the prior right of parents), but it does assert the preference that a child’s education should include respect for spiritual development for it is spiritual development which gives meaning to life itself.

This spiritual development can only be entrusted to the Churches. Education should take place therefore in denominational schools, where children can be brought up in the faith of their parents’ choice. Thus although parents have the prior rights in educational terms, they are not the main providers of education. The main providers are the different Churches.

The role of the State is to support this form of education. Its duty is not to provide education (except in special cases). This approach is instinctively hostile to State involvement in religion, seeing the potential threat of a State monopoly as one to be avoided at all cost. Freedom and pluralism are secured only by leaving the education of youth in the hands of
different private providers (i.e. the Churches). The State’s role is to fund the educational establishments on a non-discriminatory basis. It itself should not educate. It does have a legitimate interest in providing certain guidelines for matters like the curriculum, common state exams, etc., but it may not control the actual manner of education itself. This is especially the case in one area: the State has no competence in respect of religious instruction. The State may not regulate this area, even though it is obliged to fund its provision; it is to be controlled entirely by the different denominations.

According to this interpretation of the Constitution, the State’s main role is to provide funds for private (i.e. usually denominational) education, funds which the schools may use to pay for the teaching of religion or the practice of religious activities. Those schools have a right to a curriculum which is pervaded with their ethos, even though they may allow students to withdraw from formal periods of religious instruction. The churches and not the State determines what is to be taught under the aegis of religion.

**The State ensures the defence of positive rights**

Although the state as supporter view may well have been the dominant worldview at one time of Irish lawyers, politicians and educationalists, it is no longer the prevailing one. There are many reasons for this change, which I discuss in the section below, “Changing Trends and Emerging Challenges”. Here I just note that one reason no doubt is the increasing importance of the State’s role in the educational system. This increasing role is seen in the fact that the State today provides not just for free primary education, but also for free post-primary and third-level education. The “supportive” approach would have difficulty accommodating this very active role of the State. This may be why the High Court and Supreme Court have not based their recent decisions on a “supportive” basis, but have preferred the “positive rights” approach. This approach is not so deferential to the role of the Churches or so suspicious of the role of the State. It does emphasise parental rights, but this is not the core of the approach. The core lies in the idea of “rights” itself. On this approach it is not merely the duty of the state to respect rights as zones of non-interference, but also to provide for their exercise, if necessary by funding their exercise. Whilst this approach may not go so far as to say the State must pay for the exercise of educational and religious rights, it certainly asserts that it is
legitimate for the State to provide funding for educational rights, including the right to a
denominational education.

To hold that the State could not pay for denominational education would be an affront to the
rights of education and religion, and also a rejection of the principle that the Irish are a devout
people, to whom religion is deeply important.

The positive rights approach respects the ideas of pluralism and equality however: any
denomination which wishes to provide denominational education is entitled to State support
on the same basis as other denominations.

Pluralism, on this approach, also endorses the idea that denominational institutions have their
own “ethos” which they are entitled to protect and which the State is obliged to respect. It is
the possibility to transmit an ethos to successive generations which ensures the continuity of
different traditions and so assures the pluralism which is essential for the maintenance of a
constitutional democracy. This entails that although children have a right to withdraw from
formal religious instruction of which they disapprove, they have no right to insist that the
ethos of the school be stripped of its religious elements. The conscience rights of the minority
children do not outweigh the rights of the parents and children to secure an education in the
traditional ethos of their choice.

This position has been most powerfully defended in the recent case of Campaign to Separate
Church and State v. Ireland, the Minister for Education, and Four Catholic Bishops. The
Supreme Court spelled out the implications of this approach most clearly: the State may fund
denominational education since that is the apparent wish of parents, provided the funding is
provided on a non-discriminatory basis. Children may withdraw from formal periods of
religious instruction, but they have no right to a “neutral” ethos in the school.

This positive rights approach is not suspicious of the State’s role in education, or have any
special reservations about religious education, as distinct from moral education. Accordingly
there is no reason why the State may not create a syllabus for religious education.

Section Two: Educational System - Overview and Challenges
The history, current system and future of Irish education is a large topic, and therefore I can only sketch the relevant features. We shall first look at the current situation and then the historical evolution of the system, before examining the weakening consensus on denominationalism in primary and post-primary schools.

**Current Situation**

Briefly, Irish schools are privately owned (usually by religious bodies), but almost wholly funded by the State. The State lays down the broad rules for the operation of the schools, including the curriculum outline. The management of the schools is in private hands, but subject to State regulation.

The vast majority of schools are privately owned. Most of these are denominational in character, with Catholic schools dominating. There are very few genuinely multi-denominational schools, and fewer non-denominational schools. (The denominationalism of the system is further enhanced by the fact that all the state funded third level teacher training colleges are denominational - four Catholic, one Protestant.) These denominational schools allow pupils to withdraw from the formal periods of religious instruction; however the denominational character of the school pervades its entire ethos, and pupils cannot escape from that.

The State provides massive funding for these schools, paying most of their current running costs, including teachers’ salaries and, in varying degrees, the capital costs (this funding is supplemented by local contributions). The State pays the salaries of denominational religion teachers and chaplains assigned to these schools. Ever since the 1960s the State’s administrative rules recognise the denominational ethos of these schools. The State’s funding does not discriminate on the basis of denomination, except that there is some special treatment for smaller schools (often belonging to minority Protestant faiths) and multi-denominational schools.

These schools are actually run by Boards of Management or equivalent committees, which represent various local educational interests - teachers, parents, the local community and the owners of the school. These Boards manage the school, appoint the teachers, etc. Administrative rules ensure that the Board respects the ethos of the school (i.e. usually its denominational character). Thus, although the Board appoints teachers, this is subject to a
veto of the owners of the School and the Minister for Education. It has been held lawful for a teacher to be dismissed because her lifestyle is incompatible with the ethos of the school.26

**Historical Background**

The system outlined above was produced in three periods: the formative one 1831 - 1921 under British rule; the period of continuity in the Irish regime 1921-1960s; and the educational revolution of the 1960s and 1970s. The 1970s also saw a number of social changes which provoked challenges to the educational consensus.

**1831-1921 - The Formative Period**

Britain established state funding for private primary schools (called “National Schools”) in 1831.27 The National Schools emerged as a reaction against earlier systems perceived by Catholics as being proselytising institutions.28 As a response, Britain sought to establish a system of multi-denominational primary education for everyone. There would be combined instruction for all pupils in secular subjects, and separate instruction in religious matters.29 This multi-denominational experiment was thwarted by the main Churches - the established (Protestant) Church of Ireland, the Catholic Church (by far the largest) and the Presbyterians.30

Faced with almost unanimous opposition, the State’s policy became one of support for a system that was officially non-denominational but denominational in practice. Denominational education was tempered with various safeguards, though the degree of their implementation varied considerably. These safeguards included the **Conscience clause** - the right of any child to withdraw from religious instruction of which his or her parents disapproved; the separation of religious and secular instruction; the public posting of the times of religious instruction which should be at either the end or beginning of the school day, or on a separate day; and various rules relating to religious symbols in the classroom.

These rules were applied with extreme flexibility however; enough to compromise the principle which they espoused and thus create a paradox. The 1870 Powis Commission on primary education had recommended the recognition of a denominational system, but this
was never confirmed by official policy. In 1912, the then Chief Secretary for Ireland, Augustine Birrell aptly noted:

“... the intense system of denominational education there is built upon the most undenominational foundation that any wit could ever have devised.”

As regards post-primary education, for most of the 19th century state aid was limited, partially for reasons of finances, partially for reasons of ideology. State aid was only initiated with the 1878 Intermediate Educational Act. The State wished to introduce multi-denominational education. The Churches opposed this measure, and the resulting Act was a compromise which gave only limited support to private (i.e. denominational) institutions called “Secondary Schools”. That support was to be used only for secular instruction. No direct aid went to religious instruction of any sort, though denominational schools benefited from the measure. Throughout most of the 19th and 20th century, the Churches were suspicious of state aided post-primary education, and the State was reluctant to invest more in it.

1921-1960s - Continuity

Independence in 1921 did not signal a revolution in the educational system - continuity was the main feature.

At the primary level the paradox of a denominational practice and multi-denominational theory continued. Official policy in independent Ireland began to recognise the importance of religion in the educational process:

“Of all the parts of the 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.”

A further indication of the philosophy behind the primary educational system is gleaned from the “guidelines” of Minister for Education MacNeill. MacNeill’s thoughts were framed very much by the trends in Catholic social teaching in the early part of this century, referred to above. Catholic teaching which regards “education as a right and duty of parentage” was contrasted with “Statism” - to the detriment of the latter. MacNeill even rejected the idea that there should be any State schools at all (except in those cases where parents cannot provide education). MacNeill wanted no state schools, because if the system is exclusively State controlled, there would be no free parental choice; if there were some State schools, these
would be unfairly favoured by the State. Mind you, MacNeill’s conception of free choice was tepid: even where parents “have no effective choice, but are satisfied and seek no alternative” then the his conception of free choice is satisfied.

Although the importance of religion was recognised, official policy still regarded schools as multi-denominational, and separate religious instruction was the theory, if not the practice.37 National Schools were run (usually) by single denominations, though there were safeguards: children could be excused from formal religious instruction; the National School rules indicated that religious instruction was to be separate from secular instruction, and prominently timetabled so that children could absent themselves easily. Teachers had to avoid controversial denominational issues in mixed classrooms.

At the post-primary level, the most important innovation was the creation of “Vocational schools”. These schools offered a technical education, and were originally conceived as being multi-denominational, though in practice there were significant denominational elements.38 Otherwise, despite some curricular and funding changes, the level of State involvement in post-primary education remained at modest levels.

**The Educational Revolution of the 1960s and 1970s**

The educational reforms of the 60s and 70s affected all levels of education. At the primary level, the official position on religion began to change. First the State gave explicit recognition to the denominational character of National Schools.39 Second, the 1965 rules eroded some of the safeguards for religious minorities, deleting the requirement that teachers “be careful in the presence of children of different religious beliefs not to touch on matters of controversy”. The third step was taken in 1971, in the Primary School curriculum - the Teacher’s Handbook. This document gave explicit recognition to the principle of the integrated curriculum, and so rejected the idea that religious and other education should be separated.40 Henceforth the religious ethos of the school should be integrated throughout formerly secular elements (at least in theory) of the curriculum. The Handbook did however recognise that the Department could not lay down the syllabus for religious studies since that was a matter not within its competence.41
The 1970s saw two further novelties at primary level - the introduction of Boards of Management to replace the system where a local priest managed the local school; and the creation of the first multi-denominational primary schools.

The post-primary level saw even greater changes. Free post-primary education was introduced for the first time. The churches - after some initial scepticism - welcomed State support, provided denominational control was not endangered. The State established free post-primary education, and assumed the burden of current costs of the Secondary Schools, and also much of the capital costs on occasion. Nevertheless control remains in private hands, subject to state regulation. The State also established new “Community schools”. The original idea was for them to be multi-denominational. This was opposed by the Catholic Church and so these schools are now either Catholic or Protestant, though the degree of denominationalism is undoubtedly less than in Secondary Schools.

**Changing Trends and Emerging Challenges**

Above is a description of the current educational situation. However ever since the 1970s the consensus on education has dissipated for a number of reasons.

First, there is the increase in the numbers who adhere to minority faiths, or none. The importance of this should not be overestimated - despite a decline in numbers, the Catholic church still dominates overwhelmingly.

Secondly, and more importantly, has been the increasing trend among many Catholics to embrace a more liberal, pluralistic or even secular conception of the State, and to reject elements of their church’s teaching.

Third, this increased secularisation has been reflected in the educational sphere. The numbers of religious vocations has been decreasing, while the strength of the teachers unions (increasingly composed of lay persons) has been enhanced.

Fourth, education - at all levels - is increasingly seen as a right which the State must provide for all members of society.

A fifth major factor has been the growth of parents’ movements in the educational field. It has often been noted that although the Irish Constitution accords primacy to the parents and children in education, the educational system itself paid far more attention to the Department
of Education, teacher interests, the owners of schools, the Boards of Management and the different denominations separately. Over the past 15 years, parents have increasingly demanded a say in how their children are educated.

Sixth, the changes above have also allowed the development of various social groups such as the Campaign to Separate Church and State and Educate Together. The former, as its name suggests seeks to disentangle the affairs of the State and the denominations, while the latter promotes integration in education, that is multi-denominational education.

A further development is the increasing judicialisation of Irish politics and society. Ever since the judicial revolution of 1960s the judiciary have been called upon to remedy deficiencies in the body politic - in the areas of constitutional, administrative, criminal and family law, and fairness of the political process, and creating an expectation that the courts must uphold constitutional rights at all costs.

Developments in the political sphere should also be noted. The 1990s have seen an on-going public debate on the education system, with promises that the system would be put on a firm legislative basis, and reforms introduced to better respect the rights of all concerned (especially children and parents). Various conferences and discussion papers have raised queries about aspects of the system - including its denominational character. And no less a body than the expert Constitution Review Group, set up by the Government, has come to the conclusion that the current system of education is unconstitutional. Recent political concern about the need to secure equality for all persons in Ireland has also thrown up some complications in the field of education.

The Department of Education now supports various reforms in the educational system. It has promised on several occasions since 1992 to review the integrated curriculum to determine whether it fully respects everyone’s constitutional rights. It now supports increased diversity of schools, and offers special assistance to multi-denominational schools. It wishes to make religion a subject examined by the State at post-primary level. It further wishes to give statutory recognition to schools’ right to protect their ethos (i.e. their denominational or multi-denominational character).

In this environment, it is now possible to question the many denominational elements of the system. The accommodation position, for which I shall shortly make the argument challenges several elements. It accepts that religious education may take place in state funded
schools. However it insists that the State cannot actually pay for the religious elements (e.g. the salaries of chaplains or religion teachers). This requires a return to the original idea of separate religious and combined secular instruction. Only in this way can the State respect the conscience rights of parents and children on an equal basis.

A similar, but more limited claim, was made by the Campaign to Separate Church and State, in the High Court and Supreme Court.56 The Campaign to Separate Church and State was opposed by the State, the Catholic and Protestant Archbishops all of whom argued in favour if the current system of denominational education. The Campaign to Separate Church and State’s accommodationist claim was repudiated by the courts, who favoured a “positive rights” approach. Before turning to the constitutional arguments over the appropriate form of Church - State relationship, I now present the reader with some background information on Irish law, especially in the fields of education and religion.

**Section Three: The Constitutional Background**

Ireland’s constitutional history is moulded in the whirlpools of constitutional democratic politics, revolutionary action, and sectarian strife.57 Throughout the 19th Century and early 20th Century the UK tried to tame its troublesome colony with various reform measures. These included the disestablishment of the minority Protestant Church of Ireland,58 and proposals for domestic self-government.59

This last of these - the 1920 Government of Ireland Act - was overtaken by events in the struggle for independence, 1916 to 1921. During the 1916 Easter Rising, rebels issued the Proclamation of the Republic. In 1919 a revolutionary government met as an assembly in Dublin and issued their own independent Constitution and Democratic Programme. The ensuing War of Independence 1919 - 1921 was ended by a negotiated settlement, the 1921 Anglo-Irish Treaty, which partitioned Ireland. Northern Ireland was given a domestic Parliament within the UK, controlled by the 1920 Government of Ireland Act. The Treaty recognised Southern Ireland as an independent state within the British Commonwealth. The Treaty also formed the basis for the 1922 Irish Constitution which lasted until 1937.

The 1937 Constitution severed all direct constitutional links with the Commonwealth and the UK, and established the current regime.60 Then Prime Minister DeValera and a small number of civil servants drafted the text, though they consulted with selected members of the

judiciary, academia and religious bodies. The drafting process was cloaked in administrative secrecy, and details about it have only emerged in the last ten years. The text, when produced, displayed the combined influence of the 1922 Constitution with its liberal commitments, Catholic social teaching, nationalist sentiments, and borrowings from some more recent Constitutions. The final text was debated in Parliament, before being adopted by the people in a referendum.

Before turning to the more specific issues of educational rights, religious rights and constitutional interpretation, the reader should note that the Constitution establishes a Westminster style parliamentary democracy in a unitary state. However the system also accepts the supremacy of the Constitution, which can only be altered by a bill passed through Parliament and then approved in a referendum. The supremacy of the Constitution - and particularly the fundamental rights provisions - is protected through judicial review and an independent judiciary. Ever since the “constitutional revolution” of the 1960s and 70s, the normative lodestone of the constitutional order has been the fundamental rights provisions, with the judiciary exercising the power to review the constitutional validity of almost any public action (and in some cases private actions).

The Constitution protects both the rights explicitly enumerated therein and all other (unenumerated) fundamental rights. It has often been said that the fundamental rights display a tense union of liberal individualist ideology and a more community oriented morality inspired by Catholic social teaching. Many of these rights will be familiar to US readers (some are inspired by US law), but others may seem more unusual: the provisions relating to abortion, the family, the social aspect of property, and - our main concern here - the relatively detailed rights about education and religion. Here I wish to outline some aspects of these rights, though I will leave controversial interpretative issues to later parts (the full text of both articles are found in the appendix).

Educational Rights

Article 42 (and 44.2.4) of the Constitution guarantees educational rights. Article 42 designates the parents as the primary educator of children, as regards their religious, moral, intellectual, social and physical education. The State must respect the decisions of parents as to where and how to educate their offspring, though it may impose minimum standards of
moral, intellectual and social education. The State is obliged to “provide for free primary education” and shall endeavour to supplement, assist or provide other educational facilities, always having “due regard, however, for the rights of parents, especially in the matter of religious and moral formation”.

These guarantees are much more extensive than the provision in the 1922 Constitution, Article 10 of which recognised the right of citizens to “free elementary education”. There seem to have been a number of sources which inspired, however indirectly, this article. Among these were the Catholic social philosophies, referred to above, and the proposals of Alfred O’Rahilly, an Irish academic involved in the drafting of the 1922 Constitution.

O’Rahilly had proposed a series of articles on “Family, Education and Religion” which the 1922 Drafting Committee had rejected; that Committee was more studiously separationist in its approach than those responsible for drafting the 1937 document. His proposals would have recognised the primary rights of parents in the field of education, giving the State a supervisory role. It would have expressly prohibited a “state monopoly” on education. He wished to make religious education compulsory in all state aided schools (though children could withdraw from religious classes). His and other Catholic inspired proposals would have explicitly sanctioned State funding of religious activities.

Although undoubtedly inspired by these ideas in parts, it is important to remember that Art. 42 does not explicitly enshrine them. Art. 42 does recognise the primacy of parental rights and accords the State what appears to be a secondary role. It does not make religious instruction compulsory, or establish it as the basis for all education, or recognise any specific role for religious bodies in education, or explicitly sanction state funding of religious activity.

Religion

The Constitution is replete with religiously inspired provisions, and includes an article devoted to the topic. The Preamble, the various oaths of office and the closing motto all display a religious fervour. These provisions have however a mainly rhetorical function - the legally effective rules on church-state relations are found in Article 44.

Article 44 contains two sections. Section 1 was a novel provision which recognised that public worship was due to God and required the State to revere His name. Section 1, subsections 2 and 3 also referred to the “special position” of the Catholic Church as guardian
of the faith of the majority of Irish people (44.1.2), and recognised the Protestant and Jewish
denominations (44.1.3). The story behind Art. 44.1 is probably the best known of the drafting
drama, though it does not directly concern us here. In 1972 Arts. 44.1.2 and 44.1.3 were
deleted by the Fifth Amendment to the Constitution (approved by 721,003 votes to 133,430).
Article 44.1 now consists of a single section - the public worship and reverence clauses. That
section 1 “reflects a firm conviction that we are a religious people” is sure, but the full scope
of this remains unclear.

Section 2 contains various rights and guarantees mostly copied from the 1922 Constitution:
freedom of conscience, free profession and practice of religion, non-discrimination on
religious grounds, the right of religious denominations to manage their internal affairs, special
property guarantees for religious denominations and educational institutions, and the two
crucial provisions for our purposes:

“The State guarantees not to endow any religion.”

“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.”

The parliamentary debate on these provisions was minimal. The only enlightening comment
in the Dáil Debates was that of Prime Minister DeValera’s implying that the provisions were
retained since they did not seem to cause any harm, and any alteration might cause
unnecessary panic among minorities.

These provisions have the oldest lineage of any part of the Constitution. The right of any
child to attend a publicly funded school without attending any religious instruction (the
“Conscience clause”) was a feature of all educational policy documents since the 1830s. The
1886 and 1893 Government of Ireland Bills contained among their aborted provisions a
requirement that the Dublin Parliament could not endow or establish any religion. The 1914
Government of Ireland Act provided that “the Irish parliament shall not make a law so as
either directly or indirectly to establish or endow any religion”. This Act never came into
force. Similar provisions were to be repeated in the 1920 Government of Ireland Act. This
Act, although still-born in the South, became the Constitution of Northern Ireland.

These guarantees were maintained in the 1921 Anglo-Irish Treaty. Article 8 of the 1922
Constitution adopted the guarantees with some modifications, and from there the guarantees
were introduced into Art. 44.2 of the 1937 text.
The constitutional drafters in 1937 were presented with a number of alternative texts, different in content from Article 8. Some of these came from representatives of the Catholic Church and other prominent Catholics, including O’Rahilly. Several of these alternatives were influenced by the 1919 Weimar Constitution and the Polish Constitution. These alternative provisions would have, variously, ended the non-endowment requirement, made religious education compulsory, removed the child’s conscience clause, and explicitly allowed the State to fund religious activities.

The drafters of the 1937 text were aware of all these proposals but ultimately chose to retain the guarantees contained in Article 8 of the 1922 Constitution, with minor changes.

The rights and guarantees of Art. 44.2 have only rarely been litigated in the Courts; many of their complexities have only been highlighted in a judicial forum recently with the School Chaplain case. Some people have seen in this lack of litigation a reason for self-congratulation, and the 1996 Constitution Review Group was of the opinion that these provisions were “satisfactory and have worked well”.

Constitutional Interpretation

The debate on constitutional interpretation in Ireland has only recently become heated in academic journals. This is not to say that there has been a significant consensus on an accepted methodology in the courts or among commentators. Jurists have identified at least five principal interpretative approaches, and a number of ancillary ones. The main approaches are usually styled the literalist, historical, purposive, harmonious and “natural law” approaches. Regrettably there is little judicial discussion of the reasons for selecting one or other methodology, and one might cynically suppose that judges select the approach which leads to the result they like.

The literalist approach is (supposedly) straightforward: the Constitution means what its “plain words” say and nothing else. There are disadvantages with this approach, not least of which is that it only applies when the text is unambiguous. Of course, it is precisely when the text is ambiguous that we most need a theory of interpretation rather than a dictionary! In any event it is not always evident that a provision is unambiguous. Also it seems wrong to subject the broad generalities and fundamental principles of the Constitution to the literalist line by line parsing appropriate for a detailed, easily changeable statute. Such an approach
may lead to an unworkable or unacceptable result which judges have sought to avoid by using other techniques. Even worse, it may involve dogmatic and pedantic distinctions based on subjecting the Constitution to an unnecessarily intense process of parsing and analysis.

The second approach is the **historical** one. A historical approach has been endorsed by some academic commentators, in at least some cases. Certain writers have suggested that it is particularly useful in the field of educational rights. One version of the historical approach involves ascertaining the meaning of the Constitution from the laws in force at the time of the adoption of the Constitution. In *M'Gee v. Ireland*, the High Court noted that the law prohibiting the importation of contraceptives was enacted in 1935, two years before Parliament approved the new Constitution. Accordingly, Parliament must have believed that the provisions of the law were valid public policy under the new Constitution. A second variant involves using the opinions and morals of the people in 1937 to determine the meaning of the Constitution. In *Norris*, (homosexual rights) the majority judgement relied almost exclusively on this approach, saying that something which would not have been acceptable to the people in 1937, could not now be deemed to be required by the Constitution.

These versions of the historical approach are open to several criticisms. First, the Courts have usually endorsed a “present tense” interpretation, refusing to cabin the constitutional order by reference to practices of decades before. Second, it is odd to use the state of affairs existing in 1937 to interpret the Constitution, since the latter is the benchmark of legality. Third, there is the difficulty of knowing what precisely was the state of affairs in 1937. Fourth, historical analysis can throw up contradictory indications, as history is rarely straightforward.

The next approach to interpretation is the **purposive** or broad approach, that is the Constitution must be given an interpretation which makes it an effective tool to achieve its purposes. It is inappropriate therefore to rely too much on a literal or historical interpretation as the Constitution is a political document, not a precisely drafted statute, and its broad purposes must be effectuated. In particular the fundamental rights protected by the Constitution are not to be confined by an unnecessarily literalist perspective.

The fourth interpretative approach, a coherentist, is usually called the **harmonious** approach. This was set out by Henchy J. dissenting, in *O'Shea*:

> "Any single constitutional right or power is but a component in an ensemble of inter-connected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general..."
constitutional order and modulation. ... No single constitutional provision (particularly one designed to safeguard personal liberty or the social order) may be isolated and construed with undeviating literalness.”

Generally, judges at least mention harmonious interpretation as important, or pay it the tribute of using it reflexively without mentioning it by name, and the leading work on the Constitution describes this approach as “in logic ... the first canon of interpretation”.

The fifth approach is the natural law, reference to extra-textual values or “evolving moral standards” approach. Reference to moral (or political) standards is very common. Recently the Supreme Court has unambiguously endorsed reference to evolving moral standards as a legitimate tool in construing the Constitution. The legitimacy of reference to extra-textual values is the justification for the reference to foreign and international law. Once one accepts that moral standards are of relevance in interpretation, then one must acknowledge that such standards might well be found outside of Irish sources.

The above are the five main interpretative approaches, but one other approach should also be considered important. Although it is often not mentioned in this context, Ireland is a common law country and so courts are bound by the relevant judicial precedents of superior courts. A court may of course overrule a decision made by itself, but until it does so it should follow the previous decision.

Finally there are various ancillary sources of inspiration. These include foreign and international law, and legal and other writers. Judges have relied on foreign case law and legal provisions in deciding what meaning should be given to similar provisions in the Irish context. The references to US case law are so numerous that listing them would exhaust the reader's patience, and judges have referred to other jurisdictions. Treaties do not have normative force in Ireland unless incorporated by statute, but they are legitimate guides to interpretation. Reference to writers and theorists is more unusual. Recently judicial reference to Irish academics has become noticeably more frequent.

An Appropriate Interpretative Methodology

Without wishing to delve too deeply into the intricate issues of constitutional interpretation, I need to indicate what I think is the preferred approach to interpreting the Constitution. It is one which blends aspects of the harmonious, purposive and extra-textual approaches
described above, allied to a consideration of precedent. Though it insists on textual analysis and pays attention to historical development, it is slave neither to words or to history. It is willing to look to foreign and international materials for guidance.

The approach I propose is, from the viewpoint of legal theory, close to Dworkin's notion of law as integrity, and Habermas' idea of a rational reconstruction of law: one interprets a provision considering all the relevant provisions, bearing in mind their overall coherence, justification and purpose.\textsuperscript{118}

Firstly, one must start with the text of the Constitution. We must remember that the Irish Constitution is something unique, so one cannot assume that the words and phrases used in it necessarily mean the same as in some other constitutional text, much less in a statute or dictionary. An interpreter should not take a technical statute law approach to interpreting the Constitution. One should not overemphasise the literal meaning of one word or phrase taken out of context.\textsuperscript{119} Rather:

"... the Constitution must be read as a whole and ... its several provisions must not be looked at in isolation, but be treated as \textit{interlocking parts of a general constitutional scheme}."\textsuperscript{120}

We must give those provisions a harmonious interpretation which explains the relevant provisions in an integrated manner and which fulfils the purpose and moral justification of the Constitution.\textsuperscript{121}

In assigning meaning to the text, we must consider several sources of law, some binding, some merely persuasive. The binding sources of law are the constitutional text and relevant decisions of the superior Irish Courts (subject of course to the power of the Supreme Court to reverse earlier decisions). The persuasive sources include decisions of other Irish courts, foreign and international legal materials, and work by legal writers. We can also look at historical interpretations, political history, and, where applicable, social, psychological and scientific work. All these may be used as guides, never to provide cast-iron definitions. We read them not to escape the necessity to come to a decision on the appropriate interpretation of the Constitution, nor in the hope that they will provide a thoroughly objective non-controversial solution. Rather we read them to understand what sort of normative scheme provides a coherent understanding of the binding sources of law, the constitutional text and case law.
Section Four: The Argument for Accommodation

I believe that the accommodation approach outlined above offers the best interpretation of the relevant constitutional sources, in the sense that it provides a balanced integration of all the different principles which the constitutional order protects, and can be demonstrated to be principled and practical by reference to comparative and international material.

As I noted at the beginning, each of the alternative interpretations pays respect to the different elements of the constitutional order. However they interpret these elements differently and assign different levels of importance to each of them. The supportive interpretation emphasises the role of religion, parental rights in education, and the autonomy of religion. It pays less attention to the institutional separation of church and state, the principle of non-endowment and the conscience clause. Its respect for pluralism and equality is intended in a quite formal sense. The “positive rights” approach places the positive aspects of educational and religious rights at the centre of its theory, but again downplays those elements which seek to respect the mutual autonomy of church and state, the non-endowment clause and the conscience clause.

In what follows I present the argument for the accommodation approach. To summarise I am arguing that the accommodation approach makes the best sense of the principles of pluralism, separation of Church and State, religious freedom and equality, conscience rights and respect for religion as these principles are protected in the constitutional order. The State must accommodate religion, but it may not engage in it or fund it. This interpretation requires that state-assisted schools be open to all persons irrespective of religion, that religious instruction be separate from secular instruction, and that the State should only fund the latter.

The Constitutional Text and Case Law

The key criteria for determining the validity of an interpretation in Ireland must be the extent to which it resonates with the various relevant provisions of the constitutional text, the case law of the courts (especially the Supreme Court), and the principles which are consonant with those sources. Of course, any constitutional interpretation is unlikely to be a perfect fit for all
the rules and principles in the text and case law, and sometimes we must argue that some
rules are best left aside as special cases, that some cases are best unrepeated or even
overruled. The following sections will examine the claims of the “accommodation” approach
to be consonant with the principles and rules of the constitutional order. We will start with
some of the more general principles: the ideas of pluralism, the role of religion, the idea of
separation, and then move to more specific considerations of educational rights, rights of
religion and the two key provisions whose interpretation is at issue, the non-endowment
clause and the conscience clause.

**Religion and Pluralism**

The accommodation approach accepts that religion plays an important role in the lives of Irish
individuals and groups. The Constitution and the State clearly acknowledge the supremacy of
God, a theme which resonates through the Preamble, Article 6.1, Article 44.1 and the closing
motto of the text. However treating religion as important does not commit the State to a
theocratic or confessional agenda. Indeed it is precisely because religion is held in such
esteem that the State must not entangle itself in sacred matters, maintaining a legal boundary
marked out by guarantees of religious freedom, equality and separation. Thus the State
acknowledges the supremacy of God, and undertakes to respect negative limits of religious
freedom. It never explicitly undertakes to promote any religious beliefs or religion in general
however. The specific rules it does make explicit serve to protect zones of liberty within
which religious practice may flourish. It is precisely because “we are religious people” that
rights of religious liberty and equality must be protected, and that the State must obey the
principle of separation.\(^2\)

Such an attitude is necessary to maintain the essential pluralism which is the foundation of
the democratic state. As early as 1972 the Supreme Court had established this fundamental
basis of equality - the Constitution condemns any inequality founded on any assumption or
belief that some people or class of people are inferior or superior to others in the community,
whether that belief is based on race, religion, ethnic or social background of any other
factor.\(^3\)

In that case, *Quinn’s Supermarket*, the Court also looked at the provisions of Art. 44.1, which
at the time had recognised the special position of the Catholic Church and given recognition
to various Protestant and Jewish congregations. The case considered an early form of “reverse discrimination” - a rule making special provision for kosher shops so that Jews would not be inconvenienced by generally applicable rules on store closing hours during their Sabbath. The Court, relying extensively on US precedents, declared that Article 44 recognised that the state was “pluralist”, and that the provisions should not be construed as limiting their benefits to Christians or the groups designated in Art. 44:

“This declaration is an express recognition of the separate co-existence of the religious denominations, named and unnamed. It does not prefer one to the other, and it does not confer any privilege or impose any disability or diminution of status upon any religious denomination ...”

The pluralist nature of the State (and reliance on the US case law) lead as we shall see to an extensive commitment in the area of religious liberty.

The pluralist nature of the State was amplified in M’Gee v. Ireland, where the Supreme Court upheld the right of privacy, and swept away an anticontraceptive provision enacted two years before the approval of the Constitution by the same assembly. (By this stage Articles 44.1.2 and 44.1.3 had been removed by the people.)

The Supreme Court trenchantly stated the principle that the State may not impose a “code of private morality” on its citizens. It was made clear that the guarantees in Article 44 were not limited to believers, non-believers could also invoke their rights. Walsh J. addressed the holding in Quinn’s Supermarket that we are a religious people living in a pluralist society. The deletion of the provisions in Art. 44.1 did not diminish the pluralist nature of the society. Indeed, though he did not make the point, the removal of provisions explicitly naming certain congregations can only be interpreted as strengthening that pluralism, making it clear that there are no favoured Churches. Walsh J. draws a further, vital conclusion, which emphasises the constitutional separation of the sacred and the secular. The Constitution acknowledges that law is subservient to justice and that therefore the natural rights of persons, even if not specified in the text, must be protected. May the courts therefore use religious sources to determine these rights?

“In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law.”
The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity.\textsuperscript{131}

The court thus erects on the principle of pluralism, a basic barrier between the constitutional duty of the State and the ideas of different denominations. The courts must uphold the constitutional requirements of justice, which are not based on denominational considerations.

It is true that this judicial commitment to pluralism was weakened during the 1980s, in cases dealing with same-sex intercourse and abortion.\textsuperscript{132} However the decisions in those cases have been reversed by legislation\textsuperscript{133} and constitutional amendment.\textsuperscript{134} More significantly the anti-pluralist reasoning in those decisions has been sidelined or repudiated in recent decisions, and the pluralist comments in \textit{M’Gee} re-affirmed.\textsuperscript{135}

That we are a religious people is clear from the Constitution, but equally so is the pluralist nature of the State, which prohibits the State from entangling itself in theological or denominational matters. This principle was made, in the most grave manner possible, in \textit{In re A Ward of Court} where the Supreme Court allowed the withdrawal of artificial feeding from a brain damaged patient. Denham J. noted that we are a religious people, who give respect to the spiritual and religious component of life. This does not entail support for any religious denomination or any religious faith; it demands that the State respect the zone of freedom in which individuals make decisions about their religious lives.\textsuperscript{136}

In a pluralist society, respect for religion requires the State not to entangle itself in religious affairs, but to grant the greatest possible scope for the free and equal exercise of different religious beliefs. The State must recognise its own incompetence in religious matters. This is no doubt why the Courts when using the Preamble to guide their interpretation of the law, have only rarely referred to its theological features. They have consistently however invoked its references to secular principles of the “dignity and freedom of the individual”, and the duty to act with due respect for “Prudence, Justice and Charity”.\textsuperscript{137}

This constitutional affirmation of pluralism, the idea that the State serves the interests of all, equally, without entangling itself in religious matters, is also stressed in the 1916 Proclamation of the Republic:

“The republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and all its parts, cherishing all the children of the nation equally, and oblivious of the differences carefully fostered by an alien government, which have divided a minority from the majority in the past.”\textsuperscript{138}
Whilst it is not customary to look to the Proclamation for guidance as to the meaning of the Constitution, this paragraph summarises powerfully the pluralist interpretation of the Constitution, with its commitment to freedom and equality (giving pride or place to religious liberty), its promise to cherish all the children of the nation equally, and its suspicion of efforts to divide the populace on grounds of religion. These are themes re-iterated in the Constitution:

"The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life." \(^{140}\)

The concept of charity is no doubt a vague one. No doubt a key part of it is empathy for those who suffer and thus it condemns measures which inflict upon persons lives “fraught with worry, tension and uncertainty”. \(^{141}\)

This interpretation of the Constitution - that in a democratic pluralist state, the State must not entangle itself in religious matters, but must respect scrupulously the rights of religious liberty and equality - is confirmed by a careful reading of all the relevant textual provisions, a reading which in turn allows us to delineate more precisely the nature of those principles. Let us turn first to the provisions relating to educational rights, and their interpretation by the courts.

**Educational Rights**

Article 42 states the constitutional principles governing education, in many ways presaging the terms of later human rights guarantees. \(^{142}\) Its terms recognise the roles of the parents and the State. There are numerous points to make about the wording of this article.

First, even though the article does not explicitly say so, the primary rights that are at issue are those of children. The article starts off by identifying the natural rights and duties of the parents to provide their children’s education, and then discusses the role of the State. Only in the last section, Article 42.5 is it stated that where the parents fail in their duty to their children then the State may intervene to fulfil their duties, “with due regard for the natural and imprescriptible rights of the child”. The competence of the State and the duties of the parents exist to protect the child’s rights.
What are these rights of the child in the educational context? These rights are again expressed indirectly, as duties imposed on others. The child has the right to education - “religious and moral, intellectual, physical and social” (Art. 42.1). Who shall provide this education? Article 42 declares that it is the duty of the parents to provide this education and that “Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State”.

Why the emphasis on parents’ rights up to this point? I think the reason is made clear in the next section: the need for pluralism. By vesting primary authority in the myriad parents the State is denying any educational monopoly for itself, and presumably promoting a wide range of educational establishments. The primary direction in children’s education is not vested in a few small groups, or providers of education, or the State itself, but is dispersed among the population. This pluralistic interpretation is confirmed by Art. 42.3.1:

“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.”

The State shall not try to establish a monopoly or hegemony in the educational sphere. This pluralistic interpretation is vindicated by the wide range of educational establishments to which Article 42 refers: “private schools”, “schools recognised” by the state, schools “established” by the State, education “in the home”.143 This pluralistic interpretation is enhanced by the unusual provision in Article 44.2.6 that gives special property rights to educational institutions - their property may only be confiscated to carry out necessary works of public utility and upon payment of compensation.

However, the State’s role is not negligible. Where parents fail in their duties to their children the State may step in to discharge those duties (Article 42.5). More generally, and less drastically, the State may require that, no matter where a child is educated, he or she should receive a “certain minimum education, moral intellectual and social” (Art. 42.3.2). The child has a right to free primary education,144 indicated by the duty on the State to “provide for free primary education” (Art. 42.4). More generally the State shall “supplement and give reasonable aid to private and corporate educational initiative, and when the public good requires it, provide other educational facilities....” This is subject to an important proviso “... with due regard, however, for the rights of parents, especially in the matter of religious and moral formation” (Article 42.4).
Article 42 does not refer to the rights of education providers - it does not refer to the “right to teach” “academic freedom” the right “to establish educational bodies”. Its only reference to “private schools” is in the context of the parental right to choose where to educate their children, and the option of the state to aid private initiative. Nevertheless the pluralistic interpretation suggested above, as well as a purposive interpretation of the provisions, indicates that the State cannot abolish the right to set up private schools, since that would render impossible parental choice and establish the sort of hegemony the provisions aim to avoid.

What is the role of the churches in Article 42? In 1937 the educational system was largely denominational - schools were run by members of religious denominations. Yet Article 42 says nothing on the topic, except in so far as denominational schools might describe themselves as falling into one of the categories of schools mentioned in the provision, and as a reflection of the parental right to provide for the religious education of their children in different types of establishment. Despite the widespread nature of church ownership and management of schools, there is no explicit reference in Article 42 to sanction or condemn it. The churches are given no special rights.

Article 44 does make some references to the rights of churches in the field of education - Article 44.2.5 refers to the right to maintain religious or charitable institutions, which has been held to include schools. Where the State provides aid for schools it “shall not discriminate between schools under the management of different religious denominations” (Article 44.2.4). However these rights - though undoubtedly important - are peripheral in terms of the educational scheme explicitly set out in the text of Article 42. That provision emphasises the rights of the child, the rights and duties of the parents, and the duties of the State.

What does Article 42 say explicitly about religious education? It indicates that the parents are to provide the child’s religious education (Art. 42.1), that they are free to provide “this education” (presumably including religious education) in “their homes or in private schools or in schools recognised or established by the State” (Art. 42.2). Furthermore in providing for and assisting education facilities the State must have “due regard” for the rights of parents, “especially in the matter of religious and moral formation” (Art. 42.4). There is also a crucial omission - when indicating where the State must establish minimum standards, the text does not refer to religious education.
Article 42 is careful not to give the State any rights in respect of the sensitive area of religious education. Article 42 does not explicitly require the State to promote religious education either or to fund it (although alternative texts discussed in 1937 would have done so). Article 42.2 says that the parents are free to provide religious education in schools recognised or established by the State; it does not say that the State should provide that education in such schools. This dovetails neatly with the accommodation interpretation - the State may not itself provide religious education, but as an act of accommodation may allow parents to provide it themselves in schools under the State’s control. The State thus shows “due regard” for the rights of parents in respect of “religious formation” by not interfering in that provision by the parents, by regarding religious education as a no-go area. This is confirmed by the fact that the State may not establish a certain minimum religious education - it is simply incompetent in such matters.

Other interpretations of Article 42 are certainly possible. Costello P. believes that Article 42 draws a technical distinction between religious education (“the teaching of religious doctrine, apologetics, religious history and comparative religions”) and religious formation (familiarisation with “religious practice”, prayer, bible reading). The State, according to Costello P., is “having regard to the rights of parents vis-à-vis the religious formation of their children and enabling them to exercise their constitutionally recognised rights”. Assisting the exercise of constitutional rights is always permissible according to Costello P. Leaving aside the technical distinction between formation and education, which is announced with little discussion and is an example of that excessively analytical parsing criticised by Kelly, this positive rights arguments is the strongest alternative to the accommodation argument.

There is a further textual point in its favour. In the Supreme Court Barrington J. (speaking for three others and himself), referring to Article 42.2. interprets it to mean that

“the Constitution contemplates children receiving religious education in schools recognised or established by the State but in accordance with the wishes of the parents”.  

That is clearly true - but Art. 42.2 does not say that the State should provide this religious education or pay for it, or that religious values should permeate the school ethos. All it says is that the parents may provide it. If the State is to provide it, then why not explicitly say so, as indeed some of the early constitutional drafts and submissions did?
Reading Article 42 in isolation, all these interpretations are plausible. To decide which interpretation is the more acceptable we must consider other constitutional provisions and the relevant case law.

The relevant case law on education is not directly helpful in many regards. It does touch upon the definition of “education”, the nature of the State’s duty in this regard, and there are some obiter comments on the denominational structure.

In *Ryan v. Ireland* the courts rejected an extremely broad definition of “education” which would have included notions of care and nurture. The High Court held that the type of education referred to in Article 42 was “scholastic” education. The Supreme Court elaborated:

> “Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.”

The recent High Court case of *O’Donoghue v. Minister for Health* reviewed the Irish, US and international law, and national and international expert opinion, and confirmed that Supreme Court’s idea was the most appropriate one in the modern understanding - the development of one’s physical, mental and moral capacities. Interestingly neither the Supreme Court nor O’Hanlon J. mention religious education.

The nature of the State’s duties in relation to education have also been discussed, though it is too much to say that they have been clarified. The case of *Crowley v. Minister for Education* involved a claim that the State had not adequately discharged its functions under Article 42 where industrial action had lead to the cessation of primary education in one particular locality. The Supreme Court confirmed that article 42 recognised a “right to receive a minimum education, moral intellectual and social” and specifically a right to free primary education. However according to the Supreme Court, this did not mean the State was obliged to educate - its duty was “to provide for” free primary education, not to provide free primary education. Its obligation is only to fund the provision of primary education, not actually to provide it. This obligation means that the State shall provide for free primary education for those who want it; the State must in its legislation defend and vindicate this right. The Supreme Court, by a 3-2 majority, rejected the claim that the State, by its legislation had restricted this right.
Crowley, like indeed the earlier School Attendance Bill case, stands for a rather limited conception of the State’s role in education, based on a very narrow and technical reading of the Constitution. This reading has been criticised, and is inconsistent with holdings in other cases. The narrow idea, that the duty to defend personal rights is only imposed on the State in its role as legislator, is now untenable, and is indeed rejected by the Supreme Court in the case of Campaign to Separate Church and State. Most significantly, the tenor of Crowley has been side-stepped by a series of recent High Court cases of which O’Donoghue is the best example.

Before turning away from the Crowley, it is important to consider some of the obiter comments offered by Kenny J. They deserve quotation at length.

“...Thus the enormous power which the control of education gives was denied to the State: there was interposed between the State and the child the manager or board of management.”

This history lesson - with its important point that State monopoly of education was to be distrusted - should not be treated as a binding interpretation. The system of denominational education was not being challenged in the case, and so the judicially expressed support for the system then in place is no more than very instructive obiter. Kenny J. is no doubt correct to say that the State may fund education in denominational schools (this is made clear by the constitutional text). However I have slightly more difficulty with the idea of transposing a popular distrust of state schools in the 19th Century to 1937 and even more so to the 1990s. The vision that Kenny J. has of the 19th Century is of a people distrustful of an undemocratic “foreign” and possibly proselytising Government; that hardly resembles the Ireland of today. Furthermore the opinion suggests that the 1937 Constitution freezes the educational system into the format then existing, with its managers and so on. This sits rather uneasily with the wording of Article 42, which clearly envisages a role for the State, but does not mention the denominational system of managers at all. More importantly, if the 1937 system is to be a guide then many important elements of the current educational system are open to challenge
(can the State establish Boards of Management? can the State establish new types of schools even? can the State create syllabi for religious education?).

An important development in the right to education is found in O’Donoghue. This dealt with a tragic situation - the education of a young man who was severely handicapped, physically and mentally. The State did make some provision for his education, but it was inadequate. After an exhaustive review of Irish, international and US law, and prevailing expert opinion, O’Hanlon J. concluded that every individual had the right to a free basic education that would enable him or her to develop his capacities, “physical, mental and moral” however limited they may be. The State must provide “for free primary education for this group of children in as full and positive a manner as it has done for all other children in the community”. In doing this it must recognise the important role played by “trained teachers and the school environment”. 158

This case dealt with the issue of how the State should treat one particular minority. I do not wish to suggest that it itself stands for the proposition that other minorities ought to be given similar treatment. I do wish to suggest that the case stands for a particularly strong conception of pluralism and one which should be used when discussing the educational rights of others. In this way the educational rights of the Constitution will represent a principled commitment to equality rather than a patchwork of ideas.

This decision of principle expresses a deep commitment to the pluralistic principles of the Constitution. Every child, no matter their condition, is entitled to a suitable free primary education in schools funded by the State. It is not satisfactory for the State to say that it provides educational suitable for many children or even most children. It is not acceptable for the State to say that parents can always choose to educate children in the home. In today’s conditions, a genuine right to education must include at least the option of a suitable education in schools with properly trained teachers. That education must be provided in conditions of equality, i.e. the State must provide an “equal publicly supported education” to all classes of students. 159

Translated to the field of religious education this general idea entails one of two consequences. Either the State is obliged to ensure that in all regions of the country every parent has the realistic option of sending their children to a school with the particular religious ethos they desire - Catholic, Protestant, Christian, Jewish, Muslim, multi-denominational, or secular. Or the education provided for by the State must be such as to
welcome all within it. This could only be provided by a return to the originally intended ethos of the national school system - combined secular instruction and separate religious instruction. As we shall see Article 44 contains reasons to regard the second option as the preferable one.

It is true that O’Donoghue does not deal with religious education. However surely the pluralism that extends the same rights to persons irrespective of their physical condition, should also extend the same rights to persons irrespective of their religious convictions. In view of the extensive guarantees on religious rights, it would seem that discrimination on that basis is as objectionable as discrimination on the basis of physical and mental situation.

It is also important to note that O’Donoghue stands for an extremely practical pluralism. It is not sufficient to provide formal equality in legislation; the reality of equality must be delivered, if necessary with special funding or programmes.

The next important development of Article 42 is to be found in the Employment Equality Bill case, where the Supreme Court had to consider the validity of an exemption for religious bodies, including schools from the requirement of religious non-discrimination. The Court offered several comments on denominational education. According to the Court, Article 42 makes the parents primarily responsible for religious education, though they are free to provide it in schools recognised or established by the State. After paraphrasing sections of Article 42 the Court concluded that:

“It is quite clear therefore that the State is entitled to support denominational schools .... It is also clear that Articles 42 and 44 of the Constitution reflect the systems of denominational education which in fact existed in Ireland at the date of the coming into operation of the Constitution.”

Thus the system of state aid to these denominational schools did not constitute a prohibited endowment.

I shall discuss this case in more depth when considering the endowment clause. For the moment, let me note that the accommodation approach I am defending accepts that the State may aid denominational schools - on certain conditions. Furthermore one cannot deny that Article 42 and 44 “reflects” the system of education being provided in 1937. That does not answer the question though to what extent it gives that system constitutional protection, especially since the Articles do not specifically sanction, specify, or condone any aspects of it, beyond the general point (already conceded) that the State may aid denominational schools.
This review of the provisions of Article 42 and the case law tells us that the provision is primarily concerned with the education rights of the child - the means by which his or her physical, mental and moral capacities are developed (Ryan). Despite some of the rulings in Crowley, we can see that those provisions have been given a formidable interpretation by the courts. In the case of Campaign to Separate Church and State, these decisions are given only brief attention. The High Court does not refer to any of them. In the Supreme Court the two judgements make reference to the Employment Equality Bill case, and one judgement refers briefly to the obiter comments in Crowley about the background to the school system.

**Article 44 - Religious Liberty and Non-Discrimination**

Let’s turn to the provisions and case law concerning religious liberty and non-discrimination. On the accommodation interpretation, the importance of religion in a pluralist state is secured through extensive guarantees of religious liberty and non-discrimination, coupled with an institutional separation preventing the State getting involved in religious matters. These guarantees must include accommodation so that persons are free to practice their religion, on conditions of equality.

Article 44 contains rather extensive guarantees in this regard borrowed from earlier constitutional texts: the State guarantees “Freedom of conscience and the free profession and practice of religion” (Art. 44.2.1), subject to public order and morality, and undertakes not to “impose any disabilities or make any discrimination on the ground of religious profession, belief or status” (Art. 44.2.3). Sandwiched between these guarantees is the non-endowment clause.

There are relatively few cases touching these articles. Again we must turn to Quinn’s Supermarket for the main rules. The leading judgement of Walsh J. in that decision makes it clear that the provisions in Article 44 must be given an integrated interpretation, for they have a joint purpose and should not be interpreted to lead into contradiction. After a lengthy survey of US First Amendment jurisprudence, Walsh J. explained that those provisions are designed to secure free religious practice in a pluralist state. That required a very special interpretation of the non-discrimination clause. According to Walsh J., any distinction based on religious grounds is constitutionally invalid, whether favourable or unfavourable, except in one important case. If a general law were to impinge on the free exercise of religion then
that law must provide an exception from its application for persons so affected. Thus if a general non-discriminatory rule provides for shop closing hours, but those general rules affect prejudicially the right of (in that case) Jews to practice their religion, then an exception may and must be made to accommodate that practice.\footnote{164}

Further developments appeared in \textit{M’Gee v. Ireland}, where, as already noted, the Court re-emphasised the pluralist nature of the Constitution, and explained that atheists were also entitled to have their beliefs respected. In that case, Walsh J. also had some important comments to make about the protection of religious conscience under Art. 44:

\begin{quote}...
\ldots no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned \ldots Correlatively he is free to have no religious beliefs or to abstain from the practise or profession of religion. \ldots What the Article guarantees is the right not to be compelled or coerced into living in a way which is contrary to one’s conscience [in religious matters].\end{quote}\footnote{165}

These comments are somewhat obiter - Walsh J. was rejecting a complaint under Art. 44 based on a non-religious conscience claim. Nevertheless they provide a redoubtable description of the right of conscience in religious matters.

Religious non-discrimination was further amplified in \textit{Mulloy v. Minister for Education} and \textit{M. v. The Adoption Board}. Mulloy invalidated an administrative rule which discriminated against certain teachers on the grounds that they were also members of religious orders. The courts held that, absent very special justifications, such a distinction on the ground of religious status was unconstitutional. In the Adoption Board case, the High Court invalidated a provision in the law on adoption which said that applicants for adoption must be of the same religion as the child and the child’s parents. The High Court found that rule violated flagrantly the non-discrimination provision.

The implications of these two cases for the accommodation approach should be noted. The accommodation approach does not require discrimination on the grounds of religious status, and so is compatible with these decisions. The State may pay anyone for their activities as a teacher of secular subjects, irrespective of whether they are also members of religious orders. What it cannot pay for, on the accommodation analysis, is the teaching of religion or the carrying out of other religious activities. The Adoption Board case is also a useful support - the rule it struck down after all was one which indirectly tended to support religious
segregation (the rule discriminated against a couple of different religious convictions - a “mixed marriage” in Irish terms).

Of course, the accommodation approach must make crucial decisions about religious institutions where those institutions are seeking to maintain their particular ethos. In certain cases therefore, the State may have to allow private religious institutions to engage in forms of discrimination even though the state itself may not discriminate. To that extent the accommodation approach accepts the comments of the Supreme Court in *M’Grath and O Ruairc v. Trustees of Maynooth College*,\(^{168}\)

“... the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion .... Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasions recognise and buttress them. For such disabilities and discriminations do not derive from the State; it cannot be said that it is the State that imposed or made them ....”

and the holding in *Employment Equality Bill reference*. There the Supreme Court, relying on the decisions cited above and some US law,\(^{169}\) upheld a statutory provision which would have exempted religious institutions from statutory non-discrimination laws in situations where they needed to discriminate to preserve the ethos of their establishment.\(^{170}\) Such cases raise very large issues, and here I can only note that such special exemptions are compatible with an accommodationist view of the Constitution.\(^{171}\)

This brief survey of the case law on religious equality and liberty is more indicative of trends than determinative of conclusions. Nevertheless those indications are valuable: the clauses of Article 44 must be given an integrated purpose-oriented meaning (*Quinn’s Supermarket*), so to preserve the “vitality, independence and freedom” of religion (*M’Grath and O Ruairc*). Those clauses, though prohibiting religious distinctions, nevertheless require that significant accommodation be made where this is necessary to enable people to practice their religion (*Quinn’s Supermarket*). In some cases, the State may even allow private persons to engage in religious discrimination for then it is not the State itself engaging in such actions (at least where this is necessary to ensure a full freedom of religion) (*M’Grath and O Ruairc, Employment Equality Bill reference*). In interpreting these guarantees we can look to the rich US First Amendment jurisprudence for guidance (*Quinn’s Supermarket*).
Of all these cases on religion, not one is cited in the High Court decision in *Campaign to Separate Church and State*, while the Supreme Court refers only to the *Employment Equality Bill reference*.

**Institutional Separation**

There are a number of constitutional provisions which, although rarely litigated, are designed to separate the affairs of Church and State. Others provide for the autonomy of Churches from State control.

First there is Article 44.2.5 which explicitly protects the rights of denominations to control their own affairs, own property and maintain religious and charitable institutions. It has been hinted that this means denominational schools have complete autonomy in running their educational establishments. Such an interpretation is extreme for three reasons. First Art. 44.2.5 seems to guarantee the denominations a negative freedom from interference, but that does not mean the State may not attach conditions to any aid. Secondly, the Constitution clearly envisages that the State can impose conditions on denominational schools (see Art. 44.2.4, and by implication Art. 42.3.2). Thirdly, it should not be interpreted as permitting the denominations to engage in unconstitutional activity or as permitting the State to fund unconstitutional activity.

Article 44.2.6 gives special recognition to the property rights of religious denominations: the State may not confiscate their property except to carry out works of public necessity and upon payment of compensation.

Article 42, as noted above, refers to religious education (and formation) at several points, but is scrupulous about not giving the State any role in providing it.

There are also some significant omissions - the removal of Art. 44.1.2 and 44.1.3 which recognised specific denominations; the failure to recognise any special role for the churches in the areas of education (Article 42) or marriage (Article 41), even though early drafts and submissions relating to the Constitution would have explicitly done so and so entangled the civil law and law of the Churches.

Finally, there is the constitutional guarantee of non-endowment of religion.
Article 44 - Non-Endowment

This is one of the two key provisions whose interpretation we are seeking to clarify.

Prior to 1996, the non-endowment clause had only rarely been judicially considered. In *Quinn’s Supermarket*, Walsh J. commented that the non-endowment clause was not at issue since there was “no question of any employment of State funds”. In *M’Grath and O’Ruairc* the non-endowment clause was indirectly in issue, but the courts dodged it.

These interpretations are of only limited assistance, and presenting the accommodationist interpretation, it is worth noting that academic opinion on the topic was divided, though the majority of scholars thought that at least there were serious doubts about the compatibility of some elements of the educational system with the provisions of Art. 44. Academic backing for the system of denominational education was expressed by Dr. Farry and - significantly - Mr. Justice Brian Walsh, speaking extrajudicially. Nevertheless most commentators expressed misgivings or criticisms. The leading textbook on the Irish Constitution thought that serious doubts existed about the constitutionality of the integrated curriculum and the financing of chaplains. The expert Constitution Review Group felt that the current system of education was incompatible with the constitutional text. Others to question at least some elements of the system of education include Prof. Casey, Prof. Clarke, Dr. Whyte, and Dr. Forde. Academics commenting on similar provisions in Northern Ireland’s 1920 Government of Ireland Act also thought the constitutional provisions posed difficulties for the system of denominational education.

There is therefore significant academic backing for an interpretation of Article 44 which is critical of the current system of denominational education. In the light of the pluralistic interpretation of the Constitution for which I have been arguing and the accommodation approach that it requires, I argue that the non-endowment clause requires that the State not provide direct public financing or support for any religious activity. That would still allow the State to fund the non-religious activities of denominations, where they benefit the public. This interpretation is the most desirable for five reasons.

First, it fits most closely into the pluralistic interpretation of the Constitution, the principle that the State must treat all persons equally irrespective of religious differences. State funding of religious activity would certainly entangle the State in religious matters where it is not competent - prescribing the activities of religious persons for instance, or laying down
religion syllabi. It would also pose difficulties of gauging just how to fund religious activities in an equal non-discriminatory manner, as required by Art. 44.2.2. Such an approach respects the “freedom and independence” of religion by not giving the State any control over religious activity.

Second, this interpretation gives a meaningful content to the non-endowment clause. The leading alternative argument - the “positive rights” argument runs the great risk of denuding the non-endowment clause of any sense. Whilst the accommodation argument allows that normally the State may assist the exercise of rights, and insists that in some cases it must assist the exercise of rights, it also holds that in certain cases the State must limit itself to recognising only the negative duties of non-interference.

If one accepts the positive rights approach in the field of religious education, then there is no good reason not to accept it generally in respect of religious freedom (at least none is suggested in the text). Comments in Costello P.’s decision accept this as the logical outcome: on the positive rights account it would be acceptable to pay for the “spiritual and religious needs” of persons. Surely then any aid to any church assists these rights? If the State can pay for chaplains in schools to assist in religious formation, why can it not pay for all ministers of religion? They assist persons in their religious practices. Why should the State not pay for the construction of churches? That would allow people to exercise their faith in the appropriate buildings. If you accept the positive rights argument and accept the principle behind it, then this is the conclusion to which you should come. However if you come to this conclusion then you will have rendered quite meaningless the guarantee in Art. 44.2.2 not to endow any religion.

Third, this interpretation gives a principled interpretation to the non-endowment clause, something which alternative explanations do not. The principle behind this approach is that State funds should be used for the benefit of the general public and should not be used for religious purposes. It is clear that one could give a different, more technical interpretation to the provision, but it is difficult to see how it could be a principled interpretation.

Thus one could argue that the non-endowment clause only prohibits giving monies to “religions as such”, and did not prohibit paying for religious services. Or one might argue that “endowment” implies some degree of permanent vesting of property or funds, and than mere grants of money did not constitute an endowment.
Both these technical meanings are possible (at least according to some dictionaries), but what is the principle behind the distinction? Why should it be acceptable to give funds annually to a religious body, but not to vest property in that body? Both have the purpose of financing religious activities. Presumably a state prohibits one form of subvention because it directly finances religious activity and the State should not do that. If that is the principle then the technical distinction between permanent transfer and regular (or irregular) grants is of no importance. Similarly a distinction between funding a religious denomination “as such” and paying members of religious bodies for providing religious services is also unprincipled. In the first case the funds are used by the religious body, presumably to carry out religious activities. In the second case the person is being paid to carry out religious activities. It seems to me that the same principle that prohibits one should prohibit the other.

Fourth, this approach is compatible with a reading of the other provisions of the Constitution - thus the State may fund denominational schools (Art. 44.2.4), but may not get involved with religious education (Art. 42) or affect the conscience rights of the child (Art. 44.2.4). This point is strengthened by the fact that the framers of the Constitution were presented with proposals which would have explicitly authorised the State to pay for religious activities and specifically religious education. Despite the availability of those textual formulations, they were not inserted in the text.

Fifth, in one sense this argument corresponds with the lessons of history. During the 19th Century the various State attempts to support religious education were not happy ones. The early efforts were regarded as sectarian proselytising institutions by the Catholic Church, even though they only prescribed scriptural readings. That such a relatively non-contentious matter could provoke dire suspicions indicates that religion is simply too delicate an issue for the State to involve itself with. This idea become more widespread throughout the 19th Century. The debate on the 1869 Irish Church Act ultimately accepted that none of the Churches should receive state funding, even on a non-discriminatory basis. When the 1878 Irish Intermediate Education Act was debated the parliamentarians seemed to consider that funding secondary education would constitute a prohibited “concurrent endowment” unless there were safeguards to ensure that the funding was directed only to secular matters. Finally, even though the primary school system was denominational in practice, this was not the official policy. Arguably, the courts should be guided by the noble ideals of official policy.
rather than the compromises of principle which became more widespread throughout the primary system.

There is one argument against the accommodation position which seems strong. The argument runs thus: “according to the accommodation position, one can pay for the secular but not the religious activities of religious bodies. Therefore you say that the State may not pay the salaries of religion teachers or chaplains. However there is a serious practical flaw in your argument. In denominational schools religious values permeate throughout the curriculum, there is a general religious ethos. Surely it would be unprincipled to pay for education in a religious ethos, but refuse to pay for the salaries of religion teachers and chaplains.”

This objection is partially correct. On the accommodation approach, denominational schools receiving state assistance must segregate religious and secular education, and the State may only pay for the latter. This provides the link to the final important textual element supporting the accommodation interpretation. Another constitutional provision envisages and indeed requires precisely this segregation.

**Article 44 - Conscience Clause**

Article 44.2.4 provides that state aid to denominational schools shall not discriminate on denominational grounds and shall not be such as to affect prejudicially the right of a child attending the school not to receive religious instruction. This clause reiterates a right found in all the “conscience clauses” found in Irish educational documents in the 19th and 20th centuries. Its scope though has never been judicially considered until Barrington J. reached out in an obiter comment in *Campaign to Separate Church and State* to give it a narrow meaning.

The accommodation argument insists that secular and religious education, even in denominational schools, must be separate, and that the State may pay only for the former. This is required to respect the principle of non-endowment; it is also necessary to respect the right of a child attending a school receiving public monies not to receive religious instruction.

This right must be seen as an aspect of the general right of conscience. In this regard, we should recall the powerful words of Walsh J. in M’Gee:
A religious ethos which permeates a school’s atmosphere may well require a child to live in a manner not in accordance with his or her conscience: to constantly observe religious emblems in the rooms and halls, to have religious imagery and dogma insinuated throughout the curriculum all compromise the religious choices of the child. The religious ethos of a school may force a cruel choice upon a child - to live in a manner offending her conscience or to forego schooling in that area. The only way not to create this double-bind is to ensure that it is possible to attend the school, without being affected by the religious ethos.

One might argue that Art. 42.2.4 provides a right to withdraw only from formal periods of religious instruction. Such an interpretation though does not do justice the the sweep of the conscience rights described by Walsh J. It is a cabined, confined and narrow interpretation. It is much harsher than forcing a child to say a pledge of allegiance against her conscience because it involves continuous affronts to conscience throughout the entire day as the child must (e.g.) recite poems containing unpalatable religious imagery.

An opponent of accommodationism may say, “well then let the child go to another school, or be educated at home”. Indeed he might well argue that by choosing to attend the school one waives one’s rights in this regard.

This misses the point - several times. First, the school in question is receiving public funds. It seems only right and proper that a school receiving public funds should be open to all children on an equal basis. If it were not, then the State would not be discharging its duty to provide for a suitable schooling on an equal basis to all children, by analogy with O’Donoghue.

Second, given limited resources it is simply not practical to ensure that there is always an alternative school with an acceptable ethos within a reasonable distance. This means that the child may be forced to attend this particular school or none. The counter-argument “well let her be educated at home” is still not an adequate response: the State’s duty is to provide for education on an equal basis. Indirectly compelling a child not to attend a school is not providing for education on an equal basis. This is doubly so, since surely we must recognise that for most families education in the home is simply not practical. (This point is recognised in O’Donoghue).
Third, education and conscience are both constitutional rights. The constitutional doctrine of “waiver of rights” is still embryonic, though it seems any waiver of a constitutional right must be made with full knowledge and consent given freely. It can hardly be said that consent is given freely to the waiver of one’s conscience rights where such waiver is the only means to secure one’s education rights. The provision of a constitutional right should not be conditioned on the renunciation of another constitutional right. In this case, the acceptance of the need to live in a manner inconsistent with one’s conscience is such a prohibited trade-off. One should not have to sacrifice a fundamental right to exercise another one.

Fourth, education is also a prima facie duty. Except where parents exercise their right to educate children in the home, they are obliged to send their children to school until the age of 15. To compel children to attend schooling, and then to fail to provide schooling compatible with their conscience, is to callously compel someone into living in a manner inconsistent with their conscience.

On this reading of the conscience clause in Art. 44.2.4, to give it its full meaning, and to ensure its purpose, that children attending publicly assisted schools may do so without fear of having their conscience rights infringed, it is necessary to return to the system of separate secular and religious education. This system of separation had been the official policy from 1831 to 1965, though it was eroded in practice, culminating in the 1965 recognition of the denominational status of schools, and the 1971 introduction of the integrated curriculum. It is a system which, ironically, operates in some schools in the State already - the Jewish and Muslim ones. In those schools the former formal rules that religious education should be separate from secular instruction, and at either the beginning or end of the school day, are strictly respected.

This accommodationist solution also requires a deep spirit of mutual respect and toleration between the different parties - State, children, parents and education providers, religious persons. In such a system the State trusts that teachers in denominational schools will respect the rules protecting the conscience rights of children. A State which accepts the importance of religion in the lives of its citizens cannot insult adherents of any faith by implying that their religious duties would necessarily lead them to ignore the rights of others and particularly minorities. The State must act on the basis that the providers for education are motivated also to secure an institution informed by notions of justice and charity, where the welfare of the whole people may be secured.
Support for Accommodationism in Foreign and International Law

The accommodation interpretation is supported by foreign and international law, sources which we are entitled to look to for support. Of course, one must recognise that the Irish Constitution is necessarily a unique document, and so one cannot assume that what is a proper interpretation in another jurisdiction is necessarily the proper one in Ireland. Nevertheless we can look for guidance from regimes sharing similar constitutional contexts and goals, however different the technical wording of their basic texts may be.

The United States

It seems appropriate to look at US law in view of the great reliance often placed on the case law of that jurisdiction by Irish judges. Indeed it is particularly relevant here since key Irish decisions in the Church-State field and in the area of education have made use of US case law. What therefore does the US example offer?

As a general matter, it is clear that the area of Church-State law is complicated and controversial. Questions about the appropriate method of interpreting the First Amendment, what was meant by “establishment” at the time of adoption of the texts, the precise test to be used and so on, all indicate that this is a difficult quagmire.

A further general point to be gleaned from US constitutional law, is that one must be wary about assigning “plain meaning” or “historical” meanings to constitutional provisions. In particular the case law indicates that what may be a clear historical argument for one interpretation can often be repudiated with a second historical argument in the opposite direction. History provides no simple answer. Words in constitutional texts should be interpreted in the context of the Constitution, its history and purpose.

One instance of this is the manner in which “establishment” has been interpreted to mean something akin to the notion of “endowment” i.e. financial support for religious activities. Since the US courts do operate a “non-endowment” doctrine (albeit called a non-establishment one), what lessons might be gleaned from the doctrines developed there in this regard?
First, it is perfectly coherent to seek to secure the goals of religious freedom, religious equality and the separation of Church and State, all the while acknowledging that society is religious and respects religion. This is clear from *Abington Township School District v. Schempp*. Clark J., speaking for the Supreme Court of the United States, acknowledged that religion played a vital role in the history of US society. He continued to note that commitment to religious liberty was also deeply rooted in public life, especially in the context of the personal experience of religious persecution of the original colonists, and in the context of a religiously pluralist society. Such factors require a separation of Church and State (state neutrality), where the State is forbidden to engage in religious activity, to support it, to prefer one religion over another or religion over irreligion or irreligious over religion. This is no denial of the free exercise rights of the majority, for the right to religious freedom does not entail the right to use the State to engage in religious activity (p. 226).

This delicate balancing of freedom and equality, respect for religion and the principle of separation is also found in the concurring opinions, and Brennan J.’s opinion deserves consideration. He agrees that “we are a religious people”, but part of that commitment is a firm protection of religious freedom and equality, and the maintenance of state neutrality in religious matters. This neutrality forbids state support for essentially religious activities, though allowing the State to accommodate the religious practices of the people. Brennan J. then discusses various forms of accommodation which respect the principle of separation and also demonstrate the respect for the role of religion in society. These accommodations are designed to protect everyone’s rights of religious liberty equally.

These opinions and especially that of Brennan J. are relevant for three reasons. First they demonstrate the essential coherence of an accommodation approach, one which seeks to respect religion, but also to maintain the separation of Church and State so as to secure religious liberty and equality for all.

Second, they are based on many points which find analogies in Ireland. We too are a “religious people”. We too have a sorry history of religious persecution and strife - a history referred to in the Preamble of the Constitution, and a strife not yet banished from our country. We too live in a pluralist society, and wish to respect the rights of religious freedom and equality. It makes perfect sense therefore to recognise that our State must be neutral in religious matters and respect a separation between religious and secular affairs.
The third reason is that in *Quinn’s Supermarket* Walsh J. relied heavily upon the judgement of Brennan J. in particular to establish the meaning of Art. 44.2.1 and Art. 44.2.3, quoting all the portions of the opinion I have included in footnotes.

There is thus US authority for some balance of religious liberty, equality, separation and respect. The problem of course lies in the balance and the formulation of precise tests. There are of course many strands to Establishment jurisprudence, and clearly many of them cannot be translated to Irish law because of different textual, social and historical contexts.202 For a start, the Irish Constitution explicitly envisages state aid for private, denominational schools!

However the many complexities of US Establishment jurisprudence perhaps hides the fact that some of the doctrines there developed may be more directly relevant to the Irish situation.203 One element of the US doctrine does allow state aid to denominational educational establishments. This is provided the aid does not assist any religious purposes, and provided that secular and religious education is there distinguished. This of course is in the area of college education.

The US Supreme Court has drawn a distinction between college education and education of younger children, due to the character of the young people at the different stages of development. The Court’s case law permits state funding of religiously run colleges, provided a number of conditions are met.204 The secular and religious functions of the college must be distinct; state funding may only go to the secular elements; the religious character must not seep into the secular education offered, and in particular the institution must not aim to proselytise; the institution must be open to the public without discrimination on religious grounds; the institution may not compel attendance at religious services.

These college cases (which of course have their own intricacies and controversies) are motivated by the same principles found in the Irish constitutional order - to achieve desirable educational goals without excessively entangling secular and sacred concerns, and or compromising the conscience rights of students. Accordingly, they form a useful and very relevant guide for deciding in which circumstances the Irish State may provide aid for denominational schools, at the same time respecting the non-endowment principle and the conscience rights of the child. The conclusion they lead to is that state funding is acceptable provided the secular and religious aspects of education must be segregated and state funding may only go to the former.
Germany

Regrettably, little reference has been made in the Irish debate to the German law on religion and education. This is disappointing in view of the great respect owed to judgements of that Republic’s Constitutional Court, the detailed provisions its Constitution provides on the topic, and the fact that those provisions (carried over from the 1919 Weimar Constitution) inspired some of the draft Constitutions considered in 1937.

An even more important reason is that the German legal order has developed the positive rights approach to religious education. Religious instruction is available in public schools (except for secular schools), and this is justified as being “a corollary of the constitutional rights of parents.” Irish jurists looking to develop this approach may therefore look to Germany for guidance.

However I believe they should conclude that ultimately the German example offers reasons why Ireland should reject this approach and instead reform its system of denominational education. First, the German Constitution contains no prohibition on endowment, whereas the Irish one does. Second, the German Constitution explicitly provides for religious instruction in the ordinary curriculum of public schools (Article 7), whereas the Irish Constitution does not. Third, this provision of religious instruction is predicated upon the establishment of a variety of denominational, multi-denominational, secular and ideological schools. As we have seen the Irish system is overwhelmingly denominational, whereas there is a preference in Germany for multi-denominational schools.

Fourth, the German Constitution permits the funding of various religious activities. However it does so explicitly, suggesting that such provision must be stated explicitly in the constitutional text. This last point is all the more compelling because the drafters of both the 1922 and 1937 Irish Constitutions were familiar with the terms of the 1919 German Constitution, which contained those provisions. Yet they chose not to make any similar provision in the Irish text.

Finally, some support for the accommodation position can be derived from the German Federal Constitutional Court, notwithstanding all these other differences. The Federal Constitutional Court had several pertinent comments about the role of religion in multi-denominational schools. It emphasises that the religious elements must involve the minimum
amount of coercion; that the schools must be open to competing ideologies and faiths, and that:

“The [legislature] may not limit a school’s educational goals to those belonging to a Christian denomination, except in religion classes which no one can be forced to attend. Affirming Christianity within the context of secular disciplines refers primarily to the recognition of Christianity as a formative cultural and educational factor which has developed in Western civilisation.”^206

In the celebrated *Classroom Crucifix case*, the Court invalidated a state rule requiring the display of the crucifix in public schools. True, the Court held that this ruling did not apply to state assisted denominational schools. In Ireland however there is little practical alternative to the state assisted denominational schools, and so the words of the Constitutional Court are relevant:

“Parents and pupils who adhere to the Christian faith cannot justify the display of the cross by invoking their positive freedom of religious liberty. All parents and pupils are equally entitled to the positive freedom of faith, not just Christian parents and pupils. The resulting conflict cannot be resolved on the basis of majority rule since the constitutional right to freedom of faith is particularly designed to protect the rights of religious minorities.”^207

Any religious activities in such schools must be conducted on a voluntary basis, with non-conforming children having the right to opt out of the practice, and the right not to suffer any discrimination on that basis. This also entails the conclusion that there are limits to the extent to which a religious ethos may be introduced into secular instruction.

These principles should apply to any system that can be said to be compulsory, such as the system of denominational education practically is in Ireland. Indeed it seems to me that the conscience clause of Art. 44.2.4 seeks to provide exactly the same sort of protection for minorities in all schools receiving public support.^208

**Northern Ireland**

Northern Ireland is another jurisdiction whose law may usefully enlighten the discussion on endowment in Ireland. After all the provisions of Art. 44 are a descendant of section 5 of the Government of Ireland Act, which forms the Northern Irish Constitution. (Section 5 is similar in many respects to the Republic’s Art. 44).
Shortly after the establishment of Northern Ireland, the State sought to introduce multi-denominational education, with separate religious instruction being allowed in the schools outside of the compulsory school day - an accommodationist position. Many Northern Irish legal authorities were of the opinion that this was required by section 5. Despite this, a denominational system was introduced due to pressure from the Churches.

The majority of the opinions expressed about sect. 5 was doubtful about the validity of at least some elements in the denominational education system. In a 1928 decision Wilson J. interpreted the section in an *obiter dictum* to mean that the State could not pay for religious education. He recognised that the State could accommodate religious education by allowing it to take place at specified times in the school, but it would have to be paid for by the parents or church involved, and could not be provided by the State. Two Northern Irish Attorneys General were of a similar opinion. At least two academic commentators were also doubtful about the constitutionality of state aided denominational education.

Ultimately the Northern Irish Government rejected these opinions, preferring the opinion offered by the law officers of the London Government, who felt that sect. 5 was not intended to end the system of denominational education existing for some time in Ireland.

There is a compelling reason for Irish judges to prefer the Northern Irish opinions on section 5 rather than the British opinions. The Northern Irish officers were interpreting section 5 in the context of a Government limited by a written Constitution and Bill of Rights. The British law officers had no such background. This is significant because there is a difference between the interpretation of constitutional provisions and basic rights, and the form of interpretation appropriate in a state which accepts sovereignty of Parliament. This fundamental difference in context was apparent even in the debates on the earlier Government of Ireland Bills.

Hence the reasoning of the Northern Irish law officers is preferable in the context of a written constitution and fundamental rights.

**Australia**

On occasion comparisons have been drawn between Art. 44 of the Irish Constitution and the equivalent provision in Australia, though the wording of the two provisions is quite distinct. The Australian provision prohibits “establishing any religion” but makes no reference to endowment. The educational system in Australia traditionally consisted of state
funded non-denominational education where religious needs were accommodated by allowing religious instructors access to school children outside of the school curriculum.217 State funding of denominational education was only introduced in the 1960s. In 1981 this was challenged as being unconstitutional.

In Attorney General (ex rel. Black) v. The Commonwealth, the High Court of Australia interpreted the anti-establishment clause.218 The High Court had to decide whether the State could provide grants to private, religiously run schools. The majority rejected any guidance from US jurisprudence for three reasons: the US First Amendment was phrased differently; it was located in the midst of a Bill of Rights, and the general context in the US was very different from that in Australia. The majority referring to the technical words used and the UK precedents at the turn of the Century held that:

“The natural meaning of the phrase “establish any religion” is, at it was in 1900, to constitute a particular religion or religious body as a state religion or state church.”219

Accordingly State funding of private religiously run schools did not violate the anti-establishment clause. The majority opinion casts little light on the idea of “endowment” other than to say it involves “financial assistance” (p. 597).

Although the dissenting opinion of Murphy J. does not discuss the idea of “endowment”, his opinion provides some striking reminders of general principles. He implicitly makes the point that, when looking for guidance in constitutional interpretation, it is better to look to a country with judicial review and a bill of rights, rather than a country which knows neither (p. 624). He reiterates, as Irish judges often have, that constitutional provisions must not be given a narrow reading but must be read with all the generality they possess (p. 623). Constitutional provisions - especially ones protecting fundamental rights, must be given such a reading as to fulfil their purpose. In this case that purpose must include assuring not merely freedom of religion but also freedom from religion, to be free from any imposition of religious duty (p. 623).

It is also relevant to remember that although State funding of denominational education has been held constitutional, this is in the context of a pre-existing tradition of a state funded non-denominational system of education, which offers a genuine alternative.
European Convention

I do not wish to repeat the eloquent, though by no means conclusive, argument of Prof. Clarke that Ireland’s denominational system violates the European Convention system and particularly Article 2 of Protocol No. 1. Suffice it here to note that the Convention system requires that parents be allowed to excuse their children from formal periods of religious education in State funded schools, and that it would seem to violate the spirit of that prohibition if religious education was disseminated throughout the entire curriculum in a manner offensive to the conscience rights of some parents and children. The position is not certain and there are unclear indications from Commission and Court.

The Judicial Argument for the Denominational System

Costello P.’s first instance judgement in Campaign to Separate Church and State became the first authoritative ruling on the meaning of the non-endowment clause. Costello P. apparently did not find Irish case law or academic commentary to be of much use - he does not cite a single decision of the Irish courts, and he refers to only one academic article (Graham’s), only to dismiss its relevance in a few lines.

Costello P. held that the meaning of “non-endowment” in the 19th century during the debates on the disestablishment of the Protestant Church of Ireland was that non-endowment entailed a

“prohibition against the State making payments for the purpose of the advancement of religion, and this would, more specifically have included the payments of stipends or salaries to ministers of religion, and grants to seminaries.”

This was distinct from the concept of “establishment” which involved the designation of a favoured denomination as the one true church, identified with the civil authority. These definitions he establishes by reference to UK and Australian cases, and the 19th Century Disestablishment debate. In view of these technical meanings, and the different wording of the constitutional texts, Costello P. holds that US and Northern Irish case law offer no guidance to him (p. 254 - 5). This is baffling for two reasons at least. First, the UK and Australian textual provisions bear even less resemblance to the Irish constitutional text!
Second, Costello P. then goes on to adopt a totally new conception of endowment in Irish law anyway, rejecting the alleged 19th Century understanding.

In rejecting the traditional conception, Costello P. relies on three considerations.

First, Art. 44.2.4 allows the State to fund denominational education, which presumably means that the State may fund anything that happens in denominational schools, including the provision of religious education and religious services (p. 256).

Second, paying the salaries of religious persons to perform (religious) services does not directly enrich the religious denominations themselves (p. 258).

Third, and most significantly, in paying for chaplains and religion teachers, the State is assisting positively in the exercise of constitutional rights, and more specifically discharging its positive obligations to have due regard to the rights of parents in the “religious formation” of their children. Here Costello P. refers to the fact that Art. 42 mentions both “religious education” and “religious formation”. He explains that there is a technical distinction between the two. The latter concept involves, he claims, familiarising the child with “religious practice (by attendance at religious services) and developing the child’s spiritual and religious life by prayer and bible reading” (p. 257). It is to be distinguished from religious education which deals with “the teaching of religious doctrine, apologetics, religious history and comparative religions” (p. 257). The State may assist parents in the exercise of both rights, just as it may more generally provide assistance for the “caring for the spiritual and religious needs” of other human persons (p. 259). It cannot be constitutionally invalid to assist in the exercise of rights.

This High Court judgement thus endorses the “positive rights” approach to the issue of state funding for religious education. The plaintiff appealed from this decision to the Supreme Court. While this appeal was pending, the Supreme Court made very relevant comments in a case which did not directly touch the issues involved.

In the Employment Equality Bill reference, counsel argued that exempting religious bodies from the non-discrimination rules amounted to an “endowment of religion”. It would have been open to the Supreme Court to reject this somewhat large claim simply using the words of Walsh J. in Quinn’s Supermarket, noting that there was no payment of state funds, therefore no question of endowment. Or the Court could have said that even if it did, there was nevertheless the duty to accommodate religious practices. The decision of the Court

seemed to go much further. It expressly addressed the issue of state funding of denominational education (a controversial issue then in the process of being appealed to the Supreme Court in the Campaign to Separate Church and State case), and assumed that the system of funding for denominational education was constitutional, as the provisions reflected the practice in 1937. The Court then continued:

“This system [funding of denominational education] does not involve the endowment of any religion. The endowment of a religion implies the selection of a favoured State religion for which permanent financial provision is made out of taxation or otherwise. This kind of endowment is outlawed by Article 44.2.2 of the Constitution. ... The provision of such State aid across the board to schools maintained by various religious denominations cannot be regarded as the endowment of any one religion.”

The obvious meaning of this paragraph is that the Constitution only prohibits “preferential endowment”. On this view “concurrent endowment” or endowment on a non-discriminatory basis would perfectly constitutional.

It is difficult to understand why the Supreme Court made this rather controversial claim, especially when it was not necessary to decide the issue. The Supreme Court must have had second thoughts itself - 10 months later, when the appeal from Costello P.s decision appeared, it expressly and unanimously repudiated the “concurrent endowment” view.

Two Supreme Court judges - Barrington and Keane JJ. - handed down opinions. Both rejected the “concurrent endowment” viewpoint, holding that “any religion” in Art. 44.2.2 meant “all religions” so the State could not engage in non-preferential or concurrent endowment. Barrington J. relied on historical, literalist and harmonious interpretative approaches to decide in favour of the “positive rights” approach. He notes that the Constitution expressly provides for state aid to denominational schools. Accordingly, the system of state aid to such schools, “well known to the framers of the Constitution” is not an endowment of religion (p. 23). The framers of the Constitution knew that these denominational schools intended to “promote the religious values which they themselves embrace” through their own ethos. Accordingly the framers intended that this type of education could be funded not withstanding its expressly religious purpose. Furthermore Article 42.2 establishes that, according to Barrington J., children may receive “religious education in schools recognised or established by the State but in accordance with the wishes of the parents” (p. 25). Those children are entitled to “religious education” and not merely “religious instruction”. Barrington J. explains that the former term is a much wider one than
the latter, though he does not explain what precisely either means. Nor does he refer to any
cjudicial or academic commentary on the idea of “education” in making this claim. Barrington
J. concludes that paying the salaries of school chaplains is constitutional - provided that state
assistance does not discriminate on religious grounds among the different denominations, and
that Chaplains only instruct children of their own faith (p. 28).

Barrington J. does not address just the issue of paying the salaries of chaplains however. He
also makes clear his opinion on the integrated curriculum. Parents have a right to provide
religious education for their children in all schools, they “are not obliged to settle merely for
religious ‘instruction’” (p. 27). The right to withdraw is only a right to withdraw from the
formal period of religious instruction:

“A religious denomination is not obliged to change the general atmosphere of its school merely to
accommodate a child of a different religious persuasion who wishes to attend that school.” (p. 26)

Keane J. begins his opinion by noting that “religious beliefs and practices are interwoven
through the fabric of Irish society” (p. 1). The law must acknowledge the important role
played by religion. The only reason the State cannot provide financial benefits for religions is
the non-endowment clause - but what exactly does that mean? Keane J. notes, reiterating the
comments of O’Higgins C.J. in Crowley that the term must be understood in the light of
history. According to Keane J. the non-endowment clause was retained in the 1937
Constitution merely because its removal

“would provoke needless controversy. It was not intended to render unlawful, at a stroke the
system of aid to denominational education, including where appropriate the payment of salaries of
members of religious communities, whose duties might well extend beyond religious instruction in
the narrow sense to … ‘religious and moral formation’ of children.” (p. 15)

Keane J. then announces that the clause had a narrow interpretation, inherited from the 19th
Century debates on disestablishment and home rule:

“Article 44.2.2 was thus intended to render unlawful the vesting of property or income in a
religion as such in perpetual or quasi-perpetual form.” (p. 16, emphasis in original)

Keane J. refers for support to the fact that the English Attorney General expressed a similar
opinion about the equivalent provisions in the 1920 Government of Ireland Act. The
Northern Irish Attorney General had thought the non-endowment clause there posed serious
problems for the system of denominational education, but the Northern Irish government -
and Keane J. - found the English advice more congenial.
Weaknesses in the Judicial Defence of the Denominational System

I have presented at length the argument for an accommodationist interpretation of the Constitution, and more briefly the judicial argument for a “positive rights” interpretation of the religion and education clauses. The accommodationist interpretation is not hostile to the idea of positive rights, only to its application in the sphere of religion. Parental rights in this field constitute negative rights of non-involvement, according to the accommodationist approach. To apply the positive rights doctrine to the sphere of religion runs the risk of denuding some constitutional provisions of any meaning (most notably the endowment clause) and treating others as shallow promises of formal rights (particularly Art. 44.2.4’s conscience clause). There are other flaws in the judicial reasoning which I wish to highlight briefly at this point.

Treatment of Irish sources

The judges in the Campaign to Separate Church and State ignore much of the Irish case law that was available and almost all of the academic writings which raised serious questions over the validity of the educational system. It is true that those decisions offer little enough as regards their ratio decidendi, yet they do provide some useful guidance. Such reference as there is can only be described as selective.

The High Court decision does not refer to a single Irish court decision. It refers to only one academic article and that only to dismiss its relevance.

The Supreme Court opinion of Barrington J. devotes more than three-quarters of its length to repeating the facts and the textual history behind Art. 44. The opinion refers to only one Irish case - the Employment Equality Bill. The discussion of that case dismisses one comment in the earlier case about the meaning of endowment, and then endorses the other obiter comment, an unreflective validation of the denominational school system. There is no reference to any academic opinion.

Keane J.’s opinion in the Supreme Court does refer to the Supreme Court’s obiter dicta in Crowley v. Ireland, and the Employment Equality Bill case. He does refer to some historical
sources on the disestablishment debate, and also to Graham’s article on the Northern Irish situation.

All the judges ignore the contributions of legal academics such as Kelly, Hogan, Whyte, Casey, Forde, Clarke and the expert Constitution Review Group to the debate.

**Treatment of Foreign and international material**

The judges also treat foreign material with some degree of casualness.

They dismiss the usefulness of US case law on the grounds that the textual provisions in the two Constitutions are different. This is no doubt so. However it is not the entire story. First, the textual provisions are no more dissimilar than the UK or Australian ones, yet the judges refer to case law from those jurisdictions. Second, in previous cases dealing with religious freedom and equality,229 and with education,230 Irish judges have referred to US jurisprudence. This even though the precise wording of the provisions were not identical in either case.231 Indeed in Quinn’s Supermarket, Walsh J. explicitly referred to the US Establishment jurisprudence! It is difficult to accept that those textual differences suddenly become insuperable in a case involving both religion and education. This casual dismissal of US law in Campaign to Separate Church and State can only be considered an exercise in judicial ukase.

The treatment of Northern Irish law is also unsatisfactory. Although it is true that the Government of Ireland Act does not have provisions on education, nevertheless the North’s system of education is similar to the South’s. And there is a startling irony in Irish judges accepting, however implicitly, the English Attorney General’s interpretation of Irish human rights law!

The reference to some UK and Australian cases is also inadequate and resembles more selective quotation than serious consideration. The constitutional context is so utterly different in the UK that authority from that jurisdiction is unlikely to be useful.232 Rather than borrowing the Australian case’s technical definition of “establishment” Costello P. might have done better to ponder the general principles suggested by Murphy J., principles which find ready analogies in Irish jurisprudence.
The reference to international law materials does no more than tell us that some treaties have textual provisions similar to Art. 42 of the Irish Constitution. Costello P. does not make any effort to discover how those provisions have been interpreted by judicial bodies or leading academics. In view of one work which discusses the European Convention provisions in an Irish context, this is particularly unfortunate.\textsuperscript{235} 

**Literalism**

The *Campaign to Separate Church and State* displays a willingness to rely on quite technical definitions of particular words, - “religious education”, “religious formation”, “religious instruction”, “endowment”, without defending those interpretations adequately.

Thus Costello P. draws an important distinction between “religious formation” and “religious education”. Yet the supreme Court ignores this distinction. There Barrington J. propounds his own distinction between “religious education” and “religious instruction”. He does not define these terms, though it seems that his definition of “religious education” is different from Costello P.’s.\textsuperscript{234} Keane J. does not involve himself in these semantics, being more concerned to define “endowment”. He does not seem at all concerned that his definition differs from that given by Costello P.\textsuperscript{235} These judges utterly fail to engage with themselves over the meaning of these terms.

Moreover they fail to engage with previous jurisprudence and expert views. None of the judges refer to the judicial understanding of “education” in either *Ryan v. Ireland*,\textsuperscript{236} or *O’Donoghue v. Minister for Health*.\textsuperscript{237} Nor do the judges in the *Separation* case engage with expert opinion on what constitutes religious education or instruction. It is embarrassing to compare the detailed analysis of expert opinion on this matter in *O’Donoghue* with the casual assumptions in *Campaign to Separate Church and State*. This embarrassment becomes acute when one discovers that there is a sizeable body of literature which identifies several different meanings of “education” and “religious education” and which even discusses that concept in an Irish context.\textsuperscript{238} Furthermore several of those definitions clash with what seems to be the judicial understanding of religious education. This unreflective judicial assumption about the “obvious meanings” of these words when educational experts disagree, is unfortunate.

Indeed such a literal approach may lead to quite unacceptable consequences. Art. 44.2.4 refers to a right to withdraw from “religious instruction”, which Barrington J. interprets to mean that
there is no right to withdraw from “religious education”. Does that also entail that there is no right to withdraw from “religious formation”, the practice of a faith according to the tenets of a particular denomination? That would be a startling and unacceptable conclusion. That Barrington J. does not intend this outrageous conclusion is clear from the final page of his opinion. However this conclusion is one plausible fruit of such a literalist interpretation and no literalist reason is offered to exclude it. Similarly, from a literalist point of view, there is no reason to disagree with the idea in Employment Equality Bill reference that the prohibition on endowing “any” religion meant only that the State could not preferentially endow a single religion. If the Supreme Court does not like these literalist conclusions it should eschew the apparent reassuring objectivity of literalism, rather than just disagreeing with them.

**Historicism**

All the judges in the case of *Campaign to Separate Church and State* refer to the historical situation, prevailing in 1937, and the system of education which evolved over the previous century. They also refer to the understanding of terms like “endowment” and “establishment” in the debates on Irish Home Rule and Disestablishment.

I mentioned earlier that many cases have held that one cannot use the historical situation prevailing in 1937 to protect a system against unconstitutionality. Walsh J. summed this up neatly:

> “The Constitution always speaks in the present tense and therefore, it is to be interpreted in the light of current circumstances and standards, bearing in mind the fundamental principles upon which it is founded.”

The situation in 1937 cannot determine the law of today. A law prohibiting the importation of contraceptives enacted in 1935 has been struck down. The system of jury selection existing in 1937 has been held unconstitutional. Systems of property valuation and rent control existing in 1937 have been invalidated. In 1937 adoption of children born within marriage would have been regarded as unthinkable, yet today is constitutionally permissible. The powers of the prosecutor existing in 1937 have been deemed invalid. Elements of the 1937 election system, extradition system, and the 1937 judicial system, and executive prerogative, have all been successfully challenged. True, the Courts have sometimes relied
on the state of law in 1937, but they should give some indication as to why in some instances it is determinative, but not in most cases.

Even assuming that this use of history is legitimate, the High Court and Supreme Court have glossed over some of the issues in the historical analysis. In their discussion of educational matters, they usually do not mention which historical sources they are relying upon. Since accounts of Irish history are by no means undisputed this is rather unfortunate.

Further, the judges ignore important complexities. First, the theory of education was quite different from the practice of education in Ireland. The courts clearly prefer to follow the practice rather than the official position. This may be acceptable, but at least it calls for some explanation as to why one is to be preferred.

Second, the system of educational funding was quite different at the primary and post-primary levels until the 1960s educational revolution. Funding for post-primary education was minimal. The statutory regime governing aid to post-primary education contained specific limitations restricting its aid to secular education.250

Finally, some of the elements of the educational system that the judges validate on a historical analysis only received State recognition quite recently in the 1960s and 1970s, with the erosion of certain safeguards for minority children, and the adoption of the integrated curriculum. This includes the very practice being examined in the Separation case! State-funded chaplains only appeared for the first time in the 1970s, with the advent of the new type of post-primary schools. (Indeed the practice at primary level whenever clergy are employed seems to be for the individual school to pay any expenses, not the State.)251

The judges also refer to the historical debates on Home Rule, disestablishment and disendowment, and in particular Keane J. makes use of these debates to establish that “endowment” was limited to making permanent or quasi permanent financial provision for a religion as such. The historical record is by no means clear on this. The Act which ended the establishment of the Anglican Church of Ireland terminated state support for all the churches in Ireland including the annual grants provided to the Catholic seminary and Presbyterian Church.252 The parliamentary debates on the 1878 Intermediate Education Act suggest that funding of denominational schools might have amounted to an unacceptable “concurrent endowment” unless efforts were made to secure that the funds only went to secular education.253 One of the historical sources which Keane J. cites does comment on the
inconsistency in principle which saw Parliament prohibit concurrent endowment but fund a denominational system of primary education.\textsuperscript{254}

\textit{From Literalism to Historicism and Back Again}

Barrington J. makes use of both a technical literalism in his judgement and a historical vindication of the 1937 education system. Yet there is a certain inconsistency in this regard. He uses a (flawed) historical argument to validate the system generally; and then uses a technical distinction between religious “education” and “instruction” to uphold the “integrated curriculum” approach to education. Yet historically, it seems clear that an integrated curriculum would violate the official system of education. Official recognition of the denominational system and integrated curriculum only came in the 1960s and 1970s. Barrington J.’s sudden dropping of a historical for a literalist approach is therefore somewhat dubious.

\textit{Reaching out to decide unnecessary matters.}

The final criticism I wish to note of the \textit{Employment Equality} case and the \textit{Campaign to Separate Church and State} case, is that the judiciary seem willing to indicate their opinions on matters which are not directly before them, which are controversial, and which indeed may come before the courts shortly. Whilst such \textit{obiter dicta} are not impermissible they can be unwise.

In the \textit{Employment Equality Bill reference}, the Supreme Court was asked to consider the argument that making an exemption from the provisions of an anti-discrimination statute for religious institutions was an “endowment” of religion. This objection could have been dealt with briefly, on the grounds that no expenditure of state money was involved. Instead the Supreme Court announced that the endowment clause only prohibited preferential endowment, and then proceeded to assert the validity of the denominational education system. The foolishness in reaching out to decide such questions unnecessarily was demonstrated starkly when the Supreme Court itself summarily rejected the idea that the endowment clause prohibited only preferential endowment a mere nine months later. The other comments were equally unnecessary, and the Court should have treated them with equal suspicion.
In *Campaign to Separate Church and State* Barrington J. sought to decide not just the issue of chaplains’ salaries, which was before the Court, but also the integrated curriculum controversy which was not before the Court. He decides, even though it is not an issue, that

“A religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend the school.”

Barrington J. took advantage of this opportunity to give a narrow interpretation to the conscience clause in Art. 44.2.4, an interpretation which is strikingly indifferent to the powerfully expressed concerns of the German Constitutional Court in the *Classroom Crucifix* case.

**Conclusion**

I have presented in this article an interpretation of the Irish Constitution which embraces accommodationism - the State may not finance religious activity or engage in religion, but it must accommodate religious activities, so as to secure religious freedom and equality for everyone. There are many issues raised by such an approach and difficulties would be posed in working out all its strands. For now, let us consider its role in relation to the main issues in education today.

The accommodation approach requires serious reconsideration of the system of education in Ireland, a system in which the State supports an overwhelmingly denominational system. The basic system of state funding for denominational schools is constitutionally permissible - Article 44.2.4 makes this evident. However this does not mean that State assistance should be unconditional or that the denominational education system may violate other constitutional rules. In order to respect those rules - especially the principle of non-endowment and the conscience clause - the State must not entangle itself in religious education, though it must allow parents to provide this education themselves (or through their agents) in schools. This calls for an accommodation - the State may pay for the secular aspects of education, but not the religious element. One’s religious faith (or lack thereof) should not affect in any way the education which one receives in secular matters. This entails various changes to the current system - ending payment of the salaries of religion teachers and chaplains, the ending of the integrated curriculum, the return to the original idea of combined secular and separate
religious education, and the assurance that the common element of the education system does not discriminate in its ethos against children of any or no religion.

Recently the Courts have dealt with a challenge to a minor element of the denominational system, the funding of chaplains in some post-primary level schools. The answers that the Courts produced though indicate their attitude to the other issues involved. The Courts have adopted the idea that the State is entitled to assist the exercise of educational rights, including the rights of parents to provide for the religious education of their children. Though generally the State may assist the exercise of rights, it is difficult to see how this can be done in the religious sphere without making the non-endowment clause an empty provision. Furthermore there is a clear indication from Barrington J. that the conscience clause should be given a narrow reading, thus allowing the conscience of the few to be outweighed by the religious convictions of the many.

That conclusion is thoroughly repugnant to the constitutional order, with its emphasis on a social system inspired by charity and justice, with its extensive guarantees of minority rights in the fields of education and religion, and with its commitment to pluralism. It is a viewpoint which does not consider with great empathy the position of a child of a minority faith or no faith, in a situation where the only practical schooling available is a state funded denominational one incompatible with her beliefs. The State fails in its duty to provide for education for all on an equal basis in the case of such children. It thus forces minority children to choose between conscience and education.

The Constitution indicates that no child should be forced to make such a choice. Our Courts have chosen to emphasise the rights of the majority and to protect the current system of education. They would do better to enforce the constitutional guarantees for minorities.
Appendix: Relevant Constitutional Provisions

Article 42 Education

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 recognized 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.

3.2 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 endeavor 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 endeavor to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Article 44 Religion

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.

[1.2 The State recognises 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.

1.3 The State also recognises 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 of this Constitution.\textsuperscript{256}

2.1 Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2.2 The State guarantees not to endow any religion.

2.3 The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

2.4 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.

2.5 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 or charitable purposes.

2.6 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.
Notes

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2 The terms “denominational”, “multi-denominational” and “non-denominational” are the ones used in Ireland. A “denominational” school is one where one particular religious denomination is catered for, and that denomination’s ethos dominates (a “sectarian” school in US parlance). In Ireland denominational schools usually allow children from different denominations to attend, and usually excuse such students from religious instruction. A “multi-denominational” school is one which caters for the needs of students from several different religious backgrounds. A “non-denominational” school would not have any particular religious ethos, or provide religious instruction as part of its curriculum.

In Ireland the public debate is usually centred on the need for more multi-denominational schools.

3 The Irish Constitution, Bunreacht na hÉireann was adopted in 1937. You can find relevant excerpts in the appendix to this article. The full text can be found at http://www.uni-wuerzburg.de/law/ei_index.html.


5 Quinn’s Supermarket, [1972] I.R. 1, 23, per Walsh J.

6 Irish constitutional doctrine is unclear on the issue of positive rights. However it is clear that in some cases the Constitution imposes positive duties on the State to protect rights.

7 1869 Irish Church Act.

8 Private morality is immune from State interference except where there is a compelling public need to intervene: see Walsh J. in M’Gee v. Ireland, [1974] I.R. 384.

9 Kennedy J., in Lee v. Weisman, summed up these concerns powerfully, 505 U.S. 577 (1992):

“The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting non-believer, these same Clauses exist to protect religion from government interference.”

"... if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."

10 I acknowledge immediately that there are many problems involved in demarcating the ideas of the secular and religious, and in maintaining neutrality among religions and between religion and irreligion. There is a further complication that according to some religious doctrines secularism is not an "irreligious" doctrine but a sectarian religious doctrine compatible with some but not all religions.

11 The most important statement of this viewpoint is J. Mescal, Religion in the Irish System of Education (Dublin: Clonmore and Reynolds, 1957).

12 The official Catholic position was uncompromising - it would have prohibited Catholics from attending all non-denominational, multi-denominational, or denominational non-Catholic schools. See A. O’Rahilly, “The Irish University Question”, (1961) Studies: An Irish Quarterly Review 225.


17 The primary level deals with students from the age of approximately 4-6 to the age of 12 or 13. The post-primary stage of education may last for 3, 5 or 6 years, and thus most children attend it between the ages of 12 and 18. Education is compulsory until the age of 15, but in practice most pupils remain in education until at least 17. Third level education is largely secular, with some significant exceptions.

18 The owner of the school is called the patron, and is usually a religious personage, or body.

19 This is carried out through administrative regulations, not on the basis of statute. Parliamentary approval only comes through the Parliament voting funds in the annual Finance bills to support this system. Since both the Administration and Legislature are obliged to respect the constitutional order, this does not affect the standards of constitutionality. See Campaign to Separate Church and State v. Minister for Education, 25th March 1998, p. 3 of Barrington J.’s opinion.

The 1992 Green Paper on Education commented that: “Ireland is probably unique among European countries in the degree to which it administers an education system without a comprehensive and up-to-date legislative structure.” See also the comments of Costello J. in O’Callaghan v. Meath Vocational Educational Council, 20 Nov. 1990, unrep. p. 1.

20 Of state funded primary schools, 3,291 are denominational and only 26 are multi-denominational. Of 775 state funded post-primary schools, 528 are explicitly denominational. The 247 Vocational Schools are multi-denominational in theory, but show some signs of denominationalism.

21 The State - and the schools - nevertheless see this system as non-discriminatory since it provides funding for any National School project which receives sufficient local support. Today there are: 3,088 Catholic schools; 184 Church of Ireland schools; 16 Presbyterian schools; 1 Methodist school; 1 Jewish school; 1 Muslim school and 26 Multi-denominational schools. The one Muslim school was only established in 1996. (These figures were supplied by the Department of Education). The multi-denominational schools date to the 1970s and their establishment was controversial. See Report of the Constitution Review Group, p. 339; J. Whyte, Church and State in Modern Ireland, p. 392 - 395.

Secondary Schools, which educate 61% of post-primary level students, are almost all denominational.

The Vocational Schools educate 26 % of post-primary students. Vocational Schools are managed by Vocational Educational Committees (associated with the local government structure) and are state funded. These Schools are supposed to be multi-denominational. Religious instruction is offered in them, and some (the 56 Vocational Colleges) also have state-funded chaplains. Despite their multi-denominational principle, there is some concern that the practice tends to be denominational. (Alvey, Irish Education, the Case for Secular Reform, (Dublin: Church and State Books, 1991) p. 53, citing a report in the Teachers’ Union of Ireland journal.)

Community and Comprehensive Schools educate 13% of post-primary students. These schools are state funded. The Department of Education requires Community and Vocational Schools to hire religion teachers, whose salaries the State pays. It also requires Community Schools to appoint a Chaplain, whose salary is again provided by the State. The State has recently proposed that Religion should become an examinable subject in post-primary schools. The 1997 Education Bill (No. 2) proposes:

Sect. 35. Section 5 of the Intermediate Education (Ireland) Act, 1878, is hereby amended in paragraph 4 by the deletion of " , provided that no examination shall be held in any subject of religious instruction, nor any payment made in respect thereof."


23 Less than 5% of post-primary schools and less than 3% of primary schools receive no state assistance.
At the primary level there are about 3,200 “National Schools”, 115 schools for children with special needs and less than 80 private primary schools which receive no State funding. The National Schools educate 98% of all children attending primary education.

The post-primary level of education comprises 775 publicly aided schools and 38 “other and non-aided schools”. There are three different types of post-primary school: Secondary, Vocational, and Community. (Technically there are five types: Secondary, Vocational, Community, Comprehensive and Community College. Actually Vocational and Community College Schools can be considered quite similar, and Comprehensive and Community Schools can also be grouped as one type for many purposes.) The majority of post-primary schools are Secondary Schools: 452. Two hundred and forty-seven are Vocational, and 76 are Community. (Dept. of Education, “Brief Description of the Irish Education System”, at http://www.irlgov.ie/educ/organisation/21fe33a.htm, and the Report of the Constitution Review Group, p. 338 - 340.)

24 Until recently if a group wished to establish a school and receive state funding, it first had to pay for a site where a school could be constructed. Current administrative policy recognises that this is unrealistic in certain cases and now the State may agree to purchase the site for the group. This has eased one of the difficulties facing multi-denominational schools, whose promoters usually lack the organisation and financial assets of the denominations.

25 The National Schools Boards are a typical example: The Board of Management of each National School (introduced in 1975) is today composed of two nominees of the Patron, two parents, the Principal teacher in the school, one other teacher, and two members representing the local community co-opted by the above mentioned members. The co-opted members must “have a commitment to the ethos of the school” that is its denominational character. (The Department of Education’s 1997 Boards of Management of National Schools - Constitution of Boards and Rules of Procedure.)

26 Flynn v. Power, [1985] I.L.R.M. 336, a decision by Costello J. upholding the firing of a teacher on the grounds that her activities outside a school were inimical to that school’s values.

27 The policy of the National School system was laid down in a letter written by the Chief Secretary for Ireland to the members of the National School Board in 1831. The document is called the “Stanley letter”. Its text is found in Akenson, The Irish Educational Experiment. The 1870 Report of the Powis Royal Commission of Inquiry into Primary Education in Ireland described it as the “original charter” of the national system: p. 22.

28 Those schools had combined religious instruction for all pupils, where the instruction consisted only of bible reading without interpretation. This was perceived as being anti-Catholic. As the “Stanley letter” puts it: “the indiscriminate reading of the Holy Scriptures without note or comment by children must be particularly obnoxious to a Church which denies, even to adults, the right of unaided private interpretation of the Sacred Volume ....” ibid.

29 The separate instruction would take place according to the tenets of each Church. Coolahan, Irish Education, p. 4 - 19.

30 The objections were various: there was profound distrust between the Churches, they each feared the proselytising activities of the others, and none of them accepted that a division could be made between secular and religious instruction, the Church of Ireland felt that its special established position would be undermined, the Catholic Church asserted its special position as the majority Church.


32 Coolahan, Irish Education, p. 52.

33 The Act provides that monies were to be used only for secular instruction, and that the Board of Commissioners would have no competence in respect of religion. The debate in Parliament is interesting. Opponents of the bill saw it as a form of concurrent (i.e. non-discriminatory) endowment for the benefit of denominational schools. Liberal proponents denied this, insisting that the funds were used directly only to aid secular instruction; whether it took place in denominational or non-denominational schools was not relevant. See Vol. 242 Parliamentary Debate July 25 1878, columns 262 et seq., and Aug. 12 1878 columns 1776 et seq.

34 Writing in 1970 Akenson noted:

“The Irish national system of education has been preserved, as if in amber, in the Irish Republic’s schools of the Twentieth Century. ... To this day Irish primary schools remain small, clerically managed institution in which Roman Catholic rarely meets Protestant. ... [the national school system] is a brittle fossil in the second half of the twentieth.”

The Irish Education Experiment, p. 390.

The main changes introduced in the 1920s concerned the greater emphasis on Irish language and culture.

35 According to the 1926 Report of the Second National Programme Conference, it continues:
“We assume therefore that Religious Instruction is a fundamental part of the school course. Though the time allotted to it as a specific subject is necessarily short, a religious spirit should inform and vivify the whole work of the school. The teacher, while careful in the presence of children of different religious belief, not to touch on matters of controversy, should constantly inculcate, in connection with secular subjects the practice of charity, justice, truth, purity, patience, temperance, obedience to lawful authority and all the other moral virtues.”


E. MacNeil “Guidelines for an Irish Educational Policy” (1979) Irish Jurist 378. See also S. Farren, The Politics of Irish Education, chapters five and six, especially p. 139 - 142.

This was recognised in a number of reports, notably the 1926 Second National Programme Conference, and the 1953 Council of Education Report - See Hyland, p. 632, 633.


Preface to the Rules for the National Schools (1965).

The Handbook explained that:

“That the separation of religious and secular instruction into differentiated subject compartments serves only to throw the whole educational function out of focus;.....”


41 Apparently the Department no longer regards itself as incompetent in the matter, at least at the level of post-primary education. See the 1997 Education Bill (No. 2), sect. 35.


43 See the debates in Symposium on “Re-organising Irish Education” (1968) Studies Autumn.

44 See J. Whyte, Church and State in Modern Ireland, p. 337 - 340, 390 - 392.

45 For a time it had been customary to acknowledge that the various parties - State, society (especially parents) and schools were all content with this system of education. Although such contentment is rarely supported by reference, it seems that there is no general serious dissatisfaction with the system. For a thorough going defence of the denominational principles, see J. Mescal, Religion in the Irish System of Education (Dublin: Clonmore and Reynolds, 1957). Defenders of the system argued that the nation’s parents were satisfied with the system, that it was non-discriminatory - any school project which received sufficient local support and the initial funding would be supported by the State, that there was the right of pupils to absent themselves from religious instruction if they chose, finally, that, proportionately, the minority churches actually received more money than the Catholic Church.

46 See L. O’Flaherty, “Religious Control of Schooling in Ireland”, 1993 Irish Educational Studies 63.

47 According to the 1981 and the 1991 censuses, the figures in percentages are:

<table>
<thead>
<tr>
<th>Denomination</th>
<th>1981</th>
<th>1991</th>
</tr>
</thead>
<tbody>
<tr>
<td>Catholic</td>
<td>93.06</td>
<td>91.56</td>
</tr>
<tr>
<td>Church of Ireland</td>
<td>2.76</td>
<td>2.53</td>
</tr>
<tr>
<td>Presbyterian</td>
<td>0.41</td>
<td>0.37</td>
</tr>
<tr>
<td>Methodist</td>
<td>0.16</td>
<td>0.14</td>
</tr>
<tr>
<td>Jewish</td>
<td>0.06</td>
<td>0.04</td>
</tr>
<tr>
<td>Other</td>
<td>0.31</td>
<td>1.09</td>
</tr>
<tr>
<td>No Religion</td>
<td>1.15</td>
<td>1.88</td>
</tr>
<tr>
<td>Not Stated</td>
<td>2.06</td>
<td>2.36</td>
</tr>
</tbody>
</table>

48 This trend became clearly identifiable in the 1970s - the removal from the Constitution of Art. 44.1.1 and Art. 44.1.2, and the birth of primary multi-denominational schools. During the 1980s the State removed controls on contraceptives, and introduced adoption for children of married parents. Prime Minister Fitzgerald proposed a “constitutional crusade” to make the Constitution a more openly pluralistic document. In the 1990s the State has gone a long way to recognising equal rights for gay men and lesbians. The high water mark of this movement was when the electorate voted (by a wafer thin majority) to remove the constitutional ban on divorce. This decreasingly hegemonic atmosphere promotes questioning of the extreme denominationalism of the school system.

For a discussion of the role of religion in Irish public life see J. Whyte, Church and State in Modern Ireland, (Dublin: Gill and McMillan, 1981); T. Inglis, Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland (Dublin, University College Dublin Press, 1998); B. Chubb, The Politics of the Irish Constitution, Ch. 5; Hogan, “Law and Religion: Church-State Relations in Ireland from Independence to the Present Day” (1987) 35 American Journal of Comparative Law 47; as well as comments in the general history books.
The definitive version is published as Rory O’Connell, “Theories of Religious Education in Ireland” (1999-2000)
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49 O’Flaherty, “Religious Control of Schooling in Ireland”, 1993 Irish Educational Studies 63, 66.
50 The Minister for Education recognises this,

“On a social level, the consensus which previously operated and which facilitated the operation of the education system in our schools through an alliance of Government and school owners no longer exists. The other parents in education, notably parents and teachers, wish to see their role given formal recognition. Parents in particular increasingly want to exercise in a meaningful, practical way their constitutional rights and duties as the primary educators of their children. Furthermore, the interest which the wider community has in the quality of its schools and the scope for the community to contribute to the mission of the schools is recognised by the most objective observers. A key objective of this Bill is to provide on a legislative basis for the respective roles and functions of all the partners in the education system.” Debate on the Education (No.2) Bill, 1997, Dáil Éireann -Second Stage, 5 February 1998.

53 According to a letter from the Department dated Nov. 9th 1998, the following will be proposed as a revised wording of the Primary School Curriculum:

“It is the duty of the school to provide a religious education that is consonant with its ethos and, at the same time, to be flexible in making alternative organisational arrangements for those who do not wish to avail of the particular religious ethos it offers. It is equally important that, in the course of a general engagement with the curriculum, the beliefs and sensibilities of every child are respected”.

54 The Department has produced a draft syllabus, which emphasises that Religious Education should not be about indoctrinating students in a particular faith, but in exploring issues of religion in society. There will be a particular emphasis on Christianity, but other religions will also be explored, and the course is intended to allow students to reflect on “human experience”. This will be an optional subject when implemented.

As noted above the 1878 Intermediate Education Act will need to be modified before this can be implemented. The 1997 Education (No. 2) Bill is before Parliament and will achieve the necessary changes.

55 There are clearly a number of features of this system to which one might take objection, from the viewpoint of civil rights or a secular conception of the state, including:
- The funding of religious schools per se, whether denominational or multi-denominational; the funding of denominational schools; the funding of denominational schools with discriminatory practices; the funding of an educational establishment which embraces an “integrated curriculum”; the funding of the ‘religious’ activities, instruction, etc., in schools, specifically the paying of the salaries of religion teachers and chaplains; the accommodation, and indeed promotion, of religious activities (observance of denominational holidays, etc.); the establishment of exclusively denominational teacher training colleges; the presence of religious representatives on the Boards of Management, and Vocational Educational Councils; the absence of any genuine non-denominational (secular) alternative; the restricted options open to members of minority denominations.

56 That public interest group simply argued against the payment of chaplains salaries in Community post-primary schools.


59 These “Home Rule” measures included the 1886 Government of Ireland Bill, 1893 Government of Ireland Bill, the 1914 Government of Ireland Act (the First World War prevented this from coming into force), and the 1920 Government of Ireland Act.

60 A link at the statutory level remained until 1948.

61 The legislative power is exercised by a bicameral Parliament (the Oireachtas) where the directly elected lower chamber (the House of Representatives / Dáil Éireann) dominates an indirectly elected upper chamber (the Senate). There is a titular Head of State (the President) who mostly discharges ceremonial functions. The executive power is vested in a cabinet (the Government), presided over by a Prime Minister (the Taoiseach). The Government is responsible to the Dáil, but the Dáil is a very compliant ‘master’ by virtue of the Prime Minister’s power of dissolution. Further the actions of the President must usually be approved of (or at least not
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62 Judicial review of legislation is specifically sanctioned in the Constitution (Arts. 15.4, 26, 34.3, 34.4, 50). In principle only the High Court and Supreme Court can decide whether a statute is constitutional or not; any other court must refer the question to those courts. Judicial review is subject to requirements of standing and ripeness familiar to US lawyers, with the exception of “Article 26 references”. The constitutional validity of legislation can be raised in three types of proceedings:
- “incidentally”, that is as part of any ordinary court case;
- by means of “direct attack”, i.e. an action initiated in the High Court seeking a declaration that the legislation is invalid having regard to the terms of the Constitution;
- an abstract reference (“advisory opinion”) under Article 26. This allows the President to refer a bill to the Supreme Court for a decision as to its compatibility with the Constitution. This process must occur before promulgation, and the Court’s opinion is binding - the President may not promulgate the bill if the Court finds it repugnant to the Constitution.

63 The apex of the judicial hierarchy is the Supreme Court, which hears appeals in all areas of law, and sits in panels of either three or five judges. The Court is presided over by a Chief Justice. There are also courts of original jurisdiction, the most important of which is the High Court, the highest court of first instance, presided over by the President of the High Court. The judiciary’s independence is guaranteed by the Constitution. The Government decides who is to become a judge, though it must choose from the more experienced echelons of practising lawyers. Once appointed, a judge holds office until retirement at a set age. He or she cannot be removed except by a bill of impeachment for stated misbehaviour approved by both Houses of Parliament. No judge has ever been impeached.


65 There are some exceptions, e.g. bills not yet enacted cannot be challenged (except under Art. 26); certain emergency powers cannot be held unconstitutional (Art. 28.2); and legislation approved under an Art. 26 review can never again be challenged in judicial proceedings.

66 The courts have developed a tort of “infringement of constitutional rights” which allows wronged persons to seek damages (or any other appropriate remedy) to vindicate their rights.

67 These include: the right a to trial in due course of law; the right to equality before the law; the rights to personal liberty; the rights to life, good name, person, property; the rights to life of the unborn and the mother; the right to travel abroad and to receive information; inviolability of dwelling; the rights to free expression, peaceful and unarmed assembly, association and union; the rights of the family; the rights of education; and various rights associated with religion.

68 This is because Art. 40.3.1 is “open-ended”; this is somewhat similar to some interpretations of the US Ninth Amendment. See W. Breman “The Ninth Amendment and Fundamental Rights” in O’Reilly ed. Human Rights and Constitutional Law (Dublin: Round Hall Press, 1992).

This doctrine was announced in Ryan v. Ireland [1965] I.R. 294, which recognised the unenumerated right to bodily integrity. Since then many more rights have been recognised: the right to dignity, the right to die in peace and dignity, the right to self-determination, the right to social contact with one’s peers, the right to work and earn a livelihood, the right to privacy, the right of access to the courts, the right to a legal personality, the right to criminal legal aid, the right to be free from torture, the right to fair procedures, the right to marry, the right to procreate, the rights of children, the rights of unmarried families (Art. 41 is limited to the married family), the right to communicate. See Kelly, Hogan and Whyte, The Irish Constitution, p. 755 et seq.


It was a section without any parallel in the 1922 text. The first draft of Art. 44 would have effectively established the Catholic Church, in a manner deeply offensive to non-Catholics. It proposed to “acknowledge[s] that the true religion is that established by our Divine Lord Jesus Christ Himself ... [and] the Church of Christ is the Catholic Church.” It would have recognised “the Church of Christ as a perfect society, having within itself full competence and sovereign authority, in respect of the spiritual good of man.”(Keogh, Twentieth Century Ireland, p. 98) Such provisions would have antagonised the minority Churches, and so the draft was altered. Prime Minister DeValera wanted a section which would appease everyone, and the final draft achieved that aim. The minority churches were satisfied with the recognition in Art. 44.1.3 (and presumably the safeguards in Art. 44.2), and the Catholic Church was reasonably pleased with the “special position” recognised in Art. 44.1.1 (even though officially this was heretical). Very few people objected to Art. 44.1 - the most vociferous was a group of radical Catholics who wanted the Catholic Church recognised as the one true Church. Only two members of the Parliament objected on grounds of principle (1937 Dáil Debates Vol. 67, cols. 1885 - 1891, 4 June 1937).

The bulk of legal opinion in Ireland regarded the “special position” in Art. 44.1.2 as creating no special legal status or privilege, merely as stating a fact (In re Tilson, [1951] I.R. 1). Indeed in 1972, the Supreme Court announced that Art. 44.1 demonstrated that the State was a pluralist state (Quinn’s Supermarket, [1972] I.R. 1, 34, per Kenny J.; M’Gee v. Ireland [1974] I.R. 285, 317, per Walsh J.). However some Northern Irish commentators were of the opinion that this provision established the Catholic Church as the official church: see H. Calvert, Constitutional Law in Northern Ireland (London: Stevens and Sons, 1968), p. 256.

74 Quinn’s Supermarket, [1972] I.R. 1, 23, per Walsh J.
75 Kelly, Hogan and Whyte The Irish Constitution, p. 1092; Casey Constitutional Law in Ireland p. 556.
78 See section 4 of the 1886 Bill.
79 Section 3.
80 Section 5 thereof:

“neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to establish or endow any religion, or prohibit or restrict the free exercise thereof or give a preference, privilege, or advantage, or impose any disability or disadvantage, on account of religious belief or religious or ecclesiastical status, or make any religious belief or religious ceremony a condition of the validity of any marriage, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at that school or alter the constitution of any religious body except where the alteration is approved on behalf of the religious body by the governing body thereof, or divert from any religious domination the fabric of cathedral churches, or, except for the purposes of
roads, railways, lighting, water, or drainage works, or other works of public utility upon payment of compensation, any other property, or take any property without compensation.”

81 Anglo-Irish Treaty:
“Neither the parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or 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 denominations or divert from any religious denomination or educational institution any of its property except for public utility purposes and on payment of compensation.” (Section 16)

82 Article 8 provided:
“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 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 denominations or divert from any religious denomination or any educational institution any of its property except for the purposes of road, railways, lighting, water or drainage or other works of public utility and on payment of compensation.”

84 He had proposed that religious education should be compulsory in all state aided schools (except for the children of dissenting parents); that the control of that religious teaching should remain in the hands of the religious body involved, without prejudice to the State’s right of supervision; that no school should be penalised because it was owned by a religious denomination; that “There is no established or State-endowed Church”; that freedom of conscience and religion were guaranteed; and finally that “The State has the duty of making moral protection and religious ministrations available for citizens in public institutions such as educational establishments, barracks, hospitals, prisons, asylums.”

85 The 1937 text drops the qualifying phrase “directly or indirectly” from the non-endowment clause.
86 Report of the Constitution Review Group. p. 369. Since the CRG also concluded that aspects of the education system were being maintained in an unconstitutional manner, this optimistic conclusion is surprising. See p. 375 of the Report.


88 So when the Supreme Court had to decide whether the basic common law rule that there can be no appeal against an acquittal in a criminal case was constitutional, O’Higgins C.J. referred to Art. 34.4.3 which provides that there shall be an appeal from all decisions of the High Court to the Supreme Court. Simply, “plain words must ... be given their plain meaning.” “All decisions” meant all decisions, and so there could be an appeal: People (DPP) v. O’Shea. [1983] I.L.R.M. 549, 583.  

89 Indeed, in O’Shea the Supreme Court divided three to two on the meaning of the clause!
90 A Constitution is not a Finance Act, as Gavan Duffy J. quipped: NUR v. Sullivan. [1947] I.R. 77. See Dixon J. in O’Byrne v. Minister for Finance, [1959] I.R. 1: “... in the case of a Constitution, which is a unique, fundamental document, concerned primarily with the statement of broad principles in general language, I am inclined to the view that it is not to be parsed with the particularity appropriate to ordinary legislation, and that the intention, if it can reasonably be gathered, should prevail.”


Kelly, Hogan and Whyte, The Irish Constitution, p. xcii, xcix.


Kenny J. observed this in Crowley v. Ireland [1980] I.R. 102, 126:

“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 the control of a manager or of trustees who were not nominees of the State.”

The Supreme Court indicated in 1940 that this would be a consideration, when it held that the Constitution allowed internment without trial. It explained that internment was a measure so widely used in the pre-1937 Irish State, that one would have expected an explicit prohibition on internment, if it was to be prohibited at all: Offences Against the State (Amendment) Bill, [1940] I.R. 470.


Sometimes, as in the first instance judgement of O'Keefe P. in M'Gee, it is confused with the previous variant: [1974] I.R. 285, 292.


The Supreme Court has decisively rejected this version of the historical approach in many cases, including M’Gee where the Supreme Court reversed O'Keefe P. There are many other cases where historical institutions existing in 1937 (and occasionally even mentioned in the text) have been swept away by a literalist, harmonious, purposive or moral standards analysis. For instance, most elements of the “royal prerogative” have been eliminated from the constitutional order despite being mentioned in the text itself (Article 49). See Byrne v. Ireland [1972] I.R. 241; Howard v. Commissioners for Public Works [1993] I.R.M. 665. See also State (Healy) v. O'Donoghue, [1976] I.R. 325, 347 (criminal legal aid). All the other approaches insist that: “regard must be had to the extent to which ideas and values prevailing at one period have been conditioned by the passage of time” F. v. F., [1994] 2 I.R.M. 401, 410.

For, as O'Higgins C.J. said in O'Shea: "... the very existence of an inconsistency between what was formerly the law and what the words of the Constitution ... declare, repeals and abrogates what had been the law." [1983] I.R.M. 549, 553 - 4.

Records detailing the secret drafting of the Constitution have only been available since 1987; the Parliamentary debates are unenlightening, and as M'Carthy J. observed in Norris:

"I find it philosophically impossible to carry out the necessary exercise of applying what I might believe to be the thinking of 1937 to the demands of 1983. ... it would plainly be impossible to identify with the necessary degree of accuracy of description the standards or mores of the Irish people in 1937 - indeed, it is no easy task to do so today."

The point behind this approach in summed up by Costello J. in a case dealing with whether the right to earn a livelihood was invaded when the State established a monopoly. Costello J. (as he then was) says:

"... the courts should bear in mind that this document is a political one as well as a legal one and, whilst not ignoring the express text of the Constitution, a purposive approach ... is often a desirable one." Paperlink v. Attorney General, [1984] I.R.M. 373, 385


State (Quinn) v. Ryan, [1965] I.R. 70, at 123, per Ó Dálaigh C.J.:

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen, that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were the custodians of these rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and that the courts' powers in this regard are as ample as the defence of the Constitution requires."

The Pope has done much better, with several judges appealing to papal encyclicals (Kenny J. in and Dworkin (Keane J.’s Book Review of Constitutional Law of Ireland (1993) 15 The use of international instruments has been identified as being of particular importance by R. Humphreys: [1996] 2 I.R. 20; Costello J. found guidance in the case law of the European Court of Human Rights. See also Human and Peoples’ Rights: [1991] I.L.R.M. 454, 459. In Rights, the UN Universal Declaration, the American Charter of Human Rights and the Afr...
which had its roots in Catholic social teaching. However as I have already indicated the use of the drafters envisaged by the drafters of the text. Undoubtedly they were influenced more by the State as supporter ideal 143 European Convention on Human Rights. 142 141 used as an interpretative guide: Kelly, Hogan and Whyte, 140 the different denominations in Ireland (at least during most of the 19th and 20th centuries).

“Prudence, Justice and Charity”.


8

By emphasising the pluralist element in this Article I do not wish to suggest that this was necessarily envisaged by the drafters of the text. Undoubtedly they were influenced more by the State as supporter ideal which had its roots in Catholic social teaching. However as I have already indicated the use of the drafters intentions - (as opposed to their words) - is not an appropriate interpretative methodology. 133
The definitive version is published as Rory O'Connell, “Theories of Religious Education in Ireland” (1999-2000)

145 In re Employment Equality Bill
147 The Irish Constitution, p. xcii.
149 [1965] I.R. 310. The case mostly turned on bodily integrity, and whether water fluoridation violated this right.
151 [1996] 2 I.R. 20, 62. Although only a High Court decision, it is a very detailed and well argued one which has found much acceptance with other High Court judges: see Comerford v Minister for Education [1997] 2 I.L.R.M. 134; L v Minister for Justice, Minister for Education, The minister for Health, Ireland, unrep. 24 March 1995.
152 An early case seemed to envisage a very limited role for the State; however that was a very early decision of the Supreme Court exercising judicial review in rather special circumstances, and the holding has been the subject of much criticism. In re School Attendance Bill 1943; [1943] I.R. 334. See the discussion in Osborough, W. N. Osborough, “Education in the Irish Law and Constitution” (1978) Irish Jurist 145; Casey, Constitutional Law in Ireland, p. 527.
155 See Kelly, Hogan and Whyte, The Irish Constitution, p. 701, 787 - 9, Casey describes it as “most unsatisfactory”, Constitutional Law in Ireland, p. 526.
156 For other examples, please see FN (a minor suing by his next friend MH) v Minister for Education, Minister for Health, Ireland and the Attorney General and the Eastern Health Board (notice party). [1995] 2 ILRM 297; Comerford (a minor) suing by his mother and next friend Elizabeth Comerford v Minister for Education, Ireland and the Attorney General and the Eastern Health Board (notice party), High Court, [1997] 2 ILRM 134.
157 [1980] I.R. 102, 126-7. see also O’Higgins C.J. at p. 122, arguing the Article wished to avoid the provision of free primary education in exclusively State schools. Rather was it intended that the State should ensure by the arrangements that it made that free primary education would be provided. when one remembers the long and turbulent history of the church schools in Ireland, and the sustained struggle for the right to maintain such schools by the religious authorities of all denominations in all parts of Ireland, one can well understand the care with which the words used must have been selected.”
161 Religious non-discrimination is also explicitly sanctioned in relation to certain political rights: Art. 40.6.2.
169 Para. 702 of the 1964 Civil Rights Act; Church of Jesus Christ of the Latter Days Saints v. Amos, 483 U.S. 327.
170 Unrep. Supreme Court, 15 May 1997. The statute was invalidated on other grounds.
171 There are other cases where the Courts recognise the freedoms of religious persons as acts of accommodation: R. v. R. [1981] I.L.R.M. 125 (upholding privileged communications to religious persons); Merriman v. St. James Hospital, 25 Nov. 1985, Irish Times (ordering the re-instatement of a hospital worker who had refused to take a crucifix to a dying man); Flynn v. Power, [1985] I.L.R.M. 336, a decision by Costello J. (upholding the firing of a teacher on the grounds that her activities outside a school were inimical to that school's values).
Constitutional Law
Press Fund, 1996), Abraham, 
citation. Generally I have relied upon Miller and Flowers,  
Pluralist Society” (1992) 81 
State co
in question. 
“dignity”: 
religious matters, as far as Art. 44 was concerned, it is noteworthy that the courts have referred to the 
Northern Irish Legal Quarterly 
The Church and the Constitution” (1993) 82 Studies 160.  
Kelly, Hogan and Whyte, The Irish Constitution p. 1104, 1113.  
Constitutional Law in Ireland, Ch. 19. 
For Prof. Clarke’s criticisms, see D. Clarke, “Freedom of Thought in Schools: a comparative study” (1986) 35 International and Comparative Law Quarterly 271; D. Clarke, “Freedom of Thought and Educational Rights in the European Convention” (1987) 22 Irish Jurist 28; D. Clarke, Church and State: Essays in Political Philosophy (Cork: Cork University Press, 1984), Ch. 6. Prof. Clarke’s views have been described as too extreme by some legal academics. 
Constitutional Law of Ireland (Cork: Mercier, 1987).
[1974] I.R. 284, 316 emphasis added. (Although that 1974 decision restricted the right to conscience to religious matters, as far as Art. 44 was concerned, it is noteworthy that the courts have referred to the unenumerated personal right to “follow one’s conscience”: G. v. the Adoption Board [1980] I.R. 32, 52 and to “dignity”: In re a Ward of Court, [1996] 2 I.R. 79, 163.) 
I am not saying that denominational education infringes the conscience rights of people who accept the faith in question. 
See Kelly, Hogan and Whyte The Irish Constitution. p. 687. 
Circuit Court case, reported in the Irish Times, 22 February 1986. 
1926 School Attendance Act. 
Irish National Teachers Organisation The Place of Religious Education in the National School System p. 30. 
That this is an ideal endorsed in some religious attitudes is clear: Editorial “The Religious School in a Pluralist Society” (1992) 81 Studies 373. 
Since I assume the reader is familiar with the US debate, I will not try her patience further with extensive citation. Generally I have relied upon Miller and Flowers, Towards Benevolent Neutrality (Texas: Markham Press Fund, 1996), Abraham, Freedom and the Court (New York : Oxford U.P., 1998); Tribe, American Constitutional Law (Mineola: Foundation Press, 1988). 
Clark J.’s words are poignant: 
“This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears, see Everson v. Board of Education ..., could have planted our belief in liberty of religious opinion any more deeply in our heritage.”
At p. 231: 
“While our institutions reflect a firm conviction that we are a religious people, those institutions, by solemn constitutional injunction, may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion. Equally, the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means
would suffice. The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental and. . ."

203 At p. 294:
"... What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers -- as much to church as to state -- which the Framers feared would subvert religious liberty and the strength of a system of secular government."

204 Indeed even the most stalwart advocates of pluralism in Ireland tend to criticise some of the strict separation US case law: see M. Redmond “Constitutional Aspects of Pluralism” (1978) Studies 40, 54.

205 I am not referring to Bradford v. Roberts, (1899) 175 U.S. 291 or Quick Bear v. Leupp, (1908) 210 U.S. 50, although one Irish academic defender of the current denominational system believes they are useful guides "[d]espite a recent tendency to the contrary": M. Farry, Education and the Constitution, p. 134. To the extent that those cases are relevant, they should be read in the context of the college cases discussed in the text, which lead to the opposite conclusion for which Dr. Farry argues.


Interdenominational School Case, 41 BVerfGE 29 (1975), cited in Kommers, p. 467, 470.

209 93 BVerfGE 1, cited in Kommers, p. 478.

210 The example of Italy offers lessons similar to those derived from the German experience. Again one must be wary of the Italian cases, because of different textual provisions - the Italian Constitution contains no prohibition on endowment of religion, and does contain special provisions for relations with the Catholic Church (Article 7). The Italian Constitutional Court accepts that the State must engage in the positive protection of religious rights (Case 195/1993, 19th April [1993] Giurisprudenza Costituzionale 1324; Case 440/1995, 18 Oct. 1995.). However it must do so in a manner which respects the fundamental constitutional principle of pluralism, and so must do so in a non-discriminatory manner. These requirements of pluralism, and respect for religious liberty and equality, entail that religious instruction, although provided in State funded schools, must be entirely non-obligatory. The decision to accept or reject it must not be accompanied with any burdens whatsoever. Thus it must be possible to attend education without feeling any pressure to attend the formal periods of religious education (Case 203/1989, 11th April [1989] Giuris. Cost. 890; 13/1991 11 Jan. [1991] 1 Giuris. Cost. 77.).


The relevant documents are found in Graham “Religion and Education - The Constitutional Problem” 33 N.I.L.Q. 20.


Indeed Irish courts have often commented on this, echoing the words of Marshall C.J., “it is a constitution we are expounding”.


Sect. 116 of the Australian 1900 Constitution Act says:

“The Commonwealth shall make no law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required for any office or public trust under the Commonwealth.”

Boyle and Sheen, Freedom of Religion and Belief, p. 173.


(1981) 146 C.L.R. 559, 598 italics added. See also p. 582, 613.

D. Clarke, “Freedom of Thought and Educational Rights” (1987) 22 Ir. Jur. 28. Article 2, Protocol No. 1 provides that

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

In respecting this right, the State must obey the principle of non-discrimination in Article 14 of the Convention.

Danish Sex Education Case, Ser. A, no. 23. See M. Evans Religious Liberty and International Law in Europe (Cambridge: Cambridge University Press, 1997), especially p. 355-9. It would appear that the State may never sanction “indoctrination”, in either specific classes or in an integrated curriculum. However it is not certain the Convention system would label the denominational system of education a form of indoctrination.


Hamilton C.J. (who had delivered the Equality Employment Bill opinion), O’Flaherty and Denham JJ. concurred with Barrington J.’s opinion. Hamilton C.J. and O’Flaherty J. also agreed with Keane J.’s opinion.


Contrast Art. 44.2.1 and 44.2.3 with the US First Amendment; indeed there is no right to education mentioned in the US Constitution, which did not deter O’Hanlon J. from looking for US assistance in interpreting the Irish right to education!

The UK has no written Constitution, has no judicial review, has no bill of rights. In addition it has not one, but two established churches. Finally most of the “relevant” case law from that jurisdiction concerns issues of charities and trusts, far removed from affairs of constitutional principle. The case of Marshall v. Graham, cited by Irish judges for its definition of “establishment” dealt mainly with whether a particular holiday was an obligatory religious observance day for one particular religion, [1907] 2 K.B. 112.


It appears that “religious instruction” for Barrington J. means something similar to “religious education” for Costello P. What Barrington J.’s idea of “religious education” is, is unclear but apparently it includes elements of what Costello P. calls “religious formation”.

At p. 16 Keane J. says that endowment involves “the vesting of property or income in a religion as such in perpetual or quasi-perpetual form.” Costello P. however had earlier indicated that, prima facie, endowment would include paying the salary of a chaplain [1996] 2 I.L.R.M. 241, 254.


This is the interpretation placed on the word “any” in Attorney General v. Commonwealth (1981) 146 C.L.R. 559, 598, 604. Contrast Murphy J.’s dissent at 624.


Intermediate Education (Ireland) Act, 1878.

Letter from the Department of Education, Nov. 9th 1998:

“There are no chaplains employed at primary level. Individual schools within their own parishes may organise some form of chaplaincy service but this is not part of the formal system. There are no religion teachers, per se, in the primary system. In Catholic schools all teachers are nominally involved in religious education while in other denominational schools and in multi-denominational schools there is a fairly common practice of using non-teaching personnel (local clergy) to provide some or all religious education. In such cases it falls to the school authorities to pay any costs incurred.

“Chaplains are employed in all 77 (c.10% of post-primary schools) Community and Comprehensive schools and in designated Community Colleges (There are 56 such schools = 7% of post-primary schools). These are specific types of post-primary school. Chaplains are not employed officially in other Secondary Schools.

“Chaplains have been employed in Community/Comprehensive schools since about 1974.”

Bell, Disestablishment in Ireland and Wales (London: SPCK, 1969), Ch. 4.

241 Parliamentary Debates 415, 1482 (June 28, July 15); 242 Parliamentary Debates 261, 1776 (July 25, Aug. 12) (1878).


Suppose for instance the Government simply gave grants directly to students and told them to spend it on any educational facility they chose - would that be prohibited on an accommodationist argument? The same effect as direct funding of denominational education is achieved but indirectly.

Arts. 44.1.2 and 44.1.3 were deleted by the Fifth Amendment approved in 1972 by 721,003 votes to 133,430.