

Denominational Primary Schools in the Republic of Ireland and the Challenge of Democracy

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Introduction

Perhaps the winds of change have been more acutely felt in the educational sector than in any other sphere of life in the Republic of Ireland (Ireland hereafter) in the past decade. From 1998 onwards, Ireland's predominantly informal, denominational (religious) system of education has been regulated by a number of legislative measures which have effected a major transfer of control from the churches to the State. Against the backdrop of a rapidly secularising society, this short article considers some of the resulting challenges facing denominational, primary schools, which were formerly accustomed to a very high degree of autonomy.

Ireland: A Distinctive Model

In most E.U. countries, families have a degree of choice with regard to primary education; state and denominational systems of schooling are parallel options. Ireland, by contrast, is the inheritor of a singular educational tradition, in which the system of education at the primary level is almost entirely denominational. It is a complex system which, as an OECD Report considered, can only be understood in the light of a history beyond the scope of this article. The Irish author John McGahern in his most recent book states:

When Britain placed the Catholic Church on an equal footing with the Church of Ireland, they did so because they saw it as a tool of social order. The country I grew up in was a theocracy in all but name...

While other elements of Irish life had become more open to change and to democracy sooner, education remained, to a unique degree, under church control and management until 1998. The only statute directly related to education at the primary level was the School Attendance Act of 1926 (as amended). No state primary schools were established from the foundation of the State in 1922, and no substantive educational legislation was enacted until the Education Act of 1998. At that time, however, the mould was broken, and further regulations on the denominational school system followed in quick succession.

What emerged at the primary level was largely a system of recognised, regulated denominational (religious) schools and virtually no State schools. Today, parents have a constitutional entitlement to send their children to private schools, State-aided schools, State schools, or to educate their children at home, provided the constitutional minimum standard of education is met. To date, however, the vast majority of parents have chosen the denominational State-aided school model for their children's education, though some argue that they had little choice in the matter. Although multi-denominational schools have been established by parental initiatives in recent years, they still comprise less than 1% of all primary schools and are found mainly in the most populated urban settings. Now that denominational schools are regulated to a considerable degree, they are faced with the challenge of accommodating democratic rights while remaining faithful to their foundational aims and objectives in the context of a student population that is daily becoming more diverse and multi-cultural.

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Education: The Democratic Thrust

It is generally accepted, both within the E.U and internationally, that there are certain rights essential for full membership of a democratic society, including the right to equality before the law, freedom of expression of conscience and religion, freedom of association, freedom of assembly, and the right to education. Ireland's written Constitution guarantees these democratic rights: it shows a deep commitment to liberal democracy, on the one hand, but also respects religion and acknowledges God as the source of its authority on the other.

These dual constitutional objectives are also reflected in legislation which has regulated large spheres of school life, which were formerly under the control of the churches or religious orders (the denominations).

Because of the impacts of the Education Act of 1998, the Education (Welfare) Act of 2000, and the Equal Status Act of 2000, denominational school authorities have less autonomy over internal policy-making and practices than they did before. They are now required to balance the foundational aims and ethos of schools with the requirements of legislation. For example, schools must, *inter alia*, draft and implement school plans, including procedures for informing parents regarding matters relating to the operation of a school, procedures for informing students of the activities of a school, admissions policies, school attendance strategies, and codes of behaviour.

The above mentioned legislation seeks to find a *via media* between respecting the rights of the denominational school, on the one hand, and implementing democratic rights, on the other. In practice, however, these two sets of rights may sit uneasily together, particularly where student populations are becoming more diverse. As Hogan and Morgan indicate, it is only with the emergence of a growing secular society that challenges to State support for denominational education are becoming apparent. In the 1996 case, Campaign to Separate Church and State v. Minister for Education, plaintiffs unsuccessfully challenged the system of state payment of salaries to chaplains in community schools. The plaintiffs alleged that the system was in breach of Article 44.2.2 in which the State guarantees '*not to endow any religion.*' The Supreme Court distinguished between the words 'establish' and 'endow' in the context of religion, and it held that the system of State aid to denominational education in Ireland was constitutional and that the payment of chaplains from public funds was also constitutional.

Change has also come about through the involvement of various partners in education. Teacher representative bodies and unions are seeking to have a more appropriate balance struck between individual student rights and the common good of the school community in regard to disciplinary matters and appeals. Further, parental and student rights are moving to the fore in education. Parents have been accorded a right to establish a parents' association in every recognised school, and representative boards of management are required to be appointed by the patron, *where practicable*. An Ombudsman for Children has been appointed (Ms. Emily Logan) to promote the rights and welfare of children and to investigate individual complaints made on behalf of children arising in the course of the administration of, among other bodies, recognised schools. Ms. Logan has recently recommended that greater emphasis on the rights of the child be included in the Constitution. In this state of flux, it is becoming more difficult to discharge the denominational school's obligations relating to its foundational aims and objectives while meeting and respecting the needs of an increasingly diverse and pluralist society. In meeting the demands of this 'whirlwind of democracy', so to speak, is there a danger that the very *raison d'être* of religious schools in Ireland could be diluted or indeed discounted? Relevant legislation recognises the distinctive rights of denominational education/schools and provides a number of exemptions for denominational schools.

Denominational Education: Exemptions in the Legislation

The legislation provides for the constitutionally protected rights of the denominational school authorities with regard to ownership, teacher employment, and characteristic spirit (ethos). By virtue of Article 44.2.5 of the Constitution, every religious denomination has the right to manage its own affairs, own, acquire, and administer property, and maintain institutions for '*religious or charitable purposes*', e.g., for the purposes of denominational education. School ownership and foundational aims and objectives of the religious denominations remain unchanged; the patron still remains at the helm and retains the right to appoint a board of management which, in turn, appoints teachers and other staff in accordance with agreed-upon procedures. Teachers are remunerated by the State. We may conclude, therefore, that certain implied constitutional protections afforded denominational education remain unaltered.

One of the objectives of the Roman Catholic Church in establishing denominational schools was to evangelise through the educational enterprise, a fact which is common to many religions. Indeed, the special doctrinal nature of religious or denominational schools has been recognised by the courts in Canada, the United States, New Zealand, England, and Ireland. Courts in these countries have recognised that religious schools differ from secular schools in that, apart from their academic aims and objectives, the mission of the Catholic school is evangelisation and the Catholic school is one of the ways in which that church works toward its goal. Perhaps the U.S. Supreme Court in *Everson v. Board of Education* best sums up the position of the Catholic school, albeit in a very different context:

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests...

At issue in *Emerson* was whether it was constitutional to require the complainant to pay the cost of transporting pupils to church schools of one specified denomination (Roman Catholic) in the light of the First Amendment, which mandates the government to make no law respecting or prohibiting the free exercise of religion.

By contrast, the board of management of a Catholic primary school [in Ireland] has a foundational obligation to uphold and foster the school's denominational ethos. In addition, the religious values and practices of a Catholic school are expected to permeate the full life of the school, at least from the Catholic school patron's perspective. Speaking recently to the Irish Primary Principles Network (IPPN), Dr. Martin, Archbishop of Dublin, emphasised that a defined Catholic ethos should be verifiable in all its aspects:

If that is not the case, then the specific advantage and reason for having a Catholic school will cease. A Catholic ethos must be the integrating factor for all aspects of the life of the school.

Is it possible to vindicate the rights of minority children in the context of a Catholic school with an integrated ethos when no alternative school type may be available to that minority? Catholic schools frequently use religious ceremonies to indicate the opening and end of the official school year and, while a school may be able to facilitate students by allowing them to opt-out of religious instruction, it may be more difficult to arrange for a student to opt-out when the event is an integral part of the school day, e.g. assembly, mass, or preparation for the sacraments. These are some of the problems which emerge as school populations diversify.

School Provision Generally

If we look at the broader issue of school provision in a rapidly secularising society such as Ireland, we find that a problem exists for some parents and their children. Despite the wide choice of school options conferred on parents as a constitutional right, few alternatives to denominational education, if any, exist in practice for considerable numbers of parents and children with minority or secular beliefs who reside outside the centres where multi-denominational schools have been established. One of the pivotal issues for such parents is their right not to have their children participate in certain elements of school life which foster or promote a particular set of tenets. This right recognised in national and international law. Some protections for children of minority faiths or secular beliefs are also found in Irish national law. Article 44.2.4., the Constitution states:

'Legislation providing State aid for schools shall not affect prejudicially the right of any child to attend a publicly funded school without attending religious instruction at that school.'

Accordingly, the Education Act of 1998, which provides State aid for schools, may not require any child to attend religious instruction in a State-funded school. Children whose parents have requested, in writing, that their children be withdrawn from religious instruction classes, are entitled to be facilitated. However, this is not without its administrative difficulties in smaller schools. It is estimated that in 70% of all primary schools, apart from administration, the Principal teaches one or more classes. In the absence of 'floating' staff, or any extra staff, it may be difficult to implement the withdrawal right for children unless their care and supervision can be secured otherwise. Surprisingly, the constitutional

prohibition in Article 44.2.4 relates to ‘*religious instruction*’ only. It is silent on religious worship, which is commonly integrated in Catholic schools.

The Education Act of 1998 Act provides a much wider guarantee than the constitutional guarantee in Article 44.2.4. Section 30 (2) (e) of the 1998 Act provides that, without prejudice to the generality of section (1), the Minister

‘shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student.’

The State recognises that there are limits beyond which it may not go. The European Convention on Human Rights, which is now part of Irish law subject to the Constitution, requires the State to take care that information conveyed in the curriculum is conveyed in an objective, critical, and pluralist manner, and that it stops short of indoctrination that might be considered as disrespectful of a parent’s religious and philosophical convictions. May the State avert its gaze if denominational school authorities implement an integrated curriculum? The case of *Kjeldsen v. Denmark*, which dealt with the introduction of a mandatory sex education programme into Danish schools, seems to imply that, under the European Convention on Human Rights, the State may avert its gaze from integration in the school curriculum so long as it does not follow an aim of indoctrination. Moreover, parents may not object to such integration. However, it must be stated that the decision in *Kjeldsen* appears contradictory in places.

So, if a student’s parent, or a student, who has reached their 18th birthday, has a conscientious objection to any subject which is part of the State Curriculum, the Minister cannot require student attendance at that subject. Again, this could give rise to administrative difficulties in smaller schools. If, for example, there are a number of parents who wish to have their children withdrawn, on the grounds of conscience, from the health and relationships programme, who is to teach or supervise children in smaller schools where the Principal is teaching a class or classes and/or administering the school while no other staff has been provided?

Equality Legislation

Equality legislation makes special provisions for institutions with a religious ethos, including schools. The Equal Status Act of 2000, as amended, applies to schools, both in their capacity as providers of services and as ‘educational establishments’. Under the Act, schools may not discriminate on the grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race, or on the grounds of the Traveller community or victimisation. Schools have additional duties as ‘educational establishments’ under section 7(1) which provides that:

‘An educational establishment shall not discriminate in relation to

- (a) the admission or the terms or conditions of admission of a person as a student to the establishment,
- (b) the access of a student to any course, facility or benefit provided by the establishment,
- (c) any other term or condition of participation in the establishment by a student, or
- (d) the expulsion of a student from the establishment or any other sanction against the student.’

Exemptions on Religious Grounds

Pursuant to the Equal Status Act of 2000, primary and post-primary schools, which have the objective of providing education in an environment which promotes certain religious values, may admit persons of a particular religious denomination in preference to others, or may refuse to admit a student who is not of that denomination if it is proved that the refusal is essential to maintain the ethos of the school. The onus of proof in this regard is a stringent one, and it lies on the school to prove that any refusal of any student of another denomination is not just desirable, but also ‘*essential to maintain the ethos of the school.*’ It appears that in many denominational schools this exemption is being interpreted as conferring a clear right on such schools to favour their own denomination unconditionally. This practice has

not been challenged in the courts. Institutions established for the purpose of providing training to ministers of religion may admit students of one gender or one religious belief.

In 2003, the Equality Authority dealt with 78 legal case files under the *Equal Status Act of 2000* in relation to educational establishments. This number represents 10% of their total case load in 2003, the second highest area after licensed premises. These cases related to access to schools by members of the Traveller community and pupils with disabilities, dress codes and school uniforms on the grounds of gender, and access to schools on the grounds of religion.

Under the *Employment Equality Acts of 1998-2004*, certain religious, educational, and medical institutions may give more favourable treatment to an employee or a prospective employee in circumstances where it is reasonable to do so in order to maintain the religious ethos of an institution. Section 37 (1) of the Act provides:

A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this Part or Part II if –

- (a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
- (b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

This provision does not provide employers with a defense against a claim of gender discrimination, since section 27 (1) does not apply in regard to Part III of the Act which deals with such matters.

It appears that the protection afforded religious interests pursuant to the Employment Equality Acts of 1998-2004 is wider than that provided for by Article 4 (2) of the EC Directive 2000/78/EC, which established a general framework for equal treatment in employment and occupation.

Under the 1998 Act, certain religious, educational, and medical institutions may lawfully reserve places on certain vocational training courses, such as teacher training/education courses and courses in schools of nursing, in such numbers as the relevant Minister deems necessary. This is permitted to ensure the supply of teachers to denominational schools and the supply of nurses to denominational hospitals in accordance with their constitutionally protected rights.

Some contend that there exists a tension between the structures of the European Union and those of the predominantly religious Member States. Dr. Diarmuid Martin, Archbishop of Dublin, stated recently that there were fears that the EU structures and ideology could be used to undermine the culture of Member States where the viewpoint of the Catholic Church enjoys a stronger adherence than within the EU generally. Juridical culture in Europe, he continued, was dominated, as elsewhere, 'by legal positivism and by individualism' and he urged greater vigilance within government and within civil society in monitoring mechanisms of the EU if it promotes standardization of values and issues which may go beyond the mandate of the Union itself.

State Curriculum in Ireland

Turning to the curriculum, which is laid down in section 30 of the Education Act of 1998, the Minister for Education and Science is required to make allowances for the characteristic spirit of the school in a number of significant spheres:

- (2) Without prejudice to the generality of (1), the Minister –
 - (b) Shall have regard to the characteristic spirit of a school or class of school in exercising his or her functions under this section,
 - (d) shall ensure that the amount of instruction time to be allotted to subjects on the curriculum as determined by the Minister in each school day shall be such as to allow for such reasonable instruction time, as the board with the consent of the patron determines, for subjects relating to or arising from, the characteristic spirit of the school, and

- (e) shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student.'

The latter conscience clause is much broader than the clause in Article 44.2.4, which provides only for the withdrawal of children from religious instruction. Furthermore, a school may, subject to the requirement that the curriculum is taught, provide courses in other subjects, as the board deems appropriate. In the *Campaign to Separate Church and State Ltd. v. The Minister for Education, Costello P.*, in the High Court, considered that the Constitution imposed additional duties on the State with respect to the religious education of children. He noted the inalienable right of the family/parents to provide, *inter alia*, religious education for their children and the State's guarantee to respect that right. In particular, he noted the State's obligation in respect of the provision of '*a minimum education, moral, intellectual and social*' and the obligation of the State, when providing educational facilities, to have due regard for parental rights '*especially in the matter of religious and moral formation*' (Art. 44.2). In his decision, Judge Costello also pointed to the distinction between religious education and religious formation:

... broadly speaking the religious education of a child is concerned with the teaching of religious doctrine, apologetics, religious history and comparative religions, whilst the religious formation of a child involves familiarising the child not just with religious doctrine but with religious practice (by attendance at religious services) and developing the child's religious and spiritual life by prayer and bible reading and I think the Constitution should be construed so as to reflect this meaning.

Furthermore, the judge considered that Article 44.2 enjoined the State, when providing educational facilities, to have regard to these two distinct rights.

Concluding Remarks

It may be concluded that very considerable rights relating to education have been vested in the religious denominations through the Constitution and that provision has been made for such rights in the legislation. Because of the absence of a State system of education in Ireland and the social changes effected by regulation, immigration, secularisation, and a growth in population, which is outpacing all other nations in the E.U., denominational schools are coming under strain in retaining their foundational aims and objectives in the face of growing democratic demand and immense social change. Clearly, the range of educational provision needs to be expanded to meet the needs of diversity and secularity and such provision, in the opinion of this writer, needs to include State schools. This can only happen if parents require such schools in numbers which make the new school types viable.