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CHURCH AUTONOMY AND RELIGIOUS LIBERTY IN IRELAND

– PRELIMINARY REPORT –

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I. INTRODUCTION

Church autonomy is specifically guaranteed by Article 44.2.5º of the Irish Constitution, which provides as follows:

> 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.

This guarantee, however, is apt to collide with that of Article 44.2.3º:

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

Both provisions were in issue in *McGrath and Ó Ruairc* v *Trustees of Maynooth College* [1979] ILRM 166. The plaintiffs – both former priests – had been dismissed from their teaching posts at the college, which was in law a seminary but which functioned also as a Pontifical University and as a recognised college of the National University of Ireland. (In the latter capacity alone it received State funding). The ground of the dismissals was that the plaintiffs had violated certain of the college statutes. They claimed

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that those statutes discriminated between clerical and lay teachers and thus infringed Article 44.2.3º of the Constitution.

The Supreme Court rejected this contention. Henchy J, (Griffin, Kenny and Parke JJ concurring) said (at 187):

> The constitutional provision invoked here [Article 44.2.3º] must be construed in terms of its purpose. In proscribing disabilities and discriminations at the hands of the State on the grounds of religious profession, belief or status, the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion. To construe the provision literally, without due regard to its underlying objective, would lead to a sapping and debilitation of the freedom and independence given by the Constitution to the doctrinal and organisational requirements and proscriptions which are inherent in all organised religions. Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasion recognise and buttress them. For such disabilities and discrimination do not derive from the State; it cannot be said that it is the State that imposed or made them; they are part of the texture and essence of the particular religion; so the State, in order to comply with the spirit and purpose inherent in this constitutional guarantee, may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion.

The judgment continues (at 187-188):

> The raison d'etre of the college, whatever academic or educational accretions it may have gathered over the years, has been that it has at all times been a national seminary where the students are educated and trained for the Roman Catholic priesthood. This inevitably means that at least some of its academic staff must not only be priests but priests with particular qualifications and with a required measure of religious orthodoxy and behaviour. It is part of the purpose of the statutes (which, incidentally, were drawn up by the trustees, who are all bishops of the Roman Catholic Church, and were not imposed by the State) that due standards are to be observed by those of the academic staff who are priests. Even if it be said that the statutes are, by recognition or support, an emanation of the State, the distinctions drawn in them between priest and layman, in terms of disabilities or discriminations, are not part of what is prohibited by Article 44.2.3º. They represent no prejudicial State intrusion where priest is advanced unjustifiably over layman, or vice versa, as was the case in *Molloy* v. *Minister for Education* [1975] IR 88. On the contrary, they amount to an implementation of the guarantee that is to be found in subs. 5 of the same section that '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'. These statutes are what the designated authorities of the Roman Catholic Church in Ireland have deemed necessary for this seminary. Their existence or their terms cannot be blamed on the State as an unconstitutional imposition.

From this decision it would appear that the Constitution gives religious denominations[1] *carte blanche* as regards both doctrine and internal organisation. Thus matters such as a church's teachings, or the number of dioceses – or of clergy assigned to a parish – do not fall within the province of any organ of the State, legislative, executive or judicial. Nor has the State ever claimed any such competence; so, although Ireland is an overwhelmingly Roman Catholic country, the Government plays no part in the nomination of that church's bishops.

II. ECCLESIASTICAL JURISDICTION

Autonomy is also understood in practice to mean that each denomination is entitled to create a system of church tribunals – e.g. to exercise jurisdiction in disciplinary matters. (In the case of the Roman Catholic church, there are also tribunals which exercise jurisdiction over the annulment of marriages).[2] The proceedings of any such tribunals would be open to review by the High Court, for example to ensure that they do not exceed their jurisdiction and that they observe fair procedures.[3]

III. LABOUR LAW

Like other EC member states, Ireland now has a considerable corpus of labour legislation. Generally speaking, the statutes confer rights on 'employees' – defined to mean persons working under a contract of employment. The churches are not given any exemption from this body of legislation. *Prima facie*, therefore, their 'employees' would be protected by it, and could thus assert rights in matters such as equal pay and treatment, redundancy payments and protection against unfair dismissal. This would extend to lay persons employed e.g. by a diocese, a church-run school or hospital or a convent.[4]

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1 In In re Article 26 and the Employment Equality Bill 1996 [1997] 2 IR 321, the Supreme Court said that 'religious denomination' was '… a generic term wide enough to cover the various churches, religious societies or religious congregations under whatever name they wished to describe themselves' (at 354).

2 Such annulments have no civil legal effect whatever.

3 Colquhoun v Fitzgibbon [1937] IR 555 (High Court): McGrath and Ó Ruairc v Trustees of Maynooth College [1979] ILRM 166 (Supreme Court).

4 See *Anthony Kerr*, Church and Labour Law in Ireland, in: European Consortium for Church and State Research, Churches and Labour law in the EC Countries

But ministers, priests and religious will not necessarily benefit from this legislation, for they may not qualify as 'employees'. Their legal relationship with the relevant church (or religious superior) is unlikely to rank as a contractual one.[5]

IV. SCHOOLS

Most Irish schools – whether primary or secondary – are organised and run on a denominational basis; the US distinction between public and parochial schools does not exist in Ireland. But despite their religious ethos – and clerical involvement in their administration – the schools are not directly organised by the churches. Primary schools will be run by a board of management, though the power to hire and fire teachers will belong to the diocesan bishop or equivalent. These schools are heavily – though not fully – funded by the State.[6] This is perfectly compatible with the Constitution, which in Article 44.2.4º provides:

> 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 Supreme Court has accordingly upheld the validity of the arrangements outlined: *Crowley* v *Ireland* [1980] IR 102; *Campaign to Separate Church and State* v *Minister for Education* [1998] 2 ILRM 81.

In the case of the Roman Catholic church, the majority of secondary schools are run by a variety of religious orders – for example, Christian Brothers, Presentation Brothers, Holy Ghost Fathers and Jesuits in the case of boys; Dominican, Loreto, Mercy and Sacred Heart nuns in the case of girls. In addition, each diocese will usually have a junior seminary providing secondary education for boys.

Second level schools of all denominations receive considerable amounts of State funding.[7] The Constitution does not *require* this, but it creates no barrier to it; Article 44.2.4º applies here too.

(Milano/Madrid 1993), pp.134-140.

5 Ibid.

6 See further *James Casey*, State and Church in Ireland, in: *Gerhard Robbers* (ed.), State and Church in the European Union (Baden-Baden, 1996), pp. 157-159.

7 Ibid.

V. CHARITABLE ACTIVITIES

Article 44.2.5º specifically anticipates and validates the involvement of the churches in charitable activities. They were so involved long before the achievement of Irish independence in 1921, and this continues to be the case – though a drop in religious vocations has led to a considerable diminution in such activity on the part of the Roman Catholic church.

As with schools, the churches' involvement in charitable activity is usually indirect. Thus, though many hospitals are under the patronage of the Roman Catholic church, they are actually run by religious orders. (The two largest hospitals in Dublin, for example – the Mater and St. Vincent's – are run by the Irish Sisters of Charity.) The same would hold for children's or old persons' homes.

Charitable activity in the form of financial aid to the needy is the province of two lay organisations – the Society of St. Vincent de Paul, and Protestant Aid. (The Board of Guardians performs a similar function for the Jewish community.)

VI. LIMITS TO CHURCH AUTHORITY

Article 44.2.5º contains no express reservation in the interests of public order or public policy. It would appear that it gives religious denominations an absolute guarantee – that is, that church autonomy takes precedence over other constitutional values. So much is suggested by the Supreme Court decisions in *McGrath and Ó Ruairc* v *Trustees of Maynooth College (supra)*, and *In re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] IR 321.

The broad aim of the 1996 Bill was comprehensively to prohibit discrimination in employment, but it created certain exemptions – one on grounds of religion. Thus it would be lawful, say, for a denominational school or hospital to refuse to hire – or to fire – an individual who did not subscribe to that institution's ethos. The Supreme Court eventually found the Bill repugnant to the Constitution, [8] but it ruled that the religious exemptions were valid. While it was not generally permissible to make any discrimination or distinction between citizens on the grounds of religious profession, belief or status, the court's prior decisions established that such

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[8] Article 26 of the Irish Constitution provides a mechanism whereby the President may refer a Bill passed by both Houses to the Supreme Court for a ruling on its validity.

would be valid where it was necessary to give life and reality to the Constitution's guarantee of the free profession and practice of religion.

One of the criticisms levelled by counsel against the Bill's religious exemptions was that it used the word 'ethos' – but left this term undefined. This meant, it was argued, that each religious institution would be able to define its own ethos. To this the Supreme Court, *per* Hamilton CJ, responded somewhat cryptically ([1997] 2 IR 321 at 359):

> It is probably true to say that the respect for religion which the Constitution requires the State to show implies that each religious denomination should be respected when it says what its ethos is. However the final decision on this question as well as the final decision on what is reasonable or reasonably necessary to protect the ethos will rest with the court and the court in making its overall decision will be conscious of the need to reconcile the various constitutional rights involved.

The Supreme Court's ruling in the *Employment Equality Bill* case seems implicitly to confirm the correctness of the High Court's decision in *Flynn* v *Power* [1985] IR 648. The plaintiff had been employed as a teacher in a convent school run by the respondents in a small town in Co. Wexford. She formed a relationship with a married man whose wife had left him, subsequently going to live with him and his children and becoming pregnant by him. Following the birth of her baby she was dismissed from her employment. Her claim that her dismissal was unfair (under the Unfair Dismissals Act 1977) was rejected successively by the Employment Appeals Tribunal, the Circuit Court and the High Court. Costello J. in the High Court said that the key question, under section 8 (1) of the 1977 Act, was whether "having regard to all the circumstances there were substantial grounds justifying the dismissal". Here the main complaint against Ms. Flynn was that she openly rejected the norms of behaviour and the ideals which the school existed to promote. The judge stressed that the school was a religious, not a lay one, and such a school had long established and well-known aims. In assessing the effect of the plaintiff's conduct on the school, the respondents were entitled to conclude that her conduct was capable of damaging their efforts to foster in their pupils norms of behaviour and religious tenets which the school had been established to promote. Thus they had substantial grounds for dismissing her.

VII. INSTITUTIONAL RANGE

The church autonomy guarantee of Article 44.2.5º extends not only to theological core institutions (the Roman Catholic Church, the Church of Ireland, the Presbyterian Church, etc.) but also to institutions maintained by

them for religious or charitable purposes. In the *Employment Equality Bill* case the Supreme Court said the phrase 'institutions for religious or charitable purposes' in Article 44.2.5º covered religious, educational or medical institutions controlled by religious denominations, whether directly or through a board of guardians or trustees.

VIII. CONTEXTS

In general, church autonomy is not an issue in public opinion and contemporary politics. Indeed, the Constitution Review Group, which reported in May 1996, saw no need to amend Article 44.2.5º.[9]

However, there are at least two areas which are capable of generating controversy. Firstly, new curriculum guidelines for primary schools, introduced in 1971, meant that all such schools were to offer a curriculum in which religious and secular instruction would be integrated. In rural areas of Ireland, where the only accessible primary school may be a Roman Catholic one, this may make it effectively impossible for parents of other faiths to withdraw their children from religious instruction at that school. Yet Article 44.2.4º of the Constitution guarantees their right to do so. This matter was examined in detail by the Constitution Review Group, which discerned '… a potential conflict of rights to which there is no satisfactory answer'.[10] This conflict lay between

> … the right of the child exercised through its parents, not to be coerced to attend religious instruction at a publicly funded school and the right of denominational schools in receipt of such public funding to provide for the fullness of denominational education through the medium of an integrated curriculum and other measures designed to preserve the religious ethos of a particular school.[11]

Nonetheless, the Review Group did not favour the amendment of Article 44.2.4º.[12]

A broadly similar problem arises in regard to certain kinds of medical treatment, such as sterilisation. This will not be available in a denominationally-controlled hospital whose ethos is opposed to it; yet all such hospitals are nowadays the beneficiaries of extensive State funding. The Constitution Review Group posed a pertinent question:

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9 Report of the Constitution Review Group (Stationery Office, Dublin, Pn 2632), p. 387.

10 Ibid.

11 Ibid., p. 387.

12 Ibid.

> Is it permissible for a publicly funded hospital to decline, for what amounts to religious reasons, to perform what is a lawful operation?[13]

In the cities and larger towns this situation is unlikely to pose a practical problem; the relevant treatment will usually be available in public hospitals. In more rural areas, a problem could well arise.

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[13] Ibid., p. 377.