

The Constitution and the Protestant Schools Cuts Controversy: Seeing the Wood for the Trees

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The recent withdrawal of special financial arrangements for Protestant secondary schools provoked a great deal of polemic surrounding the accommodation of minority religions within Ireland's peculiar model of patronage in education. This article questions the Government's contention that the "ancillary grant", under which Protestant fee-paying schools were effectively treated as part of the "free" sector, was incompatible with constitutional anti-discrimination guarantees. It suggests that the measure represented a species of constitutionally permissible, if not constitutionally required, accommodation of religion. The ancillary grant controversy also serves as a prism through which to view the broader limitations of the constitutional framework for the guarantee of religious freedom in the education context.

I – Introduction

Despite its formal neutrality between religious denominations, the Irish Constitution underpins a public education system in which an overwhelming majority of schools available to citizens operate under a Roman Catholic ethos. In the absence of a parallel system of non-denominational public schools, this poses great problems for the religious liberty rights of those citizens who wish to have their children educated in accordance with religious or moral doctrines other than those expounded by this overwhelming majority of the publicly funded schools in the State. The constitutional, legislative and administrative framework for public education in the Republic of Ireland seeks to accommodate the rights of minority religious and non-religious individual groups by guaranteeing public recognition and funding of denominational or non-denominational schools on a formally equal basis. This may be regarded as a partial and inadequate guarantee of the religious liberty of parents and children, not least because the much-vaunted right to "choice" within the denominational model requires, for its exercise, a "critical mass" of like-minded co-religionists in a particular area which may warrant the establishment and recognition

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of a school within which the full measure of their religious liberty may be realised. In default of this, they enjoy residual guarantees against involuntary religious instruction within schools committed to imparting Catholic doctrines. With the advent of the free secondary education scheme in the 1960s, successive governments recognised the special difficulties faced by the demographically peripheral and geographically dispersed Protestant communities in the State; accordingly, they made special funding arrangements for Protestant secondary schools in order to permit these to cater to a geographically dispersed community, while availing of benefits equivalent to those available under the free secondary education scheme. However, the current Government has withdrawn one of these benefits, the “ancillary grant”, following advice from the Attorney General to the effect that the arrangement constituted an unconstitutional discrimination on religious grounds. This has provoked broad controversy and polemic, often invoking the religious liberty of the Protestant minority.¹ In this article, I outline two distinct arguments surrounding the constitutional framework for religious liberty in education in light of the question of special arrangements for minority groups. On the “internal” or doctrinal plane it is suggested, first, that the Attorney General’s constitutional advice on the ancillary grant is mistaken, and that the special arrangements for Protestant schools fall within a zone of “accommodation” of religion that is constitutionally permissible, yet not constitutionally required. In a broader sense, it is argued that the controversy surrounding the ancillary grant shows up the systemic inadequacy of the constitutional framework for religious liberty in the public education context, since it makes the full measure of this liberty for citizens subject to highly precarious, particularist and contingent measures such as those subject to recent public and constitutional controversy.

II – The ancillary and block grants in context: the history of accommodating religious minorities in Irish education

Notwithstanding the overwhelmingly Catholic demographic profile of the independent state following the partition of Ireland in the 1920s, the 1937

¹ See J.P. McCarthy, “Batt falls short of Dev’s gold standard on minorities,” *The Irish Independent* (18 October 2009); P. McGarry, “Protestant education worries CoI synod,” *The Irish Times* (29 May 2009); E. Waugh, “Why protestant schools pose a test of the Republic’s democracy,” *The Belfast Telegraph* (13 October 2009) [hereinafter McGarry].

Constitution followed its 1922 predecessor in maintaining a broadly liberal stance on religion generally, and the issue of religious liberty in education in particular.² It originally recognised enumerated minority denominations parallel to its juridically redundant recognition of the “special position” of the Catholic Church,³ it guarantees against disabilities and discrimination on grounds of religious belief, profession or status,⁴ and prevents the State from discriminating between the schools operated by different religious denominations.⁵ It explicitly prohibits the endowment of any religion,⁶ while it has been interpreted as implicitly precluding the establishment of any State religion.⁷ These constitutional provisions on religion have been described as a “skilful endorsement of religious pluralism.”⁸ In particular, the right of Protestant citizens to avail of State support for schools operating under their preferred religious ethos may be regarded as a key pillar of the post-independence accommodation of the Protestant minority, albeit a flawed and partial one as discussed below, along with the constitutional framers’ resistance of pressure to formally establish the Catholic Church,⁹ and constitutional recognition of the minority religions.¹⁰ Thus, since the 19th century and throughout the independent State, Protestant as well as Catholic clergymen have been recognised as “patrons” of State-funded schools, a status not given a legislative basis until the *Education Act 1998*.¹¹

² However, as Hogan notes, “Fianna Fáil did not object to legislation which tended to enshrine Catholic moral principles, and it availed itself of every opportunity to show that it supported orthodox Catholic teaching on social and moral issues”; G. Hogan, “Church-State relations in Ireland from Independence to the Present Day” (1987) 35 *American Journal of Comparative Law* 47 at 52.

³ The original Article 44.1.2^o, deleted following the Fifth Amendment to the Constitution, recognised the “special position” of the Roman Catholic Church as the faith of the majority of the citizens. Article 44.1.3^o, deleted in the same amendment, recognised 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.”

⁴ Article 44.2.1^o.

⁵ Article 44.2.4^o.

⁶ Article 44.2.2^o provides that “the State guarantees not to endow any religion.”

⁷ *Campaign to Separate Church and State v. Minister for Education* [1998] 3 I.R. 321 [hereinafter *Campaign*].

⁸ G. Hogan & G. Whyte, JM Kelly: *The Irish Constitution* (Dublin: Butterworth, 2003) at para. 7.8.13 [hereinafter Hogan & Whyte].

⁹ D. Keogh “The Irish Constitutional Revolution: An Analysis of the Making of the Constitution” in F. Litton, *The Constitution of Ireland 1937-1987* (Dublin: Institute of Public Administration, 1988) 74.

¹⁰ See *supra* note 3.

¹¹ Patrons are accorded specified functions under the Act. Most significantly, it is the responsibility of the patron to appoint a “Board of Management” in consultation with certain parties. Under s. 15(2)(b), this Board must “uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school.”

Notwithstanding the partial and inadequate scope of the measures for accommodating religious liberty in the education context, as described below, the State's strategy of accommodating members of religious minorities by supporting their right to attend a school of an appropriate ethos continued into the era of free secondary education. When free secondary education was introduced in 1967, it became clear, as Glendenning observes, that while 75% of Catholic students would benefit from the scheme, only 7.5% of Protestant students would similarly benefit.¹² She notes that:

the majority of the [Protestant] group, because of their size and geographical distribution, would have to attend Protestant boarding schools if they were to receive an education in accordance with their parents' religious and philosophical convictions.¹³

Therefore, the historical model of formal equality with the Catholic majority accessing State support for schools operating under the appropriate denominational ethos would have meant little for those Protestants living in areas where they were too widely and thinly dispersed to warrant the establishment of a local secondary school. Moreover, while the possibility of availing of a boarding school operating under the appropriate religious ethos might be regarded, in itself, as an inadequate guarantee of religious liberty in any number of ways, fee-paying boarding schools did not qualify for the full benefits of the "free" scheme. In recognition both of this need of many Protestant parents to avail of Protestant boarding schools – necessarily fee-paying – and the consequent impossibility of those schools coming within the "free" scheme while serving a dispersed minority community as "boarders", successive Ministers for Education therefore continued to administer, since the 1960s, two distinct and separate financial arrangements for fee-paying Protestant secondary schools.

First, an annual "block grant" for those attending Protestant fee-paying secondary schools is used to offset fees payable by residential students, on the basis of a means test, and is not made available for those attending Catholic fee-paying schools. Additionally, the State had provided an "ancillary grant" to cover such non-teachings costs as secretaries, caretakers, *etc.*, not normally made available to fee-

¹² *Ibid.* at 336.

¹³ *Ibid.*

paying schools, in order to put the Protestant fee-paying sector in a position of parity with the “free” secondary sector, again reflecting the fact that Protestant schools served a dispersed community, and therefore had to take residential students to meaningfully serve this community, and therefore could not come within the “free” sector while continuing to serve this purpose. The purpose of the “block grant”, broadly equivalent to the capitation fee allocated to “free” schools,¹⁴ was to permit Protestants to avail of a secondary school reflecting their religious beliefs, since many could only attend such schools as residents. The purpose of the additional “ancillary” grant was to place these Protestant schools – which were necessarily residential, in order to serve a dispersed community as outlined – on a footing of parity, in terms of funding, with the “free” secondary, primarily Catholic sector.¹⁵ They had effectively enjoyed the same benefits of the “free” sector in recognition of their special role. Protestant parents who had to send their children to boarding schools out of necessity, in order to preserve the integrity, their conscientious preferences, were regarded as being entitled to the same benefits within such schools as were accorded to their Catholic peers, notwithstanding the strictures of the “free” scheme.

While the block grant remains in place, the ancillary grant was abolished amidst recent educational cutbacks, with the Minister for Education, as already outlined, citing the constitutional requirement of non-discrimination on religious grounds.¹⁶ It has been claimed, by the Church of Ireland Archbishop of Ireland amongst others, that the move will jeopardise the financial viability of residential Protestant schools,¹⁷ while it has been broadly condemned as narrow-sighted and

¹⁴ *Ibid.*

¹⁵ A. Ruddock, “Minister’s discriminatory attempts to rewrite history,” *The Sunday Independent* (October 23 2009). Ruddock explains: “[O’Malley] recognised that boarding schools were an essential part of the Protestant education system because the Protestant community was scattered across the country ... O’Malley could not formally include them in the free education sector because they had to charge fees to cover those boarding costs, but he put those schools on a par with the free sector. They would get the same grants that were paid to free, and overwhelmingly Catholic schools, and would enjoy the same pupil-teacher ratios. He told the Dail that Protestant schools would be treated ‘at least as favourably’ as Catholic schools ... The critical point was the simplest: Protestant schools charged fees because they took in boarders from a dispersed community. In all other respects they were no different from the free school sector.”

¹⁶ See P. McGarry, “O’Keeffe to discuss cuts’ impacts on Protestants,” *The Irish Times* (21 October 2009 [hereinafter McGarry (21 October 2009)]). The Minister stated he had received advice from the Attorney General that “to continue the grant that was available would be unconstitutional because it was being given to the Protestant denomination and being refused to the Catholic denomination.”

¹⁷ McGarry, (21 October 2009), *ibid.*

deleterious to the equal standing of Protestant citizens.¹⁸ The then Minister for Education, Batt O’Keeffe, defended the reform not only on the basis of the concern for constitutional impropriety discussed below – as what he termed “an anomalous position”¹⁹ – but also because he claims that the retention of the block grant means that the State continues to uphold Protestants’ “right to have their children educated within their denominational ethos.”²⁰ Moreover, certain observers have welcomed the reform on grounds of the “elitism” which they associate with fee-paying Protestant schools,²¹ thereby assimilating the question of religious liberty in education to the different issue of the political morality, or social desirability, of State support for private education.

III – Was the ancillary grant unconstitutional?

In this section, I turn to the question of whether the ancillary grant historically allocated to Protestant schools represents an unconstitutional discrimination on religious grounds – simply on the basis that, in the Minister for Education’s terms, “it was being given to the Protestant denomination and being refused to the Catholic denomination.”²² It might be noted that those condemning the Government’s reform have, conversely, invoked an alternative equality argument – that the withdrawal by the State of special provisions for the minority Protestant community fails to respect their equality with the majority Catholic community, or that the failure to treat the Protestant case differently, in recognition of morally relevant social differences, is itself discriminatory, whether within the meaning of the Constitution or otherwise.²³ How do these rival claims on the values of religious liberty and equality, in the domain of religion and public education, fit within the constitutional text and jurisprudence?

¹⁸ E. Waugh, “Why Protestant schools pose a test of the Republic’s democracy”, *The Belfast Telegraph* (13 October 2009).

¹⁹ B. O’Keeffe, “Classifying schools by income is fairest method,” *The Sunday Independent* (11 October 2009).

²⁰ *Ibid.*

²¹ In particular, see S. Byrne, “Why should the taxpayer fund institutions of privilege?,” *The Irish Times* (3 June 2009).

²² McGarry, *supra* note 1.

²³ Archbishop O’Neill argued that “provision for scattered minority communities and for large majority communities will always have to be different. This is true in every aspect of life, be it education, transport or health.” McGarry (21 October 2009), *supra* note 16.

The Government's position is evidently based, primarily, on Article 44.2.3° of the Constitution, which provides that "the State shall not ... make any discrimination on the ground of religious belief, profession or status"; however, other provisions may be relevant, including those of freedom of conscience and the principle of parental authority over religious education found in Articles 44.2.1° and 42.1²⁴ respectively. Furthermore, Article 44.2.4°, effectively re-iterates the Article 44.2.3° principles in the specific public education context, stipulating that "legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations." It is necessary, first, to describe a number of peculiarities of the Article 44 non-discrimination principle which must frame this discussion. Article 44.2.3° is somewhat unusual because the Constitution does not explicitly prohibit discrimination on grounds of gender, ethnicity, age, sexuality or any other particular attribute.²⁵ These criteria all fall within the rather restrictive ambit of the general equality guarantee of Article 40.1. This provides that "all citizens shall, as human persons, be held equal before the law", but adds, crucially, that "this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function." This proviso to the constitutional equality guarantee means that the State may permissibly respect differential treatment between different categories of persons in view of "differences of capacity, physical and moral, and of social function"; thus, it is not an absolute guarantee against "discrimination" *per se*, in the sense of differential treatment on any particular ground, but against discrimination which, depending on various interpretations, is invidious, irrational or has no basis in the grounds outlined in the proviso.²⁶ On the one hand, this means that the considerable body of jurisprudence on Article 40.1 is of limited assistance in addressing the issue at hand, or at least must be treated with a great deal of circumspection (although it has been held that Article 40.1 also "manifestly" precludes discrimination on a number of grounds including the

²⁴ Article 42.1 acknowledges, *inter alia*, "the inalienable right and duty of parents" to "provide ... for the religious and moral ... education of their children."

²⁵ DeValera specifically rejected, in particular, the suggestion by women's groups that a specific prohibition on gender discrimination should be included in the text of the Constitution. See O. Doyle, *Constitutional Equality Law* (Dublin: Thomson Round Hall, 2004) at 54 [hereinafter Doyle].

²⁶ See generally Doyle, *ibid.*

religious ground²⁷ – raising difficult, hitherto unanswered questions as to the precise nature of the relationship between Articles 40.1 and 44.2.3°).²⁸

More importantly, perhaps, the specific prohibition on religious discrimination contained in Article 44.2.3° is not subject to the same far-reaching qualifications as the general equality guarantee; in textual and literal terms, it is a guarantee not of “equality” – which may, as circumstances dictate, require either differential or non-differential treatment between different categories of persons – but solely against “discrimination”, in the sense of differential treatment, on grounds of the criteria of “religious profession, belief or status.” The implication of this textual difference is that the prohibition on “discrimination” on religious grounds in Article 44 is more unequivocal in its scope than the equality guarantee of Article 40.1, not allowing for any differential treatment between different religious denominations where, for example, this might be regarded as somehow necessary to a substantive equality between them. It might be described as a guarantee of formal rather than substantive equality between religious groups, precluding *any* differential treatment on the enumerated grounds – whether benign, invidious or otherwise. On this reading, it merely precludes the use of criteria of, or relating to, religious belief, profession or status in legislation and other State actions, rather than mandating a broader fairness or even-handedness between religions. This interpretation is lent weight by the fact that the Irish language version of Article 44.2.3° (“aon idirdhealú do dhéanamh”) appears to preclude any *distinction* (“idirdhealú”) rather than “discrimination” on the enumerated grounds, which may be of significance insofar as the word “discrimination” might otherwise be regarded as encompassing merely invidious forms of differential treatment. Thus, in *Quinn’s Supermarket*,²⁹ considered in detail below, the Supreme Court rejected the argument that the provision merely precludes “discrimination *against*” persons, rather than mere differential treatment on the

²⁷ Hamilton J. stated that “the forms of discrimination ... proscribed by Article 40.1 are not particularised; manifestly, they would extend to classifications based on sex, race, language, religious or political opinions”; In *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321 at 347 [hereinafter *Employment Equality Bill*]. Also, Walsh J. stated in the *Quinn’s Supermarket v. A.G.* ruling that the equality guarantee precluded distinctions made upon the basis of “ethnic or racial, social or religious background”; [1972] I.R. 1 at 14 [hereinafter *Quinn’s Supermarket*].

²⁸ In particular, it is unclear whether the proviso contained in Article 40.1, relating to “differences of capacity, physical and moral, and of social function”, is applicable to religious discrimination cases, or whether these must be considered solely within the terms of Article 44.2.3°. The case law considered below seems to imply that the proviso is not of relevance to religious discrimination cases.

²⁹ *Quinn’s Supermarket*, *supra* note 27.

enumerated religious grounds. To justify this, Walsh J. referred both to the Irish language text outlined as well as the “omission of the word *against*” in the text.³⁰ Crucially, for the purposes of the issue at hand, this ruling considered the constitutionality of a “discriminatory” criterion used in ministerial regulations which aimed to positively accommodate the practices of the minority Jewish community, rather than representing invidious discrimination, or “discrimination *against*”. Even though the differential treatment in question was not invidious or directed against the religious beliefs of the plaintiff, the Court accepted that this distinction was a *prima facie* instance of religious discrimination,³¹ and “unconstitutional on its face.”³²

This eminently plausible doctrinal construction of Article 44.2.3° – while quite formalist and literalist – bears obvious implications for the question of special financial arrangements for Protestant secondary schools, and likely underpins the Government’s constitutional claim. To the extent that the Constitution precludes any “distinction” by the State on religious grounds, rather than merely discrimination “against” persons on these grounds, however this might be understood, it may then logically be regarded as precluding either preferential or differential treatment for the schools of a particular religion, whatever social purposes such differential treatment might serve – with religious status a presumptively invalid criterion of State action. The “differences of capacity, physical and moral, and of social function” set out in Article 40.1 are then of no weight in determining the constitutionality of measures such as those under consideration. What is of significance is not, on this view, the substantive fairness or equality of such a measure or provision towards or between religions, but whether it incorporates “religious belief, profession or status” as a criterion, however these might be defined. While Article 44.2.4° stipulates that “legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations,” the formula “discrimination between” may be presumed as bearing a similarly strict meaning (this clause may be regarded in any case as explicitly specifying a principle already

³⁰ *Ibid.* at 15-16.

³¹ *Ibid.*

³² *Ibid.*

implicit in Article 44.2.3°).³³ This construction would then confirm that the Constitution requires formal non-discrimination rather than substantive equality between religious denominations in the specific domain of public funding for denominational schools.

A. Interpreting the *Quinn's Supermarket* ruling

On this reading, it would matter little whether the ancillary and block grants were necessary to place the Protestant community on a footing of substantive parity with Catholics in the public funding of schools, in the sense that each might have equally adequate access to a network of publicly-funded schools expounding the appropriate ethos, thereby safeguarding the liberties of parents in this regard. What would then matter, instead, is whether the benefits were allocated to a particular denomination or denominations and not to others who met the same conditions, or differentially as between different denominations, thus discriminating on grounds of religious “status” or “belief” within the terms of Article 44.2.3°.

However, while the *Quinn's Supermarket* ruling, the most important of the scant authorities on Article 44.2.3°, gives a narrow and literal interpretation to Article 44.2.3°, strictly precluding any discrimination on religious grounds, it also placed the provision in the context of what it saw as the broader purpose of Article 44 in upholding religious freedom, and qualified the scope of the principle in this light. The case involved a challenge to ministerial regulations³⁴ on commercial trading hours which exempted Jewish Kosher shops from their ambit, as, *inter alia*, an unconstitutional discrimination on religious grounds within the meaning of Article 44.2.3°. The Supreme Court held that any “distinction” on religious grounds constituted a *prima facie* violation of Article 44.2.3° and was “unconstitutional on its face,”³⁵ a stance which initially appears to buttress the Government’s position on the issue at hand. Nonetheless, the Court looked to the broader purpose of the provision, and the “overall purpose” of the Article 44 guarantees, in upholding “the freedom of

³³ Arguably, a purposive reading of Article 44.2.4° would indicate that it applies not solely to the terms of legislation providing State aid for schools, but to ministerial or administrative criteria formulated, to this end, under legislative authority.

³⁴ Victuallers' Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoghaire and Bray) Order, 1948 (S.I. No. 175 of 1948), pursuant to the *Shops (Hours of Trading) Act 1938*, s. 25.

³⁵ *Ibid.*

practice of religion,”³⁶ referring both to the Preamble as well as the historical context of the enactment of the Constitution. Therefore, it held that where a conflict existed between a rigid application of the anti-discrimination principle and the free practice of religion, the latter would prevail and distinctions on the enumerated grounds would be permitted where necessary to this end. Walsh J. stated:

[a]ny law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion ... would be invalid having regard to the provisions of the Constitution, unless it contained provisions which saved from such restriction or prevention the practice of religion of the person or persons who would otherwise be so restricted or prevented.³⁷

Thus, not only were distinctions on religious grounds permitted by the Constitution under certain circumstances, they were positively required if the State was to uphold the free practice of religion in certain cases (although as will be discussed below, it is likely that the range of circumstances in which such differentiation is *required* is different from those in which it is merely *permitted*). Thus, in concrete terms, the Constitution could be read, perhaps, as permitting “positive discrimination” towards certain religious groups in order to uphold their right to practise their religion freely. However, it should be noted that the *Quinn’s Supermarket* doctrine permits distinctions or discriminations on religious grounds, as might logically be expected, only where in fact *necessary* to the guarantee of the free practice of religion. Despite the liberal doctrine which it formulated, the Supreme Court struck down the impugned measure because it exempted Jewish Kosher shops from the ambit of shop closing hours on all weekdays other than Saturday, going further than necessary to compensate Jewish shopkeepers for the loss of trade on the Sabbath, thereby constituting “discrimination more than is necessary.”³⁸ This limitation on constitutionally legitimate distinctions on religious grounds is more emphatically underlined by the Court’s subsequent ruling in *Re Article 26 and the Employment Equality Bill 1996*, where it stated: “[i]t is constitutionally permissible to make ... discriminations on grounds of religious ... belief ... *insofar – but only insofar –* as this

³⁶ *Quinn’s Supermarket*, *supra* note 27 at 11.

³⁷ *Ibid.*

³⁸ *Ibid.* at 26.

may be necessary to *give life and reality* to the guarantee of the free profession and practice of religion.”³⁹ Thus, while the Supreme Court has adopted a strict and literalist interpretation of Article 44.2.3^o, it has qualified this stance with reference to a deeper constitutional imperative, but in turn, has limited the scope of this qualification with reference to an inchoate and indeterminate criterion of “necessity.”

Therefore, on one view, the special financial arrangements for Protestant secondary schools do not constitute unconstitutional discrimination on religious grounds to the extent that they are necessary to guarantee the religious liberty rights of the Protestant community in this context, since an overly literalist or rigid interpretation of Article 44.2.3^o in this context would, in the vein of the *Quinn’s Supermarket* doctrine, fail to recognise the purpose of this provision in upholding the religious liberty of the Protestant community. This argument has been advanced by Professor Gerry Whyte in a recent letter to *The Irish Times*. He stated:

[o]ne could argue that the type of discrimination caught by this provision is unjust discrimination where two similarly situated groups are, without justification, treated differently by the State. If so, then arguably this provision would not prevent the State providing additional support to Protestant schools *where such aid is intended to “level the playing field”, so to speak*. One could also argue that Article 44.2.4 should not be interpreted in isolation but should be construed in the light of the guarantee of religious freedom in Article 44.2.1, and the approach taken by the Supreme Court to the interpretation of Article 44.2.3, which prohibits the State from discriminating generally on the ground of religious profession, belief or status.⁴⁰

In this brief letter, Whyte does not distinguish between the block grant and the ancillary grant, or discuss whether these might differ in terms of their degree of necessity to the religious liberty rights of the Protestant community. It appears likely that the reason the Government has maintained the block grant but terminated the ancillary grant is that, as per the advice apparently received by the Attorney General, it has taken account of the *Quinn’s Supermarket* test and determined that while both the block grant and ancillary grant constitute *prima facie* “discrimination” on religious

³⁹ *Employment Equality Bill*, *supra* note 27 at 358 [emphasis added].

⁴⁰ “Letters to the Editor,” *The Irish Times* (24 October 2009) [emphasis added].

grounds within the meaning of Article 44, the block grant is a constitutionally permissible (or constitutionally required) discrimination because it is necessary to the religious liberty of Protestants, while the ancillary grant is impermissible because it is not.

This seems to be the rationale informing the Minister for Education's statement, cited above, which argues that the religious liberty rights of Protestants are upheld through the continuation of the block grant.⁴¹ Recall that while the block grant is used to offset the cost of fees in residential Protestant schools for those seeking to have their children educated under this ethos, the ancillary grant provided certain non-teaching costs normally made available only to non-fee paying or "free" schools. In that light, it is possible to understand why it might be argued that the ancillary grant, unlike the block grant, is not strictly "necessary" in order to uphold Protestants' religious freedom, merely constituting a benefit for schools which is not required to enable Protestants to attend those schools, and therefore, which is constitutionally impermissible within the *Quinn's Supermarket* test.

However, the doctrinal criterion of "necessity" within the *Quinn's Supermarket* test has not been applied as narrowly in the Supreme Court jurisprudence as the Government's position appears to suggest, and therefore, it is suggested that Whyte's interpretation of the test in this case is the correct one, with the *Quinn's Supermarket* doctrine extending constitutional cover to the ancillary grant as well as the block grant. The reasons for this are quite simple. Although the Supreme Court has been ostensibly strident in its "*only insofar as necessary*" stance, it has been remarkably liberal, in its limited jurisprudence on this point, in what it has regarded as "necessary" to religious freedom, appearing even to contradict the sense of urgency and immediacy in the term. The *Quinn's Supermarket* case related to the State's response to certain burdens caused by doctrinal requirements of the Jewish religion as determined in evidence to the Court, and for this reason, must be treated with some circumspection as a precedent for the question at hand, because the accommodation of no such doctrinal requirement is in consideration in the present discussion.

⁴¹ *Supra* note 19 and accompanying text.

However, the rule arising from the ruling is articulated in broad terms, and it is very much possible to extrapolate from the case what discriminations the Court regards, in a broader sense, as “necessary” to religious freedom, and therefore, as constitutionally permissible. Recall that the Court addressed the constitutionality of a regulation which exempted Kosher butcher shops from the scope of commercial closing hours in order to compensate Jewish traders for loss of trade on the Sabbath. It found that this was “discrimination more than was necessary” because it exempted the Kosher shops on all weekday evenings as well as Saturday evenings (observance of the Jewish Sabbath was seen as precluding the sale or purchase of meat on Saturday mornings).⁴² Nonetheless, the majority judgment, delivered by Walsh J., apparently assumed that a measure simply intended to compensate Jewish traders for burdens associated with their not trading on the Sabbath was “necessary” to their religious freedom. He referred to the exemption from Saturday trading avoiding “pressures upon the practice of the Jewish religion.”⁴³ The hypothetical, more limited exemption on Saturday evening, which Walsh J. regarded as both constitutionally permissible and constitutionally required, would merely enable Jewish persons to purchase meat on Saturday evenings, following Sabbath observance, rather than on Saturday mornings, during Sabbath observance (all butcher shops were permitted to open on Sunday). A failure to exempt Kosher shops on Saturdays, which Walsh J. saw as constitutionally required, would not have prevented Jewish persons from observing the Sabbath, nor was the purchase of meat on Saturday evenings itself a requirement of the Jewish religion (furthermore, as the Court acknowledged, the advent of modern refrigeration techniques lessened the strict necessity even of the Saturday exemption by the date of hearing of this case). Had the exemption not been granted, even on the limited Saturday evening period which the Court saw as constitutionally required, the only result would have been that observant Jews would have been unable to purchase meat on Saturdays. There would have been no coercive restraint of, or interference with the practice of religion *per se*.

⁴² Kenny J. noted that “[t]he Jewish Sabbath begins at sunset on Friday and continues until darkness sets in on Saturday evening. During that time Jewish shopkeepers must keep their shops closed and Jews cannot buy anything as all work on the Sabbath is prohibited by the laws of their religion”; *Quinn’s Supermarket*, *supra* note 27 at 30.

⁴³ *Ibid.* at 26 [emphasis added].

Other precedents give even more emphatic indications that religious “discriminations”, in order to remain constitutionally valid, need not necessarily lift a coercive restraint on the actual practice of religion, but may merely seek to avoid – in the terms used by Walsh J. – “pressures” on the practice of particular religions. In the aforementioned *Employment Equality Bill* ruling, which addressed the constitutionality of the exemption of State-funded schools from the legislative prohibition on religious discrimination in employment, the Court referred to measures necessary to give “*life and reality*”⁴⁴ to the constitutional guarantee of the free practice of religion. There is a curious disparity between the ostensibly rigid criterion of “necessity” and the broad, indeterminate end of giving “life and reality” to religious practice. It appears not to mean the minimum which the State must undertake to permit particular religious practices or prevent unwarranted interference therein, but instead opens up a zone of constitutionally permissible accommodation of religion which seeks to avoid “pressures” on religious practice, including the mere temporal burdens or disadvantages, rather than coercive restraints, associated with such particular practices. This may be understood in light of the fact that the Constitution appears to recognise religion, in a non-denominational sense, as something of a public good, whose practice it may facilitate and encourage in an appropriately non-sectarian way.⁴⁵ Furthermore, the Supreme Court, in the *Employment Equality Bill* ruling, did not outline a clear relationship of necessity between legislative permission for religious discrimination in employment, and the ability of persons to engage in any particular religious practice without restraint; implicitly, perhaps, it regarded the exemption as necessary merely to facilitate parents’ broad interests in having a religious ethos upheld within a particular school. Given that not all citizens even have access to schools specifically reflecting their beliefs, this provision could hardly even be regarded as “necessary”, in the strict sense, if one were to follow the criteria of “necessity” which the Government has apparently adopted in the issue under consideration.

⁴⁴ *Employment Equality Bill*, *supra* note 27 at 358 [emphasis added].

⁴⁵ Keane J. interprets Article 44 in *Campaign* as recognising that “religion plays an important part in Irish life ... [and] the importance of the part played by religion in the lives of so many people.” See *Campaign*, *supra* note 7 at 358-359. Furthermore, Article 44.1 obliges the State to “honour and respect” religion, without naming any denomination, while it also provides that “the Homage of public worship is due to Almighty God.”

In light of the above, the “ancillary grant” for Protestant schools can hardly be regarded as constitutionally impermissible under the *Quinn’s Supermarket* test. Recall that the historical purpose of the grant was to place Protestant schools on a footing of equality with the Catholic secondary sector in recognition of the fact that, in order to serve a geographically dispersed community, the Protestant schools could not come within, and receive the benefits of, the free secondary scheme. In this sense, it was clearly directed at avoiding “pressures” upon the practice of the Protestant religion, which might put it at a great disadvantage in the education sector in view of its particular demographic profile. While the measure was not necessary in order to avoid coercive restraints on the practice of Protestantism, it was necessary in order to ensure that Protestant parents would receive the same benefits that are available to Catholic parents under the free secondary education scheme, given that many Protestant parents would otherwise have been unable to avail of this scheme while maintaining the integrity of their religious beliefs. It therefore seeks to avoid the inadvertent imposition by the State of a significant temporal burden or disadvantage arising from the choice of the Protestant religion over the Catholic one. It surely is as urgent or “necessary” an imperative, in the accommodation of the free practice of religion, as ensuring that Jewish persons do not have to choose between the observance of their Sabbath and the purchase of meat on a Saturday, as the availing of public education on an equal basis with others may be regarded as a greater temporal necessity than the purchase of meat on any particular day. From this perspective, Protestant parents should not have to forego the benefits made available to their Catholic peers as a result of the exercise of their religious choice.

As already mentioned, it has been reported that the abolition of the ancillary grant has placed financial pressures on Protestant schools, which may force some to eventually close.⁴⁶ Surely, then, even this purpose of the ancillary grant, in maintaining a viable network of Protestant schools, makes it a constitutionally permissible measure which sought to avoid “pressures” on the Protestant religion. Digressing slightly, the Government’s position is even more untenable where it holds, presumably under the *Quinn’s Supermarket* doctrine, that while the ancillary grant is not necessary to the free practice of religion, the block grant remains so, since it

⁴⁶ McGarry (21 October 2009), *supra* note 16.

enables Protestants to attend a school reflecting their religious beliefs. However, if the ancillary grant is not necessary to religious freedom in the narrow sense it assumes, neither is the block grant. There is no recognised “right” in Ireland for all individuals to attend a publicly-funded school specifically attuned to their religious or other beliefs, as further considered below. The *Education Act 1998* merely refers to the “need to reflect the diversity of educational services provided in the State,”⁴⁷ but also, to “*the effective and efficient use of resources*”⁴⁸ as a criterion of school recognition. This reality, evidently acute in contemporary Ireland,⁴⁹ is specifically foreseen in Article 44.2.4° of the Constitution, which envisages that some children will attend denominational schools as non-coreligionists, and makes provision for this scenario. In summary, therefore, the Government’s apparent criterion of the “necessary” as per the *Quinn’s Supermarket* doctrine, insofar as it can be extrapolated from its limited and terse pronouncements, is incoherent and dysfunctional.

B. The ancillary grant was allocated according to a secular criterion

On the one hand, as outlined above, the argument advanced by Whyte in the *Irish Times* is quite convincing on the basis of the limited Supreme Court jurisprudence on this point, suggesting that “discrimination” on religious grounds may be constitutionally permissible for a broader range of goals than the Government appears to assume. On the other hand, however, this debate assumes, in the first place, that the ancillary grant is in fact extended on a religiously discriminatory basis, where discrimination, as the Supreme Court held, merely indicates “difference” or “distinction”. Just as a discrimination on religious grounds is constitutionally permissible only insofar as it is necessary to promote the free practice of religion, it is only necessary to undertake this analysis, and to apply this *Quinn’s Supermarket* test, to the extent that a measure in fact constitutes a *prima facie* “discrimination” on the enumerated grounds of religious belief, profession or status within the meaning of Article 44. The argument which I wish to advance here is that although Whyte’s argument is correct insofar as it applies to *prima facie* instances of religious

⁴⁷ The Minister must also have regard to “any charters, deeds, articles of management or other such instruments relating to their establishment or operation,” s. 7(4)(iii)–(iv).

⁴⁸ Section 6(1)(e) [emphasis added].

⁴⁹ G. Carbery, “Catholic control of schooling not tenable, says Archbishop,” *The Irish Times* (17 June 2009).

“discrimination”, it is not even necessary to make this argument because the ancillary grant does not, in the first place, even constitute a “discrimination” within the meaning of Article 44; it is not then even necessary to demonstrate that it serves the purpose of giving “life and reality” to the constitutional guarantee of religious freedom – although it clearly does so.

The basis for this argument is relatively simple. It may be agreed that a measure is caught by Article 44.2.3° on an initial *prima facie* basis simply where it adopts as a criterion of differential treatment, a criterion of, or closely related to, religious “belief, profession or status.” For example, a measure which extended a benefit on the basis of religious profession, belief or status, on the basis of a person’s specific religion or lack of religion or rank within a religion, would violate Article 44.2.3° on a *prima facie* basis, unless it could be shown that this differentiation promoted the free practice of religion. It is not clear from the existing jurisprudence whether the non-discrimination principle simply precludes explicit or facial distinctions on religious grounds, such as those which name religious denominations, or explicitly specify religious belief in a broader sense as a criterion of differential treatment, or whether, on the other hand, it also precludes criteria implicitly tailored or “gerrymandered”⁵⁰ such as to discriminate on religious grounds – that is, an ostensibly secular criterion which, when placed in context, seeks to indirectly discriminate on a religious basis (it seems implausible, for example, that a criterion of “only those who agree to eat pork” or “those who attend Church on Sunday” would pass muster as a neutral or secular criterion).

It scarcely matters for current purposes because, in either case, the ancillary grant is not extended on the basis of religious belief, profession or status *per se*, but on the basis of a clear and rational secular criterion, relating to difference of social function, that has no *necessary relationship* with religious profession, belief or status. The categories of persons or institutions subject to differential treatment are not constituted according to any religious criterion; they are instead constituted according to secular criteria relating to public policy, which happen to overlap – to a significant but not complete extent – with the demographic profiles of different religious

⁵⁰ For an interesting analogy in the U.S context, see *Church of Lukumi Babalu Aye v. City of Hialeah* (1993) 508 U.S. 520 (the ‘Santeria Slaughter Ruling’).

communities. But this overlap between secular criterion and religious affiliation is not a “gerrymander” towards the end of religious discrimination, it is highly inadvertent and contingent on the markedly different social and demographic positions of the Catholic and Protestant communities in Ireland. In the furore surrounding the recent reform, it has been somewhat overlooked that the ancillary grant was also historically allocated to the sole Jewish secondary school in the State, along with the fee-paying Protestant secondary schools.⁵¹ In this light, it becomes clear that the ancillary grant was not allocated on the basis of any criterion of religious affiliation, Protestant or otherwise, but according to a secular criterion relating to concrete differences of social and demographic circumstance. In clearer terms, it has been allocated to those secondary schools serving demographically marginal and dispersed religious communities, in recognition of their purpose in enabling parents belonging to these communities to avail of the benefits that are accorded to Catholic parents under the free secondary scheme. Although the schools coming within this category were entirely Protestant bar one, this fact does not mean, in itself, that this category was delineated according to a sectarian criterion in the sense prohibited by Article 44. Thus, while an ostensibly “neutral” criterion relating to difference in social function – that of serving a dispersed community – may be substantively skewed, in real terms, to a particular denomination or denominations, it may be recalled that Article 44.2.3° warrants non-discrimination in the formal sense, rather than substantive equality or even-handedness at the level of outcome.

On this reading, this secular criterion may encompass the schools of different religious communities according to shifting and contingent demographic circumstances. Had a Muslim, fee-paying residential school been established in the capital, for example to cater for a dispersed Muslim community, it would presumably have been entitled to the ancillary grant on the same basis as the Protestant schools, but no such suitable comparator exists in this case, which would point to

⁵¹ While Minister for Education, Mary Hanafin stated in Dáil Éireann: “[t]here are currently 56 fee-charging second level schools in the country, of which 21 are Protestant, two inter-denominational, one Jewish and the remainder Catholic. Fee-charging schools, *with the exception of the Protestant and Jewish fee-charging schools for which special arrangements apply, do not receive capitation or related supports. The block grant has its origins in the desire of the State to enable students of the Protestant and Jewish persuasions to attend schools which reflect their denominational ethos, and it includes payments in respect of capitation. In addition, Protestant and Jewish fee-charging schools are eligible for payment of such grants as the transition year support grant, the secretarial grant and caretaking grant.*” See 638 Dáil Deb. Col. 1009 (2 October 2007) [emphasis added].

discrimination between those similarly situated. In this light, the category of those benefiting from the ancillary grant is determined by contingent demographic and social circumstances rather than religious affiliation *per se*, just as the category of religious denominations benefiting from governmental schemes in other contexts may similarly be constituted. For example, if the State were to provide funding for charitable groups that met certain secular requirements to carry out certain secular functions, it would hardly be regarded as constitutionally impermissible discrimination if, say, only Protestant and Catholic charities qualified for such aid, while others did not. The Government has attempted to confuse the social and secular function which the ancillary grant performed with the coincidence of its scope of application with a category of schools which happen to be almost exclusively Protestant, yet which is a category that may nonetheless be also described or defined in terms of a clear social function. It no more constitutes a discrimination against Catholics and in favour of Protestants, as the Government claims, than does the fact that the State funds the secondary schools of some religious denominations and not of others, according to the secular criterion of whether that religious denomination constitutes an “appreciable number” within a particular area, which may warrant the establishment and recognition of a school. Furthermore, while the fact that a Jewish school has also received the grant is instructive, it is not in itself decisive or necessary to the argument at hand. Even if the grant had historically been enjoyed exclusively by Protestant schools, this could still not be regarded as constituting discrimination in favour of Protestant schools, insofar as the only secondary schools in the State serving a demographically dispersed minority community simply happened to be Protestant. Discrimination, within the meaning of Article 44, would surely only arise where different religions within this clearly secular category were treated differently, for example, where the hypothetical comparator of a Muslim fee-paying boarding school were refused the grant.

It is especially implausible to claim that the Catholic secondary schools have been discriminated against because none, in the first place, are encompassed by this secular category, within which the State could not discriminate between different religions. There is certainly no Catholic school in the State which performs the same social function as the Protestant secondary schools in catering to members of a dispersed religious community who could not otherwise avail of free secondary

education in accordance with their beliefs. The categories in question, those who received the ancillary grant and those which did not, as a function of their separate demographic profile and social role, do not even coincide fully with religious affiliation – apart from the Jewish school, secondary schools under secular patronage are, presumably, equally excluded, along with the Catholic schools, from the benefits of the ancillary and block grants – but even the partial coincidence which does exist is based on the contingent demographic features of contemporary Irish society, rather than any criterion related to religious belief, profession or status *per se*. The “discrimination” between Catholic and Protestant fee-paying secondary schools was based on a difference of social function, rather than their religious status in itself; it just happens that in the Republic of Ireland, all those schools serving this distinct function are Protestant.

The potentially misleading overlap and coincidence of secular and religious criteria is illustrated by the Supreme Court ruling in *Campaign*.⁵² The Court rejected a challenge to the State payment of the salaries of Catholic and Protestant chaplains in Community and Comprehensive (both secondary) schools as an unconstitutional endowment of religion contrary to Article 44.2.2°. While the Court held that the payment was permissible in light of the constitutional mandate for State support of denominational education in accordance with parents’ convictions, it attached two important provisos to its ruling. These included the caveat that “the system of salaried chaplains is available to all community schools of whatever denomination on an equal basis in accordance with their needs,”⁵³ presumably in order to avoid any impropriety arising under Article 44.2.3°. At the time of the ruling, the State funded the salaries of only Catholic and Protestant chaplains, but the Court viewed this as constitutionally legitimate. Why was this not an unconstitutional discrimination in favour of the Catholic and Protestant denominations and against others – bearing in mind that the State may, presumably, unconstitutionally privilege a plurality of denominations, as well as a sole denomination? Again, the benefit, viewed as the permissible secular good of providing for the religious choices of parents in the education context, was extended according to a secular criterion, that is, to the category of secondary schools, of whatever religion, seeking State funding of chaplaincies or equivalents. This

⁵² *Campaign*, *supra* note 7.

⁵³ *Campaign*, *ibid.* at 358.

category happened to include solely Catholics or Protestants because only Catholics and Protestants were in such a position as to avail of the scheme, being the only denominations holding patronage status in Community and Comprehensive schools.⁵⁴

What this precedent demonstrates is that the mere fact that certain denominations might receive a State benefit while others do not is not, in itself, “discriminatory” within the terms of Article 44. However, the Government has opportunistically assumed this to be the case, in contradiction both of constitutional precedent and of the longstanding system of support for denominational education which itself casts its Article 44 claim, in this context, in a somewhat absurd light. Whatever one might think of the wisdom or fairness of a public education system reliant on the provision of State funds to denominational institutions, it would be absurd, in terms of constitutional doctrine, to contend that religious denominations which did not receive State-funded chaplaincies in secondary schools were discriminated against by this scheme, if they did not operate any State-funded secondary schools. It is equally absurd, however, in the question of the ancillary grant, to contend that merely because a benefit allocated to schools performing a distinct social and secular function is not allocated to those denominational schools which do not serve the same function, those denominations are then discriminated against on grounds of religious status. This is to opportunistically confuse categories related to public policy and secular function, with the contingently different religious profile of those institutions falling within each category. As Hogan and Whyte point out, the non-discrimination guarantee has “no application to a classification which ... although based on an apparently neutral ground in the context of religious discrimination, has a disproportionate impact on certain individuals because of their religious profession, belief or status.”⁵⁵

⁵⁴ It might be queried why only Community and Comprehensive schools benefited from the chaplaincy scheme, or indeed, whether this criterion is in itself “gerrymandered” so as to discriminate in favour of these denominations, or unfairly excludes those denominations which are not patrons of such schools. This might invite constitutional challenge from a recognised secondary school which sought support equivalent to the chaplaincy scheme in Comprehensive and Community Schools. The rationale for the distinction may be located in Barrington J.’s ruling in the *Campaign* case: “[i]n community schools it is no longer practicable to combine religious and academic education in the way that a religious order might have done in the past. Nevertheless parents have the same right to have religious education provided in the schools which their children attend.” *Campaign, ibid.* at 358.

⁵⁵ G. Hogan & G. Whyte, *supra* note 8 at para. 7.8.97.

This restriction of the ambit of the non-discrimination guarantee in the scant Supreme Court jurisprudence, to what Hogan and Whyte term a “limited understanding of equality”,⁵⁶ militates against the Government’s claim. In *Murphy v. IRTC*,⁵⁷ the Court briefly dismissed the claim that the statutory prohibition on religious advertising on television and radio did not constitute discrimination on religious grounds within the meaning of Article 44, noting that it was “directed at material of a particular class and not at people who profess a particular religion”, and that “all people in the same position are treated equally.”⁵⁸ While this claim bounds on the inexplicable given the use of a criterion explicitly related to religious belief in the relevant statutory prohibition, it further weakens the Government’s claim in relation to the ancillary grant, given that no such explicit religious criterion is even used in this case. The distinction is between schools serving different demographic constituencies, rather than persons of different religions. “All people in the same position are treated equally”, where the position is that of having to send one’s child to a boarding school in order to avail of free secondary education in accordance with one’s convictions. The fact that this category is constructed in a somewhat haphazard and inconsistent way in relation to its overall aim of promoting parental freedom of choice, does not fall within the remit of constitutional law. A similarly restricted idea of religious equality, again militating against the Government’s claim, is evident in *Greally v. Minister for Education (No. 2)*,⁵⁹ where the High Court rejected the plaintiff teacher’s claim that the requirement of teaching experience in Roman Catholic schools, as a criterion for inclusion on a recruitment panel, constituted discrimination within the meaning of Article 44.2.3°. In a similar vein to the case at hand, it was considered irrelevant that the criterion may have been close to religious affiliation where applied, insofar as the formal criterion related to an identifiable secular purpose.

IV – Are the ancillary and block grants constitutionally required?

It is argued in the previous section that both the ancillary and block grants are constitutionally permissible, primarily because neither constitutes discrimination on religious grounds *per se* within the meaning of Article 44, leaving aside the suitability

⁵⁶ *Ibid.*

⁵⁷ [1999] 1 I.R. 12.

⁵⁸ *Ibid.* at 22.

⁵⁹ [1999] 1 I.R. 1.

or sufficiency of these measures, in a broader sense, to the broader imperative of freedom of parental choice in this context. However, I suggest in this section that neither of the measures is constitutionally required. It is this contention which, in Section V, grounds an “external” critique of the shortcomings of the Irish constitutional framework in upholding religious liberty rights in the public education context.

On the one hand, Walsh J. asserted in the *Quinn’s Supermarket* case that certain State accommodations of religious communities were not only constitutionally permissible, but constitutionally required. Examples likely include exemptions from generally applicable secular regulations which inadvertently restrain or interfere with religious practices, within the boundaries imposed by public order requirements.⁶⁰ On the other, the analysis in Section III above suggests that the Constitution, and the *Quinn’s Supermarket* doctrine specifically, opens up a range of religious accommodation which is constitutionally permissible in view of the constitutional conception of religion as a public good, but of which many specific and determinate measures could not possibly be viewed as constitutionally required, in the sense that the Courts could compel the legislative or executive organs to specifically perform these. It is argued that both the block grant and ancillary grant are examples of such measures. Thus, the range of measures that the State may permissibly take in order to accommodate religious practice is not co-extensive with those it must take in order to permit free religious practice. In this article, I seek to address the implications both of the claim that measures such as the ancillary grant lie outside the range of permissible accommodations of religion, but more broadly, and assuming that the first claim is mistaken, of the possibility that such accommodation may be constitutionally left to discretionary accommodation. On the one hand, the zone of required rather than merely permissible accommodation of religion may be confined to the selective lifting of State burdens or “pressures” on religion, otherwise generally applicable, rather than positive measures involving some form of assistance or aid. Examples of the “constitutionally required” category probably include the *Juries Act 1976*, which is

⁶⁰ Article 44.2.1° makes the guarantee of the free practice and profession of religion subject to the requirements of “public order and morality.”

not denominationally specific in its exemption of religious persons,⁶¹ and the *Slaughter of Animals Act 1933*, which exempts specifically Jewish and “Mohammedan” persons from its scope. Similarly, in *McGrath and Ó Ruairc v. Trustees of Maynooth College*,⁶² the Supreme Court held, following *Quinn’s Supermarket*, that the constitutional prohibition on religious discrimination could not be applied to the functions of religious bodies, given that this would stifle their constitutionally protected organisational freedom and independence. It is difficult to envisage, in light of the separation of powers doctrine in particular, how the Courts might require the other organs of State to perform specific accommodations of religion involving expenditure, or otherwise very particular measures such as that under consideration, which do not consist merely of the lifting of a regulatory burden on religions.

However, it is not even necessary to consider these complex doctrinal issues surrounding the separation of powers and the constitutional limits of the judicial function in order to show that the block grants and ancillary grants are not constitutionally required accommodations of religious freedom. This is the case simply because there is no right for individuals, under Irish constitutional law, to attend a publicly-funded school specifically attuned to their religious or other beliefs, the end which the ancillary and block grants serve for the Protestant community. This is based not only on the rather mundane observation that no state may provide the panoply of institutions, in all geographical areas, fully appropriate to all religious, moral and philosophical preferences that might exist within the citizenry. More simply, it is based on a straightforward textual analysis of Article 44. Article 44.2.4° envisages that certain children will attend schools imparting a denominational ethos other than their own, as non-coreligionists. This is clear because it provides specific protections appropriate to this outcome, stating “legislation providing State aid for school shall not ... 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.” It would be difficult to square the fact that the Constitution envisages the attendance of non-coreligionist citizens at State-funded denominational schools with any

⁶¹ The Act automatically excludes from jury service “a regular minister of any religious denomination or community” and “vowed members of any religious order living in a monastery, convent or other religious community.”

⁶² [1979] I.L.R.M. 166.

contention that citizens, as individuals, universally enjoyed a “right” to attend a school specifically committed to imparting their beliefs, even leaving aside the empirical impossibility of providing such an outcome for all citizens. Moreover, it would be implausible, to say the least, to claim that while the Constitution envisages that the State may discharge its obligation to provide for free primary education, for some children, through institutions committed to imparting a religion other than their own, that Protestant children, specifically, were somehow constitutionally entitled to special measures to avoid this outcome. This is not to decry “special treatment” for Protestants in relation to other minorities, but to point to the broader limitations of the constitutional framework for safeguarding religious freedom in the public education context.

Article 44.2.4° accordingly recognises, implicitly, the limitations, imposed by certain social and demographic realities, on the *formal* religious pluralism of the constitutional framework, in this specific context. It provides for formal equality, in the sense of non-discrimination, between different religious and other groups in the State recognition and funding of schools; it does not, however, guarantee the right of all individuals to avail of a school specifically attuned to their beliefs, although it has become commonplace in public discourse to speak of such a “right” as if this were a viable project.⁶³ If such a “right” exists at all, it exists only for groups, and indirectly, on the basis of the guarantee against discrimination in the State funding of denominational schools, which, as explored below in Section V, cannot translate as a right for individuals to attend a school in which they will not be made subject to a certain level of interference in the choice, determination and manifestation of their beliefs.

Following *O’Shiel v. Minister for Education*,⁶⁴ it appears that a necessary criterion for recognition of this “right” to public education under a particular ethos is that a community in a particular area reach an “appreciable number”, or what has been termed elsewhere as a “critical mass”⁶⁵ of parents seeking to have their children

⁶³ See for example, T. O’Gorman, “Parental choice key issue in debate on schools,” *The Irish Times* (7 July 2009) [hereinafter O’Gorman]; J. Murray, *The Liberal Case for Denominational Schools* (Dublin: Iona Institute, 2008).

⁶⁴ [1999] 2 I.R. 321 [hereinafter O’Shiel].

⁶⁵ O’Gorman, *supra* note 63.

educated according to a particular religious or other ethos. Laffoy J. suggested that if the State were to refuse to recognise such a school which otherwise met certain minimum, “rational” criteria, and discharge its obligations solely through funding and recognition of Roman Catholic schools, this would “render worthless the guarantee of freedom of parental choice, which is the fundamental precept of the Constitution,” and be “incompatible with the lawful preference of *an appreciable number of parents in the locality*.”⁶⁶ The *Education Act 1998* adopts a similar criterion for the recognition of schools under private patronage, that “the number of students who are attending or are likely to attend the school is such or is likely to be such as to make the school viable,”⁶⁷ while the Minister must have regard to “the desirability of diversity in the classes of school operating in the area likely to be served by the school.”⁶⁸ Thus, on the one hand, only certain categories of persons, acting together as a “critical mass” in seeking school recognition, enjoy the “right”, under Irish law, to public support for a school imparting a particular religious ethos – bearing in mind that the scope even of this rather inchoate right remains unclear.⁶⁹ On the other, the Constitution makes clear that all that those persons not in such a position of social and demographic strength may expect is to enjoy certain residual protections within State-funded schools which they will attend as non-coreligionists, most explicitly the right of withdrawal from religious instruction classes within publicly-funded, Catholic-ethos schools. Where Protestant families do not enjoy, in particular geographical areas, the “critical mass” that warrants the establishment of a recognised school, the Constitution, for reasons already argued, permits the State to undertake special measures to facilitate parents in having their children educated in schools reflecting this tradition. However, all the Constitution actually requires of the State in this scenario is to ensure that Protestants (and other minorities) are not made to attend religious instruction classes in the Catholic schools which, bar waiving altogether the benefit of public education, citizens must often attend as a matter of necessity, given

⁶⁶ O’Shiel, *supra* note 64 at 347, 344 [emphasis added].

⁶⁷ Section 10(2)(a).

⁶⁸ Section 10(2)(b). The prior *Rules for National Schools* were even more explicit in this criterion, making the “right” of denominational education subject to the crude contingency of number, providing that “state aid for the establishment of a new national school may be granted on application by the representations of a religious denomination,” but only “where the number of pupils of a particular denomination in that area is sufficient to warrant the establishment and continuance of such a school.” *Rules for National Schools* (Dublin: Stationery Office, 1965), Chapter 1, rule 3.

⁶⁹ For example, it is not clear whether this right derives solely from the guarantee of parental authority under Article 42.1, or also from the right of non-discrimination in the State funding of denominational schools under Article 44.2.4°.

the overwhelming prevalence, and often monopoly, of Catholic schools in many areas of the State, particularly at primary level.⁷⁰ Even the block grant, assumed by the Government itself as so essential to the religious liberty right of the Protestant minority, therefore occupies a precarious position, existing by constitutional licence rather than constitutional requirement. Again, this is not to query the desirability or the necessity of the block grant at the broad level, but to point to the crude and limited scope of religious freedom guaranteed to citizens at the constitutional level, subject to various demographic contingencies as explored below.

V – The ancillary grant controversy illustrating the shortcomings of the constitutional framework for religious liberty in education

It is itself the fact that special provision for religious minorities, failing to attain a “critical mass” of co-religionists in particular areas, is constitutionally permissible rather than constitutionally required, that shows up the stark shortcomings of the constitutional framework for safeguarding religious liberty in education. This shows, in particular, that religious liberty rights are safeguarded in a highly precarious and unequal manner in this context, as a function of the power relations prevailing both between and within the different religious groups, in particular, in Irish society. It may be recalled that the Constitution guarantees religious liberty in education not by ensuring that the State provides public education through institutions in which the different and incompatible beliefs of citizens will be respected on a basis of equality, in order that they are not subjected to interference in the choice and determination of their beliefs, but by recognising and funding the schools of different religious denominations, on the basis of formal equality between these. But this formal equality between groups does not translate as an equal religious liberty for individual citizens, as the extent of their rights in this domain is made subject to the arbitrary contingency of the relative prevalence, in both demographic and social terms, of the religious (or other) group to which they happen to belong.

⁷⁰ Ninety-two percent of recognised primary schools operate under a Roman Catholic ethos. See A. Mawhinney, *Freedom of Religion and Schools: the Case of Ireland* (Saarbrücken: VDM, 2009) at 50 [hereinafter Mawhinney].

I have argued in a previous article⁷¹ that the inequalities in the guarantee of religious liberty rights inherent in the formally pluralist model of denominational patronage is best critiqued through the prism of John Rawls's justice as fairness.⁷² Rawls's theory insists that basic liberties are specified independently not only of any "comprehensive" or "metaphysical" doctrine of final human ends, but of the "natural and social contingencies", the morally arbitrary disparities of political and bargaining power prevailing in ordinary societies.⁷³ This abstraction of liberties from power relations and competing social claims is performed by the device of the original position, which reflects a conception of justice rooted in the idea of social contract. However, it is not necessary to accept this specifically Rawlsian premise in order to accept the critique, detailed in this section, of the inadequacies of a scheme for guaranteeing religious liberty in education which is dependent on the devolution of the public education function to what happen to be the most socially and demographically prevalent religious denominations in society. It is merely necessary to share the broad and uncontroversial premise that a fully adequate scheme for religious liberty in education should not make the extent of a person's religious liberty in this context subject to the contingency of the social and political strength of the religious community to which he happens to belong, and that his religious liberty claim, as an individual, must not be subsumed within the broader social and political claim of his community.

On the one hand, the full measure of religious liberty in education is made dependent, in the absence of a public secular system, on the availability of a local publicly-funded school whose ethos is consistent with parents' conscientious choices; this depends on certain arbitrary demographic features in particular, as detailed above. Failing this, the residual right to withdraw from religious instruction classes, as a non-coreligionist, represents an inadequate guarantee of religious liberty rights in view of the notorious policy of the "integrated curriculum", under which the religious ethos of a publicly-funded school may be integrated into the broader school environment and secular instruction. Mawhinney in particular has documented how this policy renders

⁷¹ E. Daly, "Religious Freedom as a Function of Power Relations: Dubious Claims on Pluralism in the Denominational Schools Debate" (2009) 28 *Irish Educational Studies* 235.

⁷² J. Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2002); *A Theory of Justice* (Cambridge: Harvard University Press, 1999) [hereinafter Rawls, *A Theory of Justice*]; J. Rawls, *Political Liberalism* (Cambridge: Harvard University Press, 1999).

⁷³ Rawls, *A Theory of Justice*, *ibid.* at 17.

the right of withdrawal from timetabled religion broadly ineffective, given that non-coreligionist children are, notwithstanding this formal constitutional right, nonetheless made subject to unwanted religious pressures and influences without the consent of their parents.⁷⁴

On the other hand, the history of the ancillary and block grants demonstrates that it is not solely the sheer primacy of crude number, the contingency of “critical mass”, that determines inequalities in the guarantee of religious liberty under the constitutional framework, and within the formally pluralist system of denominational “patronage” which it underpins. Although these special arrangements have undoubtedly assisted certain Protestant parents in the exercise of their religious liberty rights, albeit in a highly *ad hoc* and precarious way, the special arrangements made for particular communities could not be considered an adequate safeguard of religious liberty for all those non-Catholics wishing to avail of free secondary education in accordance with their beliefs. In the most obvious sense, it is not generally applicable or capable of guaranteeing the religious liberty of all those who might seek public education in accordance with whatever religious or other doctrine. The arrangement could not be generalised such as to guarantee all persons, of all beliefs and affiliations, the “right” to attend a school in which their religious or other beliefs were positively recognised. In the first place, this would pre-suppose the existence of the appropriate residential schools, or the means to establish them. The very necessity of the special arrangements for Protestant schools illustrates the deficiencies of the formally pluralist model of educational patronage, in its reliance on the provision of funds to those groups which are well positioned, for arbitrary reasons pertaining to history and demographics, to instrumentalise formally-neutral State support.

Thus, it is not only the demographically crude measure of “critical mass” that is necessary to exercise the precarious right to religious liberty in the public education context, it has also been necessary to draw upon certain forms of social and political capital that enable minority communities in particular to make certain claims on the State. The power relations determining the extent of religious liberty rights under the system of primarily denominational patronage extend beyond the simple criterion of

⁷⁴ Mawhinney, *supra* note 70; A. Mawhinney, “Freedom of religion in the Irish primary school system: a failure to protect human rights?” (2007) 27 *Legal Studies* 379.

number. In one sense, this applies because the Protestant community has historically been able to draw upon certain forms of capital and resources, social and political, necessary to enable it to preserve the religious liberties of its members within a public education system dominated by Catholic-ethos institutions. It has long established and attained recognition for the schools which have been the object of the special arrangements under consideration. Other communities, less well implanted in the State, may be less well endowed in the various forms of capital, social and political, necessary to the process of school establishment and recognition. For these individuals, the extent of religious liberty enjoyed in this context is made subject to certain arbitrary hazards of natural chance arising in the social world, not only in terms of the demographic weight of the community to which they belong, but also on the basis of its social and political power in a multi-dimensional, complex sense.

In another sense, the fact that special arrangements for demographically precarious religious (and other) minorities are merely constitutionally permissible, rather than constitutionally required, makes the guarantee of the full measure of religious liberty in this context subject to the discretion or grace of the State in making such arrangements. The political capital which a particular minority community may enjoy *vis-à-vis* the State at a particular time, then, represents another arbitrary contingency to which the guarantee of religious liberty is made subject in this context. If the Protestant community once enjoyed the political capital or political moral claim necessary to secure special provision for the religious liberty rights of its members within this context, this has now evidently dissipated, with its precarious basis having given way to recent economic pressures. Furthermore, the fact that religious liberty is accommodated in this context through discretionary rather than compelled accommodation of religious choice creates the danger that religions, in order to secure the full measure of their liberties, may have to lobby and ingratiate themselves in order to win political favour, and have the State exercise its discretionary power for their benefit. This in turn jeopardises the broader goal of securing the freedom and independence of organised religion from State power.⁷⁵

⁷⁵ An analogy has arisen in United States constitutional law, where the Supreme Court has repeatedly warned of the dangers, for religious freedom, of permitting the entanglement of State and religion, and the intervention of State power in religious affairs. Thus, “[o]nly anguish, hardship and bitter strife result when zealous religious groups struggle with one another to obtain the Government's stamp of approval.” *Engel v. Vitale* (1962) 370 U.S. 421 at 429.

Accordingly, any consistent critique of the legal framework for the guarantee of religious liberty rights in Irish education must focus not on the repeal of special arrangements for minority groups *per se*, but on the very fact of their necessity within the broader system of predominantly denominational “patronage”, as it is underpinned at a constitutional and legislative level. Just as the devolution of the public education function to denominational bodies leaves the religious liberty rights of individuals subject to the precarious contingencies of natural chance and social position, the *ad hoc* arrangements made for the rights of those ill-served within this framework would appear to be similarly partial, precarious and particularist in their scope. A fully adequate scheme for the guarantee of religious liberty in public education presupposes the full dissociation of religious liberty claims from citizens’ communitarian and religious allegiances, whatever these might be, such that these rights are specified and secured independently of the relative social prevalence of these beliefs and affiliations. In this way, it is possible to view the special arrangements for the Protestant minority as a partial and inadequate corrective whose rationale is consonant with the system whose inadequacies make these arrangements necessary in the first place, because this *ad hoc* scheme assumes that the religious liberty rights of the panoply of citizens, bearing complex, diverse and overlapping religious and other commitments, may be secured by accommodating the claims of religious groups, assumed as homogenous, and – taken together – as fully representative of the range of beliefs and conscientious preferences existing in the citizenry. In a further sense, just as the dominant social and demographic position of the Roman Catholic community translates into a “rights” claim appropriate to fully instrumentalise this position, the corresponding rights claim of the Protestant community is similarly specific to its historically precarious position. For others, particularly the growing ranks of the non-religious as well as the members of peripheral denominations, the claim upon religious liberty rights in education may centre instead around the more modest hope of access to fully non-sectarian schools. Indeed, this less particularist guarantee of religious liberty in education may represent the only way of guaranteeing this right independently of the vagaries of political bargaining.

VI – Conclusion

The history of the special arrangements for Protestant schools in the Republic of Ireland, as well as the controversy surrounding the withdrawal of the ancillary grant, illustrate most notably the precarious state of religious liberty, in the public education context, under Irish law, as well as the highly *ad hoc* nature of the framework for its guarantee. For the reasons outlined, and notwithstanding their inadequate and partial nature, the ancillary and block grants actually extend beyond the minimum guarantees which the Constitution requires the State to provide in the domain of religious liberty and education, although this is not to distract from the spurious position taken by the Government as to the “discrimination” against the Catholic community which the ancillary grant is implausibly supposed to represent. That these measures are not even constitutionally required, however, should direct commentary and polemic to the broader deficiencies of a constitutional and legislative framework that distributes religious liberty rights in such a starkly inadequate and unequal way in this particular context.