The Chimera of State Neutrality in a secularising Ireland.

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The liberal ideal of State neutrality demands of the State that it (a) does not justify its policies on the basis of the intrinsic superiority or inferiority of conceptions of the good life, and (b) does not deliberately attempt to influence people’s judgements of the value of these different conceptions (Kymlicka, 1990, 205). If this is so then it is clear that the Irish State is not and has never been a neutral state: as is evidenced by the existence of a long article in its constitution entitled ‘Directive Principles of Social Policy’. On the other hand, the idea of State neutrality is not absent in Irish political discourse either. A recent Supreme Court decision ruled that the State broadcasting service R.T.E. had acted unlawfully in its disproportionate allocation of broadcasting time to the pro-side in the December 1995 divorce referendum. According to the Chief Justice, in a fair referendum the State broadcasting service had an obligation to see ‘that the scales should be held equally between those for and against’ the proposed constitutional amendment (Irish Times, January 27 200). This suggests that the State should indeed be neutral between rival conceptions of the good and should not use public resources to influence peoples’ autonomous evaluation of those conceptions. Having said that, it would be a mistake to believe that the Irish State has achieved a position of neutrality on religious or moral issues, even if the liberal stance on state neutrality is often invoked in political and constitutional argument. Rather the Irish case demonstrates the difficulty of achieving State neutrality under certain conditions and suggests that the neutrality requirement may not necessarily be the best way to defend liberal values (Barry, 1990).

The 1937 Constitution.

The starting-point for any consideration of State neutrality in Ireland is the 1937 constitution. Not only did it attempt to specify the precise relationship between Church and State, it also attempted to reconcile secular traditions of thinking about politics with Catholic social teaching. On the one hand the constitution established a greater degree of majority-restraining features in the political system than had hitherto obtained (Mair, 1999, Kissane 1998). On the other, the constitution also reflected the values of the majority of the population, and many elements of Catholic social teaching which were incorporated into it have had practical effect in the Irish courts. While a recent review of the constitution has concluded that the constitution has stood the test of time well, it also recommended changes in the constitution in precisely those areas where the influence of Catholic social teaching is most obvious (Constitution Review Group, 1996). In other words, the legacy of the constitution is ambiguous, and precisely because the constitution can only be amended by referendum, differences over its component parts have become a central part of Irish public life in a way that was not envisaged when it was introduced. The constitution in other words is the site of secularising and counter-secularising tendencies in Irish life and a large body of literature has resulted from the confrontation between the two (see Chubb, 1991, Girvin, 1996, Murphy and Twomey, 1998).
Written in 1937 at a time when clerical influence in Irish life was at its peak, the constitution made no effort to reduce the significance of the Catholic Church in Irish public life and indeed went some way towards bringing Church and State closer together. The nature of the relationship that was codified had been forged in the ‘long nineteenth century’ when Irish Catholics were a minority within the United Kingdom. As a result, a close identification between the Irish nation and the Catholic religion developed, and nationalist politicians defended the prominent role accorded the Church in areas of public policy. For example an attempt by the British Government to introduce a non-denominational primary education system in the early 1900’s was frustrated by an alliance between the new Sinn Fein party and the Catholic hierarchy (Browne, 1998, 44). After independence, the Catholic Church retained its control over primary and secondary education, and in 1929 passed a decree stating that no Catholic could attend a non-Catholic primary or secondary school without special permission, a policy that also applied to attendance at Trinity College Dublin. Not only were most schools owned and staffed by the Catholic Church, the training of primary teachers was also largely under the control of the Catholic Church: the only non-denominational teacher-training college closed in 1922 (ibid, 44). Given this degree of clerical control the State made little effort to interfere in the running of the educational system: one Education Minister compared his role to that of a plumber who was called in only when something went wrong (ibid 45).

Independence in 1921 spelt an even greater degree of co-operation between Church and State than has existed heretofore. Sessions of the Irish parliament Dáil Éireann were begun with prayers in Irish; it was customary for elected representatives to attend a special mass before any new parliament was convened; and on the feast day of St. Patrick, Ireland’s national saint, government ministers attended Mass at the Catholic pro-Cathedral in Dublin. Religious festivals, like the Eucharistic Congress in 1932, were given a State reception and government ministers attended as a group (Whyte, 1998, 51). It became standard practice for public works to be blessed on completion, and the attendance of both State and clerical figures at such ceremonies became the norm (Chubb, 1991, 37). During the civil war of 1922-23 draconian security measures passed by the State were on each occasion followed by statements by the hierarchy emphasising the duty of the population to support the government in every way possible. After the civil war it became customary for the Irish army to parade up the aisle of Catholic Churches during morning mass on Easter Sunday, an event that was followed by a ceremony at the local graveyard to commemorate IRA men who had lost their lives during Ireland’s struggle for independence. Thus the forces of militant Republicanism and conservative Catholicism, which had been rent in twain by the Irish civil war of 1922-23, were reconciled in a Church ceremony.

In effect there was little separation of Church and State and by 1937 legislation on divorce, contraception, and freedom of expression had already been brought into line with Catholic teaching (Chubb, 1991, 39). The collusion between a puritanical political elite keen to be seen to be doing its best to defend Catholic values, and a Church anxious to ensure that the new State would not limit its power, is best reflected by the fact that the State’s Censorship of Publication’s Board was usually chaired by a priest! Indeed some politicians were willing to go further than the Church required in order to prove their attachment to the Catholic faith: one future prime minister, William Cosgrave, actually proposing that the new Irish parliament would have a theological upper chamber to ensure that legislation passed would be in accordance with Catholic teaching! The proposal was rejected, but despite the lack of formal theocracy, many have argued that ‘Home Rule’ did in fact mean ‘Rome Rule’, because Cosgrave’s successor, Eamon de Valera, produced a constitution that contained many articles which clearly reflected Catholic teaching (see Browne, 1998, Clarke, 1998,
Inglis, 1999). Indeed under the new constitution, it became obligatory for the President, now the head of State, to make a religious declaration when taking up office (Whyte, 1998, 59).

The preamble to the constitution reads.

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Eire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give ourselves this Constitution.

This clearly suggests that the ‘common good’ to be pursued by the State should be evaluated by religious criteria and implicitly identifies the Irish nation with the Catholic religion. Protestants and Catholics alike value the Holy Trinity, but nobody can have any illusions as to the religious identity of the nation which was struggling to be free. One view is that this preamble does not matter since it is not an essential part of the constitution. However, since the title ‘Bunreacht na hEireann’ precedes the preamble and since the preamble itself uses the phrase ‘this constitution’ this argument has been criticised (Constitution Review Group, 1996, 3). Moreover, the preamble has been cited in legal cases. For example in Norris v Attorney General [1984] IR 36 it was cited to justify the prevention of a decision rendering unconstitutional certain nineteenth century statutes criminalising homosexual conduct between consenting adult males. The Supreme Court considered that the Preamble indicated an acceptance of Christian values, and that the state was entitled to discourage conduct ‘morally wrong and harmful to a way of life and to values which the State wishes to protect’ (Casey, 1992, 317).

Article 44.1.2 read that ‘the State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens’ although other religions were also recognised. For a number of reasons this latter acknowledgement has been seen as a generous gesture. Firstly, leaders of all the faiths in Ireland were consulted about article 44 and were reportedly happy with its provisions. Secondly, in the Europe of the late 1930’s explicit recognition of the Jewish faith was a generous gesture. Thirdly, de Valera resisted pressure brought to bear by the Catholic Church to recognise that Church as the ‘true’ Church or the Church established by Christ (Chubb, 1991, 28). In view of contemporary attitudes it is ironic that the sector of Irish society that was most dissatisfied with the constitution was the Catholic Church and some of its lay organisations. These factors aside however, the article has also had legal repercussions. It, alongside the preamble, was cited in a Supreme Court decision in 1951, upholding a decision of a judge in the High Court which ruled that as a result of the special position accorded the Catholic religion in the constitution, the child of a failed mixed marriage should be awarded to the mother, contrary to practice at the time, because she was a Catholic, rather than to the
father, who was a Protestant (Browne, 1998, 46). The recognition of the Catholic religion only as the faith of the majority, while falling short of establishing that church, cannot be construed as an example of state neutrality.

In other respects the constitution was more liberal. Article 44 for example guarantees freedom of conscience and the free profession and practice of religion, ‘subject to public order and morality’. Since ‘freedom of conscience’ appears in an article dealing with the practice of religion, the freedom has been interpreted to mean that a person cannot be compelled into living in a way that is contrary to his or her conscience, ‘that means contrary to one’s conscience so far as the exercise, practice, or profession of religion is concerned’ (Casey, 1992, 558). In line with its predecessor the 1922 constitution, the state was also prohibited from endowing any religion, from discriminating against people on the basis of religious belief, and from acquiring church property by compulsion, except for certain specific public works, and then only on payment of compensation (Chubb, 1991, 26). This latter ruling has proven to be significant at a time when the prospect of local authorities taking over of church lands which have fallen into disuse for housing purposes has increased significantly. A recent decision by the Minister for the Environment made it clear that local authorities would only acquire such property from the Church or the State at ‘reasonable rates and agreed valuations’ (Irish Times, October 6 1999). Article 44.1 reads that ‘the State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence and shall respect and honour religion. Taken with the preamble this has been taken to mean by the courts that the citizens of the Irish state are a religious people, but does so ‘in terms which do not confine the benefit of that acknowledgement to members of the Christian faith’ (Casey, 1992, 556). However one does not have to be a legal genius to see that article 44.1 provides a broad justification for the State’s participation in religious ceremonies, the playing of the Angelus on State television and radio each day being an obvious example.

In contrast to the 1922 constitution a specific effort was made to incorporate aspects of Catholic social teaching into the constitution. This is most obvious with regard to article 45 which outlined ‘Directive Principles of Social Policy’ all of which tried to reconcile individual rights, such as the possession of private property, to some notion of the common good. These principles are not however justiciable although a recent call for them to be updated suggest that they are not devoid of significance (Lynch, 1996, 637-639). The influence of vocational principles were reflected in articles 18 and 19 dealing with the composition of the second chamber, Seanad Eireann, and in article 15.3.1 which permitted the establishment and recognition of vocational councils representative of the various branches of social and economic life (Chubb, 1991, 27). These provisions have not proven controversial. What has proven controversial was article 41.3.2 which declared that ‘no law shall be enacted providing for the grant of a dissolution of marriage’. Up to 1996 divorce was impossible in Ireland and the primacy of Church law over State law with regard to marriages was demonstrated by the fact that throughout the whole period the Church continued to annul marriages which the State regarded as still valid, leading to the situation where remarriages of Catholics who had been granted an annulment ‘were potentially bigamous in the eyes of the state’ (Coakley, 1987, 291). The constitution’s emphasis on protecting the family was also reinforced by two clauses, 41.1.1. recognising the family as ‘the natural and fundamental unity of Society’, and article 41.1.2. stating that the State ‘guarantees to respect the Family in its constitution and authority’. The rights of the family were also extended to education, article 41.2 stating that the State must ‘respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and
social education of their children’. The State had no right to insist that children must attend schools established by the state or any particular type of ‘designated by the State’ (Bunreacht na hÉireann, 42.3.1).

It is no doubt important that the constitution did not establish the Catholic religion, although it has been argued that it does not expressly prevent such establishment (Casey, 1992, 554). However this omission has to be viewed in the wider context:

Although the Church was not formally accorded the status of an established Church, it was because it did not need to be: if there was no specifically Catholic political party, it was because there was no call for one: if the clergy only intervened overtly in politics very occasionally, it was because there was no necessity for it. In areas in which it has an interest – education, family law, health – those charged with formulating and administering policy approached their task imbued with the basic values of their Church (Chubb, 1991, 36).

The extent to which the Church retained real control over areas of public policy can best be assessed with regard to the sphere of education. By the time the constitution was drafted clerical control over education was so entrenched that the only outstanding question was how to secure the status quo by constitutional legislation (Clarke, 1998, 66). Article 42 succinctly codified existing practice: ‘citizens had no right to education; the State had no duty to provide facilities directly to citizens; and the privileged role of the churches in schools would remain unchallenged by competition from publicly funded schools’ (ibid, 67). At the heart of the system were two principles enunciated by canon law; (1) that Catholic parents should send their children to schools which provide a Catholic education; (2) that the State should provide the parents with the freedom to make such a choice (ibid, 69). Both were achieved under the 1937 constitution which provided constitutional protection for ‘a system of public funding of private schools’ (ibid, 66). As late as 1992-93 2,988 (93.1%) out of 3,209 primary schools were Roman Catholic and just under three quarters of second-level students attended denominational schools (ibid, 66).

The saving grace of the provisions for education was article 44.2.4. which read:

*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 the school.*

Such a provision, preventing religious discrimination in the admission of pupils to publicly funded schools, had several precedents, having been present, in different forms, in the 1922 constitution, the 1921 Anglo-Irish Treaty, and two of the Home Rule Bills (Hyland, 1996, 631-632). Similarly, State instructions to National Schools in 1965 required that they were to identify clearly which periods were for religious instruction in order to facilitate any child whose parents wanted to exclude from religious instruction (Clarke, 1998, 74). However, there was no provision in the constitution requiring schools to attenuate the religious ethos of the school, so that obvious manifestations of that ethos, such as the presence of crucifixes in classrooms, the saying of prayers in advance of each class, or the holding of school Masses, were perfectly constitutional. As a result, Protestant parents who could not send their children to a nearby Protestant school, had no option but to send their children to a school where the ethos would be emphatically Catholic, even if they were exempted from religion classes. In other respects too the denominational character of State schools was accentuated over time. In the 1956 the denominational character of all national schools was explicitly recognised by
the State, despite the fact that not all such schools were attended only by people of the same religion. In 1965 also, a rule requiring that teachers be ‘careful in the presence of children of different beliefs not to touch on matters of controversy’ was deleted from the rules for primary teachers. Then in 1971 a new curriculum for primary schools teacher’s encouraged the integration of secular and religious components of the curriculum, hitherto kept separate, on the grounds that ‘the separation of religious and secular instruction into differentiated subject compartments serves only to throw the whole educational function out of focus’ (cited in Hyland, 1996, 634). As a result, the possibility of parents choosing to remove their children from religious instruction was no longer present.

This short excursus on the development of education bears out how important the constitutional provisions in 1937 were for the whole domain of Church-State relations in Ireland. If State neutrality is achieved when a State minimises the extent to which it either encourages or discourages religious belief or disbelief, then it is clear that the Irish State has never been neutral with regard to religious belief (Monsma and Soper 1997, 6). Rather, it has encouraged the practice of Catholic belief over other beliefs, and left non-believers in particular with extremely curtailed rights within the system. Indeed the 1971 primary teacher’s handbook stated that ‘religious instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school’ thus undermining efforts to keep secular and religious instruction separate in primary schools that date back to the 1830s (Irish Times, August 22, 1998). Neither was the State neutral between religions, even though the constitution expressly forbade religious discrimination. Clearly the ban on divorce infringed the rights of the small Protestant minority whose religion did not insist upon the indissolubility of marriage, and while the constitution stated that ‘the national territory’ was the whole island of Ireland, the clause could also be construed as a threat to the much larger number of Protestants living in Northern Ireland (Coakley, 1987, 291). Thirdly, if a requirement of State neutrality is that there be no disabilities associated with adherence to a particular religious or secular belief system, then the Irish State has also failed to meet this criteria (ibid, 202). A controversial case in 1985 saw the High Court upheld the validity of a legal decision to justify the dismissal of a secondary teacher on the grounds that her lifestyle implied a rejection of the values and the behaviour that her employers, a Catholic school, sought to promote. The judge commented that the plaintiff ‘knew from her upbringing and previous experience the sort of school in which she sought employment, and should have been aware of the obligations she would undertake by joining its staff’ (Casey, 1992, 529). The reality that a teacher educated in a State university, with a teaching qualification recognised by the State, in receipt of what was in effect a State salary, had no option but to work in a denominational school, was not alluded to by the judge in this statement!

In short de Valera failed in his attempt to reconcile universal rights with Catholic social teaching, and in fundamental respects many of the former have been undermined by the religious clauses of the constitution. This is most obviously the case with regard to education, but in other respects such as divorce the legacy has been a controversial one. As a result, when the liberalisation of Irish society begun in the 1960’s the constitution again became a fundamental issue in political debate. However, it is important to recognise that the pace of liberalisation has been extremely slow. For example, the Censorship of Publication Boards Board, now under lay control, still derives its authority from the Censorship of Publications Act of 1929 and the Censorship of Publications Act of 1946. As early as 1965 a review of the constitution recommended modification of the article prohibiting divorce. It took thirty years before this happened, and then the amendment passed by a margin of less than one per
cent of the voters! In the all-important area of education, the shadow of de Valera’s constitution still looms large. In 1998 the Supreme Court ruled against a claim by the Campaign to Separate Church and State that the payment by the State of chaplain’s salaries in voluntary schools breached article 44 2.2. prohibiting the endowment of a religion. Such payments cost the State £1.2 million and are extended to lay and clerical chaplains alike (Irish Times. January 14 1998). The Court ruled that the system was ‘merely a manifestation, under modern conditions, or principles which are recognised and approved by Articles 44 and 42 of the Constitution (Irish Times, March 26, 1998). In short, with regard to Church-State relationships ‘secularisation in Ireland is taking place at a slower pace than had been expected, considering its level of modernisation, and has remained much more insulated from secularising influences than its western counterparts (Corish,1998,169).

Amending the Constitution.

The 1937 constitution stipulated that after a period of three years it could only be amended by the people in a referendum. With regard to religious matters, the constitution was first amended in 1972, when the deletion of article 44 was approved by an overwhelming majority of the voters. However, lest this be seen as a sign of incipient secularisation, it should be borne in mind that a broad spectrum of politicians in 1972 regarded the constitution as anachronistic, and thought it should be replaced by what one politician called ‘a more modern and more efficient document’ (Irish Times, November 3 1972). Three decades later, no party in the Dail advocates the replacement of the constitution by another document. Moreover, in 1972 there was all-party consensus in the Dail on the deletion of article 44 and recent history has shown that constitutional amendments are difficult to achieve unless there is all-party consensus. This means that politicians will only move slowly towards having referenda and many politicians regard the avoidance of the kind of polarised debate that characterised the 1983 ‘pro-life’ amendment as desirable. This places the onus on creating momentum for constitutional change on interest groups and these interest groups have recently been successful in getting the present government to promise another referendum on the abortion issue. It should be borne in mind however that many politicians regard such interest groups with circumspection and would prefer if elected representatives were free to deliberate on constitutional change in their absence. Certainly the claim made by a Fine Gael T.D., Richie Ryan, in 1972, that he had never known anyone in the Dail ‘to be embarrassed by pressures being put on them by the Catholic or any other Church’ could not be sustained today (Irish Times, November 3 1972)

The decision, in 1972, to delete article 44 from the constitution makes sense only in the context of the Northern Ireland conflict, then in its most serious phase. The Taoiseach Jack Lynch argued that the proposed changes would contribute towards Irish unity and would be indicative of the ‘outward-looking’ approach of the Government and the people towards Irish unity (Irish Times, November 3 1972). The Government’s campaign slogan was ‘yes for a new Ireland’, and it is no exaggeration to say that the amendment was motivated more by a sense that the true state of Church-State relations was being misrepresented abroad, than by any realisation of their illiberal nature. On the campaign trail one Fianna Fail T.D. told an audience in Limerick that,

The opportunity is to display their generosity of heart and mind in openly declaring before the world, and before the people of Northern Ireland and Britain in particular, that they have no interest in a position in which the Catholic Church could have any status or privileges which are not equally extended to all religious denominations, or even to persons of no religious convictions whatever (Irish Times, November 11 1972).
In the Dail the Taoiseach said that while there was no need for mention of specific Churches, the general provisions of article 44 guaranteeing the free practice and profession of religion were ‘second to none’ in any part of the world (Irish Times, November 3 1972). Indeed in 1996 the constitutional review group were ostensibly satisfied with the provisions of article 44 with regard to the free practise and profession of religion, but suggested changes in line with the European Convention of Human Rights (Constitution Review Group, 1996, 467). The 1972 amendment was opposed by a new movement called ‘defend 44’, founded in Dublin, which saw the proposed changes as the prelude to the introduction of the permissive society to Ireland (November 13 1972). However, in this case the opposition parties agreed to support the amendment, which was passed with the approval of over 70 per cent of the voters. Nevertheless many non-Fianna Fail T.Ds were insistent that the constitution as a whole should be changed: one Labour politician, Conor Cruise O’ Brien, arguing that with the ban on divorce unchanged, the ‘special position’ of the Catholic Church still existed. The Fine Gael leader Liam Cosgrave believed that an entirely new constitution was needed to attract the North, while the Labour leader Brendan Corish argued that de Valera’s constitution should be replaced by ‘a genuinely Republican document without any taint of sectarianism’. (Irish Times, November 3 1972). This disagreement in 1972 between Fianna Fail and the other parties over the worth of de Valera’s constitution, presaged a difference of outlook on ‘the liberal agenda’ that has lasted to this day.

Evidence that the relationship between socio-economic development and liberalisation was not a linear one is provided by the fact that it took over ten years before the next constitutional amendment was introduced, and then its effect was to make abortion, which had been illegal before 1983, unconstitutional. The fear that abortion could be introduced into Ireland by the Dail or the courts was at the heart of a campaign launched by the Pro-Life Amendment Campaign formed after the Pope’s visit to Ireland in 1979. PLAC argued that article 40 of the constitution which guaranteed life to the citizen but not to the unborn, should be amended to cover the period between conception and birth (Girvin, 1986, 69). The three main political parties initially proved responsive to this campaign, one party leader, Charles Haughey of Fianna Fail, promising the electorate not only a referendum, but also an airport at a major religious shrine (ibid, 71). However, in time, the Fine Gael led-government, unsure about the wisdom of the amendment, and responding to the emergence of an Anti-Amendment Campaign, proposed a amendment to the effect that ‘nothing in this constitution shall be invoked to invalidate any provision of the law on the grounds that it prohibits abortion’ (ibid, 73). This proved unsatisfactory to PLAC, the Catholic Church, and the Fianna Fail party, and the government was defeated in the Dail vote on their proposed amendment. Instead, a Fianna Fail wording was adopted. It read as follows:

The state acknowledges the right to life of the unborn and with due regard to the equal right of life of the mother, guarantees in its laws to protect, and as far as practicable, by its laws, to defend and vindicate that right (ibid, 70)

This was subsequently opposed in the campaign by the Labour Party, Fine Gael, and the Church of Ireland, the latter arguing that the pro-amendment campaign was sectarian (ibid, 73). As a result the Catholic Church became involved in the campaign, stressing that Catholics had an obligation to vote and highlighting the danger of abortion being introduced in Ireland. A statement by the Irish Bishops Conference also stating that Catholics had a right to freedom of conscience, and could, in conscience, vote no, was followed by the a number of intransigent statements on behalf of more conservative Bishops. The amendment was passed
by a two to one majority: 66.45 per cent voting yes, and 32.87 per cent voting no. Despite the low turnout of 54.6 per cent, the result was clearly a vindication of the Catholic Church’s authority and demonstrated the vulnerability of the political process to a campaign orchestrated by a well-organised interest group. In 1980s Ireland such interest groups proliferated on the right of the political spectrum: apart from the well-known Pro-Life Amendment Campaign and the Society for the Protection of the Unborn Child, other organisations, such as the Irish Family League, the Council for Social Concern, the Responsible Society, Family Solidarity, Youth Defence, the National Right to Life Federation, and the Knights of St. Columbanus, were also active (Girvin, 1994, 204). However, the 1983 referendum also confirmed the strong tendency of Fine Gael and Labour to identify with liberal policies, while Fianna Fail appeared to be becoming more conservative. The latter advocated the maintenance of the constitutional status quo on all fronts, but could not guarantee that the controversial aspects of the constitution would go away.

Having been defeated in 1983, it may have been unwise for the Taoiseach, Dr. Garrett FitzGerald, to proceed only three years later with a referendum to amend the clause prohibiting divorce. However, FitzGerald had already publicly committed himself to such a move, he was under pressure to do so from his coalition partner, the Labour Party, and opinion polls showed large majorities in favour of divorce under carefully defined circumstances (Coakley, 1987, 292). Moreover, although the voters had rejected the anti-abortion clause in 1983, in 1985 an important bill permitting the open sale of contraceptives was passed by the Dail, a morale-boosting victory for the liberal camp. What the 1986 campaign again showed however was that any constitutional amendment, which lacked cross-party support, was vulnerable to the pressures of well-organised interest groups. In particular, the activists of the Anti-Divorce Campaign were able to rely on the support of the Catholic clergy and members of the Fianna Fail party in their efforts to frustrate the passing of the amendment (ibid, 293). As later campaigns would also show, the tactic of playing on the public’s fears of what would happen to property rights if divorce were permitted proved a decisive one. By 63 to 37 per cent the amendment was rejected by the electorate, leading many people to doubt the viability of the whole liberal project.

Politically, it was of the utmost importance in 1986 that the supposedly ‘neutral’ Fianna Fail party and the Catholic Church came out, in the end, against divorce, reinforcing the sense that the liberal-conservative cleavage had become fundamental to party politics. In 1992 after an election in which the Labour party doubled its representation, not only were left-right differences becoming more pronounced but,

there is a second explicit cleavage between fundamentalist Catholics on the one hand, and liberal Catholics, Protestants and secular citizens on the other. On this cleavage Labour and the Progressive Democrats are almost entirely in the liberal and secular camp; Fianna Fail (especially its supporters) is far more fundamentalist than liberal while Fine Gael is somewhat more liberal than fundamentalist (O’ Leary, 1993, 410).

However, the simplification and intensification of this cleavage after 1992 did not alter the fact that liberalising amendments would only succeed if they had all-party support. Indeed such support was not forthcoming when the next amendments were proposed, the effect of which would be more to qualify the right to life of the unborn that had been introduced into the constitution in 1983, than to broaden the basis on which abortion would be permitted. The major catalyst for the 1992 referendums was that of ‘the X case’, that of a 14 year-old girl who in February 1992 was denied the legal right to travel to Britain to obtain an abortion as a
result of a rape. This decision was then reversed by the Supreme Court in a judgement which ruled that under the terms of the 1983 amendment abortion would be permissible in Ireland ‘if it is established as a matter of probability that there is a real and substantial risk to the life as opposed to the health of the mother, which can only be avoided by the termination of her pregnancy’ (Girvin, 1994, 206). The judgement cast in doubt the efficacy of the 1983 amendment in outlawing abortion, and raised the possibility that the constitutional right to travel could be overridden if it conflicted with the right to life of the foetus. Not surprisingly, the Church and the anti-abortion movement demanded a new referendum to reinforce the objective of the 1983 amendment.

This time the political response was less friendly. While conceding the need for a referendum to clarify issues left over by the Supreme Courts decision, all the political parties shared a permissive attitude to freedom of travel and its concomitant, freedom of information, and were determined to exclude the interest groups from the policy-making process (ibid, 210). Since 1983 the outlook of the electorate itself had shifted on the issue of abortion. Opinion polls showed that in 1990 a majority of adults, and a huge majority of young adults, were prepared to accept abortion if the mother’s health was at risk (ibid, 205). The election, in the same year as President of Ireland, of a liberal lawyer, Mary Robinson, who had opposed the 1983 amendment, also suggested that there was a growing constituency of opinion who identified with the liberal agenda (Gallagher, and Marsh). Finally, the authority of the Catholic Church was considerably dented in 1992 by the revelation that the Bishop of Galway, Eamon Casey, had fathered a child and used Church funds to help raise it in America. Such scandals became a recurrent feature of Irish public life in the 1990s. Nevertheless, the reality in 1992 was that Fianna Fail were the dominant partner in government and the Taoiseach Albert Reynolds, while accepting the Supreme Court judgement, was determined to legislate for it in the most conservative way possible (ibid, 213).

As a result, the proposed amendments to the constitution distinguished between permitting abortion when the life as opposed to the health of the mother was at stake, the probability of suicide not being considered a basis for a threat to the life of the mother. All the other parties opposed this distinction but Fine Gael, The Green Party, and Sinn Fein equivocated on it during the campaign (ibid, 217). The Catholic Church again stated that the individual could in conscience vote either way, but criticised the Government for not allowing a clear choice between abortion and no abortion. On the issues of freedom of travel and of information the Church itself equivocated, suggesting that restrictions in these areas might have the effect of eroding restrictions on abortion itself (ibid, 218). However, as before, individual members of the Hierarchy argued for a no vote on all three issues, and the pro-life campaign followed suit. By large margins, freedom to travel and freedom of information were accepted by the electorate, but the wording on abortion, which had been opposed both by conservatives and liberals, was rejected. The political parties and interest groups had not accepted the Taoiseach’s claim that the wording represented a nuanced attempt to reconcile existing positions on a complex issue: the conservatives wanted a wording returning to the status quo ante, while the liberals recognised that the new wording did not represent an advance on the Supreme Court decision. The consequence of the referendums was stalemate: although abortion was now legally permissible under certain conditions, in practice no abortions are likely to have taken place. Indeed the Irish Medical Council changed its ethical guidelines after the vote, so that any doctor who performed an abortion under the guidelines outlined by the Supreme Court, could be struck off the medical register (Girvin, 1996, 603).
Perhaps the most significant aspect of the 1992 referendums was the political parties’ determination to wrestle control of the policy-making process from the interest groups by trying (and failing) to achieve some consensus on how to move forward. When the next issue, that of divorce, came up in 1996, their grip on the process had tightened considerably. Indeed, in December 1995 there was all-party consensus on an amendment to the article prohibiting divorce, put to the electorate by the ‘rainbow coalition’ of Fine-Gael, Labour, and Democratic Left. Fianna Fail’s acceptance of the change can be explained partly as a consequence of the fact that the Government had decided to write into the constitution the conditions under which divorce would be tolerated, specifying the number of years a couple had to be separated in order to qualify for divorce (Girvin, 1996, 610). However, in coalition with Labour between January 1993 and November 1994 Fianna Fail had also agreed to legislate for divorce and public opinion was clearly in favour of divorce under qualifying conditions. Nevertheless, once the campaign had begun, public support for divorce declined considerably, and ‘those opposed to divorce proved to be very successful in persuading traditional sectors of the electorate to change their mind’ (ibid). The Catholic Church adopted a strong position against change, leaving little room for the individual conscience (ibid). The anti-divorce campaign skilfully played on the public’s anxieties over the implications of the amendment for property rights, and these secular arguments in defence of a religious position shaped the attitudes of many. The slight margin of the victory for divorce, (less than one per cent), was all the more remarkable considering how strongly supportive of divorce public opinion had been six months before the vote. If it hadn’t rained heavily in those areas in the West of Ireland where the turnout was low, the no vote may well have exceeded the yes vote. Certainly, if the Fianna Fail party had collectively opposed the amendment, there is no reason to believe that divorce would have passed.

The narrow margin of the victory for the liberal option in 1995 is indicative yet again of how weak the impulse towards secularisation has been since the 1960s. Indeed the whole period between 1983 and 1995 can be seen as a time when a process of counter-secularisation successfully prevented the kind of developments that have taken place in other west-European countries decades earlier. Only the existence of all-party consensus on constitutional change in 1971, in 1995, and to some extent in 1992, explains why this process of counter-secularisation did not defeat the liberal agenda altogether. With that in mind, it is not surprising that in many fundamental respects Church–State relations have not been altered at all. For example, the appointment in 1995 of a review group to arrive at a contemporary assessment of the constitution has not resulted in radical changes to de Valera’s document. While certain areas were not under its remit, the following year it proposed changes to some of the religious articles of the constitution, including the deletion of most of the preamble. Not surprisingly this has not been echoed by the all-party parliamentary committee that considered the expert’s report, and was condemned in October 1997 by the Archbishop of Dublin, who suggested that to ignore the connection between natural law and the rights of the Irish nation, would be ‘to forget the historical experience of our people, who for centuries endured the injustice created by a body of positive law that systematically violated their human rights’ (Irish Times, October 7 1997). This is not the first time a religious position has been defended with secular arguments, but it shows how tenaciously Irish conservatism is still willing to defend aspects of a constitution that were widely considered anachronistic thirty years ago.

It is not my intention in this section to reject in toto the view that a process of secularisation is taking place in Ireland. For those whose outlook on life was shaped by the world-view of the Catholic Church before the 1960s much has indeed changed: ‘Ireland has moved from
banning all artificial contraception to allowing all forms of contraception, including the sale of condoms without any lower age limit; from laws criminalising homosexuality to laws on homosexuality which rank among the most liberal in the world; from a total ban on divorce to the possibility of the introduction of no-fault divorce into Irish law, all in just sixteen years’. (Corish, 1996, 141). In ways the Church itself has retreated from the anti-state position it adopted in 1953 when it opposed a Fianna Fail Health Bill on the grounds that universal health provision without a means test was contrary to Catholic social doctrine (Chubb, 1991, 41). Moreover, there have been a number of landmark legal judgements which have rejected the natural law interpretation of the Irish constitution, and defended instead a pluralist interpretation of Irish law, a position that is explicitly rejected by the Catholic Church. In 1995 for example, the Supreme Court ruled that a family had the right to withdraw a woman from a life-support system which has been keeping her alive since 1972. However, in a case that speaks volumes about the problematic nature of Church-State relations in Ireland, the hospital, under Church control, refused to discontinue the system, and the woman’s family had to have her removed to another hospital in order to carry out the Court’s ruling (Girvin, 1996, 608). Like schools, the Catholic Church, which imposes strict ethical guidelines on the staff controls most Irish hospitals, and there has been little criticism of this situation by politicians. That the balance of power between Church and State remains in the balance is also borne out by a recent case in which the Children’s Court upheld the right of a 13 year-old rape victim to leave the country for an abortion on the grounds that the risk to her life would increase substantially if the pregnancy continued (Irish Times, November 29, 1997). However, the right of the girl, who had been under the care of the Eastern Health Board, to leave for an abortion, had been challenged by the parents, whose lawyers fees were paid by the anti-abortion organisation called Youth Defence! (Irish Times, November 22, 1997). A clearer example of the tragic dimension to Ireland’s anomalous Church-State relationship could not be found.

Towards State Neutrality?

With at least a third of Irish voters committed to a liberal stance on moral issues, with another third pragmatic in the way in which they evaluate those issues, and with another third committed to a traditional Catholic viewpoint, it may be argued that the Irish State is now not only now in a position to meet the requirements of theorists of State neutrality, but has also gone considerable lengths to meet those requirements already. Not only is there a basis for State neutrality that was not present when the outlook of society was most homogenous, there may also be political gains to be had from justifying State policies on ‘neutral’ grounds. Even if such justificatory claims are expressed as support for the ideal of ‘pluralism’, it is clear that what Irish politicians mean by ‘pluralism’ is not that different from what some liberal thinkers mean by State neutrality. A recent article by the Fianna Fail Minister for Education Michael Martin, which defended the future of denominational education in Ireland, spoke of the contribution denominational schools could make to the principle of ‘pluralism’ in society. In view of non-plural nature of the system up to now, this may seem ironic, but it is much less absurd than President Mary McAleese’s recent referral to Saint Patrick as someone who had the ability to embrace and celebrate ‘difference’ (iepro@EMIGRANT.IE). This allusion may in turn be less paradoxical than the Fianna Fail Taoiseach Bertie Ahern’s stated commitment to an ‘an Ireland that includes all our people; mainstream, minority, or marginalised (Irish Times, March 4 2000), at the same time as he is preparing the ground for another referendum on abortion. The point is that the defence of ‘pluralism’, once the prerogative of a small section of the political elite, has become commonplace among the
Irish political elite as a whole, and the principle of State neutrality may be an integral aspect of that ideal.

In recent years the State has gone further towards meeting the principle of state neutrality between religions than has ever been the case. The introduction of divorce is one example of this tendency but there are others. The fact that the Taoiseach, a separated man, is seen regularly at official functions with his partner, Celia Larkin, is itself unprecedented, and, according to a Catholic newspaper, is ‘constitutionally untenable’ on the grounds that article 41 of the constitution pledges the state ‘to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack’. However, no Catholic organisation has challenged this situation in the courts, although some argue that there is a legal basis for doing so (Irish Times, January 15 1999). The presence of the President and the Taoiseach, at a State ceremony to remember ‘all those Irishmen and Irishwomen who died in past wars or in service with the United Nations’, which includes those who died serving the United Kingdom in two World Wars, is another example of how the Irish State has become more sensitive to the need to be seen to be representing all traditions. More controversially, the decision of the President, a committed Catholic, to take communion in a Protestant Church in December 1997, in defiance of canon law, is another example of the shift in attitudes among the political elite. In legal terms in July 1999 the Supreme Court upheld a High Court judgement that a newspaper could not be prosecuted for blasphemy for portraying, in the wake of the divorce referendum, a portly priest in vestments pursuing three senior government figures under the caption of ‘Hello progress – bye bye Father?’. Since the 1937 constitution did not define what the offence of blasphemy actually consisted of, the Supreme Court ruled that ‘the State is not placed in the position of an arbiter of religious truth’ (Irish Times, July 31 1999).

This shift to a more neutral interpretation of the role of the State is best illustrated by educational policy, since the last few years has seen some fundamental changes in this sphere. Up to 1998 the State did not fully fund the establishment of primary schools, but expected the sites and 15 per cent of the new school’s capital cost to be funded privately. In areas where a new school was needed, it became customary for the Catholic Church to organise the financing of such schools, and to provide a site, often from its own lands. This system placed those small groups of parents in urban areas which wanted multi-denominational education for their children at a disadvantage, since they lacked church support. Furthermore, it usually took five years for new multi-denominational schools to be recognised by the Department of Education: only then would they be entitled to an 85 per cent building or renovation grant. The system was also discriminatory since the State provided full funding for new Gaelscoileanna, schools where the medium of instruction would be Irish. In the 11 years up to 1997, while only two new Catholic schools were recognised by the Department of Education, 56 gaelscoileanna and 13 multi-denominational schools were recognised (Irish Times, February 2 1998). In the period between 1994 and now the number of multi-denominational schools has risen from 14 to 23. There are now around 3,578 pupils attending multi-denominational schools compared to 2,765 in 1994 (Irish Times, February 10 2000).

In response to this growth, the State has now undertaken to provide full funding for multi-denominational schools. The decision was prefigured in December 1997 when the Minister of Education promised to pay a once-off grant of £ 20,000 to prevent the closure of the Dublin Office of Educate Together the umbrella organisation for multi-denominational schools. In January 1998 he agreed to pay the costs of a site and 100 per cent building cost for a multi-
denominational school in Galway, thus placing these schools on the same footing as the Gaelscoileanna. The following year he announced that the State would pay for all new school sites which meant that the State would become the owner of all new school sites and buildings. Furthermore, the passing of a new Educational Bill in 1997 allowed for the first time the recognition of non-denominational schools in the Irish Republic and is expected to lead to a quick growth in secular primary schools. According to the general secretary of the Irish National Teachers Organisation, Senator Joe O’Toole,

This is bound to erode the influence and control of the main churches over primary education. In future parents will have the choice of a variety of schools for their children. Teachers will have a wider range of options in deciding the ambience in which they will work and new groups will join the ownership and management of primary schools (Irish Times, December 24 1997).

These changes suggest that the Irish State has become more ‘neutral’ in its attitude towards educational provision and with the arrival of over 1,000 asylum-seekers per month, it is not difficult to foresee the emergence of state-funded non-Christian primary schools in the future. A recent case where State funding was denied to a Steiner school in Coleenbridge Co. Clare ruled that the State was entitled to refuse funding in February 1995 on the grounds that the school failed to employ teachers with proper qualifications, and provided inadequately for the teaching of Irish. However the High Court decision was important on two grounds. Firstly, the judge ruled that the State’s argument that it had discharged its obligation to provide free primary education in the area by funding 15 denominational schools within a 12-mile area of Coleenbridge, was untenable. This suggests that the parents had a constitutional right to non-denominational education regardless of the existence of publicly-funded denominational schools in the same area. Secondly, the Court did not base its judgement on religious or philosophical criteria, which again suggests that parents have the right to receive State funding for any type of primary education they choose (Irish Times, April 17 1999). With these decisions in mind, it is not surprising that the Bishop of Cork can now envisage a future where ‘any pattern of educating children in a narrow denominational way will, I’m sure, appear increasingly anachronistic’ (Irish Times, January 3 2000).

However, these changes imply less a thoroughgoing process of secularisation in the education sector, but more a variation on the main theme of denominational schooling, since in 1997 the government negotiated a new agreement on the ethos and governance of primary schools which the Catholic hierarchy welcomed as ‘a historic development in ensuring the continuation of the ethos of schools of different religious denominations’ (Irish Times, October 2 1997). What was agreed was a new board of management for primary schools with two elected parents; two teachers, two owner representatives, and two representatives of the wider community agreed unanimously by these six. This certainly spells greater parental input, but a key demand of the Church of Ireland was its insistence on having ‘absolute discretion’ as to what pupils they allowed in. The compromise reached was that:

Nothing is this deed shall oblige the school to accept any particular child as a pupil, and, subject to the constitutional rights of all parents concerned being respected, acceptance of children as pupils in the school shall at all times be in the discretion of the board of management, having regard to the denominational character of the school; and, further, acceptance of a child who is not a member of the Church of Ireland as a pupil shall be on the basis that his or her parents accept that the ethos of the school is and will be as described herein provided always that no attempt shall be made to interfere with the particular beliefs of such pupil (ibid).
Section 29 of the Education Bill of 1997 states that where a school board of management refuses to enrol a student for reasons other than lack of accommodation, a parent or student over 18 can appeal the decision to the Secretary General of the Department of Education which has the authority to direct the school board in a certain way (Irish Times, January 23 1998). However, it is debatable whether the Department has the constitutional right to overrule the school. What is clear is that denominational schools have the right under the Employment Equality Bill to discriminate in favour of a teacher of its own religion in order to protect its denominational ethos. As a result, many minority religions may set up their own schools employing only teachers with their own worldview. However, with a chronic shortage of primary teachers in Ireland it is clear that the vast majority of the new teachers planned by the Department of Education, are going to be educated in one of the country’s four denominational teacher training colleges, Colaiste Mhuire, St Patricks, and Froebel College in Dublin, and Mary Immaculate College in Limerick (Irish Times, April 13 1998). This means that primary teachers will be educated in an environment where religion is accepted as an essential component of pedagogy. In addition, under the new curriculum announced in 1999 the content of religious instruction will be left to the individual school, although secular and religious instruction are separated in a way that didn’t apply in 1971. This suggests again that the boards will maintain the denominational nature of primary education and that what these changes imply is less the secularisation of the sector and more its modification to adapt to a changing society.

In the longer term the effect of these changes may well be to allow for the emergence of a more plural society in Ireland. It was pointed out in 1998 that for the first time in the history of the state God has not been mentioned in the philosophical introduction to the new primary school curriculum. Indeed a very different educational ethos from that of 1971 was spelt out:

Children come from a diversity of cultural, religious, social, environmental and ethnic backgrounds, and these engender their own beliefs, values and aspirations. The curriculum acknowledges this pluralism in society and caters for a variety of differences while at the same time promoting tolerance and respect for diversity in both the school and the community (Irish Times, August 22 1998).

In the area of secondary education the Catholic Church is preparing for an unprecedented degree of lay participation in the management of the country’s 360 voluntary Catholic schools. Figures for 1997-98 show that while there were 2,300 members of religious orders in secondary education in 1969-70 (34 per cent of the total), by 1997-98 this figure had dropped to just over 660 members (5.2% of the total). It is widely believed that within five to 10 years all Catholic voluntary secondary schools will be owned by trusts on which lay people are heavily represented, increasingly in the majority (Irish Times, June 7 1999). The extent to which the religious orders are retreating from education is borne out by the decision of the Holy Ghost Fathers to hand over the management of five elite schools to a private firm. An historical irony is also provided by the fact that one of these schools Blackrock College, was the alma mater of none other than Eamon de Valera.

Clearly, it will take time, and a degree of constitutional revision, before the ideal of State neutrality is a reality in independent Ireland. The State has moved towards a position of neutrality between religions but with regard to non-believers neutrality is a chimera. The ruling by the Supreme Court in March 1998 that a religious denomination was ‘not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school’ places clear limitations on the educational choices of secularists (Irish Times, March 26 1998). Little effort has been made to alter the tenets of the educational system, which is based on the parental right to have their
children educated in a manner they see fit, and which allows private schools to maintain their denominational ethos despite receiving public funding. Indeed the constitution review group suggested amending article 42.1 to acknowledge the family as ‘the primary educator of the child’ (Constitution Review Group, 1996, 355). With regard to the preamble their proposals have not been acted upon, and the Archbishop of Dublin, Dr. Desmond Connell, has rejected the argument that the proposed removal of any positive affirmation of religious belief from the constitution would be an act of neutrality. Instead, he argued that it substitutes for the views of the vast majority of Irish citizens a view which implicitly rejects the deep and personally held belief of so many Irish people in the existence of God and the religious dimension of life (Irish Times, April 2 1998). With vocations falling dramatically, the Church may be retreating from its position of dominance in education, but as the next abortion referendum will demonstrate, it remains a powerful voice when it comes to changing Irish constitutional law.

Conclusion.

The argument has been that the Irish State has never been a neutral State with regard to religion. Indeed, as liberals would expect, the elevation of one conception of the good life, Catholicism, over all others, served to ‘distort the free evaluation of different ways of life, to rigidity the dominant ways of life, whatever their intrinsic merits, and to unfairly exclude the values and aspirations of marginalised and disadvantaged groups within the community’ (Kymlicka, 1989, 900). This situation was tenable when over 90 per cent of the population were devout Catholics, but with weekly Mass attendance falling to 66 per cent by 1996, the values and aspirations of 1937 can no longer command automatic obedience (Whyte, 1998, 52). More recently, there have been moves towards neutrality in the vital area of education, but this could be caricatured as a case of the State being neutral in favour of religion. In 1992-93 there were 2,988 Catholic primary schools out of a total of 3,209 in the country and there is no doubt that the Catholic Church will ensure that the denominational ethos of such schools will be maintained as far as practicable (Constitution Review Group, 1996, 339). The idea of State neutrality may be compelling in a society where the State has already established its predominance in the public sphere, but where the State has yet to establish its dominance over civil society, the argument for neutrality may well be an argument for the status quo, with modifications. To those who have campaigned for a more plural society in Ireland, the changes that have been made are no doubt welcome. What is remarkable however is the tenacity with which traditional ideas and established institutions have maintained their grip on the political system.

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