

Religious Equality within the Irish School System: A Neglected Right?

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Abstract: *L'eguaglianza religiosa nel sistema scolastico irlandese: un diritto negletto?* – The relationship between the right to education and the freedom of thought, conscience and religion has always been a complex aspect. This is particularly true with reference to the Irish school system. Indeed, the latter is characterized by the relevant role entrusted to the Catholic Church. The essay aims at analysing the problems concerning the protection of the students' freedom of religion which affect the educational system in Ireland. A particular focus will be devoted to two key aspects, namely the school admission policy and the role of religious teaching within the curricula.

Keywords: Right to education; Freedom of thought, conscience and religion; Equality; Discrimination; Ireland

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1. Introduction

The right to education is nowadays considered one of the fundamental human rights due to several motives. The first and perhaps most basic one of these reasons is that education provides individuals with those assets, both material and immaterial, which are essential to guarantee their survival. Indeed, the primary goals of education are: a) ensuring the development of pupils' personality¹; b) providing the knowledge for the socio-economic independence of the subjects and for improving their status².

¹ The American philosopher George Herbert Mead argued that «our own selves exist and enter as such into our experience only in so far as the selves of others exist and enter as such into our experience also» (G.H. Mead, *Mind, Self and Society*, Chicago, 1934). The Brazilian philosopher and educator Paulo Freire defined the learning process as “conscientization”, intending that this process consists of the empowerment of the individual (for the Freire's theories see C. Pimentel, *The Human Right to Education: Freedom and Empowerment*, in 13(4) *Mult. Ed.* 1 (2006), 2.

² Education is an economic investment, meaning that ensuring the learning of certain skills provides a real economic return (P. Polechová, *Can schools make a difference and cut a vicious circle of poverty – underachievement – poverty?*, in 10(2) *Intern. J. Ed. L. & Pol'y*, 169 (2014). This is true especially when this investment is done by the most disadvantaged ones (F. Cunha, Flavio, J. J. Heckman, L. Lochner & D. V. Masterov, *Interpreting the Evidence on Life Cycle Skill Formation*, in *National Bureau of Economic Research Working Paper*, 2005; available at www.nber.org/papers/w11331). See also

Then, education is a crucial factor for the economic growth of a State³. Indeed, a link exists between the amount of money invested by a country in the educational system and its economic development. If education can help growing economy, thus it is an element which can also contribute to the strengthening of democracy, being the latter strictly connected with the socioeconomic wealth. Furthermore, education is an essential mechanism to transmit all the skills and knowledge necessary to make a democratic regime to function properly⁴, both in terms of transmitting values to young people and in terms of democratic practice at the individual level⁵.

Education is inescapable also in the field of human rights because it is the precondition to exercise all the other rights, as underlined also by some Courts. For example, a milestone in case law concerning education is the *Plyler v. Doe* case (1982), in which the US Supreme Court stated that the absence of education does not allow a full-fledged exercise of the right to vote. Also in Ireland, the Supreme Court recognized the inextricable link which exists between education and human dignity: in the *O'Donoghue v. Minister for Health* (1993) case, school attendance was considered functional to the development of pupils' «inherent and potential capabilities, physical, mental and moral»⁶.

Furthermore, education works as *instrumentum regni*⁷, i.e. school is an extremely efficient transmission chain of both national and constitutional identity⁸. This latter concept has been defined by the former President of

the Human Development Report 2023-2024 at the link hdr.undp.org/content/human-development-report-2023-24.

³ This argument suffers some flaws, in the sense that «there is no strong or consistent relationship between school resources and student performance. In other words, there is little reason to be confident that simply adding more resources to schools as currently constituted will yield performance gains among students» (E. A. Hanushek, *Conclusions and Controversies about the Effectiveness of School Resources*, in 4(1) *Ec. Pol'y Rev.* 11 (1998), 19. At the same time, is undeniable that without the necessary investment, the efficiency and effectiveness of the school system would be diminished.

⁴ The Italian jurist Pietro Calamandrei argued, in a speech delivered at the III Congress of the Associazione a difesa della scuola nazionale (ADSN) on 11th February 1950, that the school should be regarded as a constitutional institution that must even be accorded a central position within the constitutional system (see the transcription in *Scuola democratica-Periodico di battaglia per una nuova scuola*, supplement to number 2, 20th March 1950).

⁵ A. Benavot, *Education and Political Democratization: Cross-National and Longitudinal Findings*, in 40(4) *Comp. Edu. Rev.* 377 (1996).

⁶ D. M. Doyle, M. Muldoon & C. Murphy, *Education in Ireland: accessible without discrimination for all?*, in 42(10) *Intern. J. Hum. R.* 1701 (2020).

⁷ G. Laneve, *L'istruzione come fattore di identità costituzionale*, in *Rivista AIC*, 2024, 1, 452, 463.

⁸ For the issue of national identity see F. Waldron & S. Pike, *What does it mean to be Irish? Children's construction of national identity*, in 25(2) *Irish Ed. St.* 231 (2006); G. Laneve, *Istruzione, identità culturale e Costituzione: le potenzialità di una relazione profonda, in una prospettiva interna ed europea*, in *Federalismi.it*, 2012, 24, 1. In N. Volckmar, *Education, Nation-State Formation and Religion: Comparing Ireland and Norway*, in 10(2) *Nordic J. Ed. His.* 133 (2023), it is highlighted that the school can work as a tool for the instillation of the so-called “banal nationalism”, using the

the Italian Constitutional Court, Augusto Barbera, as «the identity and strength of a constitution [...] given by adherence to the principles and values it expresses and around which it is renewed in continuity»⁹. In other words, the constitutional identity is «what makes of that constitution that constitution»¹⁰. Thus, the school system can be considered a pillar of the constitutional order: the latter cannot stand without the former. In that sense, even the European Union believes that education is essential for the transmission of the Union's fundamental values and for the creation of a true European identity¹¹.

Lastly, school systems have gained a central role in the management of the phenomenon of the multicultural transformation of Western society. In contexts that are increasingly less culturally homogeneous, the problem arises of finding the lowest common denominator that can act as a bonding agent for social cohesion. As the primary place where young people socialise, school can be a key actor in promoting pluralism¹². Especially, when it comes to religion. Notwithstanding the belief that Western culture was destined to become increasingly more secularized and to abandon religion, the vast migratory movements and the terrorist episodes of the last years have brought the religious question back to the centre of public debate¹³. The issue at stake is to find a way to guarantee a peaceful

concept elaborated by Michael Billing (M. Billing, *Banal Nationalism*, New York, 1995). For the issue of constitutional identity see G. Laneve, *L'istruzione*, cit.

⁹ A. Barbera, *Ordinamento costituzionale e carte costituzionali*, in *Quad. cost.*, 2010, 2, 311, 314.

¹⁰ J. L. Martí, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in A. Saiz Arnaiz & C. Alcobarro Llivina (eds.), *National Constitutional Identity and Europe Integration*, Cambridge, 2013, 17, 22.

¹¹ On this question see A. Chiarello, *Peace, Tolerance and Citizenship in the Emerging 'European Dimension of Education' - Building Stones for a Plural and Inclusive European Identity*, in *International Journal for Education Law and Policy*, 2012, 8(2), 7; M. Hunter-Henin, *Religious Freedoms in European Schools: Contrasts and Convergence*, London, 2012. See also Council of Ministers, Resolution OJC177, 24th May 1988, 5-7.

¹² On the issue of school and multiculturalism see P. Colton, *Schools and the law: a patron's introspection*, in *Irish Educational Studies*, 2009, 28(3), 253; N. Spadaro, *La sfida del pluralismo educativo nella prospettiva sovranazionale e interna*, in *Stato, Chiese e pluralismo confessionale*, 2021, 6, 71. With reference to the Irish context, it is also interesting to underline the important role played by the educational system in the process of reconciliation after the Troubles in Northern Ireland. See C. McGlynn, *Rhetoric and reality: are integrated schools in Northern Ireland really making a difference?*, in *Irish Educational Studies*, 2007, 26(3), 271; C. Donnelly, *The integrated school in a conflict society: a comparative analysis of two integrated primary schools in Northern Ireland*, in *Cambridge Journal of Education*, 2008, 38(2), 187; V. K. Borooah & C. Knox, *The contribution of 'shared education' to Catholic-Protestant reconciliation in Northern Ireland: a third way?*, in *British Educational Research Journal*, 2013, 39(5), 925; L. O'Toole, D. McClelland, D. Forde, S. O'Keeffe, N. Purdy, C. A. Säfström & T. Walsh, *Contested childhoods across borders and boundaries: Insights from curriculum provisions in Northern Ireland and the Irish Free State in the 1920s*, in *British Educational Research Journal*, 2021, 47(4), 1021; N. Spadaro, *La segregazione etnico-religiosa nel sistema educativo in Irlanda del Nord*, in *Stato, Chiese e pluralismo confessionale*, 2023, 4, 99.

¹³ P. De Hert & S. Somers, *International human rights and national constitutional heritage: which legal framework do we need to manage religious tensions?*, in *International Journal for Education Law and Policy*, 2014, 10(2), 9.

cohabitation between people professing different religions and to avoid radicalization and intolerance. Faced with this scenario, schools can work with the aim to tackle stereotypes, to stimulate the interreligious dialogue and to encourage the mutual comprehension¹⁴. Consequently, the position that religion assumes in the school system is of paramount importance¹⁵. At the same time, the relationship between the freedom of religion and the right to education is one of the most complex¹⁶: instead of places for the promotion of pluralism, schools may become the contexts where discrimination and intolerance take shape. This seems to be the case of the Irish school system, as it will be argued in the next chapters.

2. An overview of the Irish school system: the denominational system

The Irish educational system is a very complex case within the European panorama¹⁷. This complexity depends on the history of the country, which led to the formation of a school system marked by a denominational structure, i.e. by the strong presence of religious entities and by the blend of the public and private sphere. To depict such situation, many definitions of the Irish educational model were given. For examples, the Department of Education labelled it as “semi-State”, stressing that the power within the system is shared between the State and the local (mainly religious) school managers¹⁸. As to the scholars, the Irish educational system was described as a “non-governmental” one (i.e. «owned and run by (central or local) religious organisations or associations whether (partly or fully) publicly financed or not»)¹⁹, as a “Church-State co-operative”²⁰, as a hybrid (i.e.

¹⁴ See M. Hunter-Henin, *Religious Freedoms* cit.; J. A. Nisa Ávila, *Análisis comparado del principio de libertad religiosa, Islam y educación en la Unión Europea y el ordenamiento jurídico de sus estados miembros*, in *Revista de Educación y Derecho*, 2018, 18, 1; J. Lumby & G. Mac Ruairc, *A key leadership issue of the twenty-first century: Religion in schools in England, Wales and the Republic of Ireland*, in *British Educational Research Journal*, 2021, 47(1), 128.

¹⁵ E. Martinelli, *Scuola, libertà religiosa del minore e politiche di integrazione*, in *Annali online della Didattica e della Formazione Docente*, 2018, 10(15-16), 47.

¹⁶ C. J. Russo, *Religious Freedom in Education: A Fundamental Human Right*, in *Religion & Education*, 2015, 42(1), 17.

¹⁷ It has been observed that the Irish case is «an anomalous figure in the landscape of international schooling» (A. O'Donnell, *Beyond Hospitality: Re-Imagining Inclusion in Education*, in Op. (eds) *The Inclusion Delusion: Reflections on Democracy, Ethos and Education*, Bern, 2015, p. 53).

¹⁸ L. O'Toole et al., *Contested Childhoods* cit. 1023. This definition was given in 1926, but it is valid still today, being that the basic characteristics of the Irish school system have remained unchanged.

¹⁹ M. Maussen & V. Bader, *Tolerance and Cultural Diversity in Schools: Comparative report*, Florence, 2012.

²⁰ D. Glendenning, *The Irish Constitution: Education and Human Rights in Recognised Schools*, 2012, 2, https://www.ihrec.ie/download/pdf/dr_glendenning_ihrc_law_society_10th_annual_human_rights_conference_13_october_2012.pdf

«neither strictly public, nor strictly private»²¹, or simply as a “patchwork”²².

Indeed, Ireland is characterized by the so-called “patronage model”, which shapes both the primary and the secondary (or post-primary) level of education. This system can be described as «a form of delegation by the State of the responsibility for school management, on the basis of a lease, a deed or a trust, to mainly private actors, with the vast bulk of schools owned and controlled by the Catholic and Anglican Churches»²³. It means that the great majority of institutes are owned and totally directed by private actors, while the task of the State is mainly limited to the financing and the definition of management guidelines and minimal directives. Therefore, the State has only a restricted engagement and responsibility for the school system. In fact, its role was described as that of a simple «arbitrator between private patrons»²⁴ or a «plumber whose function was essentially to link things up» (meaning that the only function of the State was a coordination task)²⁵.

The majority of patrons are religious institutions: they own and control nearly 94% of the primary schools, among which roughly 88.5% are under Catholic patronage and 5.5% under Church of Ireland’s control²⁶. The remaining educational institutes are 17 Presbyterian, one Methodist, one Jewish and two Muslim schools. Alongside the religious institutes, there are 16 “interdenominational” schools, which are under the patronage of both the Catholic Church and the Church of Ireland, and 156 “multidenominational” schools, i.e. 97 institutes which was founded by Educate Together, 33 Community National Schools and 26 schools under various minor patrons²⁷. Educate Together is a private educational charity founded in the 80s by a group of parents who did not want to have their children educated according to the dictates of some religion. These institutes offer a desegregated education, i.e. education not influenced by any sort of religious beliefs. Educate Together is considered a private patron in the same way of the religious ones²⁸. The Community National Schools, instead, are the second type of desegregated institutes: they are the only primary schools which are totally owned and controlled by the State. Their patrons are the local Education and Training Boards (ETB), i.e. statutory bodies composed only of representatives of local authority, school staff, parents and community. Interestingly, the public primary

²¹ N. Rougier & I. Honohan, *Religion and education in Ireland: growing diversity – or losing faith in the system?*, in *Comparative Education*, 2015, 51(1), 71.

²² OECD, *Reviews of National Policies for Education: Ireland*, 1991, 36.

²³ K. Fischer, *Schools and the politics of religion and diversity in the Republic of Ireland: separate but equal?*, Manchester, 2016, 134.

²⁴ K. Fischer, *op. cit.* 115.

²⁵ The definition of the State as a plumber belongs to the Minister of Education Richard Mulcahy. It is here quoted as reported in K. Fischer, *op. cit.* 15.

²⁶ Out of a total of 3139 schools 2945 are religious owned and controlled: 2775 are Catholic, while the other 170 belonged to the Church of Ireland.

²⁷ All the numbers are taken from the Ministry of Education website <https://www.gov.ie/en/service/find-a-school/>.

²⁸ For more information about Educate Together, see their official webpage <https://www.educatetogether.ie/>.

schools have been established only in 2008²⁹.

The situation at the post-primary educational level is quite similar. Out of 739 secondary schools, 369 (50%) are under the patronage of the Catholic Church (348, i.e. 47%) or of the Church of Ireland (21, i.e. 3%). The remaining are 149 interdenominational, 1 Jewish, 1 Methodist, 1 Presbyterian and 1 Quaker school. The multid denominational institutes amount to 215, of which 21 managed by Educate Together³⁰. The system is even more complicated by the fact that post-primary schools are distinguished into three categories, namely: a) voluntary secondary schools, i.e. non-governmental institutes controlled mainly by religious communities as well as by a charitable trust or a private charitable company (for example, Educate Together). They can be fee-paying and not eligible for State funding or can receive Government funds; b) vocational schools and community colleges, which are run by the ETBs. Even if some clerical figures can be found within the Boards of Management of these schools, they can be qualified as institutes with a governmental configuration³¹; c) community and comprehensive schools, which are usually the result of the amalgamation of different schools belonging to the two other categories, so that they are run by the State (via local boards of management which are represented and coordinated by the association of Community and Comprehensive Schools) and another body (usually a religious subject who was the previous patron of the amalgamated institutes)³². In front of this framework, the post-primary level is definable as a sort of puzzle, where the blend of private and public sphere is even more evident, especially with reference to the second and third category.

As anticipated, the denominational character of the Irish educational system is the legacy of the history of Ireland and of the close bond between the State and the Catholic Church³³. Indeed, the subsidiary role of the State

²⁹ For more information about the Community National Schools, see the governmental webpage <https://www.etbi.ie/about-etbi/primary-education/>.

³⁰ All the numbers are taken from the Ministry of Education website <https://www.gov.ie/en/service/find-a-school/>.

³¹ The history of the Vocational schools traced back even after the independence of the Republic of Ireland. Indeed, in 1899 British legislation established a network of local authority-based Technical Instruction Committees, which after independence were transformed into the so-called Vocational Education Committees (VECs) by the Vocational Education Act 1930. This Act generated different clashes between the State and the Catholic Church, which was afraid that the new vocational schools would have been the first step for the establishment of a totally public-school system. For that reason, the State and the Church concluded an agreement, according to which religion had to be taught in these schools and some representatives of the clergy had to sit within VECs. Nowadays, the presence of clericals in the ETBs is strongly diminished, but the same cannot be said for the presence of religious practices within the school's daily life. For an in-depth analysis of the story of the vocational schools see O. McCormack, J. O'Flaherty, B. O'Reilly & J. Liston, *'That's how it works here': The place of religion in publicly managed second-level schools in Ireland*, in *British Journal Research Journal*, 2019, 45(1), 161.

³² A. Meehan, *Wellbeing in the Irish Junior Cycle: the potential of Religious Education*, in *Irish Educational Studies*, 2019, 38(4), 501.

³³ For an in-depth analysis of the history of this bond see G. W. Hogan, *Law and Religion: Church-State Relations in Ireland from Independence to the Present Day*, in *The American Journal of Comparative Law*, 1987, 35(1), 47.

within the school system and the prominent position of the Catholic Church as main educational provider are well rooted in the Irish legal system: even if the denominational model and its religious nature was officialised only in the 1960s³⁴, a totally public educational system has never existed in Ireland, not even before the independence of the country (gained in 1922). In 1831, there was an attempt to create a non-denominational mixed education for both Catholics and Protestant pupils. This effort to establish a nationwide school system, managed by a national board, completely failed due to the opposition of the Catholic Church and of the Church of Ireland. Both had interest in avoiding State involvement in education: they were not willing to give up to one of the most powerful and efficient means of indoctrination at their disposal. The result was that, after «long and bitter struggles [...], while the system remained *de jure* a mixed system, it became *de facto* a denominational one»³⁵.

During the 20th century and the 21st century, the situation slightly enhanced and the control of the educational system by the Catholic Church significantly decreased³⁶. Nevertheless, the influence exercised by the Church is still quite robust and the denominational system is kept in force because it is in the interest of the State, the Catholic Church and the Church of Ireland. The Protestant community is attentive in preserving its schools because it is aware that the only way for a minority to survive is to preserve the differences that render it a minority. In that sense, school system is a powerful mean of the transmission of the Protestant culture, especially when the number of community members is dramatically decreasing³⁷. The State benefits from the patronage system because in this way it is not obliged to create a public-school network, totally owned, controlled and administered by its own structure. Subsequently, the Irish State can maintain public investment on education among the lowest in Europe³⁸. The Catholic Church, instead, can preserve its privileged

³⁴ K. Fischer, *Schools and the politics* cit. 11-31.

³⁵ J. Coolahan, C. Hussey & F. Kilfeather, *The Forum on Patronage and Pluralism in the Primary School: Report of the Forum's Advisory Group*. Dublin, 2012, 10. As mentioned in the same page of the report, the Catholic hierarchy was aware of this situation. In a 1900 pastoral letter, it is possible to read that «The system of National Education [...] has itself undergone a radical change, and in a great part of Ireland is now, in fact, whatever it is in name, as denominational almost as we could desire. In most of its schools there is no mixed education whatsoever» (quotation from *The Irish Teachers' Journal*, 6 October 1900, 4).

³⁶ For the history of the educational system see B. O'Toole, *1831-2014: an opportunity to get it right this time? Some thoughts on the current debate on patronage and religious education in Irish primary schools*, in *Irish Educational Studies*, 2015, 34(1), 89; K. Fischer, *Schools and the politics* cit. 47-96; S. Roulston, M. Brown, S. Taggart & E. Eivers, *A Century of Growing Apart and Challenges of Coming Together: Education Across the Island of Ireland*, in *Irish Studies in International Affairs*, 2023, 34(2), 78.

³⁷ M. C. Considère-Charon, *Protestant Schools in the Republic of Ireland: Heritage, Image and Concerns*, in *An Irish Quarterly Review*, 1998, 87(345), 15.

³⁸ It has been noted that Ireland «spends well below the norm for advanced high-income economies when it comes to education [and, to reach the average...] public spending on education would have to increase by close to £1.7 billion per annum» (T.A. McDonnell & P. Goldrick-Kelly, *Public spending in the Republic of Ireland: a descriptive overview and growth implications*, in *NERI Working Papers Series*, 2017, 46,

position within the school system, which is an essential factor for the transmission of catholic values³⁹.

The patronage system is also endorsed by the Constitutional and legal order as well as by case law. Regarding the Constitution, art. 42 deals with right to education. The first paragraph states that «the State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children». The second paragraph declares that «parents shall be free to provide this education in their homes or in private schools or in schools recognized or established by the State». The third paragraph provides that «the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State». Finally, the fourth and last paragraph stipulates that «the State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation». Relevant for the educational issue is then art. 44.2.4 which recognises that «legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to prejudicially affect the right of any child to attend a school receiving public money without attending religious instruction at that school».

To understand the constitutional endorsement of the patronage system, it is crucial to have clearly in mind that the 1937 Constitution is strongly based on Catholic principles. Thus, the above provisions are interpreted as imposing an obligation on schools to be denominational ⁴⁰. Firstly, it is noteworthy that the denominational model is implicitly

20). Indeed, in 2022 (last available Eurostat data) Ireland spent 2.7% of its GDP for the education system, out of which 1% for pre-primary and primary education and 1% for secondary education. The European expenditure average is 4.7% of the GDP. Eurostat data are available at the link https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:General_government_total_expenditure_on_education,_2022,_%25_of_GDP.png.

³⁹ K. Fischer, *Schools and the politics* cit. 47-96.

⁴⁰ Provisions that prove the Catholic spirit of the Constitution are for example the Preamble where the Holy Trinity is mentioned as the source of legitimacy of every authority and as ultimate goal of every action of both every man and State. Catholic inspiration can be seen also in art. 44.1 that provides 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». The original version art. 44.2 (abrogated in 1972) recognizes a “special position” to the Catholic Church. On the Catholic inspiration of the Irish Constitution see G. W. Hogan, *Law and Religion* cit.; E. Daly, *Religious freedom as a function of power relations: dubious claims on pluralism in the denominational schools debate*, in *Irish Educational Studies*, 2009, 28(3), 235; K. Fischer, *op. cit.* 11-31; D. Kenny, *The Virtues of Unprincipled Constitutional Compromises: Church and State in the Irish Constitution*, in *European Constitutional Law Review*, 2020, 16(3), 417.

recognized in art. 44.2.4: even if this article does not institutionalise such system, it admits the existence of denominational schools and the possibility of the State to finance them⁴¹. Furthermore, the current system is also confirmed by the combined provisions art. 42.1 and 42.3, according to which the parents are the «primary and natural educator of the child» and they have the right to have their children educated in accordance with their personal beliefs. Consequently, the role of the state is limited to a mere guarantor of a minimum educational standard. In other words, the Constitution enshrines the principle of parental supremacy in education, typical of the Catholic beliefs, and the subsidiary position of the State⁴².

Even the case law confirms the constitutionality of the patronage system. In *Crowley and Others v. Ireland and Others* (1979), art. 42.4 was interpreted in the sense that the State is obliged only to provide for free primary education, while no other State's obligation concerning children education is provided. In that sense, State can be fulfilling its obligations when it ensures that access to privately owned schools is free of charge⁴³. In the *Campaign to Separate Church* case (1998), Judge Keane stated that the prohibition for the State to endow any religion ex art. 44.2.2 «was not designed to render unlawful the comprehensive system of aid to denominational education which had become so central a feature of the Irish school system and the validity of which was expressly acknowledged by the Constitution»⁴⁴. This case law was shortly after reaffirmed by the *O'Shiel v. Minister for Education* case (1999), when the High Court stated that the State was obliged to recognise and to fund a Steiner pedagogy school because the obligation to provide for free primary education cannot be interpreted «as merely obliging the State to fund a single system of primary education which is on offer to parents on a “take it or leave it” basis»⁴⁵.

Finally, the patronage system has been enshrined in the most relevant legislation concerning education, namely the Education Act

⁴¹ In the case *Campaign to Separate Church Ltd and Ireland v. Minister for Education* (1998), it recognises that «[T]he system of denominational education was well known to the framers of the Constitution. We know this because they refer to it» (321 at 356).

⁴² A. Mawhinney, *Freedom of religion in the Irish primary school system: a failure to protect human rights?*, in *Legal Studies*, 2007, 27(3), 379; N. Rougier & I. Honohan, *Religion and education* cit.

⁴³ Irish Supreme Court, *Crowley and Others v. Ireland and Others*, 1-10-1979. Indeed, it is declared in the judgement that «the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager or trustees, [...] and to provide minimum standards. The distinction between providing free education and providing for it is brought out vividly in the Irish version [...] whose agreed literal translation is: “The State must make arrangements to have basic education available free” [...] Thus, the enormous power which the control of education gives was denied to the State: there was interposed between the State and the child the manager or the committee or board of management».

⁴⁴ Irish Supreme Court, *Campaign to Separate Church and State Ltd and Murphy v. Minister for Education*, 25-3-1998, 81 at 88-9.

⁴⁵ Irish High Court, *O'Shiel v. Minister for Education*, 16-4-1999, 347.

1998⁴⁶. In section 8 of the act the patron is defined as « (a) the person who [...] is recognised by the Minister as the patron of a primary school, and (b) the persons who [...] stand appointed as trustees or as the board of governors of a post-primary school and, where there are no such trustees or such board, the owner of that school. [...] The Minister shall enter his, her or their name, as appropriate, in a register kept for that purpose by the Minister». According to Section 10 only the patron can request the school recognition to the Minister: this means that every single school must have a patron and that the patronage system is institutionalised.

The denominational system was born to satisfy the needs of a quite homogeneous society, such as that in Ireland during the 19th and much of the 20th century. Starting from the last decades of 20th century, Ireland increasingly became a destination for migrants from different areas of the world. In the past, the Irish population was predominantly made up of white people of Irish origins having a Catholic faith, but the situation is nowadays definitively changed both from the ethnic and the religious point of view⁴⁷. According to the 2022 census (the last available) the 12% of the Irish population consists of non-Irish citizens (a total number of 632.000), half of which are extra-UE people. 77% of people identify themselves as White Irish, while the 10% consider themselves as having Any Other White background, 2% of people have Indian/Pakistani/Bangladeshi background and 1% of the populations consider themselves as member of the Black or Black Irish⁴⁸. There have been sensitive increment of non-Irish citizens with respect to 2006 census (the first one to devote a specific analysis to the ethnic composition of Ireland), according to which 87.37% identify themselves as White Irish⁴⁹. As to the religion, nowadays only 69% of the population declare themselves as Roman Catholic, while the peak of the Catholics was reached in 1961 census when they represented 94.9% of the whole population⁵⁰. People having no religion are over 14% of the population, with an increase of 63% since the 2016 census and 187% since the 2011 one. The second largest religious group are the Protestants (4.6%, out of which slightly less than 50% belongs to the Church of England, whose members amount to 2% of the population), followed by the Orthodox (2%), Islamic (1.6%) and Hindus (0.6%)⁵¹.

Given this scenario, a question arises: is the denominational system still a valid option to rule the multicultural transformation of the Irish society and to guarantee inclusion? The answer seems to be negative: this

⁴⁶ Since Ireland's independence, the Education Act 1998 is only the second act concerning education. The previous one was the School Attendance Act 1926.

⁴⁷ See O. McCormack et al., *That's how* cit.

⁴⁸ The census data are available at the link <https://www.cso.ie/en/statistics/population/censusofpopulation2022/censusofpopulation2022profile5-diversitymigrationethnicityirishtravellersreligion/>.

⁴⁹ See Volume 5 – Ethnic or cultural background of the 2006 census.

⁵⁰ This data is reported by the Central Statistics Office (the body in charge of carrying out the census in Ireland) at the link <https://www.cso.ie/en/releasesandpublications/ep/p-cpsiter/p8iter/p8rrc/#:~:text=The%20proportion%20of%20Catholics%20in%20Ireland%2C%201881%20to%202016&text=Looking%20back%2C%20census%20results%20show,1961%20of%2094.9%20per%20cent.>

⁵¹ See the 2022 census data.

model does not appear to be suitable to offer a real inclusion of people not professing Catholicism. The impression is that the patronage system risk to repeatedly perpetrate cases of discrimination in schools and disadvantages for those having a different religion. In next paragraphs, an attempt to understand if the denominational system is coherent with the international standards and obligations concerning the right to education and the freedom of religion will be conducted. This analysis will focus on two of the most delicate issues: a) the school admission policy; b) the religious education (RE) in school curricula.

3. The standards of the international framework

In order to understand the standards, set up in the international framework concerning the right to education and the freedom of religion, three levels must be investigated. First, the general international legal order will be analysed, with particular reference to the UN context. Then, the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) will be examined. Finally, the EU legal order will be explored.

As to the international legal order, a premise should be made: the main actor in this level is a specialized agency belonging to the UN universe, namely UNESCO. This actor is charged with a constitutional mandate, of which the protection and the promotion of the right to education represents a vital part. Among the different missions, UNESCO is also entrusted with the task to collaborate with Member States to advance the ideal of equality of educational opportunity and to fight against every kind of discrimination within the educational context. Indeed, the main core of UNESCO's constitutional mandate is the principle of «full and equal opportunities for education for all» (art. 4 of UNESCO Constitution)⁵².

The first international document to recognise education as a fundamental human right was the Universal Declaration of Human Rights (UDHR), proclaimed in 1948. Art. 26 enshrines the universality of the right to education («Everyone has the right to education»), the principle of free and compulsory primary education and the parents' right «to choose the kind of education that shall be given to their children». In this article, it is also indicated the main goals of education: the «full development of the human personality and the strengthening of respect for human rights and fundamental freedoms», together with the promotion of «understanding, tolerance and friendship among all nations, racial or religious groups» and «the maintenance of peace». The UDHR also enshrines the freedom of thought, conscience and religion in art. 18. In 1966, these provisions found confirmation in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), which represent a fundamental step as their signing endowed the UDHR's content with binding force. Art. 13,

⁵² For UNESCO's constitutional mandate see K. Singh, *The Right to Education: International Legal Obligations*, in *International Journal for Education and Law Policy*, 2005, 1, 103.

ICESCR deals with the right to education providing some minor innovations to the UDHR, such as the recognition of the parents' liberty «to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions». Art. 18, ICCPR reiterates that «everyone shall have the right to freedom of thought, conscience and religion». Then, it completes the guarantee of this right providing a prohibition to subject everyone to «coercion which would impair his freedom to have or to adopt a religion or belief of his choice» and an obligation to respect «liberty of parents and [...] to ensure the religious and moral education of their children in conformity with their own convictions».

Before the International Covenants, another fundamental binding instrument was adopted, namely the UNESCO's Convention against Discrimination in Education (1960). This document explicitly expresses the basic principles of non-discrimination and of equality of opportunity, which prohibits any kind of discrimination «based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth» (art. 3) and obliges the State to «undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education» (art. 4). In this sense, the Convention not only pursues the principle of equality from a formal point of view but also follows a substantial conception. The Convention also protects the right to education of minorities, which are entitled to «carry on their own educational activities, including the maintenance of schools» (art. 5). Finally, in art. 5 also the principle of freedom of parental educational choice is stated⁵³.

The right to education on the basis of equal opportunity is also recognised by art. 28 of the 1989 UN Convention on the Right of the Child (UNCRC), that basically reproduced the above-mentioned dispositions and art. 29 that provides the obligation to ensure an education aimed at the development of the child's personality and abilities, the respect for human rights, peace and the child's own as well as other cultures. Furthermore, art. 3, concerning the child's best interest principle, and art. 12 and 13, regarding the child's freedom of expression, must be interpreted as covering also the religious issues within education⁵⁴.

To sum up, at international level, the "core content" of the right to education is made up of 4 elements: a) the right to access education on an equal basis (accessibility); b) the right to enjoy free and compulsory primary education in line with the parental choice (availability); c) quality

⁵³ For an in-depth analysis of the Convention see K. Singh, *UNESCO's Convention against Discrimination in Education (1960): Key Pillar of the Education for All*, in *International Journal of Education Law and Policy*, 2008, 4, 70.

⁵⁴ For some further deepening see C. J. Russo, *Religious Freedom* cit.: K. Singh, *Right to Education and Equality of Educational Opportunities*, in *Journal of International Cooperation in Education*, 2014, 16(2), 5.

of education (adaptability); iv) free choice of education (acceptability)⁵⁵.

In international context, also the ECHR provides for this right: art. 2 of the Additional Protocol 1 states that «No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions». Interestingly, this provision is not part of the Convention, rather of an additional protocol. The reason for this peculiar collocation is that State Parties could not find an agreement on the content of this right, especially on the role to be given to the family in the educational scenario. The definite formulation emphasizes the State's role, limited exclusively by the obligation to respect the parents' religious and philosophical beliefs: this choice was dictated by the idea that the limitation of family's autonomy would have guaranteed the private interest in educational equality and the public interest in having an education of citizens useful for the common good⁵⁶. Consequently, the State has a wide margin of appreciation as the school system organization⁵⁷. However, it is obliged to provide equal access to education to everyone and, subsequently, to assure the existence and the maintenance of a minimum education standard⁵⁸. ECHR protects also the right to freedom of thought, conscience and religion, which is declined in two dimensions: a) the internal or ideal dimension which concerns the individual and personal choices regarding religion (i.e. to have or not a religion, to change it etc.). In this case, the State must be neutral and impartial and refrain from every interference within the individual conscience sphere; b) the external or material dimension, regarding the exercise of the religious beliefs (i.e. the teaching, the practices, the rite of worship etc.), which can be instead limited by the legislator in the cases and for the purposes prescribed by law. Every limitation must be necessary and proportionate with the pursued goal⁵⁹.

The right to education and freedom of religion are two values which enter often in conflict. The task to release tension falls to the ECtHR, that tackled three main issues about religion in schools: a) the compulsoriness of the RE; b) the alternatives to RE; c) participation in classes that are not

⁵⁵ See K. Tomasevski, *Manual on rights-based education: global human rights requirements made simple*, Bangkok, 2004; F. Coomans, *Identifying the Key Elements of the Right to Education: A Focus on Its Core Content*, 2007, <https://home.crin.org/>.

⁵⁶ See R. Benigni, *La via stretta dell'educazione religiosa nel diritto e nell'azione del Consiglio di Europa. Tra competenza degli Stati e opzione laica*, in *Rivista AIC*, 2012, 4, 1; R. Benigni, *Educazione religiosa scolastica e diritto all'esonerazione in una società democratica*, in *Rivista AIC*, 2020, 2, 410.

⁵⁷ See also N. Spadaro, *La sfida* cit. 2021.

⁵⁸ See P. Van Dijk, F. Van Hoof, A. Van Rijn & L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, Cambridge, 2018.

⁵⁹ See S. Rodriguez, *Scuola pubblica e libertà religiosa. Profili comparati e interventi del giudice di Strasburgo*, in *Dirittifondamentali.it*, 2019, 1, 1. On the right to freedom of thought, conscience and religion see also P. De Hert & S. Somers, *International human rights* cit.

formally religious but may have religious implications⁶⁰. In front of these issues, the Court has always balanced the State competence concerning the educational system and the parents' right to have their beliefs respected. Thus, the task to set and plan the curriculum falls on the State, which can decide to include RE, even rendering it compulsory. In fulfilling this duty, the State must take care of the freedom of religion of the pupils and their parents. To evaluate the respect of this obligation, the ECtHR has formulated a two-step test: a) the Court verifies if the RE is conveyed in an objective, critical and pluralistic manner, i.e. without any aim of indoctrination; b) second, if the State fails the first step, the Convention is considered violated only if no exemption mechanism (so-called opt-out) to RE is provided⁶¹. Another strand of ECtHR jurisprudence concerns the question of the display of religious symbols and dresses, but not being the focus of the essay, this issue will not be addressed⁶².

Finally, education is a theme touched also by the EU legal order. Art. 14 of the EU Charter of Fundamental Rights states that «everyone has the right to education and to have access to vocational and continuing training» and that «the freedom to found establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right». Other than that, the EU has a very limited competence in the field of education: notwithstanding the great importance that EU recognizes to school, it has only a supporting competence, which means it can only intervene to support, coordinate or complement the action of its Member States without any aim of harmonisation. Nevertheless, a minimum level of harmonisation occurred through three ways: a) the attraction of students within the framework of the freedom of movement of workers; b) the recognition of educational qualifications between Member States; c) the use of soft law instruments. The first point is especially relevant: according to the EU, the workers' freedom of movement is incomplete if their children do not have the right to attend every Member State school at the same conditions as that States's citizens. However, the jurisprudence soon recognised the students' right to movement for simple study reasons and the establishment of the EU citizenship confirmed such right⁶³. Anyway, the role of the EU Court of Justice has remained very limited: it can

⁶⁰ See R. Valutyte & D. Gailiute, *The Exercise of Religious Freedom in Educational Institutions in the Light of ECtHR Jurisprudence*, in *Wroclaw Review of Law, Administration & Economics*, 2012, 2(2), 45.

⁶¹ See ECtHR, n. 5095/71, 5920/72 and 5926/72, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7-12-1976; ECtHR, n. 71860/01, *Ciftci v Turkey*, 17-6-2004; ECtHR, n. 15472/02, *Folgerø and Others v. Norway*, 29-6-2007; ECtHR, n. 1448/04, *Hasan and Eylem Zengin v. Turkey*, 9-1-2008; ECtHR, n. 45216/07, *Appel-Irrgang and Others v. Germany*, 6-10-2009; ECtHR, n. 7710/02, *Grzelak v. Poland*, 22-11-2010; ECtHR, n. 319/08, *Dojan and others v. Germany*, 13-9-2011; ECtHR, n. 211/63, *Mansur Yalçın v. Turkey*, 16-9-2014; ECtHR, n. 29086/12, *Osmanoglu and Kokabas v. Svizzera*, 10-1-2017; ECtHR, n. 4762/18 and 6140/18, *Papageorgiou and Others v. Greece*, 31-10-2019.

⁶² About this issue see R. Valutyte & D. Gailiute, *The Exercise* cit.

⁶³ See CJEU, c-293/85, *Gravier*, 13-2-1985; CJEU, c-24/86, *Blaizot*, 2-2-1988.

intervene to protect the right to education only if there is a discriminatory conduct under EU law, especially when the unlawful behaviour concerns the access to education⁶⁴.

4. The access to education in the Irish context

From the State foundation to 2018, the access to Irish school was an almost exclusively religious matter. School access was, indeed, heavily influenced by religion: the members of a religious congregation tended to choose institutes belonging to the same community and the same schools had policies intended to favour these pupils. Basically, «a variety of exclusionary practices, which [...] have been legally permissible, have helped to facilitate the establishment of a de facto two-tiered education system in Ireland»: one Catholic and one Protestant⁶⁵. A segregated system was created. As it will be explained shortly after, the situation has partially remained the same.

In 1998, in the *Campaign to Separate Church* case, Judge Barrington stated that: «the Constitution contemplated that if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it. But such a child was to have the right not to attend any course of religious instruction at the school»⁶⁶. This decision could appear as an attempt to eradicate the segregated system and to stop religious discrimination in the school admission. Unfortunately, things went differently. In the same year, the Education Act 1998 was adopted. On the one hand, this Act moved forward the direction traced by the above-mentioned case, but on the other confirmed the pre-existing school model. Indeed, Section 6(c) indicates that one the goal of the Act is «to promote equality of access to and participation in education» and that every person involved in the implementation of the Act has the duty to respect this principle. It is also true that the same section provides the Minister with all the powers necessary to achieve these objectives, among which there is also the power to adopt regulations on the admission of students (Section 33(g)). On the other side, the Education Act 1998 was born as a compromise, intended to respect and to institutionalise the pre-existing school system⁶⁷. The Act, indeed, formalised the concept of ethos, i.e. the idea that every single school must identify the “characteristic spirit” of the institute, i.e. «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» (Section 15(2)(b)). The guardian of this aspect is the patron: according to Section 14(1) he has the power to

⁶⁴ On EU competence in the field of education see A. Chiarello, *Peace, Tolerance* cit.; A. Caprotti, *La nozione di diritto d'accesso all'istruzione alla luce delle considerazioni della Corte di Giustizia*, in *DPCE Online*, 2019, 1, 831; N. Spadaro, *La sfida* cit. 2021; S. Marino, *La competenza in materia di istruzione nell'Unione europea: prime riflessioni su recenti tendenze*, in *Rivista Eurojust.it*, 2024, 1, 150.

⁶⁵ D. M. Doyle et al., *Education in Ireland* cit.

⁶⁶ Irish Supreme Court, *Campaign to Separate Church and State Ltd and Murphy v. Minister for Education*, 25-3-1998, 321 at 357-8.

⁶⁷ D. Glendenning, *Country Report: Ireland-The Education Act 1998*, in *European Journal for Education Law and Policy*, 1999, 3, 61.

appoint the members of the Board of Management (BoM), i.e. the body in charge with the task of «provid[ing] an appropriate education for each student» (Section 15, par. 1) on behalf of the patron and through the performance of the functions assigned to it by Section 15(2). Among these functions, there are also the upholding of the school ethos (point b) and the publishing of the admission policy (point d), always with the agreement of the patron. The result of these provisions was that every school was given the possibility to determine its own admission policy and this was (and in part is nowadays) the source of religious discrimination: in order to protect the characteristic spirit of the school, which could be threatened by an unduly open admission policy, schools could decide to prioritise the admission of students belonging to a religion belief coherent with their characteristic spirit. This kind of policy was not compulsory under the Act, but neither forbidden⁶⁸.

This aspect was corroborated two years later in the Equal Status Act 2000 and in the Education (Welfare) Act 2000. The latter allows the BoM to refuse the application of a student, if such a refusal is in compliance with the school's admission policy (Section 19(1)). The former is a piece of legislation aimed at prohibiting and providing reparation to discrimination in the enjoyment of a series of public services, including education (Section 5)⁶⁹. In particular, the Equality Act prohibits discriminatory behaviours based on nine grounds⁷⁰: a) gender; b) marital status; c) family status; d) sexual orientation; e) religion; f) age; g) disability; h) race; i) membership of the Traveller community (Section 3(2)). With specific reference to education, the Act indicates four fields in which schools are prohibited to discriminate students: a) the admission policy; b) the access to any course, facility or benefit provided by the establishment; c) any other term or condition of participation in the establishment; d) the expulsion from the establishment or any other sanction against (Section 7(2)). This general rule suffers two exemptions. The first one concerns the gender ground, so that single-sex schools are allowed. The second one relates schools having «the objective [...] to provide education in an environment which promotes certain religious values»: in the admission policy, they are authorised to give precedence to students' having those specific religious beliefs and to refuse to admit a student of different faith. In the latter case, the school must prove that the refusal is essential to maintain the

⁶⁸ Ibidem; F. McDonagh, *What Constitutes a Catholic School in 2019? A Legal Perspective*, in *An Irish Quarterly Review*, 2019, 108(429), 8.

⁶⁹ For the mechanism of reparation see C. O'Mahony, *National Mechanism for Protection the Right to Education*, Invited Oral Presentation at the Irish Human Rights Commission Annual Conference, Dublin, 21st November 2009.

⁷⁰ Different kinds of discrimination are covered, such as: a) indirect discrimination, i.e. a provision, practice or requirement which does not exclude directly someone from the enjoyment of a service but has the effect to render impossible the access to that service; b) discrimination by imputation, i.e. when someone is treated less favourably because he/she is wrongfully assumed to be a member of the protected groups; c) discrimination by association, i.e. when someone is treated unequally because he/she is associated with a person belonging to one of the nine discriminatory grounds.

characteristic spirit of the school (Section 7(3)(c)). This rule clearly demonstrates that admission to school was a religious matter⁷¹.

Before entering into force, the then Equal Status Bill was referred to the Supreme Court under art. 26, Constitution⁷². No section of the Bill was specifically indicated in the reference, but it is highly probable that Section 7(3)(c) was at stake, given its potential conflict with art. 44.2.3 and art. 44.2.4, establishing the non-discrimination principle. However, the decision of the Supreme Court found the unconstitutionality of only two provisions unrelated to Section 7(3)(c). Nevertheless, one month later, a reference was made against the Employment Equality Bill, in the part it allowed schools to adopt administration policies intended to privilege the recruitment of school personnel of a specific religion. In front of this scenario, the Supreme Court stated that in some cases it was acceptable to treat people differently on the base of religion when these differences of treatment were directed «to give life and reality to the constitutional guarantee of the free profession and practice of religion»⁷³. Given the similarities between the provisions of the Equal Status Bill and the Employment Equality Bill, it is possible to presume that the Supreme Court would have not found Section 7(3)(c) unconstitutional⁷⁴.

The Courts have never clarified the scope of the exemption ex Section 7(3)(c)⁷⁵. However, the issue of the legitimacy of schools' admission policies have been addressed by Irish judges with reference to the issue of discrimination based on the ground of disability. On this point, it is evident an inconsistency of the legal system: on the one hand the legislation allowed to differentiated treatment in schools' admission policies when religion was at stake, but on the other side judges strongly rejected the possibility to do the same on the base of the physical and mental abilities of the students. This latter strand of case law is very consistent. In *O'Donoghue v. Minister for Health* (1993), Judge O'Hanlon recalled the definition of education given in the *Ryan v. Attorney General* case (1965)⁷⁶

⁷¹ On the Equality Act 2000 see the report *Schools and the Equal Status Acts* available at the link <https://assets.gov.ie/25063/a6e913a466344dce9530ce261b41d6c5.pdf>; the report *Discrimination on the ground of religion and freedom of religion rights in education*, edited by the Irish Human Rights and Equality Commission and available at the link <https://www.ihrec.ie/app/uploads/2023/11/ESA-Education-and-Religion.pdf>. See also D. Glendenning, *Denominational Primary Schools in the Republic of Ireland and the Challenge of Democracy*, in *International Journal for Education Law and Policy*, 2006, 2, 41; A. Mawhinney, *Discriminating Education System: Religious Admission Policies in Irish schools and International Human Rights Law*, in *International Journal of Children's Rights*, 2012, 20(4), 603.

⁷² Art. 26, Constitution provides for a mechanism of preventive judicial review: according to this provision, the President of the Republic, before signing a law and before law entering into force, can refer the bill to the Supreme Court to evaluate its Constitutional conformity. If the Supreme Court ascertains the unconstitutionality of the Bill, it does not enter into force. Otherwise, if the Bill is considered compliant with the constitutional provisions, the Bill receives a sort of seal of constitutionality, and it will not be possible to make another reference against it.

⁷³ Irish Supreme Court, *The Equal Status Bill*, 19-6-1997.

⁷⁴ On this affair see A. Mawhinney, *Discriminating Education* cit.

⁷⁵ D. Glendenning, *The Irish Constitution* cit.

⁷⁶ Irish Supreme Court, *Ryan v. Attorney General*, 3-7-1965.

stating that «there is a constitutional obligation imposed on the State by the provisions of article 42, s. 4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be»⁷⁷. This jurisprudence has been restated in *Comerford v. Minister for Education* (1997) where it was highlighted that «the right to free primary education extends to every child, although the education provided must vary in accordance with the child's abilities and needs»⁷⁸. The State's obligation to provide education for all, even for disabled children, was reaffirmed in *Sinnott v. Minister for Education* (2001)⁷⁹. All these cases concern the State's obligation to ensure primary education and not with the obligation of a school to establish an admission policy open to all children, independently from their physical and mental abilities. Simultaneously, these judgements strongly affirm the principle of education for all, whereby every single child has the right to education. Consequently, a question arises: how is it possible to consider a State as fulfilling its obligation to provide education for all, if the very same State adopts a piece of legislation which allows schools to discriminate and to refuse the admission to students having religious beliefs different from the patron's ones?

This inconsistency of the system has been partially overcome thanks to the Education (Admission to Schools) Act 2018. This act amended Section 7(3)(c) of the Equal Status Act, limiting the scope of application of the exemption, but not completely repealing the provision. Indeed, the new legislation still allows schools to give preference to students of a particular religion and to refuse pupils having different beliefs with respect to the school ethos (Section 11(1)(i; ii)). The great novelty is that these provisions remain valid only for non-recognised primary schools and for all (whether recognised or not) secondary schools⁸⁰. Conversely, the recognised primary schools can only «give priority to the admission of a student where the school is satisfied that: (a) the student concerned is a member of a minority religion, and (b) the school provides a programme of religious instruction or religious education which is of the same religious ethos as, or a similar religious ethos to, the religious ethos of the minority religion of the student concerned» (Section 11(b) of the Education (Admission to Schools) Act 2018, which introduces within the Equal Status Act 2000 the new

⁷⁷ High Court of Ireland, *O'Donoghue v. Minister for Health*, 27-5-1993, 20 at 65.

⁷⁸ High Court of Ireland, *Comerford v. Minister for Education*, 1-1-1997, 143.

⁷⁹ Irish Supreme Court, *Sinnott v. Minister for Education*, 12-7-2001.

⁸⁰ A recognised school is defined under Section 10(2) of the Education Act 1998 as an institute: a) having a sufficient number of students; b) being necessary in order to satisfy the needs of the probable future students if the other existing schools are not able; c) whose patron undertakes that school shall provide a curriculum coherent with Section 30 of the Education Act; d) whose patron agree to permit and cooperate with regular inspection and evaluation by the Inspectorate; e) complying with the health, safety and building standards determined by law and by the Minister; f) whose patron agrees that the school shall operate in accordance with the Minister's regulations and with the same Education Act.

Section 7A)⁸¹. The picture that seems to emerge from this context is complex. A step forward has been made, namely the possibility for the recognised primary schools to implement differentiated treatments only to protect religious minorities (so-called affirmative actions)⁸². Nonetheless, other schools can still discriminate on religious grounds when it comes to the admissions policy.

Apart from the legal framework, it is then important to look at the effective functioning of the system. First, it should be noted that the educational network created in the light of this legal framework is a segregated system, in the sense that schools are quite rigidly separated by the religious factors and students belonging to a religious community tend to enrol in schools having the same religious ethos. As already pointed out, there are a series of exclusionary practices that brought to the emergence of school segregation. The first of these practices is the so-called “defensive localism”⁸³, which consists of all the activities through which «local power is maintained to preserve the stratified hierarchy of access to education»⁸⁴. In other word, this is a mechanism intended to maintain the privileges of a certain part of the population, i.e. the Catholic or Protestant Irish nationals, to the disadvantage of the non-Irish nationals: the former are intended as belonging to the local school community and have facilitations to be admitted, while the latter are not considered as part of such community, so that they encounter a series of obstacles in the school admission⁸⁵. This mechanism, often described as a tradition to be defended, produces a marginalisation of non-Irish students in certain school, especially in the non-Catholic ones and/or in the so-called DEIS schools (i.e. disadvantaged schools)⁸⁶. The main instruments used to maintain this situation and to protect the privilege are the criteria set out in schools’ admission policies. In the past (especially before the adoption of the above-mentioned Acts, but partially even after), religion was of course a criterion

⁸¹ Interestingly, “minority religion” is defined by the same Section as «a religion other than a religion whose membership comprises in excess of 10% of the total population of the State based on the population as ascertained by the Central Statistics Office in the most recent census report published by that office setting out the final result of a census of population of the State (whether or not that is the most recent such census of population)».

⁸² According to some scholars, there is the risk that affirmative actions will be considered unconstitutional because they would apparently discriminate against Catholics and violate the parents’ right to choose a school coherent with their religious beliefs. Given that Catholic students are the majority in the Irish educational system, the Catholics will be the only ones not to be able to use affirmative actions, at least in favour of the same Catholic pupils. See M. Griffin, *Catholic Schools in Ireland Today – a Changing Sector in a Time of Change*, in *An Irish Quarterly Review*, 2019, 108(429), 55; F. McDonagh, *What Constitutes* cit.

⁸³ See M. Weir, *Urban Poverty and Defensive Localism*, in *Dissent*, 1994, 337.

⁸⁴ V. Ledwith & K. Reilly, *Accommodating all applicants? School choice and the regulation of enrolment in Ireland*, in *The Canadian Geographer*, 2013, 57(3), 324.

⁸⁵ Ibidem

⁸⁶ See D. Byrne, F. McGinnity, E. Smyth & M. Darmody, *Immigration and school composition in Ireland*, in *Irish Educational Studies*, 2010, 29(3), 271.

of selection⁸⁷. This is not surprising: as explained above legislation has always permitted and justified religious discrimination in schools' admission and the Education (Admission to Schools) Act 2018 has only limited this possibility but not eliminated it completely. Furthermore, even if the burden of proof which falls on the schools (i.e. to demonstrate that the admission refusal is justified by the necessity to maintain the institute's ethos) is heavy and it basically does not allow to use religion as the only ground for the exclusion⁸⁸, other discriminatory mechanisms exist.

Among these instruments, there is the policy according to which preference is given to the sons of past pupils or to children whose siblings currently attend the school. Even if this can appear a neutral criterion, it affects non-Irish national and Traveller students: for both it is unrealistic to have relatives attending or having attended in the past the same school to which they apply, being that migrant children are new-comer students and Travellers are usually nomads. This aspect was involved in the *Stokes v. Christian Brothers' High School Clonmel* case (2015), in which Mary Stokes lamented that the defendant school had committed an indirect discrimination against her Traveller son, applying a policy of preference for children having a sibling already enrolled in the school. Unfortunately, the Supreme Court dismissed the Stokes' appeal for lack of sufficient statistical evidence to show that the policy at stake disadvantaged Traveller children⁸⁹, even if, according to the Census statistics, Travellers are more unlikely to complete their studies than the other fragments of population⁹⁰. The 2018 Act has tried to reduce the use of this kind of admission policing: today, oversubscribed schools can reserve places to children of past pupils but only respecting the cap of 25% of the total available seats (Section 9).

Another instrument was the so-called "first come, first served" policy, according to which the priority in case of oversubscribed schools was given to those who had first presented the application. Migrants were often unaware of this policy and they did not register their children years in advance, as the Irish parents usually did. This contributed to the segregation of these children in schools unequipped with this policy. Asylum seekers children were particularly exposed to this problem⁹¹.

⁸⁷ For example, in September 2007, 50 children (mostly of African origins) could not gain admission to any school in their area, since these were mostly Catholic which operated admissions policies based on religion, and which gave preference to Catholic students. To face this situation an educational charity opened an emergency school under request of the Department of Education. Episodes reported by A. Mawhinney, *Discriminating Education* cit. pp. 609-610. The privilege of Catholic students has been defined as "Baptism barrier" or as "Catholic first" policy in D. M. Doyle et al., *Education in Ireland* cit., 1706-1707. Mawhinney notes that in the past some non-Catholic parents decided to baptise their children just to ensure their admission to a school. This phenomenon has been described as "baptism of convenience" or "compulsory Catholics" (K. Fischer, *School and the politics* cit. 165-166).

⁸⁸ This argument can be found, for example, in Irish Human Rights and Equality Commission, cit.; D. Glendenning, *The Irish Constitution* cit.

⁸⁹ Irish Supreme Court, *Christian Brothers' High School Clonmel v Stokes*, 24-2-2015.

⁹⁰ For the statistics see the Census official site, available at the link <https://www.cso.ie/en/census/>.

⁹¹ D. M. Doyle et al., *Education in Ireland* cit.

Fortunately, this issue has been overcome: Section 9 of the Education (Admission to Schools Act) 2018 has modified the Education Act 1998 by inserting Section 62(7)(e)(vii), which prohibits to use «the date and time on which an application for admission was received by the school».

In conclusion, even if the situation has gradually improved, Ireland still seems to be in violation of the main international and European instruments dealing with the right to education. Indeed, all these documents are based on the principle of education for all, i.e. the rule according to which schools must be open for everyone without any kind of discrimination. Instead, the rules governing the admission to Irish schools still allow some discriminations, especially the ones based on the ground of religion. The result is that some children risk to remain excluded from certain schools or are obliged to accept to be educated in schools which are not coherent with their own or their parents' religious beliefs. This has been pointed out even by many UN bodies, such as the Committee on the Elimination of Racial Discrimination⁹², the Committee on the Rights of the Child⁹³ and the Human Rights Committee⁹⁴.

5. RE in curricula

A second problem affecting the Irish education system is the collocation, the role and the content of RE within the schools' curricula and the right to the so-called opt-out, i.e. the right not to be obliged to take lessons inconsistent with one's own religious beliefs.

The presence of RE in the school curricula is not surprising. After all, in a denominational system, where the great majority of schools are owned, controlled and managed by religious subjects, it seems inevitable that RE is an integral part of the curricula. The problem is the collocation of RE within school teaching, which can be understood only looking at the evolution of the school curricula over time. Since the independence of the Irish State, school curricula have received special attention from the main actors of the education system, namely the State, the Catholic Church and the Church of Ireland. From the 1920s (when the Irish Free State was born) until the 1960s, school curricula were dominated by the idea that the primary objective of school was to form and transmit the Irish national identity. As it is quite ordinary when a State gains independence and in the immediate aftermath, Ireland experienced a strong revival of nationalist feelings: after centuries of colonial domination, perpetrated by Britain, one of the main goals of the new-established Irish State was to create a national identity which could assert the distinctiveness of Irish people and nation. Thus, the State adopted many policies aimed at emphasizing the peculiar characteristics of the Irish people. The focus was put on two aspects: the

⁹² See the Concluding Observations concerning Ireland of the Committee on the Elimination of Racial Discrimination CERD/C/IRL/CO/3-4, 4-4-2011, paragraph 26.

⁹³ See the Concluding Observations on Ireland of the Committee for the Rights of the Child CRC/C/IRL/CO.2, 29-9-2006, paragraph 61.

⁹⁴ See the Concluding Observations of the Human Rights Committee concerning Ireland CCPR/C/IRL/CO/3, 30-7-2008, paragraph 22.

Celtic and Gaelic heritage of the population and the religious factor. Indeed, the overwhelming majority of Irish people identified themselves as Roman Catholic and this was a strong element of differentiation from the British, who mainly followed the Protestant creed of the Church of England (denominated Church of Ireland within the Irish territories). Even more significantly, Ireland embraced a "partitionist" mentality, in the sense that Irishness and Catholicism were identified as the core of the national identity and consequently anyone who did not conform to these two aspects was not considered a true Irish⁹⁵.

This kind of logic penetrated also in the Department of Education and was the main driving force of the definition of each curriculum until the 1960s. Indeed, the governmental aim regarding education was defined by the same Department as «the strengthening of the national fibre by giving the language, history, music and tradition of Ireland their natural place in the life of Irish schools»⁹⁶. Consequently, the goal of the educational system was to instil in the minds of young people both Irishness and Catholicism (the latter intended as a tradition of the Irish people)⁹⁷. In this context, «schools were arenas for power struggles over nationality, religion and language»⁹⁸ and RE was used as a proper form of indoctrination: for example, the 1922 curriculum states that pupils «should be trained to habits of prompt obedience»⁹⁹. At the same time, also the Protestants conquered their space in the system to ensure the survival of their community¹⁰⁰.

Starting in the 1960s, curriculum policies were completely reformed and the paradigm at the basis of the system was radically changed: from the theological model, there was a shift towards the so-called mercantile and child-centred curriculum. Mercantile paradigm means that the objective to be pursued through the curriculum design was the fostering of national economic development. Indeed, education was intended as an instrument to provide students with the skills required by the labour

⁹⁵ See G. W. Hogan, *Law and Religion* cit. On the close relationship between the Irish national identity and Catholicism see also T. Garvin, *National Identity in Ireland*, in *An Irish Quarterly Review*, 2006, 95(379), 241; F. Waldron & S. Pike, *What does it cit.*; T. O'Donoghue & J. Harford, *A Comparative History of Church-State Relations in Irish Education*, in *Comparative Education Review*, 2011, 55(3), 315.

⁹⁶ Department of Education. *Statistics Relating to National Education in Saorstát for the Year 1922–23*. Dublin: The Stationery Office, 1925. This document is cited as reported in T. Walsh, *100 years of primary curriculum development and implementation in Ireland: a tale of a swinging pendulum*, in *Irish Educational Studies*, 2016, 35(1), 5.

⁹⁷ On the transmission of the Catholicism and Irishness through the school curricula see B. O'Reilly, *That's how cit.*; T. O'Donoghue & J. Harford, *A Comparative History* cit.; K. Fischer, *School and the politics* cit. 11–31; L. O'Toole et al., *Contested Childhoods* cit.; J. Gleeson, *Evolution of Irish curriculum culture: understandings, policy, reform and change*, in *Irish Educational Studies*, 2022, 41(4), 713; N. Volckmar, *Education, Nation-State* cit.

⁹⁸ T. Walsh, *Concepts of children and childhood from an educational perspective 1900–1940: Context curriculum and experience*, in C. Boylan & C. Gallagher (Eds), *Construction of the Irish child in the independence period, 1910–1940*, London, 2018, 25, 27.

⁹⁹ National Programme Conference, *National programme of primary instruction*, Dublin, The Educational Company of Ireland, 1922, p.15.

¹⁰⁰ See M. C. Considère-Charon, *Protestant Schools* cit.

market. In that sense, more educated people would have ensured a better functioning of the market and thus the production of more wealth¹⁰¹. Child-centred logic requires a curriculum design which portray «children as active constructors of knowledge rather than receptors of information»¹⁰²: children were no more passive receptors of knowledge, but they were individuals with their own characteristics and inclinations which the school had the duty to develop, involving them as active subjects of this process¹⁰³. This swift also determined a major involvement of the State in the educational system, in terms of both the funding and the curriculum design. In 1987, the National Council for Curriculum and Assessment (NCCA) was established, composed of the representatives of key stakeholders of the educational system and entitled with the task to advise the Minister of Education on curriculum and assessment and to review the curricula. Before the establishment of this body, every single school had the faculty to autonomously design its own curriculum. After the creation of the NCCA, the Department of Education increased its involvement in the matter¹⁰⁴.

The Education Act 1998 was again a turning point. Indeed, under this Act the Minister of Education enhances its role regarding curriculum. Section 30(1) states that the Minister has the faculty to prescribe curriculum for recognised schools, defining: a) the subjects to be offered; b) the syllabus of each subject; c) the amount of instruction time to be allotted to each subject; d) the guidance and counselling provision to be offered in schools. Then, Section 30(2)(c) specifies that the Minister has also the faculty to give directions to schools to ensure that the subjects and syllabuses pursued in those schools are appropriate and relevant to the educational needs of the students. However, the same section warns that all these faculties must be exercised having regard to the characteristic spirit of a school and not requiring any student to attend instruction in any subject which is contrary to the conscience of the parents of the student or of the adult student. Institutes preserve a margin of autonomy in the curriculum design (Section (30)(4)): they can decide to enrich the ministerial curriculum by providing courses in subjects other than the one indicated by the Minister or they can choose not to follow the ministerial curriculum. In the latter case, schools will not be qualified as recognised ones. As to the part of the curriculum regarding RE, there is a fundamental difference between primary and post-primary schools. In the former ones the Minister of Education plays no role in the definition of the syllabus: the design of RE syllabus is totally remitted to the patron. For secondary ones, instead, the Minister provides a RE syllabus¹⁰⁵.

Focusing now specifically on the RE, in the past the curriculum design was dominated by the notorious Rule 68 of the Rules for National Schools under the Department of the Education. This provision made clear that RE was a crucial and indispensable part of the curricula, so that it was basically

¹⁰¹ See T. O'Donoghue & J. Harford, *A Comparative History* cit.

¹⁰² See J. Gleeson, *Evolution of Irish* cit. 719.

¹⁰³ See T. Walsh, *100 years* cit.

¹⁰⁴ See J. Gleeson, *Evolution of Irish* cit.

¹⁰⁵ See A. Meehan, *Wellbeing in the* cit.

compulsory to include it in the provided teaching. Indeed, Rule 68 stated that «of all parts of a school curriculum, Religious Instruction is by far the most important, as its subject matter, God's honour and service, includes the proper use of all man's faculties, and affords the most powerful inducements to their proper use. 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, Rule 68 not only prescribed the mandatory presence of RE in school curriculum, but it also set that religion should be incorporated into secular subjects and inform the whole school daily life. This logic was described with the expression "integrated curriculum", i.e. a teaching program based on the idea that religion should not be confined to RE, but it should permeate every aspect of the teaching¹⁰⁶. However, the effective degree of integration between secular and religious instruction varied from school to school. In some institutes, religion strongly influenced almost all other subjects, such as nature studies, poetry, art, history, drama, singing, reading classes, language lessons, relationship and sexual education¹⁰⁷. Furthermore, the integrated curriculum implied also that many religious practices took place in the school daily life, such as school assembly, prayers, bible stories, hymn singing, meetings with the clergy, religious services (like mass) and religious symbols in the school¹⁰⁸. This was also justified in the *Campaign to Separate Church* case (1996), where Judge Costello of the High Court affirmed the inalienable parents' right to give religious education to their children under art. 44.2 of the Constitution. According to him, this right implies the State's obligation to provide a minimum moral, intellectual and social education. Furthermore, this must be done, respecting the parents' rights, especially in the matter of religious and moral formation. Costello stated also that «broadly speaking the religious education of a child is concerned with the teaching of religious doctrine, apologetics, religious history and comparative religions, whilst the religious formation of a child involves familiarising the child not just with religious doctrine but with religious practice (by attendance at religious services) and developing the child's religious and spiritual life by prayer and bible reading and I think the Constitution should be construed so as to reflect this meaning»¹⁰⁹.

Today Rule 68 is no longer in force: it was officially repealed in January 2016, but this appeared to be more of a symbolic move, given that the system has been only minimally affected by this decision. Indeed, the Catholic Church continues to be one of the main stakeholders of the educational system and to influence the curriculum design¹¹⁰. Nowadays RE is still part of the curriculum and religion in some measure influences daily school life. In primary schools, this is a consequence of the role of the patrons, who are mainly religious actors, as the main subject responsible for the definition of the RE syllabus. Instead, the post-primary schools have

¹⁰⁶ See A. Mawhinney, *Freedom of Religion* cit.; K. Fischer, *School and the politics* cit. 11-31.

¹⁰⁷ On this point see A. Mawhinney, *op. cit.* 390.

¹⁰⁸ On this point A. Mawhinney, *op. cit.* 391.

¹⁰⁹ High Court of Ireland, *Campaign to Separate Church and State Ltd. And Murphy v. Minister for Education*, 17-1-1996.

¹¹⁰ See T. Walsh, *100 years* cit.

only the faculty and not the obligation to provide RE. However, RE is a recognised subject and some syllabuses are provided for by the Minister of Education. These latter documents prove that the situation is enhanced: borrowing Judge Costello's words, the RE teaching program is increasingly moving their focus from the "religion formation" to the "religion education" and the syllabuses provided by the Minister are based on a more multicultural approach. However, the Catholic, or at least Cristian, influence continues to be strong. The Syllabus and the related Guidelines for Teachers for the Senior Cycle can be taken as reference¹¹¹. The latter, for example, explains that the Syllabus consists of different sections. While some of them have a quite neutral and objective approach to the religious phenomenon, others are strongly affected by Catholic culture. For example, section 2 is basically devoted to the teaching of the theological principles which inform the Catholic doctrine (i.e. the history of Jesus, the analysis of the proofs of God's existence, the Christ's resurrection, Paul's letters etc.). In section 4 there is a specific focus on the Cristian morality. Section 8 is completely devoted to study of the Bible, and this is the most detailed part of the entire Syllabus together with section 2.

Furthermore, recent research has proved that, still nowadays, Catholic schools (thus, the great majority of the Irish educational institutions) can be divided into three groups from the point of view of the influence of religion on the daily life and on the curriculum: a) Faith-Visible schools, i.e. the ones having a robust Catholic identity. They tend to have a strong liturgical life, a heavy communal aspect and a visible Catholic environment; b) Faith-Transition schools, which have a less solid Christian identity and a less positive approach to the Catholic faith and practices. They are characterized by the loosening of the traditional Catholic identity and by a tendency to a more individual practice of faith; c) Faith-Residual schools, i.e. institutes having a very weak Catholic identity. They are basically Catholic only from the point of view of the denomination, while the ideology of the Roman Church does not inform the daily school life¹¹².

As seen *supra* par. 3, the international legal framework strongly guarantees the freedom of thought, conscience as well as the children's right to receive an education coherent with their parents' religious beliefs. In the light of the analysis of the Irish context, a serious threat to such rights seems to exist. For the purposes of this discussion, however, a distinction must be made between primary and secondary schools. As to the former ones, RE is compulsory and the content of this subject's program is totally remitted to the patrons, which basically means the religious authorities. In such a case, the international framework provides the children's right to opt out. The Irish legal order enshrines such right in art. 42.3.1 of the Constitution and in Section 30(2)(e) of the Education Act 1998. The problem is that this right must be effective and this is not

¹¹¹ Post primary education in Ireland is made up of two cycles: a) a three-year Junior Cycle; b) a Senior Cycle, which can last two or three, depending on whether the optional Transition Year is taken. The mentioned documents are available at the NCAA website, <https://www.curriculumonline.ie/>.

¹¹² See R. Byrne & D. Devine, 'Catholic schooling with a twist?': a study of faith schooling in the Republic of Ireland during a period of detraditionalisation, in *Cambridge Journal of Education*, 2018, 48(4), 461.

always the case in Ireland. Indeed, the Irish Human Rights and Equality Commission explicitly admits that the right to opt out to religious instruction in schools with a religious ethos can sometimes give rise to difficulties for parents and children, for example «where requests to opt out are not respected, where indoctrination occurs contrary to the parent's preference, where participation is exempted but attendance in the classroom during religious instruction is still required, where faith formation is integrated throughout the school day, where students feel penalised or alienated due to non-participation in religious instruction, etc.»¹¹³. Section 62 of the Education (Admissions to School) Act tries to reduce the problem by imposing schools to indicate in their admission policies the arrangements to be made for children to opt out to religious instruction. However, this provision is problematic: it simply requires not to shorten the school day of the children that resort to the opt-out, but it does not specify the other substantive requirements of the arrangements¹¹⁴. Given this scenario, the right to opt out does not seem to be effectively ensured in the Irish context. Where a school fails to secure the exercise of such right, it is necessary to understand the content of the RE. Indeed, if a religion teaching program is compulsory and the opt-out is not possible (both *de jure* and *de facto*), the ECtHR does not consider conventional rights violated if the teaching does not consist in a form of indoctrination. Otherwise, a violation will be found¹¹⁵. Since the RE curriculum is mainly set up by religious authorities, there is the practical risk that the RE in certain schools can be considered a form of indoctrination.

As to the post-primary schools, the situation is different: RE is not a compulsory subject and its subject syllabus is composed of different sections, some of which could be considered forms of indoctrination, while others not. However, the student has the possibility to choose the latter instead of the former, not being all the sections compulsory. In this case, there would seem to be no grounds for a violation of internationally proclaimed rights. However, if a student was *de facto* forced to attend a school with a religious ethos (for example, the case of a student living in a region where there are only Catholic schools) and was therefore exposed to beliefs other than his or her own, perhaps there could be scope for finding a violation of the rights of the students. The same reasoning is applicable also to the primary schools. The problem is that the alternatives to denominational schools is very limited and consequently schools with a

¹¹³ See Irish Human Rights and Equality Commission, cit. 10. Other examples of these difficulties are reported in A. Mawhinney, *Freedom of Religion* cit.; P. Colton, *Schools and the Law* cit.; M. Parker-Jenkins & M. Masterson, *No longer 'Catholic, White and Gaelic': schools in Ireland coming to terms with cultural diversity*, in *Irish Educational Studies*, 2013, 32(4), 477; A. Duff, *Education Equality-Submission to the Human Rights Council*, in *Universal Periodic Review of Ireland*, 2016, 25(2); K. Fischer, *School and the politics* cit. 80-112.

¹¹⁴ As noted by the Irish Human Rights and Equality Commission, this flaw implies that for example a child can be obliged to remain in the classroom during religion classes. See Irish Human Rights and Equality Commission, cit. 10.

¹¹⁵ The approach of the ECtHR is the same followed by the UN Human Rights Committee. See *Hartikainen v Finland* (Comm No 40/1078) UN Doc A/36/40, 9th April 1981.

non-religious ethos are usually oversubscribed. Thus, students are often obliged to attend institutes having religious ethos and to be exposed to their religious spirit¹¹⁶.

6. Concluding remarks

As seen from the analysis carried out in the previous paragraphs, the Irish educational system presents some serious flaws from the point of view of religious equality. Starting from the late 20th century some enhancements have been made, but there are still some mechanisms that can lead to discrimination based on the ground of religion. Especially, when it comes to the issues of the admission policy and curricula. However, the underlying problem seems to be the denominational system which leads to a situation of segregation along religious lines.

This model has been created and is kept untouched also nowadays because it responds to the interests of the Catholic Church *in primis*, but also of other actors of the educational context, such as minority religious groups and Educate Together¹¹⁷. The State has derived and justified this system from the constitutional principles of pluralism in religion and education. Unlike most European states that have guaranteed pluralism through the secularist principle of the religious neutrality of public education, Ireland has decided to guarantee such pluralism through the State's support to schools of different religious denominations on a formally equal basis. This logic has found a foothold in the parents' right to have their children educated according to their religious beliefs: as confirmed in the above-mentioned case *O'Shiel v. Minister for Education*, the State must underpin the denominational system because it is the best way to ensure the parental right. According to the judgement, the combined constitutional provisions of the parental education authority ex art. 42 and the State's prohibition to discriminate schools on religious grounds as to the funding, implies that the State cannot refuse the recognition of a denominational school, provided that an appreciable number of parents in a certain area require the establishment of such a school¹¹⁸. Here lies the crux of the matter. If pluralism is intended in that way, it means that this principle operates with the goal of ensuring and maintaining the power relations between religious groups: only the religious or non-religious groups which are demographically consistent can enjoy the benefits of this system and obtain the establishment of the desired denominational schools. On the contrary, people with a different religion to that of the numerically largest groups are destined to sacrifice their right and risk being subjected to discrimination. This kind of reasoning of course is to the advantage of the numerically most consistent religious groups in Ireland, namely the Catholic and the members of the Church of Ireland, together with non-religious people, who represent the second largest "religious" group in the country. Consequently, a paradox can be found: the Irish State has always placed great emphasis on the issue of parental right of choice, but in doing

¹¹⁶ See A. Mawhinney, *Freedom of Religion* cit.

¹¹⁷ See K. Fischer, *School and the politics* cit. 147-178.

¹¹⁸ E. Daly, *Religious freedom* cit.

so it ends up violating these individual rights of the members of religious minorities. As it has been noted «the constitutional framework is “pluralist” only in that it precludes provision of a “one-size-fits-all” system which is unresponsive to the preferences of “critical mass” groups of parents, but this pluralism is markedly contingent on empirical factors, as its benefits are confined to certain empirically prevalent groups. It does not prevent the State from paring down the freedom of conscience and religion of individuals who do not belong to the benefited groups, in order to accommodate prevailing religious identities»¹¹⁹. This has been also defined as the “majority argument”, i.e. the idea that the members of the majority groups have the possibility, if not a proper right, to receive precedence in the school choice¹²⁰.

This poses a problem of hierarchy of rights, in so far as the Irish State seems to give priority to the patrons’ rights over the right of the individuals. Indeed, the parents’ right to have their children educated in conformity with their conscience and religious belief is used as main instrument to protect patrons’ rights and to maintain in force the denominational system. The same Catholic Church has often defended such model recalling the parentals prerogatives¹²¹. This makes also clear what means that the State is simply «an impartial referee between different patrons»¹²²: its role is limited only to ensure a formal equality between patrons¹²³, an equality which tends to disappear when it comes to the substantial level, where discrimination against religious minorities continues to exist.

The result is that «schools are widely perceived as belonging legitimately to different social groups, whether religious institutions or groups of parents more recently, and not as existing to serve the interests of children, in the perspective»¹²⁴. In other words, the Irish educational system seems to be built up on the assumption that the rights of the children are hierarchically subordinated to the rights of the adults, whether parents or organised religious groups. The preference of the rights and the interests of groups of adults over children’s rights is made evident also in the *Campaign to Separate Church* case. In the Supreme Court’s ruling, indeed, Judge Barrington clarified that «the Constitution cannot protect [a child] from being influenced, to some degree, by the religious “ethos” of

¹¹⁹ E. Daly, *op. cit.* 239.

¹²⁰ This expression is used by K. Fischer, *School and the politics* cit. 147-178, where reference is made to the use that has been made of this concept in D. Clarke, *Church and State: Essay in Political Philosophy*, Cork, 1984.

¹²¹ For some examples see K. Fischer, *School and the politics* cit. 147-178.

¹²² K. Fischer, *op. cit.* 154.

¹²³ For example, in 2007 the then Minister for Education, Mary Hanafin reacted to the UN Committees reports expressing concern about religious discrimination in Irish schools, stating that «All patron bodies are treated on an equal footing regardless of whether they are non-denominational, denominational, inter-denominational or multid denominational». See M. O’Halloran, *Hanafin Defends Policy on Schools*, in *Irish Times*, 6th September 2007.

¹²⁴ K. Fischer, *op. cit.* 155.

the school»¹²⁵. Again, the rights of the groups end to prevail on the rights of the individuals.

The tension that arises between the individual freedom to religion and the rights of the religious groups to have their own school is highly problematic, when it comes to the international legal order. Indeed, the latter is characterized by a strong focus on the single person. The freedom of religion is recognized to individuals, i.e. to every single person, whether an adult or a child. This point is also made clear by the Preamble of the Convention on the Rights of the Child, which declares that «everyone is entitled to all the rights and freedoms set forth therein», among which freedom to religion (art. 14) and right to education (art. 28) are included. Also, the ECHR explicitly underlines that the freedom to religion belongs to every single individual, neither to adults only nor to groups. At the same time ECHR recognizes the right to education, prohibiting every kind of discrimination based on religious grounds. Furthermore, the international legal framework is built up starting from the principle of the child's best interest, which must always prevail when children are at stake. Consequently, the subordination of children's right to adults' rights within the Irish case appears problematic and the very same foundations of this system seem to be at odds with the principles of the international legal framework.

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¹²⁵ Irish Supreme Court, *Campaign to Separate Church and State Ltd and Murphy v. Minister for Education*, 25-3-1998, 321.

