

The Irish Constitution: Education and Human Rights in Recognised Schools

Introduction.

1. Distinctive Character of Irish Education

By contrast with the European norm, education in Ireland is largely a Church-State co-operative,¹ a status enshrined in the Constitution,² enacted in legislation³ and upheld by the Supreme Court.⁴ The nature of this co-operative requires respectful dialogue, negotiation and cooperation between Church and State where their education remits intersect or overlap.⁵ The absence of a full public education sector in a diversifying society is one of the unique characteristics of Irish education, but given the current financial climate, any changes in this sphere are likely to be achieved incrementally. Meanwhile, the existing denominational sector schools, with their voluntary unpaid boards of management nationwide, are highly cost effective. The State provides funding for recognised schools and prescribes and supervises the curriculum. Under the Education Act 1998 (the Act of 1998) the denominational schools are required to operate in accordance with ministerial regulations⁶ and with the Act and with any other terms and conditions as may reasonably be attached by the Minister for Education & Skills (the Minister) to school recognition. A recognised school⁷ is required to conduct its activities in accordance with any such ministerial regulations. On the one hand the Minister is required to "have regard to", inter alia, the need to reflect the diversity of educational services provided in the State and the practices and traditions relating to the organisations of schools or school groupings existing at the commencement of Part 1 of the Act of 1998 and to make all reasonable efforts to consult with the parties in education.⁸ However, the State bears the responsibility for the education of children, and consequently bears an obligation to respect the

¹ *McD v Minister for Education* [2008] IEHC 265, HC. (O'Neill J).

² In Arts 42 and 44.

³ The Education Act 1998.

⁴ *Crowley v Ireland* [1980] IR 102 and *O'Keefe v Hickey* [2009] 302.

⁵ In *Lautsi v Italy* [GC], Application no 30814/06 (3 Nov 2009) (18 March 2011) the European Court of Human Rights (ECtHR) summarised and restated the main principles falling on the State affording the State a wide margin of appreciation in such matters.

⁶ Made from time to time under ss. 13 and s. 33 of the Act of 1998.

⁷ A school recognised by the Minister for Education & Skills under s. 10 of the Education Act 1998 which opens the way to State funding under s. 12 of the Act.

⁸ Section 7 (4)(iv) and 7(4)(b).

human rights of the recipients of education and those of their parents, be they of religious or non-religious beliefs.⁹

2. The Interplay between National Law and International Law

In Art 29.3 of the Constitution Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states and many constitutional rights are also human rights. Not surprisingly, since the Constitution pre-dates certain human rights treaties, some important human rights are absent or are inadequately stated in that document.

Although international law, being a non-prescriptive branch of law, does not dictate to States how to organise their education systems or services, its principles have been recognised in case law,¹⁰ although limited by the restrictions in the European Convention on Human Rights Act 2003¹¹ and by Art 29 of the Constitution. International law casts obligations, inter alia, on Irish State which has signed and ratified, inter alia, the core UN human rights treaties.¹² In delivering its education services nationally, the State is expected to apply these standards and principles and their application is supervised either by monitoring bodies or judicial mechanisms. If the State fails to protect and apply those standards or ignores their existence, it must reconsider the relevant situation, may have to submit to censure and may ultimately be expelled as a party to the relevant treaty or convention.¹³ In order to rely on international law in an Irish court, it is necessary to plead that some particular Irish law needs to be interpreted in a specific manner so that Ireland will not breach its human rights obligations, or that some State authority has failed to comply with its obligations to respect the rights guaranteed under international law.¹⁴

⁹ Religion & Education: A Human Rights Perspective (2011), Irish Human Rights Commission, Introduction, paragraph 12. See further *Lautsi v Italy* [GC], Application no 30814/06 (3 Nov 2009).

¹⁰ *O'Donoghue v Minister for Health* [1996] 1 IR 20 at 68 (O'Hanlon J); *D [a Minor] v Refugee Appeals Tribunal & Anor* [2011] IEHC 431 (Hogan J).

¹¹ Doyle and Ryan, "Judicial Interpretation of the European Convention on Human Rights 2003: Reflections and Analysis" (2011) 33 *Dublin University Law Journal* 369.

¹² Ireland has signed and ratified 6 UN Treaties, those most relevant to education being the International Covenant on Civil and Political Rights (1966) and its Optional Protocols (1989): The International Covenant on Economic, Social and Cultural Rights (1966) and its Optional Protocol (2008) and the UN Convention on the Rights of the Child (UNCRC) (1989) and its two Optional Protocols (2000): see further www.dfa.ie under "human rights ratification".

¹³ Dr Alison Mawhinney, School of Law, Queen's University, Belfast, paper presented at the Irish Human Rights Commission/TCD Conference Religion and Education: A Human Rights Perspective, 27 Nov 2010. Accessible on www.humanrights.ie under 'past events'; see further Dr Ursula Kilkelly's paper at the same conference.

¹⁴ Human rights instruments derive mainly from the work of the United Nations and its precursor the Council of Europe. For online access to the UN documents see *International Instruments: Resolutions (1946 onwards): General*, <http://www.un.org/Depts/dhl/resguide/resins.htm>; also *Basic Documents on Human Rights*, Brownlie, ed, (3rd edn, Clarendon Press, 1992); *International Documents on Children*, Van Bueren, ed, (1993) Dordrecht. .

3. School Establishment: Various Models

In the Constitution parents are free to provide education in their homes,¹⁵ in private schools, in State recognised schools or in State schools. The latter option has not been exercised by Irish parents to date and the closest we have to State schools are the vocational schools vested in local vocational education committees.¹⁶ Recent research by the Irish Primary Principals' Network (IPPN) indicates that approximately 20% of parents would opt for State-run primary schools.¹⁷ This research indicates that, while the majority of parents desire change in existing school patronage, they still wish to have religious instruction¹⁸ (RI) taught within the school day.¹⁹

In *Campaign to Separate Church and State v Minister for Education*²⁰ (the *Campaign case*), which was a constitutional challenge to the State funding of chaplains in community schools, Barrington J confirmed that the Constitution contemplates children receiving religious education in schools recognised or established by the State but in accordance with the wishes of the parents.²¹ Since the State's constitutional brief includes moral and social education,²² the State is empowered to provide knowledge about comparative religions, morality, citizenship and ethics (RE) in primary schools²³ as part of the State curriculum, as it does in second level schools, which is also compatible with international law.²⁴

¹⁵ Art 42.2. Currently approximately 730 children are registered for home education, National Education Welfare Board statistics.

¹⁶ Apart from the 8 or so Model Schools which are vested in and managed by the State and are inherited from the 19th century.

¹⁷ IPPN RedC Poll, 30 April 2012, www.IPPN.ie.

¹⁸ Which includes worship and religious formation.

¹⁹ IPPN RedC Poll, 30 April 2012, www.IPPN.ie.

²⁰ *Campaign to Separate Church and State v Minister for Education* [1998] IR 321 at 357-8.

²¹ *Campaign to Separate Church and State v Minister for Education* [1998] IR 321.

²² In Art 42.3.2.

²³ In discharging its constitutional role as "...guardian of the common good..."

²⁴ *Kjeldsen v Denmark* (1976) 1 EHRR 711: General Comment No 22 (1993) on Art 18 of the ICCPR: *Hartikainen v Finland*, Comm No 40/1078 (9 April 1981) in which a case was taken to the UN Human Rights Committee by the General Secretary of the Union of Free Thinkers in Finland regarding the teaching of religion in a Finnish public school. Art 18(4) of the International Covenant on Political and Social Rights 1966 (ICCPR)²⁴ states: "The States Parties to the present Convention undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their religious and moral convictions." Having considered the scope of Art 18(4) of the ICCPR the Committee stated that where parents or guardians object to the common religious doctrinal instruction programme in Finnish schools (RI) for their children at school, it is compatible with Art 18(4) of the

Most publicly funded schools in the EU provide some form of citizenship programmes and comparative, religious, ethical or moral programmes (RE) with the aim of promoting common norms and values through education by providing a common framework for good behaviour and responsible sexual conduct. However, there are concerns among some parents that their cultural and/or religious values are being replaced in such programmes by the secular norms of the State as it advances into social spheres²⁵ and that civic values validated by international human rights law are leading to what Scalia J in the US context, has termed 'a tepid civic version of the faith'.²⁶

In Ireland the newly established community national schools (CNS) provide a common core programme of religious education (RE) for all pupils during the school day with shorter periods during which pupils are separated and instructed in accordance with the tenets of their individual faiths (RI) at certain times of the year.

However, if parents in Ireland want the State to provide for RI in State schools or State recognised schools, the Constitution, it appears, requires that it be provided. In *the Campaign case Costello P* in the High Court stated that Art 42.4 enjoins the State when providing educational facilities to have regard to religious and moral formation. But, notably, the Supreme Court took account of changing circumstances, as Barrington J clarified:

"In community schools it is no longer practicable to combine religious and academic education in the way that a religious order might have done in the past."

It was for the school chaplains to provide, inter alia, that extra dimension (RI) in conjunction with the principal and in accordance with the wishes of parents and the local bishop although parents, the judge stated, are not obliged to settle merely for RI.²⁷

ICCPR for domestic legislation to require that instruction should be given instead in the history of religions and ethics (RE) provided this is done in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion.

²⁵ See *Jimenez Alonso and Jimenez Merino v Spain*, No 51188/99, ECHR 2000-VI.

²⁶ Dictum of Scalia J in *Locke v Davy* 540 US 712.

²⁷ *Campaign to Separate Church and State v Minister for Education* [1998] IR 321 at 358. Was the legislative rationale of s. 35 of the Education Act 1998 which amends s. 5 (4) of the Intermediate Education (Ireland) Act by the deletion of the very

Whatever programme of public school instruction is chosen by a state, the General Comment No 22 (1993) on Art 18 of the International Covenant on Civil and Political Rights (ICCPR) implies that appropriate teacher education and training in the delivery of these programmes in schools is pivotal, so that teachers are made fully aware of the human rights implications involved and of the dangers involved in transgressing them.

Since the Family is the primary and natural educator of the child and the right and duty to provide, inter alia, for the religious and moral education of their children vests in them, parents are free to provide non-denominational educational facilities (e.g. schools) which exclude RI from the curriculum. Accordingly, in the Educate Together sector, there is no constitutional requirement on these schools to teach RI during the school day. From the legal perspective, these schools appear to be non-denominational in character although the sector describes its schools as multi-denominational. The Educate Together sector provides an ethical programme about religions which includes moral formation (RE) during the school day in accordance with the wishes of parents.

3. The Right to Education

The right to education is widely regarded as fundamental.²⁸ This right is enshrined in Art 42 of the Constitution²⁹ and in a wide range of international treaties, in Art 2 of Protocol 1 of the European Convention on Human Rights (ECHR),³⁰ in the UN International Convention on Economic, Social and Cultural Rights (ICESCR) and in Art 14 of the EU Charter of Fundamental Rights.³¹ The

significant phrase "provided that no examination shall be held in any subject of religious instruction, nor any payment made in respect thereof" to legitimise the payment of such chaplains who teach RI or to legitimise the inclusion and examination of the RE programme in second level schools.

²⁸ See *D [a Minor] v Refugee Appeals Tribunal & Anor* [2011] IEHC 431 Hogan J held that the likely denial of basic primary education by Serbia, to a Roma child violated basic human rights and amounted to "persecution" under the Irish Refugee Act 1996 (the Act of 1996), so the decision of the Refugee Tribunal to deport a Roma child to Serbia was quashed by the High Court. However, Hogan J pointed out that two previous decisions of the High Court had found that discrimination in other parts of the former Yugoslavia did not amount to "persecution" under the Act of 1996. See further Glendenning, *Education and the law*, 2nd ed., 2012, chapter 8.

²⁹ *Crowley v Ireland* [1980] IR 102 and *O'Keefe v Hickey* [2009] 2 IR 302.

³⁰ Art 2 of Protocol 1 provides: "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."

³¹ Chapter VII, Art 51 provides: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are

right to education is stated in Art 28.1 of the UN Convention on the Rights of the Child (UNHRC)³² which requires State Parties to make all forms of secondary, general and vocational education available and accessible to every child, while Art 24 restates the obligation on them to ensure that all segments of society have access to education.³³ Furthermore, States Parties agree that the education of the child shall be directed to the development of respect for the child's parents, his or her own cultural identity, language, values and civilisations different to his or her own (e.g. Travellers).³⁴ In summary international law guarantees the right to education, the right of access to existing educational establishments and the right to the substance of education within such establishments³⁵ but it imports no linguistic requirements unless the language of choice is also the national language or one of the national languages.³⁶ Accordingly, parents in Ireland have an implied human right to choose to have their child educated through the medium of Irish since it is the national language and the first official language.³⁷

Apart from setting down the aims and objectives of education in a free society, the ICESCR puts in place a hierarchy of educational obligation in respect to provision with the most onerous obligations in regard to primary education.³⁸ Moreover, it underscores the buttressing of basic education for early primary school leavers who have not received or completed primary education.³⁹ Article 13(1)(d) provides:

"Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education."

implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

³² All of which has been acknowledged by the Irish courts. See *D [a Minor] v Refugee Appeals Tribunal & Anor* [2011] IEHC 431 (Hogan J).

³³ See also the Universal Declaration on Human Rights 1948; the International Covenant on Civil and Political Rights (ICCPR) 1966; the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

³⁴ UNCRC Art 29.

³⁵ *Cyprus v Turkey* (2002) 35 EHRR 30. In this case the ECtHR, inter alia, upheld the right of access to the substance of education for Greek Cypriot children in secondary schools in Northern Cyprus then under the control of the Turkish authorities who had abolished Greek language facilities. Accordingly, the applicants had the right to have their education, which had been commenced in the Greek language, continued in that language. In the Irish context see also *Geaney & Ors v Pobalscoil Chorca Dhuibhne* [2009] IEHC 267 (Laffoy J). This case was part heard (Application for Further and Better Particulars only) and was finally settled.

³⁶ *Belgian Linguistic Case 1* EHRR 252 at 253.

³⁷ Art 8(1) of the Constitution.

³⁸ In Art 13.

³⁹ Art 13 (1)(d).

Remarkably, it is estimated that 45.2% of Traveller children in Ireland fail to complete primary education.⁴⁰ Essentially, what is enshrined and underscored in Art 13 is a human right to fundamental education for all children i.e. basic literacy, numeracy and relevant basic life skills.

An analogous right i.e. to "...a certain minimum education, moral intellectual and social" is found in Art 42.3.2 of the Constitution and the State, as guardian of the common good, is mandated to require [shall require] that the children receive this minimum education.⁴¹ Yet, despite the buttressing of basic education in constitutional law and in human rights law, research indicates⁴² that the Irish State is failing to discharge this basic right to some prisoners,⁴³ to many Traveller children⁴⁴ and to certain children who died in the care of the State, or were known to the State, during the past decade.⁴⁵ Of course, as Hardiman J. pointed out in *TD v Minister for Education*,⁴⁶ as the child gets older, and passes the age of reason and criminal responsibility in respect of serious crimes, the State's duties are complemented by a reciprocal duty on the part of the child or young person to engage and co-operate with the facilities provided for him or her. That said, many supports for manifestly vulnerable children were severely cut back recently or dismantled. Among the most notable were the swingeing cuts to Traveller education⁴⁷ and the repeal of s. 32 of the Education Act 1998⁴⁸ which provided for "educational disadvantage"⁴⁹ (despite the temporary reprieve for the DEIS schools). In particular, the shelving, so to speak, of the remaining sections of the Special Educational Needs Act 2004, (the Act of 2004)⁵⁰ leaves children with special educational needs (SEN) and disabilities with a statutory right⁵¹ to inclusive

⁴⁰ Census 2002, Central Statistics Office, Dublin.

⁴¹ *DPP v Best* [2000] 2 IR 17. SC.

⁴² PISA Report (2009) OECD, vol 5. But see also 'The 2009 National Assessments in English, Reading and Mathematics: Incidental Inspection Findings 2010'.

⁴³ Prison Chaplains Report 2003 and Prison Chaplains Report 2008 which states: 'Prisons have simply become dumping grounds for those reflected by society': an average of 38% of prisoners attended classes in 2011 <http://www.irishprisons.ie>

⁴⁴ Fr. M. McGreil, "Emancipation of the Travelling People" (2010).

⁴⁵ G. Shannon and N. Gibbons, Report of the Independent Child Death Review Group (RICDRG) 2012.

⁴⁶ *TD v Minister for Education* [2001] 4 IR 259 at 343.

⁴⁷ Budget 2010 and 2011. These include the withdrawal of resource teachers in primary schools; the withdrawal of teaching hours in second level schools; the withdrawal of the Visiting teacher for Travellers (Sept 2010 and the phasing out of Senior Traveller Training Centres (June 2011).

⁴⁸ By s. 7 of the Education (Amendment) Act 2012.

⁴⁹ "educational disadvantage" is defined in this section as "...the impediments to education arising from social or economic disadvantage which prevent students from deriving appropriate benefit from education in schools"

⁵⁰ At the time of writing the following provisions of the Act of 2004 have not been commenced: ss. 3-13, 14 (1)(b), 14 (1)(d)-(f), 15, 16 and 17.

education⁵² in mainstream schools but denies them the right to assessment,⁵³ to education plans and to education services and support measures under the Act of 2004. These education cuts, which target fundamental education for vulnerable categories of children, sit uneasily with human rights norms and standards for basic education. Furthermore, they were implemented at a time of generous State funding for private 2nd level schools, at a time when 3rd level tuition fees are low,⁵⁴ and at a time when 3rd level completion rates in Ireland are high (48% of young people by contrast with an OECD average of 37% of young people).⁵⁵ Could such provision reflect the degree of priority or the structure of priority set down for educational provision in Art 13 of the ICESCR, or in Art 28 of the UNCRC, both of which Ireland has signed and ratified, or for that matter, with Art 42.4 of the Constitution?

Because of the constitutional doctrine of the separation of powers, the Supreme Court have stressed in, inter alia, *TD v Minister for Education*⁵⁶ that the courts will not, except in very exceptional cases, become involved in an adjudication on the fairness or otherwise of the manner in which other organs of State have administered public resources.⁵⁷

However, in *Sinnott v Minister for Education*,⁵⁸ Barr J observed a failure on the part of administrators in the Department of Finance, who play a major role in the allocation of the financial resources of the State to the weak and deprived in society "**...to exercise a balance of constitutional justice where appropriate...**" (emphasis added) so as to enable them to assess realistically the degree of priority and the structure of priority which the State should devise in meeting its constitutional obligations as distinct from other non-constitutional obligations. In this regard Barr J presciently stated in 2001:

‘It is, of course, a fact of life that in times of economic difficulty the State may be obliged to rein back severely on expenditure, and many projects for which exchequer funding is sought may have to be postponed or curtailed through lack of resources at the particular time. In such circumstances the need for government, and financial administrators, to exercise a balance of constitutional justice where appropriate in prioritising such claims is of particular

⁵¹ Under s. 2 of the Act of 2004 which has been commenced.

⁵² International Covenant on the Protection and Promotion of the Rights and Dignity of Persons with Disability 2006, Art 24.

⁵³ But not, it appears under s. 2 of the Education Act 1998 as amended, see further *Mc D v Minister for Education* [2008] IEHC 265, HC. (O Neill J) which is discussed in Glendenning (2012), 6.64 et seq.

⁵⁴ Education at a Glance 2011, OECD.

⁵⁵ Education at a Glance 2011, OECD.

⁵⁶ *TD (a Minor) v Minister for Education* [2000] 3 IR 62; *O'Reilly v Limerick Corporation* [1989] ILRM 18.

⁵⁷ Discussed in Glendenning, *Education and the Law* (2012), 5.80 et seq.

⁵⁸ [2001] 2 IR 545 at 568 HC.

importance. This necessarily implies that the ultimate financial decision-makers and officials who devise annual revenue/exchequer budgets and administer State funds must have real awareness and appreciation of the constitutional obligations of the State to all sectors of the community and in particular to the rights of the grievously deprived in society, including those such as the first plaintiff who suffer profound mental disablement. Those entitled to State aid by constitutional right should not have to depend on numerical strength and or political clout to achieve their just desserts. Needs should be met as a matter of constitutional priority and savings, if necessary, should be made elsewhere. A citizen's constitutional right must be responded to in full. A partial response has no justification in law, even in difficult financial circumstances which may entail the raising of new tax revenue to meet such claims ...'

4. Access to Existing Educational Establishments

The right of access to existing educational establishments is one facet of the right to education. Research indicates that approximately 80% of recognised schools admit all children who present for admission.⁵⁹ In the remaining schools boards of management apply the selection procedures they have devised in accordance with their mandatory admissions policies.⁶⁰ In the *Campaign case*,⁶¹ Barrington J stated:

'... 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.'⁶² (emphasis added)

The first phrase above can scarcely be construed as conferring open access to children of all faiths and none to a denominational school since the school's

⁵⁹ Smyth, Darmody, McGinnity and Byrne, 'Adapting to Diversity; Irish Schools and Newcomer Students' (ESRI, 2009).

⁶⁰ Education Act 1998, s 15(2)(d): see further Kearney, 'A Legal Look at Admissions Policies', *Education Matters*, 29 June 2011.

⁶¹ *Campaign to Separate Church and State v Minister for Education* [1998] IR 321 at 357-8.

⁶² *Campaign to Separate Church and State v Minister for Education* [1998] IR 321 at 356.

constitutionally protected ethos could be endangered. On the other hand, if a school is oversubscribed, this phrase can scarcely be construed as protecting absolutely the right of children of the school's denomination to admission over all children of different faiths and none, since the school is a State funded institution. Arguably, some balancing of Church-State interests is envisaged here but as Hamilton CJ stated in the Employment Equality Bill 1996⁶³:

'It is probably true to say that the respect for religion which the Constitution requires the State to show implies that each religious denomination should be respected when it says what its ethos is. However the final decision on this question as well as the final decision on what is reasonable or reasonably necessary to protect the ethos will rest with the court and the court in making its overall decision will be conscious of the need to reconcile the various constitutional rights involved.'⁶⁴

It is one of the objects of the Act of 1998 in s.6(c) "to promote equality of access to and participation in education...." and every person concerned in the implementation of the Act is required to have regard [shall have regard] to this object and the Minister has all such powers as are necessary to further this object.⁶⁵ Section 33 of the Act of 1998 provides that the Minister may make regulations relating to, amongst other matters, (g) admission of students to schools" and schools are required to conduct their activities in compliance with any such regulations.⁶⁶ Against this background, what is the import of the exemption for religious schools in s. 7 (3)(c) of the Equal Status Act 2000?

Section 7(3) of the Equal Status Act 2000 provides, inter alia, that an educational establishment does not discriminate:

'(c) where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in case of a

⁶³ Employment Equality Bill 1996 [1997] 2 IR 321 at 359.

⁶⁴ Employment Equality Bill 1996 [1997] 2 IR 321 at 359.

⁶⁵ Section 7 (2)(f) of the Education Act 1998.

⁶⁶ Made from time to time by the Minister, s. 33(c) of the Act of 1998.

refusal, it is proved that the refusal is essential to maintain the ethos of the school.'

To the best of the writer's knowledge, no challenge had been taken to the above provision⁶⁷ and consequently there is no judicial interpretation to illuminate this very significant provision but it appears to cast a heavy onus on a school when it refuses to admit a student on the religion ground i.e. that the school must prove that it is essential to maintain its ethos. As Hamilton CJ stated in the Employment Equality Bill 1996,⁶⁸ it is for the Supreme Court to decide and to reconcile the various constitutional rights involved.

Since access to education and to education services can have a fundamental effect on the right to education, the work of the Equality Authority and the Equality Tribunal is critical in preventing discrimination under the Equal Status Acts 2000-2011.⁶⁹ Approximately 20% of all cases taken under the latter Acts annually come from the education sector and in 2010 the largest category was disability⁷⁰ followed by membership of the Traveller Community.⁷¹

In *Christian Brothers' High School Clonmel v Stokes*,⁷² (the Stokes case) the High Court considered whether the criteria in a recognised school's admission policy⁷³ complied with the requirements of the Equal Status Act 2000 and in particular with s. 3(1)(c) of the Act in what appears to be a classic case of indirect discrimination. McCarthy J looked at the extent of the disadvantage experienced by Travellers and non-Travellers alike where both are unable to benefit from the preferential treatment conferred on the sons of past pupils, rather than on the difference between Travellers and non-Travellers in respect of the risk of suffering that disadvantage. As Whyte puts it:

⁶⁷ By the parent of a child or a child who is not of the school's denomination who has been refused admission to the school. Art 28 of the Equal Status Act 2000 provides for an appeal to the Circuit Court and from the Circuit Court to the High Court on a point of law only.

⁶⁸ Employment Equality Bill 1996 [1997] 2 IR 321 at 359.

⁶⁹ The Acts provide for the promotion of equality in regard to the provision of services, property and other opportunities to which the public generally has access including education and educational establishments.

⁷⁰ Which accounted for almost half of the education cases.

⁷¹ Annual Report 2010, Equality Authority. With appropriate pre-service and in-service training and education for teachers and training for school boards of management, this number could be substantially reduced.

⁷² *Christian Brothers' High School Clonmel v Stokes* (3 Feb 2012), McCarthy J, unreported HC [2011] IECC: See further Mel Cousins BL, *The Bar Review*, Vol 16, Issue 6, Dec 2011, pp 116–19.

⁷³ Made pursuant to s. 15 (2)(d) of the Education Act 1998

‘What indirect discrimination targets is the risk of belonging to the disadvantaged class and when the question is framed in this manner, one could argue that the plaintiff’s son had a ‘more than ordinary’ risk of coming within the affected class than the child of settled parents.’⁷⁴

Census figures have identified that risk as very high indeed.⁷⁵ The *Stokes* case has been appealed to the Supreme Court.

In *Clare v Minister for Education and Science*⁷⁶ the High Court (Smyth J) held that the making of special educational provision for a student with special educational needs under s. 4 (4) of the Equal Status Acts did not discriminate unfairly, unreasonably or at all. In expelling the student, the school had regarded the student’s constitutional rights and the school was entitled to balance his rights and those of other students in his (intended) class on the basis of the facts. The school had given three months notice to the parents that it intended to take a probable course of action. In dismissing the plaintiff’s case, the Court found there was no breach of the European Convention on Human Rights Act 2003 in this case and no discrimination pursuant to s. 7(4)(b) of the Equal Status Act 2000 or otherwise.⁷⁷

5. Formal RI in Denominational Schools

Art 44 (4) provides that legislation providing State aid for schools (the Act of 1998) shall not, inter alia,

"...be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school."

It follows that a child whose parents wish their child to be withdrawn from any course of RI during the school day, and have informed the school to that effect, must be withdrawn from formal RI.⁷⁸ Section 30 of the Act of 1998 provides,

⁷⁴ G. Whyte, ‘Implications for Schools of Irish Equality Legislation’, at Schools’ Conference, ‘Litigation against Schools: All the Recent Developments’, lecture delivered 24 March 2012. Census figures 2002 confirm this very high risk.

⁷⁵ 63.2% of Travellers had left school by the age of 15 years and 54.8% had completed primary education only, Census Figures, Central Statistics Office, 2002. The 2011 figures for this are still not available.

⁷⁶ *Clare v Minister for Education and Science* [2006] IEHC 183.

⁷⁷ Cf. *O'Donovan v De la Salle College, Wicklow* [2009] IEHC 163 in which the school was held to have breached statutory provisions and the applicant's dismissal was quashed by the High Court.

⁷⁸ See s. 30(2)(e) of the Education Act 1998. In *CJ et al v Poland* (1996) A Eur Comm HR, Decisions 46 the applicant was initially withdrawn from RI in school and waited on the corridor during this period, but later joined the RI class due to alleged pressure. However, the ECtHR found no breach of the Convention since there was no suggestion of force or indoctrination involved and the provision of an opt-out clause was considered sufficient to protect the right of parents.

without prejudice to the generality of subsection (1), (the State curriculum), that the Minister.....

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

In addition, Rule 69 of the Rules for National Schools 1965 requires the time-tabling of formal RI while Rule 69(2)(b) specifically requires that the periods of formal RI be fixed so as to facilitate the withdrawal of pupils whose parents or guardians disapprove of any RI. It has been recommended by the Irish Human Rights Commission (IHRC) that such facilitation can be achieved in primary schools by moving formal RI classes to the start or end of the school day⁷⁹ and by providing an appropriate programme for those who have obtained exemptions from formal RI at this time. The IHRC's recommendation is in line with the Rules for National Schools although the 5 or so one teacher schools would be unable to comply with it for obvious reasons.⁸⁰

General Comment No 22 (1993) on Art 18 of the ICCPR reiterates that public education which includes instruction in a particular religion or belief is inconsistent with Art 18(4) of the ICCPR unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians. Human rights jurisprudence in regard to opt-out clauses has evolved further in recent years as illustrated in *Leirvag v Norway*⁸¹ and *Folgero v Norway*⁸² in which the exemptions for religion classes provided by the Norwegian State authorities proved to be inadequate for certain parents of the humanist tradition who challenged them. We may conclude from these cases that any such exemptions provided to children of other faiths or none should not be partial exemptions nor should they be complex to operate, onerous on parents or children or inadequate. In future the ECtHR and the UNHRC are more likely to subject opt-out arrangements to greater

⁷⁹ Religion and Education: A Human Rights Perspective (May 2011) Irish Human Rights Commission, p 105.

⁸⁰ There are 5 one teacher primary schools nationwide and three such schools with 1 teacher and a further teacher is shared with another school and there are 380 two teacher primary schools. I am grateful to the Statistical Section of the Department of Education & Science for this information.

⁸¹ CCPR/C/82/D/1155/2003 discussed in Glendenning, *Education and the Law*, 2nd ed. Bloomsbury Professional (2012), 8.60.

⁸² [GC], No 15472/02 and ECHR 2007-111 discussed in Glendenning, *Education and the Law*, 8.24, 8.60 and 8.64.

scrutiny particularly from the perspective of students and parents and the burdens imposed upon them during opt-out periods.⁸³ In *Lautsi* the ECtHR pointed out that in the area of education and teaching under Art 2 of Protocol 1 the supporters of secularism are able to lay claim to views attaining the "level of cogency, seriousness, cohesion and importance" required for them to be considered "convictions" within the meaning of Art 9 of the Convention and Art 2 of Protocol No 1.⁸⁴ More precisely, it continued, their views must be regarded as "philosophical convictions", within the meaning of the second sentence of Art 2 Protocol No 1, given that they are worthy of "respect in a democratic society" are not incompatible with human dignity and do not conflict with the fundamental right of the child to education.

Informal Ethos Rights: Denominational School

Turning to informal ethos rights, in the *Campaign case*⁸⁵ Barrington J stated that the Constitution cannot protect a child of a different religious persuasion from being influenced, to some degree, by the religious 'ethos' of the school.⁸⁶ However, he did not place any express limitations on a denominational school's ethos related rights outside of formal RI time nor did he indicate any specific role for the State in this regard.⁸⁷

International law casts specific obligations on the State in regard to education which the ECtHR summarised and re-stated in *Lautsi v Italy & Ors*.⁸⁸ In *Lautsi* the Grand Chamber⁸⁹ held that the display of a crucifix, (which it considered to be a passive symbol), in State-run Italian schools did not violate Art 2 of

⁸³ See further paper delivered by Dr Alison Machinery, School of Law, Queen's University Belfast, at the Irish Human Rights Commission/TCD Conference, Religion and Education: A Human Rights Perspective, 27 November 2010 which is online at www.humanrights.ie under 'past events'.

⁸⁴ See *Campbell v Cosans v United Kingdom*, 25 Feb 1982, para 36, Series A no 48.

⁸⁵ *Campaign to Separate Church and State* [1998] IR 321 at 357–8 (SC).

⁸⁶ In the context of sex education see *Kjeldsen v Denmark* (1979) 1 EHRR 711.

⁸⁷ In pre-independence Ireland the Commissioners of National Education, the predecessors of the Minister, included important safeguards in the Rules for National Schools which ensured that their inspectors monitored any transgressions of "the mixed education principle. See National Archives, Education File 9, No 2690 details a complaint against Kings Inns Street' Convent N.S. for filing to remove a crucifix during secular instruction while File No 4349, Co Down 1887 indicated that students were given secular instruction during religious education time.

⁸⁸ *Lautsi v Italy*, [GC] App no 30814/06, 18 March 2011

⁸⁹ By 15 votes to 2 overruling the Chamber's earlier decision.

Protocol 1 of the ECHR in the light of Art 9⁹⁰ which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion. The Court held that Art 9 imposes on States a "duty of neutrality and impartiality" in the exercise of various religions, faiths and beliefs stating: "Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups."⁹¹ That role concerns both relations between believers and non-believers and relations between the adherents of various religions, faith and beliefs.⁹² While the word "respect" in Art 2 Protocol 1 implies some positive obligation on the State's part,⁹³ the requirements of the notion of "respect",⁹⁴ may vary considerably from case to case, taking account of the diversity of practices followed and the situations pertaining in the Contracting States. In this respect the States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and the resources of the community and of individuals. The ECtHR also referred to its settled case law on the place of religion in the school curriculum and in particular to *Kjeldsen v Denmark*,⁹⁵ *Folgero v Norway*⁹⁶ and *Hasan and Zengin v Turkey*⁹⁷ and it summarised the main principles as follows:

"According to those authorities, the setting and planning of the curriculum fall within the competence of the Contracting States. In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era.

In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum.

⁹⁰ See *Folgero v Norway* [GC], no 15472/02, ECHR 2007-111.

⁹¹ *Approving Sahin v Turkey* [GC], no 44774/98, para 107, ECHR 2005-XI.

⁹² *Lautsi v Italy*, [GC] App no 30814/06, 18 March 2011.

⁹³ As indicated in *Campbell and Cosans v UK*(1982) 4 EHRR 293.

⁹⁴ Which is also included in Art 8 of the ECHR.

⁹⁵ 7 Dec 1976, paras 50-53, Series A no 23.

⁹⁶ *Folgero v Norway* [GC], no 15472/02, ECHR 2007-III.

⁹⁷ *Hasan and Zengin v Turkey* no. 1448/04, paras 51-and 52, ECHR 2007-XI.

However, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralist manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed."

As the State advances in education policy making and reforms, the prudent words of Eoin McNeill, the first Minister for Education in the Irish Free State Government (1922-1925), seem relevant:

"One safeguarding principle is always to be borne in mind. The *raison d'être* of the State is the good of the people. The State should exist only to subserve and protect the people's wellbeing. It is imperative that this truth, however obvious, should be constantly before us, for there are too many who base their notions of policy and stake the very existence of the nation on a contrary theory, that the people are mere material for the maintenance of the State or of some particular form of State."⁹⁸

Dympna Glendenning B.L.

October 2012.

⁹⁸ Eoin MacNeill TD, Minister for Education in the Executive Council of the Irish Free State Government, 1922-1925, A View of the State in Relation to Education: see also Irish Education Policy Parts 1 and 11, and MacNeill, Education in a Free Ireland.

