

## **Religion and Education: A Children's Rights Perspective**

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**Dr Ursula Kilkelly, Senior Lecturer in Law, University College Cork**

### **Introduction**

The aim of this paper is to examine the issues of religion and education from a children's rights perspective.<sup>1</sup> Despite its importance, talk of children's rights in the education system and in schools is still greeted with some degree of scepticism. In addition, education is not always – if it is ever – viewed as a children's rights issue and the international law which gives expression to the right to education has not had a children's rights focus until very recently. At the same time, despite its recognition in numerous international treaties, education is not just an issue for children. It is a matter of social importance that ties in with a country's need for an educated population and workforce. In that respect at least, it matters to all of us how education is organised with respect to religious freedom and more generally.

My focus today, however, is to present a children's rights perspective on the issues under consideration here. I will begin by outlining what a children's rights perspective means in this context, and I will then go on to analyse, briefly in the time available, what this means for the Irish legal and policy framework and indeed the children affected by it.

### **International Law – the Development of the Child's Right to Education**

The right to education is one of the oldest rights in international law, and among the most widely protected. Article 26(1) of the Universal Declaration of Human Rights recognises everyone's right to education, including free and compulsory education at elementary level, and significantly, Article 26(2) provides that education should be directed to 'the full development of the human personality', to 'strengthening of respect for human rights and fundamental freedoms', promoting 'understanding, tolerance and friendship among all

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<sup>1</sup> This paper is based on research undertaken and published as follows: Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Bloomsbury Publishing, 2008) and Kilkelly, 'The Child's Right to Religious Freedom: Time for Reform' in Fineman and Worthington (eds) *What is Right for Children? Competing Paradigms of Religion and Human Rights* (Ashgate, 2009) pp 243-268.

nations, racial or religious groups' and furthering the activities of the United Nations for the maintenance of peace. While Article 26 contains no reference to education as a child's right, paragraph (3) establishes that 'parents have a prior right to choose the kind of education that shall be given to their children.' This latter provision is the only one replicated in the International Covenant on Civil and Political Rights (ICCPR), Article 18(4) of which provides that states must undertake to respect the liberty of parents 'to ensure the religious and moral education of their children in conformity with their own convictions'.<sup>2</sup> As we have just heard, it is also a fundamental element of Article 2 of the First Protocol to the European Convention on Human Rights, which provides in its second sentence that

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 religions and philosophical convictions.

The first sentence of Article 2 provides that '[n]o one shall be denied the right to education'.<sup>3</sup> It is significant that the European Court of Human Rights (ECtHR), has established that notwithstanding its negative formulation, Article 2 contains a right to education that must be secured to all children.<sup>4</sup> The significance of the negative wording refers instead to the scope of the right which states must protect. In particular, the ECtHR has held that the provision does not guarantee a right to education of a specific type or level but, when read with Article 14, Article 2 it guarantees a right of equal access to existing educational facilities.<sup>5</sup> Whether this forbids admission policies that use 'religion' as a criterion is, as yet, unclear.<sup>6</sup>

Arguably the first positive affirmation of the right to education is contained in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>7</sup> Article 13 of which is dedicated to the right to education at primary, secondary and tertiary level. It also sets out the aims of education, highlights the need to improve teaching conditions and recognises the right to establish educational institutions subject to the regulation of the state. Like the ICCPR, however, Article 13 of the ICESCR does not recognise the right to education

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<sup>2</sup> GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force Mar 23, 1976.

<sup>3</sup> See generally Kilkelly, *The Child and the ECHR* (Ashgate, 1999) pp 62-87.

<sup>4</sup> *Costello-Roberts v UK*, Series A no 247-C, 19 EHRR 112, para 27.

<sup>5</sup> *The Belgian Linguistics Case* Series A no 6, 1 EHRR 252.

<sup>6</sup> On the application of the ECHR in this area see Dr Alison Mawhinney's paper also delivered at this conference.

<sup>7</sup> GA res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force Jan 3, 1976

as a child's right, and indeed the only reference to children is contained in paragraph (3) which recognises the right of parents to choose their child's school subject to minimum educational standards and to ensure the religious and moral education of their children in conformity with their own convictions.

Although the assertion of parents' rights in respect of their children's education was a necessary and natural response to the indoctrination policies of Nazi Germany,<sup>8</sup> it is regrettable that these provisions were not supported by general recognition of education as a right of the child. Even the Convention on the Elimination of Discrimination in Education, adopted by the United Nations in 1962, failed to take this step.<sup>9</sup> The 1959 Declaration on the Rights of the Child began this process, however, and Principle 7 of the Declaration made provision for the child's right to education while recognising that the best interests of the child must be the guiding principle of those responsible for a child's education and guidance, that responsibility lying in the first place with the child's parents.<sup>10</sup> It was 1989, however, before this standard was set in a binding international instrument. Accordingly, the adoption of the Convention on the Rights of the Child (CRC) can be marked as the first time that expression was given in binding international law to education as the right of the child. The CRC has two provisions concerned with education (as well as others which are relevant to our topic today): Article 28 is dedicated to the right to education and Article 29 outlines the aims of education. The CRC has clearly established that education, to which everyone is entitled, is a right of particular importance for children and although subsequent documents like the Vienna Declaration<sup>11</sup> stress the universal importance of the right to education, the UN Millennium Declaration articulates the goal of ensuring that 'children everywhere, boys and girls alike, will be able to complete a full course of primary schooling' by 2015.<sup>12</sup>

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<sup>8</sup> See further Steiner, Alston and Goodman, *International Human Rights In Context: Law, Politics, Morals*, (OUP, 3<sup>rd</sup> Ed, 2007) on the background to this part of the right to education.

<sup>9</sup> Again, the only reference to the rights of children is made in the context of the parent's right to choose education for their children. See Article 5(1)(b) of the Convention against Discrimination in Education, 429 UNTS. 93, *entered into force* May 22, 1962.

<sup>10</sup> GA res 1386 (XIV), 14 U.N. GAOR Supp (No 16) at 19, UN Doc. A/4354 (1959).

<sup>11</sup> Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF 157/24 (Part I) at 20 (1993).

<sup>12</sup> GA Res 55/2, UN GAOR, 55th Sess, Supp. No. 49, at 4, UN Doc A/55/49 (2000), para 19.

Articles 28 and 29 of the CRC have been supplemented by the Committee on the Rights of the Child's General Comments, including one on the Aims of Education,<sup>13</sup> and together these instruments set out states' obligations regarding the protection of the child's rights to and in education. Apart from the general recognition of the child's right to education, Article 28 imposes on states a duty to progressively make primary education free and compulsory for all children, encourage the development of different forms of secondary education and make tertiary education accessible to all on the basis of capacity. Two new duties are contained in Article 28(1) (d), which require educational and vocational information and guidance to be made available and accessible to all children and (e), which requires the adoption of measures to encourage regular attendance at schools and the reduction of drop-out rates. Significantly, too, Article 28(2) requires states to take 'all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention'. Article 28(3) requires states to promote and encourage international co-operation taking particular account of the needs of developing countries.

Significantly – and in a departure from previous international instruments - the Convention makes no reference to the right to have a child educated in accordance with his/her religious convictions, from either the parents' or the child's perspective. I will return to the child's right to religious freedom a little later.

It is also noteworthy that Article 29 of the CRC develops the Universal Declaration's standard that the content of education should serve to protect and promote human rights values and principles. Although statements as to the importance of effective education are absent, it is noteworthy that Article 29(1)(d) requires that education be directed to:

The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

Somewhat surprisingly perhaps, the General Comment on the Aims of Education, which supplements Article 29, provides very little detail as to how this might be realised in practice although it talks about the need for an holistic approach to the child's education and

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<sup>13</sup> Committee on the Rights of the Child, *General Comment No 1 (2001) The Aims of Education Article 29(1)* CRC/GC/2001/1 (17 April 2001).

educational opportunities with the overall objective of education being ‘to maximize the child’s ability and opportunity to participate fully and responsibly in a free society’.<sup>14</sup> The General Comment requires that ‘education should be ‘child-friendly, inspiring and motivating’ ... and ...[s]chools should foster a humane atmosphere and allow children to develop according to their evolving capacities’.<sup>15</sup> It is important, from the Irish perspective, that according to the Committee ‘the school environment itself must thus reflect the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin called for in article 29 (1) (b) and (d).

Also reinforced throughout the General Comment is the relevance of other CRC provisions to education. Of significance here are the general principles of Article 2 (non-discrimination), Article 3 (best interests of the child as a primary consideration in all actions taken) and Article 12 (the child’s right to express their views and have them given due weight in matters that concern them). I will return to these provisions shortly.

Beyond Article 28 and 29 of the CRC, several other Convention provisions are relevant to today’s discussion, although they have greater relevance to religion than to education. The most important is Article 14.

Paragraph 1 of Article 14 provides that

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

Accordingly, this stands out as a provision which gives expression to the right of religious freedom as an independent right of the child. Although Article 14(3) provides that the freedom to manifest one’s religion or beliefs can be subject to limitations on the grounds of public safety and order, and the right and freedoms of others, the more interesting and arguably more important limitation on the child’s right to freedom of religion comes in paragraph (2) of Article 14. This provides that:

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<sup>14</sup> Committee on the Rights of the Child, *General Comment* No 1, para 12.

<sup>15</sup> *Ibid.*

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

Although this provision – which recognises the role of parents in the child’s exercise of his right to religious freedom – reflects similar provisions in other instruments – including the Irish Constitution – from a children’s rights perspective this provision is unique in that it is the only CRC provision that limits the child’s exercise of his/her rights by reference to the ‘rights and duties of parents’. So, although Article 5 of the CRC gives expression to the general principle of evolving capacity - in recognition of the right and responsibility of parents to provide appropriate direction and guidance to children in the exercise of their rights, in line with the child’s evolving capacities - Article 14 is a rare application of that principle in the specific context of religious freedom. Of course, the effect of Article 14(2) on the child’s right is not to place a permanent restriction on the child’s autonomous exercise of his/her right to religious freedom. Rather it makes it clear that while younger children – those with less capacity – may need guidance in this area, children with greater capacity will with increasing competence be able to exercise this right without parental direction or guidance.

In addition, Article 14 reflects a significantly lesser or weaker form of the right to religious freedom than that recognised in so-called ‘adult treaties’ – the ICCPR, the ICESCR and the ECHR – in that the provision is limited in two ways by the omission of two clauses: first, the Convention does not recognise as a child’s right “the freedom to have or to adopt a religion or belief of his/her choice” and second, it does not protect the “freedom either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.”

The overt absence of both rights from Article 14 raises questions about the level of protection afforded by the CRC to the child’s right to religious freedom. If the right does not comprise these two elements of choosing and exercising one’s religion, what elements of the right are protected? One conclusion is that Article 14 protects only the “inner” elements (the private matters of holding religious beliefs) and not the “outer” elements (the more public aspect of choosing and practising religious beliefs) of religious freedom. If this is the case, it is clear that according to international law, the child’s right to religion is not worthy of the same protection as the equivalent adult right. However, the alternative view is that these elements

are implicit in Article 14 even if not given express recognition. That is certainly the view of States like Belgium and the Netherlands, which entered declarations to the CRC on ratification to the effect that Article 14 (1) is to be interpreted, consistent with the ICCPR and the ECHR, as including the right of the child to choose his/her religion or belief. The drafting records do not bear out this interpretation, however, and show instead a deliberate decision to remove the child's right to choose his/her religion from the provision on religious freedom. While earlier drafts submitted by the Scandinavian countries and Canada, for example, proposed a provision broadly reflective of the ICCPR standard, the vociferous objection of a group of Islamic States, who argued that the notion that a child could freely choose his religion ran counter to the principles of Muslim law prevailed, causing this element of the provision to be dropped (LeBlanc, 1995). While most States agreed with the need for compromise here, in pursuit of the more laudable goal of universality, others complained about the lowering of standards, which this clearly represented.

In relation to the child's right to practise his/her religious beliefs, it is not clear why this element was not given express protection in Article 14 particularly given that Article 14(3) places an express limitation on that right. While this may support the view that this part of the right is in fact implicit in Article 14(1) (UNICEF, 2002), the failure to give it explicit protection is a source of confusion and ambiguity, not least given that it appears in the equivalent ICCPR and ECHR provisions. Article 30 of the CRC confuses matters further. Concerned with the rights of children of ethnic minorities, Article 30 provides:

in those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group... to profess and practise his or her own religion.

There are a number of caveats here: first, this right relates expressly only to those States in which minorities exist and does not have general application. Second, the right to profess and practise religion is limited to children who are members of such a minority, and third, the provision refers only to collective worship - practising religion "in community with other members of his other group." The fact that this provision is negatively formulated – it prohibits the denial of this right to children rather than recognising that the right must be actively secured – may further limit its potential to provide protection for children of religious minorities who wish to practise their religion with others. If Article 14(1) includes

the freedom to manifest one's religion, why was it necessary to include such a limited right in Article 30? If it does not, then why are only those children belonging to ethnic minorities entitled to enjoy this right?

So, in specific terms, the CRC provisions - Article 14, 28 and 29 – although not completely without merit of course - may not be of much use in the debate around how to ensure that the Irish education system complies with international standards with respect to the child's rights to religious freedom in education. If we are concerned with ensuring that education is child-friendly we need to look beyond these provisions to the Convention's general principles. Of particular significance here are the requirement that the child's best interests are a primary consideration under Article 3, and that the child has a right to a say in matters that affect him/her in Article 12.

It is self-evident that education is in a child's best interests; but what does best interests mean in the educational context? Criticisms abound about the vague nature of the best interests principle, which has been described as 'all things to all people'.<sup>16</sup> Everyone in this room might claim to know what is in a child's best interests, but asserting that as part of the Article 3 standard is not as straightforward. At one level, the best interests test is a paternalistic one, where adults assess what approach best meets the child's needs, and the education system is designed accordingly. An approach that aims for greater consistency with the Convention itself, however, is one that advances compliance with Article 12, namely the right of the child to be heard.<sup>17</sup> This approach to the application of Article 3 requires that what is in the child's best interests in this context must be determined with reference to the child's own views. This brings us neatly to Article 12, in my view the pivotal Convention provision in this context.

Article 12 requires that

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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<sup>16</sup> Kil Kelly and Lundy (2006) 18(3) 'The Convention on the Rights of the Child: its use as an auditing tool', *Child and Family Law Quarterly*, 331-350.

<sup>17</sup> Committee on the Rights of the Child, *General Comment on the Child's Right to be Heard*, CRC/GC/12/2009.



2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In this way, it is clear that Article 12 is concerned both with the substantive right of children to have a say in matters that affect them as it is about process, ie about enabling children to express their views and have them taken into account in matters that affect them. As a result, considerable attention has focused in recent times on the child's right to participate in education, to have a say about their education and to learn skills of citizenship and democracy through their treatment in school.<sup>18</sup> Nevertheless, the implementation of Article 12 remains a particular challenge for policy makers and others required to secure rights to children in education, not least because as Sinclair notes,

‘securing change requires a culture shift in school life in which children’s views are not just valued and respected but seen to be integral and embedded within decision-making’.<sup>19</sup>

Critically, children’s views are not yet embedded in the delivery of education in Ireland, nor are they ever a formal part of the discussions that takes place around the necessary reform.<sup>20</sup>

## **PART II**

It is against this backdrop that I want to go on now to consider the extent to which Irish law and policy meets the standards of this child-friendly approach to education and religion.

It is well known that the Constitution makes little express provision for the autonomous rights of children and in literal terms at least children have no autonomous right to education under the Irish Constitution. Case-law has of course filled these gaps – making a significant contribution in the area of special needs education, for example, as the work of my colleague

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<sup>18</sup> See Sherlock, ‘Listening to children in the field of education: experience in Wales’ 19 CFLQ (2007) 161-182; Macintosh et al, ‘Electronic Democracy and Young People’ 21(1) *Social Science Computer Review* 2003, 43-54 and Lundy, L., (2007) 33(6) ‘Voice is not enough’: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child’, *British Education Research Journal*, 927-942.

<sup>19</sup> Sinclair, ‘Participation in Practice, Making it Meaningful, Effective and Sustainable’ *Children and Society* Vol 18 (2004) pp 106-118.

<sup>20</sup> See Kilkelly, *Children’s Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2008).

Dr Conor O'Mahony testifies<sup>21</sup> – but in my view the impact of this invisibility from the Constitution of the child's right to and in education has had a clear knock-on effect on the statutory provision in this area too. Although it is important to view constitutional provisions in their historic context as well as with reference to the current landscape of education in Ireland, the position of the child's right to education in the Constitution is a critical issue insofar as it has a heavy influence on the direction and content of educational law and policy. In this regard, it is of particular importance that the terms of Article 42 – so eloquently analysed by my colleagues - are parent-rather than child-focused reflecting the fact that in Irish law, education concerns the relationship between the state and the family, rather than the child. Prof Whyte has observed that 'quite plainly the constitutional model of education placed parents at the apex of the system, with the State in a supportive role'.<sup>22</sup> One might add that children are largely invisible in this model. The failure to acknowledge the existence of the right to education either in general-<sup>23</sup> or child-specific terms means that the Constitution lacks a clear expression of the right to education as an independent right of the child.

Fortunately, the courts have approached the interpretation of the state's duty to provide for free primary education as encompassing a corresponding right of the child to receive education.<sup>24</sup> While this is welcome, it is insufficient in my view to ensure that the child's right to education is the dominant value in Article 42 and to secure that the model of education in Ireland is child-friendly. Nor is the absence of an express right to education in Article 42 addressed by the reference in Article 42.3.2 to the 'certain minimum education' which the child has an entitlement to receive.<sup>25</sup> The failure to define the 'minimum' education has allowed the concept to be interpreted as a standard lower than the primary education, which the state is obliged to provide under Article 42.4.<sup>26</sup> In this context, it is notable that the Constitution Review Group (CRG) recommended the insertion into Article 42 of a more explicit statement of the child's right to free primary education.<sup>27</sup> However, this

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<sup>21</sup> O'Mahony, *Educational Rights in Irish Law*, Roundhall Press, 2006.

<sup>22</sup> Whyte, 'Education and the Constitution: Convergence of Paradigm and Praxis' [1002-2994] XXVII-XIX *Irish Jurist* 69 at p 73, in O'Mahony, *ibid.*.

<sup>23</sup> In this regard, the 1937 Constitution can be contrasted with that of 1922, Article 10 of which provided for free elementary education to be guaranteed to all citizens.

<sup>24</sup> *Crowley v Ireland* [1980] IR 102, at 122.

<sup>25</sup> See *Re Article 26 and the School Attendance Bill 1942* [1943] IR 334, which highlighted the need for legislation on this matter.

<sup>26</sup> *O'Shiel v Minister for Education* [1999] 2 ILRM 241 Laffoy J.

<sup>27</sup> *Report of the Constitution Review Group* (Stationery Office, 1996) p 353.

recommendation has not heretofore been given any consideration, even in recent discussions around the proposed constitutional amendment on children's rights.

To understand this reluctance to change the Constitution, it is necessary to look back at what was behind the current provision. One view is that the failure to give expression to the right to education in Article 42 stems from a reluctance to include any socio-economic rights in the Constitution. This view was echoed in 1996 by the CRG, which recommended against the inclusion of socio-economic rights in the Constitution. Somewhat ironically, the CRG recommended that serious consideration be given to the extension of Article 42 to include a right to free secondary education, highlighting further the anomalous position that education enjoys in the constitutional framework.<sup>28</sup> This confusion is perhaps a second reason behind the weakness of the existing provision. But according to Professor Quinn, the more logical answer to the question of why Article 42 lacks a rights- or even a child-focus is that, essentially, this was not its purpose. Instead, he asserts 'the main intention of Article 42 seems to have been to copperfasten [the] historic arrangement between Church and State', and in this regard, it had 'less to do with the substantive right to education of the child and more to do with protecting the arrangement between the funders of education (the State), the providers of education (the religious bodies) and the parents.'<sup>29</sup> Changing this perspective, in anticipation of any amendment to Article 42, is likely to be a long and slow process.

It is also critical in the absence of a right to education from Article 42 that the formulation of the state's duty to provide free primary education comes with limitations. Chief among these is the insertion of the word 'for', apparently by De Valera's own hand, into the terms of the provision.<sup>30</sup> This means that the duty on the State is not to provide education to those who require it, but to provide for education, or rather to see it provided. The difference is subtle but extremely important because it was clearly intended to exclude direct state responsibility for the provision of education which, it was feared, would prove litigious and costly as against the State. The impact has been just that, ie to preclude claims against the State for failure to provide education. Case-law confirms that the use of the preposition 'for' keeps the

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<sup>28</sup> See O'Mahony, *Educational Rights in Irish Law*, pp 37-38.

<sup>29</sup> See Quinn, 'Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order' in Costello (ed) *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Irish Centre for European Law, 2000) p 49, in O'Mahony, *Educational Rights in Irish Law*, p 38.

<sup>30</sup> Glendenning, *Education and the Law*, p 60.

State ‘at one remove from the actual provision of education’<sup>31</sup> suggesting that once the state has made arrangements for the provision of education – provided the buildings, paid the teachers and set the curriculum – it is absolved of responsibility when the education is not actually delivered. In these terms, *Crowley v Ireland*,<sup>32</sup> concerning the impact of a teacher’s strike on children’s right to education, appears to offer the state more protection than is warranted by the terms of Article 42.4 and O’Mahony rightly makes a case for strengthening the duty on the state to make education available in fact.<sup>33</sup>

### *Balancing Rights and upholding Claims*

Apart from the absence from Article 42 of the child’s right to education, the other difficulty with the provision is the balance that it draws between the rights of children, parents and the State. Who holds the rights, who exercises them and on whom is the duty placed to vindicate them? As O’Mahony explains, ‘the balance between the education rights of children and parents may be more properly described as an imbalance in favour of parents’.<sup>34</sup> The question of the relationship between the child and the parent’s rights was at issue in the *Sinnott* case where in the High Court Barr J found that in addition to the claim of the child who had been denied adequate education by the State, his mother was also entitled to damages for the loss that she had suffered watching her son’s condition deteriorate.<sup>35</sup> This was overturned by a majority of 6-1 in the Supreme Court with the majority finding that the claim was ‘wholly unsustainable’.<sup>36</sup> Denham J disagreed, however, finding with reference to an harmonious interpretation of Articles 42.4 (the duty to provide for free primary education), 40.1 (equality before the law) and 41.1 (the guarantee to protect the Family), *inter alia* that the denial of the child’s education also raised issues of the mother’s equal treatment vis a vis a mother whose son received an adequate education, of her ability to fulfil her parental rights and duties and her family’s right to constitutional protection. There is persuasive argument here that where a parent’s suffering is genuine and is linked causally to the denial of her child’s right to education he/she may be entitled to claim separately for the damage caused to him/her, or to the family. This point is particularly persuasive in light of

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<sup>31</sup> O’Mahony, *Educational Rights in Irish Law*, p 148.

<sup>32</sup> [1980] IR 102.

<sup>33</sup> O’Mahony *Educational Rights in Irish Law*, p 149. See also Farry, *Education and the Constitution* (Round Hall Sweet and Maxwell, 1996) pp 23-37.

<sup>34</sup> O’Mahony, ‘Children, Parents and Education Rights: A Constitutional Imbalance’ [2004] 3 *Irish Journal of Family Law* 3-7. See also O’Connell, *The ECHR Act 2003: A Critical Perspective* in Kilkelly (ed) *ECHR and Irish Law* (Jordans, 2004) pp 1-11, p 7.

<sup>35</sup> *Sinnott v Minister for Education and Science* [2001] 2 IR 545.

<sup>36</sup> *Ibid.* See the analysis of this aspect of the case in O’Mahony, *Educational Rights in Irish Law* pp 127-130.

the fact that Article 42 views the child's education from the parent's perspective and does not explicitly identify the child's right as one that they hold independently from their parents. In this regard, Laffoy J noted in *O'Shiel v Minister for Education* that Article 42 'focuses on the primacy of the family and the rights of parents in relation to the education of their children' and merely 'inferentially recognises certain rights of children'.<sup>37</sup> Moreover, in *Comerford v Minister for Education*, McGuinness J referred to 'the extremely strong rights given to parents and the family in the Constitution and the comparative lack of express constitutional rights for the child as against the parents.'<sup>38</sup> The fact that Article 42.5 threatens to supplant the place of parents who fail in their duty to their children, but the provision does not acknowledge the legitimacy of the parents' claim where the state is responsible for the harm caused supports this further. At the same time, although linked to the same act or omission on the part of the state, the claim of the parent is and must be entirely separate from that of the child, notwithstanding that the failure to provide adequate education for a child with special needs will have a serious impact on the child's family life. It is a likely consequence of the children's rights approach – were the child's right to education to be given explicit protection in the Constitution – that the parents' claim will be rejected as parasitic unless it can be based, as Denham J argued, on entirely separate constitutional grounds. Thus, given the current formulation of Article 42, where the rights of children and parents are interwoven, it would appear just that both claims should be upheld where the facts allow such a conclusion and vice versa. However, this position should not detract from the need to give proper recognition to the child's independent right to education in Article 42.

### **The Irish Legislative Framework**

It is well known that Ireland came late to legislating for educational provision adopting its first substantive piece of legislation in the area in 1998<sup>39</sup> followed closely by the Educational (Welfare) Act 2000. In 2004, the issue of special educational needs was addressed in the Education for Persons with Special Educational Needs Act 2004. Together these pieces of legislation provide a statutory framework for education in Ireland by setting out the functions of the Minister for Education and the school and by making provision for school administration in areas like school attendance and absenteeism, discipline, school inspections

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<sup>37</sup> [1999] 2 ILRM 241, at 261-262.

<sup>38</sup> [1997] 2 ILRM 134 at 145. in O'Mahony, *Educational Rights in Irish Law* at p 5 and paras 5.53 – 5.59.

<sup>39</sup> For an historical overview see Glendenning, *Education and the Law* (Butterworths, 1999) pp 9 – 42. See also

and special needs provision. Even a cursory glance at these instruments highlights the sustained invisibility of children from Irish education law and policy.

### Consultation

Compromises are evident throughout the Education Act in line with the nature of Irish education which exists as a partnership between Church and State. In this regard, several of the Act's provisions require consultation and in particular, the Minister has a duty under s 7(4)(b) to 'make all reasonable efforts to consult with patrons, national associations of parents, parents' associations in schools, recognised school management organisations, recognised trade unions and staff associations representing teachers'. Students are not included as partners in this context and thus the opportunity to ensure the implementation of Article 12 of the CRC, which requires children's views to be taken into account in all matters that affect them, was lost. On a positive note, s 7(4)(b) of the Act makes provision for consultation with 'such other persons who have a special interest in or knowledge of matters relating to education'. There is clearly scope to include in this definition students and/or their representatives and this provides a clear legal basis for consulting students on education law and policy (s 7(1)(b)) and on the quality and effectiveness of the education provided (s 7(2)(b)). This approach would also serve to meet the first goal of the National Children's Strategy, ie to ensure that children will have a voice in matters which affect them.<sup>40</sup> The same point can be made with respect to giving formal recognition in the legislation to children's right to be consulted by those undertaking the inspection process in schools. The failure of the Education Act 1998 to specifically require the establishment of schools councils (s 27 provides that students at post primary 'may' establish a schools council') is a further example of the failure to secure to students their right to have a say, and indeed it is apparent that the value of including children as parties to the educational process has not yet been fully recognised.

Separate and distinct legal issues arise in relation to the framing of the disciplinary measures, notably under section 28 of the Education Act and the fact, for example, that the right to appeal a decision in this process falls not to the child but to the parent. In my view, the constitutional ethos – which views education through the prism of parents' rights – has had a knock-on effect here.

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<sup>40</sup> National Children's Office, *Our Children Their Lives a National Children's Strategy* (Stationery Office, 2000), pp 29-36.

### A Rights Basis

The Education Act, although representing an important first step in establishing a solid legislative basis for education in Ireland, is disappointing from a children's rights perspective also because it does not make more explicit provision for the child's rights to, in and through education, especially given that it was adopted subsequent to Ireland's ratification of the CRC in 1992. In this regard, it is notable that the Committee on the Rights of the Child has recommended that all sectoral laws relating to children give expression to the rights of the child.<sup>41</sup> Thus, although it is important that s 6 places obligations on those concerned with the implementation of the Act to have due regard to a set of principles and values, there is little reference in those principles to the rights of the child. While s 6(a) refers to giving 'practical effect to the constitutional rights of children ... as they relate to education', given that the constitutional rights of children are at best unclear in this context, it would have been preferable to state explicitly that the aim of the Act is to ensure the vindication of every child's right to an appropriate and effective education. Section 6(c) is a more positive example, in this context, insofar as it provides for the promotion of equality of access to and participation in education although again, a clear expression of the child's right to access and enjoy education without discrimination would have strengthened the legislation. As it is, s 6 makes more explicit provision for the rights of parents than the rights of children even though the provision made – for parental choice – merely reflects constitutional provision in this area.

Also absent from the Act is the principle set out in Article 3 of the CRC that the best interests of the child must be a primary consideration in decision-making concerning the child. Although the child-focus is evident in educational policy, the failure to give the principle statutory expression in the 1998 Act is a missed opportunity to give this principle value in statute. One further gap in the Act is its failure to make explicit provision for the duty to ensure that children's views are heard and taken into account in decisions made about their education. Giving this principle statutory protection would greatly facilitate its implementation in practice providing a statutory mandate to include children in decision-making at both national and local levels.

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<sup>41</sup> Committee on the Rights of the Child, General Comment No 5 (2003) *General Measures of Implementation* UN Doc CRC/C/GC/5/2003.

Overall, greater compliance with the CRC would be achieved by including in Education law and policy the general principles of the CRC (notably the best interests principle but most importantly the child's right to be heard) as guidance to those charged with its implementation and the delivery of education in Ireland. This would have provided a clear rights-based platform for education in Ireland and ensured that those involved in the delivery of education at national and local levels are supported by a clear legislative statement of its child-focus.

Lundy has argued with respect to Northern Ireland that 'the statutory framework does not give pupils an independent right to decide whether to receive religious education, even where they have attained the age of eighteen'... 'Nor do they have any say in the content of the religious education. As the legislation stands, if the parent and child hold conflicting views on the matter, the parent's views prevail. Thus a parent can both insist on a child receiving religious education and can withdraw him or her from such classes as he or she wishes. Although the compatibility of this situation with Article 14 is in doubt given its limitations, the parents' absolute right of withdrawal is potentially in conflict with Article 12 of the UNCRC.<sup>42</sup> The same point could be made with respect to current the Irish situation where the absence of express rights for children - either in the Constitution or in legislation - means that parents' rights dominate. It may be harsh to suggest that in this environment children are left at the mercy of their parents in the context of religious education, but it is certainly true to say that there is little space within an educational system dominated by religion for children's own religious beliefs to develop, independent of their parents.

## **Conclusion**

A children's rights analysis of the subject of today's conference - education and religion - clearly shows not only that the Irish educational model falls short in substantive terms. I would make two final points here:

First, it appears to me that compliance with children's rights standards in education - whether concerning religion or generally - is difficult if not impossible - without first addressing the constitutional framework. The current proposals to insert a new Article 42 into the

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<sup>42</sup> Lundy, 'Children, Religion and Rights in Northern Ireland, chapter in Fineman, M. and Worthington, K. (eds): *Competing Paradigms of Rights and Responsibilities: Children in the Discourse of Religion and International Human Rights*, (Ashgate, 2009).



Constitution which recognises the state's duty to respect the individual rights of the child gives cause for hope here, not least because two of the rights given as examples here are the right to education and the child's right to have his/her voice heard.

The second point relates to the duty, as a matter of process, to ensure that children have a right to a say in matters that affect them. No research in Ireland has measured children's experiences or views of religion in the school context.<sup>43</sup> The Committee on the Rights of the Child has expressed concern about the impact of the opt-out clause on children in the school system and there are clear arguments why this is not an appropriate solution to the problem, not least where the integrated curriculum is employed. Although devising a solution to the apparent problem is a matter that falls to adults, why not engage young people directly in this debate around the need to reform the patronage model or more generally to secure more effective ways to ensure the best fit between the nature of the schools on offer and children's rights both to education and respect for religious freedom?

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<sup>43</sup> But see *Share it with the rest of the class. A nationwide study of second level students and Principals examining their views on student participation in school decision making and student councils* (National Youth Council of Ireland, 2000).