

# **Egalitarianism, Religious Preferences and the Integrated Curriculum**

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## **Introduction**

The purpose of this conference is to develop human rights perspectives on the issues of religion and education. In this paper, I want to focus on a number of egalitarian considerations that arise when one considers the interaction between religion and education. Put loosely, the issue is as follows: in a social situation where education is largely provided (whether directly or indirectly) by the State, how can one design a system that accommodates the competing religious preferences of different students (or their parents)? We must include within this notion of religious preferences the idea of a preference to be non-religious. I view these as first order preferences. However, these religious and non-religious perspectives also lend themselves to second order preferences as to how religion should be treated in schools. There is no necessary overlap between the first order preferences and the second order preferences. However, the permutations might include the following. A parent who wishes her child to be brought up as a Roman Catholic (first order) might also believe that the religious perspective should permeate all aspects of the education (second order). Conversely, a parent who wishes her child not to be brought up in any religion (first order) might also think that religion has no place in the education system or, somewhat less strongly, that religion should be confined to a discrete class on religious instruction (both second order positions). As should be clear from this analysis, there is a standing possibility for a conflict between the first order and second order preferences. One parent's second order preference for all encompassing religious education can conflict with another parent's first order preference for her child not to be subjected to religious influences. Conversely, one parent's second order preference for education not to have any religious influences may conflict with another parent's preference for her child to be educated in a religious manner. The challenge is to design an education system that accommodates these different interests.

## **The constitutional position on education**

Education in Ireland is fundamentally governed by the Constitution. The Constitution of Ireland protects family rights in the following terms:

1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

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2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

Article 41.2 recognises, somewhat controversially, the value of work done by woman in the home. Article 41.3 pledges the State to guard with special care the institution of marriage, on which the Family is said to be founded: divorce is only allowed in certain, constitutionally defined circumstances. Article 42 provides for education rights in a manner that reflects the notion of the Family as a natural institution, antecedent to positive law. Article 42.1 recognises the Family as the natural and primary educator of the child, Article 42.2 allowing Families to provide this education in the home, in private schools or in State-supported schools. Article 42.3 attempts a balance between parents' rights and a residual State concern for the welfare of children: parents cannot be forced to send their children to State schools or any school designated by the State; however, the State can require that children receive a certain minimum education. Article 42.4 imposes an obligation on the State to provide for free primary education, to assist private and corporate educational initiative and to provide other educational institutions where the public good requires it. However, this must all be done with due regard for the rights of parents. Finally, Article 42.5 provides as follows:

In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

These constitutional provisions clearly recognise or establish an order in which parents have the primary role in relation to decisions about their children. The State has a supporting role but must be careful not to allow that support unduly interfere with parental authority. However, the State has a residual role to protect children from parents who have (or who might) fail them.

The intellectual lineage of Articles 41 and 42 is Roman Catholic Natural Law Theory. The Constitution, adopted in 1937, can be seen as the culmination of a constitutional moment, going back to Independence in 1922, and possibly earlier. The State established immediately post-Independence was governed by the Constitution of the Irish Free State 1922. However, this document was considered by many to be too English in character. It was also too easy to amend, rendering it ineffective as a basic law. From 1935 to 1937, a new Constitution was drafted, largely in secret. One of its major differences from the 1922 Constitution were the provisions on family and education. The principal author was Éamon de Valera. He was assisted by a small number of civil servants but also received many suggestions from a number of religious figures, most prominently Fr John Charles McQuaid, later Archbishop of Dublin. The documentary

evidence clearly establishes a link from the natural law, through the teachings of the Roman Catholic Church, into the provisions of Articles 41 and 42 of the Constitution.

The provisions of Article 41 were similar to those in the Portuguese Constitution of 1933. They also reflected provisions of Roman Catholic teaching, principally Pope Pius XI's Encyclical on Christian Marriage, *Casti Connubii* (1930). The provisions of Article 42 owe more to Pope Pius's earlier Encyclical, *Divini Illius Magistri*. In this work, Pope Pius, drawing heavily on Aquinas, viewed humans as being drawn into three societies: the family, civil society and the Church. The Church has the first title in education,<sup>1</sup> but the family came before civil society:

43. Now this end and object, the common welfare in the temporal order, consists in that peace and security in which families and individual citizens have the free exercise of their rights, and at the same time enjoy the greatest spiritual and temporal prosperity possible in this life, by the mutual union and co-ordination of the work of all. The function therefore of the civil authority residing in the State is twofold, to protect and to foster, but by no means to absorb the family and the individual, or to substitute itself for them.

44. Accordingly in the matter of education, it is the right, or to speak more correctly, it is the duty of the State to protect in its legislation, the prior rights, already described, of the family as regards the Christian education of its offspring, and consequently also to respect the supernatural rights of the Church in this same realm of Christian education.

45. It also belongs to the State to protect the rights of the child itself when the parents are found wanting either physically or morally in this respect, whether by default, incapacity or misconduct, since, as has been shown, their right to educate is not an absolute and despotic one, but dependent on the natural and divine law, and therefore subject alike to the authority and jurisdiction of the Church, and to the vigilance and administrative care of the State in view of the common good. Besides, the family is not a perfect society, that is, it has not in itself all the means necessary for its full development. In such cases, exceptional no doubt, the State does not put itself in the place of the family, but merely supplies deficiencies, and provides suitable means, always in conformity with the natural rights of the child and the supernatural rights of the Church.

46. In general then it is the right and duty of the State to protect, according to the rules of right reason and faith, the moral and religious education of youth, by removing public impediments that stand in the way. In the first place it pertains to the State, in view of the common good, to promote in various ways the education and instruction of youth. It

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<sup>1</sup> [11]-[15]

should begin by encouraging and assisting, of its own accord, the initiative and activity of the Church and the family, whose successes in this field have been clearly demonstrated by history and experience. It should moreover supplement their work whenever this falls short of what is necessary, even by means of its own schools and institutions. For the State more than any other society is provided with the means put at its disposal for the needs of all, and it is only right that it use these means to the advantage of those who have contributed them.[32]

47. Over and above this, the State can exact and take measures to secure that all its citizens have the necessary knowledge of their civic and political duties, and a certain degree of physical, intellectual and moral culture, which, considering the conditions of our times, is really necessary for the common good.

48. However it is clear that in all these ways of promoting education and instruction, both public and private, the State should respect the inherent rights of the Church and of the family concerning Christian education, and moreover have regard for distributive justice. Accordingly, unjust and unlawful is any monopoly, educational or scholastic, which, physically or morally, forces families to make use of government schools, contrary to the dictates of their Christian conscience, or contrary even to their legitimate preferences.

This papal encyclical, and the Constitution as drafted on it, is written in a language that is different from that which we would use nowadays. There is also a potential ambiguity in the identification of the Church's interests and the family's interests. The document is equally concerned with the State encroaching on the domain of the Church and the domain of the family. This was fully consistent with other positions adopted by the Church at the time, notably in relation to property rights in the face of communism. However, the assumption appears to be that the interests of the family will coincide with the interests of the Church. Accordingly, a system of (state supported) denominational education would correctly serve the interests of parents. Whether this identification held good in the 1930s is arguable. It certainly does not hold good today, particularly when one recalls that there are legitimate first order preferences for children to be brought up in no religious tradition and also that there are legitimate second order preferences for education not to be delivered in a religious way.

Whyte has convincingly argued that the actual system of education in Ireland fails to respect the constitutional model in two ways. First, a highly centralised bureaucracy led to far greater power for the Department of Education than consistent with the subsidiarity approach endorsed by the Constitution. Second, and of more concern to this paper, minority rights fail to be

protected by the system of the integrated curriculum (discussed below).<sup>2</sup> Certainly, if one assumes that the Constitution does not endorse any identification of Church interests and Family interests (and this is a reasonable assumption), Whyte is correct to raise concerns about the constitutionality of the integrated curriculum.

### **The integrated curriculum**

Section 15(2)(b) of the Education Act 1998 provides:

(2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall—

do so in accordance with the policies determined by the Minister from time to time,

uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school, and at all times act in accordance with any Act of the Oireachtas or instrument made thereunder, deed, charter, articles of management or other such instrument relating to the establishment or operation of the school.

Section 9(d) provides:

9.—A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to—

(d) promote the moral, spiritual, social and personal development of students and provide health education for them, in consultation with their parents, having regard to the characteristic spirit of the school,

Rule 68 of the Rules for National Schools 1965 provides as follows:

Of all the 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

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<sup>2</sup> See Gerry Whyte, "Education and the Constitution: Convergence of Paradigm and Praxis" (1990-1992) 25-27 *Irish Jurist* 69, at 70.

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. The teacher should constantly inculcate the practice of charity, justice, truth, purity, patience, temperance, obedience to lawful authority, and all the other moral virtues. In this way he will fulfil the primary duty of an educator, the moulding to proper form of his pupils' character, habituating them to observe, in their relations with God and with their neighbour, the laws which God, both directly through the dictates of natural reason and through Revelation, and indirectly through the ordinance of lawful authority, imposes on mankind.

The current status of these Rules in relation to the running of primary schools is rather nebulous. Nevertheless, even if no longer the reason for certain practices in primary schools, Rule 68 is an accurate representation of those practices. In this regard, the crucial aspect of this Rule is the idea that religious spirit inform and vivify the whole work of the school. This reflects a holistic, religious view of education and provides the sort of religious education that committed Roman Catholic parents would like to see their children receive. It is quite likely that parents committed to other religious faiths might well like their children to be educated in an integrated curriculum that reflects their faith. Accordingly, the integrated curriculum can be seen as catering to the needs of religious parents. It is consistent with the first order and second order preferences of one set of parents.

From another perspective, however, the integrated curriculum - particularly in a factual situation where the vast majority of primary schools are controlled by one particular religious denomination - makes it difficult for parents to have their children educated without exposure to a religious belief with which they disagree. Thus, the integrated curriculum while respecting the preferences of some parents infringes the preferences of other parents.

Although the constitutionality of the integrated curriculum has never been challenged, there is some suggestion from the case law that the courts may consider it constitutionally permissible. In *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321, the Supreme Court adopted an approach very sympathetic to state support for religion in schools. The Court upheld the system whereby the salaries of chaplains in community schools were paid from public funds. Specifically, the Court held that the payment of the salaries of chaplains did not constitute the endowment of religion. Most tellingly for this issue, Barrington J made the following *obiter dictum*:

The Constitution therefore distinguishes between religious "education" and religious "instruction" - the former being the much wider term. A child who

attends a school run by a religious denomination different from his own may have a constitutional right not to attend religious instruction at that school but the Constitution cannot protect him from being influenced, to some degree, by the religious "ethos" of the school. A religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school.

If the courts were to follow this *dictum*, they would necessarily uphold the integrated curriculum.

Nevertheless, there is another strand to the courts' jurisprudence which appears to have grown stronger over the past number of years: namely, recognition of parental authority over their children. This was always a feature of Irish constitutional law, but was trenchantly asserted by the Supreme Court in cases such as *Northwestern Health Board v HW* [2001] 3 IR 622 (parents entitled to refuse administration of PKU test) and *N v HSE* [2006] IESC 60 (biological and subsequently married parents entitled to return of their child from the proposed adoptive parents). This latter case is of crucial importance for a number of reasons. At a general level, it suggests that the courts now strongly support parental autonomy in relation to children. Hardiman J put the matter in particularly vivid terms:

There are certain misapprehensions on which repeated and unchallenged public airings have conferred undeserved currency. One of these relates to the position of children in the Constitution. It would be quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the "natural and imprescriptible rights" and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights. This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child.

If the prerogatives of the parents in enabling and protecting the rights of the child were to be diluted, the question would immediately arise: to whom and

on what conditions are the powers removed from the parents to be transferred?  
And why?

Arguably this approach on the part of Hardiman J brings the judicially recognised constitutional position closer to that argued for by Whyte in 1991. However, the older judgment in *Campaign to Separate Church and State* is far closer to the factual and legal issues raised by the integrated curriculum. Accordingly, it cannot be predicted with confidence what attitude the courts might take to the integrated curriculum, should it arise to be decided as a matter of constitutional law. Nevertheless, it is worth considering what might be an appropriate replacement to the integrated curriculum as currently operated.

### Equal respect and the accommodation of preferences

A major contribution of Ronald Dworkin to political philosophy is the ideal of equal respect.<sup>3</sup> This ideal requires the State not to treat all people equally all the time, but rather to treat people as equals. There are some ways of treating people that only make sense if one assumes an *a priori* inequality as between human beings. At times, this notion has animated Irish constitutional law, although the courts have rarely followed through on its implications. The judgment of Walsh J in *Quinn's Supermarket v Attorney General* provides a neat account of the idea:

[Article 40.1] is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. [1972] IR 1, at 13-14.

A failure to treat as equal or an assumption of inferiority can be seen not only in naked discriminations, but also in social structures that unduly privilege the interests of one section of the community, to the extent that one may legitimately question whether the interests of another section were ever considered at all. Abstracting from a discussion of particular constitutional rights and entitlements, it is arguable that this is the wrong done by the

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<sup>3</sup> See generally Dworkin, *Sovereign Virtue: the Theory and Practice of Equality* (OUP, 2000).

integrated curriculum as currently operated. Against a background of near universal religious patronage of schools, the integrated curriculum (while respectful of the interests of some parents) means that the interests of some sections of the community cannot be taken into account. Where nearly all schools are denominational and where those schools operate an integrated curriculum, it becomes impossible for parents to arrange, through the state system, for a non-religious education. Although this situation may have evolved over time through increasing secularisation, and as such might be argued not to reflect any conscious decision to discriminate against the excluded section of the community, it is arguable that the continued operation of this system reflects a belief that those who feel excluded by it are in some way less worthy. If the community were truly to treat those people as equals, taking their legitimate interests as being equally worthy of consideration and protection, would it really tolerate a system of education that systematically privileged one group over the other?

No matter which constitutional or human rights packaging is used, therefore, there seem to me to be good reasons to replace the current system of almost exclusively denominational education, combined with an integrated curriculum, with something else. The question is with what.

In this regard, a number of Human Rights instruments suggest a different approach to the interaction between religion and education, but one which may pose its own problems. For instance, Article 18 on the International Covenant on Civil and Political Rights provides as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and 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.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant 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 own convictions.

The Human Rights Committee in its General Comment on this provision has stated:

The Committee is of the view that Article 18(4) permits public school instruction in subjects such as general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure their children receive religious and moral education in conformity with their own convictions, set forth in Article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in Article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with Article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.<sup>4</sup>

Such an approach would assuredly avoid the difficulties posed by the integrated curriculum as it is operated in Ireland. However, there are many questionable assumptions underlying the General Comment. First, the Comment is prepared to allow the teaching of the general history of religions and ethics, but apparently not the teaching of religion and ethics themselves. Religion and ethics are not historical subjects; they are normative subjects. There is therefore a fundamental difference between the teaching of a history of religion and the teaching of religion. Teaching the history of religion will be of no interest to a parent who wants her child to receive a religious education, still less a religious education through an integrated curriculum. Second, the reference to “neutral and objective” seems to imply that religions themselves are necessarily non-neutral and non-objective. But there is no *a priori* basis for this assumption. Religions believe themselves to be objectively correct worldviews. People who subscribe to religions do so because they believe that the religions are, objectively, correct. People who subscribe to non-religious perspectives also do so because they believe those perspectives to be objectively correct. It would be perverse for anyone to believe in anything for reasons other than thinking that it is correct. In a sense, the qualifier “objective” adds nothing. The General Comment advances its own view as to the circumstances in which religion may be taught. The drafters of the General Comment also presumably hold this view because they believe it to be correct. However, the General Comment implicitly privileges the views that some people hold to be correct over the views that other people hold to be correct. With little textual support from the wording of the Convention, the General Comment privileges one perspective on the teaching of religion (it shall not be taught, save on terms that are fundamentally alien to it), thereby failing to take account of the interests (and the freedom of religious practice) of those who take a different view. There seems to be an implication in the General Comment that religions are non-neutral, but it is again unclear what is meant by this. Of course, religions believe themselves to be correct and, as such, are not neutral on the issue of which worldview is correct. But the General Comment itself is non-neutral in exactly the same way: it believes that

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<sup>4</sup> Office of the High Commissioner for Human Rights, General Comment No 22: The right to freedom of thought, conscience, and religion (1993), at [6].

its view on the teaching of religion is correct and rejects other views.

The General Comment addresses the issue of religious education in general, but the same issues arise when we consider the integrated curriculum. The animating ideas of the General Comment would also presumably proscribe an integrated curriculum, but in doing so they implicitly privilege the second order view that an integrated curriculum is objectionable over the second order view that an integrated curriculum is desirable. This may become just as much a matter of doctrinal orthodoxy as religious perspectives have been in the past. What underlies this position, I suggest, is a view that religious worldviews are inherently irrational and less worthy than a secularist worldview. Is such an attitude consistent with the injunction to treat people with equal respect is breached by this attitude. Now it may be the case that religious worldviews are inherently irrational but this is a proposition that needs to be argued for. Religious viewpoints cannot be selected for exclusion from public speech and religious parents should not be targeted as the one group that cannot have their children educated in the way that they wish. It is disturbing that this should be the outcome of a position that represents itself as neutral.

There is, however, an alternative solution to the problems posed by the integrated curriculum that would not pose the same difficulties. The objection to the integrated curriculum is that it is almost unavoidable. In Ireland, the parent who wishes for her child to avoid the integrated curriculum (or religious education in general) will find it difficult to do so, particularly depending on issues of geography, population density and diversity of educational provision. But it is these contingencies that suggest the method of addressing the problem in a manner that respects the viewpoints both of those who support the integrated curriculum and those who oppose it. If there were an adequate diversity of educational provision (denominational, non-denominational, multi-denominational), the problems posed by the integrated curriculum would not arise, as no-one would be subject to the integrated curriculum who did not want to be. There may be difficulties in the way of meeting that objective, but it is a worthy goal to attempt to pursue.

Interestingly, it is a goal that is fully consistent with the constitutional text as it currently stands, severed from any 1930s identification of the Church's interests with parents' interests. A constitutional paradigm that recognises family rights, as against the State, in the context of education is one that genuinely respects the views of the religious and the non-religious without having to commit itself to any political view on whether the religious or the non-religious have better access to truth. It also avoids the dangers inherent in the self-delusion that certain beliefs about the ordering of society are more neutral than others, and preferable on that account. In short, the challenge facing Irish education is to reconnect with the values of the Constitution rather than to jettison those values.

