

The rights of denominational schools in Irish and international law

SUMMARY:

1. It is increasingly asserted that denominational schools are in breach of both national and international law in that they show insufficient respect to children belonging to religious and non-religious minorities.
2. Similar thinking also seemed to inform some of the recommendations (see below) of the Advisory Group to the Forum on Patronage and Pluralism established by Education Minister, Ruairi Quinn.
3. Denominational schools are not in fact in breach of national or international law. National and international law upholds the rights of parents to see their child educated according to their beliefs.

THE 'HUMAN RIGHTS' CRITIQUE OF DENOMINATIONAL SCHOOLS

The report of the Advisory Group to the Forum on Patronage states: "... over recent decades a number of international conventions has been agreed, to which Ireland is a signatory, which set out the rights of children and which highlight the human rights of all citizens, including their educational rights. There is now a mis-match between the inherited pattern of denominational school patronage and the rights of citizens in the much more culturally and religiously diverse contemporary Irish society."

This is true in that the overwhelming majority of primary schools in Ireland are denominational school. This is why the Catholic Church has agreed in principle that an undetermined number of its schools should be transferred to other patron bodies.

However, it would appear from the Advisory group report that even if a certain number of schools are transferred, the remaining schools, especially so-called 'stand alone' schools

(meaning the only school within a given radius), must still make radical changes to their practice in order to comply with 'human rights' standards, that is, to be more 'inclusive'.

However, this 'inclusiveness' would seem to come at the price of denominational school identity.

For example, the recommendations of the Advisory Group would allow the State to:

- Set down conditions on how religion should be taught in denominational schools (Recommendations P8 and P9)
- Set down conditions on the display of religious symbols and art (Recommendation P10)
- Set down conditions on how prayers should be said (Recommendation P10)
- Remove the right of denominational schools to enrol children of their own faith ahead of other children in the event of overcrowding (Recommendation P5)
- Remove the right of denominational schools to permeate the school day with their ethos (Recommendation P7.1)

A similar 'human rights' critique of denominational education is to be found in paper published

by the Irish Human Rights Commission in 2011 called 'Religion and Education: A Human Rights Perspective'.

It is not our intention in this short document to provide a moral or philosophical defence of denominational schools. We have already done that in two other documents ('Religion, Education and Human Rights' and 'The Liberal Case for Religious Schools') which can be found on our website or ordered from us free of charge.

IT WOULD APPEAR THAT 'INCLUSIVENESS' IS TO COME AT THE PRICE OF DENOMINATIONAL IDENTITY

Our intention here is simply to show that denominational schools are not in fact violating human rights law and that the present ethos and practice of denominational schools is in fact protected by both national and international human rights law.

We will now look at the main legal instruments quoted in this debate one by one.

THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Ireland is a signatory to the European Convention on Human Rights provisions of which are often quoted against denominational education. Rulings on the Convention are made by the European Court of Human Rights (ECtHR) in Strasbourg.

The convention and the court are often assumed to be institutions of the European Union. They are in fact institutions of the Council of Europe.

The only authoritative interpretation of the Convention comes from the ECtHR. Interpretations by the Forum or by the Human Rights Commission

or by any other third parties are not authoritative, but are really in essence educated opinions with no binding force whatsoever.

Indeed, the Convention and the rulings of the ECtHR are not per se a part of Irish domestic law. They cannot be relied on or enforced directly in an Irish court in the way that Irish or EU legislation or judgments of the courts of Ireland or of the EU can be. Rather, the Convention and the rulings of the ECtHR have been incorporated into Irish law in accordance with the Convention on Human Rights Act 2003. This is a piece of Irish statute law which sets out the limited circumstances and ways in which the Convention and the decisions of the ECtHR shall be taken into account by Irish Courts and other organs of the State. The principal provisions in this respect are sections 2(1) and 3(1) which state as follows:

2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

The Act states that an "organ of the State" "includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised".

The most important point to note in respect of the 2003 Act, however, is that it means that the Convention and the case law of the ECtHR are incorporated into Irish law at a sub-constitutional level. This means that, unlike European Union law, legal claims based upon the Convention or its case law which conflict with the requirements of Irish constitutional law can have no legal force in Irish Courts.

DENOMINATIONAL EDUCATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Two themes appear to emerge from the ECtHR's case law. The first is the importance of pluralism for the health and survival of liberal democracy and the need for government policies relating to religion and education to protect and foster pluralism. The second theme is less clearly articulated, more recent and more controversial than the first. It is the idea that pluralism requires state neutrality between religions and that such neutrality requires, in effect, a secularist model of public and political life.

Arguably one of the most important recent cases for present purposes is *FolgerØ v Norway*¹. It suffices here to note a number of observations as to its relevance to the situation in Ireland.

Norway has a State religion and a State Church, of which 86% of the population are members. Article 2 of the Constitution provides: 'Everyone residing in the Kingdom shall enjoy freedom of religion. The Evangelical Lutheran Religion remains the State's official religion. Residents who subscribe to it are obliged to educate their children likewise.' The 'Christianity, Religion and Philosophy' (KRL) subject was compulsory in every primary school in the country. The Grand Chamber, by only a bare majority of 9 to 8, found a violation of the applicants' rights under Article 2 of the First Protocol in light of the conjunction of two considerations. The first was the *qualitative* priority given to Christianity in KRL over other faiths and philosophies and the second was the difficulty and complexity of the partial opt-out provided. There are several points to note here.

First, the Court did not object per se to a quantitative prioritising of Christianity in the curriculum in State schools:

'... the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court's opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (see, *mutatis mutandis*, *Angelini v. Sweden* (dec.), no 1041/83, 51 DR (1983). In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State's margin of appreciation in planning and setting the curriculum.²'

This is an important point, which was re-affirmed by the Grand Chamber in *Lautsi*³, as it answers a concern raised in the IHRC Discussion Paper which, at para 18, stated in respect of the Primary School Curriculum section titled 'Pluralism':

'It might be argued that the centrality given to the "Christian heritage and tradition in the Irish experience", in the Curriculum seems to be somewhat at odds with the pluralist ethos also promoted by the Curriculum.'

Second, the violation consisted, specifically, in the absence of a full, rather than a partial or conditional, exemption in circumstances where the information and knowledge included in the State-mandated curriculum was not conveyed in an objective, critical and pluralistic manner. There is no equivalent State-imposed mandatory curriculum of religious education in Ireland. Moreover, there is a constitutionally recognised right to opt out from religious instruction.

Third, while the Court reiterated its holding in para 50 of *Kjeldsen, Busk Madsen and Pedersen*, that the 'second sentence of Article 2 of Protocol No. 1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society"

1. Grand Chamber Judgment, 29 June 2007. 2. Para 89. See also *Zengin v Turkey*, Judgment, 9 January 2008 at para 63. 3. *Lautsi v Italy*, Grand Chamber Judgment, 18 March 2011, para 71. 4. 'According to the Government, it would have been possible for the applicant parents to seek alternative education for their children in private schools, which were heavily subsidised by the respondent State, as it funded 85% of all expenditure connected to the establishing and running of private schools. However, the Court considers that, *in the instant case*, the existence of such a possibility could not dispense the State from its obligation to safeguard pluralism *in State schools* which are open to everyone.' (Para 101, emphasis added).

as conceived by the Convention', the possibility of achieving pluralism in education through a diversity of school types was given no proper or detailed treatment by the judgment. Rather its rejection of this option was expressly limited to the specifics of the case⁴ and it must be considered to remain an equally valid course of action for Ireland to pursue.

A second and more recent case of importance is the Grand Chamber decision of the ECtHR in *Lautsi v Italy*. The Grand Chamber judgment in *Lautsi* represents a clear distancing of the Court from the line of reasoning that had begun to emerge in recent cases suggesting a secularist uniformity at the expense of the Court's earlier emphasis on religious pluralism and its recognition of a margin of appreciation for States. 'Neutrality' is no longer identified with a public space cleansed of religion and the Court expressly recognises that the contracting States enjoy a 'wide margin of

- The Contracting 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 resources of the community and of individuals. In the context of Article 2 of Protocol No. 1 that concept implies in particular that this provision cannot be interpreted to mean that parents can require the State to provide a particular form of teaching [Para 61]

- 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. [Para 62]

- On the other hand, 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 [in State schools] is conveyed in an objective, critical and pluralistic 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. [Para 62]

- It is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1. [Para 66]

THE EUROPEAN COURT OF HUMAN RIGHTS IN ITS 'LAUTSI' RULING FOUND THAT IT IS PERMISSIBLE FOR STATE SCHOOLS TO DISPLAY CRUCIFIXES ON THEIR WALLS AND THIS DOES NOT AMOUNT TO 'INDOCTRINATION' AND DOES NOT VIOLATE HUMAN RIGHTS

appreciation' (para 61) in these matters. Some of the key findings are as follows:

- States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. [Para 60]

•The Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. That applies to organisation of the school environment and to the setting and planning of the curriculum. The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination. [Para 69]

It is noticeable, and significant in an Irish context, that the Court looked very favourably on the freedom allowed for religious expression in the classrooms of Italian State schools and regarded this as an important factor in its reasoning. It noted that:

'...Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were "often celebrated" in schools; and optional religious education could be organised in schools for "all recognised religious creeds" ... Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.' (Para 74)

Finally, it must be remembered that Lautsi concerned a State school and not a private denominational school in receipt of public funding. If it is in principle possible for a State school to have a crucifix on its classroom walls, then even greater freedom of religious expression should be permissible in a private denominational school, even if in receipt of public funds.

THE STANDING OF UN DOCUMENTS IN IRISH LAW

Ireland is signatory to a number of UN conventions quoted by the IHRC in connection with denominational schools and religious education. These include the International Convention on Civil and Political Rights and the Convention on the Rights of the Child.

The compliance of signatory states with these conventions is reported on by special monitoring bodies. In the course of their reporting and monitoring activities these bodies rely upon or offer certain interpretations of the texts of these conventions but they are not courts and these interpretations have no legal standing in international or Irish law. Needless to say, the interpretations of Irish NGOs have no legal standing either.

THE INTERPRETATIONS OF UN DOCUMENTS BY UN COMMITTEES AND IRISH NGOS HAVE NO STANDING WHATSOEVER IN EITHER NATIONAL OR INTERNATIONAL LAW. PROVISIONS FROM THESE DOCUMENTS ALSO SUPPORT THE RIGHTS OF PARENTS WHO SEND THEIR CHILDREN TO DENOMINATIONAL SCHOOLS

In addition, it is essential to remember that many provisions of the above conventions can be quoted in support of denominational schools and above all the rights of parents who choose to send their children to such schools.

THE IRISH CONSTITUTION

The key constitutional principles governing the State's duties with respect to religious freedom and education can be summed up as follows:

- i. Respect is required for parental choice in education.
- ii. Support (in the positive sense of active facilitation and funding) is required for parental choice in primary education and is *permitted* for parental choice in post-primary education.
- iii. Following from (i) and (ii), parental choice is to be respected by respecting religious/denominational diversity *between* State-supported primary and post-primary schools.
- iv. Following from (i) and (ii), parental choice is to be respected by respecting religious/

denominational diversity *within* State-supported primary and post-primary schools, but only so far as is consistent with (iii) above.

These four principles reconcile the positive (freedom to) and negative (freedom from) aspects of religious freedom by rejecting any presumption in favour of either a secular or a confessional understanding of the State and endorsing a pluralistic approach built upon (a) the core principle of the primacy of parental responsibility and choice in education, in both its negative and positive aspects, and (b) a recognition of the important and ineliminable function of ethos in education. Moreover, as mandated by the Constitution and the Courts, it is these principles which should govern any future policies and reforms in this area.

CONCLUSION

Denominational schools will come under increasing pressure to change their practices in order to conform with certain interpretations of human rights law. However, these interpretations are highly contentious and no judgement has been made either by an Irish court or by an international court that impinges on the current practices of Irish denominational schools.

It is also very important to keep in mind that both national and international law give strong support to parental rights in matters of education, including the right of parents to have their children receive a religious education.

APPENDIX: KEY EXTRACTS FROM THE IRISH CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS TREATIES

Far from undermining the right of denominational schools and parents who send their children to such schools, both the Irish Constitution and international law underpin those rights.

We carry below some key extracts from those texts which should be borne in mind and used by all denominational schools which find themselves coming under pressure due to contentious interpretations of human rights law.

The Irish Constitution (1937)

ARTICLE 42

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.
2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
5. 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.

ARTICLE 44

1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.
2. 1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
2° The State guarantees not to endow any religion.
3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.
5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.
6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

Universal Declaration of Human Rights (1948)

ARTICLE 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

ARTICLE 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

European Convention on Human Rights (1950)

ARTICLE 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

FIRST PROTOCOL (1952): ARTICLE 2

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.

Convention on the Elimination of All Forms of Racial Discrimination (1965)

ARTICLE 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms

and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) Other civil rights, in particular:

... (vii) The right to freedom of thought, conscience and religion; ...

(e) Economic, social and cultural rights, in particular:

... (v) The right to education and training; ...

International Covenant on Civil and Political Rights (1966)

ARTICLE 18

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.

Convention on the Rights of the Child (1989)

ARTICLE 14

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

ARTICLE 28

States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

ARTICLE 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) 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;

- (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Charter of Fundamental Rights of the European Union (2000)

ARTICLE 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

ARTICLE 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.

The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right



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