

Freedom of religion in the Irish primary school system: a failure to protect human rights?

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In the Republic of Ireland nearly all primary schools are state-funded but the vast majority of these schools are owned and managed by religious bodies. There is no system of state-run schools. This paper discusses the protection of freedom of religion within this unique system of schooling. In particular, it examines the notion of 'the integrated curriculum' whereby all schools in receipt of state funding are legally obliged to ensure that a religious spirit informs and vivifies the whole work of the school. The paper identifies the international human rights standards relevant to the teaching of religion in schools. Through empirical evidence based on interviews with parents, teachers and pupils, an assessment is made of how far Irish law and practice respect these standards. The outcome of this evaluation of the use of religious bodies in non-state service provision is discussed.

INTRODUCTION

'Of all parts of a school curriculum, Religious Instruction is by far the most important, as its subject matter, God's honour and service, includes the proper use of all man's faculties, and affords the most powerful inducements to their proper use. Religious Instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school.'¹

This regulation, which forms part of the legal framework governing all state-funded primary schools in the Republic of Ireland, stipulates that religion should play an important part in their life. It has led to the development and practice of what is known as the 'integrated curriculum', whereby religious teaching is expected to be incorporated into secular subjects and throughout the daily life of the school. This paper explores the nature of the integrated curriculum and the extent to which it respects international guarantees of religious freedom.²

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1. *Rules for National Schools under the Department of the Education* (Dublin: The Stationery Office, 1965) r 68. In Ireland any primary school in receipt of state funding is officially known as a national school.

2. Clearly children have rights, independent of their parents' rights, to freedom of religion, thought and conscience as well as to education. However, given that this paper concentrates on the role of religion in the primary education sector where the potential for conflict between children's and parents' rights is arguably minimal, the focus will be predominantly on parental rights.

RELIGIOUS LIBERTY IN SCHOOLS: THE INTERNATIONAL STANDARDS

International human rights standards suggest that, when doctrinal religious instruction is taught in schools, opt-out clauses must be provided for those who do not want to participate in such classes.³ However, in contrast to timetabled doctrinal teaching, the practice of an integrated curriculum presents international human rights law with different concerns. Opt-out provisions can no longer be considered a potential remedy. A child cannot be opted out of unscheduled and potentially continuous religious teaching which is woven into the very fabric of daily education. Instead, the attention of international human rights bodies must switch to, and focus on, the nature and aim of the integrated curriculum being taught.

European Court of Human Rights

In the case of *Kjeldsen, Busk Madsen and Pedersen v Denmark*, the European Court of Human Rights held that under Art 2 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention) schools are free to impart knowledge of a directly or indirectly religious or philosophical kind, and that parents may not object to the integration of such teaching in the school curriculum – provided that the state takes care that knowledge included in the curriculum is conveyed in an ‘objective, critical and pluralistic manner’.⁴ It warned that schools and teachers had to ensure that the religious and philosophical convictions of parents were not disregarded in practice ‘by carelessness, lack of judgment or misplaced proselytism’.⁵ In the course of its judgment, the European Court stressed that ‘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 of what must not be exceeded’.⁶ It was explicit in noting that this prohibition applied throughout the school programme and was not simply restricted to the hours of religious instruction classes.

‘Article 2, which applies to each of the State’s functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme.’⁷

The court did not offer an expansive notion of what it understood by ‘indoctrination’. In the specific context of sex education it noted that the Danish legislation ‘in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour’.⁸ Dictionary definitions suggest that indoctrination involves the teaching of one particular attitude or set of beliefs in a manner that does not allow for reflexivity: ‘teaching someone to accept doctrines uncritically unquestioning’;⁹ ‘to

3. *Hartikainen v Finland* (Comm No 40/1078) UN Doc A/36/40, Decision of 9 April 1981, *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979–80) 1 EHRR 711.

4. *Ibid*, para 53. This formula of words has been relied upon by the court and Commission in subsequent cases; see, for example, *Jimenez and Jimenez Merino v Spain* (Application No 51188/99) *Reports of Judgments and Decisions* 2000-VI.

5. *Ibid*, para 54.

6. *Ibid*, para 53.

7. *Ibid*, para 52.

8. *Ibid*, para 54.

9. See the website available at <http://www.cogsci.princeton.edu/cgi-bin/webwn>.

imbue with any opinion, to instruct in any doctrine'.¹⁰ Clarke argues that, in the context of teaching religious beliefs, indoctrination should be understood as 'causally determining the beliefs of another through non-rational procedures'.¹¹

In the more recent case of *Ciftci v Turkey*,¹² the European Court of Human Rights again stressed that domestic regulations on education must avoid pursuing an aim of indoctrination that might be regarded as not respecting the parents' religious and philosophical convictions. In this case, it concurred with domestic regulations that prevented Koranic teaching to children who had not completed primary schooling on the basis that 'this precondition sought to limit the possible indoctrination of minors at an age when they asked many questions and could be easily influenced by Koranic classes'. It held that this legal requirement did not amount to an attempt at indoctrination aimed at preventing religious education.

Discussion of the means of addressing concerns about an integrated curriculum raises the question of alternative provision, namely, does the availability of non-state schooling, either at home or in private schools where an integrated curriculum is not practised, lessen the burden on the state to ensure that state schooling is conducted in a manner that respects parental convictions? The Strasbourg organs have given somewhat ambiguous guidance on this question. In its decision in the *Kjeldsen* case, the court took into account the fact that the state had given substantial assistance to private schools, and that this alternative, as well as that of home education, was available to parents – albeit that such choices could well involve 'undeniable sacrifices and inconveniences'.¹³ In their observations on this point, van Dijk and van Hoof remark that:

'how much weight the Court is prepared to attach to this aspect in a concrete case was not revealed, since it reached the conclusion that the obligatory sex education was of such a nature as not to conflict with the interest of the parents protected in Article 2.'¹⁴

They go on to observe that in the case of *Campbell and Cosans*, the European Commission of Human Rights rejected the argument that the existence of private

10. *The Chambers Dictionary* (Edinburgh: Chambers Harrap Publishers Ltd, 1998).

11. D Clarke *Church and State: Essays in Political Philosophy* (Cork: Cork University Press, 1984) p 215. It is of interest to note an eight-point test developed by the Ontario Court of Appeal to assist in distinguishing between religious indoctrination and education about religion: *Corporation of the Canadian Civil Liberties Association v Ontario* (1990, 71 OR (2d) 341 (CA)). The test states, inter alia, that a school may sponsor the study of religion, but may not sponsor the practice of religion; may expose students to all religious views, but may not impose any particular view; should seek to inform about various beliefs but not seek to conform a student to any one belief; should strive for student awareness of all religions, but not press for student acceptance of any one religion; should educate about religions, not convert to any one religion and the school's approach should be academic, not devotional. For a discussion of this case, see J Black-Branch 'Judging education: implications of the Canadian Charter of Rights and Freedoms' (1997) 7(1) *Oxford Studies in Comparative Education* 59.

12. (Application No 71860/01) Decision of 17 June 2004.

13. Above n 3, para 54. Similarly, in *Jimenez*, above n 4, the court noted that 'there is a wide network of private schools in Spain which coexist with the state-run system of public education. Parents are thus free to enrol their children in private schools providing an education better suited to their faith or opinions. In the instant case, the applicants have not referred to any obstacle in preventing the second applicant from attending such a private school'.

14. P van Dijk and GJH van Hoof *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 3rd edn, 1998) p 649.

schools released the government of its obligations in state schools.¹⁵ The Commission further noted that if these schools were costly or located far from the family home they would not represent realistic alternatives for parents. Carolyn Evans also argues that the availability of home or private education should 'not excuse the State from respecting the beliefs of parents in State education'.¹⁶ She claims that:

'were this not the case, the right to respect for religious beliefs in education would only be protected for those who could afford to pay the fees at private schools and whose religious groups had sufficient membership and resources to make operating a school practical.'¹⁷

Desmond Clarke argues that the travaux préparatoires of Art 2 of Protocol 1 clearly support the notion that 'it is not enough for states to allow parents to withdraw their children from state schools and send them to private schools; this version of the text was explicitly rejected by the Consultative Assembly'.¹⁸ He argues that this Convention right requires that the state must respect the religious and philosophical convictions of parents in all schools financed by the state, even in situations where parents might have the choice of sending their children to private schools.

The Human Rights Committee

The approach of the European Court of Human Rights in the *Kjeldsen* and *Ciftci* cases is reflected in a decision taken by the UN Human Rights Committee in *Hartikainen v Finland*.¹⁹ This was a 1978 case brought by Erkki Hartikainen, the then General Secretary of the Union of Free Thinkers in Finland, on the issue of the teaching of religion in public schools. Mr Hartikainen claimed that the content and teaching of a compulsory course on the history of religions and ethics was religious in nature and that the law requiring attendance at these classes violated Art 18(4) of the International Covenant on Civil and Political Rights 1966 (ICCPR).²⁰ The Human Rights Committee took the view that the compulsory nature of this course was not necessarily incompatible with Art 18(4) provided it was taught in a 'neutral and objective way' and respected the convictions of those who do not believe in any religion.²¹

15. Report of 16 May 1980, B.42 (1985) 38–39. Van Dijk and van Hoof note that in a later decision the Commission ignored the question of whether parents could afford private education as an alternative: *W & DM and M & HI v United Kingdom* (Applications 10228/82 and 10229/82) (1984) 37 DR 96 at 100.

16. C Evans *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) p 90.

17. *Ibid.*

18. D Clarke 'Freedom of thought and educational rights in the European Convention' (1987) 29 *The Irish Jurist* 40.

19. Above n 3.

20. *Ibid.*, para 2.1. This course was compulsory for those students who had been exempted from religious instruction classes. Article 18(4) of the ICCPR provides that 'States Parties to the present Convention undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

21. *Ibid.*, para 10.4. Finland had admitted to difficulties in the teaching of the course. The Human Rights Committee accepted that appropriate action was being taken by the domestic authorities to ensure that the requirements of Art 18(4) would be met within the framework of the existing legislation: para 10.5.

In the 2004 case of *Leirvag and Others v Norway*,²² the Human Rights Committee examined whether the instruction of the Norwegian religious education subject was ‘imparted in a neutral and objective way’.²³ It found that as the instruction included the actual practice of religion, for example learning by heart of prayers, declarations of faith and religious texts, singing of religious hymns, attendance at religious services, excursions to churches, production of religious illustrations, and active or passive roles in religious dramatisations, the teaching of the subject could not be said to meet the requirement of being delivered in a neutral and objective way, unless a system of exemptions worked to ensure that those children who did not want to participate in these activities were not forced to do so.²⁴

Together, these international standards and jurisprudence provide the core elements that must be respected in state schools when religious education is integrated into the general school curriculum and the school day, and is thus compulsory. First, the knowledge must be conveyed in a manner that can be described as ‘objective, critical and pluralistic’ or ‘neutral and objective’; and, secondly, the teaching of such knowledge must not have an aim of indoctrination.

The case of religious schools

The extent to which these standards apply to private and state-funded religious schools will depend on the existence of alternative acceptable schooling. The European Court of Human Rights has held that the existence of an alternative solution is one of the factors to be taken into account when adjudicating whether there has been a violation of the Convention. For example, in the case of *Cha'are Shalom Ve Tsedek v France*,²⁵ the court held that:

‘there would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.’²⁶

With respect to Art 2 of Protocol 1, Malcolm Evans argues the existence of alternative schooling would be a key consideration in deciding whether the state was in breach of its obligations:

‘If parents hold a religious or philosophical belief and a school teaches, as a matter of belief, another, then there is a danger of “indoctrination” and the availability of an alternative is an important element of determining whether the obligation [under Art 2 of Protocol 1] has been breached.’²⁷

Consideration of alternative schooling as a means of protecting religious freedom is the only practical option in the context of an integrated curriculum such as that practised in Ireland with its system of state-funded religious schools. As noted, opt-out provisions within the existing school are not a solution – the pervasive nature of

22. CCPR/C/82/D/1155/2003, Decision of 23 November 2004

23. Ibid, para 14.3.

24. Ibid.

25. (Application No 27417/95) 27 June 2000.

26. Ibid, paras 80–81. In this case the court found no violation as the applicant association could easily obtain supplies of the required meat from Belgium.

27. M Evans *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997) p 359.

an integrated curriculum makes the option of withdrawing children an impossibility. Indeed, even if a child could withdraw from those parts of the curriculum that were intertwined with religious doctrinal values, it is certainly arguable that her/his right to an effective education would be breached.²⁸

However, in a situation where there is no alternative to religious schools, should the state prevent such schools from teaching an integrated curriculum in order to protect the religious freedom of those, not sharing the relevant belief, who have no choice but to attend religious schools? It is useful to consider this question in the light of the jurisprudence of the European Court of Human Rights regarding its view of the state's role in protecting freedom of religion. Recent developments in Convention jurisprudence have identified the role of the state as a neutral and impartial organiser of religious rights. This duty forbids the state to act as an arbiter of the legitimacy of any religious beliefs or the ways in which those beliefs are expressed,²⁹ and requires it to ensure mutual tolerance between opposing groups.³⁰ The implementation of this principle with respect to education suggests that the state must allow religious schools to exist so that those individuals who wish to educate their children in a denominational environment may do so.³¹ For these individuals, an integrated curriculum is an essential component of such an environment and to forbid it would be considered an interference with the freedom to manifest one's religion.

However, the court has also noted that in democratic societies where several religions coexist, it may be necessary for the state to place restrictions on the freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.³² For example, if a state chooses to organise its education services entirely through religious bodies, it would seem that, in the absence of alternative schooling, it has a duty to regulate the operation of such schools to ensure the freedom of religion of non-adherents who must attend such schools. As a consequence, the right of religious individuals to manifest their religious rights through educating their children in a denominational environment would be restricted in favour of protecting the right of others not to be indoctrinated. In this scenario, religious schools would have to restrict religious instruction to defined periods of the school day and the operation of an integrated curriculum would be forbidden.

In sum, an examination of international human rights standards suggests that if a range of school types (state schools, private religious schools, state-funded religious schools, state-funded multi-denominational schools) exists in an area, then a religious school would be permitted to operate an integrated curriculum whereby its

28. For an examination of the right to an effective education, see U Kilkelly *The Child and the European Convention on Human Rights* (Aldershot: Ashgate, 1999) pp 67–68.

29. *Manoussakis and Others v Greece, Reports of Judgments and Decisions* 1996-IV at 1365.

30. *Serif v Greece, Reports of Judgments and Decisions* 1999-IX at para 53.

31. While a state must permit such schools to exist, it does not have to fund them and it is permitted to impose minimum educational standards on these schools. Where a state does provide financial support to private educational establishments, its duty to act as a neutral and impartial organiser of religious rights obliges it to do so on a non-discriminatory basis.

32. *Kokkinakis v Greece* Series A No 260-A 25 May 1993 at 18. The court noted that this follows both from para 2 of Art 9 and the state's positive obligation under Art 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.

ethos is allowed to permeate throughout the school day. The state will have discharged itself of its responsibility to ensure that any child in the area is not indoctrinated through ensuring that children have access to a school – for example a state school or a state-funded multi-denominational school – that observes international standards with respect to the curriculum. However, the converse of this argument suggests that if alternative schools do not exist, then the state will be held to be in breach of its obligations unless it takes steps to establish such schools or, alternatively, regulates the curriculum of the existing schools in line with international standards.

THE INTEGRATED CURRICULUM IN IRISH PRIMARY SCHOOLS

In this section the workings of the integrated curriculum in the Irish primary school system are described and subsequently analysed with respect to international human rights norms. Material gathered from a postal questionnaire survey to school authorities and from an interview survey of parents and teachers is used to examine the compatibility of domestic law and practice with these standards. The questionnaire survey, involving 100 randomly selected schools, was carried out over a 2-month period.³³ Its aim was to establish a picture of how schools operationalise legal requirements concerning the teaching of religion in schools. The survey had a response rate of 37%. The interview survey was designed to gather information about the experiences of minority-belief teachers and parents with respect to the teaching of religion in schools. A total of 13 parents and 10 teachers were interviewed (in 3 cases parents included their children in the interview).³⁴ This empirical research provides evidence concerning both the operation of the integrated curriculum and the reality experienced by individuals. This, in turn, has enabled an assessment of the actual degree of protection offered to freedom of religion when an integrated curriculum is practised in Irish schools. First, it is necessary to describe briefly the defining characteristics of the primary school system in Ireland – the monopoly of religious control and the absence of a system of state schools – and the relevant governing legislation.

Ireland: state education delivered through non-state schools

The history of primary education in Ireland, together with the state's current education policy and legislative framework, has produced a unique system of primary education whereby churches own and manage the vast majority of primary schools, while the

33. The schools were selected from the full list of primary schools using a disproportionate stratified sampling technique to allow for the better representation of the smaller categories of school type, that is Protestant, multi-denominational and inter-denominational schools.

34. Judgemental and snowballing sampling techniques were used to form a sampling framework. Initial contact was made through placing letters in the main daily newspapers and through contacting humanist associations, campaign organisations and trade unions. Of the 13 parents, 11 related their experiences with respect to Catholic schools and 2 with respect to Anglican schools. Of the 10 teachers, 8 had taught in Catholic schools and 2 in Anglican schools.

state meets the bulk of costs.³⁵ Hence, there is no system of state primary schools.³⁶ Rather, the vast majority of schools (99%) are run by religious bodies and funded by the state.³⁷ There are a small number of multi-denominational schools in the country,³⁸ created by groups of parents coming together to form private limited companies to set up and run such schools.

While the board of management is charged with the direct governance of the school, every primary school is ultimately controlled by a patron.³⁹ Typically, the Roman Catholic and Church of Ireland bishops are the patrons of the schools within their dioceses.⁴⁰ Traditionally, the patron was the owner of the school and was concerned with both the purpose and quality of education in the school. Over the years, the Department of Education and Science has increasingly become responsible for the quality of education while, as noted by the Technical Working Group of the Commission on School Accommodation, 'patrons . . . have increasingly described their role in terms of the purpose of the school'.⁴¹ This purpose – variously

35. It is of interest to note that in 1831 when the Irish school system was established a notable feature was that schools had to offer a curriculum which combined moral and literary instruction but separate religious instruction. Religion was to be taught at a fixed time of the day and parents could withdraw their children from such instruction if they wished. However, as schools became increasingly denominational in character, this feature of a separate and timetabled religion class gradually diminished and the concept of the integrated curriculum, whereby religion was expected to be integrated into all subjects and school life, became more prevalent. For a detailed account of the background to the establishment and subsequent operation of the Irish education system and its treatment of religious education, see D Akenson *The Irish Education Experiment: The National System of Education in the Nineteenth Century* (London: Routledge & Keegan Paul, 1970).

36. The state does own nine schools. These schools are known as Model Schools and were founded before the establishment of the state in 1922. They were originally used as training schools for pupil teachers in the nineteenth century. Although under ministerial control, these schools operate according to a religious ethos: five are run under Catholic patronage and four under Church of Ireland (Anglican) patronage: Department of Education and Science, Press Release, 17 February 2007, available at <http://www.education.ie>.

37. Currently five of the religious schools in the country have an inter-denominational ethos as opposed to a mono-denominational ethos. An inter-denominational ethos implies that Roman Catholic and Protestant beliefs are promoted in the one school: *ibid*.

38. Currently there are 41 such schools (19 of which are located in the greater Dublin area) out of a total population of approximately 3171 primary schools: see the website available at <http://www.educatetogether.ie>.

39. Education Act 1998, s 15(1).

40. In recent decades, bodies other than churches have been recognised as patrons. The patron of a multi-denominational school may be the board of trustees of the school or 'Educate Together', the limited company that acts as the representative organisation of multi-denominational schools throughout Ireland. The patron of an Irish-language school may be Foras Pátrúnachta na Scoileanna Lán Ghaeilge, which is a limited company set up for that purpose. More recently, in February 2007, the Minister for Education announced that a new model of patronage was being investigated whereby local authorities could act as a patron for a new primary school in a situation where a traditional patron was not available. The model will be piloted in a new school due to open in 2008 after a process of consultation with established patrons.

41. Commission on School Accommodation *Report of the Technical Group Criteria and Procedures for the Recognition of New Primary Schools* (Dublin: Department of Education and Science, January 1998) p 58.

described as an ethos, characteristic spirit or mission – gives a school a distinctive character and is fundamentally informed by the educational philosophy of the patron. However, as the Technical Working Group observes, matters of purpose and quality frequently intersect in reality and the patron retains control over key aspects of school life – a role given statutory recognition by the Education Act 1998. For example, although teacher and parent representatives on the Board of Management are elected by their respective bodies, the names of all elected individuals must be forwarded to the patron for appointment. In performing its functions, the board must ‘uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school’.⁴² All decisions regarding admission policies and the appointment and dismissal of teachers must be carried out in accordance with procedures agreed with the patron.

The regulatory structure for the governing of primary schools includes the Education Act 1998 and Rules for National Schools 1965.⁴³ In addition, standards are set for teachers and schools in the Primary School Curriculum (1999).⁴⁴ The Employment Equality Act 1998, the Equal Status Act 2000 and the Equality Act 2004, which form the basis of equality legislation in the state, also have implications for the protection of human rights in the primary education system.⁴⁵ However, most important in the context of human rights is the Constitution of Ireland, where education and religion in schools are dealt with in Art 42 and Art 44.⁴⁶ Under Art 42, the state must provide for free primary education.⁴⁷ The nature of this obligation was clarified in *Crowley v Ireland*⁴⁸ where Kenny J emphasised that the state was obliged to provide for free primary education but it was not obliged to educate. Hence, the Constitution endorsed the existing denominational nature of the primary school system and acquitted the state from any constitutional obligation to establish state schools. The state considered its obligation under this provision to be fulfilled through the provision of the greater part of the capital and current cost of schools, by paying the teachers’ salaries, specifying the curriculum and providing free transport to schools where necessary.

42. Education Act 1998, s 15(2)(a).

43. *Rules for National Schools under the Department of the Education*, above n 1. Technically, schools that are privately owned but receive state funding and adhere to the rules and regulations of the Department of Education are referred to as national schools.

44. *The Primary Curriculum 1999* (Dublin: Department of Education and Science, 1999).

45. Together this legislation outlaws discrimination in, inter alia, employment, vocational training and the provision of goods and services, including primary schools, on nine distinct grounds, including religious belief. However, each act contains significant exemptions for religious education establishments that are run by religious orders or institutions that promote certain religious values. For example, s 7 of the Equal Status Act permits primary schools to refuse admittance to students who are not of the school’s denomination in order to allow the ethos of the school to be maintained.

46. Constitution of Ireland 1937.

47. Article 42.4: ‘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’.

48. (Unreported) 1 October 1979, Supreme Court.

Certain provisions of Art 44 attempt to protect the rights of minorities in education.⁴⁹ They prohibit discrimination on denominational grounds in the provision of state assistance for schools, protect children who wish to opt out of religious instruction and proscribe discrimination on the ground of religious profession, belief or status.

Several tensions exist within and between Arts 42 and 44 with respect to the rights of individuals and schools in a system of education dominated by religious schools. On the one hand, Art 42 reflects Roman Catholic social teaching by protecting the principle of parental supremacy in respect of the education of children, including the right to choose denominational education. Furthermore, denominational schools are given constitutional support through Art 44.2.4⁵⁰ and religious denominations are guaranteed the right to manage their own affairs, including the way in which they choose to run their schools under Art 44.2.5.⁵¹ However, on the other hand, certain constitutional guarantees found in both Arts 42 and 44 seem to provide a child with the right to attend a school which is in receipt of public funds without having to attend religious instruction and protects the right of parents not to send their child to a school in violation of their conscience. Moreover, as the Constitution Review Group⁵² notes, the growth of state funding for religious institutions, such as hospitals and schools, raises significant questions to do with the non-discrimination provision found in Art 44.2.3.⁵³

49. These constitutional provisions developed from the ‘Articles of Agreement for a Treaty between Great Britain and Ireland 1921’. Article 16 of that Treaty provides: ‘Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school or make any discrimination as respects state aid between schools under the management of different religious denominations or divert from any religious denomination or any education institution any of its property except for public utility purposes and on payment of compensation’.

50. Article 44.2.4: ‘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’.

51. Article 44.2.5: ‘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’. Education is traditionally included in ‘charitable purposes’ and thus gives religious patrons the right to ‘maintain institutions, for the purpose of schooling’: Commission on School Accommodation, above n 41, p 13.

52. Constitution Review Group *Report of the Constitutional Review Group* (Dublin: The Stationery Office, 1996) p 382. The Review Group was established by the Government of Ireland in 1995 to review the Constitution and to establish those areas where constitutional change may be desirable or necessary with a view to assisting the All-Party Committee on the Constitution in its work.

53. Article 44.2.3: ‘The state shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status’. Constitutional case-law makes clear that this provision applies strictly only to the state: *Schlegal v Corcoran and Gross* [1942] IR 19; *McGrath and O’Ruairc v Trustees of Maynooth College* [1979] ILRM 166. Furthermore, it has been held that in order to protect the constitutional guarantee to the free profession and practice of religion it may, at times, be necessary to distinguish between persons or bodies on the grounds of religious profession, belief or status: *Quinn’s Supermarkets v Attorney General* [1972] IR 1; *Mulloy v Minister for Education* [1975] IR 88.

The implications of these tensions for the safeguarding of international freedom of religion standards, as well as the efficacy of the religious liberty guarantees provided by domestic legal provisions, are discussed below. First, it is necessary to examine the operation of the integrated curriculum within Irish primary schools.

The practice of the integrated curriculum

The 1971 primary school curriculum clearly endorsed the principle of the integrated curriculum and instructed schools to integrate religious themes and values as much as possible into other lessons.⁵⁴ In the introduction to part one of the *Teachers' Handbook* it was stated that the curriculum should be seen 'more as an integral whole rather than as a logical structure containing conveniently differentiated parts'. It asserted that 'the separation of religious and secular instruction into differentiated subject compartments serves only to throw the whole educational function out of focus'. All schools were consequently expected to offer a curriculum where religious and secular instruction could be integrated. While the 1999 Primary School Curriculum does not express support for an integrated curriculum in such an explicit manner, it does state that it encompasses the philosophical thrust of the 1971 document and it recognises the principle of 'the integrated nature of the curriculum' as being central to that philosophy.⁵⁵ The continued integrated nature of the curriculum may be seen, for example, in the current Church of Ireland (Anglican) religious education programme, 'Follow Me'. This programme is constructed using the same framework of strand units found throughout the rest of the curriculum:

'This structure can facilitate the integration of religious education with the rest of the curriculum – connections can be made with other curriculum areas which can give religious education a place in the life of the school beyond the time allocated to it each day.'⁵⁶

How does this interpretation of religion within the curriculum manifest itself in practice, and what are the experiences of teachers, parents and pupils? Over two-thirds of the schools surveyed stated that the ethos of the school is integrated into other lessons. The degree of integration varies from a comprehensive inclusion of religion – 'permeates all lessons', 'is an integral part of the school curriculum' and 'a Christian ethos predominates throughout' – to a more general emphasis – 'where appropriate, a Catholic/Christian viewpoint is used in lessons' and 'general reference as occurs'. Frequently, the ethos of the school informs the position taken in regard to the subject called 'Social, Personal and Health Education', where issues surrounding relationships and sexuality are taught.

The pupils and parents interviewed gave a picture of the extent of the integration of religion (depending upon the individual teacher) into secular subjects such as nature studies, poetry, art, history, drama, singing, reading classes and language lessons:

54. The 1971 Curriculum was published in the form of a two-volume *Teachers' Handbook* comprising more than 700 pages.

55. *The Primary Curriculum*, above n 44, p 19.

56. Irish National Teachers Organisation *Teaching Religion in the Primary School: Issues and Challenges* (Dublin: INTO, 2003) p 20.

‘We were talking about swifts. I remember asking, how do they know when to come back from Africa and the teacher said that it was just because God made them that way. And nearly all the songs we do are religious songs.’ [pupil]

‘A lot of things are attributed to God, like rainbows and the rain coming down.’ [parent]

‘It can be very subtle. All projects seem to be religious based. We don’t get too uptight about it but all the projects are religion based.’ [parent]

Teachers also spoke of the extent they were expected to integrate religion into other subjects:

‘Yes, you do, definitely you do [teach an integrated curriculum]. First of all, we were told to teach that way in college . . . That’s how we were taught. So we would teach an integrated curriculum. For example, in our school we have an assembly once a week on Friday and a different class takes the assembly each week. So if you were doing assembly that week you would spend half your week getting ready for assembly – a little drama, your song, prayer. And that takes place outside of your half-hour of religion . . . And we’d say grace before we eat our lunch.’

‘How far it is brought into the curriculum probably depends on individual teachers and how strongly teachers feel about their own faiths. Certainly if someone was a religious fanatic they could run amok. Moral religious values would tend to come into the curriculum, for example, abortion with older children.’

The expectation that a religious ethos should permeate beyond specific religion classes is not confined solely to its anticipated integration with secular subjects. As noted at the beginning of this paper, r 68 of the Rules for National Schools insists that ‘a religious spirit should inform and vivify the whole work of the school’ and not simply be restricted to the taught hours of the school day. The questionnaire survey confirmed that this ‘religious spirit’ does indeed permeate throughout the school day and in a variety of ways.

For example, 70% of schools surveyed by questionnaire hold a school assembly on a regular basis. Of these, 80% have a religious focus and they comprise prayers, bible stories, hymn singing and addresses by clergy. In 50% of cases no opt-out clause is offered to any children not of that religious belief. In those schools that do offer an opt-out facility, the choices include remaining in class (3%): ‘children who do not want to participate in the morning prayers are expected to stay silent and just show respect to those praying’; or coming to school late (33%): ‘we have mass in the morning on occasions and the children can come in after if they wish’. Some schools (30%) hold class assemblies, all of which are religious in content. Only 33% of these schools offer an opt-out provision to non-participating pupils, the most common being to remain in the room: ‘work at side of room during prayers or just stay in seat reading etc’.

The ethos of the school is integrated into other activities. Thus, 68% of schools hold religious services during school hours, either at the local church or on school premises. The frequency of these services range from once a month through to ‘once or twice a year’, and include services at Christmas, Easter, Ash Wednesday, feast days, for a funeral (parent or school member), anniversary mass (former principal or recent past pupil) and for the sacrament of reconciliation. The majority of these services (70%) are of a denominational nature with the remainder being broadly

Christian in focus. The most common opt-out provisions include the option to 'study on own under supervision' or 'to be collected from school by parents'.

Schools also reported that the ethos of the school was promoted through religious symbols on walls, altars in classrooms, grace before meals, prayers at the start and end of the day, visits to churches, visits from clergy and the staging of Nativity plays and carol singing at Christmas time. The majority of school policy documents, submitted with completed questionnaires, were explicit in stating the extent of the permeation of the school ethos in school life: a 'Christian Spirit will inform all the activities of the school'; a 'Christian environment is offered' by the school; and, in explaining the extent of school links with local parishes, 'this, for example, is shown by the fact that the pupils attend services in the local church and the Rector visits the school on a regular basis in his role as Chaplain'. These reports are in keeping with statements by religious authorities which have been consistent in explicitly asserting the importance of the school ethos to the life of their schools. For example, in February 2005, the Roman Catholic Archbishop of Dublin re-emphasised the need for a Catholic school to 'have a defined ethos which should be verifiable in all its aspects'.⁵⁷ He noted that 'a Catholic ethos must be the integrating factor for all aspects of the life of the Catholic school' and that a Catholic school must 'place at the centre of its mission the passing on of the message of Jesus Christ, his truth and his love, from generation to generation, as a factor of liberation, integration and hope in the young person's life'.

The parents interviewed confirmed that an integrated curriculum is practised throughout the school day:

'It actually turned out in reality that religion is not a subject that they do for a half-hour. It's constantly brought up again and again like prayers here and there, colouring in pictures, say of the nativity.'

'It was 24 /7!'

'I had a strong sense that everything was predicated on following the Church of Ireland [ethos]. It came into every subject. I find it hard to pinpoint . . . but a strong Church of Ireland Christian atmosphere did pervade.'

'Religion comes into almost everything, from blessing themselves in the morning to prayers before dinner and after dinner, at the end of the day. The priest calls in frequently with little messages.'

Teachers also described the pervasive nature of the integrated curriculum:

'Religion crops up a lot. For example, if a child's granny dies then the class says a prayer.'

'Certainly it's there throughout the day, and throughout the calendar year with feast days etc. Religion is there . . . I think it is integrated into the life of the school, maybe not into all subjects. You have your prayers in the morning, your prayers before you eat and your prayers going home in the evening time.'

The questionnaire and interview surveys provide a qualitative insight into how the integrated curriculum is taught in Irish primary schools. To determine whether the integrated curriculum and its teachings are in accord with the standards of

57. 'Archbishop says schools must have Catholic ethos' *The Irish Times* 5 February 2005.

international human rights law, it is necessary to ask two critical questions derived from international jurisprudence.⁵⁸ Is the nature of the religious knowledge taught through an integrated curriculum conveyed in a manner that can be described as 'objective, critical and pluralistic manner' or 'neutral and objective'? Does such teaching have an aim of indoctrination? These are now addressed, using the interview responses.

Neutral and objective?

When asked whether they believed that the religious knowledge put across through the integrated curriculum was conveyed in an objective, critical and pluralistic manner, parents were of the opinion that this was not the case:

'How can that be possible to integrate doctrinal beliefs in an objective, critical and pluralist manner?'

'No allowance is made for those who may have had a different perspective. It's not presented with any balance – it's presented as fact.'

'It couldn't be objective and pluralist as long as these really pure Catholic Virgin Mary prayers are being used. It is definitely not pluralist or objective, not at all. It is specifically Catholic.'

'It's only one religion [that is taught], not the subject of religion. A big difference. Not integrating a multi-denominational approach to religion. They're being anti all those things.'

'It's taught as fact . . . it's taught as something that definitely, obviously, really happened. God is this, Jesus did that, instead of saying some people think this or that . . . They teach it only in its most simplistic, narrow form. It's not taught in a broad ethical or philosophical way.'

Aim of indoctrination?

With respect to the aim of indoctrination, parents were adamant that the lack of objectivity and neutrality in the teaching of the integrated curriculum combined with its compulsory nature resulted in the involuntary indoctrination of their children into a particular religious faith:

'If you're only steeped in one religion – is that not indoctrination? It is all indoctrination simply because adults have the influence to children at a very basic level at an early age without perhaps understanding that they are [indoctrinating], a child absorbs.'

'My problem would be the indoctrination part of the religious teaching and the acceptance of it as a school subject, an educational pursuit. These are issues kids are not aware of.'

58. See the two sections above dealing with the case-law of the European Court of Human Rights and the Human Rights Committee. Having ratified both the Convention and the ICCPR, Ireland has accepted an obligation to abide by the standards set by this international jurisprudence.

Teachers confirmed the inherent aim of indoctrination in the integrated curriculum in Irish primary schools:

‘It could vary from individual to individual. More conservative teachers could be teaching in a way that is indoctrination, mightn’t even be aware of it. Others may be more objective. Once something is integrated it becomes difficult not to indoctrinate people by sheer dint of its integration . . . And where do you put the children who do not want to be exposed to that religion?’

‘The school’s role is to indoctrinate. That is its purpose.’

‘That is what I think people have interpreted as ethos – that they have the freedom to indoctrinate. They have every right to indoctrinate. It’s people’s working definition of ethos. It’s almost a licence to do so . . . Part of the religious programme is to teach them a prayer before lunch, after lunch and a prayer in the morning. It leaks into the school day. Definitely indoctrination. Definitely directed at a god.’

This account of the aim of the integrated curriculum would most certainly suggest that its teachings are aimed at advocating a specific religious view.⁵⁹ Schools are not simply facilitating the study of religion but are pursuing an aim of indoctrination by seeking to impose a particular religious belief through a devotional rather than academic approach to the teaching of religion.

Opt-out possibility

As already noted, international human rights law holds that if doctrinal religion is taught in schools, then those individuals who do not want to participate in such teaching must be offered an opt-out provision.⁶⁰ However, teachers confirmed the difficulties that would exist for a child who wanted to avoid the teachings of the integrated curriculum:

‘[The integrated curriculum is] very real. Religion is integrated into other subjects which is why it is impossible for a child who is a non-believer [to avoid it]. There’s no question of that. Christmas cards, songs, if you were in third class you might become the choir for the communion children . . . Obviously it’s integrated, of course it is.’

‘Generally, assembly is religious. The drama is a dramatised bible story with the song and the prayer, eg thank you God for trees, God keep us safe. And on a practical level, you practise [for assembly] in the hall and you may not be able to practise in your official [religious education] half-hour. So if you had a child using the opt-out clause, can you say to the Mum well today don’t bring them in at 12 because that’s when the hall is free. It would be very, very difficult . . .’

‘It would be near nigh impossible [for a child to opt out of the integrated curriculum].’

‘[Minority-belief children] can’t be taken out of morning prayers, they can’t be taken out if a religious issue comes up in a reading . . . To my way of thinking this

59. Above n 8.

60. Above n 3.

is practically unworkable . . . I would say that in 99.9% of cases where a child is not practising the religion of the school they are attending it is a very alienating experience for them . . . And that's one of the reasons why I feel there shouldn't be something in schools that's going to reinforce in children feelings of alienation, you don't belong to this community. We'll tolerate you here to do your maths but we won't tolerate you for being essentially different.'

Furthermore, parents reported that the pervasiveness of such an integrated curriculum and the impossibility of opting out failed to respect their philosophical and religious convictions:

'I'm unhappy with the way that the Catholic religion is playing such an important role in the whole curriculum. It is blended in . . . They pray before the lessons start in the morning, they pray before every break and they pray before school finishes. You couldn't possibly avoid it. Even if we took him out of religious classes . . . he would still constantly be confronted with religious Catholic belief . . . there is no way that you could possibly avoid it.'

'[The school authorities] objected to me withdrawing my child from Christian drama: they told me that he cannot be excused from this. [They were] very, very unsympathetic, very dogmatic.'

'I asked my daughter what happened [in morning prayers], just to see if she did get the opportunity not to do it and whether other kids don't do it. She was saying "I can't do anything about it". She was saying sometimes she doesn't want to but she has to do it every morning.'

'On Ash Wednesday they put ashes on his head. They knew my views on religion but I came to pick him up one day and he had ashes on his forehead. I asked the teacher about it, she said "ah sure all the children were having it, it's not that much of a big deal".'

Alternative provision

The evidence set out above illustrates how a doctrinal integrated curriculum, from which no opt out is possible, is practised in Irish primary schools. In such circumstances, the availability of acceptable alternative schooling, as argued above, would be a critical consideration in determining whether religious freedom was adequately protected in an education system.

In the Irish context the availability of a state-funded alternative to denominational schooling is extremely limited. As was noted above, only 41 out of approximately 3171 primary schools in the country are multi-denominational in ethos.⁶¹ These schools are typically vastly over-subscribed. If parents wish to send a child to a multi-denominational school and there is no such school in the locality, or there are insufficient places in a local multi-denominational school, they must get together with other like-minded parents to form an association and establish a school. This process is a daunting one. Furthermore, it is one in which the state offers no initial

61. Above n 38.

encouragement or assistance, either in terms of expertise or finance.⁶² The lack of options together with a resulting sense of powerlessness was a dominant theme emerging from interviews with parents:

‘It is an important issue [the integrated curriculum] but I don’t know what I can do about it . . . No one complains about it . . . there is no where else to go.’

‘There weren’t any alternatives, there were absolutely none. Home education would have been the only alternative.’

‘You feel impotent as a parent.’

The nature of the integrated curriculum found in Irish primary schools suggests that its practice fails to respect international guarantees of religious freedom: its teachings are doctrinal; its aim is one of indoctrination; opting out is impossible and alternative acceptable schooling is extremely limited. The question that then arises is whether domestic law can offer protection to the rights of those who believe that their religious freedom is violated in this way.

THE RESPONSE BY DOMESTIC LAW

The domestic legal framework surrounding the teaching of an integrated curriculum in state-funded schools creates a confusing and contradictory picture. Article 44.2.4 of the Constitution provides that a child has the right to attend a school receiving public money without attending religious instruction at that school.⁶³ In addition, Art 42.3.1 provides that ‘the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State’.

This same Article has been interpreted to mean that parents can elect to choose denominational education for their children and, under Art 44.2.4, state funding for such denominational schools is permitted.⁶⁴ However, if the conscience provisions found in Arts 44.2.4 and 42.3.1 are to be respected, such denominational schools would be required to refrain from many practices such as the integrated curriculum. This, however, would negate what many people consider to be the essence of a

62. This lack of encouragement may be contrasted with education policy in England where the government is pursuing a policy of encouraging the establishment of ‘trust schools’ by groups of parents dissatisfied with local schools provision. For example, Part 1, s 3 of the Education and Inspections Act 2006 gives parents an increased say in the provision of schools in their area by requiring local authorities to respond to representations by parents who are not satisfied with the local provision of schools.

63. Article 44.2.4: ‘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’.

64. Article 42.4 also gives constitutional support for the state funding of denominational schools where it reads the state ‘. . . shall endeavour to supplement and give reasonable aid to private and corporate educational initiative’. The decision of the Supreme Court in *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321 confirms that the principle of non-endowment of religion found in Article 44.2.2 does not prohibit state funding of denominational schools. See G Hogan and G Whyte *JM Kelly: The Irish Constitution* (Dublin: LexisNexis Butterworths, 4th edn, 2003) pp 1940–1942.

denominational education.⁶⁵ The tension produced by these constitutional provisions has not come under detailed legal scrutiny.⁶⁶

In 1991, a lobby group called the Campaign to Separate Church and State attempted to mount a legal challenge to the integrated curriculum. However, a draft Green Paper on Education produced at the time appeared to promise reforms in this area and the case was not pursued. The unpublished draft Green Paper stated that ‘the integrated primary curriculum appears to be in conflict with Art 44.2.4 of the Constitution which safeguards the right of children not to attend religious instruction in schools in receipt of public money’. However, in the event, the subsequent White Paper and Education Act 1998 did not address the issue. In its negotiations with the churches on the setting up of boards of management, the government was apparently prepared to relinquish its position on the issue of the integrated curriculum. Walshe remarks:

‘[The Minister for Education] went to great lengths to progress the White Paper and its implementation, [she] concentrated on winning changes in the composition of school boards from the main Churches. But in so doing she was, initially at any rate, prepared to make concessions which amounted to a hefty price to pay for convincing the Churches to give up direct – but not indirect – majority control over primary schools boards of management.’⁶⁷

In its 1996 report, the Constitutional Review Group noted the unsatisfactory nature of the constitutional situation created by the near-monopoly provision of denominational education and the rights of minority believers. In its view, either Art 44.2.4 ought to be changed or the school system needed to be changed to accommodate the requirements of Art 44.2.4.⁶⁸ It concluded that if Art 44.2.4 did not exist to provide a safeguard for the rights of non-believers the state might well be in breach of its international obligations insofar as minority-belief children:

‘might be coerced by force of circumstances to attend a school which did not cater for their particular religious views or their conscientious objections. If this were to occur, it would also mean that the state would be in breach of its obligations under Art 42.3.1.’⁶⁹

It therefore recommended that:

‘if a school under the control of a religious denomination accepts state funding, it must be prepared to accept that this aid is not given unconditionally.

65. For a detailed review of Arts 44 and 42 and the relevant case-law, and for a discussion of the various interpretation approaches that may be applied to these constitutional provisions, see R O’Connell ‘Theories of religious education in Ireland’ (1999) 14 *Journal of Law and Religion* 443.

66. Gerry Whyte has noted that that until recently any potential discordance caused by this tension was obscured by the dominant social consensus. However, ‘that consensus is now breaking up. Parents are seeking a greater say in the education of their children while humanists are more assertive in defence of their rights’: G Whyte ‘Education and the Constitution: convergence of paradigm and praxis’ (1994) XXV–XXVII *The Irish Jurist* 79.

67. J Walshe *A New Partnership in Education: From Consultation to Legislation in the Nineties* (Dublin: Institute of Public Administration, 1999) p 180.

68. Constitution Review Group, above n 52, p 375.

69. *Ibid*, pp 386–387.

Requirements that the school must be prepared . . . to have separate secular and religious instruction are not unreasonable or unfair.⁷⁰

A similar conclusion was reached by Desmond Clarke in his observations that Irish educational policy makes it impossible for a child to attend a state-funded primary school without receiving denominational religious instruction. He argues that according to the rights guaranteed in both the Irish Constitution and the Convention, schools are obliged 'to separate denominational religious instruction from other subjects and to allow parents to choose whether their children should attend that portion of the school curriculum'.⁷¹

The Irish government has not acted upon the recommendations of the Constitution Review Group.⁷² Moreover, the rationale behind these recommendations was ignored in the drawing up of the Education Act 1998. This Act, the first piece of legislation dealing with education since the formation of the state, failed to clarify the situation. While it contains a provision to protect pupils from receiving religious instruction contrary to their conscience or the conscience of their parents,⁷³ it was silent on the issue of the integrated curriculum and gave statutory protection to schools to promote their ethos, thereby simultaneously ignoring and conflating the issues.⁷⁴ As noted above, the integrated curriculum continues to receive additional sanction through r 68 of the Rules for National Schools and through the 1999 Primary School Curriculum. In March 1998, it appeared to receive explicit judicial support in a ruling by the Supreme Court.⁷⁵ In this decision, the court held that 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'. The court further held that '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'.⁷⁶

70. Ibid.

71. Clarke, above n 18, p 52.

72. The Parliamentary All-Party Committee on the Constitution is reviewing aspects of the Constitution following the 1996 report.

73. Section 30(e): '[The Minister] shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student'. Rule 69(2)(a) of the Rules for National Schools contains a similar opt-out clause: 'No pupil shall receive, or be present at, any religious instruction of which his parents or guardians disapprove'.

74. Furthermore, the Act does not reflect the instructions found in the Rules for National Schools (1965), which stipulate that the hours of religious instruction should be fixed and indicated on a timetable so as to facilitate the withdrawal of pupils not wishing to participate: r 69(2)(b) and 69(5).

75. *Campaign to Separate Church and State in Ireland v the Minister for Education* [1998] 2 ILRM 81. The case dealt with the question of the constitutionality of the state paying the salaries of chaplains in community schools (a type of secondary level school). The court ruled that the state may fund denominational education provided that the funding is made available on a non-discriminatory basis.

76. Ibid, at 101. Hogan and Whyte suggest that 'this approach would clearly protect the display of religious artefacts in publicly-funded schools and possibly also the public funding of the integrated curriculum, i.e. a curriculum permeated by religious values, provided this does not constitute religious instruction as such': Hogan and Whyte, above n 64, p 2070.

In the absence of constitutional and education legislative provisions guaranteeing freedom of thought, conscience and religion in the context of the integrated curriculum, it might be presumed that the recent European Convention on Human Rights Act 2003 (ECHRA) could be employed to offer protection for such a Convention right.⁷⁷ However, constitutional jurisprudence and recent disputes involving matters of ethos in schools suggest that this protection may not be forthcoming. First, the provisions of the Act are subject to the overriding authority of the Constitution, which remains the supreme law of the country. To date, denominational school bodies have been excluded from certain rights obligations found in the Constitution when the courts have considered it ‘necessary to make distinctions in order to give life and reality to the constitutional guarantee of the free profession and practice of religion’.⁷⁸

For instance, in *McGrath and O’Ruairc v Trustees of Maynooth College*,⁷⁹ it was held that the prohibition of discrimination under Art 44.2.3 of the Constitution was confined to the state and not extended to institutions receiving public funding. The autonomy of religious bodies is additionally safeguarded by Art 44.2.5 of the Constitution, which protects the right of denominations to control their own affairs, including the running of educational establishments and the enforcement of its own regulations.⁸⁰

A second reason to doubt the capacity of the ECHRA to protect the rights of minority-belief individuals in denominational schools lies in the applicability provision of the Act. The Act is applicable only to those bodies defined as ‘organs of the state’.⁸¹ As yet, the courts have not been asked to consider this definition. For present purposes, the question arises as to whether privately owned and managed, state-funded, denominational schools would be classified as ‘organs of the state’. In its initial report to the Economic, Social and Cultural Committee in 1997, the government stated that ‘Overall responsibility for education in Ireland lies with the Minister for Education who is a member of the Irish Government and responsible to the National Parliament’.⁸²

77. This Act aims to give further domestic effect to the rights and freedoms guaranteed under the Convention. It creates a new requirement in statutory interpretation; the possibility of an action against an organ of the state as a result of a contravention by such an organ to perform its functions in a manner compatible with the state’s obligations under the Convention provisions; and the possibility of an action or application for a declaration by the High Court or Supreme Court that a statutory provision or rule of law is incompatible with the state’s obligations under the Convention provisions.

78. *In the Matter of Article 26 and the Employment Equality Bill 1996* 118/97 at 16.

79. [1979] ILRM 166.

80. *Ibid.*

81. A definition of ‘organ of the state’ is set out in s 1 of the Act: ‘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 corresponding application provision of the UK Human Rights Act 1998 suggests a less restrictive approach to applicability. Article 6(3) of that Act provides that the Act shall be applicable to public authorities including ‘any person certain of whose functions are functions of a public nature . . .’. However, to date, the approach by the courts towards defining this provision has been criticised as being overly narrow and institutional; see, for example, Joint Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act* Ninth Report of Session 2006–07. HL 77, HC 410, 28 March 2007 (London: TSO, 2007).

82. E/1990/5/Add.34, para 693.

However, the test for deciding on the phrase ‘organ of the state’ proposed by the government during the passing of the ECHR Bill does not suggest that in matters of ethos, state-funded denominational schools would necessarily be considered as acting as ‘organs of the state’. This test stated that if a body ‘exercises the legislative, executive or judicial powers of the state, it . . . falls within the definition’.⁸³ However, in the Education Act 1998 the state is not given powers in matters to do with ethos. A recent disagreement illustrates the power that patrons hold over matters of ethos and the unwillingness of the state to intervene in such disputes. In 2003, the patron body of an inter-denominational school sacked the principal in a dispute about the teaching of religion.⁸⁴ The principal, parents and teachers had decided to undertake sacrament preparation outside of school hours to avoid segregating the children during the school day.⁸⁵ The patron disagreed with this decision and dismissed the principal for taking this initiative. The Department of Education stated that this was a matter which it could not ‘interfere in’ as it was for the patron to decide on matters of ethos.⁸⁶ This position of the government demonstrates that it believes it does not exercise any powers when matters of ethos arise in primary schools. Such a view, in turn, leads to the conclusion that schools would not therefore be considered to be ‘organs of the state’ for the purposes of the ECHR when considering matters of ethos and would not, in such situations, be bound to respect the human rights standards found in the Convention.

The interplay of history, domestic legislation and the Constitution has produced a situation where human rights standards are not protected. The nature and intensity of this failure in human terms have been illuminated by the reported experiences of teachers, pupils and parents. Given the lack of an adequate response to the protection of rights of these individuals by the domestic legal framework, attention now turns to the efficacy of international supervisory bodies in protecting the religious freedom of these persons.

THE INTERNATIONAL RESPONSE

Both the UN Committee on Economic, Social and Cultural Rights and the UN Human Rights Committee have expressed concern about the role of religion in Irish primary schools. In its examination of the Initial Irish Report under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1990, the Economic, Social and Cultural Rights Committee requested further information about the role of the state and its control in respect of denominational schools.⁸⁷ Greater clarification was also sought on the meaning of ‘the ethos of a school’ to elicit whether it was representative of an ideology or simply a set of rules of conduct in the school.⁸⁸ In

83. Brian Lenihan, Minister of State at the Department of Justice, Equality and Law Reform. Seanad Debate, 19 June 2003.

84. The school, Gaelscoil Thulach na nÓg, is an inter-denominational Irish-language school founded in Dunboyne, Co Meath in 1998.

85. In primary schools run by the Catholic Church it is normal practice to undertake sacrament preparation during school hours (First Confession and First Communion at the age of 7–8 and Confirmation at the age of 11).

86. Editorial Comment *The Irish Times* 2 August 2002.

87. Initial ESCR Report E/1990/5/Add.34, para 39.

88. E/C.12/1999/SR.16, para 39.

its Concluding Observations, the Committee recommended that Ireland ‘adequately supervise the quality of education received by students at the primary school level of the formal educational system in order that the education system be in conformity with Arts 13 and 14 of the Covenant’.⁸⁹

When Ireland made its initial report to the Human Rights Committee in 1992, Mrs Evatt, the Committee member from Australia, noted that ‘some reform of the state religious education policy currently in force was certainly necessary, since it favoured the dominant religions, with the result that there were very few non-denominational schools in Ireland’. She wished to know ‘exactly how important was religious education in the national school curriculum?’⁹⁰ In particular:

‘She questioned the compatibility of rule 68 of the Rules for National Schools referred to in the initial report with the freedom of individuals and parents to adopt a religion of their choice and the freedom from coercion protected by the Covenant . . . Since the principle of freedom of religion was at risk under the current policy, she sought confirmation that the provisions of the Covenant would be fully adhered to through the implementation of the proposed reforms.’⁹¹

It is not clear from the text of the Summary Record of the meeting which proposed reforms are being referred to here. It is possible that the Attorney-General was referring to the Education Bill which was under consideration at this time. In his response to Mrs Evatt’s question, the Attorney-General stated that:

‘The possible contradiction in the Rules for National Schools, 1965, between the requirement for primary teaching permeated by a religious ethos and spirit and the right of parents not to have their children present during religious education was well understood, and a vigorous national debate was currently taking place on that issue.’⁹²

Again, it is not obvious where this ‘vigorous national debate’ was taking place. If indeed it was a reference to the discussions surrounding the Education Bill the outcome would not have satisfactorily allayed Mrs Evatt’s concerns. In this Bill, which became the Education Act 1998, schools gained a statutory right to promote a denominational ethos and the Act was conspicuously silent on the question of the integrated curriculum. This development was noted and raised by the Human Rights Committee when Ireland appeared before it again in 2000 to answer questions raised by its second report:

‘Mr Amor [the Committee member from Tunisia] drew attention to the statement in paragraph 228 of the report that the Education Bill recognized the right of schools to maintain their own distinctive “characteristic spirit” and asked how

89. E/C.12/1/Add.35, para 28. With respect to primary education, Art 13 requires states to ensure that it is compulsory, available free to all and respects the liberty of parents to ensure that the religious and moral education of their children is in conformity with their own convictions. Article 14 requires states to work out and adopt a plan of action to ensure the principle of compulsory education free of charge for all. The reference to ‘quality of education’ in the Committee’s recommendation would thus imply that it is not only concerned about access to free primary schooling in Ireland but that it is also uneasy about the extent to which primary education is in conformity with parental convictions.

90. CCPR/C/SR.1235, para 38.

91. *Ibid*, para 39.

92. CCPR/C/SR.1239, para 44.

the state ensured that teaching did not become indoctrination in private schools and in religious schools in particular.⁹³

In responding to this question, the Attorney-General fell back on the constitutional articles dealing with religion:

‘On the point raised by Mr Amor concerning the right to education, he [the Attorney-General] said that article 42 of the Constitution stipulated that parents should be free to choose the form of education their children received, and the state was prohibited from obliging children to attend any particular school in violation of the lawful preferences of their parents.’⁹⁴

This response both ignored the complexity, ambiguity and reality of the Irish legal situation surrounding the integrated curriculum as well as the limited choice of schooling open to parents in Ireland. If the reality of the Irish integrated curriculum – its content, together with the inoperability of any exemption provisions – were clearly conveyed to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, it is highly probable that Ireland would be held to be in breach of its obligations under Art 18(4) of the ICCPR and Art 13(3) of the ICESCR, respectively. However, it would seem that, to date, the UN bodies have yet to comprehend fully the nature of the non-state system of primary schooling in Ireland and the role played by the integrated curriculum in schools. In its most recent submission (July 2005) to a UN supervisory body – the Committee on the Rights of the Child – Ireland yet again made no reference to the integrated curriculum.⁹⁵ In the section entitled ‘Religious education in schools’, it noted that ‘religious education is part of the curriculum for primary schools and schools are obliged to allocate 30 minutes per day to religious instruction’.⁹⁶ Its subsequent statement that ‘under Section 30 of the Education Act, 1998, no student can be required to attend instruction in any subject that is contrary to the conscience of the parent of the student’ would suggest to those unfamiliar with the Irish school system that religious freedom is protected by domestic legislation.

During the examination of this report in September 2006, Ms Smith, the Committee member from Norway, asked whether children ‘could decide not to attend mandatory religious instruction in school’.⁹⁷ Brian Lenihan, Minister of State at the Department of Justice, Equality and Law Reform, replied that ‘parents had a constitutional right to withdraw their children from religious instruction, which was respected by the Department of Education and the school authorities’.⁹⁸ In its Concluding Observations, the Committee did express its concern about the lack of

93. CCPR/C/SR.1847, para 58.

94. CCPR/C/SR.1848, para 3.

95. *Second Periodic Report of State Parties (Unedited Version): Ireland* (CRC/C/83 Add.17, 7 November 2005).

96. *Ibid.*, paras 526–527.

97. CRC/C/SR.1182, para 9. In its initial report to the Committee on the Rights of the Child in 1998, Ireland cited Art 42.1 of the Constitution as protecting religious freedom in schools. It stated that this article ‘grants parents the liberty to ensure that the religious and moral education of their children is fully protected’. It further noted that the Constitution grants every child the right ‘to attend a denominational school receiving state funding without having to participate in religious instruction in the school’. No member of the Committee on the Rights of the Child questioned these statements: CRC/C/11/Add.12, paras 163–164.

98. *Ibid.*, para 26.

non-denominational and multi-denominational schools and encouraged the promotion of the establishment of such schools.⁹⁹ A similar recommendation had been made by the Committee on the Elimination of Racial Discrimination following its examination of Ireland's report in March 2005.¹⁰⁰

The European Court of Human Rights has not been asked to examine the question of the integrated curriculum and its potentially indoctrinating influence in the Irish context. As one parent interviewed noted:

'The difficulty of this issue is what to do. You find yourself torn. A court case takes so long, years. Who would put their child through it, and the expense of it. But it will happen some day. Some day a parent will be furious enough to do it, eventually.'

However, if the court were given this task, it is highly likely that it would recognise that Irish law and practice permitted and, indeed, demanded a doctrinal integrated curriculum to be taught in Irish schools. If this conclusion were reached, the existence of acceptable alternative schooling – as was argued above – would then be a key consideration in deciding whether the state was in breach of its obligations by permitting state-funded religious schools to operate a doctrinal integrated curriculum.

CONCLUDING REMARKS

The analysis presented in this paper suggests that the Irish domestic legal order does not provide protection against involuntary religious indoctrination conveyed through the practice of a doctrinal integrated curriculum in primary schools. The conscience clauses found in the Constitution and the Education Act 1998 cannot operate to protect freedom of religion in a situation where a child is exposed to doctrinal teaching throughout the school day. These provisions are designed for a school system which is non-denominational and where religious instruction is only given during specific timetabled hours. By the standards set by international human rights bodies, the operation of a doctrinal integrated curriculum in an education system dominated by religious schools – where realistic alternatives are non-existent – raises serious concerns under both the Convention and the UN treaties and should, if brought to the notice of the supervisory bodies, cause Ireland to be declared in breach of its international obligations.

The difficulty the state has in taking appropriate measures to comply with international standards stems from the fact that it has chosen to deliver primary education almost entirely through the medium of religious non-state actors. In the absence of realistic alternatives to religious schools, the only alternative form of acceptable state-funded denominational schooling would be one where religious instruction is taught for a specific period of the day from which it is practically possible to opt-out and where teachers refrain from any attempt at indoctrination.¹⁰¹ However, this arrangement produces a tension between the right of a child not to be exposed to unwanted doctrinal instruction and the right of those parents who wish to see their children receive a full denominational education through the practice of an integrated

99. CRC/C/IRL/CO/2, paras 61–62.

100. CERD/C/IRL/CO/2, para 18.

101. For arguments in favour of this arrangement, see Clarke, above n 18, p 53.

curriculum. In other words, the current education system produces a conflict between the right to freedom of religion of minority-belief individuals and the right to freedom of religion of the majority. From the perspective of using religious organisations in public service provision, this analysis yields a clear learning point. Religious bodies should not be placed in a monopoly position, either functionally or geographically, in providing a particular service. In Ireland the policy pointer that emerges from this is the need for the state to reduce the monopoly situation either by setting up its own schools, or by working with those organisations that are attempting to provide alternatives. In the provision of a local service, such as education, the need to avoid a geographical monopoly or dominance by a religious non-state service provider is of particular importance. To ignore this principle risks either violating the human rights of a minority or restricting the religious rights of a majority.