

# A discriminating education system: religious admission policies in Irish schools and international human rights law

**Alison Mawhinney**

Lecturer in Law, School of Law, Bangor University, Gwynedd, LL57 2DG, UK  
a.mawhinney@bangor.ac.uk

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## Abstract

Irish equality legislation permits discrimination in favour of co-religionists in admission policies to state-funded schools. This article examines whether Irish policies and practice in the area of pupil admissions meet and satisfy international human rights standards. In doing so it draws on material from interviews with parents and a survey to schools to provide an insight into how religious admission policies impact on the lives and rights of individuals. It concludes that by providing exemptions from equality legislation to religious schools, in a situation where these schools are in a near-monopolistic position, the Irish State is disregarding its responsibility to protect the right to non-discrimination, the right to education and the right to freedom of religion of those children and parents who do not adhere to the ethos of these religious bodies.

## Keywords

discrimination; schools; children's rights; admission policies; education, religion; human rights

## 1. Introduction

The structure of the primary education system in the Republic of Ireland is distinctive. There are no state-run primary schools. All primary schools are run by private organisations which are funded by the state. The vast majority of these private organisations are religious bodies.<sup>1</sup> This means that more than 98% of primary schools in Ireland are privately run religious schools. Irish equality legislation permits all primary schools to discriminate in their admission policies on the basis of a pupil's religion. Domestic legislative authorisation of religious admissions policies of this nature generates a complicated and often competing interplay of education rights, freedom of religion rights

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<sup>1</sup>) Out of more than 3228 primary schools in the country, only 60 are privately initiated multi-denominational schools.

and non-discrimination rights under international human rights law. In the context of the unique structure of Irish primary education, it produces a particularly complex picture. This article explores whether Irish law in the area of pupil admissions strikes an appropriate balance between these various rights and asks whether religious admission policies in Irish schools satisfy international human rights standards. In particular, it explores the role played by international human rights treaty bodies in monitoring the enforcement of these standards in the Irish education system.

The article begins by giving an overview of Irish law and practice in the area of religious admission policies. In so doing, information gathered from a questionnaire survey to school authorities is used in order to illustrate how provisions providing for discriminatory treatment are employed by schools in operational terms. In addition, material from an interview survey with parents is used to provide instances of the reality generated by discriminatory policies and to give an insight into the impact that such policies have on the human rights of individuals. In particular, parents were asked whether, in their experience, religion played a role in school admission policies and whether they believed a religious admission criterion impinged on their freedom of religion. Next, the norms set by international human rights law with respect to discriminatory school admission policies are considered. Finally, the impact of these standards on Irish law are measured through an examination of the observations made by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child in the course of their examination of recent periodic reports submitted by Ireland.

## **2. Religious admission policies and Irish law**

The degree of protection afforded to international human rights standards is decisively influenced by two factors: the level of scrutiny by international human rights supervisory organs and the domestic legal environment. The role of international human rights tribunals is to set standards and to help ensure those standards are respected through a variety of monitoring mechanisms. At the domestic level, states have a duty to transform international standards into effective domestic law and policy. These roles should be complementary and offer an equivalency of protection to rights. Together they constitute a protection structure for human rights.

The importance of the domestic legal arena for the effective implementation of international human rights has been widely recognised. Anne Gallagher, observing that the implementation of, and compliance with, international human rights treaties are ultimately national issues, comments that 'at the end

of the day, individual rights and freedoms will be protected or violated because of what exists or what is lacking within a given state or society'.<sup>2</sup> This view is reflected by the Commission on Human Rights:

Domestic law consistent with the Charter and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed, and within which all activities referred to in this Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted.<sup>3</sup>

The ability of a state to guarantee human rights and to acquit itself adequately of its international responsibilities depends to a large extent on how it has translated its obligations into its legislative framework and, in particular, the effectiveness of available remedies. In Ireland, key components of the domestic regulatory framework governing education and protecting human rights norms are the Education Act 1998 and the Equal Status Act 2000. The strength of important domestic institutions such as the judiciary and a national human rights commission is also recognised as being highly significant in protecting rights. With regard to the latter, Gallagher argues that 'independent human rights institutions are, in a very real sense, the logical national collaborators of treaty bodies in so far as they can play an important monitoring, and at times, investigative role'. She maintains that the mandate and workings of a national human rights commission can be a highly significant factor in affecting the degree to which international standards are upheld, particularly for countries which follow the 'non self-executing' theory of treaty law. In terms of such institutions in Ireland, the Irish Human Rights Commission and the Equality Authority have a central monitoring role to play in protecting human rights norms with the latter having a particular remit in the field of non-discrimination law and policy.<sup>4</sup>

The Education Act 1998 gives the school patron, through the board of management the right to draw up the school's admission policy. Every school must have a patron and in most cases it is the local Roman Catholic or Anglican

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<sup>2</sup>) A. Gallagher, 'Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners', in *The Future of UN Human Rights Treaty Monitoring*, eds. P. Alston & J. Crawford (Cambridge: Cambridge University Press, 2000) 201.

<sup>3</sup>) Article 3 of *The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, General Assembly resolution A/RES/53/144, 8 March 1999

<sup>4</sup>) The Equality Authority was created under the Employment Equality Act 1998 and is charged with functions related to the enforcement of the both that Act and the Equal Status Act 2000. Its function is to work towards the elimination of discrimination and 'to provide information to the public on and to keep under review the working of this Act and, whenever the Authority thinks it necessary, to make proposals to the Minister for its amendment', Equal Status Act 2000, Section 39(c).

Bishop of the diocese in which the school is located.<sup>5</sup> Section 15(2)(c) states that the board shall

...publish, in such manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school... having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned.

The formulation of an admissions policy must not only take account of constitutional provisions but also domestic equality legislation notably the Equality Status Act 2000. The Act aims to prohibit discrimination in the provision of goods and services, accommodation and educational establishments across nine grounds including religion. However, it explicitly permits schools, whose objective is to provide education in an environment that promotes certain religious values, to discriminate in favour of co-religionists. Sub-section 7(3)(c) provides for this significant exemption:

An educational establishment does not discriminate... where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school.

In 1997, the President of Ireland referred the Equal Status Bill to the Supreme Court for a decision on the question of whether any of the provisions of the Bill were repugnant to the Constitution.<sup>6</sup> Although no specific section of the Bill was highlighted for consideration, it is probable that Sub-section 7(3)(c) was of concern given its potential to conflict with non-discrimination provisions found in the Constitution, namely Article 44.2.3 and Article 44.2.4.<sup>7</sup> In the event, the Supreme Court, having found two other provisions - unrelated to

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<sup>5</sup>) A patron is defined as '...the person or body of persons recognised as such by the Minister for Education and Science. The Patron may manage the school personally or may nominate a suitable person or body of persons to act as manager. Subject to the approval of the Minister, the Patron may at any time resume direct management of the school or may nominate another manager'. *Boards of Management of National Schools: Constitution of Boards and Rules of Procedures*, Department of Education and Science, 2000. Article 2(a).

<sup>6</sup>) *In the matter of Article 26 of the Constitution and in the matter of The Equal Status Bill, 1997* [1997] 2 IR 388. Under Article 26 of the 1937 Constitution of Ireland, the President may, after consultation with the Council of State, refer any Bill to the Supreme Court for a decision on the question of its constitutionality.

<sup>7</sup>) Article 44.2.3: 'The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status'. Article 44.2.4: 'Legislation...[may not] 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'.

Sub-section 7(3)(c) - to be unconstitutional did not consider it necessary to 'embark on a consideration of other provisions of the Bill'.

However, one month earlier the Supreme Court had been asked to consider the constitutionality of another contentious bill - the Employment Equality Bill. In so doing, the Court had upheld provisions that allowed schools to apply administration policies with a view to maintaining their own religious ethos.<sup>8</sup> This decision had to do with proposed legislation permitting religious discrimination by schools in employment policies. In reaching its decision, the Supreme Court held that in certain circumstances differences of treatment based on religion were acceptable 'in order to give life and reality to the constitutional guarantee of the free profession and practice of religion'. It quoted, with approval, the views of Henchy J in *McGrath and O'Ruairc v. The Trustees of Maynooth College*:

The constitutional provision invoked here (Article 44.2.3) must be construed in the term of its purpose. In proscribing disabilities and discriminations at the hands of the State on the grounds of religious profession, belief or status, the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion. To construe the provision literally, without due regard to its underlying objective, would lead to a sapping and debilitation of the freedom and independence given by the Constitution to the doctrinal and organisational requirements and proscriptions which are inherent in all organised religions. Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasion recognise and buttress them.<sup>9</sup>

As Hogan and Whyte point out, 'support for a discriminatory admissions policy is analogous to the legislative authorisation of religious discrimination by schools in employment policies which was upheld by the Supreme Court'.<sup>10</sup> For this reason it may be presumed that the Supreme Court would not have found sub-section 7(3)(c) to be constitutionally unsound. Indeed, the Bill, having been subsequently amended to meet the Supreme Court's other requirements, was passed as the Equal Status Act 2000.

Sub-section 7(3)(c) permits religious discrimination in two instances. First, a school which exists to promote certain religious values in an educational environment can admit a student of a particular religious denomination in preference to other students. Second, such a school can also refuse to admit a student who is not of that religion provided it can prove that this refusal is essential to maintain the ethos of the school.<sup>11</sup> Initially, it was the latter aspect

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<sup>8</sup>) *In the Matter of Article 26 and in the Matter of the Employment Equality Bill, 1996*, [1997] 2 IR 321.

<sup>9</sup>) [1979] ILRM 166, at p. 187.

<sup>10</sup>) G. Hogan & G. Whyte, *JM Kelly: The Irish Constitution* (Dublin: LexisNexis Butterworths, 2003) 2071.

<sup>11</sup>) Equality Authority, *Schools and the Equal Status Act* (Dublin: Equality Authority and the Department of Education and Science, 2003) 9.

of permitted discrimination which attracted attention. The Equality Authority anticipated that that the phrase 'essential to maintain the ethos' of a school would lead to difficulties both in defining 'an ethos' and in establishing a test of what is essential to maintain such an ethos in a school environment. As a spokesperson for the Equality Authority said:

Is it essential that all parents go to mass to maintain ethos of the school? Is the presence say of someone who is not a Catholic in a Catholic school going to undermine the ethos or is refusing their admission essential to maintaining the ethos? [It has] to be teased out by case law – there is no [current] case law on it.<sup>12</sup>

However, findings from the questionnaire and interview survey as well as recent events reported in the media show that it is the first permitted act of discrimination – preferential admission of students based on religion – which has created most controversy. As the discussion below reveals, permitting this type of religious discrimination within a education system dominated by denominational schools produces a situation which endangers the right to education, the right to non-discrimination and the right to freedom of religion of children and parents in Ireland.

### **3. Admission policies in practice**

The results from the questionnaire survey to schools indicate that the majority of schools do discriminate in favour of co-religionists in their enrolment procedures.<sup>13</sup> Of the schools surveyed, 78% cited religion as a criterion in their schools admissions policy. Priority was generally given to children from the parish, then other children of that denomination, followed by - in the case of Protestant schools - children of other Protestant denominations, then children from other Christian affiliations and then other religions. Children of no religious affiliation were listed last, if at all. Approximately one-third of schools reported that they required parents to produce a baptismal certificate when enrolling a child. Of schools surveyed, 5% (2 schools) said they had refused admission to children on the grounds of religion.<sup>14</sup>

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<sup>12</sup>) In interview with the author, May 2003.

<sup>13</sup>) The questionnaire was sent to one hundred primary schools using a random, disproportionate stratified sampling technique to allow for the better representation of smaller categories of schools (i.e. Protestant, multi-denominational and inter-denominational schools). The response rate was 37%.

<sup>14</sup>) Both schools were Church of Ireland (Anglican) schools who refused admission to children in order to ensure that a majority of the pupils were members of the Church of Ireland as required by the Deed of Variation of each school. In 1997, the Minister for Education and school patrons agreed to vary the terms of existing leases. The new document (Deed of Variation)

Interview material confirmed that religion was a consideration in school admission policies.<sup>15</sup> The emphasis placed on religion appeared to depend on the school and, in particular, on whether the school was rural or urban based. In the former, there is little pressure on numbers and schools welcome new pupils.

*Rural schools take whoever.*

*Anyone with a pulse was taken.*

Rural-based parents reported that they did not encounter any adverse attitudes or experiences at the point of admission to schools, only later did they experience problems as minority-belief families. By contrast, in urban areas where the pressure to obtain a school place is greater, parents were aware that they could be legally discriminated against if they were perceived not to belong to the appropriate religion.

*People I know who wouldn't believe in Catholicism still get their children baptised Catholic because it's easier. My brother-in-law got his daughter baptised just in case she couldn't get into a good Catholic school.*

*Yes, we certainly were [asked our religion].*

*We had to supply baptismal certificates.*

*A friend in Dublin - her child was refused as he's not Catholic, not baptised.*

In September 2007 the human rights impact of religious admission policies was highlighted in an area of Dublin which had experienced high population growth. With a week to the start of the school year it became clear that 50 children had no school place. The schools in the area were Catholic schools and operated admissions policies based on the religion of the families. This resulted in non-Catholic children being turned away when priority was given to Catholic pupils. The vast majority of the children who did not get a place were non-Catholic Irish-born children of African parents. In response to the situation the Department of Education asked an educational charity to open an emergency school to accommodate the children. This development has led to fears of a racially segregated school system developing in the area as well as in other areas experiencing similar conditions of population growth and a

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which supplements the original leases provides that the school will be managed in accordance with the rules laid down by the Minister for Education and in accordance with the ethos of the school. Catholic Primary School Management Association *Management Board Members' Handbook* (Dublin: The Catholic Primary school Managers' Association, 2004) 10.

<sup>15</sup>) 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 campaign organisations.

shortage of school places.<sup>16</sup> In responding to complaints by parents from ethnic backgrounds that they had been unable to enrol their children in schools under Catholic management, the director of education of the Catholic Archdiocese of Dublin said 'we must stick to our enrolment policy of providing an education for Catholic children and siblings first. This enrolment policy has been public and unchanged since the Education Act 1998'.<sup>17</sup>

In response to this episode, the Equality Authority issued a paper which warned the Minister for Education and the Catholic Archbishop of Dublin that the operation of religious admission policies could breach equality legislation despite the exemption found in sub-section 7(3)(c). The Authority suggested that such a policy was only permitted where it was deemed essential to maintain the school's ethos. However, the Catholic Primary School Managers' Association (CPSMA) rejected this challenge saying it had received legal opinion that confirmed that schools with enrolment policies that favour Catholics were not breaking the law: 'only in cases where the school refuses to admit a person who is not of that denomination the school must prove that this is essential to maintain the ethos'.<sup>18</sup>

In the same paper, the Equality Authority also argued that discriminatory admission policies risked contravening the EU Race Directive which prohibits direct or indirect discrimination unless the action can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. It argued that the provision of denominational education may be deemed to be a legitimate aim in some contexts 'although there may be a difficulty in establishing a legitimate aim where parents are having their children baptised solely for the purposes of school admission'.<sup>19</sup> Furthermore, it noted that 'there must be a concern as to whether the means of achieving that aim are appropriate and necessary in a context where the outcome is one of segregation for black and minority ethnic students'. In response to this point, the CPSMA stated that 'the principle of denominational education, which has long been chosen by thousands of parents over the years, both in Ireland and abroad, would be deemed to comprise a "legitimate aim" within the meaning of the race directive'.<sup>20</sup>

The need to strike a balance within the Irish domestic legal order between protecting the rights of denominational schools and protecting the right of the child to education, religious liberty and non-discrimination was recognised by

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<sup>16</sup>) "Ireland opens its first all black school" *Times Online*, September 24, 2007

<sup>17</sup>) "Enrolment policy not to blame for crisis – church" *Irish Times*, September 4, 2007, 5.

<sup>18</sup>) 'Catholic schools say enrolment policy not illegal' *Irish Times*, September 28, 2007, 10.

<sup>19</sup>) 'Catholic schools' enrolment policy may be illegal' *Irish Independent*, September 13, 2007, 20.

<sup>20</sup>) "Catholic schools say enrolment policy not illegal" *Irish Times*, September 28, 2007, 10.

the Constitutional Review Group in its 1996 Report.<sup>21</sup> It concluded that it was not unreasonable or unfair to require a state-funded denominational school to be prepared in principle to accept pupils from denominations other than its own.<sup>22</sup> The government choose not to follow this recommendation when drafting the Equal Status Act 2000. Rather, in allowing schools to not only give preference to certain students over others but also to refuse admittance to some children in cases where it can be proved that a refusal is essential to maintain the school ethos, it has failed to guarantee a right of access of all children to all state-funded schools.

A number of years later during the passing of the Equality Bill 2004 the government had a further opportunity to revise sub-section 7(3)(c). This Bill was brought forward to amend the Equality Status Act 2000 in order to implement the provisions of EU equality directives. The Humanist Association of Ireland lobbied strongly to have Section 7 changed at this time. They pointed out that in relation to sub-section 7(3)(1), out of all the state-funded schools in the state, they had a right of access to only the small number of multi-denominational schools which existed. They claimed that

this new Bill...provides the Government with an excellent opportunity to remove current discriminatory practices in State funded education...While privately funded institutions have certain rights to control their ethos, we do not believe that the State should actively support these practices with taxpayers' money. State services should never be restricted to support the views of any one sector in society...<sup>23</sup>

However, the Equality Act 2004 was passed with section 7 unchanged. In a context where 98% of schools in Ireland are denominational in character, the question of admission policies based on religious criteria becomes a critical one. Policies of this nature raise issues not only under discrimination law but also under the rights to education and freedom of religion and can cause breaches of these substantive rights. If schools are permitted to use such criteria in their admission policies, there is a danger that a refusal to admit a pupil who is not of the appropriate religion may result in a violation of that child's right to education if no alternative school provision exists in the area. Alternatively, it may lead to parents having their children baptised and concealing their religious outlook or beliefs to ensure that their children gain a

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<sup>21</sup>) The Constitution Review Group was established by the government in 1995 to review the Constitution and to establish those areas where constitutional change may be desirable or necessary. The purpose of its report was to assist the All-Party Committee on the Constitution in its work.

<sup>22</sup>) Constitution Review Group, *Report of the Constitution Review Group* (Dublin: The Stationery Office, 1996) 386.

<sup>23</sup>) <http://www.irish-humanists.org/HotIssuesSub/equality.html>. Last accessed September 2009.

place in a situation where all available schools are religious schools and no alternatives exist.

The persistent unwillingness of the Irish Government to recognise that subsection 7(3)(c) is problematic in a situation of near-monopolistic control of schools by religious bodies poses a risk for the human rights of minority belief individuals, religious and non-religious. As noted above, both domestic and international organs have a role to play in upholding human rights standards. When the domestic legal environment appears unwilling to take responsibility to protect rights, then it falls to international human rights supervisory organs to step in and play their part in the process of human rights protection.

#### 4. International human rights standards and religious admission policies

Since the passing of the Education Act 1998 and the Equal Status Act 2004 several UN human rights supervisory bodies have chosen, through the periodic review mechanism, to look at the question of Irish schools admission policies under the following treaties: the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of the Child.<sup>24</sup> Typically these bodies have examined the issue under non-discrimination provisions with reference also made to the right to education and the right to freedom of religion.<sup>25</sup>

Under the right to non-discrimination in international human rights law not every act of differentiation is considered to amount to discrimination. For example, in its general comment on non-discrimination, the Human Rights Committee states that

not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>26</sup>

<sup>24</sup>) No case has gone from Ireland to the European Court of Human Rights on this issue.

<sup>25</sup>) Non-discrimination articles are found in these treaties as follows: International Covenant on Civil and Political Rights (Articles 2 and 26); International Covenant on Economic, Social and Cultural Rights (Article 2); and the Convention on the Rights of the Child (Article 2). All provisions recognise religion as a prohibited ground of discrimination. Articles 2 of the ICCPR and ICESCR do not grant an independent right to freedom from discrimination. By contrast, Article 26 of ICCPR guarantees a wide and general independent right to equality before the law and a prohibition on discrimination. This means that the obligation not to discriminate under Article 26 applies to the introduction of all legislation, or the application of such legislation, and is not restricted to the rights found in the Covenant.

<sup>26</sup>) *Ibid.*, para. 13. For instances of where the HRC has employed the 'reasonable and objective' test, see, *Blom v. Sweden* (No. 191/1985, ICCPR), *Waldman v. Canada* (No. 694/1996, ICCPR) and *Broeks v. the Netherlands* (No. 172/1984, ICCPR). As noted above this test is also used by EU equality law in identifying unlawful acts of discrimination.

The question of the compatibility of religious-based school admission policies with international human rights standards is inevitably linked to this test. For a school to refuse to admit a child on the grounds of religion, it must demonstrate that such a refusal has a legitimate aim. Furthermore, the use of admission policies based on religious criteria must operate in a manner that can be justified as reasonable and necessary to achieve the desired aim. When examining whether such a justification exists, supervisory bodies will consider how far the discriminatory treatment infringes other rights – such as the right to education and the right to freedom of religion.

A right to education is found in the International Covenant on Social, Economic and Cultural Rights.<sup>27</sup> The Committee on Economic, Social and Cultural Rights recognises accessibility as one of its core elements. It has held that 'education must be accessible to all...in law and fact, without discrimination on any of the prohibited grounds'.<sup>28</sup> Furthermore, it has noted that the prohibition against discrimination found in Article 2(2) of the ICESCR

is subject to neither progressive realisation nor the availability of resources: it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.<sup>29</sup>

When speaking of the minimum core obligations of States parties to ensure, at the very least, the satisfaction of minimum essential levels of each of the rights found in the Covenant, the Committee again emphasises the prohibition on discrimination in education:

In the context of article 13 [the right to education], this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis...<sup>30</sup>

Finally, when identifying violations of the right to education, it notes that such violations include

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<sup>27</sup>) Article 13.

<sup>28</sup>) General Comment 13, The Right to Education, E/C.12/1999/10, para. 6(b).

<sup>29</sup>) *Ibid.*, para. 31. It is of interest to note that Ireland has refused to sign the UNESCO Convention against Discrimination in Education despite recommendations to do so by international supervisory bodies; see, for example, European Commission against Racism and Intolerance (ECRI) Report on Ireland 1997, CRI (97) 55, para. A.2. This Convention forbids discrimination in access to education (Article 1(a)) and only permits religious educational institutions to discriminate if attendance at such institutions is optional (Article 2(b)) or in the case of private institutions, where 'the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities' (Article 2(c)). In November 2008, the Minister for Education and Science, Batt O'Keefe, confirmed that there are no immediate plans to ratify this Convention as 'Ireland's commitment to equality in education is reflected in the provisions of the Equal Status Act 2000'. Minister for Education and Science, *Dáil Debates*, 11 November 2008, Column 841.

<sup>30</sup>) *Ibid.*, para. 57.

the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education [and] the failure to take measures which address de facto educational discrimination...<sup>31</sup>

The Committee on the Rights of the Child also strongly emphasised the prohibition on discrimination in an educational context. In its General Comment No.1 on the right to education it states that

Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.<sup>32</sup>

The second substantive right at risk in the practice of a religious admissions policy is the right to freedom of religion. Here the Human Rights Committee specifically notes in its General Comment on freedom of religion (Article 18) that policies or practices that restrict - either intentionally or unintentionally - access to education and employment and which may cause individuals to adopt a religion or belief, or recant their religion or belief, or to convert, are inconsistent with Article 18.2.<sup>33</sup>

Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.

## 5. Justified discrimination or a human rights violation?

The law and practice in Ireland with respect to school admission policies clearly indicate that discrimination based on religion is sanctioned and takes place. Given this, the international legal order's concern would be to establish whether this discrimination has a legitimate aim, is reasonable and objective, and respects the core meaning of the right to education as well as the right to freedom of religion.

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<sup>31</sup>) *Ibid.*, para. 59.

<sup>32</sup>) General Comment No.1 on Article 29 of the Convention on the Rights of the Child: the aims of education, CRC/GC/2001/1.

<sup>33</sup>) General Comment No. 22: The right to freedom of thought, conscience and religion, CCPR/C/21/Rev.1/Add.4, para. 5.

Arguably, a legitimate aim and justification for discriminatory admissions policies is that they are necessary for maintaining the ethos of a school where a child can receive a denominational education in line with parental beliefs and convictions. This was the approach taken by the Supreme Court *In the matter of Article 26 of the Constitution and the Employment Equality Bill 1996*. Here the Court held that

...it is constitutionally permissible to make distinctions or discriminations on grounds of religious profession, belief or status insofar - but only insofar - as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution.<sup>34</sup>

As the then Attorney-General, Mr McDowell, noted in his response to the Human Rights Committee in 2000, by this judgment the Supreme Court upheld domestic equality legislation provisions - such as Section 7(3)(c) of the Equal Status Act - which allow schools to apply discriminatory administration policies to ensure that their ethos is maintained.<sup>35</sup> The Attorney-General continued his response to the Committee with the following justification for this permitted discrimination:

Thus, the concept of total equality was balanced by the opposite concept, namely that those who ran denominational schools should have certain rights arising from the particular nature of those schools. Although that might seem to run counter to strict equality in some respects, it did have the effect of promoting equality between different religious groups, since all schools received the same amount of State support.

This explanation, however, did not consider whether the legitimate aim of ensuring the free practice of religion through the provision of denominational schooling took sufficient account of the position of minority-belief parents in a school system dominated by religious schools. It is this issue which international bodies would examine to establish whether the measures taken to meet the legitimate aim are reasonable and preserve the fundamental nature of the right to education, as well as the right to freedom of thought, conscience and religion of minority-belief parents who may feel coerced into taking measures, such as baptising a child, in order to facilitate school admission at a later date. Central to any such analysis would be the existence of alternative schooling which did not discriminate on religious grounds and which any child could attend regardless of religious background. Access to such schools would preserve the right of the child to education and would ensure that par-

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<sup>34</sup>) *In the matter of Article 26 of the Constitution and the Employment Equality Bill 1996*, [1997] IR, 132.

<sup>35</sup>) CCPR/C/SR.1848, para. 3.

ents would not be obliged to baptise their child in order to be guaranteed a school place. In other words, if acceptable alternative schooling is available to a child, it is likely that a religious discriminatory policy would not be deemed unreasonable and thereby unacceptable as the right to education of the child would not have been substantially injured and religious freedom would not have been compromised. The state will be judged to have adequately discharged its duties under the right to education and freedom of religion and the discrimination would be deemed to be proportionate to the right of religious schools to maintain a religious ethos. However, if no alternative schooling were available then the discrimination would be viewed as disproportionate as the child's right to education would have been violated on the grounds of religion. To uphold its human rights obligations the state would therefore be obliged to establish schools - either state schools or state-funded schools - with an open-admissions policy or, alternatively, would be required to oblige existing religious schools to desist from discriminating in favour of co-religionists.

The lack of alternative schooling available to parents not wishing to send their children to denominational schools was a source of frustration as expressed during interviews.

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

*We felt we had no options.*

*The reality in most places is that parents don't have a choice.*

*Obviously we would like there to be an alternative to an all-Catholic school but not going to be one in the near future around here.*

*There are only Catholic schools. We don't have a multi-denominational school.*

Parents commented that where there was a multi-denominational school in their locality, it was usually vastly over-subscribed.

*The multi-denominational schools [in the area] have huge waiting lists.*

*The nearest multi-denominational school was full up, no chance of admission.*

*The multi-denominational nearby is oversubscribed – a long waiting list.*

In addition, a number of parents made the point that they wanted their children to attend the local school and not go to a school outside the community.

*Our reason for choosing the school we choose was because it's very important for your child to have a sense of community. So therefore we wanted to try and get her as close to that community as possible. So going to the peripheral of what was practical [by attending a multi-denominational school miles away] was compromising on that choice, staying within and knowing your local community. And her playschool friends were going there as well.*

*I'd love to see my little fellow going to the local school. Love to see religion being extra-curricular. Prefer to see multi-denominational. But there is no alternative. What do you do? I want to live here, I don't want to move elsewhere.*

Together these comments indicate a failure of the state to provide an effective alternative to religious schools. Some interviewees expressed their frustration with the lack of initiative taken by the Department of Education in tackling this issue.

*I'm not satisfied with the current range of school types...not satisfied with the unfair advantage given to both the principal denominations over non-denominational schools...I would like to see the Department of Education getting off its backside, realising what century we're in and getting a system of state schools up and running...they have totally washed their hands of the responsibility to found schools that are compatible with the religious beliefs of all minorities.*

The reality of the situation presents minority belief individuals with a real dilemma when faced with the challenge of securing a place for their child in a primary school. They may feel the need to appear to be practising a particular religion and to take measures such as getting their child baptised in order to secure a school place for their child. Parents interviewed spoke about such pressures – pressures that sit uneasily with international standards dealing with freedom of religion.

*I knew if we didn't [get the children baptised] it would be a problem getting them into that school.*

*It was in the back of my mind, will I restrict them [if I don't get my children baptised], will I get them into school, into teacher training college.<sup>36</sup> What will be excluded for them? Those questions are still there.*

*No alternatives [if had been refused admission to a Catholic school]. The only schools are Catholic ones...You would be stuck. It's a problem. You like it or lump it...What choice do you have? Parents know that the schools aren't going to change so they tick the right boxes – yes, I go to mass every weekend. There's no point fighting it.*

## 6. The views of UN supervisory bodies

The lack of non-religious schools has been an issue of concern for all the UN supervisory bodies when examining Ireland's education system. In 2005 the UN Committee on the Elimination of Racial Discrimination questioned Ireland regarding the practice of discriminatory admissions practices in situations

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<sup>36</sup>) The training of primary school teachers is organised along exclusively denominational lines, in colleges of education which are managed by religious orders for Catholics and a distinct Protestant teacher-training college for non-Catholic Christians. The State funds both equally and according to Rule 153(3) of the Rules for National Schools, 'The bishop of the diocese in which the Training College is situated is recognised as manager of that college'.

where there is little viable alternative schooling. During Ireland's appearance before the Committee in March 2005, Mr Boyd, a Committee member from the USA, put the following question:

Given that Catholic schools were allowed, when making admission decisions, to give preference to Catholic pupils, he wished to know what options were open to non-Catholic pupils if places were scarce in multi-denominational schools.<sup>37</sup>

Another Committee member, Mr de Gouttes (France), wondered how the Government reconciled the increasing numbers of non-Catholic immigrant children in Ireland with the large number of Catholic schools,<sup>38</sup> while Mr Lindgren Alves (Brazil) wanted to know how the government guaranteed the right to education when such a large number of schools in Ireland were not State-run.<sup>39</sup> In its Concluding Observations, the Committee expressed the following concerns:

The Committee, noting that almost all primary schools are run by Catholic groups and that non-denominational or multi-denominational schools represent less than 1% of the total number of primary educational facilities, is concerned that existing laws and practice would favour Catholic pupils in admission to Catholic schools in case of shortage of places, particularly in the light of the limited alternatives available.

The Committee, recognising the 'intersectionality' of racial and religious discrimination, encourages the State party to promote the establishment of non-denominational or multi-denominational schools and to amend the existing legislative framework so that no discrimination may take place as far as the admission of pupils (of all religions) in schools is concerned.<sup>40</sup>

Similar recommendations were made by the Committee on the Rights of the Child during its examination of Ireland's performance in 2006. In its Concluding Observations, the Committee encouraged

the State party to take fully into consideration the recommendations made by the Committee on the Elimination of Racial Discrimination (CERD/C/IRL/CO/2, para. 18) which encourages the promotion of the establishment of non-denominational or multid denominational schools and to amend the existing legislative framework to eliminate discrimination in school admissions.<sup>41</sup>

<sup>37</sup> CERD/C/SR.1687, para. 29.

<sup>38</sup> *Ibid.*, para. 59.

<sup>39</sup> *Ibid.*, para. 60. The Irish Government did not directly address these questions in its response to the Committee. It rather misleadingly stated that the majority of Irish schools are 'Catholic and public' and that 'all children, whatever their religion and nationality, had the right to attend Irish schools'. CERD/C/SR.1687. Summary Record, paras. 13-14. Translated from the original French text by the author.

<sup>40</sup> CERD/C/IRL/CO/2, para 18.

<sup>41</sup> CRC/C/IRL/CO.2, para 61.

In responding to the observations of these committees, the then Minister for Education, Mary Hanafin, stated that the current legislation (the Equal Status Act, 2000) 'reflects the Irish education system' and that she saw no need to change that.<sup>42</sup> Furthermore, in describing the operation of the Irish schooling system to international supervisory bodies the Government has frequently cited Article 44.2.4, which suggests that every child has the right of admittance to all state-funded schools: 'Legislation...[may not] 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'.<sup>43</sup> However, this information does not convey the reality of the domestic legal situation. In light of legislative provisions which have been constitutionally approved and which allow schools to exclude children on the grounds of religion, this provision is better understood as protecting the right of a child to opt-out of religious instruction in a state-funded school that s/he is attending rather than as protecting a child's right to attend any such state-funded school.

In addition, a rather distorted picture is created with respect to the choice of schools available to parents while the rights of patrons of schools – who run the schools - are downplayed. For example, in its Second Report to the Committee on Economic, Social and Cultural Rights in 2000, the Irish Government notes that 'aside from resource implications, parents have absolute discretion as to where they send their children to school, subject only to regard for the rights of others'.<sup>44</sup> Similarly, in its Second Report to the Human Rights Committee in 1998, the Government states that the Education Bill specifically contains an objective 'to promote the rights of parents to send their children to a school of the parents' choice having regard to the rights of patrons and the effective and efficient use of resources'.<sup>45</sup> Most recently in 2008 in its report to the Human Rights Committee, the state again suggested that parents have 'absolute discretion' as to where they send their children to school 'subject only to the rights of others'.<sup>46</sup> However, in reality, this means subject only to the rights of those who run the primary schools – 98% of whom are religious bodies who are allowed to discriminate on the basis of religion.

There are signs that international supervisory bodies are becoming increasingly impatient with Ireland's refusal to either repeal section 7(3)(c) of the Equal Status Act 2000 or, alternatively, to take steps to increase the provision of non-denominational education. In July 2008, at its third appearance before the Human Rights Committee, the Irish delegation was quizzed intensely by

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<sup>42</sup> "Faith before fairness" *The Weekend Review, Irish Times*, September 8, 2009, 1.

<sup>43</sup> See, for example, Initial Report to the Committee on the Rights of the Child, CRC/C/11/Add.12, para. 164.

<sup>44</sup> E/1990/6/Add.29, para. 247.

<sup>45</sup> CCPR/C/IRL/98/2, para. 228.

<sup>46</sup> CCPR/C/IRL/3, para. 410

Committee members on the role of religion in the Irish primary school system and the lack of choice of school types. Mr Lallah (the Committee member from Mauritius) noted that 'it was intolerable for children of primary-school age to be forced to convert to a different religion in order to obtain admission to a school'.<sup>47</sup> He further observed that

The Roman Catholic Church assumes responsibility for some 98 [sic] per cent of primary schooling in Ireland, despite the fact that there was now a large and growing population of members of other religious denominations and non-believers...The time had come for the State to intervene and provide secular options for parents. Such a move would require a major investment but Ireland was no longer a poor country.<sup>48</sup>

Mr Amor (the Committee member from Tunisia) returned to concerns he had previously expressed in 2000 concerning the extent to which schools have a right to maintain the 'characteristic spirit of the school'.

Clarification was needed on the reference in the report to the right of schools under the law to maintain their own distinctive 'characteristic spirit'. He failed to understand what precisely was meant by such a spirit and the extent to which the State could restrain that spirit if, for example, intolerance or discrimination was encouraged. He asked the delegation to respond to his concern that schools could invoke that provision in the law for sectarian purposes or to exclude certain children.<sup>49</sup>

In its Concluding Observations for the session, the Committee pinpointed the lack of alternative schooling and the operation of the integrated curriculum as its key concerns.<sup>50</sup> The Committee noted

That the vast majority of Ireland's primary schools are privately run denominational schools that have adopted a religious integrated curriculum thus depriving many parents and children who so wish to have access to secular primary education.

The State party should increase its efforts to ensure that non-denominational primary education is widely available in all regions of the State party, in view of the increasingly diverse and multi-ethnic composition of the population of the State party.<sup>51</sup>

In sending this strong and unambiguous signal to the Irish Government that the Irish education system raises serious issues under the Covenant, the

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<sup>47</sup>) CCPR/C/SR.2552, para. 14.

<sup>48</sup>) *Ibid.*

<sup>49</sup>) *Ibid.*, para 20.

<sup>50</sup>) Irish primary schools are legally obliged to teach an 'integrated curriculum' whereby religion must be integrated into the teaching of other subjects during the school day. This practice raises serious concerns under freedom of religion provisions given that it is impossible to opt children out of continual religious teaching.

<sup>51</sup>) CCPR/C/IRL/C/3, para 22.

Committee referred to the following articles: Article 2 (non-discriminatory and effective implementation of the rights contained in the Covenant); Article 18 (right to freedom of religion); Article 24 (Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State) and Article 26 (general non-discrimination provision).<sup>52</sup>

Significantly, the Committee identified the recommendation on the education system as one of the three priority areas on which Ireland had to report to the Committee on within 12 months.<sup>53</sup> In its follow-up report one year later, the Government made no reference to the possibility of amending sub-section 7(3)(c) of the Equal Status Act 2000 to prevent schools discriminating on the basis of religion.<sup>54</sup> Rather it focussed on a new model of owning and running primary schools which it had started to pilot test in two schools in Dublin in 2007. Under this model schools are to be run by local authorities, rather than religious bodies. However, the report made clear that 'the new model of primary school patronage is not intended to replace the existing models but to provide an additional model, likely to be used particularly in areas of growing population'.<sup>55</sup> In other words, existing schools would not be transformed into the new model of school but would continue to be run by religious bodies and operate religious admissions policies. Furthermore, if such a new model of school will only open in areas of high population growth, namely parts of Dublin, the vast majority of parents in the state will continue to have no choice but to send their children to denominational schools.

## 7. Conclusions

For much of the existence of the Irish education system and of the state, the absence of non-religious schools was unproblematic. However, as the 2006 census data show, the Irish population is not only increasing but is becoming more complex. There is more religious diversity with people of no religion now constituting the second largest group in the state. Furthermore, Ireland's

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<sup>52</sup> *Ibid.*

<sup>53</sup> In accordance with its rules of procedure, the Committee can select certain recommendations which the State party must provide information on within one year, *Ibid.*, para 27. The other two recommendations on which Ireland was asked to report dealt with prison conditions and counter-terrorism measures.

<sup>54</sup> CCPR/C/IRL/CO/3/Add.1

<sup>55</sup> *Ibid.*, para 53.

booming economy attracted – and required - large numbers of immigrants. In 2006 foreign-born residents made up 14% of the population; many of these are adding further to the religious mix in society. It is this changing society that is presenting challenges to Ireland's unique system of primary education where religious schools run more than 98% of the schools

In areas of high population growth where there is a shortage of schools the problem becomes one of religious discrimination. Irish equality law permits schools to give preference to co-religionists in their enrolment policies. However, when Catholic schools in these areas operate admissions policies based on the religion of the families, non-Catholic children have been turned away and left without any school place. The situation has also led some parents to get their children baptised specifically to ensure that their child can gain entry to a school in their area.

Through providing exemptions from equality legislation to religious organisations, in a situation where these bodies are in a near-monopolistic position, the Irish State is disregarding its responsibility to protect the right to non-discrimination, the right to education and the right to freedom of religion of those who do not adhere to the ethos of these religious service providers. While the permitted discrimination may be deemed to have a legitimate aim, the means of achieving that aim cannot be considered reasonable and proportionate in a context where the outcome may be mean that minority belief child has no school to go to or that a parent feels pressurised to conform to a particular religion through the baptism of a child.

Despite efforts by the Equality Authority in warning Ireland to take steps to protect the rights of minority belief children and parents, the government has failed to impose limitations on the autonomy of denominational schools to decide their admission policies or to establish an alternative network of schools.<sup>56</sup> International human rights bodies have consistently highlighted the incompatibility of Irish religious admissions policies with international human rights standards. It remains to be seen whether the latest pressure from the Human Rights Committee will successfully bring about a change in how Ireland treats the rights of minority belief children in its education system.

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<sup>56</sup> In October 2008 the Equality Authority's budget was cut by 43% in what has been described by the Equality and Rights Alliance (a consortium of 50 Irish NGOs) as 'a move widely seen as an attempt by Government to undermine the effectiveness of statutory bodies charged with promoting equality, preventing discrimination and protecting human rights' <http://www.ericampaign.org/about-us>. Last accessed September 2009.

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