

NATIONAL MECHANISMS FOR PROTECTING THE RIGHT TO EDUCATION
Dr Conor O'Mahony, Lecturer in Constitutional Law, University College Cork
IHRC/Law Society Annual Human Rights Conference 2009

Introduction

For a period of about 10 years from the mid-1990s to the middle of this decade, the scope and enforcement of the right to education was one of the foremost problems occupying the Irish superior courts. The recognition by the High Court in *O'Donoghue v Minister for Health*¹ that the phrase "free primary education" in Article 42.4 of the Constitution was not confined to scholastic education provided in primary schools between ages 4 and 12, but extended to include the needs of all children, however limited their capacities, led to a deluge of litigation teasing out not only the boundaries of the right to free primary education itself, but also of the powers of the courts to enforce that right in cases where it has not been vindicated. Legislative reform and associated resource provision moved the issue away from centre stage for the latter part of the decade; however, recent cutbacks stemming from the economic downturn, and the delay of the implementation of new legislation, has made the issue of enforcing the right to education a hot topic once more.

The purpose of this paper is to examine the scope of the right to education in Irish law with particular reference to mechanisms available for its enforcement. To this end, Ireland's obligations under international law will first be set out, and compared with the parameters of the right under the Irish Constitution and relevant legislation. The particular areas where the vindication of the right is threatened in the current context will then be highlighted, before the various enforcement mechanisms available in domestic law are examined. The characteristics of an effective remedy for a breach of the right to education will be set out, and the various mechanisms, including statutory bodies, constitutional judicial review and international mechanisms, will be assessed against these criteria in order to establish how effective the remedial framework is and how it could be improved for the future.

¹ [1996] 2 I.R. 20.

International Law

In providing for the State's duty to educate, the consistent approach adopted in international law is that primary education must be provided free of charge, while other levels of education are to be provided on a progressive basis. Article 26(1) of the UDHR states that education shall be free "at least in the elementary and fundamental stages". The ICCPR provides that primary education shall be "available free to all";² secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education",³ while higher education shall be made "equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education".⁴ The UNCRC also provides for free primary education⁵ and sets the goal of progressive introduction of free secondary education, while also placing States under a duty to offer financial assistance in case of need.⁶

It is clear from this overview that States are under an immediate duty to provide free primary education, and that the goal of free secondary education is to be aspired to, with free higher education more aspirational still. While the formulation of these duties is somewhat weak, it could be argued that the progressive implementation provisions should be read in light of Ireland's position as a highly developed and (by global standards) wealthy country. On this view of international law Ireland would be obliged to provide free secondary education at a minimum and arguably free third level education as well. However, even on such a view, it is clear that Ireland's obligations have been more than adequately discharged on the whole, as free primary, secondary and third level education are all currently available, albeit that problems persist in a number of respects, as will be discussed further below.

The right to education set out in the ECHR is of a somewhat limited nature when compared with the global instruments.⁷ The negative formulation of Article 2 of the First

² Article 13(2)(a).

³ Article 13(2)(b).

⁴ Article 13(2)(c).

⁵ Article 28(1)(a).

⁶ Article 28(1)(b).

⁷ Mountfield, "The Implications of the Human Rights Act 1998 for the Law of Education" [2000] *Education Law Journal* 146 states at p.146 that "[t]he right not to be denied an education contained in the Convention is a limited and cautious right in comparison with some other instruments."

Protocol, which states that “[n]o person shall be denied the right to education”, has been held by the European Court of Human Rights not require the State to provide any education at all, being interpreted instead as merely conferring a right of access to educational establishments existing at a particular time.⁸ Viewed in isolation, this is clearly an unsatisfactory level of protection; however, it is worth noting that it has been argued by Van Dijk & Van Hoof:

“However, the exercise of the right to education, understood as a right of equal access, requires by implication the existence and the maintenance of a minimum education provided by the State, since otherwise that right would be illusory, in particular for those who have insufficient means to maintain their own institutions. Denying a person the possibility to receive primary education has such far-reaching consequences for the development of the person and for his possibilities to enjoy the rights and freedoms of the Convention to the full that such a treatment is contrary, if not to the letter of Article 2, at all events to the whole system of the Convention, in the light of which Article 2 has to be interpreted.”⁹

Indeed, it should also be borne in mind that the State Parties to the ECHR all had a system of free primary education in place at the time of the drafting of Article 2 of the First Protocol, and it could therefore be credibly argued that the continuation of this position is a minimum requirement of that provision.¹⁰ Whether or not this is the case in respect of primary education, it is certainly highly unlikely that Article 2 of the First Protocol requires the provision of free secondary or third-level education. Nonetheless, since it requires equal access to existing educational establishments, it does have some application to education other than primary education.

As regards the issue of special educational needs, international law clearly contemplates that the right to free primary education extends to everyone, regardless of any special need or disability which he or she may have. Article 26(1) of the UDHR states that “[e]veryone has the right to education.” This provision clearly contemplates that the right is vested equally in every human being, irrespective of his or her physical or mental capacity. The same argument applies to Article 13(1) of the ICESCR, which also recognises the right of “everyone” to education. Article 28(1) of the UNCRC also adopts

⁸ *Belgian Linguistics case* (1979–80) 1 E.H.R.R. 252.

⁹ Van Dijk & Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed., Kluwer Law International, The Hague, 1998), p.647.

¹⁰ A similar point is made in relation to the second sentence of Article 2 by Ovey & White, *Jacobs & White: European Convention on Human Rights* (4th ed., Oxford University Press, Oxford, 2006), pp.377–378.

an inclusive approach, stating that State Parties recognise the right of the child to education, and imposes duties on them to take certain measures “with a view to achieving this right... on the basis of equal opportunity.”

This latter point relating to equal opportunity raises the interesting and relevant issue of the existence in international law of a right to equality of educational opportunity. Such a right would seem to be an inherent part of the ideal that all children should have the same opportunity to develop themselves to the best of their abilities and talents. The all-inclusive language of Article 26(1) of the UDHR and Article 13(1) of the ICESCR can be said to imply the existence of a right to equality of educational opportunity, particularly when read in tandem with Article 23 of the UNCRC (which is discussed below).

It would seem that Article 28(1) of the UNCRC removes all doubt on this issue by explicitly stating that the actions which States are obliged to take under the Convention must be with a view to achieving the right on the basis of equal opportunity. Indeed, Hodgson believes that the right to equality of educational opportunity is so well established in international law that it has satisfied the stringent criteria necessary to acquire the status of customary international law.¹¹ If all people are to enjoy equality of educational opportunity, then clearly it is impermissible to discriminate on grounds of learning difficulty or disability; consequently, children with special educational needs are entitled to education in the same way as everyone else, albeit with the necessary allowances made for differences in capacity.

Further detail relating to the educational rights of children with special educational needs is contained in Article 23 of the UNCRC, which deals specifically with the rights of disabled children. Paragraphs (1) to (3) of Article 23 state as follows:

- “1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.

¹¹ Hodgson, *The Human Right to Education* (Ashgate, Aldershot, 1998), pp.63–64.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”

Article 23 clearly encourages all State Parties to provide free education and training to disabled children, although paragraph (2) allows them to avoid doing so where sufficient resources are not available. This clearly leads to difficulty where the political will is lacking to address the needs of a group such as disabled children, who are numerically small and geographically dispersed, and consequently do not have any electoral clout. Even when the economy is strong, politicians are reluctant to spend money on the disabled; in times of economic difficulty, they are among the first to suffer.

In relation to the ECHR, it can be argued on three grounds that Article 2 of the First Protocol does confer, to a certain extent, a right to special educational provision. The text of Article 2 of the First Protocol is—like Article 26(1) of the UDHR and Article 13(1) of the ICESCR—all-inclusive, stating that “[n]o person shall be denied the right to education.” The use of the phrase “no person” clearly indicates, in a similar manner to the global instruments, that children with learning difficulties or disabilities have the same rights as anyone else. It could also be argued that the right to special educational provision was bolstered by the interpretation afforded to Article 2 by the European Court of Human Rights in the *Belgian Linguistics* case, where it was held that the right to education includes the right to an effective education,¹² implying the need to make allowances for differences of capacity. Finally, as noted above, the right guaranteed by Article 2 is generally viewed as being one of equal access to existing educational facilities; such a right would clearly prohibit discrimination on grounds of learning difficulty or disability.

¹² (1979–80) 1 E.H.R.R. 252 at 280–281. Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995), p.543 have commented that although the Court did not expressly mention the right to an effective education, its existence may be “inferred generally from the language the Court used in terms appropriate to the facts before it.” Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate, Aldershot, 1999), pp.67–68 also argues that the right exists, citing the principle set down in *Airey v Ireland* (1979–80) 2 E.H.R.R. 305 that the Convention guarantees rights of a practical and effective nature. Finally, in *Graeme v United Kingdom* (Application No. 13887/88, February 5, 1990), the Commission referred to the child’s “right to have an as effective [*sic.*] education as possible.”

Unfortunately, the ECHR case law which specifically deals with the issue of special educational needs seems to indicate that Article 2 of the First Protocol has a limited role to play in this area.¹³ As noted above, it has been held that the negative formulation of the provision does not require the State to provide any education at all. Discussion has revolved almost entirely around the issue of integrated education for children with special needs, and the Commission and Court have left an enormous amount of discretion to national authorities as to how best to use their resources.¹⁴

Irish Law

The terms of Article 42.4 of the Irish Constitution make it clear that the only level of education which the State has a duty to provide for is primary education. It is well established that primary education need not be provided directly by the State – it may fund the provision of such education by a third party, which in practice is what has exclusively occurred in the primary school system since the foundation of the State. The courts have imposed conditions of effectiveness¹⁵ and reasonable accessibility¹⁶ on the provision of free primary education. The Constitution does not explicitly refer to any level of education other than primary education; what it does provide, in Article 42.4, is that the State “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”. It is unclear what exactly this provision requires of the State, especially since it has not received any detailed consideration by the courts.

While the Irish Constitution makes no express provision for a right to special educational provision, the existence of such a right is no longer in any doubt, and indeed can be said to derive from a number of different provisions. By far the most relevant and most frequently litigated provision is the first clause of Article 42.4, which provides that “[t]he State shall provide for free primary education”. Although this is expressed as a duty on

¹³ See generally McManus, *Education and the Courts* (Jordans, Bristol, 2004), pp.232–237.

¹⁴ See, e.g. *P and LD v United Kingdom* (Application No. 14135/88, October 2, 1989); *Simpson v United Kingdom* (Application No. 14688/89, December 4, 1989); *Graeme v United Kingdom* (Application No. 13887/88, February 5, 1990), and *McIntyre v United Kingdom* (Application No. 29046/95, October 21, 1998).

¹⁵ See McWilliam J. in *Crowley v Ireland*, unreported, High Court, December 1, 1977 at 7 and Parke J. in *G v An Bord Uchtála* [1980] I.R. 32 at 100.

¹⁶ See McMahon J. in *Crowley v Ireland* [1980] I.R. 102 at 113.

the State rather than as a right of the child, it is well established that children have a right which corresponds to this duty since the Supreme Court decision in *Crowley v Ireland*:

“... the imposition of the duty under Article 42, s. 4, of the Constitution creates a corresponding right in those in [*sic.*] whose behalf it is imposed to receive what must be provided. In my view, it cannot be doubted that citizens have the right to receive what it is the State’s duty to provide for under Article 42, s. 4.”¹⁷

In terms of whether this provision could extend to encompass special educational provision, it is certain that the framers of the Constitution in 1937 intended the term “primary education” to bear its ordinary meaning of the time: education from approximately the ages of 4 to 12 years provided in primary schools, comprised of reading, writing, arithmetic and religious instruction. However, it is also well established that the Constitution is to be interpreted in light of prevailing standards and attitudes.¹⁸ Since the general conception of what education should comprise of has changed dramatically since 1937, the central question in special educational needs disputes has concerned what exactly is understood by the expression “primary education”, as employed in Article 42.4, and whether it includes a right to special educational provision.

This issue first reared its head in the Irish courts in *O’Donoghue v Minister for Health*.¹⁹ The applicant, a profoundly disabled child, claimed that by failing to provide education suitable to his needs, the State had failed in its duty to provide for his free primary education. Since the State had quite obviously failed to provide suitable education, its defence was directed towards showing that, in this case, no such duty existed. Accordingly, it relied on two main arguments. First, the State argued that the applicant, by reason of being profoundly mentally and physically disabled, was ineducable, and that all that could be done for him to make his life more tolerable was to attempt to train him in the basics of bodily function and movement.²⁰ O’Hanlon J. rejected this argument on the basis of the expert medical evidence presented.²¹ Second, the State argued that the primary education contemplated by Article 42.4 was scholastic in character and exemplified in the curriculum of primary schools, and accordingly would not be of any

¹⁷ [1980] I.R. 102 at 122, *per* O’Higgins C.J.

¹⁸ See, e.g. Walsh J. in *McGee v Attorney General* [1974] I.R. 284 at 319 and Denham J. in *Sinnott v Minister for Education* [2001] 2 I.R. 545 at 664.

¹⁹ [1996] 2 I.R. 20.

²⁰ *ibid* at 25.

²¹ [1996] 2 I.R. 20 at 62–63.

benefit to the applicant. Such training as could be given to the applicant, they argued, was not properly describable as “education”, and could not be regarded as “primary education” within the meaning of that expression as used in Article 42.4. Thus the issue of the definition of education, and more particularly of primary education, came to be central to the educational rights of disabled children.

In his judgment on the issue, O’Hanlon J. adopted the definition of education set down 30 years earlier by Ó Dálaigh C.J. in *Ryan v Attorney General*,²² but struck a powerful blow for the rights of disabled children by adding on the clause “however limited these capacities may be”:

“I conclude, having regard to what has gone before, that there is a constitutional obligation imposed on the State by the provisions of Article 42, s.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, *however limited these capacities may be.*”²³

This expansive definition of education clearly contemplated that even the most severely disabled in society should be entitled to free primary education. This approach was confirmed by McGuinness J. in *Comerford v Minister for Education*,²⁴ where she stated that “the right to free primary education extends to every child, although the education provided must vary in accordance with the child’s abilities and needs.”²⁵ The full extent of what could be encompassed by the expression “primary education” was considered in *Sinnott v Minister for Education*.²⁶ Both Barr J. in the High Court²⁷ and Keane C.J. in the Supreme Court²⁸ expressed their approval of O’Hanlon J.’s findings in *O’Donoghue* in respect of the definition of primary education and the existence of a right to special educational provision. Murray J. stated that “the nature and content of primary education

²² [1965] I.R. 294 at 350, *per* Ó Dálaigh C.J.

²³ [1996] 2 I.R. 20 at 65 (emphasis added). The learned judge reached this conclusion after considering, *inter alia*, legislative developments such as the English Education Act 1970 and the US Education of All Handicapped Children Act 1975 as well as reports such as the English *Warnock Report (Special Educational Needs: Report of the Committee into the Education of Handicapped Children and Young People (1978) Cmnd 7212)* and the Irish *Blue Report (Stationery Office, Dublin, 1983)*.

²⁴ [1997] 2 I.L.R.M. 134.

²⁵ *ibid* at 143.

²⁶ [2001] 2 I.R. 545.

²⁷ *ibid* at 579.

²⁸ *ibid* at 628.

must be defined in contemporary circumstances. That means where children are capable of benefiting from primary education (however its content is defined) the State have an obligation to ensure that it is provided free to children who can benefit from it including those who suffer from severe mental or physical handicap.”²⁹ Geoghegan J. rejected the argument that the requirements of profoundly disabled children, such as toilet training and speech therapy, are not education as such but are more properly regarded as health or therapy treatments:

“If a handicapped child, unlike a normal child, cannot naturally acquire skills in the home but has to have special training to acquire them then I cannot see why that special training would be inappropriately described as “education”. At any rate I do not think that health therapy and education requirements are mutually exclusive of each other. They can overlap and can be given a double if not a treble description.”³⁰

While Murphy J. dissented on this point, it is clear from the above that the weight of judicial opinion favours the view that the expression “primary education” in Article 42.4 encompasses special educational provision. Consequently, since the child has a right to receive the primary education which it is the State’s duty to provide for,³¹ it follows that the right to free primary education under Article 42.4 encompasses a right to receive free special educational provision.

More recently, in *O’Carolan v Minister for Education*,³² MacMenamin J. held that in determining whether the applicant’s constitutional right to education was being vindicated, the test was whether the provision on offer was “appropriate”. The test was not whether an alternative placement was better or the best, so long as the placement in question was appropriate to the needs of the particular child.³³ This was in spite of the learned judge stating that he was basing his decision on the definition of education set down by O’Hanlon J. in *O’Donoghue v Minister for Health*³⁴ and subsequently approved in a number of cases. In this context, it should be recalled that in the relevant passage of that decision, O’Hanlon J. stated that the “education” contemplated in Article 42.4 should enable a child “to make the *best possible use* of his or her inherent and potential

²⁹ *ibid* at 682.

³⁰ *ibid* at 724.

³¹ *Crowley v Ireland* [1980] I.R. 102 at 122, *per* O’Higgins C.J.

³² [2005] I.E.H.C. 296.

³³ *ibid* at 46.

³⁴ [1996] 2 I.R. 20 at 65.

