

Enshrined Education Rights: A three state comparison

Kofi Annan, the former Secretary-General of the United Nations, said: “Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.” [Bellamy].

It is not possible to fully compare education rights between nations without also comparing their respective constitutional, political, economic and social environments. Such a study, though, is beyond the scope of this paper which will compare enshrined education rights in three countries, the United Kingdom, Ireland and the United States of America and examine whether the explicit constitutional protection afforded to the right to free primary education by the Irish Constitution has proved to be a superior source of education rights than the United Kingdom’s less formal protection of education rights or the United States Constitution’s indirect protection of education rights. It will also consider whether these differing forms of enshrining rights affect their sustainability in terms of whether they can be upheld and developed. This is of course a broad topic and it begs many questions: What are education rights? Where and how are they enshrined? Why select these three particular countries?

What are education rights?

Even the most basic question of what education is or how it is to be defined would merit a thesis in itself. The precise meaning of the term ‘education rights’ is perhaps a matter best left to the courts to decide in any given set of circumstances. It would be difficult to describe the full range of what have been deemed education rights so an indication of what they encapsulate will be set out instead.

Whilst the European Convention on Human Rights, for example, does not define education, its judicial arm, the European Court of Human Rights, gave a narrow definition in *Campbell and Cosans v United Kingdom* (1982) 4 E. H.R.R. 293:

“The Court would like to point out that the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.” [O’Mahony, (2006), p.9].

Enshrined?

If the law of a particular state provides a right to a certain level of education in certain circumstances, and of course the level of education and the circumstances in which it is provided for can vary hugely, what is the difference whether this is provided for in ordinary legislation or enshrined? Sir John Laws, a UK Appeal Court judge noted for his extra scholarly writings, referred to, “...a higher-order law: a law which cannot be abrogated as other laws can, by the passage of a statute promoted by a government with the necessary majority in parliament” [Laws, (1995), p.84]. Enshrined rights’ protections tend to safeguard the individual from having certain rights infringed by the state or state authorities. They would usually be found in written constitutions or conventions. Laws attested to the importance of rights being enshrined: “...the survival and flourishing of a democracy in which basic rights...are not only respected but enshrined requires that those who exercise democratic, political power must have limits set to what they may do...” [Laws, (1995), p.81].

Why use these countries for comparison?

This article has elected to compare education rights in three English-speaking western democracies which share many values and whose systems of education are not dissimilar. It will compare the Irish system of education rights with those pertaining in the United Kingdom

and the United States of America. The Irish system of state education originated in the United Kingdom with which it shares many similarities. The degree and nature of judicial activism in the Irish Supreme Court has often mirrored that of its United States counterpart. However, whilst the manner of provision and the content of this education may be closely aligned in the three states the legal and constitutional framework in which their respective education rights are found is significantly different. Such a study, therefore, allows for a discussion of how sustainable education rights may develop in different legal/political frameworks and how the latter influences the former.

The United Kingdom does not have a written constitution but following the enactment of the *Human Rights Act 1998* a right to education via Article 2 of the First Protocol to the European Convention on Human Rights has been enshrined in UK law albeit at a sub-constitutional level.

The Constitution of Ireland guarantees a right to free primary education. It does not define what education is or the scope of the right but this is not unusual as fundamental rights are rarely defined in such documents. The nature and scope of the right have, however, been elucidated somewhat by the jurisprudence of the High Court and Supreme Court.

Contrastingly there is no right to education *per se* in the United States Constitution. However, although argued on other bases, education rights have featured prominently in the jurisprudence of the United States Supreme Court. This article will chart some of the major issues and cases pertaining to education rights that have been fought on both sides of the Atlantic and examine whether the Irish explicit protection of the right to free primary education is demonstrably a superior source of education rights or whether it is possible to achieve as much or more through aligning education rights to other rights as is necessitated by the nature of the US Constitution or indeed whether rights can be adequately asserted without recourse to any constitutional provision as would necessarily be the case in the United Kingdom.

Consequently this article will ask, given their very different legal frameworks, how the right to education is protected in each of these states. Further, it will examine which framework, if any, is more conducive to the development of sustainable education rights.

The United Kingdom

Whilst it is often stated that the United Kingdom does not have a constitution this is not completely accurate. It does not have a formal written constitution that can be found in a single document or set of documents. What it does have is a system of conventions or long established systems of how law and government operate, together with some of the most important pieces of legislation enacted over the centuries which are taken to form the UK constitution. While it is impossible to set out precisely what constitutes the UK constitution there is no doubt but that constitutional scholars would be in broad agreement about what constitutes the majority of this informal constitution with disagreement limited to some minor elements.

The United Kingdom has a well-established track record in education. The right to free primary education was set out in the *1870 Education Act* which made provision for providing free primary education in parts of the country where none had been provided before. The range and scope of educational provision and regulation was expanded in subsequent legislation. The principle of free primary and secondary education for children is now so well established that it may well form part of the UK constitutional order but the specificities of the various legislative provisions pertaining to education are at a sub-constitutional level and it is difficult to construe, therefore, to what extent they could be described as rights, enshrined or otherwise.

UK legislation pertaining to education is not, to paraphrase Laws' previously cited quotation, a higher form of law that cannot be amended or removed by the passage of a subsequent bill through parliament. It must be remembered that one of the basic principles of UK constitutional

law is supremacy of parliament meaning that there is *no* law that parliament cannot enact, amend or repeal and no person or body has the power to overrule parliament. This principle has been altered in practice, if not in theory, by the *Human Rights Act 1998* which had the effect of incorporating the European Convention of Human Rights (ECHR) into UK law. The origins of this statute are that whilst the UK, like Ireland, has been a signatory to the ECHR since its inception the body of jurisprudence related to education rights was of limited value as the United Kingdom and Ireland were in the unusual position compared to other signatory states of being ‘dualist’ as opposed to ‘monist’ states. This means that international treaties are only applicable between states and do not have effect domestically unless specifically incorporated into domestic legislation. The Convention did not have domestic effect in the UK until the enactment of the *Human Rights Act 1998* which came into effect in October 2000. This opened up a whole new body of jurisprudence to be argued in UK courts and included not just the case law from the time of the Act coming into force but the entire body of the European Court of Human Rights’ jurisprudence to date. This piece of legislation requires the UK courts to, insofar as possible, interpret all legislation in accordance with the Convention. If it is not possible to do so the courts may not strike down a statute due to the principle of parliamentary supremacy, but may make a declaration of incompatibility placing an onus on parliament to amend the legislation so as to make it compatible. The Act is only a piece of legislation, albeit legislation so significant as to be considered part of the UK constitution, and since it has come into force declarations of incompatibility have frequently been followed by amending legislation. Any provision contained in the Convention is therefore *de facto* enshrined in the UK constitution.

Section 1 of the Act states:

“1 The Convention Rights.

(1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol...”

So what does the Convention have to say about education?

ARTICLE 2 of the First Protocol [Protocols were added to the Convention after it was initially ratified and are binding upon such states as have ratified them.] of the ECHR states:

“Right to education

No person shall be denied the right to education. *In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*” (See reservation below in respect of italicised sentence).

The United Kingdom, it must be pointed out, only accepted this protocol subject to the following reservation which is set out in Part II of Schedule 3 to the Human Rights Act:

“At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

Dated 20 March 1952

Made by the United Kingdom Permanent Representative to the Council of Europe.”

By implication therefore the United Kingdom unreservedly accepts the first sentence of Article 2 above. [O'Neill].

Another provision closely connected with education is:

ARTICLE 9 ECHR

Freedom of thought, conscience and religion

1.

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

2.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others

Section 2 of the *Human Rights Act 1998* obliges UK courts to "take into account" the jurisprudence or case law of the European Court of Human Rights to date regardless of where the case originated. There have been cases such as those involving rights to be educated in the national language [*Belgian Linguistic Case* (Nos. 1 & 2) (No.1) (1967), Series A, No.5 (1979-80) 1 EHRR 241 (No.2) (1968), Series A, No.6 (1979-80) 1 EHRR 252], to respect the religious convictions of parents [*Hasan and Eylem Zengin v. Turkey* [2007], app. 1448/04, par. 51. *Mansur Yalçın and Others v. Turkey* (application no. 21163/11)], to prevent a child being excluded from school because his parents refused to allow the use of corporal punishment

[*Campbell and Cosans v United Kingdom* (application no. 7511/76; 7743/76)]. In *Lautsi v Italy* [2011] ECHR 30814/06, the Grand Chamber of the European Court of Human Rights overturned the original decision of the court in holding that the display of crucifixes in state school classrooms did not violate the right to education, guaranteed by Article 2 of Protocol No. 1 of the European Convention on Human Rights or those contained in Article 9 of the Convention.

That means that there is now a body of case law clarifying the meaning and extent of Convention rights and should UK law purport to limit or alter them in any way it is open to anyone in the UK to challenge this in UK courts or ultimately in the European Court of Human Rights in Strasbourg.

Quite apart from the European Court of Human Rights' jurisprudence there have been many other cases in the UK litigating upon education matters notwithstanding a lack of a constitutional basis upon which to base an action. In 2009, for example, the Supreme Court handed down what may transpire to be a landmark case concerning the right of state funded faith schools to determine their own admissions policy [*R (on the application of E (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants)* [2009] UKSC 15.] The Court upheld a challenge taken by a parent whose child had been refused admission to the Jews' Free School on the grounds that the Chief Rabbi did not recognize the child's mother as being Jewish.

It is important, however, not to overstate the significance of Strasbourg's rulings with regards to education rights in the UK. The late Lord Bingham, the former Master of the Rolls and Lord Chief Justice said:

The Strasbourg jurisprudence...makes clear how article 2 [of the First Protocol] should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states...But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14, Lord Bingham at para 24.

There is not such a direct line of cases in the United Kingdom setting the boundaries of the right to education as there is in Ireland (see below). Lord Bingham's quotation above was approved by Lord Clarke in *A v Essex County Council* [2010] UKSC 33 at para 9. "Lords Clarke, Phillips and Brown held that art 2 of the First Protocol did not give the claimant an absolute right to education that met his special needs." [UK Supreme court Blog].

Ireland

Ireland's position with regard to the ECHR as a dualist state was similar to that of the UK. It effectively incorporated the Convention into Irish law by way of the *European Convention on Human Rights Act 2003*. Additionally the Constitution of Ireland or Bunreacht na hÉireann has an explicit wellspring of education rights – Article 42, although education rights have been gleaned from other articles also.

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.

Which citizens have such a right in terms of whether there can be limitations imposed with regard to age or disability, for example, are questions that have provided a rich seam of jurisprudence of the Irish High and Supreme Courts over the past 50 years.

The Irish courts followed the US Supreme Court in taking an activist position in terms of upholding and discovering enumerated and unenumerated rights in the 1960s. They became the battleground in the fight to uphold education rights particularly in respect of profoundly disabled children when the state has argued that such children were being adequately provided for or were ineducable.

Since the 1990s, however, whilst the judiciary have further clarified the scope of the right to education in the Irish Constitution they have appeared reluctant (most notably in *Sinnott* and *TD* below) to impose any obligations on the state that would require the expenditure of significant resources even when it was arguable that the expenditure of such resources was necessary to uphold the educational rights of certain individuals or groups.

In *O'Donoghue v Minister for Health* [1996] 2 IR 20 (HC 27.5.93), Paul O'Donoghue, who was physically as well as profoundly mentally disabled, sued the State, through his mother Marie, seeking to compel it to provide him with free primary education. The State offered a place at a facility which was not deemed suitable by the O'Donoghues. The response of the Minister for Health and the other State respondents was that the child 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" [O'Hanlon J. *O'Donoghue v Minister for Health* [1996] 2 IR 20 at 25]. Furthermore, the respondents argued that the constitutional guarantee of free primary education is "scholastic in character, exemplified in the curriculum

of the national schools, and that such education cannot be of any benefit to the applicant” [O’Hanlon J. *O’Donoghue v Minister for Health* [1996] 2 IR 20 at 25]. In other words the State was arguing that it had satisfied its constitutional obligations to Paul O’Donoghue.

Previously in *Ryan v A.G.* [1965] IR 294 at 310, Justice Kenny in the High Court said: “The education referred to...must ... be one of a scholastic nature.” Chief Justice Ó’Dálaigh in the Supreme Court judgment broadened this definition: “Education essentially is teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral” [*Ryan v A.G.* [1965] IR 294 at 350]. Justice O’Hanlon’s judgment at 65 in *O’Donoghue* in the High Court, in rejecting the state’s contention that a disabled child was ‘not educable’ expanded upon that of Chief Justice Ó’Dálaigh in the *Ryan* case to state:

“[T]here 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.”

The respondents appealed to the Supreme Court which largely upheld the High Court’s ruling.

In *Comerford v Minister for Education* [1996] IEHC 48; [1997] 2 ILRM 134 (20th December, 1996), the state was held to have failed to fulfil its obligations under Article 42 where in light of the parents’ total abandonment of their ten year old son, Stuart, it had failed in its own duties to provide suitable primary education for a child with ‘attention deficit disorder’. An order was sought on behalf of Stuart Comerford, compelling the state to uphold his constitutional rights under Article 40 pertaining to personal rights and Article 42. Mrs Justice Catherine McGuinness, in granting the order explicitly upheld the judgment of Justice O’Hanlon in *O’Donoghue* [1997] 2 ILRM 134 at 144 and 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", [1997] 2 ILRM 134 at 143 [O'Mahony, (2006), p.158].

In his High Court judgment in *Sinnott v Minister for Education* [2001] 2 IR 545 (12.7.2001), Mr. Justice Barr, quoted extensively and approvingly from the *O'Donoghue* ruling. Jamie Sinnott was a 23 year old autistic man who, despite his age, had only received two years of formal education. He took proceedings through his mother, Kathryn, to force the State to allow him to continue with his primary education. Justice Barr said that Justice O'Hanlon did not create a new right in *O'Donoghue* but rather that the obligation on the state emanating from Article 42.4 is to provide for all citizens, including those who suffer from mental disability. In Justice Barr's opinion the ultimate criteria in determining the state's obligation to provide for primary education for the disabled was need and not age. He ruled in favour of Jamie and Kathryn Sinnott. The state appealed the High Court's decision and the Supreme Court upheld the appeal. The main issue under appeal was that the state's constitutional obligation to provide for free primary education only applies to persons up to eighteen years of age. A majority of the Supreme Court agreed with this.

TD v Minister for Education [2001] 4 IR 259 (17.12.2001), closely followed, chronologically and logically, the ruling in *Sinnott*. Mr. Justice Peter Kelly in the High Court sought to compel the Minister for Education to provide care facilities necessary for the State to comply with its constitutional obligations to a minor. The Minister appealed to the Supreme Court which by a 3:2 majority upheld the appeal on the grounds that to do otherwise would violate the separation of powers between the various branches of government.

O'Carolan v Minister for Education [2005] IEHC 296 (15.6.5), related to 14 year old Lewis O'Carolan who was autistic and displayed challenging behaviour. This behaviour included significantly damaging the family home and inflicting injuries upon himself. Difficulties were

experienced in dealing with Lewis at school and these difficulties eventually led to his parents withdrawing him from the school. Lewis was provided with ten hours per week home education which his parents felt was inadequate. Lewis' parents came to the conclusion that he would not receive a satisfactory education in the state. There was much discussion between them and the Irish authorities over suitable education for Lewis. Eventually by the time of the court proceedings the position was that the Minister for Education & Science was offering a place for him at a facility known as 'Woodlawn' in Co. Dublin which the parents felt was not adequate for his needs and instead wanted the Minister to fund Lewis to attend at a facility at Bangor in Northern Ireland which they felt was.

The issues were set out by Justice MacMenamin in his High Court judgment at 296 when he stated:

The kernel of this case is whether or not the state has breached its duty as set out under Article 42 and identified by O'Hanlon J. in the case of *O'Donoghue*. This question is primarily one of fact."

He went on to say: "The court is satisfied that the issue is not, therefore, whether Woodlawn is better than Bangor or whether it is the best but whether it is appropriate." The Judge determined "that the facility now on offer in Woodlawn is objectively adequate and in compliance with the constitutional duties of the respondents." Consequently the plaintiffs did not succeed in their proceedings.

If the test was the *appropriateness* of the facilities and the facilities were *adequate* then arguably the Court reached a logical conclusion; but was the correct test employed? That turns on what kind of education is referred to in 42.4. It is hard to conclude other than as Dr. Oran Doyle has done [in referring to Conor O'Mahony, "The Right to Education and 'Constitutionally Appropriate' Provision" (2006) 28 *DULJ* 422] that if Justice MacMenamin's

approach does not signify a retrenchment on the *O'Donoghue* position it, at the very least, signifies “an unwillingness further to extend the scope of court intervention in this area”. [Doyle, Oran, (2008), p.283]. It is submitted that standard of constitutionally protected rights to education in Ireland has moved from ensuring “the best possible use of his or her inherent and potential capacities” in *O'Donoghue* [[1996] 2 IR 20 at 65] to the requirement of the educational facility in question in the *O'Carolan* case being “appropriate” as decided by the court rather than “the best” as desired by the parents in the case; and that this represents a narrowing of the vision, at the very least, of what the scope of these constitutional rights should be.

United States

Whilst the existence if not the scope of a constitutionally protected right to education in the Irish Constitution is beyond doubt, there is no such right to education in the United States Constitution but that has proven to be no barrier to the issue of education being litigated before the United States Supreme Court. One of the most famous US Constitutional law cases, *Brown v Board of Education* 347 U.S. 483 (1954) will be discussed below and consideration given to the constitutional litigation it spawned which, although not argued on that basis, was very much about education. First, however, it is imperative to consider a case that on its face would seem to have nothing whatsoever to do with education rights:-

The Fourteenth Amendment to the United States Constitution guarantees “the equal protection of the laws” to all citizens. *Plessy v Ferguson* 163 U.S. 537 (1896) was a challenge to segregationist legislation. The Supreme Court upheld the doctrine of “separate but equal” in relation to a Louisiana statute of 1890 known as the Separate Car Act which required black and white people to travel in “equal, but separate” train carriages. The opinion may be contrasted between its relative insignificance at the time and the symbolic importance it would later attain because it was the ‘separate but equal’ principle that was at issue in the seminal case dealing

with segregated education, *Brown v Board of Education*. This case overruled *Plessy* and found that racial segregation violated the 14th Amendment to the US Constitution by denying equal protection of the laws to those who were segregated.

The *Brown v Board of Education* case was, in effect, split in two. The initial decision [*Brown I* 347 U.S. 483 (1954)] decided only the merits of the case; a year later the Court handed down its decision as to the relief to be ordered [*Brown II* 349 U.S. 294 (1955)]. The latter judgment, like the former, was a single unanimous opinion of the Court delivered by Chief Justice Warren. The now (in)famous phrase that captured what many commentators saw as the lack of force in the judgment was contained in the last paragraph where the Chief Justice said that it should be implemented “with all deliberate speed”. *Brown* established that the very fact of having separate public schools for black and white students was inherently unequal. The Court in *Brown II* had set no deadline to implement the desegregation mandated by *Brown I* other than that students must be admitted to public schools on a racially nondiscriminatory basis “with all deliberate speed” [Wilkinson, J. Harvie, (1979), p.63]. It left the responsibility for dismantling segregation in the hands of local school authorities to be overseen by local federal judges [Wilkinson, J. Harvie, (1979), p.65]. This delegation proved to be a failure as demonstrated by the fact that ten years after the judgment had been handed down only, “...2.3 percent of southern blacks were enrolled in desegregated schools” [Wilkinson, J. Harvie, (1979), p.65]. Of course whilst the Supreme Court in *Brown II*, may have been too cautious it did need to strike a balance between what it sought to achieve and what was feasible.

Having a right to education or more specifically a right to a certain type of education such as racially desegregated education and benefitting from such education is not the same thing. This was amply demonstrated by a line of cases following from and building on *Brown*. In *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970) the Supreme Court forced an expansion of the provision of ‘busing’ - bringing black children who had been attending

schools where the school population was predominantly black to schools that were predominantly white and conversely bringing white children from schools that were predominantly white to schools that were predominantly black in order to address the racial imbalance. If *Swann* was ‘a great liberal victory’ its feathers were trimmed in 1974 when the Supreme Court, whilst ostensibly dealing with Detroit, in effect, excluded suburbs in general from being included in busing programmes. In the words of Lively *et al*, it “stressed that relief could reach no further than the district within which the constitutional violation occurred”. [Lively *et al* (1996)], p.496] “The gradual ratcheting out of remedies to implement *Brown I* ended as abruptly and as conclusorily as it began...*Milliken v Bradley*, 418 U.S. 717 (1974) by rejecting so-called interdistrict remedies, established the new outer limit of constitutional remedies.” [Hutchinson, (2009), p.224]. Just as the Irish Supreme Court’s activism in the 1960s mirrored that of its US equivalent, its more conservative path in subsequent decades was also a reflection of the trajectory of US Supreme Court decisions such as its most significant in this area in recent years namely *Parents Involved in Community Schools v Seattle School District No. 1* and *Meredith v Jefferson*, 127 S. Ct. 2738 (2007). These cases held that limited affirmative action plans based on ensuring that the racial composition of the individual high schools approximated that of the district as a whole violated the Equal Protection Clause of the 14th Amendment of the US Constitution.

Sustainability

This article focuses on how sustainable education rights are enshrined in three particular legal and political contexts. The discussion may be expanded to how education rights form the basis of other types of sustainability. Educational rights necessarily support educational sustainability which is a prerequisite to economic and environmental sustainability and development. The latter viewpoint is supported by research such as that of Bouhari and Soussi who have reviewed various empirical studies which indicate “...a causal relationship between

education and economic growth as well as between education and investment” [Bouhari and Soussi] in five MENA countries – Algeria, Egypt, Morocco, Tunisia and Turkey. Other researchers have reached similar conclusions in relation to other regions. In a study of the effects of education on economic growth in Greece from 1960 to 2009: “Overall the conclusion of the study indicates that secondary and higher education have had a positive contribution to economic growth.” [Pegkas at 44.] Enshrining education rights underpins the provision of education which contributes to (and is itself a form of) sustainable economic development that will both foster and attract international business in regions where education is prioritized.

Conclusion

From the Irish constitutional perspective this analysis has focused on Article 42. This is undoubtedly a somewhat artificial analysis as a study of the constitutional protection of education can no more exclude other Articles of the constitution than a consideration of education rights can exclude other socio-economic rights. Even from the selection of cases to which reference has been made here, and there are no doubt others that could have been discussed, it is clear that the courts have sought to sift from the Constitution the scope of the education rights it enshrines. There has been an evolution from Justice Kenny’s ‘scholastic test’ in the High Court in *Ryan v A.G.* to Chief Justice Ó’Dálaigh’s expansion of the definition in the appeal to the Supreme Court. Justice O’Hanlon stretched Chief Justice Ó’Dálaigh’s definition in *O’Donoghue v Minister for Health* to recognise the educational potential of children with disabilities while there was arguably a narrowing of this vision in *O’Carolan v Minister for Education*. The courts have pronounced upon obligations to provide for various types of education in different circumstances – a process that will no doubt continue for as long as there is judicial review of the Constitution. This, of itself, is a good thing as it allows consideration of the type of constitutional and legislative protections society would desire and deserve for such a basic and profound right as the right to education.

In US constitutional jurisprudence by way of comparison *Brown* and the strand of cases which emanated from it established that the very fact of having separate public schools for black and white students was inherently unequal. The full effects of *Brown* took a long time to be felt and ripples from the judgment are still erupting and expanding to this day. It is worth considering in an article such as this looking at comparative education rights, how non-education rights, for example those emanating from the equal protection clause of the 14th Amendment, may indirectly enunciate education rights perhaps to an equal or greater extent than if specific education rights had been enshrined in the United States Constitution.

It is submitted that whilst the Irish higher courts in the last three decades have been less activist than was previously the case in enunciating the range and scope of education rights in the Constitution by not discovering new rights or expanding existing rights. The US Supreme Court, it is argued, has been more extreme by paring back previously recognized rights. It could be seen as rowing back from what many scholars would have seen to be the implications of *Brown* and subsequent cases. This may be due to the more indirect nature of education related rights in the US Constitution compared to the explicit education rights in the Irish Constitution.

When comparing the directly enshrined constitutional right to education in the Irish Constitution with those other rights in the US Constitution that indirectly give rise to education rights with education rights in the United Kingdom that are not directly enshrined in any constitution but are arguably enshrined via the *Human Rights Act 1998*, it is necessary to bear in mind the different nature of each. Whilst there is a strong foundation to US and Irish rights they have taken sixty odd years to develop to the point we now find them. The question could be posed as to whether the nature of rapidly changing societies, such as those examined in this paper, with ever evolving technologies is conducive to enshrining rights to education when the very nature of what constitutes education is transforming. One is reminded of the quotation from Lord Bingham stated previously: “There is no right to education of a particular kind or

quality, other than that prevailing in the state.” *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14, Lord Bingham at para 24. As the understanding of what constitutes education changes how valuable is a constitutionally guaranteed right if it is unclear what is being guaranteed? The difference between a constitutionally and otherwise protected right might be somewhat moot. Conversely the merits of an enshrined right may lie in its sustainability in that it may not be easily limited, nor may it be easily altered even if such change is thought to be in line with and supportive of other changes in society.

Even where a right is enshrined in a constitution, the jurisprudence of the Irish Superior Courts and the US Supreme Court would indicate that the constitutional basis of a right is in some respects less significant than the willingness of the judiciary and political systems to recognize and enforce it. Even had the US Constitution contained a right to education the argument would no doubt have been made that this did not mean a right to racially desegregated education. If the Irish Constitution did not contain the Article 42 provisions the courts could possibly have found equivalent unenumerated rights elsewhere in the Constitution were they of a mind to do so.

There is much to be learned from undertaking a comparative analysis of the sources of education rights in these three jurisdictions. *Brown* dealt with issues of education and race but there have been numerous US Supreme Court cases relating to education and schooling and issues of prayer, political protest, free speech, privacy, state financial support for students, etc. All these issues could have relevance in an Irish context. Racial segregation in Irish schools has not been a problem in the past but could in the future as Ireland becomes less ethnically homogenous. However education is to a very large extent segregated there between various denominations and none. If one were to take a positive view of the UK legal structure it might be that legislators are not hamstrung by constitutional provisions and therefore have great

flexibility to innovate and to adapt the legislative framework of education rights to reflect altering views of what constitutes education or of what should constitute education.

Having analysed how the right to education is protected in each of these states which, if any, is more conducive to the development of sustainable education rights? There is perhaps no perfect system of enshrining or sourcing sustainable education rights and indeed no absolute rule as to the advantages of having enshrined as opposed to non-enshrined or at the least more easily altered education rights. However, in striving to achieve the best outcome within the legal framework within which one finds oneself, there is undoubtedly much to be learnt from comparing UK, Irish and US jurisprudence in this area in an effort to see what is the best that can be seen and followed from each.

Books

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