

Review of Alison Mawhinney, *Freedom of Religion and Schools: the Case of Ireland* (Saarbrücken: VDM Verlag, 2009)

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The curious nature of the Irish primary school system, where schools are titled “National Schools” and funded by the State, but are exclusively owned and managed by private bodies, has been the object of some comment and litigation over the years. When drafting the Constitution in 1937, Eamonn de Valera took the step of inserting the word “for” in his own handwriting into Article 42.4, which states that the “State shall provide for free primary education,” so as to ensure that this arrangement would constitute an adequate discharge of the State’s duty to educate.¹ In *Crowley v. Ireland*, Kenny J. in the Supreme Court confirmed that the use of the phrase “provide for” in Article 42.4 keeps the State at one remove from the actual provision of education: “[t]he effect of this is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager or trustees, to provide means of transport to the school if this is necessary to avoid hardship, and to prescribe minimum standards.”²

More recently, in *O’Keeffe v. Hickey*,³ the Supreme Court held that one of the implications of this arrangement is that the State does not bear vicarious liability for acts of sexual abuse perpetrated by a school principal on a pupil. The majority of the Court held that the teacher was, at all times, the employee of the school and not the State. Since no employer-employee relationship existed between the teacher and the State, the principles of vicarious liability could not be brought to bear upon the circumstances of the case, and the State could not be held liable. The manner in which this outsourcing of the duty to educate has allowed the State to insulate itself from responsibility for what occurs in primary schools has been the object of some

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¹ M. Farry, *Education and the Constitution* (Dublin: Round Hall, Sweet & Maxwell, 1996) at 13; *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996) at 344.

² [1980] I.R. 102 at 126. It is interesting to note that Kenny J. included the provision of buildings within scope of the State’s duty, even though this was part of what was intended to be excluded by the wording of the duty to provide “for” free primary education.

³ [2008] I.E.S.C. 72.

criticism,⁴ and is currently the subject of an application to the European Court of Human Rights.⁵

Perhaps more controversial, however, is the breakdown of the nature of the private organisations who own and manage primary schools in Ireland. Put simply, the system is overwhelmingly (if not quite exclusively) denominational in nature, with approximately 98% of primary schools owned and run by religious denominations. Unsurprisingly, the vast majority (92%) are Catholic denominational, and in spite of recent efforts made by the Educate Together movement to establish multid denominational schools, well over 3,200 out of a total of 3,300 primary schools remain denominational in nature. The implication of this is that these schools are required to operate an integrated curriculum, whereby a religious spirit “should inform and vivify the whole work of the school,”⁶ and are entitled under legislation to discriminate on grounds of religion with respect to both pupil admissions⁷ and teacher employment⁸ so as to uphold the ethos of the school. The Irish courts have repeatedly upheld the constitutionality of these arrangements as being necessary to uphold the freedom of religion of those who operate and avail of denominational schools.⁹

Given the complete lack of freedom of choice available in the Irish primary school system for members of minority religions and of none, and the fact that the integrated curriculum renders any attempt to exercise the opt-out clause of Article 44.2.4° of the Constitution ineffective, commentators such as Desmond Clarke¹⁰ and Gerry Whyte¹¹ have long questioned whether the right to freedom of thought, conscience and religion is adequately protected by this system. This concern applies

⁴ See e.g., C. O’Mahony, “State liability for abuse in primary schools: systemic failure and O’Keeffe v Hickey” (2009) 28 *Irish Educational Studies* 315.

⁵ See B. Roche, “Woman abused as child by teacher to take case to Europe,” *The Irish Times* (24 June 2009).

⁶ *Rules for National School* (Dublin: Stationery Office, 1965), Rule 65 at 38.

⁷ *Equal Status Act 2000*, s.7(2)(c).

⁸ *Employment Equality Act 1998*, s.37(1).

⁹ See e.g., *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 I.R. 321 and *Campaign to Separate Church and State Ltd v. Minister for Education* [1998] 2 I.L.R.M. 81.

¹⁰ See D.M. Clarke, *Church and State: Essays in Political Philosophy* (Cork: Cork University Press, 1984); “Freedom of Thought and Educational Rights in the European Convention” (1987) XXII *Irish Jurist* (n.s.) 28, and “Education, the State and Sectarian Schools” in T. Murphy & P.M. Twomey, eds., *Ireland’s Evolving Constitution: 1937 – 1997 Collected Essays* (Oxford: Hart Publishing, 1998) 66.

¹¹ G. Whyte, “Education and the Constitution” in D. Lane, ed., *Religion, Education and the Constitution*, (Dublin: Columba Press, 1992) and “Education and the Constitution: Convergence of Paradigm and Praxis” (1992–1994) XXV–XXVII *Irish Jurist* (n.s.) 69.

equally to pupils, parents and teachers, and accordingly will affect everyone at some point in their lives, and some people throughout their lives. More recently, as immigration and declining rates of religious participation have dramatically altered the religious make-up of Irish society, the issue has become the focus of a more sustained debate. Extensive media commentary since 2008 has been accompanied by academic analysis by Eoin Daly,¹² Dympna Glendenning¹³ and the present author.¹⁴ The latest contribution to the debate is this new book from Dr. Alison Mawhinney, which builds on existing analysis of the human rights issues involved by conducting empirical research into the reality of education policy and practice in the Irish primary school system. While much of the previous commentary had identified a potential tension between existing practice and the right to freedom of thought, conscience and religion guaranteed by both domestic and international law, Dr. Mawhinney's study seeks to flesh out the extent to which this tension presents a real human rights problem. This is achieved through interviews with and questionnaire surveys of pupils, parents and teachers, whose experiences are measured against international human rights law so as to expose whether the realities of the Irish system fall short of international standards.

The book begins with a detailed historical account of how the Irish primary education system came to be a *de facto* State-funded but privately owned and managed system of schools in which the major religious denominations had, in effect, a monopolistic position. For the interested lawyer, this gives a valuable insight into the forces which shaped the system, which cannot be ignored in any sincere attempt at reform. The discussion proceeds to set down the legal framework governing primary education in domestic Irish law and the structure of the primary school system.

The substantive analysis of the extent to which the Irish primary school system conforms with international human rights standards regarding freedom of thought,

¹² See e.g., E. Daly, "Religious Freedom and the Denominational Education Model in the Republic of Ireland: the Shortcomings of 'Accommodationist' Reform" (2008) 9 *Education Law Journal* 242 and "Religious freedom as a function of power relations: dubious claims on pluralism in the denominational schools debate" (2009) 28 *Irish Educational Studies* 235.

¹³ See D. Glendenning, *Religion, Education and the Law: A Comparative Approach* (Haywards Heath: Tottel, 2008).

¹⁴ See C. O'Mahony, *Educational Rights in Irish Law* (Dublin: Thomson Round Hall, 2006), particularly Chapters 4 and 5.

conscience and religion takes place in Chapters 2, 3 and 4. Chapter 2 examines in detail the teaching of doctrinal religion and the operation of the integrated curriculum; Chapter 3 examines school admission policies; and Chapter 4 examines teacher employment, including appointment, promotion and dismissal, as well as the terms of the employment contract. In each chapter, the scope and content of international human rights law is first explored, and benchmarks are extracted against which the empirical data regarding the experiences of pupils, parents and teachers is assessed. This approach is commendable for advancing the terms of the debate beyond an assessment of the abstract legal position and onto an evidence-based assessment of the extent to which international human rights standards are truly observed in education practice and policy.

In Chapter 2, Dr. Mawhinney presents evidence that confirms the suspicions of earlier commentators that the Irish primary school system fails to respect the right to freedom of thought, conscience and religion. First, the religion taught in Irish denominational schools, far from being an objective or pluralist study of religious thought, is in reality doctrinal instruction in which religious beliefs are presented as fact – as one parent put it, “it’s taught as something that definitely, obviously, really happened.”¹⁵ This is combined with the operation of an integrated curriculum, in which religion is integrated into the entire work of the school and opt-outs from timetabled religious instruction are ineffective. In the words of the parents interviewed, “religion is not a subject that they do for a half-hour. It’s constantly brought up again and again like prayers here and there, colouring in pictures, say of the nativity. It was 24/7!”¹⁶ Others commented, “[a] lot of things were attributed to God, like rainbows and the rain coming down,”¹⁷ or “[r]eligion comes into almost everything, from blessing themselves in the morning to prayers before dinner and after dinner, at the end of the day. The priest calls in frequently with little messages.”¹⁸ The teachers interviewed confirmed this impression, with one stating that “[i]t would be near nigh impossible” for a child to effectively opt out.¹⁹

¹⁵ A. Mawhinney, *Freedom of Religion and Schools: the Case of Ireland* (Saarbrücken: VDM Verlag, 2009) at 107.

¹⁶ *Ibid.* at 104.

¹⁷ *Ibid.* at 105.

¹⁸ *Ibid.*

¹⁹ *Ibid.* at 106.

Perhaps more serious still is the evidence which clearly suggests that an opt-out of even timetabled religious instruction is often not available in any meaningful way, with children left to amuse themselves in the library or sometimes in the same classroom due to a lack of resources.²⁰ In some cases, schools will only allow an opt-out if the parents collect the child from school (which is often impractical), and in one instance the school positively objected to a request for an opt-out from “Christian drama”. These facts are reinforced by clear evidence that parents who do not wish their child to be exposed to doctrinal religious instruction are reluctant to exercise whatever opt-out is available due to fears concerning their child being stigmatised or even bullied by other pupils or by teachers.²¹ Finally, the empirical evidence highlights the sheer amount of time devoted to sacrament preparation in particular, and how this takes place during school hours and can dominate the school day for weeks in a particular class.²² When all of this data is combined with the clearly established lack of choice as between types of schools, Dr. Mawhinney presents a compelling argument that in spite of a theoretical opt-out clause, the Irish primary school system routinely exposes children to doctrinal religious instruction in contravention of the preference of parents and pupils, raising serious questions regarding the protection of freedom of thought, conscience and religion.

The discussion of school admissions policies in Chapter 3 is less detailed, perhaps in part because while the legislation clearly permits schools in certain circumstances to refuse admission on grounds of religion, the empirical study exposed a very low incidence of such refusals actually occurring in practice. What is more interesting about this Chapter is the evidence that suggests that the law on admissions policies, combined with the lack of freedom of choice available, leads in many instances to parents choosing to have their child baptised for the purpose of securing a place at the local school where otherwise they would have chosen not to. Parents made comments like “[t]he only schools are Catholic ones...You would be stuck.”,²³ and “I knew if I didn’t [get the children baptised] it would be a problem getting them into that school.”²⁴ Dr. Mawhinney’s research offers some support to Ruairí Quinn’s

²⁰ *Ibid.* at 79-80.

²¹ *Ibid.* at 75-77 and 81-82.

²² *Ibid.* at 77-79.

²³ *Ibid.* at 142.

²⁴ *Ibid.*

recent comment in *The Irish Times* that many parents “realise that a visit to the baptismal font is between them and access to a primary school place for their child. Parents and godparents, not practising, lapsed, agnostic or atheists are now required to make solemn vows before a priest, to raise the child as a practising Catholic. The priest, who has not seen the parents before and does not expect to see them again, goes along with this charade.”²⁵ A more in depth exploration of this issue would have been welcome, given the serious nature of State policy leading not just to exposure to beliefs other than one’s own, but also an insidious pressure to (at least superficially) convert to and practise a religion that does not conform with one’s own beliefs.

In Chapter 4, Dr. Mawhinney examines the impact of school employment policies on the freedom of thought, conscience and religion of teachers. The absence of the availability of alternative employment outside of denominational schools is once again a key factor here. In light of this lack of alternatives, the evidence once more suggests that the freedom of thought of teachers is undermined by the fact that schools may discriminate when employing and promoting teachers; may (and do) include a clause in employment contracts requiring teachers to deliver doctrinal religious instruction; and may ultimately dismiss teachers for conduct either at or outside the workplace if it is felt that such is “undermining the religious ethos of the institution.”²⁶ The effect of this is that teachers feel compelled to give the appearance of being a practising member of the denomination when being interviewed for appointment or promotion (and sometimes feel there is no point in applying for promotion if their true religious views are known in the locality). They are also compelled to teach, as fact, religious doctrine which they do not believe in themselves, and to prepare children for the sacraments. Finally, teachers whose lifestyle does not conform to the teachings of the denomination of the school which employs them, such as cohabitees, divorcees and homosexuals, are in constant fear for their jobs. One teacher commented that “[i]f you are to uphold the ethos you are expected to be a Catholic person inside and outside of the school,”²⁷ while another

²⁵ R. Quinn, “Time to transfer control of primary education,” *The Irish Times* (26 January 2010).

²⁶ Section 37(b), *Employment Equality Act 1998*.

²⁷ A. Mawhinney, *supra* note 15 at 175.

commented that “upholding the ethos has meant conforming to the ethos...This responsibility does interfere with my freedom of thought and conscience.”²⁸

Dr. Mawhinney ultimately concludes that the current system fails to respect the freedom of thought, conscience and religion of members of minority religions and of none, and that this failure is primarily attributable to the lack of diversity in the existing system. She is careful to acknowledge that any attempt to force religious denominations to change the way that denominational schools are run may interfere with the religious rights of members of those denominations, and argues instead that the answer lies in the avoidance of the current model which affords a virtual monopoly to religious denominations as providers of primary education. This argument is certainly very measured and logically attractive; unfortunately, the current financial realities in the education system militate against it, and it seems likely that the current difficulties will continue unless reform requires the dominant majorities to make concessions at least on the operation of the integrated curriculum so as to allow for an effective opt-out of doctrinal religious instruction. A partial restriction on the religious rights of members of the majority religions may ultimately be a necessary price of the avoidance of a severe abrogation of the freedom of thought, conscience and religion of members of minority religions and of none.

Dr. Mawhinney’s study is certainly timely, and is commendable for its use of empirical data to advance the understanding of the nature of the problem and to reinforce arguments which others had made on a more abstract level. The use of international human rights law to provide benchmarks against which the Irish system could be judged is appropriate and rigorously executed, and the empirical data is highly illuminating. At a domestic law level, one thing that is absent from the discussion is a proper engagement with some of the more recent commentary emanating from this jurisdiction.²⁹ The primary criticism that could be made of the work is that insufficient information is given regarding the sampling process, with little more being said other than that 100 schools were selected at random using a disproportionate stratified sampling technique.³⁰ The emphasis is very much on

²⁸ *Ibid.* at 176.

²⁹ See the material cited *supra* notes 12, 13 and 14.

³⁰ A. Mawhinney, *supra* note 15 at 6-7.

qualitative rather than quantitative data, and while the comments quoted in the text confirm anecdotal impressions, overall it is difficult to garner an impression of how truly representative of the national position the data is. No doubt, the scope of this project, which was undertaken as a doctoral thesis, placed constraints on the extent of the empirical research that could be conducted, and moreover, Dr. Mawhinney stresses that since international law protects the rights of individuals, it is not necessary to establish that any particular number of people are affected by a breach of human rights standards. Nonetheless, even within this context and the scope of the project, a more detailed sampling framework could usefully have been documented so as to contextualise the results. Additionally, greater use of quantitative data could have demonstrated the prevalence of particular views and experiences, thereby demonstrating the scope of the problem and urgency of reform, instead of just focusing on the nature of the experiences themselves.

The above comments should not be allowed to detract from what is a very fine piece of work that will help to strengthen the case for reform on one of the most pressing issues concerning educational and religious rights in contemporary Ireland. At the time of writing, the debate is in full swing, with a poll conducted by leading market research firm MRBI in January 2010 suggesting that 61% of people are opposed to the dominant position of the Catholic Church in the primary school system,³¹ to which Catholic bishops responded that the extent of this control is exaggerated.³² The legal conundrum on this issue is well documented by now, and evidence of the reality of the situation on the ground is essential to advancing the debate to the next stage. Dr. Mawhinney's work has made the picture a little clearer for all concerned.

³¹ See S. Collins, "Catholic Church 'should give up control of primary schools,'" *The Irish Times* (25 January 2010).

³² See L. O'Reilly, "Catholic 'control' of schools exaggerated," *The Irish Times* (28 January 2010). Bishop O'Reilly made the valid point that the MRBI survey misleadingly suggested that the Catholic Church controlled the primary school system rather than individual schools, but continued by stating that "the control exercised [over individual schools] by patrons, whether Catholic or otherwise, is a very limited form of control." Dr. Mawhinney's empirical research would certainly seem to call this view into question.