

THE IONA INSTITUTE

# Religion, Education & Human Rights

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**Submission of The Iona Institute in response to the IHRC Discussion Paper  
'Religion and Education: A Human Rights Perspective'**

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*'Education is a subject which cannot be discussed in a void: our questions raise other questions, social, economic, financial, political. And the bearings are on more ultimate problems even than these: to know what we want in education we must know what we want in general, we must derive our theory of education from our philosophy of life. The problem turns out to be a religious problem.'*

*T.S. Eliot*

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## EXECUTIVE SUMMARY

1. This paper argues that decisions as to whether religion should or should not have a role in the education of children properly belong with parents, rather than the State or any other third party. The job of the State is, within reason and according to resources, to facilitate the wishes of parents with regard to the formal education of their children.
2. Our paper argues that the principle of parental choice is fully enshrined both in the Irish Constitution and in international human rights law. It also provides a critique of certain recent interpretations of both domestic and international law in this regard, especially those which seek to limit the meaning of religious freedom or to conflate pluralism with secularism.
3. We believe that there should be greater diversity of provision in schooling than is currently available.
4. While it is the duty of the State to provide this greater diversity, we believe that the Churches should do what is reasonable to accommodate and make possible such diversity.
5. The freedom of conscience and religion of teachers can be better accommodated in the more diverse education system we support.
6. At the same time, a more diverse system will give denominational schools greater freedom to be true to their ethos.
7. We believe that the choice is not between denominational schools on the one hand, and schools that provide education in an “objective, critical and pluralistic manner” on the other. We believe that denominational-based education, while having a point of view, can be both objective and critical, and at the same time can show respect for other points of view.

Crucially, we do not believe it is possible for any education system or school not to have a point of view, that is, we do not believe it is possible for an education system to be ‘value-neutral’.

8. This means we are not faced with a choice between denominational schools and ‘value-neutral’ schools, but rather between schools with one or another value-system or ethos.
9. This being so, it is a fundamental mistake to think the best way to accommodate ‘diversity’ is within an exclusively State-run multi or non-denominational State-run school system. Such schools will unavoidably have an ethos. Instead, the best way to cater for diversity is to make available a range of school type, insofar as resources allow.
10. This will minimise, though not eliminate, the number of parents unhappy with the present lack of diversity. It would do so far better than moving towards a non or multi-denominational State-run system.
11. Accordingly, it is perfectly appropriate that the ethos of denominational schools should infuse all the activities of the school, again in accordance with the wishes of parents who want a denominational education for their children.

## I. INTRODUCTION

### I.1 Recognising the need for more parental choice

The Iona Institute recognises that parental choice, in both its positive and negative aspects, is the foundational principle upon which State education policy should be built and it recommends a pluralistic system of education that provides a diversity of schools types as the best way to respect and instantiate that principle.<sup>1</sup>

The principle of parental choice and the pluralistic model of diverse school types are both unambiguously endorsed by the text and jurisprudence of the Irish Constitution. They are also fully consonant with the foundational texts of international human rights law in this area. They are also endorsed by vast majority of Irish people.<sup>2</sup>

The inadequacies of the current Irish education system with regard to the rights to religious freedom of certain parents are not attributable to Ireland's Constitutional principles but arise from a combination of changed social circumstances and Government inaction which has meant that these principles are often not realised effectively in practice, particularly for non-Catholic parents in the primary school sector.

The Iona Institute has long highlighted the need for national debate and Government action to address these serious deficiencies in the realisation of parental choice.

### I.2 Overview of contents of this submission

This submission has five parts.

**Part II** discusses the nature of religious freedom and the nature of education, and examines the concepts of secularism and neutrality that are often used in contemporary debates. These are all topics which are not given adequate consideration in most discussions of human rights law and which are not discussed at all in the IHRC Discussion Paper. In particular this part stresses a point often ignored in secularist<sup>3</sup> criticisms of denominational schooling: namely,

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<sup>1</sup> A detailed philosophical case was made for these claims, and various objections addressed, in an earlier position paper by the Iona Institute, J Murray, 'The Liberal Case for Religious Schools' (Dublin 2008), available at [www.ionainstitute.ie](http://www.ionainstitute.ie) See also the recent paper 'Doing God in Education' published by the UK think tank Theos (note 29 below).

<sup>2</sup> A Red C poll commissioned by The Iona Institute in 2009 found that 72 percent of respondents agreed with the statement: 'Parents should be allowed the right to choose from a variety of publicly-funded schools for their children', whereas 25 percent agreed with the statement: 'In a modern society all publicly-funded schools should be run by the State'

<sup>3</sup> Secularism is defined for the purposes of this paper as the view that no State funded or supported school should have a denominational or religious ethos. For a more wide-ranging discussion of secularism and a critique of its claim to neutrality see J Finnis, 'On the Practical Meaning of Secularism' (1998) 73 Notre Dame

that no theory or practice of education is or can ever be value-neutral since all educational activity necessarily relies upon and endorses some conception of proper human development. Thus good teaching inevitably involves both formation and information. It is only when this point is ignored that a uniformly secular system of education, claimed to be neutral in terms of ethos and course content, can appear as a reasonable means of safeguarding pluralism in education.

**Part III** considers the Irish Constitutional right to freedom of religion with regard to education. It outlines the key guiding principles and responds to certain criticisms noted by the IHRC Discussion Paper.

**Part IV** considers the right to freedom of religion in education in international human rights law. The Iona Institute contends that the various legal instruments considered do not provide any grounds for deeming State support for denominational schools or an integrated curriculum to be, *per se*, in violation of any human rights obligation of the State under international law. By contrast the clear emphasis is on the promotion of pluralism in education and the provision of diverse school types. The provision of effective opt outs and/or adequate numbers of alternative school types are practical or resource-based problems which, like many rights in the area of education, can only be addressed by commitments to progressive realization,<sup>4</sup> but which do not require a revision of our Constitutional principles in this area.-

**Part V** offers some concluding comments.

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<sup>4</sup> UNESCO, *A Human Rights-Based Approach to Education* (2007) 22ff.

## II. THE NATURE OF RELIGIOUS FREEDOM AND EDUCATION

### II.1 The nature of ‘freedom of religion’

Before one considers the content of domestic and international human rights law, it is useful to first note that the legally posited human right commonly referred to as ‘freedom of religion’ can be thought of as comprising two distinct but equally important aspects or moral rights. It is both a positive freedom *for* religion, e.g. the freedom to practice and manifest one’s religious commitments, and a negative freedom *from* religious coercion (including anti-religious creeds), e.g. the freedom from coercion by public or private parties to *assent to* or *deny* any particular religious or philosophical proposition. These two aspects may occasionally come into tension such that some balance must be struck in practice, but it is never justifiable to prefer one to the total exclusion of the other in any proper analysis or application of the requirements of freedom of religion. This is because either aspect loses its justifying rationale in the absence of the other. The negative freedom from religious coercion only makes sense in the context of an antecedent moral duty to seek and conform to the truth in all aspects of one’s life. In other words, the negative aspect of religious freedom exists to facilitate a free, informed, intelligent, reasonable and responsible consideration by the individual of those perennial and yet most personal of questions the answers to which, manifested in belief and practice, frame and define what is commonly meant by ‘religion’, e.g. How should I live? Why is there something rather than nothing? Is there a God? If there is a God, has there been a public, historical act of divine self-revelation? etc. In other words, religion is deserving of constitutional protection because it is concerned with truthfully answering, and living in accordance with the answers to, fundamentally important questions (concerning the transcendent origin of all being, truth and goodness) which it is wholly reasonable for every person to ask and to try to answer correctly.<sup>5</sup> In this regard, religion (understood in this definitional, pre-denominational sense) is a wholly rational aspect of human personal and communal life, the legal protection of which should not be downplayed and caricatured as either an outdated inheritance or a concession to human sentimentality and

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<sup>5</sup> See J Finnis, ‘Does Free Exercise of Religion Deserve Constitutional Mention?’ (2009) 54 American Journal of Jurisprudence 41 for a compelling philosophical argument for the conclusion that: ‘Religion deserves constitutional mention [i.e. protection], not because it is a passionate or deep commitment, but because it is the practical expression of, or response to, truths about human society, about the persons who are a political community’s members, and about the world in which any such community must take its place and find its ways and means. Even the many seriously misguided religions tell in some respects more truth about the constitution’s ultimate natural (transcendent, supranatural) foundations than any atheism or robust agnosticism can.’

irrationality, nor reduced to merely a specification of one general right, such as autonomy, privacy or identity.<sup>6</sup>

Thus this negative freedom, this freedom of externally uncoerced deciding-for-one's-self, necessarily links up in three distinct ways to the positive aspect of religious freedom, the freedom of being able to confess, live according to and share the answers one has judged to be *true*. For the negative freedom, first, facilitates the proper exercise of the positive freedom to live by the truth (as best one can determine it) and, second, is justified by reference to the intrinsic good (or reasonableness) of so living and, third, exists as a qualification on the acceptable limits of any one individual's exercise of positive freedom in a political community with others.

There are also instrumental arguments in favour of legal protection for religious freedom, i.e. arguments that such protection advances and protects other goods for individuals and society apart from the intrinsic good of 'religion' itself (as described above).<sup>7</sup> One prominent strand of justification regularly mentioned in ECHR case law is the indispensable role of religious groups in the building up and sustaining of a healthy civil society. Consider the following for example:

- *Kokkinakis v Greece*, judgment, 25 May 1993 (para 31, emphasis added)

'As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, *depends on it*.'

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<sup>6</sup> In this respect, inter alia, the conception of religious freedom employed by the ECtHR is often confused and critically deficient. Note, for example, the Court's frequent reduction of the protection of religious freedom to the protection of 'one of the most vital elements that go to make up *the identity* of believers and their conception of life,' *Kokkinakis v Greece*, judgment, 25 May 1993, para 31 (emphasis added), a passage regularly cited since; see, e.g., *Zengin v Turkey*, Judgment, 9 January 2008, para 69.

<sup>7</sup> Consider the following example from the South African judgment of Sachs J: '... religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is a part of a way of life, of a people's temper and culture.' *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at [33]. See also M McConnell, 'The Problem with Singling out Religion' (2000) 50 De Paul Law Review 1 for case that 'religious freedom' operates as a placeholder for the amalgamation of multiple values, without the possibility of reducing it to one.

- *Hasan v Chaush v Bulgaria* (2002) 34 EHRR 55, 1359 (see also *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13, 336)

‘... the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.’

- *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46, [61] (re Article 9 combined with Article 11, association):

‘It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.’

The Irish Constitution,<sup>8</sup> the Universal Declaration of Human Rights,<sup>9</sup> the European Convention on Human Rights,<sup>10</sup> and the International Covenant on Civil and Political Rights<sup>11</sup> all make express reference to both the positive and negative aspects of religious freedom.

Moreover, when referring to the religious freedom of parents in the context of education all four of these documents use formulations which are equivocal between the positive and negative forms of religious freedom as follows (emphases in italics added):

**Irish Constitution, Article 42**

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
2. Parents *shall be free to provide this education* in their homes or in private schools or in schools recognised or established by the State.
3. 1° The State shall not oblige parents *in violation of their conscience and lawful preference* to send their children to schools established by the State, or to any particular type of school designated by the State....

<sup>8</sup> Compare 44.2.1° and 44.2.2°-4°.

<sup>9</sup> Compare the first and second clauses of Article 18.

<sup>10</sup> Compare the first and second clauses of Article 9(1).

<sup>11</sup> Compare 18(1) and 18(2).

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.

**UDHR**, Article 26.3

Parents have *a prior right to choose* the kind of education that shall be given to their children.

**ECHR Protocol 1**, Article 2

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 religions and philosophical convictions.

**ICCPR**, Article 18.4

The States Parties to the present Covenant undertake to have respect for *the liberty of parents* and, when applicable, legal guardians to ensure the religious and moral education of their children *in conformity with* their own convictions.

Such equivocation in the international human rights instruments is particularly significant and important. It means that any application of or commentary on these texts which seeks to prioritize the negative aspect over the positive aspect must be recognised as going beyond a mere interpretation of the wording and necessarily relying upon an evaluative or political judgment not expressly contained in or authorized by the text itself (see IV.1 below). Thus, anyone invoking such commentaries in national political debate (such as lobbyists, jurists or human rights bodies, for example the IHRC itself) cannot reasonably rely on a simple assertion of the legal status of the international text but should provide a substantive (i.e. normative, philosophical) justification for the evaluative judgment upon which the commentary rests. Moreover, in so far as such commentaries rely on or assume a preference for a wholly secularist system of public education, they fall foul of the pluralistic approach adopted by Irish Constitution in its guarantee to respect and support parental choice in education (see III.1 below).

The importance of always keeping in mind the positive aspect of freedom *for* religion is underlined when one considers that the primary inspiration behind the inclusion of ‘religious freedom’ in the canon of international human rights law, first articulated in Article 18 of the Universal Declaration of Human Rights (1948), was to protect religious persons and groups

in the context of violent State intrusion. It was certainly not intended to be used to restrict their rights to religious education and formation.<sup>12</sup>

## II.2 The nature of education

‘Philosophy is merely thought that has been thought out. It is often a great bore. But man has no alternative, except between being influenced by thought that has been thought out and being influenced by thought that has not been thought out. The latter is what we commonly call culture and enlightenment today.’<sup>13</sup>

‘Every education teaches a philosophy; if not by dogma then by suggestion, by implication, by atmosphere. Every part of that education has a connection with every other part. If it does not all combine to convey some general view of life it is not education at all.’<sup>14</sup>

‘The fashionable fallacy is that by education we can give people something that we have not got ... These pages have, of course, no other general purpose than to point out that we cannot create anything good until we have conceived it... Education is only truth in a state of transmission; and how can we pass on truth if it has never come into our hand?’<sup>15</sup>

These short quotations from the famous British journalist and author G.K. Chesterton are merely meant to serve as a window into some of the issues and claims that arise when one begins to reflect critically on what is meant by ‘education’. It is remarkable how little consideration is given in human rights discourse concerning education to the nature of education itself.<sup>16</sup> The problematic consequences of such underdeveloped thinking become especially clear when jurists turn to discuss the right of parental choice in education. Thus it is useful to begin by setting out some observations which, though very basic, often seem to be

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<sup>12</sup> In his seminal work on the drafting of the Universal Declaration of Human Rights Johannes Morsink outlines the extent to which the UDHR was a response to the evils of Nazism and World War II. ‘During the final General Assembly debate of December 1948 the drafters made it abundantly clear that the Declaration on which they were to about to vote had been born out of the experience of the war that had just ended.’ J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999) 36. Chapter 2 contains a discussion of how various articles originated as opposition to Nazi theory and practice.

<sup>13</sup> GK Chesterton, ‘The Revival of Philosophy: Why?’ *The Common Man* (Sheed & Ward, London 1950) 176 cited in J Haldane, *Faithful Reason* (Routledge, London 2004) 211.

<sup>14</sup> Chesterton 167 cited in Haldane 211.

<sup>15</sup> GK Chesterton, *What's Wrong with the World* (Cassell, London 1910) 198-200 cited in Haldane 217.

<sup>16</sup> The ECtHR, for example, offers very little. See, e.g., *Zengin v Turkey*, Judgment, 9 January 2008, para 55: ‘...teaching is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils as well as their personal independence.’ See also *Campbell and Cosans v UK*, judgment, 25 February 1982, para 33: ‘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.’

overlooked by many human rights treaty bodies in their interpretation and development of human rights law.<sup>17</sup>

### *Disambiguating 'neutrality'*

Legal discussions of religion in education, particularly judgments of the ECtHR, are littered with references to neutrality.<sup>18</sup> In some situations it is clear that 'neutral' is meant as a short hand for general *policies* of what might be called non-identification (of State with religion) and non-interference (by State with religion). In other contexts, however, 'neutrality' seems to be invoked as the *value* behind or *justifying principle* for such policies. Unfortunately, no clear definition is ever given of what is undeniably an ambiguous term. Some theorists have sought to distinguish between three possible meanings of 'liberal' neutrality as follow:

*justificatory neutrality*: the state is neutral if and only if it does not make decisions on the basis of any consideration of the intrinsic value of a conception of the good life.

*consequential<sub>i</sub> neutrality*: (equal effects neutrality) the state is neutral if and only if it has an equal effect on all conceptions of the good.

*consequential<sub>ii</sub> neutrality*: (equally easy neutrality) the state is neutral if and only if it ensures that all conceptions of the good do equally well.<sup>19</sup>

Most liberal theorists, including John Rawls and Ronald Dworkin,<sup>20</sup> reject both forms of consequential neutrality as unnecessary and practically unworkable. All neutrality, however, is somehow connected with the idea of restraining certain action, and within neutrality of justification two separate principles of restraint are apparent:

*concrete neutrality*: the State (and/or citizens) should refrain from acting with the intention of promoting controversial ideals and values through political action.

*neutrality of grounds*: the State (and/or citizens) should refrain from basing their political arguments on reasons or considerations that are controversial or not publicly acceptable.<sup>21</sup>

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<sup>17</sup> For a comprehensive but concise introductory text see D Carr, *Making Sense of Education: An introduction to the philosophy and theory of education and teaching* (Routledge, Abingdon 2003).

<sup>18</sup> The most recent and most authoritative formulation given by the ECtHR is as follows: 'States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups.' *Lautsi v Italy*, Grand Chamber Judgment, 18 March 2011, para 60.

<sup>19</sup> S Caney, 'Consequentialist Defences of Liberal Neutrality' (1991) 41 *The Philosophical Quarterly* 457-458. See equivalent versions in J Rawls, 'The Priority of Right and Ideas of the Good' in S Freeman (ed) *Collected Papers* (Harvard University Press, Cambridge 1999) 459; and J Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 114-5.

<sup>20</sup> R Dworkin, 'What is Equality? Part 1: Equality of Welfare' (1981) 10 *Philosophy and Public Affairs* 185; and J Rawls, 'Fairness to Goodness' in S Freeman (ed) *Collected Papers* (Harvard University Press, Cambridge 1999) 278-285.

<sup>21</sup> Wording of principles adapted from S Wall, *Liberalism, Perfectionism and Restraint* (Cambridge University Press, Cambridge 1998) 32; titles from P de Marneffe, 'Liberalism, Liberty, and Neutrality' (1990) 19

The various philosophical problems with ‘liberal’ theories of justificatory neutrality (and the related notions of controversy, reasonable acceptability and public reasons) and the debates which they have engendered between, for example, anti-perfectionist and perfectionist political theorists are well known and do not require retelling here.<sup>22</sup> To put it crudely: there are no ‘neutral’ reasons for advocating justificatory neutrality. Equally problematic, however, is the related tendency among certain legal theorists and judges to conflate secularism with neutrality, as if (i) secularism itself is not a reasonably-contestable political doctrine and (ii) no religious beliefs are capable of being rationally defended (or at least as rationally defended as beliefs in, say, democracy and human rights). Both (i) and (ii) are substantive claims that require justificatory argumentation, have been subject to many philosophical criticisms, and should not be simply assumed by bodies authorized to interpret, apply or promote legal texts.

### *Understanding education*

The question of what neutrality means becomes especially important in the area of education where it has a direct impact on how the ideal of ‘pluralism in education’ is to be understood and achieved. In this context, a further objection to the conflation of neutrality with secularism arises when one considers the difficulties inherent in considering any model or system of public schooling, whether secular or not, as neutral.

First, there is no such thing as a ‘neutral’ theory or practice of education – in either the justificatory or consequential senses. It is a contradiction in terms, since education is a purposive activity and, accordingly, its practice in any given situation will be determined by the purpose or purposes that it is understood to serve. What this purpose is or should be is a normative or moral question that has been the subject of significant philosophical and political debate in the Western intellectual tradition since at least the time of Socrates. It is certainly not specified or determined in any international human rights treaty.

Second, there is no practice of education that does not imply or presuppose some concept of human development or transformation, and hence some concept of the human person. As Prof John Haldane puts it:

‘Education is the process of formation involving the realization of certain potentialities. Whatever the particularities of the case, education is part of a general

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Philosophy and Public Affairs 253.

<sup>22</sup> A good overview is provided by S Mulhall and A Swift, *Liberals and Communitarians (2nd ed)* (Blackwell, Oxford 1996) see especially the concluding remarks at 348-353. See also the summary of criticisms offered in L Hogan, 'Religion and Public Reason in the Global Politics of Human Rights' in N Biggar and L Hogan (eds), *Religious Voices in Public Places* (Oxford University Press, Oxford 2009).

movement towards the full actualization of the subject's nature. To formulate the goals of human education, therefore, and to determine how best these might be achieved one needs to have an account of the kind of thing a human being is. That is to say one needs an organized set of descriptions of the various capacities characteristic of human beings *per se*: the pattern of their development and inter-relations and of the states and activities in which a developed human being most fully realizes his or her nature. Such an organized body of knowledge ... serves to answer questions both as to what is the case and as to what ought to be done...<sup>23</sup>

Clearly such a 'body of knowledge' could not be considered 'neutral' in any sense.

Third, there is no practice of education without some recognition of 'authority' and 'tradition'. This is simply an analytical consequence of the presuppositions that constitute the very practice of teaching. One of the leading theorists of the analytical school of English-language philosophy of education Richard Peters argued in his book *Ethics in Education*<sup>24</sup> that 'education involves processes leading to the development of a desirable state of mind in which one achieves some understanding and cares about *what is held to be of value*.'<sup>25</sup> This appears to have been acknowledged by the EctHR also.<sup>26</sup> Thus we should recognise that 'of its nature education involves a commitment to transmission from one generation to the next of *a set of cognitive and social values*; otherwise expressed, it involves inculcating in its recipients understanding of and respect for certain traditions.'<sup>27</sup>

Haldane uses the term tradition here in the broadest possible sense as his later discussion of the acquisition of language, symbolic forms and morality makes clear:

'[I]t is very important to see that the child's acquisition of its first language is not a matter of coming to possess a medium *externally* related to the various activities, traditions and institutions that shape the infant's social environment; rather the language is itself part of the social fabric and is shaped by, and in turn influences, the development of these various ways of thinking and acting. To acquire a language is to acquire a culture. It is to become part of a socially and historically extended tradition.

Moreover, what is true of socially embedded natural languages is also true of other symbolic forms...A child simply has not mastered the use of the numeral '2', or of a basic pictorial element unless it can deploy these in ways that make sense to those

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<sup>23</sup> J Haldane, 'Understanding Education'*Practical Philosophy: Ethics, Society and Culture* (St Andrews Studies in Philosophy and Public Affairs Volume XV Imprint-Academic, Exeter 2009) 322.

<sup>24</sup> R Peters, *Ethics and Education* (George Allen and Unwin, London 1966).

<sup>25</sup> Haldane, 'Understanding Education' 315 (emphasis added).

<sup>26</sup> See cases and quotations at note 16 above.

<sup>27</sup> Haldane, 'Understanding Education' 312 (emphasis added). This thought was well captured by T.S. Eliot as follows: 'Education is a subject which cannot be discussed in a void: our questions raise other questions, social, economic, financial, political. And the bearings are on more ultimate problems even than these: to know what we want in education we must know what we want in general, we must derive our theory of education from our philosophy of life. The problem turns out to be a religious problem.' From *Modern Education and the Classics* (1932) cited in J Hayward (ed), *T.S. Eliot: Selected Prose* (Penguin, Hammondswoth 1953) 221-2.

who instructed him or her in them. To learn English, or arithmetic or drawing or basic morality is to be inducted into a complete set of rule- or norm-governed practices. It simply makes no sense at this stage to regard instructor and pupil as equals with respect to the content that might be expressed through the system of representations. It is not just that the art teacher can draw better than the child what lies on the table before them, but that through acquiring and gaining some mastery of the tradition of draughtsmanship the teacher sees the objects in ways as yet unavailable to the child. Learning to draw is a way of learning to see and understand; learning to read and write is a way of coming to organize experience and imagine possibilities; learning moral values is a way of developing a respect for others.<sup>28</sup>

Thus, in sum, any practice of education, even when it purports to avoid subjects known to be politically controversial or sensitive in a given time and place, necessarily implies substantive evaluative (i.e. non-neutral) positions on (i) the human goods or purposes to which education is directed, (ii) the nature of the human person and of the development of the human person, and (iii) the moral desirability and hence authority of particular sets of cognitive and social values (i.e. traditions). And these are three areas where it is reasonable to expect that different religious and secular traditions will have distinctive and conflicting views. Accordingly, any account of religious freedom in education which relies, expressly or by implication, on the possibility of a wholly neutral practice of education, such that the negative rights of religious freedom of any parent could never be reasonably considered to be interfered with, must be rejected as fundamentally misinformed.<sup>29</sup>

It might be objected here that certain 20<sup>th</sup> century liberal theorists, most famously perhaps John Rawls, have argued for the merits of bracketing out claims to ‘truth’ from public discourse in favour of a political model of overlapping consensus as the appropriate basis for justifying political and legal authority.<sup>30</sup> This is a debate that continues in political philosophy which it is outside the scope of this paper to comment upon,<sup>31</sup> but it should be noticed that, quite independently, there are major problems with transferring such a model of adult-citizen-political-interaction from the public square for which it was intended into the

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<sup>28</sup> Haldane, 'Understanding Education' 332.

<sup>29</sup> For a recent paper developing similar points and applying them to concrete issues in the UK see T Cooling, *Doing God in Education* (Theos, London 2010) available on-line at <http://campaigndirector.moodia.com/Client/Theos/Files/DoingGodinEducation.pdf>

<sup>30</sup> See, e.g., J Rawls, 'Justice as Fairness: Political not Metaphysical' in S Freeman (ed) *Collected Papers* (Harvard University Press, Cambridge 1999) and the endorsement therein of what he terms the ‘method of avoidance’ (at 395). For a criticism of the implications of such a strategy on the nature of political philosophy see W Galston, *Liberal Purposes* (Cambridge University Press, Cambridge 1991) 154-162.

<sup>31</sup> For important critiques of the coherence of Rawls’s account of ‘public reason’ and its bracketing out of truth-claims from political discourse see J Hampton, 'The Moral Commitments of Liberalism' in D Copp, J Hampton and JE Roemer (eds), *The Idea of Democracy* (Cambridge University Press, Cambridge 1993); and J Finnis, 'Public Reason, Abortion and Cloning' (1998) 32 *Valparaiso University Law Review* 361–364-70. See also references in note 22 above.

school or classroom for which it was not.<sup>32</sup> For one thing, it must be recalled that the liberal model of justificatory neutrality or anti-perfectionism itself presupposes and aims to accommodate (rather than eliminate) cultural, religious and moral pluralism. This pluralism depends on the continued existence (and hence transmission to the next generation through education) of the different traditions in question. And each tradition, whether expressly or by necessary implication, holds its beliefs and teachings to be *true*, to be worthy of rational and reasonable assent, and not merely to be the product of a political consensus. It is precisely *as truths* (objective and critical), and not as *reports* of opinions, that a tradition wishes to transmit its beliefs in education.<sup>33</sup> Moreover, given the very nature of education itself, it necessarily involves the presupposition and transmission of certain truth-claims and so cannot coherently conform itself to the rationale or procedures of a Rawlsian bracketing-out of appeals to what is true.

The eminent British theorist of education Terence McLaughlin summarised as follows the different philosophical challenges which have been made to the possibility of applying liberal principles of neutrality to the practice of education itself:

- ‘the danger of invoking an unduly abstract and a-historical conception of autonomy, rationality and the human agent;
- a possible neglect of the rootedness of persons in particular cultural traditions of belief, practice and value and of the significance of the involvement and engagement in such traditions for the ability to achieve identity and critical independence;
- use of an unreal model of the child as an abstract, rootless chooser, unchanged by choices made;
- the need to encourage initial stable beliefs, reflective commitment and a range of determinate dispositions and virtues in the development of autonomy;
- lack of specification of the character and range of autonomy, and of critical reflection;
- the impossibility of determining a single optimum route to the achievement of autonomy;
- the problem of specifying general criteria for choice and value;
- difficulties in distinguishing between “public” and “private” values.

Such difficulties are elaborated and discussed not only by philosophers of education, but also by philosophers sympathetic to the values and benefits of tradition and by communitarian critics of liberalism....At the very least, the difficulties...indicate the complexities involved in outlining significantly non-controversial ethical and other

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<sup>32</sup> See Chapter 11 ‘Liberalism, impartiality and liberal education’ in Carr, especially 178-181.

<sup>33</sup> See further discussion of implications of this point in NM Stolzenberg, ‘“He Drew a Circle that Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education’ (1993) 106 Harvard Law Review 581.

principles for the conduct of the common school, even within a liberal framework of values. Among the issues here are dangers of superficiality in learning, or disorientation, arising from a “babel” of values in the common school, and doubts about whether the fairness of such a context can be sufficiently established to enable it to be insisted upon as the only context in which liberal education can take place...While all these issues require further discussion, the onus lies with liberal educationalists opposed to all forms of separate [i.e. denominational] schooling to show that the difficulties mentioned above can be resolved in such a way that only one starting point and institutional form of liberal education can be specified, and the one I suggest as an alternative for parental choice be ruled out either on grounds of incoherence or incompatibility with the liberal ideal. Part of this task would be to show that philosophical difficulties concerning the significant neutrality of the common school can be overcome.<sup>34</sup>

### **II.3 Secular education is not neutral**

There are three common arguments made to support the claim that secular education is neutral. The first is based on distinguishing the reasonableness of belief in certain human rights doctrines (e.g. those found in the UDHR) from the reasonableness of belief in any religious doctrines. This relies, however, on a rather naive understanding of the rational foundations for both sets of beliefs and it is hard to find any critical defense of such a view among philosophers.<sup>35</sup> Ultimately, both the case for, say, the existence of God and the case for the reasonableness of certain moral norms labeled human rights, depend upon a common fallible process of reasoning and judgment.<sup>36</sup> In neither case, is there an absence of philosophical controversy and rights-skepticism is as ripe a question for academic debate as any in moral philosophy or the philosophy of religion. Although this attempt to rank-order the reasonableness of these two sets of beliefs was alien to most of the originators of the

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<sup>34</sup> T McLaughlin, 'The Ethics of Separate Schools' in D Carr, M Halstead and R Pring (eds), *Liberalism, Education and Schooling* (Imprint Academic, Exeter 2008) 190-2 (49 references omitted). McLaughlin defines 'liberal education' (which he argues can be delivered in properly constituted religious schools) by reference to the following 'family of conceptions': '(i) the aim of developing autonomy; (ii) an emphasis on fundamental and general knowledge; (iii) an aversion to mere instrumentality in determining what is to be learnt; and (iv) a concern for the development of critical reason...' McLaughlin 179.

<sup>35</sup> The response of Jacques Maritain, one of the philosophers mandated by UNESCO to consult on the UDHR, when asked how so many ideological and political opponents could agree on charter of rights is infamous among rights-theorists: 'Yes, we agree about the rights but on condition no one asks why.' J Maritain, 'Introduction' in UNESCO (ed) *Human Rights: Comments and Interpretations* (Allan Wingate, London 1949) 10.

<sup>36</sup> For a comprehensive and well-informed overview of the spectrum of approaches to the inter-relationship of religious belief and belief in human rights see ZR Calo, 'Religion, Human Rights and Post-Secular Legal Theory (February 2, 2011)' St. John's University Law Review (forthcoming) Available at SSRN: <http://ssrn.com/abstract=1754073>.

rights-talk in the 20<sup>th</sup> century,<sup>37</sup> this uncritical view has gained popular currency in recent years. For example, although, according to the UN Human Rights Committee, the State may teach the ‘*general history* of religions and ethics if it is given in a neutral and objective way,’<sup>38</sup> Article 29(1)(b) of the Convention on the Rights of the Child requires States to direct the education of children towards the ‘development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.’ Here there are no caveats directing teaching towards general history, neutrality or objectivity. Nor have any secularist commentators expressed concerns about the risk of indoctrination in this regard.<sup>39</sup> In contrast to this bare international law mandate to promote an acceptance of the moral claims made by human rights theory, the ECtHR stresses the need for education to foster in students a ‘critical mind’<sup>40</sup> with regard to religious matters.

A second common argument for the neutrality of secular education distinguishes a secular school ethos from an atheistic one. On this view, secularism represents a silence about religious matters whereas an atheistic ethos, like any religious one, represents the adoption of a specific, often antagonistic, position regarding religious matters and, as such, is not neutral. Thus, for example, a law banning any display of religious symbolism in a school setting should be considered a neutral silence rather than a partisan anti-religious position. Again, this is an argument that relies on a rather uncritical view of what it is to adopt or communicate or imply a preference. For example, it is clear from many other aspects of our everyday lives that, in certain contexts, one can assert some propositional content by falling or remaining silent. Moreover, the absence of a sign can itself be a sign, i.e. can be interpreted as significant.

For on its face the practical effect of both the atheist and secular options are identical in their impact on the education of the children of the religious believer – both result in an exclusion from the process of forming and informing our young people any positive role for religious faith. And this in a context where schools are being encouraged to include more and more morally-directive information deemed of public importance (i.e. not ‘neutral’) in the core

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<sup>37</sup> Recall the opening words of the Universal Declaration of Human Rights where it states: ‘the peoples of the United Nations have in the Charter reaffirmed *their faith* in fundamental human rights...’ (emphasis added).

<sup>38</sup> General Comment 22 (on the ICCPR), para 6 (emphasis added).

<sup>39</sup> By contrast, Prof James B. Murphy of Dartmouth has argued that even secular civics education designed to foster civic virtues such as multicultural toleration or patriotism are not neutral and thus should, if one is to be consistent, also be classed as a form of ‘indoctrination.’ JB Murphy, ‘Against Civil Schooling’ in EF Paul, FD Miller and J Paul (eds), *Morality and Politics* (Cambridge University Press, Cambridge 2004).

<sup>40</sup> *Zengin v Turkey*, ECtHR Judgment, 9 October 2007, para 69.

curriculum (e.g. environmental and civic awareness, relationships and sexuality education etc.). What message might a child take if among such important matters no positive or approving mention of God or of religious belief and practice is to be found? Prof Joseph Weiler, in the course of his critique of the controversial ECtHR decision in *Lautsi v Italy*, gives the following example:

‘Consider the following parable of Marco and Leonardo, two friends just about to start a new school. An exciting moment. They live in a place like Abano Terme, the locale where Ms Lautsi lived. Leonardo visits Marco for the first time at his home. He enters and notices a crucifix on the wall at the entrance. ‘What is that?’, he asks. ‘A crucifix – why, you don’t have one? Every house should have one.’ Leonardo returns to his home agitated. His mother patiently explains: ‘They are believing Catholics. We respect them and their beliefs.’ (Or, we don’t believe in such stuff, but we respect their right to believe etc.) ‘Can we have one on our wall?’ ‘No’ would surely be the answer of a firm and decided mother like Ms. Lautsi. And rightly so. It is a secular world view that she wants to impart to her children. Now imagine a visit by Marco to Leonardo’s house. ‘Wow!’, he exclaims, ‘no crucifix? An empty wall?’ He returns agitated to his house. ‘Well’, explains his mother, ‘they are a wonderful family, good and kind and charitable. But they do not share our belief in the Saviour. We respect them.’ ‘So can we remove our crucifix?’ ‘Of course not. We respect them, but for us it is unthinkable to have a house without a crucifix.’ The next day both kids go to school. Imagine the school with a crucifix. Leonardo returns home agitated: ‘The school is like Marco’s house. Are you sure, Mamma, that it is okay not to have a crucifix?’ That is the essence of Ms. Lautsi’s complaint. But imagine, too, that on the first day the walls are naked. Marco returns home agitated. ‘The school is like Leonardo’s house,’ he cries. ‘You see, I told you we don’t need it.’ And even more alarming would be the situation if the crucifixes, always there, suddenly were removed.

In a society where one of the principal cleavages is not among the religious but between the religious and the secular, absence of religion is not a neutral option. Some countries, like the Netherlands and the UK, understand better the dilemma. The state there is more serious in trying to be neutral or agnostic in the educational area. It funds secular schools and, on an equal footing, religious schools. It is a system that has clear advantages in allowing parents to give the kind of education they choose for their children with equal funding by the state – though, of course, respecting a certain core of civic content.’<sup>41</sup>

This objection seems to echo the concurring opinion of Judge Ann Power in the recent Grand Chamber judgment overturning the earlier Chamber decision in *Lautsi* where she states:

‘Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all world views rather than a preference for one. To my mind, the Chamber Judgment was striking in its failure to recognise that secularism (which was the applicant's preferred belief or world view) was, in itself, one ideology among others. A preference for secularism over alternative world views—whether religious, philosophical or otherwise—is not a neutral option. The Convention requires that respect be given to the first applicant's convictions insofar as the

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<sup>41</sup> J Weiler, 'Lautsi: Crucifix in the Classroom Redux' (2010) 21 *European Journal of International Law* 1 4.

education and teaching of her children was concerned. It does not require a preferential option for and endorsement of *those* convictions over and above all others.’

The third argument responds to objections such as that given by Weiler by stressing that a reasonable impartiality can be achieved by secular schools with regard to different religious and atheistic beliefs by presenting children with information on a variety of religious ‘points of view’ in what the ECtHR would call an ‘objective, critical and pluralistic’<sup>42</sup> manner. Here again, however, it must be recognised that the philosophy of education underlying such an approach is not neutral. As Stanley Fish has noted with respect to similar claims made by a US Court,<sup>43</sup> a parent may reasonably object to the imposition of a particular theory of education which assumes that

‘the mind remains unaffected by the ideas and doctrines that pass before it, and its job is to weigh and assess those doctrines from a position distanced from, and independent of any of them. ... The chief danger is not any particular doctrine to which the children might be exposed, but the unannounced yet powerfully assumed doctrine of exposure as a first principle, as a virtual theology. This is where the indoctrination comes in, not at the level of urging this or that belief, but at the more subliminal level at which what is urged is that encountering as many ideas as possible and giving each of them a run for its money is an absolutely good thing. What the children are being indoctrinated in is distrust of any belief that has not been arrived at by the exercise of their unaided reason as it surveys all the alternatives before choosing one freely with no guidance from any external authority.’<sup>44</sup>

The account of the human person (and the significance of his/her relationship with his/her community, tradition, culture etc.) which is assumed by such an educational philosophy is open to the various criticisms summarised above by McLaughlin (see II.2).

#### **II.4 Not all religious education is the same**

There is a final basic point that is too often overlooked in the legal discourse around human rights and education. It is the simple fact that not all religions are the same and, in particular, not all forms of denominational education and schooling are the same. Accordingly, it is mistaken to imagine that a distinction between acceptable and unacceptable educational practice (from whatever perspective) can simply be drawn onto the distinction between a religious and a secular school ethos. For there are, in principle, more and less

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<sup>42</sup> See *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Judgment, 7 December 1976.

<sup>43</sup> *Mozert v Hawkins County Board of Education* 827 F 2d 1058 (6<sup>th</sup> Circuit, 1987).

<sup>44</sup> S Fish, 'Mission Impossible: Settling the Just Bounds Between Church and State' (1997) 97 Columbia Law Review 2255 2289-90.

philosophically-justified, educationally-informed, rights-compliant etc (i.e. more and less reasonable) forms of religious and secular education alike.<sup>45</sup>

One way in which this mistake is manifested is by the use of the highly pejorative term ‘indoctrination’ to speak of any form of education which directly advocates or significantly presupposes the truth of a religious claim. Such use of the term is unreasonable and unjustifiably offensive. Indoctrination implicitly suggests a strategy whereby a teacher deliberately seeks to suppress or bypass a student’s capacity for rational thought or to frustrate the very development of such a capacity.<sup>46</sup> Clearly such strategies may be used for a variety of purposes, religious or secular, and by a variety of agents, e.g. the State, advertisers, teachers, parents, peers etc. There is simply no basis, other than prejudice, for equating such a strategy with the activity *per se* of education in and from a religious tradition, for (as noted above) *all* education must necessarily take place in the context of *some* tradition (whether realized and articulated or not).<sup>47</sup>

Moreover, it is a grave insult to the vast majority of Irish teachers (and to the various patrons and parents whose ethos they work conscientiously to uphold) to suggest that they are engaged in the indoctrination of their students, that is to say in the deliberate harming of their students by interference in the development and use of their natural capacity for reasoning.

Ultimately, all schools, whatever their ethos, should be required to satisfy certain basic standards in the manner and content of their teaching in order to protect the best interests of the students. Such standards have been the subject of considerable study and sophisticated elaboration by educationalists, very often by those working within the Christian tradition, and there is absolutely no reason to believe that schools in Ireland with a religious ethos are less likely to meet such standards *simply because of* that ethos. Accordingly, the Iona Institute would strongly recommend the IHRC to avoid any use of the term ‘indoctrination’ that equates it with education of or from a religious perspective, rather than with a particular type

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<sup>45</sup> Though it should be stated that Ireland is very fortunate to have such high standards of teaching across all school types.

<sup>46</sup> As it is a description of a human (voluntary, intentional) act, it is important that any definition of the term should include reference to the deliberate intention (goal, purpose) of the actor (in this case the teacher).

<sup>47</sup> For a historical and philosophical consideration of the emergence of the ‘liberal’ tradition (the mostly unacknowledged tradition of those who equate secular education with neutrality) see A MacIntyre, *Whose Justice? Which Rationality?* (Duckworth, London 1988), especially Chapter 17.

of (unacceptable) teaching method (as described above),<sup>48</sup> a method, incidentally, which is totally rejected, for example, by all Catholic theories of education.<sup>49</sup>

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<sup>48</sup> Alternatively, a much broader and non-pejorative meaning could be given to the term so that it would encompass the deliberate teaching of any material which recommends, directly or indirectly, any normative proposition or value. Such a definition would render the term almost meaningless, however, as every act of teaching arguably satisfies this condition. Certainly, it would require the classification of the teaching of human rights and other 'secular' value systems as indoctrination.

<sup>49</sup> 'Truth... is to be sought after in a manner proper to the dignity of the human person and his social nature. The inquiry is to be free, carried on with the aid of teaching or instruction, communication and dialogue, in the course of which men and women explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth... Wherefore this Vatican Council urges everyone, especially those who are charged with the task of educating others, to do their utmost to form persons who... will come to decisions on their own judgment and in the light of truth, govern their activities with a sense of responsibility, and strive after what is true and right, willing always to join with others in cooperative effort.' Declaration on Religious Freedom (*Dignitatis Humanae*), 7 December 1965, paras 3, 8.

### III. THE IRISH CONSTITUTION AND RELIGIOUS FREEDOM IN EDUCATION

The constitutional law dealing with religion and education in Ireland has been well set out elsewhere<sup>50</sup> and it is not proposed to detail it here. Instead, this part (III.1) highlights the key constitutional principles which the Iona Institute believes must be kept to the forefront in any future reform of the Irish education sector and (III.2) addresses some of the legal criticisms that have been leveled against the current constitutional position.

#### III.1 Key constitutional principles of religious freedom in education

The Iona Institute agrees with those who argue that problems with the status quo concerning respect for religious freedom in education are not a result of the guiding principles provided by our Constitution but arise from the manner in which these principles are currently applied (or not applied) in practice in a society that has gone through a relatively rapid process of social change and religious diversification.<sup>51</sup>

The key constitutional principles governing the State's duties with respect to religious freedom and education can be summed up and systematized as follows:

- i. Respect (in the negative sense of non-interference and non-coercion) is required for parental choice in education.<sup>52</sup>
- ii. Support (in the positive sense of active facilitation and funding) is *required* for parental choice in primary education and is *permitted* for parental choice in post-primary education.<sup>53</sup>
- iii. Following from (i) and (ii), parental choice is to be respected by respecting religious/denominational diversity *between* State-supported primary and post-primary schools.<sup>54</sup>
- iv. Following from (i) and (ii), parental choice is to be respected by respecting religious/denominational diversity *within* State-supported primary and post-primary schools, but only so far as is consistent with (iii) above.<sup>55</sup>

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<sup>50</sup> GW Hogan and GF Whyte, *J.M. Kelly: The Irish Constitution* (4th edn LexisNexis Butterworths, Dublin 2003).6.248-266, 294-300; 7.8.100-7.8.114.

<sup>51</sup> See, e.g., O Doyle, 'Egalitarianism, Religious Preferences and the Integrated Curriculum' (IHRC/TCD Conference on Religion and Education 2010)

<sup>52</sup> Articles 42.1, 42.3.1°, 44.2.2° - 4°. *O'Shiel v Minister for Education* [1999] 2 IR 321.

<sup>53</sup> Articles 42.2, 42.4, 44.2.4°. *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321.

<sup>54</sup> *Crowley v Ireland* [1980] IR 102, *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321, *Greally v Minister for Education (No 2)* [1999] 1 IR 1.

<sup>55</sup> *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321. (iii) must qualify (iv) and not the reverse. For if (iv) was taken as the primary way of expressing the State's respect and support for parental choice in education, as set out in (i) and (ii), such that (iii) was only applicable in so far as it was consistent with (iv), that would potentially render unconstitutional all of the practices necessary to realise

These four principles are consistent and coherent. The Iona Institute does not consider that they represent the product of an ‘ideological fault line’ running through the Constitution. They reconcile the positive and negative aspects of religious freedom by rejecting any presumption in favour of either a secular or a confessional understanding of the State and endorsing a pluralistic approach built upon (a) the core principle of the primacy of parental responsibility and choice in education, in both its negative and positive aspects, and (b) a recognition of the important and ineliminable function of ethos in education. Moreover, as mandated by the Constitution and the Courts, it is these principles which should govern any future policies and reforms in this area.

### **III.2 Criticisms of the Constitutional status quo**

Of course, these constitutional principles, though legally authoritative, may not be convincing to those critical of some of the decisions cited. Perhaps, they might argue, our Constitution is wrong and should be changed. To this, a number of responses can be made.

First, it is important to note that there are compelling substantive reasons to support these Constitutional principles. In an earlier paper the Iona Institute offered a stand-alone philosophical case in support of a pluralistic educational system based on the principle of parental choice.<sup>56</sup> A copy of that paper is included with this submission for the consideration of the Commission.

Second, it is important to distinguish the different grounds upon which a criticism of these constitutional principles can be made. They can be grouped as follows:

- (1) Irish law critique – i.e. the Court reached a wrong legal answer as a matter of Irish law.
- (2) International law critique – i.e. the Court reached an answer incompatible with international human rights law.
- (3) Moral critique – i.e. regardless of what the law did or did not require, the Court reached the wrong moral answer in terms of how things should be all-things-considered.

With respect to type (3) moral critiques, various substantive criticisms are responded to in the earlier Iona Institute paper on religion and education mentioned above.<sup>57</sup>

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denominational schooling. And this would flatly contradict the permissive acceptance of denominational schooling in the Constitution itself (see references in II.2 below). This ordering of (iii) and (iv) is also expressly supported by Barrington J’s distinction, in *Campaign to Separate Church and State* at 357, between ‘religious education’ and ‘religious instruction’ though it is not dependent upon it.

<sup>56</sup> See note 1 above.

<sup>57</sup> See note 1 above.

Arguments in the form of a type (2) international law critique will be considered in Part IV of this paper. Some type (3) criticisms will be briefly considered in the remainder of this section.

Prof Gerry Whyte criticises, as a matter of Irish law, the interpretation of Articles 42 and 44 given by the Supreme Court in *Campaign to Separate Church and State*<sup>58</sup> and his criticism is specifically noted in paragraph 51 of the IHRC's Discussion Paper. Whyte makes two points which are pertinent to the current discussion. The first is as follows:

‘However the reasoning [of Barrington and Keane JJ] is not without its difficulties. In the first place, it is at least as plausible an interpretation of the Constitution to argue that the non-endowment clause [44.2.2°] should be used to qualify the principle of State support for denominational education as it is to argue that the principle of State support for denominational education should be used to qualify the non-endowment clause. Indeed insofar as both Keane J in the Supreme Court and Costello J in the High Court relied upon Article 42.4 to qualify Article 44.2.2°, they were invoking a relatively weak obligation on the State to ‘endeavour to supplement and give reasonable aid to private and corporate educational initiative’ to qualify the more robust prohibition on State endowment of religion and it would arguably do less violence to the text of the Constitution to reverse the priority of these two provisions. At best, one would have to accept that the constitutional text is indeterminate on this point and yet the Supreme Court decision does not offer any compelling reason for adopting its preferred interpretation over the alternative contended for by the plaintiffs.’

This is a problematic analysis. First it gives the impression, at least to anyone not familiar with the decision, that Keane J simply followed Costello J of the High Court in basing his conclusion on the implications of Article 42.4 for the non-endowment clause. In fact, Keane J expressly argued that on the basis of a literal and historical interpretation of the term ‘endow’ the payment of the salaries of school chaplains in community schools did not even constitute a *prima facie* endowment of religion such as might then be justified by appeal to Article 42.4.<sup>59</sup> Second, and more seriously perhaps, it simply overlooks the actual ‘compelling reason’ that Barrington J (with whom the whole Court concurred) did in fact give for why the non-endowment clause should be qualified by the principle of State support for denominational education. Barrington J argued, citing the analysis previously given by the Supreme Court in *The Employment Bill 1996*<sup>60</sup>, that in so far as Article 44.2.4° of the Constitution had expressly referred to and contemplated State aid for schools under the

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<sup>58</sup> [1998] 3 IR 321. See G Whyte, 'Religion and Education - the Irish Constitution' (IHRC/TDC Conference on Religion and Education 2010); and Hogan and Whyte, *The Irish Constitution* [7.8.63-70].

<sup>59</sup> Of course it is true that Keane J did also summarily endorse, but merely in the alternative, the analysis of Costello J (at 366).

<sup>60</sup> [1997] 2 IR 321.

management of different religious denominations, the earlier part of the same Article could not reasonably be interpreted as precluding such aid.<sup>61</sup> Moreover the learned judge noted that

‘...the matter does not end there. Article 42 of the Constitution acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of the parents to provide for the religious and moral, intellectual, physical and social education of their children. Article 42.2 prescribes that the parents shall be free to provide “this education” (*i.e. religious*, moral, intellectual, physical and social) in their homes or in private schools or “in schools recognised or established by the State”. In other words the Constitution contemplates children receiving religious education in schools recognised or established by the State but in accordance with the wishes of the parents.’<sup>62</sup>

Thus, in sum, it is primarily Articles 42.2 and 44.2.4, not Article 42.4,<sup>63</sup> which the Supreme Court invokes to aid the proper interpretation of (or, as Whyte says, ‘to qualify’) the bar on religious endowment in 44.2.2°. Patently this represents an attempt to secure a harmonious reading of the Constitution and it is unclear how it does any violence to the text. Indeed, by contrast, Whyte does not give any ‘compelling reason’ as to how or why the Court should have read the non-endowment clause as a qualification on support for denominational education. For the analogy drawn by the Court, between payment of the salaries of teachers in a denominational school (envisaged and permitted on the face of the Constitution) and the payment of chaplains, seems reasonable. In both cases, the State is conferring a financial benefit upon the religious body in charge of the school by saving it the expense of paying for staff members employed to uphold and further the particular educational ethos of the school. If such payments to teachers are not an endowment (as the harmonious reading above would suggest), then it is reasonable to conclude that such payments to those involved in other aspects of the school’s ethos (such as pastoral care) are not either.

Whyte’s second criticism can be understood as speaking to the soundness of this analogy. For as he puts it:

‘Second, Article 42.4 is construed both by Costello J in the High Court and by the Supreme Court as *obliging the State actively to assist parents, through the educational system, with the religious and moral formation of their children* whereas one could plausibly construe the reference in Article 42.4 to the rights of parents in

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<sup>61</sup> [1997] 2 IR 321 at 356. Indeed Keane J at 359 made the same point regarding Article 44.2.4°.

<sup>62</sup> [1997] 2 IR 321 at 357 (emphasis in original).

<sup>63</sup> Keane J specifically prefixes the section of his judgment where he cites Article 42.4 with the words: ‘Accordingly, if one leaves to one side for the moment the question of “endowment” of religion, there is no reason in principle why the State, through its different organs, should not confer benefits on religious denominations, provided – and it is, of course, a crucial proviso – that in doing so it remains neutral and does not discriminate in favour of particular religions.’ (359) It is wholly in that context that Keane J goes on to cite 42.4 along with 44.2.3° and 44.2.4°.

such matters as a restraint upon, rather than authorisation for, State activity.’  
(emphasis added)<sup>64</sup>

To recall Article 42.4 states:

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.

We noted above that Article 42.4 appears ambivalent between the positive and negative aspects of religious freedom. Thus while we agree with Whyte that one could plausibly construe, and in relevant contexts apply, this section as imposing a negative duty on the State not to interfere with the parent’s decisions regarding the religious and moral formation of their children, it does not follow that one can plausibly construe it as such to the exclusion of any positive duty in other contexts where appropriate. Indeed, Whyte offers no argument for this later contention and it is not difficult to see the problem such an exclusive interpretation would create. For if read as exclusively negative, and thus as a specification of, rather than a limit on, the non-endowment clause in the area of education, it would simply be impossible to reconcile with the permissive contemplation of denominational education (religious, moral, intellectual, physical and social) in Articles 42.2 and 44.2.4.

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<sup>64</sup> In fact it is only Costello J who draws attention to reference to ‘religious and moral formation’ in Article 42.4 (at 341). Keane J only cites the Article in the context noted above (see note 63). It is interesting to note that in the almost identical paragraph in Hogan and Whyte, *The Irish Constitution* (at [7.6.49]) from which this section of Whyte’s conference paper was taken, the holding which I have italicised is attributed specifically to Barrington J although no mention is made of Article 42.4 in his judgment.

#### IV. INTERNATIONAL HUMAN RIGHTS LAW AND PARENTAL CHOICE

The most important point to note in respect of international human rights law is that it largely under-determines the question of how individual states should best secure pluralism and diversity in education. As a recent UNESCO report puts it:

‘There is no single approach to respecting religious and cultural rights in education systems.’<sup>65</sup>

In evaluating the key constitutional principles governing Irish law in this area in light of international human rights law (what we termed above the ‘international law critique’), however, it is useful to distinguish as follows three different modes which the critique might conceivably take:

- (1) The legal critique – i.e. that the State is under a legal obligation, under Irish law, to act in conformity with the requirements of an international human rights instrument solely on the basis of the State’s signing and ratifying of that instrument.
- (2) The political critique – i.e. that we should amend our Constitution if necessary in order to comply with and make effective within the jurisdiction the provisions (as articulated by any connected review body, whether authoritatively or not) of any international treaty which we have signed and ratified.
- (3) The moral critique – i.e. the standard or rule articulated at the level of international human rights law (whether authoritatively or not) is simply *better*, morally speaking, and our Constitution should be amended accordingly.

It must be clearly recognised at the outset that the claim made by the legal critique is mistaken. There is no legal right or duty that can be directly invoked or enforced in Irish Courts with regard to any act or omission by the State solely on the grounds that the particular right or duty is provided for in an international treaty ratified by the State, such as the ECHR, the ICCPR, the CRC or the ICERD.<sup>66</sup> Nor does the State’s ratification of an international human rights instrument create a ‘legitimate expectation’ that allows an individual to plead that instrument, or the determinations of any body established by that instrument, directly in municipal law.<sup>67</sup> Thus, in the absence of any justiciable or legal duty on the part of the State to incorporate into municipal law the contents of a ratified international human rights instrument, it becomes clear that the political critique in fact collapses into either (i) a political claim that we should incorporate every proposed element

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<sup>65</sup> UNESCO 78. See also the concluding two paragraphs of A Mawhinney, ‘International Human Rights Law and the Place of Religion in Schools’ (IHRC/TCD Conference on Religion and Education 2010).

<sup>66</sup> *In Re O Laighleis* [1960] IR 93. With regard to the status of ECHR in particular and the effect of the European Convention on Human Rights Act 2003 see also the more recent Supreme Court decision in *McD v L* [2009] IESC 81.

<sup>67</sup> *Kavanagh v The Governor of Mountjoy Prison* [2002] IESC 13.

of international human rights law into our municipal law regardless of its substantive merits or (ii) a straight-forwardly moral claim.

But in acting in response to any such political claim an Irish Government must in turn either act in a manner compatible with the principles of Irish constitutional law or propose the necessary constitutional amendments. If the latter course is preferred, then the critique must again function at the level of a stand-alone moral claim which it is up to the citizens of Ireland to evaluate substantively on its merits (as opposed to its legal or political pedigree) and judge accordingly. At this level, the philosophical case for a pluralistic school system set out in the earlier Iona Institute paper becomes relevant and, it is submitted, is more sound than any contrary approach whether purportedly advocated by international law or not.<sup>68</sup>

#### **IV.1 The relevance and authoritative identification of international human rights law**

The Iona Institute fully supports the view that the international human rights treaties to which the State is a party are relevant to the formation of future Government policy in Ireland with respect to ensuring religious freedom in education. Moreover, it believes that the rights set out in these legal instruments are both substantively sound and legally compatible with the key Constitutional principles set out above.

A clear distinction must be drawn, however, between the texts of these ratified treaties and the interpretations of those texts proposed by the various bodies established by them. For, in the first place, the interpretations given to these texts by such bodies are not authoritative as a matter of either international<sup>69</sup> or Irish<sup>70</sup> law. But, secondly, and more importantly, these interpretations are sometimes poorly reasoned, philosophically unsound, and at variance with

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<sup>68</sup> See note 1 above.

<sup>69</sup> ‘It seems to be well accepted that the findings of the treaty bodies do not themselves constitute binding interpretations of the treaties...Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body [sic] expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty.’ International Law Association (International Human Rights Law and Practice Committee), ‘Final Report of the Impact of Finding of the United Nations Human Rights Treaty Bodies’ (2004) 71 Int’L. Ass’n Rep. Conf. 621–626, 627.

<sup>70</sup> ‘The notion that the “views” of a Committee even of admittedly distinguished experts on international human rights, though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is patently unacceptable. To be fair, even in international law, neither the Covenant [of Civil and Political Rights] nor the Protocol make such a claim. Neither the Covenant nor the Protocol at any point purports to give any binding effect to the views expressed by the [UN Human Rights] Committee. The Committee does not formulate any form of judgment or declare any entitlement to relief. Its status in international law is not, of course, a matter for this court. It suffices to say that the appellant has not furnished any arguable case for the effect of the Committee’s views. His case encounters the “insuperable obstacle” identified in the judgment of Maguire C.J. [in *In Re O Laighleis* [1960] IR 93, i.e. ‘the reservation by Article 15, section 2, sub-section 1 of the “sole and exclusive power of making law for the State” to the Oireachtas.’]’ *Kavanagh v The Governor of Mountjoy Prison* [2002] IESC 13 per Fennelly J (Keane CJ, Denham, Hardiman, Geoghegan JJ concurring).

both the actual text of the relevant Covenant as well as its *travaux préparatoires*. This last point is important as the Vienna Convention on the Law of Treaties (1969) makes clear that the interpretation of international treaties is to be governed by their actual text (Article 31.1) and can be supplemented by analysis of their preparatory materials (Article 32).

Moreover, the rights recognised in these texts are formulated in general, abstract and under-determined language. Consequently, it is unavoidable that the interpretations or applications of these rights offered by the respective human rights bodies (particularly at first instance) will be informed by and dependent upon certain evaluative (i.e. moral and political) judgments which themselves cannot be justified by reference to the text.<sup>71</sup>

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<sup>71</sup> The point is perhaps trite but it is important and the following concluding section from a recent critical analysis of human rights adjudication by Gunnar Beck is worth repeating in full:

‘Rights are not worded sufficiently precisely to prevent value conflict; nor are legal principles sufficiently clear, autochthonous and hierarchical to overcome the dependence of human rights adjudication on foundationalist values, and neither can they escape the normative dilemmas and conceptual ambiguities attendant on those foundationalist values. In many actual cases of clashes between legally recognised rights, no less than in the theoretical sphere of conflict between alternative sets of rights derived from rivalrous pluralistic values, there will always be cases where choices between conflicting rights can only be justified in terms of the values underlying these rights. Thus for as long as the human rights de facto recognised in human rights instruments are capable of colliding and, in addition, might also collide with public security or other public interest requirements, the philosophical dilemma of value pluralism remains relevant to the judicial and political choices that need to be made in such cases. Competing pluralistic values are ethically and legally indeterminate and cannot furnish detailed prescriptions of how rights may be balanced best. Value pluralism means that indeterminacy in human rights adjudication is not merely an unavoidable consequence of legislative and judicial fallibility but a logical result of normative necessity.

It is common to draw a distinction, often a stark one, between the issue of a philosophical justification for human rights, which is regarded as the remit of philosophers, and the less abstract issue of bringing coherence into judicial and political human rights language as the basis and criticism for adjudication and legislation. This strict juxtaposition is mistaken: the foregoing discussion has shown that the normative and conceptual contestability of human rights not only raises fundamental normative questions about the justification for judicial value judgments; it likewise calls into question the very basis for the distinction between political and judicial judgments as both seem inescapably wedded to value judgments. Judicial decisions defining the meaning of individual rights or balancing the countervailing requirements of competing rights lack both a distinctive justificatory legal and normative foundation. They lack certainty not simply as a matter of experience but by logical necessity, and consequently share the characteristics of political decisions and balancing acts, just as any bill of rights must be regarded as essentially a political document to the extent to which its provisions are incapable of rational justification in terms of a coherent ideal of human ends but explicable above all in terms of political choices made in a particular political and social context. Value pluralism and conceptual uncertainty thus do not only provide a useful theoretical framework for analysing the use and abuse of judicial discretion in human rights adjudication; they likewise undermine the idea of human rights as ultimate legal values in a society characterised by ethical pluralism. There is nothing that renders human rights normatively less contentious than many other contested moral or political concepts. Human rights therefore lack the overriding normative status that is commonly assumed in justifying their privileged legal status, and they likewise lack the attributes of clarity, precision or non-reducibility that would facilitate or allow for their justiciability in a way in which the conceptual structure of other moral claims does not. In the absence of moral truth, the priority of the right over the good seems morally arbitrary, judges make rights, and their choices remain political.’

G Beck, 'Human rights adjudication under the ECHR between value pluralism and essential contestability' [2008] *European Human Rights Law Review* 214 243-244.

Too often in their analysis of religious freedom in education these bodies have introduced evaluative judgments based upon undefended and unacknowledged secularist assumptions. In particular two inchoate but prevalent background assumptions can be identified and articulated as follows:

- (1) That some version of secularism (*laïcité*) is the only possible means for properly safeguarding, what the ECtHR has called, the ‘possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention.’<sup>72</sup>
- (2) That complete value-neutrality in education is possible and that a secular education system or school can be devised within which ‘education and teaching in conformity with their own religions and philosophical convictions’<sup>73</sup> can be equally and simultaneously secured for every parent, whatever their beliefs.

Neither of these claims has been expressly argued for by any of the international rights bodies but it is clear that at key points in their analyses of cases and interpretations of treaty texts such or similar assumptions are often being relied upon.

Assumption (1) is a substantive and controversial claim of political theory which cannot be found or grounded in the text of any international treaty. It involves a mix of philosophical and factual judgments as to what is and is not possible and proper. Such judgments are clearly underdetermined by the authoritative legal texts and must stand or fail on the basis of their reasonableness. The Iona Institute has already provided a philosophical argument contesting this connection between pluralism and secularism and defending the important role of denominational education in supporting and fostering pluralism.<sup>74</sup> Assumption (2) constitutes a simplistic view of education which has been addressed in Part II above.

In the following sections each of the principal human rights documents cited in the IHRC Discussion Paper will be considered in more detail.

## **IV.2 European Convention on Human Rights**

That there are tensions and inadequacies in the European case law concerning religious freedom is today well acknowledged.<sup>75</sup> This is perhaps understandable given the complexity

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<sup>72</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (Application no. 5095/71; 5920/72; 5926/72) 7 December 1976, para 50.

<sup>73</sup> ECHR Protocol 1, Article 2.

<sup>74</sup> See note 1 above.

<sup>75</sup> See, e.g., I Leigh, 'New trends in religious liberty and the European Court of Human Rights' (2010) 12 *Ecclesiastical Law Journal* 266; ZR Calo, 'Pluralism, Secularism and the European Court of Human Rights' (2010) 26 *Journal of Law and Religion* 261; and C Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, Oxford 2010) 200 (cited in Calo, 'Pluralism, Secularism and the European Court of Human Rights' 267). See also references cited below in this section.

of the issues involved and the diversity of political and social situations across the membership of the Council of Europe. Two themes in particular appear to emerge from the Court's case law. The first is the importance of pluralism for the health and survival of liberal democracy and the need for government policies relating to religion and education to protect and foster pluralism.<sup>76</sup> The second theme is less clearly articulated, more recent and more controversial than the first and, in light of the Grand Chamber decision in *Lautsi v Italy*, arguably now of questionable status. It is the idea that pluralism requires state neutrality between religions *and* that such neutrality requires, in effect, a secularist model of public and political life. This is evident, for example, in the judgments in *Dogru v France*<sup>77</sup> and *Kervani v France*<sup>78</sup> which had the effect of indirectly giving the Court's blessing to the 2004 French law restricting the public display of religious symbols,<sup>79</sup> a law the effects of which the Human Rights Committee has claimed to be a breach of Article 18 of the International Covenant on Civil and Political Rights.<sup>80</sup> The high water mark of this secularist tide was undoubtedly the Chamber judgment in *Lautsi v Italy* (see further below)<sup>81</sup> and thus the dramatic reversal of that decision by the Grand Chamber judgment of 18<sup>th</sup> March 2011 marks a significant change of emphasis by the Court away from what was an emerging secularist strand and back to the original pluralist conception of religion in education.

The very recent Grand Chamber decision in *Lautsi* will be considered further below. At this point, it is useful to highlight briefly some of the criticisms that had emerged concerning recent pre-*Lautsi* case law.

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<sup>76</sup> See *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgment, 7 December 1976 para 50 – which is consistently cited in all cases related to Article 2 of the First Protocol. See generally A Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights' (2007) 3 *European Constitutional Law Review* 367.

<sup>77</sup> Judgment, 4 December 2008.

<sup>78</sup> Judgment, 4 December 2008.

<sup>79</sup> As seen in the combined inadmissibility decisions of the Court a year later made on the basis of *Dogru* with respect to several challenges against the 2004 law. See '*Aktas v France*, Appl no 43563/08; *Bayrak v France*, Appl no 14308/08; *Gamaleddyn v France*, Appl no 18527/08; *Ghazal v France*, Appl no 29134/08 (17 July 2009), involving the wearing of the headscarf; and *J Singh v France*, Appl no 25463/08 and *R Singh v France*, Appl no 27561/08 (17 July 2009), concerning the wearing of the a 'keski', an under-turban worn by Sikhs.' (cited in Leigh at note 14).

<sup>80</sup> See the Committee's Concluding Observations on the fourth periodic report of France (CCPR/C/SR.2562, 22 July 2008, para 23).

<sup>81</sup> The Chamber judgment, for example, simply asserts without justifying argument at para 47: 'Schools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils can acquire knowledge about their respective thoughts and traditions.' See also *Sahin v Turkey*, 10 November 2005.

In a nuanced and wide-ranging 2010 analysis of the jurisprudence of Article 9 of the ECHR and Article 2 of the First Protocol, Dr Julie Ringelheim concludes an otherwise positive review by noting:

‘When one considers the Court’s jurisprudence on contestations regarding expressions of religion, or about religion, in the public sphere, whether in the democratic public debate or in public institutions, the weaknesses and shortcomings of its present conceptualisation of religious freedom come clearly into light... the uneasiness of European judges when faced with disputes relating to religious expressions in the public sphere may partly be due to the influence the classic secularisation theory exercises on their conception of the scope of religious freedom.’<sup>82</sup>

Ringelheim summarises the meaning and criticisms of secularisation theory and its role in ECHR case law as follows:

‘Importantly, secularization is both a descriptive and a normative theory: while proposing an analysis of the historical evolution of the place of religion in society, it also claimed that privatization and fading away of religion were indispensable to the development of modernity. In order for a society to be modern, it had to privatize religion; to relegate it to non-public and non-political spaces. Since the 1960s, however, this theory has been subject to numerous criticisms. On the one hand, empirical research has highlighted that outside Europe, modernity did not necessarily entail the decline of religiosity and marginalisation of religion. In Europe itself, which is considered the most secularized region in the world, secularisation process took different forms and attained different levels of intensity, depending on the dominant religious tradition (Catholicism, Protestantism or Orthodoxy) and on the history of state-church relations. On the other hand, several authors have emphasised the important role played by religious movements in the last forty years in social and political mobilisations in a number of countries. Based on these observations, Casanova in particular argues that, while the thesis of the differentiation of the secular sphere from religious institutions and norms remain valid, the privatization of religion is not necessary to modernity. Moreover, provided certain conditions are met, religions may enter the public sphere and assume the role of civil society actors, without endangering individuals’ freedom and modern differentiated structures.... Coming back to the ECtHR, we can see that its case law bears the mark of the secularisation theory, although the Court’s stance is not uniform and some of its rulings reflect other influences...’<sup>83</sup>

More critically, Dr Sylvie Langlaude concluded her 2006 survey of European case law on religious freedom by arguing:

However, despite this part of the case-law [dealing with the autonomy of religious communities] being much more community-oriented, religious communities still

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<sup>82</sup> J Ringelheim, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in C Ungureanu and L Zucca (eds), *A European Dilemma: Religion and the Public Square (forthcoming)* (Cambridge University Press, Cambridge 2010) (p 36-37 of manuscript on file with author).

<sup>83</sup> Ibid 19-20 (references omitted). See also Calo, 'Pluralism, Secularism and the European Court of Human Rights' 268-80 for an analysis and critique of the 'secular logic' present as a 'background assumption' in the reasoning of the ECtHr.

suffer from the Court's approach to neutrality and secularism. In particular, there is intrusion and interference within the more substantial aspects of the religious freedom and religious identity of communities. Ingwill Thorson Plesner argues that:

The practice and argumentation of Turkey in the *Refah* case hence does not only conflict with the liberal tradition regarding individual manifestations of religious identity in the public sphere, but also with the liberal tradition of respecting a certain legal autonomy for religious groups--a principle that had otherwise been supported by the Court.

... It appears then that the case-law is taking a strange and worrying direction. The main aspect of the case-law is the emphasis on the prevention of indoctrination, neutrality, secularism and laïcité. However, the Court does not seem to realize the negative consequences that this has on religious communities. There is a dichotomy in the Court's approach: it recognizes the principle of nonintervention of the State in the internal procedures of religious communities while at the same time restricting the legitimacy of certain religious practices.

...In the end, what is the point in recognizing some form of 'external' freedom of religion if the Court does not allow religious communities to engage in a number of religious practices or to hold their own 'ethical and religious precepts', simply because they are held not to be in accordance with neutrality and secularism? Unfortunately the Court's use of its discretion seems to interfere with this more substantial aspect of religious freedom. It contradicts itself, and seems to be destroying with one hand what it has built with the other.

... Under the banner of tolerance and pluralism, the Court has assessed that some religious practices were not in conformity with secularism and the prevention of indoctrination. Of course, the Court only responds to the cases that are brought before it. Yet we are left with the clear impression that the Court is trying, increasingly, to impose its own conception of secularism at an unacknowledged cost to religious freedom.<sup>84</sup>

In this regard, it is also worth citing from Ringelheim's discussion of how the uncritical endorsement of secularism by the Court in *Sahin v Turkey* actually undermines its commitment to pluralism.

'In the famous *Leyla Sahin v. Turkey* case (10 November 2005), the Court was asked to review the conformity with the European Convention of such a prohibition in higher education institutions in Turkey. The applicant is a Turkish female student who complains of being forbidden from wearing the headscarf within the university, in accordance with her religious beliefs. The Court, sitting as a Grand Chamber, rules by a majority of sixteen to one that no violation of Article 9 has occurred: the impugned measure is deemed justified by a legitimate aim, namely the protection of the rights of others and the preservation of public order. Like in *Otto-Preminger-Institut*, it relies heavily on the national margin of appreciation, claiming that domestic decision-making body's role must be given special importance 'where questions concerning the relationship between State and religions are at stake', and notably 'when it comes to regulating the wearing of religious symbols in educational institutions, especially (...) in view of the diversity of the approaches taken by national authorities on the

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<sup>84</sup> S Langlaude, 'Indoctrination, secularism, religious liberty, and the ECHR' (2006) 55 International & Comparative Law Quarterly 929-942-44 (references omitted).

issue.’ But according to information provided in the judgment itself, amongst the forty-seven parties to the Convention, only two states apart from Turkey, namely Azerbaijan and Albania, have introduced regulations on the wearing of headscarf at universities. On the other hand, the Court observes that in delimiting the extent of the margin of appreciation, it must have regard to what is at stake, in particular ‘the need to protect the rights and freedoms of others’ and to preserve ‘true religious pluralism, which is vital to the survival of a democratic society.’ Yet, it is a peculiar understanding of ‘true religious pluralism’ that is applied in this ruling.

First, the Court uncritically praises the principle of secularism (meaning *laïcité*), as interpreted by the Turkish Constitutional Court. Emphasising that the ban on the wearing of a headscarf in university premises was grounded on the notions of gender equality and secularism, it declares that this latter principle is not only consistent with the values underpinning the Convention, but may be considered necessary to protect the democratic system in Turkey. In consequence, Turkish authorities could legitimately ‘wish to preserve the ‘secular nature’ of the institutions concerned, and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.’ Yet, the interpretation of the *laïcité* concept adopted by the Turkish Constitutional Court is especially far-reaching: by virtue of this principle, the state may prohibit any religious manifestation for the sole reason of being public. This principle indeed is viewed by Turkish Constitutional judges as holding a higher place in the Constitutional hierarchy than the protection of religious freedom. This position rests on the idea that the *laïcité* of the state, and hence its religious neutrality, is jeopardized as soon as a person exteriorises his or her religious convictions in the public square, regardless of whether he or she is a state agent. According to this line of thought, neutrality does not only mean that the state should not favour one religion over others: religious expressions as such should be excluded from state institutions, and even from the public space in general. But this conception contradicts Article 9 ECHR which guarantees the freedom to manifest one’s religious convictions *in public*, and authorises restrictions to this freedom only under the condition that they are necessary to attain one of the aims listed in its second paragraph, and are proportionate to this objective. The Court will indeed admit the potential conflict between the Turkish conception of *laïcité* and freedom of religion a few years later in *Ahmet Arslan and Others v. Turkey* (2010)...<sup>85</sup>

In light of the foregoing and, in particular, the Grand Chamber decision in *Lautsi* the Iona Institute believes that it would be a mistake to base future government policy on an uncritical application of the secularist, as opposed to the truly pluralist, strand in the European Court’s past case law.<sup>86</sup> As noted already, there are many compelling reasons for rejecting secularism as an appropriate model for the safeguarding of pluralism in education.<sup>87</sup>

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<sup>85</sup> Ringelheim 26-29.

<sup>86</sup> This confusion of pluralism with secularism has been critically commented on by many observers. In addition to the articles cited above, see, e.g., I Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30 *Cardozo Law Review* 2669–2676-88; and the quotes and references given by Françoise Tulkens, Judge of the ECtHR and President of the Second Section, in F Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism' (2009) 30 *Cardozo Law Review* 2575–2587. See also the critiques of *Lautsi v Italy* cited in note 110 below.

<sup>87</sup> See references in notes 1 and 29 above.

Moreover, the text of Article 9 of the Convention and Article 2 of the First Protocol are, on their face, wholly compatible with the Irish constitutional position set out above. To recall, Article 2 states:

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 religions and philosophical convictions.

The first clause of the second sentence clearly implies that there are certain functions in relation to education and to teaching which a State may or may not decide to assume.<sup>88</sup> Once it has assumed such functions, however, then it is bound by the right set out in the second clause of that sentence. In this respect one must ask what ‘in conformity’ means here. Does it mean (more positively) ‘conforming to’ or ‘according to’ or does it mean (more negatively) ‘not in conflict with’ or ‘not contradicting’? The meaning of this article was expressly considered for the first time in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*,<sup>89</sup> in the course of the Court’s rejection of the respondent government’s contention that State run schools were not covered by Article 2, as follows:

‘The Court notes that in Denmark private schools co-exist with a system of public education. The second sentence of Article 2 is binding upon the Contracting States in the exercise of each and every function - it speaks of "any functions" - that they undertake in the sphere of education and teaching, including that consisting of the organisation and financing of public education.

Furthermore, the second sentence of Article 2 must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching.

The "travaux préparatoires", which are without doubt of particular consequence in the case of a clause that gave rise to such lengthy and impassioned discussions, confirm the interpretation appearing from a first reading of Article 2. Whilst they indisputably demonstrate, as the Government recalled, the importance attached by many members of the Consultative Assembly and a number of governments to freedom of teaching, that is to say, freedom to establish private schools, the "travaux préparatoires" do not for all that reveal the intention to go no further than a guarantee of that freedom. Unlike some earlier versions, the text finally adopted does not expressly enounce that freedom; and numerous interventions and proposals, cited by the delegates of the

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<sup>88</sup> This is *not* to say that the State would be free, for example, to assume no functions in relation to education. The duty to secure an individual’s right to education ultimately rests on the State.

<sup>89</sup> Judgment, 7 December 1976.

Commission, show that sight was not lost of the need to ensure, in State teaching, respect for parents' religious and philosophical convictions.

The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.'

The Court thus concludes, as the Commission did unanimously, that the Danish State schools do not fall outside the province of Protocol No. 1 (P1). In its investigation as to whether Article 2 (P1-2) has been violated, the Court cannot forget, however, that the functions assumed by Denmark in relation to education and to teaching include the grant of substantial assistance to private schools. Although recourse to these schools involves parents in sacrifices which were justifiably mentioned by the applicants, the alternative solution it provides constitutes a factor that should not be disregarded in this case. The delegate speaking on behalf of the majority of the Commission recognised that it had not taken sufficient heed of this factor in paragraphs 152 and 153 of the report.'

This is an important discussion because it shows that the Court accepts in principle that Article 2 asserts the positive aspect of parental choice (what it terms 'freedom of teaching' – a right expressly protected by Article 9) as well as the negative aspect (which places limits on what the Court terms 'State teaching'). Thus both aspects must be kept in mind when the Court goes on to declare the purpose of the Article as the safeguarding of 'pluralism in education'. One issue that is not altogether clear is what would count as 'State teaching' in Ireland given that the majority of State-supported schools are private and there is no mandatory State-made curriculum of religious education. It cannot be too readily assumed that judgments of the Court regarding the criteria for 'State teaching' in the distinctive education arrangements of Denmark, Norway, France and Turkey can be applied directly to the situations in Irish primary and post-primary voluntary schools.

The remainder of this section considers three of the ECHR judgments discussed in some detail in the IHRC Discussion Paper.

1. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*<sup>90</sup>

The European Court of Human Rights has on occasions helped itself, in the course of applying the Convention, to secularist assumptions not supported by the Convention itself. This reached a controversial new height in the decision of *Lautsi v Italy*<sup>91</sup> (see below), but such trends were evident in an early case dealing with Article 2 of the First Protocol. In

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<sup>90</sup> (Application no. 5095/71; 5920/72; 5926/72) 7 December 1976.

<sup>91</sup> Judgment, 3 November 2009.

*Kjeldsen, Busk Madsen and Pedersen v. Denmark*<sup>92</sup> the applicants claimed that the denial of a right to exempt their children from State-mandated sex education was a violation of their rights under Article 2 of the Protocol. The Court rejected their claim in a decision which is very hard to reconcile with its more recent treatment of State-mandated religious education or the presence of religious symbols in classrooms.

It is important to consider the nature of the programme of sex education to which the applicants objected. Firstly, it was mandatory in all public schools. Secondly, it was integrated, by law, into the whole curriculum so that it was not practically possible to opt out from it. Thirdly, there was no provision for opt outs though private schools in the state were fully exempt from the sex education regulations. Fourthly, it involved, what the Court termed, ‘considerations of a moral order’ (para 51). This was euphemistically described by the Court as follows:

‘...such instruction clearly cannot exclude on the part of teachers certain assessments capable of encroaching on the religious or philosophical sphere; for what are involved are matters where appraisals of fact easily lead on to value-judgments. The minority of the Commission rightly emphasised this. The Executive Orders and Circulars of 8 June 1971 and 15 June 1972, the "Guide" of April 1971 and the other material before the Court (paragraphs 20-32 above) plainly show that the Danish State, by providing children in good time with explanations it considers useful, is attempting to warn them against phenomena it views as disturbing, for example, the excessive frequency of births out of wedlock, induced abortions and venereal diseases. The public authorities wish to enable pupils, when the time comes, "to take care of themselves and show consideration for others in that respect", "not ... [to] land themselves or others in difficulties solely on account of lack of knowledge" (section 1 of the Executive Order of 15 June 1972).’

Earlier in the judgment the Executive Order introducing the curriculum was cited which stated, *inter alia*, that schools were required ‘to provide instruction...on contraception...’ (para 31). The Court also noted that ‘while the Bill was being examined by Parliament, the Christian People’s Party tabled an amendment according to which parents would be allowed to ask that their children be exempted from attending sex education. This amendment was rejected by 103 votes to 24.’ (para 33). So it was clear from the facts that the State, in full recognition of the objection of certain religious groups, was requiring parents to have their children educated about specific practices which some parents may consider immoral. In light of this it is remarkable how the Court justified its decision. Firstly, in a passage directly after the one cited above, it asserted its finding as follows:

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<sup>92</sup> (Application no. 5095/71; 5920/72; 5926/72) 7 December 1976.

‘These considerations are indeed of a moral order, but they are very general in character and do not entail overstepping the bounds of what a democratic State may regard as the public interest. Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour.’ (para 51)

The reduction of parental objections to sex education courses to the claim that they advocate a specific kind of behaviour overlooks the many ways in which such education may be objectionable to parents and may interfere with their right to the education of their children in inconformity with their philosophical and religious convictions.<sup>93</sup> But the Court goes on to justify its verdict by appeal to two reasons. First it gives a list of things which it considers would be unacceptable for the curriculum to do but which it claims are not done by it:

‘It does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible.’

Thus it appears that the threshold is set rather high in terms of ‘exalting’ or ‘inciting’ certain practices. By contrast, such a test of express inducement was not applied by the Court in the more recent cases involving religious education and religious symbols. Indeed Langlaude has specifically noted the very broad conception of indoctrination underlying the Court’s reasoning in recent cases<sup>94</sup> and the serious problems this raises for individual believers.<sup>95</sup> This later conception of indoctrination amounts to a clear departure from the narrower understanding in *Kjeldsen*.<sup>96</sup> Arguably, however, the recent Grand Chamber decision in *Lautsi* represents a welcome return to a narrower conception of indoctrination through (i) its distinction between a passive symbol and ‘didactic speech or participation in religious

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<sup>93</sup> For a detailed discussion of the problems inherent in any claim to value-neutral sex education and the various ways in which sex education in State schools may violate the duty of neutrality see T McLaughlin, ‘Sex Education, Moral Controversy and the Common School’ in D Carr, M Halstead and R Pring (eds), *Liberalism, Education and Schooling* (Imprint Academic, Exeter 2008) esp. 270-81. These include (i) the articulation of curricula on biased value assumptions, (ii) failures to include certain moral viewpoints, (iii) an implied relativism in reducing differing religious or other viewpoints to mere preferences, (iv) insensitivity to the offence that may be caused by the way the sex education is conducted, (v) the possibility that an unduly narrow range of skills may be proposed for development in students, (vi) danger of neglecting various sensitivities which arise in relation to illicitly value-laden language which can be used in programmes of sex education.

<sup>94</sup> E.g. *Dahlab v Switzerland*, admissibility decision, 15 February 2001 (discussed further below); *Sahin v Turkey*, judgment, 10 November 2005 (discussed above); *Lautsi v Italy*, Chamber judgment, 3 November 2009 (reversed by Grand Chamber, 18 March 2011).

<sup>95</sup> Langlaude 929-34.

<sup>96</sup> It is submitted here that the conception of indoctrination assumed by the Court in *Kjeldsen* was substantially sound, but its application to the facts of the case was flawed.

activities<sup>97</sup> and (ii) its recognition of the importance of the overall context and factual circumstances for the forming of a proper perspective.<sup>98</sup>

The second reason given by the Court in *Kjeldsen* (which, again, in recent cases would have supported governments in their defence of public religious education) has also been silently dropped by the ECtHR. That reason was as follows:

‘Further, it does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents’ own religious or philosophical convictions.’

Again, this seems to set a very high bar for parents wishing to show a breach of their negative right to education of their children in conformity with their own religions and philosophical convictions. So far as the State does not interfere with the parents’ right to advise and guide their children, presumably *outside school hours*, then this will be considered a relevant factor in assessing the impact of what happens during obligatory classes.

Thus *Kjeldsen* is a case where the negative right to religious freedom in education is interpreted in a severely restricted manner in circumstances where religious applicants seek to withdraw their children from a mandatory, integrated, secular curriculum of sex education involving ‘considerations of a moral order’ and expressly requiring the teaching of practices deemed immoral by the parents. Indeed a final telling insight into the Court’s mindset is given by the penultimate paragraph of the Court’s decision on the alleged violation of Article 2 of the Protocol where it remarked, after having justified its decision and without explaining the relevance of this observation for this decision, that:

‘Besides, the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions.’ (Para 54).

The Court had outlined these sacrifices and inconveniences at para 18:

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<sup>97</sup> Para 72.

<sup>98</sup> Para 74.

‘The applicants claim that there are insufficient private schools and that their pupils frequently have to travel long distances to attend them; moreover, parents wishing to send their children to a private school in Copenhagen have to enter them on waiting lists at least three years in advance.’

What is one to make of this parting observation that there was always the option for religious parents to remove their children from the public system if they wanted to and pursue the more troublesome alternative of private education? In the absence of any express link with the Court’s reasoning, it seems to reveal a certain predisposition to view religious freedom as presumptively a less important interest in the face of the purportedly neutral ‘public interests’ served by secular sex education. Moreover, the Court’s willingness to leave unquestioned the State’s decision to exempt private schools from a course which the State argued was neutral and of major public importance is in stark contrast to its approach in later cases, such as *Zengin v Turkey*<sup>99</sup> where the mere existence of an opt-out for Jews and Christians from the religious studies course was treated by the Court as undermining the Turkish government’s claim that the course was religiously neutral (see para 74).

## 2. *FolgerØ v Norway*.<sup>100</sup>

Arguably the most important recent case for present purposes since *Kjeldsen* is *FolgerØ v Norway*.<sup>101</sup> The key findings of the case are summarised in the IHRC Discussion Paper.<sup>102</sup> It suffices here to note a number of observations as to its relevance to the situation in Ireland.

Norway has a State religion and a State Church, of which 86% of the population are members. Article 2 of the Constitution provides: ‘Everyone residing in the Kingdom shall enjoy freedom of religion. The Evangelical Lutheran Religion remains the State’s official religion. Residents who subscribe to it are obliged to educate their children likewise.’ The ‘Christianity, Religion and Philosophy’ (KRL) subject was compulsory in every primary school in the country. The Grand Chamber, by only a bare majority of 9 to 8, found a violation of the applicants’ rights under Article 2 of the First Protocol in light of the conjunction of two considerations. The first was the *qualitative* priority given to Christianity

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<sup>99</sup> Judgment, 9 October 2007.

<sup>100</sup> Grand Chamber Judgment, 29 June 2007.

<sup>101</sup> Grand Chamber Judgment, 29 June 2007.

<sup>102</sup> Paragraphs 37-38. The text in the fifth bullet point (at p. 11 of the Discussion Paper) needs clarification in that the requirement that information be conveyed by the State in an objective, critical and pluralistic manner (the requirements set out originally in *Kjeldsen*) may only form the basis of a violation of the Protocol in circumstances where an adequate opt out option is not available.

in KRL over other faiths and philosophies and the second was the difficulty and complexity of the partial opt-out provided. There are several points to note here.

First, the Court did not object per se to a *quantitative* prioritising of Christianity in the curriculum:

‘... the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court's opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (see, *mutatis mutandis*, *Angelini v. Sweden* (dec.), no 1041/83, 51 DR (1983). In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State's margin of appreciation in planning and setting the curriculum.’<sup>103</sup>

This is an important point, which was re-affirmed by the Grand Chamber in *Lautsi*,<sup>104</sup> as it answers a concern raised in the IHRC Discussion Paper which, at para 18, stated in respect of the Primary School Curriculum section titled ‘Pluralism’:

‘It might be argued that the centrality given to the “Christian heritage and tradition in the Irish experience”, in the Curriculum seems to be somewhat at odds with the pluralist ethos also promoted by the Curriculum.’<sup>105</sup>

Second, the violation consisted, specifically, in the absence of a full, rather than a partial or conditional, exemption in circumstances where the information and knowledge included in the State-mandated curriculum was not conveyed in an objective, critical and pluralistic manner.<sup>106</sup> There is no equivalent State-imposed mandatory curriculum of religious education in Ireland. Moreover, there is a constitutionally recognised right to opt out from religious instruction.

Third, while the Court reiterated its holding in para 50 of *Kjeldsen, Busk Madsen and Pedersen*, that the ‘second sentence of Article 2 of Protocol No. 1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the “democratic society” as conceived by the Convention’, the possibility of

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<sup>103</sup> Para 89. See also *Zengin v Turkey*, Judgment, 9 January 2008 at para 63.

<sup>104</sup> *Lautsi v Italy*, Grand Chamber Judgment, 18 March 2011, para 71.

<sup>105</sup> The IHRC comment also overlooks Article 29(1)(c) of the Convention of the Rights of the Child which seems to permit and require a distinct place for the ‘national values’ of the country in which one lives in addition to learning about other civilizations: ‘1. States Parties agree that the education of the child shall be directed to: ... (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.’

<sup>106</sup> *FolgerØ v Norway*, Grand Chamber Judgment, 29 June 2007, para 102.

achieving pluralism in education through a diversity of school *types* was given no proper or detailed treatment by the judgment. Rather its rejection of this option was expressly limited to the specifics of the case<sup>107</sup> and it must be considered to remain an equally valid course of action for Ireland to pursue – particularly in light of Grand Chamber’s conclusion in *Lautsi* that the Contracting States ‘enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’<sup>108</sup>

### 3. *Lautsi v Italy*<sup>109</sup>

Much has been written criticising the coherence and reasonableness of the Court’s Chamber judgment in *Lautsi*.<sup>110</sup> Given that this decision has now been decisively reversed on appeal by the Grand Chamber in a judgment that is now the leading case in this area it is proposed to offer only a brief discussion of the first judgment here before considering the most relevant points from the Grand Chamber decision

#### (a) Chamber (Second Section) Judgment

It suffices to bring the following critical comments of Prof Ian Leigh to the attention of the IHRC in support of the criticisms made above as to the unfounded use of secularist assumptions in recent ECHR case law.

‘It is clear then that in the ECtHR’s view by requiring the displaying of crucifixes in its schools the Italian state was aligning itself with the Catholic church and that this compromised its duty of neutrality:

“The state is obliged to religious neutrality in public education where attendance is required irrespective of religion and must seek to instill [sic] in students critical thinking. The Court does not see how display in classrooms of public schools of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism that is

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<sup>107</sup> ‘According to the Government, it would have been possible for the applicant parents to seek alternative education for their children in private schools, which were heavily subsidised by the respondent State, as it funded 85% of all expenditure connected to the establishing and running of private schools. However, the Court considers that, *in the instant case*, the existence of such a possibility could not dispense the State from its obligation to safeguard pluralism *in State schools* which are open to everyone.’ (Para 101, emphasis added).

<sup>108</sup> *Lautsi v Italy*, Grand Chamber Judgment, 18 March 2011, para 69.

<sup>109</sup> Chamber (Second Section) Judgment, 3 November 2009; Grand Chamber Judgment (reversing) 18 March 2011.

<sup>110</sup> See, e.g., Weiler; and the Written Comments prepared as an amicus curiae for the Grand Chamber by a 37 member group of law professors from 11 countries coordinated by Notre Dame Professor Paolo Carozza available on-line here <http://www.becketfund.org/files/writtencomments.pdf> . Further details about this document are available on-line here [http://www.strasbourgconsortium.org/index.php?blurb\\_id=897](http://www.strasbourgconsortium.org/index.php?blurb_id=897)

essential to the preservation of a ‘ democratic society’ as conceived by the Convention.”

In reasoning thus the Court seems to have imported a strong duty of state neutrality-through-separatism that cannot be found in the Convention text. It is hard to avoid the conclusion that the ideal pattern of state-religion relations that the Court appears to have in mind is a secular state. The difficulty, of course, is that this ignores the context in which previous dicta about neutrality were given; namely in decisions applying the margin of appreciation to states, such as Turkey and France, that do have a constitutional guarantee of secularity. Why states that have chosen a different constitutional pattern in order to protect human rights, religious liberty included, should all be squeezed into the same mould is far from obvious. Secularism may be one way to protect religious liberty but there is certainly room for debate about whether it is the only or best way.

Whether state neutrality requires the removal of religious symbols depends on a number of implicit stages in the Court's reasoning: that symbols have a coercive power over those who observe them that engages Article 2 of Protocol No. 1 (this has in effect already been conceded in earlier jurisprudence on the wearing of the veil by teachers), that the display of a symbol is irreconcilable with religious pluralism, and that removal of crucifixes is itself an act of religious neutrality. On the last point it can certainly be argued that different connotations apply to the removal of religious symbols than to their introduction. The move will be widely interpreted as a promoting a distinctive secular vision, that religious adherents may themselves feel threatened by. The Court's answer to this is that:

“The display of one or more religious symbols cannot be justified either by the request of other parents who want religious education consistent with their beliefs, nor, as the Government argues, by the necessity of a necessary compromise with political parties of Christian inspiration. Respect for beliefs of parents in education must take into account compliance with the beliefs of other parents.”

Quite reasonably, however, it may be asked why in balancing the respective beliefs of differing groups of parents the state is bound under the neutrality doctrine to tilt towards the minority view so that is the majority that must ‘ take account’ of others' beliefs, rather than vice versa. Nor is it clear in any event that this has to be a zero-sum game that results in the total removal of all crucifixes in all classrooms, rather than accommodating, for example, specific objections or permitting some local discretion.<sup>111</sup>

It is precisely to avoid the inadequacies of a zero-sum game approach to religious freedom and parental choice, that the Iona Institute strongly endorses the model of pluralism in education through a diversity of State-supported school types.

As noted by Leigh, the reasoning of the Chamber in *Lautsi* draws on its findings in an earlier case, *Dahlab v Switzerland*,<sup>112</sup> that the wearing of a headscarf by a primary school teacher constituted a ‘powerful external symbol’ which, although no complaints were made by any

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<sup>111</sup> Leigh 272-273 (references omitted).

<sup>112</sup> Decision, 15<sup>th</sup> February 2001.

students, parents, teachers or local inspectors (and there was no suggestion of any overt proselytising by the applicant at any point), the Swiss authorities were entitled to ban from the classrooms of public schools. Again, one may reasonably question the sustainability and wisdom of the very broad conception of indoctrination underlying the decision. Nevertheless, in *Dahlab* the Court was ultimately concerned with the margin of appreciation to be given to a member state, under Article 9, in restricting such symbols in schools in the interests of maintaining pluralism in a state-approved system of secular education. For this reason, even though the Court admitted that the effect of such a symbol on the children would be ‘very difficult to assess’ and the strongest conclusion it could reach was that ‘it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect’, it was content to give the Swiss authorities the benefit of the doubt and allow their judgment as to its negative impact on the rights of others to stand. In *Lautsi*, however, the Chamber adopted the already portentous (and secularist) idea that a religious symbol in a classroom is a ‘powerful *external* symbol’ (emphasis added) as means to effectively *deny* Italy any margin of appreciation for its own educational policy in this area and instead to impose a uniform trans-European standard regarding the acceptability of religious symbolism in certain public spaces. This represents a new departure, and (it was contended in the first edition of this submission paper, issued before the Grand Chamber judgment) a misguided over-reach by the Court, in taking principles developed in the Swiss, Turkish and French cases in articulating the margin of appreciation enjoyed by member states in adopting secularist measures against religious expression in education, and turning them into the basis for a common secularist standard applicable to all member states. This mistake has now been acknowledged and overturned by the Grand Chamber judgment of 18<sup>th</sup> March 2011 reversing the Chamber’s decision by a 15-2 majority.

#### (b) Grand Chamber Judgment

As noted above, the Grand Chamber judgment in *Lautsi* represents a clear distancing of the Court from the line of reasoning that had begun to emerge in recent cases suggesting a secularist uniformity at the expense of the Court’s earlier emphasis on religious pluralism and its recognition of a margin of appreciation for States. ‘Neutrality’ is no longer identified with a public space cleansed of religion and the Court expressly recognises that the contracting States enjoy a ‘wide margin of appreciation’ (para 61) in these matters. Some of the key findings relevant to the IHRC’s Discussion Paper are as follows:

- States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. [Para 60]
- The Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In the context of Article 2 of Protocol No. 1 that concept implies in particular that this provision cannot be interpreted to mean that parents can require the State to provide a particular form of teaching [Para 61]
- The setting and planning of the curriculum fall within the competence of the Contracting States. In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era. In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum. [Para 62]
- On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed. [Para 62]
- It is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1. [Para 66]

- The Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. That applies to organisation of the school environment and to the setting and planning of the curriculum. The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination. [Para 69]

It is noticeable, and significant in an Irish context, that the Court looked very favourably on the freedom allowed for religious expression in Italian classrooms and regarded this as an important factor in its reasoning. It noted that:

‘...Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were “often celebrated” in schools; and optional religious education could be organised in schools for “all recognised religious creeds” ... Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.’ (Para 74)

This point was also stressed by the concurring opinion of Judge Rozakis (joined by Judge Vajic) who cited paragraph 74 and added:

‘These elements, demonstrating a religious tolerance which is expressed through a liberal approach allowing all religions denominations to freely manifest their religious convictions in State schools, are, to my mind, a major factor in “neutralising” the symbolic importance of the presence of the crucifix in State schools. I would also say that this same liberal approach serves the very concept of “neutrality”; it is the other side of the coin from, for example, a policy of prohibiting any religious symbols from being displayed in public places.’<sup>113</sup>

### **IV.3 International Convention on Civil and Political Rights**

The IHRC Discussion Paper quotes paragraph 6 of General Comment 22 of the Human Rights Committee established by the ICCPR. The shortcomings in the analysis offered in that paragraph were well considered in the paper presented by Dr Oran Doyle at the IHRC/TCD conference on 27<sup>th</sup> November 2010. It is also important to be clear about the legal status of such Comments.

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<sup>113</sup> See also the remarks cited above from the concurring opinion of Judge Power (p. 20 above) distinguishing secularism from neutrality and pluralism.

‘The [Human Rights] Committee is authorized only to make general comments on reports. The states concerned are not required to take any action on the Committee’s comments, nor are the Committee’s conclusions submitted to an authoritative political organ empowered to make formal and specific recommendations to the government concerned.’<sup>114</sup>

That said, the Iona Institute would like to highlight paragraph 4 which outlines the positive aspect of religious freedom and, in particular, states:

‘...the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or *religious schools* and the freedom to prepare and distribute religious texts or publications.’ (emphasis added).

The IHRC Paper also mentions the 2004 case of *Leirvag v Norway*<sup>115</sup> which was decided by the Human Rights Committee under the provisions of the Optional Protocol allowing complaints by individuals to be heard by the Committee. Essentially the same factual matters were considered by the ECHR in *FolgerØ v Norway*<sup>116</sup> discussed above.

It is important to note, however, that nothing in *Leirvag* (or *FolgerØ*) touches upon or compromises the right of a State to support and fund denominational schooling. This can be seen clearly in the 1999 decision in *Waldman v Canada*.<sup>117</sup> Here the Committee held that (at para 10.6):

‘the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria.’

Indeed, this notion of allocating funding for denominational education by reference to reasonable or objective criteria, not based on an assessment of the merits of the religion itself, had already been articulated in Irish law approximately six months earlier in *O’Shiel v Minister for Education* [1999] 2 IR 321 at 347-8.

The analysis in *Waldman* is flawed, however, by the unsound and unargued for secularist assumption that a school which is non-religious is *ipso facto* neutral, and thereby consonant

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<sup>114</sup> LF Damrosch and others, *International Law: Cases and Materials (4th ed)* (West Group, St Paul, Minn 2001) 628.

<sup>115</sup> Communication No. 1155/2003, UN Doc CCPR/C/82/D/1155/2003 (23 November 2004).

<sup>116</sup> Grand Chamber Judgment, 29 June 2007.

<sup>117</sup> Communication No. 694/1996, UN Doc CCPR/C/67/D/694/1996 (5 December 1999).

with the requirements of Article 18(4). It is only on the basis of such an assumption (itself not justified by reference to Article 18 of the ICCPR) that the Committee could draw the distinction implied in this paragraph, namely that between the obligation of the State to fund secular public schooling and the merely *permissible* option of funding religious schools.

With regard to the Concluding Observations of the Human Rights Committee on Ireland's third periodic report<sup>118</sup> two points arise. First, it is striking to consider the range of politically contested policies which the Committee purports to advocate on the basis of the text of the ICCPR. From the introduction of civil partnership to the liberalisation of abortion law,<sup>119</sup> many issues not in any way mentioned in or addressed by the Covenant are raised by the Committee on the basis of what can only be described as its own independently originated ideological agenda. Second, and in light of the foregoing and the secularist bias already noted above, it is notable how restrained the Committee is in regard to its recommendations on education (at para 22):

‘The Committee notes with concern 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 (arts. 2, 18, 24, 26).

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.’

Indeed, this recommendation, with its advocacy of an increased diversity of school *types* rather than any encroachment on the status, funding or rights of privately run denominational schools, is wholly consonant with the recommendations of the Iona Institute.

#### **IV.4 Convention on the Rights of the Child**

The IHRC suggests at para 54 of its Discussion Paper that the Irish State may be in breach of its obligations under the Conventions of the Rights of the Child and, at paras 40 and 47, makes reference to Article 14 of that Convention.

Given the provisos set out in Article 14(2) and 14(3) however it is far from obvious that the Irish Constitutional principles of parental choice and diversity of state-supported school types (as opposed to their practical implementation or resourcing in any given situation) is in anyway inconsistent with Article 14.

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<sup>118</sup> CCPR/C/SR.2563 and 2564, 22 and 23 July 2008.

<sup>119</sup> Paras 8 and 13.

For one thing, claims that education in a religious school necessarily impedes the ‘development of the child's personality, talents and mental and physical abilities to their fullest potential’<sup>120</sup> or inhibits the development of ‘a critical mind with respect to religious matters’<sup>121</sup> are at best unsubstantiated assertions<sup>122</sup> and at worst inflammatory rhetoric, and at any rate have been well answered by educationalists.<sup>122</sup>

Secondly, Article 14 must be read in light of Article 28(1) and 29 which state:

#### Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

#### Article 29

1. States Parties agree that the education of the child shall be directed to:

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<sup>120</sup> Article 29(1)(a) of the CRC (cited in full below).

<sup>121</sup> *Zengin v Turkey*, ECtHR Judgment, 9 October 2007, para 69, *not* making this claim about religious schooling but referring to para 13(ii) of the Council of Europe Parliamentary Assembly Recommendation no. 1396 (1999) and para 14 of Recommendation no. 1720 (2005), cited in full at paras 26 and 27 of the judgment.

<sup>122</sup> See T McLaughlin, 'School Choice and Public Education in a Liberal Democratic Society' (2005) 111 *American Journal of Education* 442 and references cited therein, especially: S Burt, 'Comprehensive Educations and the Liberal Understanding of Autonomy' in K McDonough and W Feinberg (eds), *Citizenship and Education in Liberal-Democratic Societies* (Oxford University Press, Oxford 2003); M Halstead and T McLaughlin, 'Are Faith Schools Divisive?' in R Gardner, J Cairns and D Lavrton (eds), *Faith Schools: Consensus or Conflict?* (Routledge, Abingdon 2005); CL Glenn, 'Protecting and Limiting School Distinctiveness: How Much of Each?' in A Wolfe (ed) *School Choice: The Moral Debate* (Princeton University Press, Princeton 2003); JM O'Keeffe, 'Catholic Schools and Vouchers: How the Empirical Reality Should Ground the Debate' in A Wolfe (ed) *School Choice: The Moral Debate* (Princeton University Press, Princeton 2003); McLaughlin, 'The Ethics of Separate Schools'. See also P Weithman, 'Religious Education and Democratic Character' in N Biggar and L Hogan (eds), *Religious Voices in Public Places* (Oxford University Press, Oxford 2009).

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

While it is regrettable that Article 29(1) does not make express mention of the importance of spiritual and religious formation in education such matters are clearly encompassed within the broad account given and the Committee on the Rights of the Child (established by the CRC) makes express mention of the spiritual dimensions of education in paras 7 and 12 of its General Comment on Article 29(1).<sup>123</sup> Moreover, there is nothing to suggest that Article 29(1) is meant to be exhaustive or exclusionary such that there may not be other dimensions to education also required by a proper understanding of children's rights.

Thirdly, any practical application of Article 14 in municipal law should take full cognisance of the detailed and critical analysis and contextualisation given to it by Langlaude<sup>124</sup> and Brennan.<sup>125</sup>

Ultimately the meaning of Article 14 of the CRC and its actual practical significance and concrete implications for issues in Irish schooling are so under-determined and controversial at present and raise so many complex issues of educational theory, philosophy, and developmental psychology that one should proceed with caution when appealing to the

<sup>123</sup> CRC/GC/2001/1 (17 April 2001). This was the first General Comment issued by the Committee.

<sup>124</sup> S Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (2008) 16 *International Journal of Children's Rights* 475; and S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff Publishers, Leiden 2007).

<sup>125</sup> PM Brennan, 'The 'Right' of Religious Liberty of the Child: Its Meaning, Measure, and Justification' *Emory International Law Review* 129.

Convention in order to justify particular, concrete policy proposals in the area of education and religion. However, it can be said that reading Article 14 as a whole, which guarantees not only the right to a child's freedom of religion but also the duty of parents to direct their children in the exercise of such a right, as well as the freedom to manifest one's religion and beliefs, there is no textual support for the complete supplanting of parental choice in education in favour of a uniform secularist model of education.<sup>126</sup>

#### **IV.5 Convention on the Elimination of All Forms of Racial Discrimination**

CERD does not directly address the issues surrounding religious freedom in education nor does anything in Article 5 conflict with Irish Constitutional principles in this area. Nevertheless, seemingly on the basis of its Concluding Observations in 2005 on Ireland's initial and second periodic reports, the IHRC suggests in its Discussion Paper (para 54) that the State may not be in compliance with its obligations under the CERD. The Concluding Observation in question states:

'The Committee, noting that almost all primary schools are run by Catholic groups and that non-denominational or multid denominational schools represent less than 1 per cent of the total number of primary education facilities, is concerned that existing laws and practice would favour Catholic pupils in the admission to Catholic schools in case of shortage of places, particularly in the light of the limited alternatives available (art. 5 (d) (vii) and 5 (e) (v)).

The Committee, recognizing the "intersectionality" of racial and religious discrimination, encourages the State party to promote the establishment of non-denominational or multid 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) to schools is concerned.'

Of the two recommendations made by the Committee, the first, concerning the establishment of a greater diversity of school types, is clearly consonant with the position endorsed and advocated by the Iona Institute, though it is not clear why the Committee does not also include the possibility of establishing new non-Catholic denominational schools where sufficient demand exists. The second recommendation, however, amounts to a direct interference with the autonomy of denominational schooling which is nowhere justified by reference to the CERD or any other human rights instrument. In particular, the invocation of an 'intersectionality' between racial and religious discrimination can be questioned when one considers the facts of the situation. For example the Committee has overlooked a number of possibilities. First, there is no account taken of the fact that Catholicism, as a world religion,

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<sup>126</sup> Nor is it likely that such a broad range of countries would have signed up to the Convention if it was understood to require a secularist model of education.

may be the religion of a substantial number of the members of different racial groups. Second, there is no consideration of the fact that some non-Catholic religious parents may not want to send their children to non-denominational schools and may prefer a school with a religious ethos, even if it is one that they do not wholly share, than a secular school. Finally, there is no account taken of the fact that religious schools, and Catholic primary schools in particular, are more socially, racially and religiously inclusive than other types of schools as demonstrated in a Department of Education and Science report issued in November 2007 called ‘Audit of School Enrolment Policies’.

Indeed this ill-informed and negative conception of Catholic education which is simply assumed by the Committee in its remarks should be contrasted with the presumably approving silence of the Committee with regard to the directly exclusionary policy of secular French schools, mandated by law, towards (often non-European) students who wish to wear Islamic garb to school. In the Committee’s most recent Concluding Observations to France no mention is made of these measures, even though they have been condemned by the Human Rights Committee,<sup>127</sup> nor of the ‘intersectionality’ of this form of religious discrimination with racial discrimination.<sup>128</sup>

#### **IV.6 Conclusions regarding international human rights law**

While the various international human rights treaties can be seen to support the principle of parental choice in education, in both its positive and negative aspects, a significant shortcoming with the analysis offered in the international human rights discourse is the absence of a recognition that a wholly secular system of State education can also constitute a failure to respect the religious freedom of parents and their children. In short, there appears to be an unacknowledged bias underlying some of the evaluative judgments of the various international bodies that emphasises freedom *from* religion and conflates secularism and secular education with pluralism or neutrality towards religion. This bias should be rejected as a basis for Irish educational reform on several counts. First, it is not found in the text of the international treaties themselves but is merely an asserted and unwarranted extrapolation from them. Second, it is in conflict with the guiding principles of Irish constitutional law in this area. Third, it assumes a philosophically unjustified conception of the relationships

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<sup>127</sup> See the Human Rights Committee’s Concluding Observations on the fourth periodic report of France (CCPR/C/SR.2562, 22 July 2008, para 23).

<sup>128</sup> See the Concluding Observations of the Committee on the Elimination of Racial Discrimination on the seventeenth to nineteenth reports of France in its Report [2010], 76<sup>th</sup> and 77<sup>th</sup> sessions, Supplement No. 18 A/65/18, p. 53.

between pluralism, neutrality and secularism. Fourth, it assumes an implausible and simplistic account of education. Fifth, it is unreasonable as an account of how society should organise education.

In the analysis of the IHRC, the main criticism of the status quo in Ireland from the perspective of Convention and international human rights law appears to relate to the inadequacy of the current provisions for opting-out, particularly at primary school level, in light of (a) the absence of adequate supervisory procedures, resources and complaint or oversight mechanisms and (b) the prevalence of an integrated (denominational) curriculum. In other words, the State funding of denominational education or of schools employing an integrated curriculum is not *per se* in breach of any internationally recognised human right. This is an important point to note. The essence of the problem is the lack of real alternatives, i.e. of effective pluralism. This restriction of parental choice has not been and is not a legally or constitutionally mandated state of affairs. Rather it is a problem in Ireland at the level of resources, administrative policy and, ultimately, political will.

## V. GENERAL CONCLUSION

The Iona Institute supports the taking of appropriate measures, as a matter of some urgency, to remedy the practical failures to effectively instantiate the principle of parental choice enshrined in the Irish Constitution. But these practical failures should not become the pretext for the adoption by fiat of a secularist understanding or model of public education. Nor should the controversial value judgments present in much international human rights commentary, though not in the actual law itself, be uncritically invoked in the national political conversation. There is a useful and important debate to be had about the merits and value of instantiating the principle of parental choice in a model of educational pluralism built upon a diversity of school types and it should not be short-circuited by appeals to ‘human rights’, when it is clear that the authoritative international position on these matters largely under-determines and reserves to State actors the detail of how best to secure such pluralism. It must equally be recognised that a State-mandated uniformly-secularist system of education would also have the effect of violating international human rights norms protecting education in conformity with the religious and philosophical convictions of parents.

In essence, the issues comes down to whether respect and support for parental choice should be mediated through respect for

(a) a diversity of school types (including secular and multi-denominational schools) with state supervision to ensure, e.g., minimum standards and respect for pluralism and the development of critical thinking in all schools; an adequate distribution and provision of each school type; and, where necessary due to the absence of effective school choice for whatever reason, properly resourced and structured rights to extensive opt-outs to mitigate as far as possible the effect of an integrated curriculum on children whose parents do not share the school's ethos;

or

(b) a single school type within which diversity is 'respected' through state enforcement of a lowest common denominator policy that excludes any endorsement or manifestation of a belief or practice or holistic combination of same (i.e. an ethos) by any teacher (or pupil?) such that no parent might reasonably consider the resulting education to be not in conformity with his or her religious or philosophical convictions.

Each approach has a shortcoming, though there is a significant difference in the type of shortcoming that suggests we should prefer (a) wherever possible. For option (b) founders on the fact that it is simply not possible to secure such complete neutrality (understood as value-neutrality) in institutionalised schooling<sup>129</sup> and, what is more, even if it were it would result in such an emaciated school curriculum and ethos that it would not be fit for purpose on even the most minimalist accounts of the function and aims of education in a liberal democratic society. No legal authority can change this basic reality. Furthermore, an exclusive focus on so-called neutral schools would represent an unjustifiable privileging and absolutising of the negative aspect of religious freedom (freedom *from* religion) and parental choice to the exclusion of their equally important (and rationally interconnected) positive aspects. Such an absolutising of negative freedom over positive freedom would have seriously detrimental consequences for religious believers and is dependent on secularist assumptions which have no authoritative foundation in international human rights law and are themselves highly questionable, both from a philosophical and a Constitutional perspective.

The shortcoming with (a) is of a different, more practical and contingent kind. For, unlike (b), there is no inherent incoherence within (a)'s approach. Rather, the shortcoming concerns the high likelihood that in certain specific situations, e.g. small or remote rural communities, it will not be financially or logistically practicable to provide a diversity of school types that will satisfy to the full the parental choice, in its positive aspect, of all parents. Ultimately, in such situations there will be a balance to be struck that may impact on the workings of the dominant school type in that area – whether it be denominational or of some other type – to

<sup>129</sup> The ECtHR has recognised this in certain passages but does not seem to have grasped the full implications for its own conception of secularism as neutrality. See, e.g., see *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Judgment, 7 December 1976, at para 53, cited in *Zengin v Turkey*, Judgment, 9 January 2008, at para 51.

ensure that the negative rights of such parents be protected as far as possible. This may involve a sub-optimal solution for both religious and non-religious parents and children. But importantly, this will be recognised as such<sup>130</sup> and will not be held out as the ideal result of any sweeping principle which excludes *ab initio* all the interests of one or the other sets of parents and children by virtue of a pre-determined preference for one aspect of religious freedom over another. Thus the resulting compromises will be necessitated by the contingencies of a given set of resources, demographics or geographical location. Accordingly, and in the interests of a genuine pluralism, they should be negotiated and determined on a localised and flexible basis and, in the interests of neutrality (understood as non-identification and non-interference), independently, so far as is reasonably possible, of any evaluative judgment as to the respective merits of the different religious positions or beliefs in question.

To endorse option (b) is effectively to pursue a policy of ‘equalizing down’ on the grounds that not every positive parental choice is likely to be equally supported in practice. It relies on a notion of consequential neutrality (neutrality of equal impact or equal outcome) which is not required by liberal theories of limited government and is widely rejected. Moreover, it represents a completely disproportionate impact on the possibility of positive parental choice, when a more proportionate option is readily available that combines diverse school types with an appropriate supervision of all forms of education to ensure that they promote pluralism and critical thinking and, where required, facilitate effective opt-outs so far as is possible.

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<sup>130</sup> An essential first step in their progressive elimination by means of further resourcing etc as circumstances permit.

## REFERENCES