

**4<sup>th</sup> World Congress on Family Law and Children's Rights  
Cape Town, South Africa, March 20-23 2005**

**DOMESTIC ENFORCEMENT OF THE RIGHT TO EDUCATION:  
ANGLO-IRISH LESSONS ON CONSTITUTIONALISM**

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**Introduction**

One of the major rights guaranteed by the UNCRC is the right to education under Article 28 of the Convention. Unfortunately, in spite of its obvious importance, the realisation of this right is still far away for children in many States who are parties to the Convention. This is largely attributable to the expensive nature of education; unlike many other rights, education costs a significant amount of money and suffers accordingly in developing countries. Perhaps more worrying, however, is the failure to fully vindicate the right to education in many fully developed and indeed wealthy countries. When a lack of resources ceases to be an excuse, one must look elsewhere for reasons which go towards explaining such a lamentable state of affairs.

This paper is concerned with the domestic implementation and enforcement of this particular Convention right, and more specifically with the legal structures which States employ in order to ensure that all children are provided with an adequate education. It will proceed on the basis of the following thesis: that the right to education is best vindicated in domestic law through a combination of a constitutional right to education on the one hand, and a detailed legislative framework on the other. By this it is not meant that such a legal framework provides perfect protection, but that it is the best available mechanism for the vindication of the right to education. The validity of this thesis will be tested against two criteria. First, theories of constitutionalism and fundamental rights will be considered specifically in the context of the right to education. Second, practical experience will be examined in two particularly appropriate jurisdictions – England & Wales, which has a legislative

framework but no constitutional right, and Ireland, which has a constitutional right but until very recently had no legislative framework.

This paper has developed in the context of a comparative study on the legal provision for special educational needs in England & Wales and in Ireland. Consequently, there is something of a focus on special educational needs in the practical examples which are invoked; in any event, this is the aspect of the right to education which wealthy countries most frequently fail to vindicate. In this context it is worth noting that the UNCRC clearly contemplates special educational provision within the provisions which deal with education.<sup>1</sup> Furthermore, since the two jurisdictions in question are both extremely wealthy, it could be said that the thesis being advanced is most applicable to wealthy, rather than developing, countries. However, as acknowledged by Article 28(1) of the UNCRC, there are many aspects to the right to education, from pre-school and primary education to secondary and third level education and special educational provision. Consequently, while this thesis may be advanced in relation to the right to education in general, the number of aspects of that right to which it will apply will vary in accordance with the wealth of the country in question.

### **Why should the Right to Education be Constitutionalised?**

In testing the thesis which has been put forward above, the first and most basic question to be considered is what it is about the right to education that demands constitutional protection. Two reasons shall be put forward that not alone justify but impel taking such a step. First, it shall be argued that education is a most fundamental right; second, it shall be argued that the unique and complex nature of the right to education makes it more difficult to protect than other rights, and this fact, when combined with the most fundamental nature of the right, dictates that it should be given the highest form of protection that the law can offer to it.<sup>2</sup>

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<sup>1</sup> A concern for the educational rights of children with special educational needs can be seen in the reference to equal opportunity in Article 28(1) and the reference to children reaching their full potential in Article 29(1), as well as the reference to the provision of education for disabled children in Article 23(3).

<sup>2</sup> While it is conceded that this second argument, viewed in isolation, might also be turned the other way, it is submitted that when viewed together with the first argument relating to the fundamental nature of the right to education, it is in fact sustainable. This will be developed further below.

### Education is a Most Fundamental Right

There can be little doubt that the right to education is one of the most fundamental rights of all. This stems from a number of aspects of the right, but above all from the position of education as a pre-requisite to the realisation of many other rights. This aspect of the right to education was neatly captured by Dympna Glendenning when she described it as "...that most significant human right, the right to education, in the absence of which many other human rights are likely to be beyond reach."<sup>3</sup> The Committee on Economic, Social and Cultural Rights has referred to education as "both a human right in itself and an indispensable means of realizing other human rights."<sup>4</sup> The link between the right to education and some rights such as the right to earn a living is self-evident; however, it is connected to many other rights in a less obvious way.

To take one example, the right to vote is fatally undermined in the absence of an adequate education. Election issues and referenda on, for example, major reforms in the European Union are becoming increasingly complex and it is often a challenge even to the most educated in society to fully understand what it is they are voting on. Clearly, in such circumstances the uneducated will have little chance of exercising a fully informed vote; this has been recognised by U.S. Supreme Court in the case of *Plyler v. Doe* when the Court stated that "...some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."<sup>5</sup> Douglas Hodgson agrees, stating that "[i]t is arguable that a proper education is a prerequisite to a more reasoned exercise of political and civil liberties. A well educated population may also be a prerequisite to maintaining democratic structures and ideals."<sup>6</sup> Similar arguments can be constructed in relation to the importance of education to the realisation of many other rights; however, a limited amount would be achieved by exhaustively reciting them here, and it will therefore be assumed that the point has been made.

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<sup>3</sup> Glendenning, *Education and the Law*, Dublin, Butterworths, 1999 at p. 251.

<sup>4</sup> Committee on Economic, Social and Cultural Rights, *The Right to Education (Art. 13): General Comment No. 13*, E/C. 12/1999/10, 8<sup>th</sup> December 1999 at para. 1.

<sup>5</sup> 457 U.S. 202 at p. 221 (1982).

<sup>6</sup> Hodgson, *The Human Right to Education*, Dartmouth, Aldershot, 1998 at p. 18. See also Mountfield, "The Implications of the Human Rights Act 1998 for the Law of Education" [2000] *Education Law Journal* 146 at p. 146 where she refers to education as "a foundation of democracy."

The fundamental nature of the right to education stems also from its inherent connection to human dignity. The central role that the ideal of human dignity plays in the human rights movement is illustrated by its invocation in the Preamble of the UDHR;<sup>7</sup> interestingly, this step was taken 11 years previously in the Preamble of the Irish Constitution,<sup>8</sup> and it has been argued that human dignity is, along with freedom, the most fundamental of all values under the Irish Constitution.<sup>9</sup> There can be no doubt that education has a fundamental connection to human dignity; it brings about basic life skills such as communication and self-reliance, in the absence of which dignity is hugely undermined. Article 13(1) of the ICESCR recognised this connection by stating that education should “be directed to the full development of the human personality and the sense of its dignity”.

The importance of education in this context is further amplified in the field of special educational needs, where even the most basic elements of human dignity are sometimes only attainable pursuant to intensive and ongoing education. Mary Warnock has described the difference that education can make to a severely disabled child as the “difference between self-determination, or freedom, albeit extremely limited, and total dependency and indifference to the real world.”<sup>10</sup> Thus it is clear that the full realisation of human dignity is inherently connected to the provision of adequate education for all. The fact that education is essential to the pursuit of one of the central values of human rights law as a whole clearly shows that education is one of the more fundamental rights.

The status of the right to education in international human rights law reflects the fundamental nature of the right that has been explained above. The right is included in a plethora of major human rights instruments and is made non-derogable in the ICCPR and ICESCR. Furthermore, Hodgson argues that it can be asserted “with

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<sup>7</sup> The preamble of the UDHR refers to “...the inherent dignity...of all members of the human family [as] the foundation of freedom, justice and peace in the world...”

<sup>8</sup> The preamble of the Irish Constitution states that “...the people of Éire...seeking to promote the common good...so that the dignity and freedom of the individual may be assured...”

<sup>9</sup> See generally O’Dowd, “Dignity and Personhood in Irish Constitutional Law” in Quinn, Ingram and Livingstone (Eds.), *Justice and Legal Theory in Ireland*, Dublin, Oak Tree Press, 1995 at pp. 163-181.

<sup>10</sup> Warnock, *Nature & Mortality: Recollections of a philosopher in public life*, London, Continuum, 2003 at p. 45.

confidence” that at least two aspects of the right – the right to free primary education and the right to equality of educational opportunity – are so universally recognised and established that they have satisfied the stringent criteria necessary to acquire the status of customary international law.<sup>11</sup> If this assertion is correct, then it reflects a globally-held belief that the right to education is to be protected as a matter of priority.

If it is accepted that education is one of the most fundamental of all rights, then it surely follows that as such, it should be the subject of the highest form of protection that the law can offer. This can only be achieved by a justiciable provision in an entrenched Bill of Rights, which is free from resource limitations and includes mechanisms for judicial review of legislation. However, the fundamental nature of the right is not its only aspect which makes such protection a necessity.

#### Education is a Unique and Complex Right

As well as being a most fundamental right, education has a unique and complex nature which makes it more difficult to protect than other human rights. This difficulty is most unwelcome when viewed in light of the fundamental nature of the right, and it will be argued here that it acts as a further justification for the constitutionalisation of the right. There are several aspects of the right to education which contribute to this complexity. First, unlike other rights which involve a right of the individual and a corresponding duty of the State, education involves a third protagonist: the parents of the child in question. Parents are often involved in the exercise of children’s rights; however, in the case of education, they are actually conferred with independent rights of their own, which they are not merely exercising on behalf of the child. This has greatly complicated the issue for the courts, as the competing needs of three parties must be balanced in any given case. Even this is a somewhat simplistic view when one considers the pressures exerted by various interest groups, and in this regard the difficulties faced by a court in adjudicating on an education dispute have been neatly summarised by Niall Osborough:

Education problems supply one of the litigation battlefields of the modern Republic. All the protagonists – the State, the churches, the teachers and their unions, the local

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<sup>11</sup> Hodgson, *The Human Right to Education*, Dartmouth, Aldershot, 1998 at pp. 63-64.

community, the parents, the children too – have individual interests they wish to see upheld. The difficulty which so frequently precipitates the lawsuit is that in seeking to uphold the interests of one set of protagonists, it is commonly impossible to do otherwise than to interfere with, and sometimes even substantially downgrade, the interests of one, if not more, of the other sets.<sup>12</sup>

A second unique aspect of the right to education is the fact that unlike other rights, its exercise is compulsory.<sup>13</sup> This has the result of creating rights and duties for all parties<sup>14</sup> – unlike other rights, which create a right for one party and a corresponding duty for another. Of course, the fact that there are rights and duties for three parties as opposed to two complicates this even further. Various justifications have been put forward for the compulsory nature of the right to education. Manfred Nowak believes that the reason is to protect children against their parents and all forms of economic exploitation, stating that “[c]ompulsory education and the prohibition of child labour...are, therefore, complementary standards.”<sup>15</sup>

Douglas Hodgson argues that the rationale behind compulsory education is that every person has an irrevocable entitlement to a period of education at public expense, and the term “compulsory” is intended to signify that no person or body can prevent children from receiving a basic education; consequently, the State is obliged to ensure

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<sup>12</sup> Osborough, Review of Farry’s *Education and the Constitution*, [2000] XXXV *Irish Jurist* (ns) 416. The difficulty of achieving a balance between the interests of children and parents has been discussed in Van Bueren, “Education: Whose Right is it Anyway?” in Heffernan (Ed.), *Human Rights: A European Perspective*, Dublin, Round Hall, 1994 at p. 339 and O’Mahony, “Children, Parents and Education Rights: A Constitutional Imbalance” [2004] 3 *Irish Journal of Family Law* 3.

<sup>13</sup> The principle of compulsory primary education is set out in Article 26(1) of the UDHR, Article 13(2)(a) of the ICESCR and Article 28(1)(a) of the UNCRC, and has been held to be permissible under the ECHR in *Family H. v. United Kingdom* (1984) 37 *Decisions & Reports* 105. In England & Wales, compulsory education is provided for by sections 7-8 of the Education Act 1996. In Ireland, compulsory education is provided for by Article 42.3.2° of the Constitution and section 17(1) of the Education (Welfare) Act 2000.

<sup>14</sup> Although compulsory education is normally enforced through the imposition of a duty on the parents rather than on the child, it may be argued that the child has a duty to be educated, and that legal systems simply impose this duty vicariously on the parents of the child as it is legally expedient to do this as opposed to attempting to impose criminal sanctions directly on the child for failing to attend school. See the contrasting discussion carried out on this point by Nowak, “The Right to Education” in Eide, Krause & Rosas (Eds.), *Economic, Social and Cultural Rights: A Textbook*, Kluwer, 1995 at p. 197 and Van Bueren, “Education: Whose Right is it Anyway?” in Heffernan (Ed.), *Human Rights: A European Perspective*, Dublin, Round Hall, 1994 at p. 341. Whether or not this argument is accepted, the point being made is still valid – the existence of rights and duties for both parents and the State in respect of education certainly give rise to added complications for the legal provision for the right to education.

<sup>15</sup> Nowak, “The Right to Education” in Eide, Krause & Rosas (Eds.), *Economic, Social and Cultural Rights: A Textbook*, Kluwer, 1995 at p. 205.

that such an education is provided in cases of parental failure.<sup>16</sup> Geraldine Van Bueren believes that the principle of compulsory education for children “implies that it is in the best interests of the child that children are not entitled to refuse education below a specified level.”<sup>17</sup> However, it is submitted that the most convincing justification has been offered by the eminent Irish constitutional scholar, John Kelly, who linked the notion of compulsory education to the desire to develop society, both politically and economically:

...a modern state, which cannot escape the consequences of modern techniques and modern ambition, is exposing its population to poverty and exposing itself to disintegration unless it maintains a certain level of universal education...The State, cannot allow its citizens to remain ignorant, because for very good reasons it cannot afford to.<sup>18</sup>

A further complication with regard to the right to education is that it is extremely difficult to classify into one of the so-called “generations” of rights. While many rights are labelled as being “civil and political” rights, “economic and social” rights or “group” rights, and some rights fall within two of these generations, Manfred Nowak has remarked that education is probably the only right which reveals aspects falling under all three generations.<sup>19</sup> Education is clearly a classic economic and social right, in the sense that it is a positive entitlement to receive a service from the state. Its civil and political aspect includes parental rights with respect to religious, philosophical and cultural education, as well as its connection, discussed above, to the ability to exercise civil and political liberties such as the right to vote. Finally, in the context of education as a group right, Natan Lerner has cogently observed:

As far as groups are concerned, the very preservation of the existence of the group may be related to the right to education...it is clear that a group will see its future threatened if it is deprived of the right to ensure its members an education in accordance with its traditions or beliefs, or in its own language.<sup>20</sup>

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<sup>16</sup> Hodgson, *The Human Right to Education*, Dartmouth, Aldershot, 1998 at p. 41, referring to Article 26 (1) of the UDHR. This analysis sits particularly well with the provisions of Article 42.5 of the Irish Constitution.

<sup>17</sup> Van Bueren, “Education: Whose Right is it Anyway?” in Heffernan (Ed.), *Human Rights: A European Perspective*, Dublin, Round Hall, 1994 at p. 341.

<sup>18</sup> Kelly, “Education and the Irish State”, annexed to Whyte, “Education and the Constitution: Convergence of Paradigm and Praxis” [1990-92] XXV-XXVII *Irish Jurist (ns)* 69 at pp. 84-85.

<sup>19</sup> Nowak, “The Right to Education” in Eide, Krause & Rosas (Eds.), *Economic, Social and Cultural Rights: A Textbook*, Kluwer, 1995 at p. 196.

<sup>20</sup> Lerner, *Group Rights and Discrimination in International Law*, Dordrecht, Martinus Nijhoff, 1991 at p. 147.

This confusion between civil and political rights and economic and social rights in particular creates a number of practical difficulties for the legal protection of the right to education. The economic and social aspect of the right leads to much opposition to the notion of making it a justiciable element of a Bill of Rights, due to the resource implications of such a step.<sup>21</sup> It is for this reason that the right was originally omitted from the ECHR, and when subsequently included, it was formulated in negative terms which do not require the State to provide any education at all.<sup>22</sup>

The limited nature of the right to education under Article 2 of the First Protocol to the ECHR would seem to stem from this confusion in its classification; its eventual inclusion in what is largely a civil and political rights instrument was very much in a civil and political format – i.e. a right not to be denied something – and this overlooked the economic and social aspect of the right, undermining its scope and effectiveness. In the Irish context, the right overcame the initial hurdle of inclusion in the Constitution; however, its complex nature has led to its occupying an anomalous position within the fundamental rights scheme of the Irish Constitution,<sup>23</sup> which has in turn had negative ramifications for the remedies available for a breach of the right.<sup>24</sup> Thus it can be seen how confusion surrounding the classification of the right to education as “civil and political” or “economic and social” can, indirectly, have a detrimental impact on the practical enforcement of the right.

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<sup>21</sup> Some commentators would dispute whether economic and social rights should ever be legally protected, or even whether they can properly be described as “rights”; see, for example, Cranston, “Human Rights, Real and Supposed” in Raphael (Ed.), *Political Theory and the Rights of Man*, Bloomington, Indiana University Press, 1967 at pp. 43-53. The contrary argument has been well set out by Van Hoof, “The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views” in Alston & Tomasevki (Eds.), *The Right to Food*, Dordrecht, Martinus Nijhoff, 1984 at pp. 97-110.

<sup>22</sup> The limited nature of the right to education under Article 2 of the First Protocol to the ECHR can be seen in cases such as the *Belgian Linguistics* case (1979-80) 1 *European Human Rights Reports* 252 and *McIntyre v. United Kingdom* (Application No. 29046/95, 21<sup>st</sup> October 1998). See further Mountfield, “The Implications of the Human Rights Act 1998 for the Law of Education” [2000] *Education Law Journal* 146.

<sup>23</sup> The education rights under Article 42 of the Irish Constitution are the only economic and social rights to be given a justiciable provision in the fundamental rights scheme of the Constitution; other economic and social issues such as housing are relegated to the non-justiciable “Directive Principles of Social Policy” of Article 45 which itself expressly provides that the principles set down therein “shall be the care of the Oireachtas [Irish Parliament] exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.”

<sup>24</sup> See *T.D. v. Minister for Education* [2001] 4 *Irish Reports* 259, as discussed in O’Mahony, “Education, Remedies and the Separation of Powers” (2002) 24 *Dublin University Law Journal* (ns) 57.

In summary, therefore, education is a right which falls under all three generations of rights; it is tri-partite and its exercise is compulsory. Not only are these aspects of the right unique; it has been shown above how they create practical difficulties for the legal protection of the right. The most fundamental nature of the right, which was set out above, dictates that it is imperative that these difficulties be overcome, and that it is essential that the right to education be given the highest form of protection that the law can offer. Furthermore, any entrenched constitutional right must be well formulated; analysis of the provisions of the Irish Constitution shows how a badly formulated Constitution can, when entrenched, lead to intractable difficulties,<sup>25</sup> and indeed that even reasonably well formulated provisions can be interpreted in an undesirable way.<sup>26</sup> This latter danger exists in respect of all legal sources, but all possible steps should be taken to avoid it.

Of course, it is not possible to constitutionalise the right to education in isolation. The level of protection being advocated in this paper can only be achieved through the adoption of an entrenched Bill of Rights, and opinion is divided as to whether this is in fact a desirable step. The next step in proving the thesis is therefore to consider the arguments which have been made against the adoption of a Bill of Rights and to attempt to rebut them. In doing so, the general arguments in relation to a Bill of Rights will be considered, but particular reference will be made to the fundamental and unique nature of the right to education, as set out above; many of the arguments against the adoption of a Bill of Rights are questionable in a general sense, but are completely unsuitable for application to the right to education.

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<sup>25</sup> A prime example of this is the exclusion of extra-marital families from the ambit of protection of Articles 41 and 42, on which see O'Mahony, "Extra-Marital Families and Education Rights under the Irish Constitution" [2003] 2 *Irish Journal of Family Law* 21.

<sup>26</sup> See, e.g., the discussion of the age-limitations on entitlements in Ryan, "Disability and the Right to Education: Defining the Constitutional 'Child'" (2002) 24 *Dublin University Law Journal* (ns) 96; the discussion of the balance between the interests of children and parents in O'Mahony, "Children, Parents and Education Rights: A Constitutional Imbalance" [2004] 3 *Irish Journal of Family Law* 3; and the discussion of remedies and the separation of powers in O'Mahony, "Education, Remedies and the Separation of Powers" (2002) 24 *Dublin University Law Journal* (ns) 57.

## **Rebuttal of Arguments against Constitutionalising the Right to Education**

Prior to the enactment of the Human Rights Act 1998, a lengthy debate occurred in the U.K. as to whether, and in what form, a Bill of Rights should be adopted. This debate spawned an enormous volume of academic literature setting out the advantages of a constitutionalised Bill of Rights, as well as a substantial volume of opposition towards taking such a step. In arguing in favour of a constitutionalised right to education, it is necessary to consider and to attempt to rebut these arguments. The material which has arisen from the debate in the U.K. provides an ideal forum in which these issues can be addressed. In doing so, particular attention will be paid to the unique nature of the right to education, as set out above; many of the arguments against the adoption of a Bill of Rights simply do not apply to this particular right.

In the U.K., much of the opposition to a Bill of Rights was based on claims that any instrument which would conflict with the fundamental principle of British constitutional law – that of parliamentary sovereignty – would be undemocratic. In the context of this paper, which is intended to be of more general application than the U.K., it is proposed not to focus too much on parliamentary sovereignty here; instead, the following discussion will focus on the underlying value which parliamentary sovereignty is intended to protect – that of democracy.<sup>27</sup> It will be argued that the adoption of an entrenched Bill of Rights which includes a justiciable right to education is not undemocratic; on the contrary, such a move actually positively promotes democracy.

There are a number of points that can be made which go towards proving that a constitutionalised Bill of Rights, and more particularly a constitutionalised right to

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<sup>27</sup> For a discussion of the connection between parliamentary sovereignty and representative democracy, see Bradley & Ewing, *Constitutional and Administrative Law* (13<sup>th</sup> Ed.), London, Longman, 2003 at p. 75. Historically, parliamentary sovereignty developed as a result of the shift of power from a hereditary monarch to an elected Parliament. Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> Ed.), London, MacMillan & Co. Ltd., 1960, hinted at this at p. 470 when stating that parliamentary sovereignty came about through a “gradual transfer of power from the Crown to a body which has come more and more to represent the nation.” While it may have originally have been a mechanism for subjugating the Royals to the will of Parliament, the ultimate rationale underlying the doctrine is surely that of protecting democracy. Dicey would seem to suggest as much *ibid* at pp. 72-74 where he sets out the distinction between the legal sovereignty of Parliament and the political sovereignty of the electorate, stating that “the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country.”

education, is not undemocratic in itself, and indeed arguably promotes democracy. It has been argued that for a Bill of Rights to allow the courts to overrule the will of Parliament is undemocratic, since Parliament is taken as representing the will of the people.<sup>28</sup> However, this argument is misconceived. In Ireland, for example, one point immediately presents itself to undermine it: the Constitution which allows the courts to do so was, after all, voted upon by the people in the 1937 plebiscite, and in the words of the Preamble they adopted, enacted and gave it to themselves. This direct vote of the people can surely be considered to be more representative of their views than any vote in Parliament, bound as it is by party political lines and the whip system. In the absence of any amending referendum in the interim, the text of the Constitution must be taken by the courts as accurately representing the will of the people – even more so than the view of Parliament.

In any country which does not already have a written constitution, or indeed has one which does not contain a justiciable right to education, it is often the case that if the reform being advocated in this paper ever does take place, it will only occur in the aftermath of a referendum of exactly this type. A direct vote of the people is, in spite of its own imperfections, perhaps one of the purest of all forms of democracy. Even if a referendum does not take place, the amendment of the constitution usually requires a special majority – or at the very least a simple majority – vote in Parliament, so at the very worst it could be said to be at least as democratic as ordinary parliamentary procedures.

A second argument can be made to rebut the contention that a Bill of Rights is undemocratic. The meaning of the term “democracy” is a vast issue in itself, which could never be fully considered here; however, it is surely reasonably clear that the ordinary meaning of the word, in its everyday usage in the majority of developed countries, implies far more than a mere headcount. This is an issue which has been taken up by many eminent commentators, foremost among them Ronald Dworkin:

When the eminent French historian François Furet came recently to Britain to lecture on the occasion of the bicentennial of the French Revolution, he said that the signal

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<sup>28</sup> See, e.g., Lord Simon of Glaisdale in *British Railways Board v. Pickin* [1974] *Appeal Cases* 765 at p. 798.

triumph of democracy in our time is the growing acceptance and enforcement of a crucial idea: that democracy is not the same thing as majority rule, and that in a real democracy liberty and minorities have legal protection in the form of a written constitution that even Parliament cannot change to suit its whim or policy. Under that vision of democracy, a bill of individual constitutional rights is part of fundamental law, and judges, who are not elected and who are therefore removed from the pressures of partisan politics, are responsible for interpreting and enforcing that Bill of Rights as they are for all other parts of the legal system.<sup>29</sup>

Similar sentiments have been expressed by H.L.A. Hart,<sup>30</sup> Michael Zander,<sup>31</sup> Sir Stephen Sedley<sup>32</sup> and Sir John Laws:

It is a condition of democracy's preservation that the power of a democratically elected government – or Parliament – be not absolute...the citizen's democratic rights go hand in hand with other fundamental rights; the latter, certainly, may in reality be more imaginably at risk, in any given set of political circumstances, than the former. The point is that both are or should be off limits for our elected representatives. They are not matters upon which, in a delegated democracy – a psephocracy – the authority of the ballot-box is any authority at all.<sup>33</sup>

Indeed, this issue has even been the subject of judicial comment in Ireland; in the seminal case of *Ryan v. Attorney General*, Kenny J. in the High Court observed that Article 40 of the Irish Constitution is "...in many ways the most important in the Constitution, for Article 5 declares that Ireland is a democratic State and what can be more important in a democratic State than the personal rights of the citizens..."<sup>34</sup>

Even accepting that a Bill of Rights is not of itself undemocratic, but is in fact an important element of a democratic society, there are those who would argue that the inclusion of a justiciable economic and social right such as the right to education would be undemocratic. The reason for this is that it would tie the hands of elected officials as to the allocation of resources, a matter which is properly the domain of elected officials since they, unlike the courts, are able to consider the competing

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<sup>29</sup> Dworkin, *A Bill of Rights for Britain*, London, Chatto & Windus, 1990 at p. 13.

<sup>30</sup> Hart, *Law, Liberty, and Morality*, London, Oxford University Press, 1963 at pp. 77-81.

<sup>31</sup> Zander, *A Bill of Rights?* (4<sup>th</sup> Ed.), London, Sweet & Maxwell, 1997 at p. viii.

<sup>32</sup> Sir Stephen Sedley, "The Common Law and the Constitution" in Nolan & Sedley, *The Making and Remaking of the British Constitution*, London, Blackstone Press, 1997 at p. 5.

<sup>33</sup> Laws, "Law and Democracy" [1995] *Public Law* 72 at pp. 85-90.

<sup>34</sup> [1965] *Irish Reports* 294 at p. 310.

demands of all that may claim the resources, rather than the claims of individual litigants in isolation.<sup>35</sup> Again, however, it is possible to rebut the argument that the right to education should be excluded from a Bill of Rights by recalling that, as noted above, education supports democracy by enhancing the ability of the electorate to make fully informed decisions. A comprehensive study on the entire issue of the constitutionalisation of economic and social rights has been conducted by Cécile Fabre; she argues that since the right to an adequate education is a fundamental feature of the concept of democracy and a necessary condition for its functioning and survival, constitutionalising that right does not therefore conflict with democracy.<sup>36</sup> Her study concludes that constitutionalising rights such as minimum income, housing and healthcare may conflict with democracy, whereas constitutionalising the right to education actually supports democracy.<sup>37</sup> It is interesting to note that this is the exact situation which pertains under the Irish Constitution, as well as the constitutions of numerous other States.

In light of the above, it is submitted that any argument against the constitutionalisation of the right to education which is based on the ground of a conflict with democracy is ill-founded. The adoption of a Bill of Rights in the form advocated certainly does not conflict with democracy; furthermore, a Bill of Rights which contains a constitutionalised right to education actually serves to positively promote democracy. This would seem to constitute a strong rebuttal of this particular argument against the adoption of a constitutionalised right to education.

Another school of thought, which includes commentators such as Lord Lloyd of Hampstead, argues that the legislature is a better forum than the courts for the protection of rights and for dealing with grievances arising from an infringement of rights. Among the reasons offered for this argument is the notion the legislature is more accessible than the courts to the average man on the street.<sup>38</sup> This line of argument is immediately open to attack: in fact, quite the opposite is true in practice. While anyone can, eventually, take a case to court with the support of legal aid or

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<sup>35</sup> See, e.g., Walzer, "Philosophy and Democracy" (1981) 9 *Political Theory* at pp. 391-392.

<sup>36</sup> Fabre, *Social Rights under the Constitution*, Oxford, Clarendon Press, 2000 at pp. 4-5 and pp. 125-126.

<sup>37</sup> *Ibid* at pp. 184-185.

<sup>38</sup> Lord Lloyd of Hampstead, "Do we need a Bill of Rights?" (1976) 39 *Modern Law Review* 121 at p. 127.

voluntary groups, the political process is extremely inaccessible to individuals and quite often to groups as well. In this context Gerry Whyte has correctly observed that, “if one moves from the realm of political theory to the world of political reality, it is quite clear that some minorities cannot, for whatever reason, secure adequate protection for their interests through our political system.”<sup>39</sup> Lynch & Connolly have identified the reasons for this as being, *inter alia*, insufficient numbers to cause any real impact in any given electoral constituency and the geographical dispersal of members of groups such as the disabled.<sup>40</sup>

These remarks on the inequities of the political system can be usefully contrasted with the remark made by David Gwynn Morgan that “[t]he judges’ strong instinct for fairness has led to a number of decisions [in Ireland] protecting groups likely to be disadvantaged”.<sup>41</sup> Zander has also taken this point up, stating:

The vested interest of all government is to preserve the normal way of doing things and to resist pressure for change...Legitimate pressure can be generated through litigation under a Bill of Rights...Legislation or executive action on human rights matters is frequently affected by the political exigencies of the moment. Often it cannot be achieved at all, or only partially. Litigation to enforce the Bill of Rights may be easier to mobilise than either legislation or executive action.<sup>42</sup>

Zander continues by arguing that judges are better equipped and more ready to find a remedy for grievances than politicians or civil servants; he points in this context to the experience of civil liberties lawyers in the U.S. having more success in the courts than they ever had in either State or federal legislatures.<sup>43</sup> It is submitted that this is a far more realistic appraisal of the situation than that offered above by Lord Lloyd, and indeed is one which has been backed up by experience in recent years in Ireland. The enactment of the Education for Persons with Special Educational Needs Act 2004 was not brought about by political lobbying by parents or interest groups, but as a direct

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<sup>39</sup> Whyte, “Travellers and the Law” (1988) 10 *Dublin University Law Journal* (ns) 189 at p. 196. Similar sentiments are expressed by Quinn, “Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order” in Costello (Ed.), *Fundamental Social Rights: Current European Legal Protection & the Challenge of the EU Charter on Fundamental Rights*, Dublin, Irish Centre for European Law, 2000 at p. 41.

<sup>40</sup> Lynch & Connolly, “Equality before the Law” in *Report of the Constitution Review Group*, Dublin, Stationery Office, 1996 at p. 588.

<sup>41</sup> Morgan, *A Judgment Too Far? Judicial Activism and the Constitution*, Cork, Cork University Press, 2001 at p. 106.

<sup>42</sup> Zander, *A Bill of Rights?* (4<sup>th</sup> Ed.), London, Sweet & Maxwell, 1997 at p. 65.

<sup>43</sup> *Ibid* at p. 66.

result of persistent high-profile constitutional litigation on foot of the failure of the State to vindicate the right to education of children with special educational needs.<sup>44</sup> In the absence of the constitutional right, such litigation could not have taken place, which would have left the aggrieved children without any remedy whatsoever; furthermore, and more significantly for the purposes of the present argument, the impetus which drove the enactment of the legislation would have been absent.

Finally, it is necessary to consider the possibility that the existence of a justiciable constitutional right to education may have the effect of prioritising the needs of the individual over the needs of the collective. This point has been taken up by Ann Blair, who, basing her analysis on the limited right-based nature of the special educational needs statementing process in England & Wales, expresses concern that a rights-based approach to special educational needs may result in the needs of the few outweighing the needs of the many.<sup>45</sup> As will be explained in more detail below, this may occur where the full vindication of the rights of some children results in a lack of resources for the vindication of the rights of those who do not go to the same lengths to secure them.

Blair's argument is based upon an application of welfare law analytical models to the legal framework for special educational needs in England & Wales, whereby most children with special educational needs have their provision funded by the school which they attend, but those with the most severe learning difficulties become the subject of a statement of special educational needs, which entitles them to specified provision.<sup>46</sup> A full discussion of these welfare law models would be outside the scope

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<sup>44</sup> See, *inter alia*, *O'Donoghue v. Minister for Health* [1996] *Irish Reports* 20; *F.N. v. Minister for Education* [1995] 1 *Irish Reports* 409; *Comerford v. Minister for Education* [1997] 2 *Irish Law Reports Monthly* 134; *Sinnott v. Minister for Education* [2001] 2 *Irish Reports* 545; *T.D. v. Minister for Education* [2000] 3 *Irish Reports* 62 (High Court); [2001] 4 *Irish Reports* 259 (Supreme Court).

<sup>45</sup> Blair, "Rights, duties and resources: the case of special educational needs" (2000) 12 *Education and the Law* 177, particularly at p. 179.

<sup>46</sup> The legal framework for special educational needs is set out in Part IV of the Education Act 1996, as amended by the Special Educational Needs and Disability Act 2001 and the Education Act 2002. For a general overview of this framework see Oliver & Austen, *Special Educational Needs and the Law*, Bristol, Jordans, 1996 or Friel & Hale, *Special Educational Needs and the Law*, London, Sweet & Maxwell, 1996. Children whose special education needs are such that the Local Education Authority (LEA) is required, under section 324 of the Education Act 1996, to determine the special educational provision that is to be made for the child, are made subject to a statement of special educational needs which sets out the special educational provision that is to be made for that child. The LEA owes a personal duty to the child to arrange the special educational provision specified in the statement, and consequently the child has a statutory right to that provision. On the other hand, a large number of

of the current discussion, which is intended only to address the issue of balancing individual and collective interests in the context of enacting a constitutional right to education. Blair makes particular use of a classification which was set out by Jerry Mashaw, under which there are three models of administrative systems designed to allocate resources.<sup>47</sup> The Bureaucratic Rationality model involves matching a claimant's circumstances to pre-determined categories of need. The Professional Treatment model involves using professional judgment to make individual assessments of need. Finally, the Moral Judgment model involves adversarial claims against resources which are judged using judicial concepts of fairness. Blair proceeds on the basis of Michael Adler's simplification of Mashaw's classification, which states that the first model relies on a system of rules, the second on a system of discretion and the third on a system of rights.<sup>48</sup>

Essentially, Blair's point is that a rights-based approach results in more inequality than either the rules-based or discretion-based approach, as not everyone is able to access the adversarial system in the same way or to the same extent.<sup>49</sup> Those who successfully engage in the adversarial system receive total vindication of their rights, leaving fewer resources available to meet the needs of those who do not take a case. The court or tribunal which determines the case is not required to consider the needs of those who are not party to the case, even though the allocation of resources resulting from its decision may ultimately impact on those needs by removing a potentially sizeable portion of resources from a limited pot. Blair cites Jack Tweedie's explanation of this point:

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children with less severe special educational needs are not made subject to a statement of special educational needs, and have no enforceable statutory right to special educational provision. See *R. v. Secretary of State for Education and Science ex parte Lashford* [1988] 1 *Family Law Reports* 72 and *R. v. London Borough of Harrow ex parte M.* [1997] *Education Law Reports* 62, as well as Lundy, "Stating a case for the 'unstatemented' – children with special educational needs in mainstream schools" [1998] 10 *Child and Family Law Quarterly* 39.

<sup>47</sup> Mashaw, *Bureaucratic Justice: managing social security disability claims*, London, Yale University Press, 1983 at pp. 23-34, discussed by Blair, "Rights, duties and resources: the case of special educational needs" (2000) 12 *Education and the Law* 177 at pp. 181-184.

<sup>48</sup> Adler, "Decision making and appeals: social security in need of reform" (1997) 68 *Political Quarterly* 388 at pp. 394-396, cited by Blair, "Rights, duties and resources: the case of special educational needs" (2000) 12 *Education and the Law* 177 at p. 181.

<sup>49</sup> Blair, "Rights, duties and resources: the case of special educational needs" (2000) 12 *Education and the Law* 177 at pp. 186-187.

When rights are interpreted by decision-makers focused on individual claims, as judges are expected to be, individual claims are given near-absolute precedence over collective policy considerations, often undermining the programme's pursuit of collective goals.<sup>50</sup>

Furthermore, the adversarial process itself is expensive and often wasteful of resources which, rather than being spent fighting claims, could be released to spend on meeting needs instead.

Having rejected exclusive reliance on the rights-based model, Blair acknowledges the difficulties surrounding the alternative models, and in particular the need to separate professional judgment from the holder of the purse strings, in order to avoid a situation where "some need will be unmet because it is not serious enough to attract scarce resources rather than because it is not genuine."<sup>51</sup> Consequently, she advocates the pursuit of collective goals through a combination of a discretion-based system with a system of independent review (which she distinguishes from appeals), and suggests that this can be achieved in England & Wales through school-based initiatives designed to move resources away from the special educational needs statementing process, targeting them instead at attempting to address needs before they become so acute as to merit the preparation of a statement.<sup>52</sup> However, Blair concedes that "it will be important to build in safeguards to deal with the difficulty of ensuring that weakening the hold of individual rights does not mean that we are persuaded to accept levels of provision which are inadequate to meet genuine need."<sup>53</sup>

This latter point is of some considerable importance when operating in a system where resources are the dominant consideration in assessing special educational needs. Blair's entire analysis proceeds on the basis of an acceptance that overall resources will always be set at a fixed level which may often be insufficient to meet overall demand. This is where the rights-based model which Blair rejects is in fact critical: since the crux of this issue is resources, the solution may be found in the Bill

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<sup>50</sup> Tweedie, "Rights in social programmes: the case of parental choice in schools" (1986) *Public Law* 407 at p. 434, cited by Blair, "Rights, duties and resources: the case of special educational needs" (2000) 12 *Education and the Law* 177 at p. 188. A similar point is made by Fabre, *Social Rights under the Constitution*, Oxford, Clarendon Press, 2000 at p. 176.

<sup>51</sup> Blair, "Rights, duties and resources: the case of special educational needs" (2000) 12 *Education and the Law* 177 at p. 190.

<sup>52</sup> *Ibid* at pp. 187-189.

<sup>53</sup> *Ibid* at p. 190.

of Rights which is being advocated here. A constitutional right to education for children with special educational needs which rises above resource considerations (as is the case under the Irish Constitution),<sup>54</sup> places a constitutional duty on the State to make available whatever resources are necessary to make full and effective provision for the educational needs of all children.

The major practical impact of the presence of such a right is that the statutory framework for special educational needs in Ireland has been formulated so as to be rights-based and demand-led. Resources are provided in response to what has been determined to be required by assessments and education plans, and the purse-strings have been separated from those who exercise discretion.<sup>55</sup> In theory, therefore, this legal framework should ensure the availability of the resources necessary to fully meet the special educational needs of all children who have accessed the system. This can be contrasted with the system in England & Wales, which is largely discretion-based and supply-led, and where (as Blair herself has identified) the current system involves decisions regarding levels of provision being made within the confines of a limited pool of resources, which results in many children, whether stated, unstated or indeed not having special educational needs at all, having to settle for less than full provision as the necessary resources have simply not been made available under the legal framework.

Blair herself concedes that regardless of which model is employed, the making of adequate provision is ultimately dependent on the existence of adequate budgets.<sup>56</sup> These can only be guaranteed by a constitutional provision, which would remove the difficulty of how best to balance making full provision for the needs of every individual child while attempting to address the requirements of the collective within the constraints imposed by operating from a limited pot of resources. The Irish

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<sup>54</sup> It has been held on a number of occasions that resource considerations do not apply to the State's duty to vindicate constitutional rights – see, e.g., Costello J. in *O'Reilly v. Limerick Corporation* [1989] *Irish Law Reports Monthly* 181 at p. 193 and Barr J. in *Sinnott v. Minister for Education* [2001] 2 *Irish Reports* 545 at p. 568 (quoted below, n. 75).

<sup>55</sup> See section 13 of the Education for Persons with Special Educational Needs Act 2004. While it is conceded that the same effect could, in theory, be brought about by legislation alone, the level of expense involved is such that it is difficult to see a government taking such a step without the impetus which is provided by an entrenched constitutional imperative.

<sup>56</sup> Blair, "Rights, duties and resources: the case of special educational needs" (2000) 12 *Education and the Law* 177 at p. 189.

framework, although currently slightly flawed in this respect,<sup>57</sup> nevertheless points to a way in which a combination of a constitutional right and a legislative framework can make legal provision for adequate resources for all, without being subject to budget limitations. This may sound unrealistically expensive, but it is submitted that it is money well spent, both in human and economic terms;<sup>58</sup> moreover, all wealthy states can afford it.

In summary, therefore, the main arguments against the constitutionalisation of the right to education in the manner being advocated in this paper are based on notions of democracy, the suitability of the legislative branch of government to the protection of rights and concerns relating to individual rights undermining the collective good. However, each of these arguments has been shown to be either misconceived or ill-founded, particularly when applied specifically to the right to education.

Consequently, the first part of the thesis being put forward in this paper should by now have been proven: in order to be vindicated to the fullest extent possible, the right to education, including the right to special needs education, should have the benefit of constitutional protection in the form of a justiciable constitutional right which is free from resource constraints. In addressing the second part of the argument – that a legislative framework is also required – it is necessary to first consider whether the constitutional right is enough on its own.

### **Is a Constitutional Right to Education Sufficient on its Own?**

In considering whether a constitutional right to education, without any further legislative provision, is sufficient to ensure the full vindication of the right, it is

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<sup>57</sup> Some doubt persists as to whether the wording of section 13 of the Education for Persons with Special Educational Needs Act 2004 actually guarantees the full availability of resources; see O'Mahony, "The Education for Persons with Special Educational Needs Act 2004: A New(ish) Beginning" (2004) 19 *Irish Law Times* 301. However, this is a very technical point and could be easily rectified through a slight re-phrasing of that provision.

<sup>58</sup> In human terms, the connection between education and human dignity, and the fundamental role which human dignity plays in human rights law, dictates that education should be provided for all, irrespective of cost; see above. In economic terms, the passage quoted from Kelly, above n. 18, illustrates the importance of education, and in the context of special educational needs, research indicates that the cost of making adequate educational provision for, e.g., autistic children in their early years is more than offset by the savings which accrue at a later stage when the benefits of the education provided earlier mean that less care facilities have to be provided in later life; see Boyle & Burton, "Making Sense of SEN: The Role of the Voluntary Sector" [2004] *Education Law Journal* 15.

possible to draw upon 60 years of practical experience of this exact situation in Ireland and answer the question with an emphatic “no”. The Irish experience provides a graphic and unequivocal illustration of the need for more than a mere constitutional right; a highly detailed legislative framework is required to guide its operation and to give teeth to the right. Constitutional documents, by their very nature, should state matters at a level of generality which is entirely inappropriate to the vastly complex area of education.<sup>59</sup> The contrasting demands of the various levels and types of education, from pre-school to higher level, and particularly the field of special educational needs, require a highly detailed framework in which to operate. The Irish experience of the past decade in particular has illustrated the difficulties which can arise from relying solely on the constitutional provisions.

In the absence of a detailed legislative framework to guide its operation, education has remained very much in the executive field, being regulated by a series of circulars and memoranda issued by the Department of Education. This has led directly to two major difficulties in practice which have had the effect of undermining the right to education of the child. First, demarcation disputes have arisen between government departments as to who is responsible for funding various aspects of educational provision such as transport, psychological assessments and residential care. Given the level of expense involved in these matters, the Department of Education has been all too eager to try to pass the buck to the Department of Health and the Department of Transport. In turn, these departments feel that they are being asked to take on expenses rightly belonging to the Department of Education. This is a particular danger in the resource intensive area of special educational needs, where a variety of support services are required and the amount of money necessary to vindicate rights is disproportionately larger than the number of votes which will be lost as a result of a failure to make adequate provision.

These disputes between departments tend to descend into protracted wrangling, giving rise to lengthy delays in making adequate provision for children; delays which may cause irreparable damage to a child with special educational needs, since it is well

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<sup>59</sup> The *Report of the Constitution Review Group*, Dublin, Stationery Office, 1996, states at p. 355 that “the Constitution should, where possible, endeavour to state propositions at a sufficient level of generality to permit evolution and development.”

established that early diagnosis and intervention are of paramount importance in relation to learning difficulties such as autism and dyslexia. Furthermore, if the law imposes age limits on entitlements to educational provision (as it does in both England & Wales and Ireland),<sup>60</sup> delays in meeting a child's needs cause that child to irrevocably lose part of his limited period of entitlement to free provision. Referring to one series of such delays, Kelly J. in the Irish High Court referred to the situation as a "scandal" and stated that: "The addressing of the rights of the young people that I have had to deal with appears to be bogged down in a bureaucratic and administrative quagmire."<sup>61</sup> The advantage of a legislative framework in such a scenario is to clearly stipulate – in legally binding terms – the areas of responsibility of each government department.<sup>62</sup> This prevents the crucial issue of educational provision from becoming a political football which departments, having decided that special needs education costs more money than votes, are content to pass back and forth between themselves.

The other major difficulty which has arisen from the absence of a legislative framework relates to the issue of remedies. This is a highly complex issue, and no more than a brief explanation is possible in the present context.<sup>63</sup> As noted above, the absence of legislation in Ireland has caused education to remain in the executive field as a matter of policy rather than of statutory obligation. Even in the U.K., where there is a relatively loose separation of powers, the courts will be reluctant to interfere with matters of policy.<sup>64</sup> However, in Ireland, where there is a far tighter separation of

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<sup>60</sup> See section 312(5) of the Education Act 1996 and *Wakefield Metropolitan District Council v. E.* [2002] *Education Law Reports* 203 in England & Wales, and section 1 of the Education for Persons with Special Educational Needs Act 2004 and *Sinnott v. Minister for Education* [2001] 2 *Irish Reports* 545 in Ireland.

<sup>61</sup> *D.B. v. Minister for Justice* [1999] 1 *Irish Law Reports Monthly* 93 at p. 104.

<sup>62</sup> In Ireland, the Education for Persons with Special Educational Needs Act 2004 addresses this issue by assigning responsibility in cases where it is possible to do so and establishing a dispute resolution mechanism to deal with cases where the issue is unclear. Section 7 sets out the division of responsibility between health boards and the National Council for Special Education. Section 7(5) provides that if a dispute arises between a health board and the Council as to which of them can more effectively provide particular services identified as being required in respect of a child by an assessment or an education plan, it must be referred to the Special Education Appeals Board by either or both of the bodies within 2 months of arising. The Appeals Board is then to determine the case within 2 months.

<sup>63</sup> This matter has been fully discussed by O'Mahony, "Education, Remedies and the Separation of Powers" (2002) 24 *Dublin University Law Journal* (ns) 57.

<sup>64</sup> On the relative looseness of the separation of powers under the British Constitution, see the following quote from Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (1993), quoted in Laws, "Law and Democracy" [1995] *Public Law* 72 at p. 90: "Nothing underlines the atheoretical nature of the British Constitution more than the casualness with which it approaches the separation of powers." In spite of this, the courts still tend to regard an

powers set down by the written constitution, the result has been the decision of the Supreme Court in *T.D. v. Minister for Education*<sup>65</sup> that is impermissible to grant mandatory injunctive relief compelling a Minister to provide the resources necessary to discharge the State's constitutional obligations.

The flaws in this decision have been set out by the present author elsewhere;<sup>66</sup> for now, it is sufficient to recall that the other available remedies – damages and declaratory relief – are generally inadequate, and that mandatory relief is often essential to the vindication of the rights of the child. Crucially, it was commented by one of the judges involved in the *T.D.* decision that the difficulties which arose in relation to the separation of powers would not arise if a legislative framework was in place,<sup>67</sup> and this would seem to have been confirmed in principle.<sup>68</sup> While it is as yet unclear, due to a technical issue, whether the legislative framework eventually enacted actually solved the problem,<sup>69</sup> the fact remains that in principle, this is another benefit of adding such a framework to the underlying constitutional right.

A further reason for adding a legislative framework to the constitutional right relates to access to alternative and more specialised remedial procedures. It is essential that remedies in the field of special educational needs be speedy and accessible, since delays can cause irreparable damage to a child's educational prospects, and as mentioned above, cause the child to irretrievably lose a period of their entitlement to free education. However, a plaintiff wishing to sue directly on foot of the constitutional right in Ireland must do so in the superior courts; this is inordinately expensive and time-consuming. An action for breach of statutory duty, on the other hand, can be brought at a lower level; furthermore, a legislative framework can establish a statutory remedial procedure such as the Special Educational Needs and

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interference with matters of policy as being a breach of the separation of powers; see *Council of Civil Service Unions v. Minister of State for the Civil Service* [1985] *Appeal Cases* 374.

<sup>65</sup> [2001] 4 *Irish Reports* 259.

<sup>66</sup> See O'Mahony, "Education, Remedies and the Separation of Powers" (2002) 24 *Dublin University Law Journal* (ns) 57.

<sup>67</sup> In *Sinnott v. Minister for Education* [2001] 2 *Irish Reports* 545, Hardiman J. suggested at pp. 711-712 that no difficulty would arise in respect of injunctive relief granted pursuant to a statutory duty. Hardiman J.'s judgment in *Sinnott* was basically a less developed version of the judgment which he gave shortly afterwards in *T.D.*

<sup>68</sup> See *Cronin v. Minister for Education*, High Court, unreported, 6<sup>th</sup> July 2004.

<sup>69</sup> See O'Mahony, "The Education for Persons with Special Educational Needs Act 2004: A New(ish) Beginning" (2004) 19 *Irish Law Times* 301.

Disability Tribunal in England & Wales<sup>70</sup> and the Special Education Appeals Board in Ireland.<sup>71</sup> Both children with special educational needs and their parents already suffer from cumulative disadvantage which has been identified as causing them to lack the time, resources or confidence to go to court as individuals.<sup>72</sup> Consequently, it is essential that remedies be made as accessible as possible to them. Specialist tribunals have the distinct advantage of being more informal and user-friendly than the courts, in addition to being far quicker and less expensive. Moreover, they are composed of specialist members who are in a better position than a court of law to make informed judgments on the needs of individual children.

The overall argument in favour of adding a legislative framework to an underlying constitutional right is that it provides the necessary level of detail to give practical effect to the right which is guaranteed in the Bill of Rights. The function of a constitutionalised right to education in an entrenched Bill of Rights is not to deal with minute matters of detail, but to ensure the highest level of legal protection available. Legislation – both primary and secondary – will deal with the finer aspects of educational provision, setting out exactly what is to be provided, who is to provide it, procedures for how provision should be made and remedies for when it is not. The practical experience in Ireland would seem to have conclusively demonstrated the need for legislation and the ineffectiveness of a constitutional right alone. However, before concluding that the argument being made in this paper has been justified, it is necessary to consider one further issue: if it is legislation, rather than the Bill of Rights, that gives practical effect to the right to education, is there really any need for a constitutionalised right in the first place?

### **Is a Legislative Framework Sufficient on its Own?**

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<sup>70</sup> The Special Educational Needs and Disability Tribunal was established in England & Wales by section 177 of the Education Act 1993 and is currently governed by Part IV of the Education Act 1996 (as amended by the Special Educational Needs and Disability Act 2001) and the Special Educational Needs Tribunal Regulations 2001 (S.I. 2001/600); see generally Harris, *Special Educational Needs and Access to Justice: The Role of the Special Educational Needs Tribunal*, Bristol, Jordans, 1997.

<sup>71</sup> The Special Education Appeals Board was established in Ireland by section 36 of the Education for Persons with Special Educational Needs Act 2004.

<sup>72</sup> Lynch & Connolly, "Equality before the Law" in *Report of the Constitution Review Group*, Dublin, Stationery Office, 1996 at p. 588.

Having established the necessity for legislation, the final step in justifying the argument that the right to education is best protected by a combination of a constitutional right and a legislative framework is to re-affirm the need for a constitutional right to underlie the legislation, and to dispel any doubts arising in this regard from the fact that it is the legislation, rather than the constitutional right, which has a practical impact. The first point to make is to recall the arguments made above in favour of constitutionalising the right to education: the most fundamental, unique and complex nature of the right, which demands the highest form of protection the law can offer. These arguments are all somewhat theoretical; they shall now be supplemented by some other arguments of a more practical nature.

First, and perhaps most crucially, constitutionalising the right to education in a manner free from resource constraints, as is the case under the Irish Constitution,<sup>73</sup> would shield it from the political and economic demands of any given moment, and cause it to rise above resource considerations. As already noted, the vindication of the right to education is expensive; indeed, in the context of special educational needs, inordinately so. It will always be an extremely tempting target for funding cutbacks in times of economic hardship or when political priorities lie elsewhere. This is a situation which should be prevented at all costs. In purely economic terms, it should be noted that education contributes enormously to the economic development of society; any attempt to save money by cutting funding to education is simply a false economy.<sup>74</sup> An even greater danger applies to special educational provision as the most expensive type of education per head, but also the type which affects the least number of people; its expensive nature and lack of electoral impact dictate that it will always be a prime target for spending cutbacks. Apart from the fact that this does not make economic sense, it should be noted that in human terms, given the importance of education to the dignity of individuals with special educational needs, this should not be allowed to happen.

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<sup>73</sup> It has been held on a number of occasions that resource considerations do not apply to the State's duty to vindicate constitutional rights – see, e.g., Costello J. in *O'Reilly v. Limerick Corporation* [1989] *Irish Law Reports Monthly* 181 at p. 193 and Barr J. in *Sinnott v. Minister for Education* [2001] 2 *Irish Reports* 545 at p. 568 (quoted below, n. 75).

<sup>74</sup> See quote from Kelly, n. 18 above, and discussion in note 58 above.

Under a simple legislative framework, it is all too easy for a government to reduce the level of educational provision which is made available. The issue of budgeting and limited pools of resources has already been discussed; a constitutional right free from resource limitations will help to overcome this major hurdle. Furthermore, education legislation itself often contains an in-built resource qualification; however, even if it does not, repeal of the statute by a simple parliamentary majority will suffice to make any reductions in provision which the government seeks. The presence of a Bill of Rights which constitutionalises the right to education will prevent this from happening, as it cannot be eroded as easily as legislation, and a lack of resources will not justify a failure to vindicate the right. This advantage was neatly summarised in relation to the Irish Constitution by Barr J. in the Irish High Court in *Sinnott v. Minister for Education*:

A citizen's constitutional right must be responded to by the State in full. A partial response has no justification in law, even in difficult financial circumstances which may entail the raising of new tax revenue to meet such claims – happily a situation which has not pertained for several years.<sup>75</sup>

In practical terms, few more compelling arguments could be presented in favour of constitutionalising the right to education.

A further argument can be drawn from the overall impression that one gains when contrasting the body of constitutional case law relating to education in Ireland with its legislative equivalent in England & Wales. The Education Acts in England & Wales involve placing LEAs under a series of statutory duties and affording to them a large degree of statutory discretion as to how to discharge those duties. Undoubtedly, a large amount of discretion is necessary for LEAs to carry out their function. However, in the absence of a “right” to education (properly so-called) in English law, the effect of this is as follows: as courts are invariably reluctant to interfere with a public authority in its exercise of a discretion conferred by statute, cases begin from the standpoint – indeed, almost the presumption – that the courts should not interfere with the course of action adopted by the LEA. It is up to the plaintiff in the case to persuade the court that there is a strong case for doing otherwise. This has the effect

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<sup>75</sup> [2001] 2 *Irish Reports* 545 at p. 568.

of stacking the deck in favour of the LEA in many cases and creating a major hurdle which many genuinely aggrieved plaintiffs will find it difficult to cross.

The presence of an overarching constitutional right to education causes Irish case law to have an entirely different emphasis. Instead of revolving around a reluctance to interfere with the exercise of a statutory discretion, the case law focuses on the fact that the plaintiff has a constitutional right which the State has failed to vindicate. This is obviously a far preferable situation to that which persists in England & Wales, where the statutory procedures which are the subject of much litigation are so detailed that they become an issue in themselves, with the fundamental issue of a breach of a child's right to education becoming lost in the process. A constitutional right to education would redress the imbalance which currently exists between the parties to education cases in England & Wales by ensuring that the real issues are at the heart of the litigation and do not become lost in a blur of procedure and discretions.

A bigger issue, however, is the focus of the legislation itself; indeed, it is from this that the focus of the litigation results. As mentioned above, the absence of a rights-based approach to educational provision leads to a situation where the availability of resources is determined out of an overall budget figure, out of which individual allocations of resources are to be allocated on a discretionary basis. Because the allocation of resources is supply-led and works from the top down, the overall budget is invariably inadequate, which has the knock-on effect that individual allocations of resources will, in certain cases at least, be similarly inadequate. This is exacerbated by the failure to separate the holder of the purse-strings from the exercise of the discretion, which inevitably leads to cases where individual provision is determined by reference to what can be provided within the budget rather than by reference to what is actually provided.

The rights-based and demand-led approach to resources which has been adopted in the Irish legislation would seem to have been a direct consequence of the pre-existence of a constitutional right to education. Under this approach, resource allocations are determined from the bottom up, with assessments of what provision the child requires being made by a body which is not involved in the allocation of resources, and the overall resources being provided by reference to the education

plans which have been prepared pursuant to the assessments. This is a huge difference to the approach in England & Wales, and if the Irish framework is implemented in a manner which is consistent with the interpretation which has been made here, it will have a profound impact on the educational provision made for children with special educational needs. However, such is the expense involved in such a system that it is difficult to see it having been designed in such a way in the absence of an entrenched and justiciable constitutional right to education which is free from resource constraints. Thus the true impact of the presence of a constitutional right to education in Ireland and the absence of such a right in England & Wales could be distilled down to the difference between a demand-led system which requires the consent of the people to any radical changes, and a supply-led system which can be altered quite easily by, if not entirely at the whim of, the government of the day.

### **Conclusion: Is a Combination of a Constitutional Right and a Legislative Framework Really the Answer?**

It has been argued in this paper that the right to education should be afforded the level of protection that can only be afforded by an entrenched and justiciable constitutional provision which is free from resource constraints. This is due to the most fundamental, unique and complex nature of the right to education, coupled with the resource intensive nature of the right and the need to ensure that the rights of the child are the central consideration in legal proceedings concerning cases of a failure to vindicate the right to education. Furthermore, it has been shown that, while a constitutionalised right to education is the highest form of protection which the law can offer, the practical implementation of the right requires that it be backed up by a detailed legislative framework. Practical experience in England & Wales and in Ireland has shown that one element of provision is insufficient without the other; if the right is to be vindicated for all to the fullest extent possible, this co-dependence of the two branches of law dictates that both must be present. To draw an analogy, they are similar to the foundation and superstructure of a building; a superstructure requires the support of a foundation, but a foundation is of little use on its own.

Much, of course, depends on how the relevant constitutional provision and legislation are drafted and interpreted, and as set out above, they should ideally be free from resource constraints and other limitations regarding age and type of educational provision, and should provide a clear framework which stipulates the rights and duties of all the relevant parties to the educational process. Furthermore, it is also extremely important that any reforms in this area are carefully co-ordinated between the two branches of law. A global approach must be taken to the issue which avoids the pitfalls of reforming one branch of the law without making the necessary adjustments to the other. If all of this is done, then it may be possible to say that the legal systems of wealthy States such as Ireland and the U.K. make adequate provision for the domestic implementation of the right to education under the UNCRC.