BOOK REVIEW

"EDUCATIONAL RIGHTS IN IRISH LAW"

(Thomson Round Hall, 2006)
Conor O'Mahony

THE HON. MR. JUSTICE RONAN KEANE*

The approach of our law makers to the regulation of Irish education reminds one of Bus Eireann – you wait an hour for a bus and then three or four arrive together. So after decades when the only statutory intervention in education was the school attendance legislation, the Education Act 1998 was followed by the Education (Welfare) Act 2000, the Education for Persons with Special Educational Needs Act 2004 and the Disability Act 2005. The arrival on the statute book of this vast body of novel legislation led to the welcome publication last year of *Special Educational Needs and the Law* by Mary Meaney, Karl Monaghan and Nessa Kiernan. Now we have a further valuable contribution from Dr Conor O'Mahony who is a lecturer in the Faculty of Law in University College Cork.

The historical background from which our educational structures emerged and the elaborate treatment of the family and education in the Constitution have given rise to difficult legal and constitutional issues, some of which have yet to be resolved, as Dr O'Mahony eloquently demonstrates. The Constitution acknowledges the role of the family as "the primary and natural educator of the child" but obliges the State to provide for free primary education and other educational facilities required by "the public good". What precisely is meant by "education" and similar expressions is one of the problems with which the courts have had to grapple.

While Dr O'Mahony is certainly correct in saying that this was one of the issues which the judgments of the Supreme Court in *Sinnott v. Minister for Education*[1] did not resolve, it is surely

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[1] [2001] 2 I.R. 545 (S.C.).

unlikely that Irish courts in the future will adopt the narrow construction of "education" adopted by Kenny J. in *Ryan v. Attorney General*.[2] That eminent judge was of the view that, since Article 42.2 refers to the rights of parents to provide the education referred to elsewhere in the Article in their homes "or in schools" it was clear that what was meant was "scholastic education". However, a broader view was taken by O'Dálaigh C.J. on appeal in the same case:

> Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.[3]

In the subsequent cases of *O'Donoghue v. Minister for Health*[4] and *Sinnott*, the High Court judges (O'Hanlon J. and Barr J. respectively), in dealing with the constitutional entitlements of children suffering from mental handicap, adopted this broader formulation favoured by O'Dálaigh C.J. Since the issue did not directly arise on the appeal in *Sinnott*, Dr O'Mahony would seem to be justified in concluding that the approach adopted by the High Court judges represents the law. As it happens, it is also in harmony with the definition of "education" in such instruments as the United Nations Universal Declaration of Human Rights and Covenant on the Rights of the Child.

As judges have frequently had occasion to point out, Article 42 lays particular emphasis on the rights of parents to decide how their children are to be educated, subject to the overriding requirements that they receive a certain minimum education. However, as Dr O'Mahony points out, this guarantee of the right of the parents to choose which schools their children will attend is somewhat illusory. He cites statistics from the Department of Education that, in 2005/6, 98.5 per cent of ordinary national schools were denominational, with 92.1 per cent being Catholic denominational schools. There are, accordingly, severe constraints on the theoretical freedom of parents to send their

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[2] [1965] I.R. 294 (H.C.).
[3] [1965] I.R. 294, 350 (S.C.)
[4] [1996] 2 I.R. 20 (S.C.).

children to schools of a different denomination or to multi-denominational or to inter-denominational schools.

It is understandable that the drafters of the Constitution in 1937 recognised that the State's obligation to ensure free primary education could be met by the maintenance of the existing system under which such education was provided in denominational schools funded by the State. Whether this framework will continue to be appropriate in a rapidly changing Ireland with a greater diversity of beliefs remains to be seen.

The constitutional provisions on education also reflect the times in which they were drafted in affording no express recognition to the right of the child to receive education. It is, however, clear from the judgment of O'Higgins C.J. in *Crowley v. Ireland*[5] that there is such a constitutional right and it has more recently been given statutory form in the legislation already mentioned. There has, however, been controversy as to the nature of the remedy available where the State is in breach of its constitutional duties in this area.

Here Dr O'Mahony joins other academic commentators in criticising the decision of the Supreme Court in *Sinnott* and *T.D. v. Minister for Education*[6] as adopting an unduly conservative approach to the granting of mandatory injunctive relief in such cases.[7] In *Sinnott*, the issue as to whether such a mandatory injunction should be granted became effectively moot having regard to the decision of the majority in the Supreme Court that the constitutional right of children to free primary education ceased at the age of 18. In *T.D.*, the question as to whether such an injunction should be granted certainly arose in a unique context: the granting in the High Court of a mandatory injunction requiring the relevant Minister to implement, within a specified time, a plan for the building of a number of care units for children with behavioural problems. While a majority of the Supreme Court were of the view that the order in the form in which it was made was inconsistent with the separation of powers, it would be unsafe to assume that the decision wholly excludes the Court's

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[5] [1980] I.R. 102 (S.C.).

[6] [2000] 4 I.R. 259 (S.C.).

[7] No difficulty arises as to the award of damages or the granting of declarations.

jurisdiction to grant mandatory injunctions in every case where a Minister disregards the constitutional rights of children or anyone else.

However, while it is possible to disagree with Dr O'Mahony on this and other topics, his book is undoubtedly an important contribution in an area of law in which increasing judicial involvement seems likely.