

THE RIGHT TO EDUCATION

An Analysis of International Law concerning the Right to
Education and Its Application in Belgium, France and Ireland

by

JULIAN LONBAY

Thesis submitted for assessment with a view
to obtaining the Degree of Doctor of the
EUROPEAN UNIVERSITY INSTITUTE
FLORENCE, ITALY

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VOLUME 1

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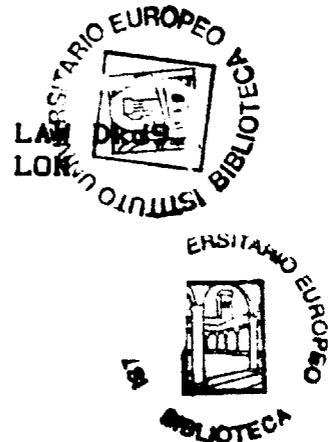
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* * *

Members of the Jury:

- Prof. Geoffrey J. HAND, University of Birmingham, former European University Institute (Supervisor)
- Prof. John M. KELLY, University College, Dublin
- Dr. Margherita RENDEL, University of London Institute of Education
- Prof. Antonio CASSESE, European University Institute
- Prof. Bruno DE WITTE, European University Institute



PREFACE

This work is dedicated to Ann, my wife. I also owe a great deal to my thesis supervisor Professor Geoffrey Hand. Professor Bryant Garth kindly read many of the chapters in draft and gave sound advice. Any errors and misconceptions that remain are, of course, the author's entire responsibility. Many thanks also go to librarians and their staff, in Geneva (U.N.), Florence (EUI), Indiana (School of Law, Bloomington), Birmingham (Faculty of Law) and Oxford (Radcliffe Camera).

The length of this work is not just a product of its long gestation. In the expanding literature on human rights there has been no attempt to systematically examine the right to education at an international level. Part Two of the thesis reflects the large area that it attempts to cover, an area that has previously not been written about. It covers not only an important precedent-setting pre-World War Two "minority" treaty, but several of the post-World War II U.N. treaties and other instruments dealing with human rights law. These were negotiated over a long period, and their negotiation is largely a matter of public record. The U.N. archival documents are relatively widely available, yet no-one, to the present writer's knowledge, has attempted a systematic analysis of the human rights instruments so produced. This work then cannot rely or build on what others have written but is largely original research mainly from primary U.N. documents, but also from the League of Nations archives (at Geneva). The analysis of the *travaux préparatoires* of the European Convention on the Protection of Human Rights and Fundamental Freedoms also relied on original documents supplied by the Council of Europe.

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INTRODUCTION:

Aims of the thesis

INTRODUCTION:

This introduction is in two main parts. The first (A) is essentially an explanation of the focus and motivation of the thesis. The second (B) amounts to a preliminary explanation of the possible meanings and basic assumptions connected with the term the "right to education".

A. OUTLINING THE AIMS OF THE THESIS

All of the ideas lying behind the educational provisions of the human rights treaties to be considered in this work arose from ideas originally expressed at the national level concerning what amounted to a good education. Ideas of equal educational opportunity, state provision of education and freedom in education were clearly visible during the French revolutionary period.¹ Many of the ideas have percolated through national consciousness to become enshrined in international law.

Education is in many respects an odd candidate for enshrinement as a right whether at the European or wider

1. See Chapter Ten on France.

INTRODUCTION:

Aims of the thesis

international level.^{'2'} It is closely linked to national cultures, intertwined with national political, religious, linguistic and ethnic compromises, and heavily dependent on national financial appropriations.^{'3'} Yet education is of fundamental importance to the individual and family, often determining individual opportunity to succeed in society. Despite its complexity^{'4'} it has been emerging as a matter that is of international concern. This thesis is primarily

2. A preliminary sketch of the issues involved in examining this right is given below in section B. There are perennial questions about the nature of education. There are difficult questions about what is a "good" education. When one adds in factors such as the transmission of social values and attempts to use education as an agent for social change then the depth of difficulty of these questions increases enormously. Intensely subjective, often political, factors, sometimes hiding as theory, will influence one's position in answering them. See Hare, R. M., 'Liberty and equality: How politics masquerades as philosophy', in Paul, E. F., Miller, F. D., and Paul, J., *Liberty and Equality*, (Blackwell, Oxford, 1985), 1 at p.5; Also Narveson, J., 'Equality vs Liberty: Advantage, liberty', in Paul *et.al. op.cit.*, 33, at p.43.
3. See Part Three.
4. See further section B of this Introduction.

INTRODUCTION:

Aims of the thesis

concerned with the emergence and evolution of the right to education in international law.⁽⁹⁾ Politicians and the nation states they represent have agreed on certain rights. In some cases the international enforcement machinery set up to monitor state performance has resulted in the evolution of the rights so enshrined.

The thesis looks at the obligations in respect of educational rights, examining the impact that the rights might potentially have as they evolve.⁽¹⁰⁾ Three West European states France, Ireland and Belgium are used as illustrations.

Looking at the international law on the right to education

5. There are sceptics of international human rights such as Watson and Lane, who look to appalling human rights abuses in the world (genocide in Kampuchea for example), see that nothing is done to alleviate the situation and conclude that such law does not exist. These critics have had their arguments ably rebutted by D'Amato, A., 'The concept of human rights in international law', (1982) 82 *Col.L.R.* 1110 and citations therein. This thesis does not enter that specific debate.
6. It does not tackle the wider issue of how such rights are to be universally guaranteed. See generally Trubek, D, M., 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs programs', in Meron, T., *Human Rights in International Law*, Vol.1 (Clarendon Press, Oxford, 1984) 205. See below p.38.

INTRODUCTION:

Aims of the thesis

involves an assessment of the role of what one could call international constitutionalism⁷⁷, that is the increasing impact that International law has on domestic decisions as to resource allocation within the states. It is trite to say that constitutional adjudication has a legislative impact, but this phenomenon is traditionally reserved and expected to occur only at a state level. Increasingly though it is occurring in international fora. This is certainly true when one looks at the treaty establishing the European Economic Community (EEC).⁷⁸ It is commonplace to assess the Treaty of Rome as a constitutional document,⁷⁹ and the EEC member states as being in a nascent functional federalism. But the thesis does not

7. See further Chapter Seven, The European Dimension, Section on Common standards, especially note 94 and accompanying text, and authors cited therein.
8. The Treaty of Rome establishing the European Community, reproduced as amended in Rudden & Wyatt, *Basic Community Laws*, 2nd Ed. (OUP, 1986).
9. See e.g. Donner, 'Constitutional powers of the European Court of Justice', [1974] *C.M.L.Rev.* 516; Stein, E., 'Lawyers judges, and the making of a transnational constitution', (1981) 75 *A.J.J.L.* 1; Hartley T. C., 'Federalism, Courts and legal systems: The emerging constitution of the European Community', (1986) 24 *A.J.C.L.* 229.

deal with the European Communities.⁽¹⁰⁾ Instead what it tries to

10. There has been considerable debate over the question as to whether the EEC should adhere to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter either European Convention on Human Rights or ECHR). For recent literature see Dausies, M., 'The protection of fundamental rights in the Community Legal Order', (1985) 10 *E.L.Rev.* 398; Brown, L. N., and McBride, J., 'The United Kingdom, The European Community and the European Convention on Human Rights', (1981) 1 *Ybk.E.L.* 167. In the field of education with which this thesis is concerned, the European Communities have a relatively small, though growing, role (primarily related to mutual recognition of qualifications, and the protection of the interests of migrant workers and their children). See generally, Neave G., *The EEC and Education*, (Trentham Books, Stoke on Trent, 1984) However human rights questions relating to education in the European Communities do crop up from time to time. For example the complaint in Application 11055/84 against Belgium and the European Communities over admission to the European School in Brussels. This was dismissed by the European Commission on Human Rights as Belgium alone was not responsible for the European School and the E.C's were not a party to the European Convention on Human Rights. Application No. 11055/84

INTRODUCTION:

Aims of the thesis

assess is the role that international law plays in deciding internal criteria for resource distribution, in effect setting the internal political agenda. When this occurs it naturally has an integrative effect. This effect is analysed as regards the right to education.

What is meant by internal resource distribution is that human rights demand specific resource allocation within states,¹¹ most often at the instigation of individuals and human rights pressure groups. If the rights are available to be enforced in a national court of law then the individual's human rights claim can short-circuit the normal political conduits for change. This is studied in particular in relation to questions of economic, social and cultural rights, specifically the right to education. In the process the question of the classification of international human rights is analysed.

We all know that human rights "exist" and are bandied about

v Belgium and the European Communities, (1986) 8 *E.H.R.R.* 317.

11. And potentially amongst states. See Article 2 Covenant on Economic, Social and Cultural Rights and the Charter of Economic Rights and Duties of States of the General Assembly of the U.N. 1974 setting out the basis for a new international economic order (NIEO).

INTRODUCTION:

Aims of the thesis

in a political fashion by those concerned with foreign policy.¹² This reflects their legal existence which legitimises this intervention in internal affairs of other states. But the same human rights can also be used by individuals within a state to "coerce" a particular resource allocation within that state. Clearly the ability of individuals to use international law "domestically" in this fashion depends critically on what legal force a state allows to international law in its domestic legal system. It is a rare state that allows it supremacy over its own laws.¹³ Even in such a state the international rule has always been previously endorsed by the

12. Derian, P. M., 'Human rights and U.S. foreign relations: An overview', (1978) 10 *Case Western Res. I.L.J.* 243; Schoultz, L., 'U.S. economic aid as an instrument of foreign policy: The case human rights in Latin America', in Nelson, J., and Green, V., (eds), *International Human Rights*, (Coleman, N.Y., 1980) 317; Nayar, M., 'Human rights: The U.N. and U.S. foreign policy', (1978) 19 *H.I.L.J.* 813, at p.824.; Subcommittee on Foreign Affairs and International Organisations, House of Representatives, 99th Congress, *U.S. Human Rights Policy*; Komers and Loesch, *Human rights and American foreign policy*, (U.P. Notre Dame, 1979); Cohen, 'Conditioning U.S. security assistance on Human Rights practices', (1982) 76 *A.J.I.L.* 247.
13. Belgium is such a state, see chapter Ten below.

INTRODUCTION:

Aims of the thesis

national legislature or components of that legislature. This thesis is concerned specifically with the situation in Western Europe.¹⁴

Apart from the individual vindicating human rights claims in the domestic forum, the treaties, in some instances, allow the individual to pursue a claim internationally. The spectre of the individual tackling the state in an international forum, was an unthinkable event in the nineteenth century.¹⁵ Most international lawyers are now happy to accept that International Law has changed and that the individual may now be a subject of such law. In the past this has occurred in the Upper Silesian system¹⁶, and currently

-
14. Using the position in France, Ireland and Belgium as examples. Their acceptance of international law is considered below in the respective chapters on their legal systems.
 15. See below chapters two and three. It is also a feature of the International Covenant on Civil and Political Rights where states have ratified the Optional Protocol. See chapter four below. Some consider it a problem still, see *passim*, McDougal, M., Lasswell, H., and Chen, L., 'Nationality and Human Rights: The protection of individuals in international arenas', (1974) 83 Y.L.J. 900.
 16. See below chapter two.

INTRODUCTION:

Aims of the thesis

does under the European Convention on Human Rights system.¹⁷ Such systems have the two-fold effect of ensuring enforcement of the claims, but perhaps more important even than the individual redress, is the resulting development of the human rights norms themselves. The development of the right to education, particularly under the ECHR system, is considered in considerable detail below in chapter seven. Another role played at the international level is that of reporting on human rights by the states themselves and having an international body comment on reports submitted. The European Social Charter probably has the most effective system in this respect¹⁸ as the Committee of Ministers has the power to issue recommendations, both to individual states as well as general recommendations. Such systems do not cater for individual petitions but nonetheless try to ensure enforcement of the norms by the states undertaking to respect them and thus they also make inroads into national decisions on

17. See below chapter seven. Also in the American Convention on Human Rights. The latter treaty is not directly considered in this work as none of the states under study are parties to it. See though chapter eight for an analysis of the proposed Protocol to the American Convention on Human Rights.

18. See below chapter seven.

INTRODUCTION:

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resource allocation.^{'17'}

Chen argues that these developments have not changed international law at all.^{'20'} He argues that individuals are not the subject of international law, and that the states parties to international human rights treaties are in fact joined in a functional federation.^{'21'} It may seem a matter of semantics whether one argues that we have a redefined, but weakly enforced, international law, or whether one can say that international law remains the same but that states have entered into a functional union of sorts. It is fertile ground for political scientists. The ideas of Chen on functional federalism are clearly echoed by those espousing

19. The Human Rights Committee that oversees the International Covenant on Civil and Political Rights can only make general comments. See below chapter four.
20. Chen, B., 'Custom: The future of general state practice in a divided world', in MacDonald R, St, J., and Johnston, D, M., (eds.), *The structure and process of International Law*, (Martinus Nijhoff, the Hague, 1983) 513.
21. Though somewhat inconsistently he makes an exception for treaties that allow an individual to press a claim in a supranational forum. Inconsistently because the supranational forum idea seem to epitomise more the idea of a functional federation. Writers do accord the ECHR a *sui generis* status. See below chapter seven.

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the revival of regime theory though in a different language.⁽²²⁾ What essentially matters in this debate and what is addressed in this work, is whether, in fact, the system, be it a matter of international law, political clusters of expectations,⁽²³⁾ or a matter of functional federalism, actually helps to ferment a dialogue between the international norm (and any bodies that interpret and/or enforce the norm) and domestic political and legal action. In other words does the norm have an impact on state sovereignty, and if so, what is the effectiveness and merit (or demerit) of its impact from the point of the individual, and from the point of view of the norm's impact on integration amongst state parties to the norm. Its impact will clearly be affected by how the right is defined. Regime theory will not be applied by the writer to the international law of human rights as the thesis takes a more legalist approach, assessing the nature of the right to education and examining how it arose in international law. Part Two of the thesis is devoted to this

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22. Donnelly, J., 'International Human Rights regimes', (1986) 40 *Int.Org.* 599, and references therein.
23. McDougal, M., and Reisman, *International Law in contemporary perspective: The public order of the world community*, (1981). Also McDougal, M., and Reisman, M., 'International law in policy-oriented perspective', in MacDonald, R., and Johnston, D., (eds.) *The structure and process of International law*, (Nijhoff, The Hague, 1983) 103, at p.106.

assessment. That Part analyses the drafting and negotiating process of selected human rights treaties, it then looks to the substance of the rights protected, their potential for both the individual and the states and their subsequent development.

The international human rights norms themselves are not static but have evolved. This is an expected phenomenon especially when there are special organs designed to oversee the implementation of the rights. The European norms have (in the author's opinion) moved from a system requiring equal access to educational facilities to a system of minimum guarantees of educational opportunity.⁽²⁴⁾ This points up the role of international law in this area as being both highly political as well as adjudicatory. It may be more realistic to adopt the Chen approach, since international law in this field is increasingly decisive and important in resolving internal political divisions as to distributive justice in the fields covered by human rights agreements. This statement is perhaps exaggerated. It must be remembered that this study looks in detail at the systems of only three Western states. Moreover it is somewhat of a fluke that these states agreed, in a directly binding document, to a right to education. In the main the socio-economic and cultural rights were designated to the European Social Charter, which has an entirely

24. This is especially so as regards the requirements of the ECHR, but the result is importantly buttressed by the European Social Charter. See below chapter seven.

different enforcement mechanism. ⁽²⁵⁾

I have written above that international human rights, as demanded within states primarily through legal action in courts, but also by political action, affect the way that scarce resources are allocated. This is especially so with the economic, social and cultural rights, which include rights such as the right to work, social security and the right to education. ⁽²⁶⁾ It is the latter that has attracted my attention. What could it possibly mean for a treaty between sovereign nations to declare that "no-one shall be denied the right to education"? Or that "everyone has the right to education"? The potential implications of these claims, if they are treated as legal rights, is enormous. Of course the scope of the claim/right depends on how education is defined, a matter dealt with below. ⁽²⁷⁾

Part Three of the thesis turns the spotlight on three Western European educational and legal systems. It assesses the evolution of the domestic educational systems and examines how individuals can use international human rights law internally. The situation in three West European States (Belgium, France, Ireland) is examined in the light of international law as it affects each country. This Part of the thesis is used as the basis for illustrations in Parts One, Two and Four.

25. See below chapter seven.

26. See Chapter Twelve section (III)B for an analysis of the classification of human rights.

27. See pp.14 et seq.

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B. THE RIGHT TO EDUCATION: A PRELIMINARY EXCURSUS

In order to help understand the idea of a right to education a brief preliminary excursion follows into what is meant by the term 'right to education'. This will be taken up again later in the thesis and commented on in the light of the illuminations and conclusions that can be drawn from the body of the thesis.

It is hoped that the work throws light on the evolution of the right and will help in understanding how legal methods can establish and enhance socio-economic rights.

1. Definition of Education

In examining the phrase the 'right to education' I shall first examine what is meant by 'education'. Numberless scholars and philosophers have considered what education means and reflected about how it should be carried out. It is not the purpose of this brief section to look at all their myriad positions, but rather to establish a preliminary understanding of what it is we are writing about when we write of 'education'.

Education is directed primarily to the young, the future generation; however in a rapidly changing society it is recognised

INTRODUCTION:

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At its widest, education means up-bringing or socialisation. In this sense education occurs spontaneously and is a term that is not only applicable to human beings. Other sentient creatures also undergo education in a wide sense.

In a narrower sense, education has become associated with schooling. (29) Thus Mowgli emerging from the jungle would not normally be regarded as 'educated'. (30) The ideas behind words such as training and instruction reflect the narrow meaning of education.

Definitions of what constitutes education change in the light of the perceptions of the purpose or aims of education. It is clearly affected by the social values and cultural environment in

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28. Janne, H., 'Future policy', (1972) 19 *Education and Culture* 14. Also Frese, H, H., 'Permanent Education - Dream or nightmare', (1972) 19 *Education and Culture* 9.
29. Niewenhuis, H., 'Le rôle de l'école dans l'éducation à la culture', (1957) 16 *Cahiers de Pédagogie et d'Orientation Professionnelle* 69.
30. Peters, R.S., 'Education and the Educated Man', (1970) 4 *Proceedings of the Philosophical Society of Great Britain* 5, esp. at p.13.

INTRODUCTION:

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In general usage most would concur that education, at least in Western countries, connotes teaching and learning in specialised institutions. It has become associated with such institutions.

Education can be regarded as a 'family of processes whose principle of unity is the development of desirable qualities in someone'.⁽³³⁾ In this respect it is interesting to note that there is a deschooling movement⁽³⁴⁾ that believes that schools inculcate the wrong values through their 'hidden curriculum'. The deschoolers still think of education in terms of inculcating skills and developing cognitive faculties.⁽³⁵⁾ They object though to the means used and to some of the inherent socialisation that takes place in

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31. Blackstone, for example, writing his *Commentaries*, in 1765-1769 considered that one should be educated according to one's station in life.
 32. Peters *op.cit.*
 33. Peters *op.cit.*
 34. Passia, Illich, I., *Deschooling Society* (Harper & Row, New York, 1971).
 35. Suchodolski, B., 'Out-of-school education', (1972) 2 *Prospects* 142.

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Another important aspect of education that has already been mentioned, and is worth repeating, is that it is interactive. It involves learning.⁽³⁸⁾ Someone who has been to school and yet

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36. Hans, N., *Comparative Education*, 3rd ed., (R.K.P., London, 1958) p.9. cf. Piaget, J., (with Weil, A-M) 'The development in children of the idea of homeland and of relations with other countries', (1951) 3 *Int.Soc.Sciences Bull.*, 561. A study by Jahoda failed to reproduce Piaget's results; Jahoda, G., 'Children's conceptions of Nationality: A critical study of Piaget's stages', (1964) 35 *Child Development* 1081.
37. See below chapter two.
38. This aspect causes difficulties when assessing equal educational opportunity. What if an individual or group refuse access to schools, or, not valuing school education, do little work and thus "fail" tests and examinations. If one is testing "outcomes" as being indicators of the equality of opportunity grave difficulties ensue. The Three Western states in this study have all compelled school attendance in

INTRODUCTION:

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It is not surprising that the word 'education' has such richness of meaning given that both society and the individuals within society are so strongly affected by it (or lack of it). In fact when the individual is a young child then his parents or legal guardians will also be involved in educational matters that concern the young child. Thus a three-way (child/parent/state) balancing act is to be performed and it is here that the right to education can help sort out the 'weight' to be given to each 'actor'.

2. Allocating educational opportunities

Even looking at education in only its narrow sense is not devoid of difficulty in the context of allocating rights. What level of cognitive ability or what level of skills should be incorporated in the right to education? The answer given depends on the social vision or, more philosophically, on the demands of justice. The

part to meet this difficulty. See below Part three.

39. It is the main reason behind the lack of success of those seeking to sue educational authorities for malpractice. e.g. *Hoffman v Board of Education* 424 N.Y.S 2d 376 (1979) at pp.378-9. *Torres v Little Flower Children's Services* 485 N.Y.S. 2d. 15 (1984), cert. denied, 106 S.Ct. 181 (1985).

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'extent' of the right to education even in its narrow sense faces the same difficulty as that of indicating what comprises education in a general sense. In other words, because appropriate education depends on the society where it takes place, the vision of appropriate education is likely to vary from society to society and certainly from country to country. In this sense the right may be considered a social right.

Rawls's theory of talent-pooling (the difference principle), that benefits of individual's talents should be treated as a common asset⁽⁴⁰⁾, assumes that an individual's happiness is based on fulfillment of an individual rational plan of life.⁽⁴¹⁾ This he argues can be arrived at regardless of natural endowments, and is an

40. Rawls, J., *A Theory of Justice*, (Harv.U.P., 1971) p.101. How such redistribution would work in practice is a complex question not dealt with here. See Kronnman, A.T., 'Talent pooling' in *Nomos XXIII*, *op.cit.*, p.58 at pp.64 et seq. The whole notion has been attacked by Nozick on the grounds that it uses individuals as a means to an end (other's welfare), and thus goes against a main tenet of liberal theory. Nozick *op.cit.* p.228. Rawls attenuated notion of "self", used to defeat "desert-based" redistribution arguments has also been challenged by Nozick, *id.*, p.214. See also Sandel, M., *Liberalism and the Limits of Justice*, (C.U.P., 1982) p.178.

41. *Op.cit.*, p.409.

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The right to education: A preliminary excursus end in itself.⁴² This clearly implies that all individuals should have at least a *basic education*.⁴³

The idea that distribution of resources be as "equal" as possible contrasts with the view that "contribution" (desert or merit) could be the basis of such distribution (which would lead to unequal distribution).⁴⁴ In Plato's Republic fairness required that all be allowed to develop their "merits" by having access to equal educational opportunity.⁴⁵ Thus it seems that both proponents of "liberty" as being the predominant value and proponents of "equality" as being the predominant value support the right to education.

Beyond the core of basic education that a society might agree upon there lie further educational opportunities. How these should be distributed is a matter of some political and theoretical contention. Clearly the interests of the state, the child and the parent all potentially clash, and at the higher levels there are often not

42. *Theory op.cit.*, pp.548-9.

43. *Theory* pp.62, 90-95. It would appear necessary for the operation of his second principle of justice. Martin makes this assumption in, Martin, R., *Rawls and Rights*, (U.P.Kansas, 1985), p.82 et seq.

44. Rawls does not rule out unequal distribution of primary goods if it is to everyone's long-term advantage.

45. Blackstone,W.T., "Human Rights, Equality and Education," (1969) 19 *Educational Theory* 288 at p.292.

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sufficient resources for all to partake.

The concept of equality of educational opportunity is open to many interpretations and criticisms.⁴⁶ The importance of environment⁴⁷ and, to a lesser extent, genetic factors, is continually stressed in studies on equality of educational

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46. Rawls, J., *A Theory of Justice*, (Harv.U.P., 1971), Section 77, p.511, points out that it could be used to justified equalising family advantages by, for example taking children from parents to be bought up communally, thus eliminating unfair environmental advantages. This was suggested in the French revolutionary period with the idea of the *maisons d'égalité*; see below chapter ten on France. See also Nozick, R., *Anarchy, state and Utopia*, (N.Y., 1974) ; Waltzer, M., *Spheres of Justice*, (Basic Books, N.Y., 1983) esp. ch.8; Galston, W., 'Equality of opportunity and liberal theory', in Lucash, F., *Justice and Equality here and now*, *op.cit.* p.89.
47. A study by Keys , W., *Aspects of Science Education in English Schools*, (NFER-Nelson, 1987) reported in *The Times* 5 June 1987, p.3 found that home background was the single most important factor contributing to student achievement (23% of the variation). The nature of the school attended accounted for only 0.2% of the variation in achievement.

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opportunity.^{'48'} This implies that mere access to schooling may not
increase social mobility, and certainly will not increase
equality.^{'49'}

48. Most famously in the Coleman Report. Coleman, J.S., et al.,
Equality of Educational Opportunity, (U.S. Government,
Washington, D.C., 1966), p.312. Hugo de Blende, 'Des
inegalités des chances dans l'enseignement et fonction de
milieu social', in [1978] *Enfant et Société* 73; See Warnock,
M., 'The concept of equality in Education', (1975) 1 *Oxford
Review of Education* 3; Eysenck, H. J., 'Equality and
education: Fact and Fiction', (1975) 1 *Oxford Review of
Education* 51; Jensen, A. R., 'The price of inequality',
(1975) 1 *Oxford Review of Education* 59; Halsey A. H.,
'Sociology and the equality debate', (1975) 1 *Oxford Review
of Education* 9 ;Ennis, R.H., 'Equality of Educational
Opportunity', (1976) 26 *Educational Theory* 3.

49. ... [S]chools serve primarily as selection and
certification agencies, whose job is to measure and
label people, and only secondarily as socialisation
agencies, whose job is to change people. This implies
that schools serve primarily to legitimise inequality.
Jencks, C., *Inequality*, (Peregrine Books, 1975) p.135.

Equality in
Education

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A central question arising is 'equality for what?'.⁽⁵⁰⁾

Judith Shklar⁽⁵¹⁾ considered it almost a synonym for the 'right to be socially successful, if one is able'. What amounts to "success" and what is acceptable depend on the society.⁽⁵²⁾ The concept itself is western⁽⁵³⁾ and relies on a pluralistic market society.⁽⁵⁴⁾ It also is closely based on the individual, who is seen as the "benchmark" of the principle of equality of opportunity.⁽⁵⁵⁾ Each individual under the principle should be able to develop his/her talents and abilities

50. A question tackled by Shklar, J., 'Injustice, Injury, and Inequality: An Introduction', in Lucash, F., (ed.) *Justice and Equality here and now*, (Cornell.U.P, 1986) 13. The equally difficult question of "What is equal education?" See n.38 above, and notes 59-61 and accompanying text below.
51. *Id.* p.21.
52. Waltzer, M., 'Justice here and now', in Lucash, F., *Justice and equality here and now*, *op.cit.*, p.136, at p.143 et seq.
53. A marxist would naturally consider this whole exercise bourgeois and unnecessary for in a communist society the question of distributive justice has already been settled, and is placed beyond the bounds of acceptable discussion. See penalties imposed for anti-state propaganda etc. in Eastern European countries.
54. Not a Rawlsian egalitarian society.
55. Galston *id.*, p.91 where he criticises the communitarian arguments of Sandel on this point.

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The right to education: A preliminary excursus to the fullest extent and thus try to "be socially successful". Without this concept, conventions such as the European Social Charter make no sense. (56)

In this study, questions of distributive justice are not central, though education is seen by many as a method of assuring the socialisation of the new generation (57) to match their principles of justice. There is in this a touching faith in the "healing powers" of education. (58) The Coleman Report in America and the Swann

56. See chapter seven below, in particular the discussion of article 9. Clearly vocational guidance and choice of career only make sense in this context.

57. Jencks, *op.cit*, p.255 observed:

None of the evidence we have reviewed suggests that school reform can be expected to bring about significant social changes outside schools.

Passia, Meyer, J. W., 'The effect of education as an Institution', (1977) 83 *A.J.S.* 55.

58. *Passia*, Neave, G., *Equality, Ideology and Educational Policy: An essay in the history of ideas.*, (Occasional Paper, Institut d'Education, Fondation européenne de la Culture, Paris, 1977), also Anderson, C. A., 'A sceptical note on the relation of vertical mobility to education', (1966) 66 *A.J.S.* 560.

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The right to education: A preliminary excursus Report⁽⁵⁷⁾ in the U.K., must make one cautious about the extent that schools can effectively support social change.⁽⁵⁸⁾ Certainly there are grave difficulties in measuring the success of educational opportunities, not the least of which is the question of how to compare "success" between individuals with radically different

59. *Education for All*, The Swann Report, (HMSO, Cmnd.9453, 1985), especially at pp. 82-86.
60. The attempt in Ireland to use schools to revive the Irish language seem to have failed. See Chapter eleven below. The debate typically is between those pointing out that schools in fact do not generate equal opportunity (in terms of outcome), but assign roles (life chances) largely based on social origin, (which naturally mirror inequalities inherent in the social system), and those stressing that the concept of equal educational opportunity should make merit, rather than social origin, determine life chances (which they may accept as being not equal). See further Levin, H., 'Educational Opportunity and Social Inequality in Western Europe', (1976) 24 *Social Problems Journal* 148. Also Schieser, H, A., 'Equality vs Freedom', and Havinghurst, R., 'Opportunity, equity, equality', in Kopan A., and Walberg, H., (eds.), *Rethinking Educational Equality*, (McClutchan, California, 1974).

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The right to education: A preliminary excursus goals,⁶¹ and what amounts to equal schooling - a uniform curriculum?⁶² The equal outcomes debate is not further pursued here. The Western states under study have accepted the notions of pluralistic democracy and the implications for liberty that attach thereto. This thesis does not directly engage in the debate on how to establish principles of justice by which one may allocate rights.

Potentially human rights treaties could determine the purpose of education, for they certainly say things about the nature of society.⁶³ A possible barrier to this outcome lies in their acceptance by a wide variety of countries with many different cultural and social traditions. Moreover in the U.N. International Covenants⁶⁴ self-determination as a right is stressed, implying that the right to education could not have a world-wide integrative social effect.

Can there be a core of education that is universally valid

61. Campbell, E. G., 'Defining and attaining Equal educational Opportunity', (1973) 26 *Vand.L.R.* 461.
62. *Id.* p.465.
63. Their wide audience though ensured that the wording was suitably delphic and so acceptable to as many types of social system as possible. See below chapter four.
64. See below Chapter four.

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The right to education: A preliminary excursus for all societies?⁶⁵ The three countries chosen in this study are largely of common mould, and moreover have agreed in the European Convention on Human Rights⁶⁶ to protect the right to education so the problem is not as gripping as it might have been had different countries been chosen.⁶⁷ However, to label the right to education a human right implies a universal morality.⁶⁸ The moral basis for such a claim will now be briefly examined.

3. Moral basis for education as a right

Education is valuable because it develops the individual's potential capabilities. This is not only in the individual's interest by allowing him to participate in society, but is also in society's interest in assuring its own perpetuation and

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65. International documents do establish a common purpose to education. See next section.
66. And other instruments of European integration, such as the Treaty of Rome establishing the EEC and numerous Council of Europe Conventions. Belgium has not yet ratified the European Social Charter.
67. See below chapter seven, section on emergence of a common standard.
68. Milne, A.J.M., 'The Idea of Human Rights a Critical Inquiry', in Dowrick, F, E., (ed.), *Human Rights*, (Saxon House, Farnborough, 1979).

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The right to education: A preliminary excursus advancement.⁶⁹ The basis of the universal morality of the right to education can be said to lie in the fundamental idea that the individual is entitled to respect for his own sake. It is recognised by the present writer that this moral basis relies on cultural assumptions and the recognition of the individual worth of every human.⁷⁰ Not all may share these prejudices.⁷¹ However, they are drawn from the present fabric of the international law of human rights.⁷² The fact that the rights exist by being incorporated in treaties and declarations does not of course establish them as

69. Whether via a "trickle-down" method or a more egalitarian based "redistribution".
70. Passis, Sapir, E., 'Culture, genuine and spurious', (1924) 29 *A.J.S* 401.
71. Or at least they may be doubted or difficult (even impossible) to prove. Nielsen, K., 'Scepticism and Human Rights', (1968) 52 *Monist* 573, at p.578 et seq. But see his Note 40 at p.594. See Charvet, J., 'A critique of human right', in Pennock, J.R., and Chapman, J.W., (eds.) *Human Rights*, (Nomos XXIII) (N.Y.U.P., 1981) 31.
72. The literature on human rights has mushroomed. See Vincent-Daviss, D., 'Human Rights Law: A research guide to the literature..', (1980) 14 *NYUJLP* 209. For an early and excellent overview of the notion of human rights see U.N.E.S.C.O., *Human Rights: Comment and Interpretations*, (Allen Wingate, London, 1947).

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The right to education: A preliminary excursus morally correct. But it may be considered as the end of a process whereby "people" have agreed that these "rights are necessary".⁽⁷³⁾

Principles of equality and non-discrimination form part of the basis of this law, and might even be categorised as forming part of the *jus cogens*.⁽⁷⁴⁾ These two principles are espoused in the

73. Ascription of rights can be based on many different criteria; e.g. God, reason, power, utility, social contact theory. The purpose of this work is not to assess the underlying basis of the established human right norms, but to look at the effects of their establishment.

74. On the concept of *jus cogens* generally see, Schwelb, E., 'Some aspects of International *jus cogens* as formulated by the International Law Commission', (1967) 61 *A.J.I.L.* 946; Sinclair, I. M., *The Vienna Convention on the Law of Treaties*, (M.U.P., 1973), Chapter 5. Contra Schwarzenberger, G., *International Law and Order*, (Praeger, New York, 1971), Chapter 3. Verdross, A., '*Jus dispositivum* and *jus cogens* in international law', (1966) 60 *A.J.I.L.* 55 at p.59 contemplates a very wide range of "humanitarian" *jus cogens*. Bossuyt, M., *L'interdiction de la discrimination dans le droit international des droits de l'homme*, (Bruylant, Brussels, 1976). See generally McKean W., *Equality and Discrimination under International Law*, (Clarendon, Oxford, 1983) but esp. at p.277 et seq. The first Preambular

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first two articles of the Universal Declaration of Human Rights⁽⁷⁵⁾

Paragraph of the Universal Declaration of Human Rights
states:

Whereas recognition of the inherent dignity and of the
equal and inalienable rights of all members of the human
family is the foundation of freedom, justice and peace
in the world, ...

The International Court of Justice in the *Barcelona Traction,
Power and Light Co.*, (1978) *I.C.J.Rep.* at p.32, and the
Advisory Opinion on Namibia (1971) I.C.J.Rep. at p.57 cases
supported the notion that the principle of non-discrimination
formed part of the *jus cogens*.

75. Articles 1 and 2 of the Universal Declaration of Human Rights
read as follows:

Article 1

All human beings are born free and equal in dignity and
rights. They are endowed with reason and conscience and
should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set
forth in this Declaration, without distinction of any kind,
such as race, colour, sex, language, religion, political or
other opinion, national or social origin, property, birth or
other status.

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and are also present in the International Covenants on Human Rights.⁷⁶ The morality endorsed by these international treaties is shared by many nations. One can question the values enshrined from a personal viewpoint⁷⁷ but this certainly does not alter their normative existence, and hardly threatens their moral foundation.

In article 26 of the Universal Declaration of Human Rights educational purposes are defined in terms of this coherent moral order that at least in its general principles is subscribed to by most nations of the world. Article 26(2) declares:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

76. International Covenant on Economic, Social and Cultural Rights; Article 2(2), and Article 3; International Covenant on Civil and Political Rights; Article 2(1), Article (3).
77. Cranston, M., *What are Human Rights*, (Bodley Head, London, 1973), Cranston, M., 'Human Rights real and supposed', in Raphael (ed), *Political Theory and the Rights of Man*, (Indiana University Press, Bloomington, 1971) p.47.

INTRODUCTION:

The right to education: A preliminary excursus groups, and shall further the activities of the United Nations for the maintenance of peace.⁷⁸

Article 13 of the International Covenant on Economic, Social and Cultural Rights more explicitly still also talks of the development of the dignity of the human person and adds that 'education shall enable all persons to participate freely in society'.⁷⁹ We see then that in these documents what is considered valuable (in terms of social vision) is applied to help the definition of the aims or purposes of education. That the moral order posited seems to reflect Western liberal ideas, and has been questioned by some,⁸⁰ has not stopped the socialist and some third

78. See below chapter four on the Universal Declaration of Human Rights. The aims of education here set out are very close to Piaget's "full blossoming of the child". Piaget, 'Le droit à l'éducation dans le monde actuel', in UNESCO, *Les Droits de l'Esprit*, (Unesco, Paris, 1948).

79. See Chapter four.

80. Vincent J., (ed.), *Foreign policy and human rights*, (C.U.P., 1986); Przetacznik, F., 'The socialist concept of human rights; its philosophical background and political justification', (1977) 13 *R.B.D.I.* 238; Donnelly, J., 'Cultural relativism and universal human rights', (1984) 6 *H.R.Q.* 400.

INTRODUCTION:

The right to education: A preliminary excursus world countries adhering to the relevant instruments.⁽⁸¹⁾ Indeed Tyagi denies that the concept and protection of human rights has an exclusive Western mould.⁽⁸²⁾ It seems undeniable that the socialist influence in the U.N. drafting committees had an impact on Western attitudes to the socio-economic rights.⁽⁸³⁾ But the question of the Universality or otherwise of human rights need not detain us long here. As is pointed out above the countries under study here all form part of a close-knit European group of states, all Western and all espousing similar pluralistic ideas in relation to human rights.

The moral basis of a right to education rests then on the self-preservation of the individual. Sufficient education is a

81. And supporting the principles behind the Universal Declaration of Human Rights. Proclamation of Tehran, 1968. See generally U.N., *U.N. Action in the field of Human Rights*, (U.N., 1983), pp.13-14. The Eastern European block of states that had abstained in the vote on the Universal Declaration of Human Rights (UDHR) all subsequently adhered to the Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975 (reprinted in Brownlie, I., *Basic Documents*, *op.cit.*, p.320) which specifically endorsed the UDHR.
82. Tyagi, Y.K., 'Third World Response to Human Rights', (1981) *I.J.I.L.* 119, where he emphasises in particular the third world's influence in getting the right to self-determination endorsed.
83. See Chapter Three below.

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The right to education: A preliminary excursus prerequisite for social abilities and for the use of the other rights and freedoms that are also human rights. In this sense education is a 'core' human right.⁸⁴

4. Rights talk

Having looked at what is meant by education and the moral basis for attributing rights to it, it is now time to look at what we mean when we talk of rights.⁸⁵ In this endeavour it is not proposed to examine all the jurisprudential works any more than the various opinions of educational philosophers were canvassed in the previous section on what we meant in talking of education. Rather a brief overview is offered to help put the subsequent analysis in perspective. The wideness and diversity of meanings given to the word 'education' may make it seem an inappropriate subject to be connected with legal rights. It must be pointed out that many human rights, in fact all human rights, being based initially on wide moral premises, share in this richness of meaning.

A human right may well exist but not be enforceable in a given legal system.⁸⁶ If the criterion used to work out a human right meant its universal application in fact everywhere in the world, the concept would be useless. A human right's appearance as a

84. It is for example taken as a basis in Rawls's *Theory of Justice*.

85. See generally Gower, B., 'Understanding rights: an analysis of a problem', in Dowrick, F., *op.cit.* p.51.

86. It adheres by the mere fact of humanness.

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legal right in a national legal system marks the realisation of the
right for the persons subject to that state's jurisdiction.⁽⁸⁷⁾ Their
'human' rights pre-existed its appearance in national law.

Hart emphasised that one could not talk of 'rights' unless
there was an element of choice in the exercise or otherwise of it.
Although in his later writing he recognised that his will theory of
'option' rights had to be modified to accommodate

the important deployment of the language of rights by the
constitutional lawyer and the individualistic critic of the law,
for whom the core of the notion of rights is neither individual
choice nor individual benefit but basic or fundamental individual
needs.⁽⁸⁸⁾

Clearly an option right, a right that depends on an
individual's choice to assert it, becomes highly problematical when

87. The relationship between international law and national law
must be clarified in relation to each of the countries under
study if the impact of the internationally protected right to
education is to be fully understood in the national context.
See Part Three below.
88. Hart, H.L.A., 'Bentham on Legal Rights', in Simpson, (ed.),
Oxford Essays in Jurisprudence (Second Series), (OUP, 1973).
Also in Hart, H., *Essays on Bentham*, (OUP, 1982). Golding M,
P., 'Towards a Theory of Human Rights', (1968) 52 *Monist*
521, at p.542 et seq. emphasises the importance of conceding
the existence of 'welfare rights' as well as 'option rights'.

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one considers it in relation to a possible right to education. For
one thing, in all of the countries under study, education is
compulsory up to a certain age.⁸⁹ Thus the child cannot opt not to
be educated.⁹⁰ Under an unmodified will theory of rights this
would effectively rule out the possibility of there being a right to
education for one of the most important categories of potential
beneficiaries.⁹¹ As Maccormick observes.⁹²

89. Lack of legal capacity in children does not mean that rights
are not ascribable to them. Others act on their behalf
(parents, guardians, etc.) Hart, H, L, A., *Essays on
Bentham*, (DUP, 1982), p.184 note 86. See Maccormick, n.91
below for criticism of this aspect of the choice/will
(option) theory.
90. The child's status itself is also a barrier to ascribing
rights to children. Generally see Freeman, M, D, A., 'The
rights of children in the International Year of the Child',
[1980] *C.L.P.* 1. Coons J., and Mnookin R., 'Towards a theory
of children's rights', in Baxter I., and Eberts M., (eds),
The Child and the Courts, (S&M, London, 1978), 391. Also
Bandman, B., 'Some legal, moral and intellectual rights of
children', (1977) 27 *Educational Theory* 169.
91. See Maccormick, N., 'Children's Rights: A Test Case for
Theories of Rights' in (1976) *LXII A.R.S.P.* 385 for a
trenchant criticism of the will theory. Also Maccormick, N.,

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We are all accustomed to talking and thinking about some rights as 'inalienable'. But if the will theory is correct, the more they are inalienable, the less they are rights.

Basic education is clearly a welfare right.

In examining legal rights, emphasis has been laid on the necessary correlative legal duty.^{'93'} This element is present in all theories.^{'94'} The genus of legal rights has been subdivided into various particular types of rights. Rights 'stricto sensu', rights that are in the form of freedoms, rights that are in the form of powers, and rights that are in the form of immunities. All of these may play a role in relation to the right to education.^{'95'}

'Rights in Legislation', in Hacker, P, M, S., and Raz, J., *Law, Morality, and Society*, (OUP, 1977).

92. Maccormick, 'Rights in Legislation', *op.cit.* pp.198-199.
93. Marshall, G., 'Rights Options and Entitlements', in Simpson (ed.) *Oxford Essays in Jurisprudence*, (2nd Series), (OUP, 1973).
94. Though the duty need not necessarily arise first.
Maccormick, N., 'Rights in Legislation', *op.cit.* esp. p.19 et seq.
95. See Hohfeld, *Fundamental Legal Conceptions*, (1919); Kamba, W.J., 'Legal Theory and Hohfeld's Analysis of a Legal Right' (1974) *Juridical Rev.* ; Also Dowrick, F.E., 'Introduction' in Dowrick (ed.), *Human Rights*, (Saxon House, 1979) esp. pp.88

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If there is to be a right to education then on whom does the duty to educate fall? We have already seen that in a wide sense education will occur regardless of formal instruction. Indeed the importance of non-formal education is recognised.^{96*}

5. The International formula

Turning again to the Universal Declaration of Human Rights and the International Covenant on Social, Economic and Cultural Rights⁹⁷ one can deduce the type of education the parties had in mind, and on whom they considered the duty to fall. Article 26(1) of the Universal Declaration of Human Rights states:

Everyone has the right to education. Education shall be

et seq.; Perrott, D.L., 'The Logic of Fundamental Rights' in Bridge, J.W., *et al. Fundamental Rights*, (Sweet and Maxwell, 1973). It is not proposed to analyse criticisms of Hohfeld's theory. See *passim* Halpin, A.K.L., 'Hohfeld's conceptions: From eight to two', (1985) 44 *C.L.J.* 435 and Raz, J., 'Legal rights', (1984) 4 *Ox.J.L.S.* 1.

96. See above p.15. It is even recognised by the European Court of Human Rights, see chapter seven below.
97. Cf. The provisions of the UNESCO Convention against Discrimination in Education (below chapter six), the draft Covention on the Rights of the Child (below chapter five), and the draft Protocol to the American Convention on Human rights (below chapter eight).

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free, at least in the elementary and fundamental stages.

Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on a basis of merit.

The corresponding provision in the International Covenant on Social, Economic and Cultural Rights is even more explicit, stating:

The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:

- (a) Primary education shall be compulsory and available freely to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as fast as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff

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The right to education: A preliminary excursus shall be continuously improved.

The European Convention on Human Rights by contrast has no such detailed provisions. Similar provisions in the European Social Charter were omitted.⁹⁸ From this brief perusal⁹⁹ the duty appears to be on the state to make available various educational X institutions. Moreover the development of schools must be 'actively pursued'.

However, the State is not the only person on whom the duty falls. Traditionally the duty to see that the child receives education falls on the parent (guardian).¹⁰⁰ The parental role is recognised in the Universal Declaration of Human Rights, the International Covenants, and in the European Convention on Human Rights.¹⁰¹ The role as a direct provider of education has diminished with the rise of educational systems but is still very important, especially in the context of determining the type and

98. See below chapter seven.

99. See Part Two below for detailed analysis of the International Treaties.

100. Blackstone, *Commentaries. op.cit.*

101. See *X.Y and Z v Sweden* Appl. 8811/79 (13 May 1982), (1982) 5 *E.H.R.R.* 147, outlined below in Chapter seven, where the European Commission on Human Rights recognised the parental right to bring up children as falling within article 8's (ECHR) protection of the right to respect for family.

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content of education that the child will receive.¹⁰² In the case of adults and those on whom no compulsion to be educated falls the question of content is not as critical as for those subject to compulsory education. Adults can choose their own courses. The content of education in an institutional setting for young children, however, is vitally important. The immaturity and lack of development of young children means that decisions are made on their behalf, by their parents (or guardians, etc.).

There are two reasons for a strong parental role here. Firstly, the current status of the family in the West (despite the decline of its traditional form), and the closeness of the parent/child relationship. Secondly, the desirability of a pluralistic democratic society. This is recognised by the countries under study all of which have ratified the European Convention of

102. Some consider it the most important aspect of educational rights. Voeltzel, R., 'Religion and the question of rights: Philosophical and legal problems in European tradition' (1966) *Wrlid.Ybk Educ.* at p.218:

It must, however, be recognised that such a right [to education] has no meaning unless at the same time it is stated who can and must decide what education shall be. ... Not only Europe but all mankind has urged that this is the right of the parents and this may be regarded as the hallowing of a principle of "natural right" which is admitted instinctively by the whole human race.

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The right to education: A preliminary excursus Human Rights and its First Protocol (that deals with the right to education). The preamble of the European Convention of Human Rights declares, *inter alia*, their allegiance to 'effective political democracy' and goes on to emphasise their like-mindedness and 'common heritage of political traditions, ideals, freedom and the rule of law'. Given the social nature and function of education it is clear that different social cultures will be transmitted even within one country. The idea of a single monolithic state culture is abhorrent to those holding liberal views. Elements of parental influence in the type of schooling received by their children forms part of the social tradition of the countries under study.⁽¹⁰³⁾

As mentioned the parental role has been recognised in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and by the European Convention on Human Rights. The Universal Declaration states in Article 26(3):

Parents have a prior right to choose the kind of education that shall be given to their children.⁽¹⁰⁴⁾

Parental influence can be established in a variety of ways.

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103. Especially in France and Belgium, and at least nominally in Ireland. See relevant chapters below. This social aspect is important when it comes to interpreting the right to education.
104. The corresponding provisions in the International Covenant on Economic, Social and Cultural Rights and European Convention on Human Rights will be dealt with in detail below in chapters four and seven.

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They can be allowed the choice of a non-school alternative⁽¹⁰⁵⁾ subject to minimum standards (to ensure that core education is not neglected), a choice of schools outside the State sector,⁽¹⁰⁶⁾ or a choice of schools within the State sector,⁽¹⁰⁷⁾ or finally of choice within schools themselves. Parental choice may not be unlimited for it could fly against the child's own right to education or against the state's interests. The question of the extent of parental influence in schooling issues is one of the questions to be tackled by the thesis. Clearly it is problematic in that, if given great weight, then the realisation of the fundamental norm of equality will suffer.

At a higher level of balancing the right to education must also be balanced against other human rights. Is it a programmatic right? One of those normally classed as Economic, Social and Cultural in International Law and to be progressively achieved?⁽¹⁰⁸⁾

105. See below Part Three.

106. The non-state sector being either supported by the state or not.

107. As in recent practice in the United Kingdom. See Stillman, A., and Maychell, K., *Choosing Schools: Parents, LEA's and the 1988 Education Act*, (N.F.E.R-Nelson, Windsor, 1986).

108. And having different forms of enforcement than civil and political rights, typically relying on reviews of state reports. See chapter seven for the European Social Charter

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It does find its place in the International Covenant on Economic, Social and Cultural Rights, but interestingly it is also contained in the European Convention on Human Rights (First Protocol) which is traditionally thought of as containing civil and political rights and it is only indirectly mentioned in the European Social Charter. The question of its classification into these differing classes of rights and their significance (as a mode of establishing priorities between human rights and an indication as to the legal nature of the right i.e. its availability and enforceability) is one that will be examined.⁽¹⁰⁹⁾

6. The Content of Education

Whilst the international documents give us guidance as to the general aims of education, i.e. the preparation of the individual for effective participation in society, and outline the method of achievement of this aim, i.e. through educational institutions being made available, and preferably free, they give us few clues as to the content of education. Thus the core, or 'amount' of education necessary may well vary wildly between different types of society. The only guide to the level expected lies in the stipulation that such education will develop 'respect for human rights and fundamental freedoms'. At the European level, given the aims of some of the

practice, and chapter four for the International Covenant on Economic, Social and Cultural Rights position.

109. See chapter seven.

INTRODUCTION:

The right to education: A preliminary excursus international bodies set up, there is a distinct possibility of a common standard becoming established.⁽¹¹⁰⁾

There is at least a possibility of some property interest in education developing from the notion that examination certificates comprise such an interest. If what amounted to core education were agreed upon, then, potentially, one could consider a right to be educated to that level and to receive the relevant certificate. There are numerous problems with such a notion. What would happen if the child was simply incapable of coping due to illness, genetic disorder, handicap or other learning disability, to say nothing of the possibilities of social or cultural disadvantages? If the certification is granted on the basis of scoring in an achievement test, then mere presence in a school for the requisite number of years would not entitle one to such an award. A "right" to a certificate if one failed to score adequately on the test could be strongly opposed on the grounds that the test was designed to measure achievement rather than attendance.⁽¹¹¹⁾ The notion of school performance as a mechanism for sorting people is strongly ingrained (as part of equal educational opportunity) and indeed a recognised function of the system. The right to education cannot possibly

110. This is considered in detail in chapter seven.

111. To say nothing of opposition to testing at a relatively young age when it is known that children develop at different rates.

INTRODUCTION:

The right to education: A preliminary excursus guarantee what may be impossible.⁽¹¹²⁾ We can thus, at the outset, exclude the right to a "certificate" as amounting to the right to education.⁽¹¹³⁾ One could say however that one should not be denied a certificate on non-educational grounds. To that extent the right to education would be recognised.⁽¹¹⁴⁾

112. See Levin's criticism for all "positive" rights on the basis that they require material resources. He overlooks though the fact that the "negative liberties" he espouses equally require "resources" to ensure their vindication, if opposed. Levin, M., 'Negative Liberty', in Paul, E., Miller, F., and Paul, J., *Liberty and Equality*, *op.cit.* p.84.
113. This right has in fact not been recognised by the European Commission on Human Rights. See Application 9270/81 (7 December 1981); Council of Europe, *Digest of Strasbourg Case-law relating to the European Convention on Human Rights*, vol.5 (Heymanns Verlag, Berlin, 1985) p.784 (No right to pass an exam protected).
114. In the U.S.A. *Goss v Lopez* 419 U.S. 565 (1975) established a property interest in education that could not be denied without the appropriate "due process". However on the question of the imposition of academic sanctions (lowering "grades" (i.e. marks)) for disciplinary infractions there has been no consistency. Some courts have allowed the practice and others have not. See *Knight v Board of Education of Tri-*

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C. CONCLUSION

Having looked at the phrase 'right to education' we can see that the phrase could be put together to mean many different things, ranging from a broad view of what constitutes education and rights, to a narrow view. Basic education can be considered a welfare right. This right is supported by both liberal and egalitarian philosophy.¹¹⁵ The international protection of the right extends beyond a needs-based ideology and embraces the concept of the dignity of all individuals. It requires that education allow the full development of the personality.

The concept of equal educational opportunity, whilst open to many competing interpretations, seems to have been endorsed in

point School District 38 Ill.App. 3d 603, 348 N.E. 2d 299 (1976); *Haer v Board of Education Twp. High Sch. District No.13*, 383 N.E.2d 231 (Ill.App. 1978) and *Katzman v Cumberland Valley School District* 479 A.2d 671 (Pa.Cmwlth.1984). In the *Belgian Linguistics* cases ECHR Ser.A., No.6 the European Court of Human Rights emphasised the right to draw benefit from education by recognition of diplomas. See below chapter seven for details.

115. Though Shue does not include it in his list of basic needs as its absence would not cause pain, although it would seem to fit his definition of a basic right. Shue, H., *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, (P.U.P., Princeton, New Jersey) pp.19-20.

international law to the extent that, at first blush, the international treaties seem to strongly endorse the idea that individuals should have an equal start in life based on inherent dignity and equality of human beings. As against this, particularly at the European level, pluralism is a strongly recognised goal, inevitably leading to a conflict with the goal of equality.

Furthermore we have seen that schooling is also seen as a socialising event, and that school systems have been deliberately set to nation-building.¹¹⁶ One can ponder over whether the emerging international educational law will result in any de-emphasis of nationalistic tendencies. This is especially likely to happen in Western Europe, given that many of the international institutions established there have been deliberately created to foster "European unity" and diminish nationalism. At a wider level it is the evident aim of some of UNESCO's activities.¹¹⁷

The content of education varies according to the social setting. International law, at first impression, does not allow the state absolute control over content, but rather provides that the parent should have a role in determining this, whilst, at the same time, stressing the child's right to development and dignity.

It is proposed now to look at the evolution of the right to

116. Assimilation being a primary goal of American public schooling for example. Or the consciousness-raising of compulsory Irish language learning.

117. See below chapter six.

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education in international law to help assess what exactly it means in contemporary international law. Clearly the social context in which the phrase is used varies. Part Two follows its emergence and assesses the scope of the West European protection of the right. Part Three of the thesis examines the evolution of the concept in three West European countries, with especial reference to its emergence in France which to a large extent exported and made popular the concept of a right to education. Part Four is comprised of conclusions.

PART TWO

INTERNATIONAL LAW: Establishing the norms

CHAPTER TWO: GENERAL THEMES

A. INTRODUCTORY

In examining the educational rights it is most helpful to look at international human rights treaties and other international instruments dealing with the rights, to see how the relevant articles were drafted and later interpreted. The declarations and treaties that will be examined in this way are the Universal Declaration of Human Rights, the Declaration of the Rights of the Child, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on the Protection of Human Rights and Fundamental Freedoms (First Protocol), the European Social Charter and finally the UNESCO Convention (and Recommendation) against Discrimination in Education. Relevant articles of the Convention on the Rights of the Child that is currently being drafted at the U.N. will also be scrutinised. In the conclusions the reader will also find a brief analysis of the draft Protocol to the American Convention on Human Rights.

Part Two contains much of the original research undertaken for this thesis. This lies in evaluating the *travaux préparatoires* of the major international treaties and other instruments concerned with educational rights. One result of the dearth of previous research in this field is that in parts this thesis is rather more detailed and exhaustive than would otherwise be necessary. This writer has in

fact, in the interest of brevity, condensed and left out some of the details of the various United Nations (hereinafter U.N.) treaties. The *travaux préparatoires* of the International Bill of Rights, the Declaration and Convention on the Rights of the Child, and the Convention and Recommendation Against Discrimination in Education are in parts repetitive. Some repetition is necessary for accuracy's sake but where it is not it has hopefully been excised.

In the consensus-building negotiations undertaken in the United Nations each state was given several opportunities to provide written comments on the drafts produced, and many also took part in the oral discussions. These opportunities were typically afforded not once but several times, as a result of the hierarchical (inverted pyramidal) structure of the U.N.. The resulting duplication of state contributions have not all been reproduced except where they were particularly significant or influential.

It is necessary to qualify the scope of this examination in relation to the Universal Declaration,¹ for the question of its normative validity in the international law is still in debate.² Nevertheless the elaboration of article 26 dealing with education in

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1. And the other Declarations covered.
 2. Verdoodt, A, *Naissance et signification de la Déclaration Universelle des droits de l'homme*, (Ed Nauwelaerts, Louvain-Paris, 1964). Waldock, H., 'Human Rights in Contemporary International Law', (1965) Supplement 11 *I.C.L.Q.* 15. See below chapters four and five.

this document has clearly strongly influenced the establishment of similar rights in subsequent treaties and thus great attention is paid to its drafting.⁽³⁾

When dealing with the question of international protection for the right to education two major issues, apart from the legal analysis referred to above, must come to the forefront of one's mind. Firstly the problems of illiteracy and secondly the more devious problem of the penetration of international rules to "guide" what is actually taught in schools. This is an area jealously guarded by state and sub-state bodies.

The first issue I briefly discuss in order to dismiss it (Section B below) as the main subject of the international part of the thesis. The second issue is more the focus of attention. Much work has been carried out by UNESCO in this area, and potentially the human rights treaties also imply a diminution of sovereign state control over aspects of the curriculum, a surrender of sovereignty to the individual receiving education and to parents. As is well known some states do not directly control curriculum and textbooks used in

3. See e.g. its use by M. Teitgen who played a prominent role in the drafting of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR or European Convention on Human Rights). Below Chapter seven, section (IV)B. It was also used in the drafting of the Convention against Discrimination in Education, see chapter six below.

textbooks used in support thereof⁴ though the states used as examples in Part Three of this thesis all directly dictate which texts are available for school use, and to a greater or lesser degree regulate what is taught in schools by prescribing a curriculum.

B. ILLITERACY

The massive illiteracy in the world as a whole⁵ is clearly a major problem in terms both of attempts to assure the right to education to all and attempts to develop nations. A skilled work force is a vital ingredient before housing and other infra-structure needs can be contemplated. This fact was recognised in the United Nations debates on the right to education.⁶ UNESCO a specialised agency of the United Nations,⁷ launched a series of regional conferences designed to establish plans and mobilise action to combat

4. The United Kingdom and United States of America for example leave this question to local bodies, though the current British government plans to establish a centrally planned core curriculum.
5. Estimated at 50% of the world population in the 1950's. In 1952 half of the world's children were not able to attend school. UNESCO, *World Survey of Education*, (UNESCO, 1955).
6. See chapters four and five below.
7. See chapter six below.

this weakness.^{'8'} The concept of "fundamental education" was incorporated in the Covenant on Economic, Social and Cultural Rights largely at the instigation of UNESCO, and is directed to combating the problem of illiteracy.^{'9'}

UNESCO, in fighting illiteracy, has been battling against massive population growths which mean that the actual number of illiterates grows though the percentage of illiterates declines.^{'10'} In the early fifties illiteracy was estimated at 50% of the world population.^{'11'} There has been significant overall progress,^{'12'} but

8. For a brief review of the problem as seen in the sixties, see Joyce, J. A., 'UNESCO and schools for all', (1962) 202 *Contemporary Review* 288.
9. See chapter six below.
10. UNESCO, *Literacy, 1972-1976*, (UNESCO, 1980) p.14. The figures given are 814 million illiterates (aged 15 and upwards) representing 29% of the corresponding world population in 1980.
11. UNESCO, *Facts and Figures*, (UNESCO, 1952), p.8. In 1954 illiteracy in Africa was estimated at between 75-85% of the population. UNESCO, *Facts and Figures*, (UNESCO, 1954), p.9. A large percentage of primary school-age children were not being schooled.

the problem is still a major one and even the Western industrialised states have a small percentage of illiterates.^{'13'}

The work of UNESCO in the field was and is well-respected by the recipient states. The work is clearly very important for the creation of a genuine right to education, however, as pointed out above, it is not appropriate in this work to deal with it further.^{'14'}

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12. For statistics, see generally, UNESCO, *Statistics of Educational attainment and illiteracy 1945-1974*, (UNESCO Statistical Reports and Studies, No.22, 1977). Also UNESCO *Estimates and Projections of Illiteracy*, (UNESCO, 1978) and for complete data UNESCO, *Statistical Yearbooks*. For a general overview see, Lestage, A., *Literacy and Illiteracy*, (UNESCO, 1982).
 13. UNESCO, *Literacy, 1972-1976*, (UNESCO, 1980). The figures given for the U.S.A. for example show that 10% of the population is illiterate, for the U.K. the figure is 4%. *Id.*, p.10.
 14. See Laves & Thompson *op.cit.*, Chapters 7 & 8 for details of UNESCO's early programmes.

C. THE CURRICULUM: PROMOTING INTERNATIONAL UNDERSTANDING

The other prong of UNESCO programmes in the educational sector has been to encourage the development of education for international understanding. The *Handbook for the Improvement of Text-books and Teaching Materials*,¹⁵ outlines the history of international action taken to improve textbooks. In the nineteenth and early twentieth centuries action by individuals and groups was grounded mainly in the belief that one cause of hatred and lack of understanding among nations was the chauvinism found in school textbooks.¹⁶ There was no formal inter-governmental cooperation.

Though education was discussed during the drafting of the Covenant of the League of Nations no formal attribute of competence was ultimately forthcoming.¹⁷ The League of Nations International

15. UNESCO, *Handbook for the improvement of text-books and teaching materials; as aids to international understanding*, (UNESCO, Paris, 1949).
16. *Id.*, p.10.
17. Andrews, F. F., 'Education at the Peace Conference' in Scanlon, D. G. (ed.), *International Education: A documentary history*, (Teachers College, Columbia Univ., New York, 1960) pp.61-64. The Assembly of the League passed resolutions recommending teaching about the aims of the League and increased international travel by children. See Prescott, D. A., *Education and International Relations*, (Harv.U.P., 1930),

Committee for Intellectual Cooperation^{'18'} (hereinafter ICIC) initiated a mutual inspection of text-books^{'19'} by its National Committees in the 1920's.^{'20'} This had scant success^{'21'} and the procedure was slightly strengthened in 1932. The procedure was entirely voluntary.^{'22'} The League of Nation's Assembly Declaration

p.105 and generally especially chapter eight on the League of Nations. Cf. the ERASMUS programme of the European Communities, designed to increase the mobility of students within Europe, Bull.E.C. 5/87, p.11.

18. This Committee was appointed by the Council of the League. *Records of the Second Assembly, Plenary Meeting, (League of Nations, Geneva, 1921) p.309. See Scanlon, D., op.cit. pp.65-74 for pertinent extracts.*
19. Only facts could be challenged. The challenged book could be retained by the state in question without any explanation.
20. *UNESCO Handbook...*, op.cit., p.16 et seq.
21. Only three complaints were made, resulting in only one alteration. *Id.* p.18.
22. The League had no general formal juridical competence to deal with education, a fact fully recognised by the Council of the League, League of Nations Doc. A/15, 1926, XII, p.2. It had particular jurisdiction in some instances, established by the various minorities treaties. See chapter three below.

on the matter was adopted,⁽²³⁾ though the major powers declined to endorse it mainly because they had no power over the use of text-books.⁽²⁴⁾ The ICIC⁽²⁵⁾ also promoted international understanding by gathering "model passages" from text-books as examples for would-be authors.

Under UNESCO⁽²⁶⁾ work has continued in this vein.⁽²⁷⁾ In the

23. The Declaration regarding the Teaching of History, (October, 1937). The text is reproduced in the UNESCO, *Handbook*, *op.cit.*, pp.105-106.
24. *Id.*, 19 *et seq.*
25. In 1926 the International Institute for Intellectual Cooperation was established in Paris as a bureau of the League of Nations. Prescott, *op.cit.*, p.116. This was made possible by a gift of a 2 million francs/per annum annuity by the French government. (\$100,000 at the 1925 exchange rate). See Laves & Thompson *op.cit.*, p.10, note 21. The ICIC became the governing body of the Institute. The Institute was recognised by the League of Nations in 1926.
26. See below Chapter six.
27. Its first adopted programme in 1946 dictated that UNESCO should encourage regional and bilateral agreements concerning text-books. UNESCO, *Bilateral consultations for the improvement of history textbooks*, (UNESCO, Educational Studies and Documents, No.IV, 1953) p.5. UNESCO did not have

late 1940's and early 1950's UNESCO organised conferences of school-

sufficient staff to carry out an ambitious attempt to reform textbooks in 1947. UNESCO, *Handbook, op.cit.*, p.64. The 1974 Recommendation in paragraph 39 states:

Member States should promote appropriate measures to ensure that educational aids, especially textbooks, are free from elements liable to give rise to misunderstanding, mistrust, racialist reactions, contempt or hatred with regard to other groups or peoples. Materials should provide a broad background of knowledge which will help learners to evaluate information and ideas disseminated through the mass media that seem to run counter to the aims of this recommendation.

Para 45 states:

Member States should encourage wider exchanges of textbooks, especially history and geography textbooks, and should where appropriate, take measures, by concluding, if possible, bilateral and multilateral agreements, for the reciprocal study and revision of textbooks and other educational materials in order to ensure that they are accurate, balanced, up-to-date and unprejudiced and will enhance mutual knowledge and understanding between different peoples.

teachers to promote international education,^{'28'} and in 1953 started its Associated Schools project^{'29'} which by 1975 had over 1,000 participating national schools in 63 countries.^{'30'} In 1985 there were over 1,900 schools in 90 member states.^{'31'} The project seeks to promote international understanding by encouraging special projects on international understanding and cooperation^{'32'} at schools and teacher-training institutions chosen by the UNESCO National

28. In the sixties the emphasis shifted to East-West understanding. See e.g. UNESCO Doc. UNESCO/ED/176 (21 October 1960), which is the Report of a Seminar on the use of publications for schools in increasing the mutual appreciation of Eastern and Western cultural values.
29. UNESCO, *International Understanding at school*, (UNESCO, Paris, 1965), gives an account of the progress of this project. More recently see Issue (1980) 39-40 *International Understanding at School*.
30. Buergethal *op.cit*, p.28.
31. UNESCO, (1984-1985) 48-49 *International Understanding at School* 3.
32. It also published materials designed to help promote international curricula. e.g. UNESCO, *Education for International Understanding; examples and suggestions for class-room use*, (UNESCO, Paris, 1959).

Commissions. ⁽³³⁾

The spate of clearing up fascist text-books in Germany and Italy, and Shinto in Japan was not inspired by UNESCO ⁽³⁴⁾, but UNESCO did encourage bilateral co-operation, ⁽³⁵⁾ following a successful

33. The number of associated institutions was over 2,000 in 1986.

34. In the occupied countries (i.e. Japan and Germany), the occupiers regulated the process. Militaristic and nationalistic texts were eliminated. See UNESCO, *Handbook*, *op.cit.*, p.43, 47. In Japan all reference to Shinto doctrine was deleted from text-books. See Laves & Thompson, *op.cit.*, p.238 *et seq.* for an account of how the Education Institute was set up in the Federal Republic Germany, in Hamburg in 1952. The staff and funding were international (with the U.S. contributing the bulk of the financing).

35. The UNESCO, *Handbook*, *op.cit.*, analysed the existing bilateral and multilateral (Latin American, 1933; the U.S.A. did not sign (for federal jurisdictional reasons) but approved) treaties on text-book revision and concluded that:

In many cases there had been little practical application of the principles set forth in the accords.

Id., p.12.

conference in 1950 on the Improvement of history textbooks.³⁶ It recognised that different states had such diverse educational systems and structures controlling them that multilateral treaties would not work.³⁷ Its main role is as a provider of information and a clearing-house for ideas.³⁸ As Dr Evans (Director-General of UNESCO at the time) wrote:

It is not within our power, nor do I think it would be wise,

36. UNESCO, *Bilateral consultations for the improvement of history textbooks*, (UNESCO, Educational Studies and Documents, No.IV, 1953). UNESCO role was to encourage national efforts by teachers and others involved. See Lauwerys, J.A., *History Textbooks and International Understanding*, (UNESCO, Towards World Understanding Series, 1953), which reports on the seminar. Laves & Thompson *op.cit.*, p.232 report that of 28 bilateral groups functioning in 1953, twenty three included at least one participant in a UNESCO seminar.
37. The Associated schools project is one of its main tools in promoting its aims. See n.29 above.
38. E.g. UNESCO publications such as:
UNESCO, *Primary School Textbooks*, (UNESCO, 1959) that outlines how such books are prepared, selected and used in 69 countries responding to a UNESCO questionnaire. Also UNESCO, *International Understanding as an integral part of the School curriculum*, (UNESCO, Geneva, 1968).

for us to indulge in public denunciation of passages in textbooks that have given offense, even when a consensus of historians might support the criticisms made. ... [It] would be resented. (39)

It is clear from this brief survey of educational aspects of UNESCO programmes that international cooperation as to the content of schooling relates primarily to two main themes. Firstly international understanding, by which is meant reduced chauvinism in teaching (and textbooks) and a stronger place for international affairs and problems in the curriculum. UNESCO adopts an encouraging and supportive role in relation to the former, and a more active role including the provision of materials in the latter. The second aspect is the promotion of human rights values. This is performed by the creation of materials⁴⁰, but also by the adoption of

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39. Letter, 22 December 1955 to Mr Benton (USA) concerning Soviet history books. Quoted by Laves & Thompson, *op.cit.*, p.230.
40. See Generally UNESCO, Outline of a seven year plan for the development of human rights teaching, Doc. ES/HR/79/16.8/892 (August 1979). For example the excellent two volume study by Vasak, K., *The International Dimension of Human Rights*, (UNESCO, 1979).

Recommendations⁽⁴¹⁾ and binding treaties especially the Convention Against Discrimination in Education.

The inclusion of an international perspective in children's education is one of the main aims of the 1974 Recommendation concerning Education for International Understanding, co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.⁽⁴²⁾ In 1985 the General Conference of UNESCO adopted the Plan for the Development of Education for International

41. The 1974 Recommendation in Paragraph 10 & 11 states:

10. Member States should take appropriate steps to strengthen and develop in the processes of learning and training, attitudes and behaviour based on recognition of the equality and necessary interdependence of nations and peoples.

11. Member States should take steps to ensure that the principles of the Universal Declaration of Human Rights and of the International Convention on the Elimination of All Forms of Racial Discrimination become an integral part of the developing personality of each child, adolescent, young person or adult by applying these principles in the daily conduct of education at each level and in all its forms, thus enabling each individual to contribute personally to the regeneration and extension of education in the direction indicated.

42. See further Chapter six.

Understanding, Cooperation and Peace, to help implement the 1974 Recommendation.^{'43'} The plan envisions the promotion of curricular reform and improvement, including the revision and reform of school text-books,^{'44'} and the preparation of educational materials on world problems by member states with UNESCO support.^{'45'} In the past some eminently practical though perhaps eccentric ideas have been promoted by UNESCO. For example in a study of the teaching of geography one recommendation was that loose-leaf text-books be produced so that "undesirable or incorrect information ... could easily be remedied" by the teacher.^{'46'}

43. The plan is outlined in UNESCO, *International Understanding at School*, Special Supplement, 1986, pp.34 et seq. A Consultative Committee has been established to help implement the plan. UNESCO Doc. 126 EX/16 (13 April 1987).
44. Especially in the following fields: history, geography, social studies or literature.
45. Recently UNESCO has set up Advisory Committees to write 'regional' histories. See UNESCO Docs 126 EX/22 Rev. (14 May 1987); 127 EX/14/Annex 1, 2 & 3 (28 August 1987).
46. Willcock, J. B., *Preparing Teachers for Education for International Understanding*, (UNESCO, Institute for Education, Hamburg, 1962) p.22. The seminar also recommended *inter alia*, that UNESCO National Commissions study foreign text-books dealing with their country and recommend those

Occasionally the Commission on Human Rights⁴⁷ will trespass on UNESCO territory. For example at the 596th meeting, the Belgian representative submitted a draft resolution⁴⁸ on the teaching of the Universal Declaration of Human Rights as a means of combatting discrimination in education. After the discussion the Belgian text was revised by the Belgian and Lebanese representatives.⁴⁹ The suggestion in it that the teaching the Universal Declaration of Human Rights should be made compulsory was criticised. It was pointed out that some governments had no authority to prescribe school curriculum and that in a number of countries there were no compulsory courses.⁵⁰ The co-sponsors presented another revised draft (Rev.2)

that were least distorted.

47. U.N. Economic and Social Council Official Records, 29th Session 1960 (meetings 1094-1111 annexes).
U.N. Doc. E/3322.13 is a report of the Secretary General of the U.N. and Director General of UNESCO. It deals with how the U.N. is taught about in various countries. See the French report, p.13, Belgium p.10, the U.K. p.22, the U.S.A. p.23.
48. U.N.Doc. E/CN.4/L.474.
49. U.N.Doc. E/CN.4/L.474 Rev.1.
50. ECOSOC Commission on Human Rights U.N. Doc. E/CN.4/SR.596 (2 May 1958). Mr. Wolf (Belgium) supports his draft amendment (p.3). Mr. Fomin (U.S.S.R.) opposed the Belgian Resolution (p.4). Sir Samuel Hoare (U.K.) also spoke against the Belgian

at the 598th meeting. The Belgian representative pointed the intention was to introduce compulsory teaching of the principles of the Universal Declaration of Human Rights at the school, in particular, military schools and schools for the training of administrative and judicial officers. This draft was adopted, eventually, by nine votes to none with nine abstentions.⁽⁵¹⁾

From this brief review of direct attempts by universal international organisations to seek to modify the state curricula in schools one can conclude (1) that states will not willingly give up power to educate their citizens directly, (2) that they will not easily allow non-national influences to impinge on what is taught in their countries, and (3) any external manipulation of curricula will be strongly resisted.

However there is an alternative (indirect) method by which internationally recognised ideas can infiltrate national systems. Individuals armed with internationally recognised human rights could, in exercising their rights, affect the national school systems and

Resolution, partly on the grounds that the government in Britain did not set the curriculum (p.9). ECOSOC Commission on Human Rights U.N. Doc. E/CN.4/SR.597 (7 May 1958) p.3 Mrs. Simon (U.S.A.) sympathising with the Belgian Amendment pointed out that the U.S. government had no control over curriculum.

51. Report of the Commission on Human Rights, 14th sess. *op.cit.* p.9.

what is taught therein. There are numerous obstacles to this occurring. The first, a preliminary issue, is the question of the status of the individual in international law. This question is dealt with immediately below. Once that obstacle is overcome others follow. The main part of this Part of the thesis tries to establish how international norms in this area developed, what they are, and their likely future evolution. The impact of their development on the international system is also assessed.

D. THE INDIVIDUAL IN INTERNATIONAL LAW

When looking at the protection of the individual's right to education in international law one must recognise that until recently international law was considered to be a law between States and those States had complete sovereignty over their nationals. The consequence of those two doctrines was that the individual was accorded no rights in international law. Oppenheim,⁵² for instance, considered that individuals could not have international rights and duties because such rights and duties could only exist between States. The result was that:

As far as the Law of Nations is concerned apart from morality there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals.

52. Oppenheim, L., *International Law*, 2nd ed., (Longman's Greene & Co., London, 1912).

This was not to say that individuals could not be the object of international concern. The suppression of slavery and the Slavery Convention indeed concerned the protection of the individual's rights.⁵³ Individuals have often been the object of international concern.⁵⁴ Thus one can note the protection of minorities after the First World War, and the protection of refugees.⁵⁵

Lauterpacht⁵⁶ considered that lack of procedural capacity did not mean that the individual could not be the subject of international rights. *The Jurisdiction of the Courts of Danzig* case⁵⁷

laid down, in effect, that no considerations of theory can prevent the individual from becoming the subject of

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53. Lauterpacht, H., *International Law and Human Rights*, (Stevens, London, 1950); Henkin, L., *The Rights of Man Today*, (Stevens, London, 1979), for a general overview; Luard, E., 'The origins of International Concern over Human Rights', in Luard, E., (ed.), *The International Protection of Human Rights*, (Thames and Hudson, London, 1967).
54. Rosting, H., 'Protection of Minorities by the League of Nations', (1926) 20 *A.J.I.L.* 641.
55. See below chapter three for details of the Polish Minority Treaty and the Upper Silesian Minority system.
56. Lauterpacht, H., *International Law and Human Rights*, *op.cit.*
57. *Jurisdiction of the Courts of Danzig*, (1928) *P.C.I.J.*, Ser.B, No.15.

international rights if they [States] so wish.⁵⁸

Clearly under the Upper Silesia regime the individual had some capacity on the international plane.⁵⁹ Latterly the U.N. Charter⁶⁰ and the international Bill of Rights as well as regional developments such as the European Convention on Human Rights have emphasised that individuals do have a measure of procedural capacity in international law.⁶¹ The Treaty of Rome establishing the European Economic Community and the granting of rights to individuals on the Community plane provides a further example of individuals being accorded enforceable rights. Certainly States by Treaty can accord the individual substantive enforceable rights.⁶² This

58. Lauterpacht, *op.cit.* p.29.

59. See below chapter three.

60. Kelsen, H., *The Law of the U.N.*, (Stevens, London, 1950) and Hudson, 'Integrity of International Instruments' (1948) 42 *A.J.I.L.* 105. *contra.*

61. Cf. *Lawless case* ECHR Ser.A. Nos.1 and 2 (November 1960 and April 1961 respectively); 1 *E.H.R.R.* 1, 13 respectively. See below concerning their position in Upper Silesia under the minorities regime.

62. For a recent general account of the evolution of Human Rights norms see Sohn, L. B., 'The New International Law: Protection of the Rights of Individuals rather than States', in (1982) 32 *American University L. Rev.* 1; Also d'Amato, A.,

question has already been discussed in the introductory chapter and so will not be further pursued here.

A general point may be made. The scope of the domestic jurisdiction exception has been eroded⁶³ and the position of the national within his own domestic legal system can be affected directly by international law. The extent that this is true for the States under study and in particular in relation to the international law on the right to education it is one of the purposes of this thesis to find out. The extent that international law trenches on national sovereignty and the potential integrative effects of the dialogue between international law and national law is also examined, especially in the Western European context.

Bearing in mind this background to educational questions, showing as it does the reticence of states about allow direct

'The concept of Human Rights in International Law', (1982) 82 *Col. L. Rev.* 1110.

63. See Fawcett, J.E.S., 'Human Rights and Domestic Jurisdiction' in Luard, E., (ed.) *op.cit.* p.286 at pp.292 et seq.

If, in this short study of domestic jurisdiction, the obstacles it presents have been emphasised, it is because we must keep steadily in mind that, even where international standards of human rights have been accepted by agreement and machinery established to enforce them, the old Adam of sovereignty can still fight a delaying action at many points.

international intervention in this sensitive area of what is taught in schools, yet also showing that it is firmly placed on the international agenda, though mainly in a non-binding fashion, one must recognise that the establishment of rights for individuals in this field will make the matter one of binding law.

The following analysis of international law does not commence with an examination of the post World War Two treaties, it starts rather with an examination of the regimes imposed for the protection of minorities (hereafter minority regimes)⁶⁴ that were established after the First World War. As we have seen the League of Nations had no formal jurisdictional competence in relation to education in general. However the minority treaties provided a system of rights, including fairly prominently educational rights for minority groups, under the formal guarantee of the League. The main treaty to be examined is the Germano-Polish Convention relating to Upper Silesia of 1922 (hereafter the Geneva Convention) though it is proposed to look first of all to look briefly at the general minority regimes established after the First World War, and also to assess the

64. By using this term I do not intend to analyse the situation between Poland and Germany in terms of modern regime theory though in fact the system set up does accord with such theories. See generally Krasner, S. D., 'Structural causes and regimes consequences: regimes as intervening variables' (1982) 36 *Int. Org.* 185; Haas E. B., 'Words can hurt you; or who said what to whom about regimes', (1982) 36 *Int. Org.* 207.

Albanian schools case.⁶⁵ These regimes were concerned, *inter alia*, with educational rights of minorities. The Treaties were concerned with groups⁶⁶ rather than with individuals *per se*, but important questions as to appropriate safeguard machinery as well as the substantive content of rights in education had to be tackled.

E. SUMMARY GUIDE TO PART TWO.

Chapter three seeks to find, by an analysis of the minority regime for Upper Silesia, some help with defining what might be appropriate as an international guarantee in relation to rights in education, as well as some interesting methods of enforcing such a right. Chapter four details the emergence of the international Bill of Rights and its consideration of educational rights, and Chapter five examines the (draft) instruments that protect the rights of the child (The Declaration on the Rights of the Child and the draft Convention of the same name), concentrating on educational rights and chapter six outlines UNESCO's role in protecting the right to education. Chapter seven examines, in detail, the European dimension. Chapter eight is comprised of an assessment of the draft Protocol to the American Convention on Human Rights as it might affect the right to education.

65. *Minority Schools in Albania*, Ad.Op. P.C.I.J. 1935 Ser. A/B.

66. Though the principle of non-discrimination clearly affected individuals, the provisions that we look at here are the group rights relating primarily to education.

CHAPTER THREE

POST FIRST WORLD WAR DEVELOPMENTS: MINORITY REGIMES

A. INTRODUCTORY

After the First World War various minorities treaties were created under the auspices of the League of Nations.⁽¹⁾ These treaties, of which the Polish Treaty was the first to be signed and is considered archetypal⁽²⁾, were signed by the relevant States⁽³⁾

1. There were some partial precedents for this type of Treaty, See Lauterpacht, *Oppenheim's International Law*, (8th ed. Longmans, Green, London, New York 1955), p.712 for examples, and *passim*, Evans, I., 'The protection of Minorities' (1923-4) 4 *B.Y.I.L.* 95. Also McCartney, C. A., *National States and National Minorities*, (DUP, 1934), Chapter 5. For a brief survey see Capotorti, F., 'A study of the rights of persons belonging to ethnic, religious and linguistic minorities', U.N. Doc. E/CN.4/Sub.2/384/Rev.1. Also Temperley, H., *A History of the Peace Conference*, Vol.5 Ch.II. (Hodder & Stoughton, London, 1924).
2. As Azcarate, P., *The League of Nations and National Minorities: An Experiment*, (Carnegie, Washington, 1945) p.29 notes:

In the sphere of minority questions, Poland was the best

and the Principal Allied and Associated Powers and were guaranteed by the League. Linguistic, racial and religious minorities had their rights protected to prevent their forcible assimilation. There was a procedure of petitions to the League.⁴ In general it was considered that the power of petitioning did not make the petitioners subjects in international law as they 'only benefited through the exercise of the right of intervention of the League' and possessed no

client of the League of Nations ... [which] ... devoted more ... time and effort to Polish minority questions, ..., than those of any other country.

3. The fact that not all States were bound but only the newly created (or re-established) States and the weaker States led to a great deal of resentment. On the re-establishment of Poland see Temperley *op.cit.* Vol.6, Ch.II. See McCartney, C.A., *National States and National Minorities*, *op.cit.* esp. pp. 232 *et seq* for a summary of objections and President Wilson's response. Also included are extracts of Clemenceau's famous letter (See p.129 below). See also *id.* p.286 *et seq.* The protection of minorities by Treaty was not a universal phenomenon.
4. Stone, J., 'Legal Nature of the Minorities Petition' (1931) 12 *B.Y.I.L.* 76. The procedure was the subject of great criticism - see for example Prokopy in (1935) 1 *Danubian Review* p.5 *et seq.*

rights in international law.⁽⁵⁾ The major rationale for such protection, apart from humanitarian considerations, was to help the defeated countries reconcile themselves to the loss of territory in the light of the knowledge that the minorities there would be protected. That it did not work out in this way is evidenced by Walters who states in relation to Germano-Polish minorities relations:

To recover from Poland the lost districts of Upper Silesia, Posen and Pomerania, to bring Danzig back into the Reich and wipe out the corridor which separated East Prussia from the rest of Germany these were the aims of all Germans.⁽⁶⁾ They could not often be

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5. Colban, *Arch.L.N.* 41/38260/30181. But the exceptional nature of the Upper Silesian regime in this respect was recognised by van Hamel (Director of the Legal Section of the Secretariat of the League) *Arch.L.N.* R1672 41/32948/20675.
 6. Shirer, W., *The rise and fall of the Third Reich*, (Crest, New York, 1962) (previously published by Simon and Schuster, 1959), confirms this writing that Poland 'was the hated and despised enemy in the minds of the Germans'. He quotes General von Seeckt ('father of the Reichswehr and arbiter of foreign policy during the first years of the Republic') as advising the German government

Poland's existence is intolerable, incompatible with the essential conditions of German life. Poland must go and

frankly proclaimed by responsible statesmen; but they were never absent from their minds, and governed, openly or secretly, all their acts of foreign policy⁽⁷⁾ - their commercial quarrels with Poland, their encouragement to the German minority to make the most of every cause of complaint,⁽⁸⁾ The Statesmen of Europe recognised it as the greatest and most serious threat to World Peace; but most of them judged it safest to avert their eyes and hope that the storm might never break.⁽⁹⁾

A further aim of the minority regimes was that the protected

will go.

at p.294 et seq..

7. This is confirmed by von Riekhoff, H., *German-Polish Relations 1918-1933*, (J. Hopkins Press, Baltimore/London, 1971) pp.95 et seq and p.199 concerning the policy of Stresemann where he shows that it was actually clearly in their minds during the build-up to Locarno.
8. Also see Bagley *op.cit.* p.128.
9. Walters, F. P., *A History of the League of Nations* (OUP, 1952) p.287; See also Claude, I.L., *National Minorities*, (Harv. U.P., 1955) p.467. At the signing of the Convention the German Delegate, M. Schiffer, did not conceal his feelings. See Kaackenbeeck, G., *The International Experiment of Upper Silesia* (OUP 1942) p.21. This ill-will was also present during the Peace Conference, Temperley *op.cit.* Vol.2 pp.4, 441.

minorities themselves would be happier, their rights being guaranteed. Azcarate, a former Director of the Minorities Section of the League of Nations,¹⁰ considered that the protection of Minorities instituted by the Peace Treaties of 1919 and 1920 did not have a humanitarian aim, but was purely political.¹¹ The prevention of international disputes was the primary aim.¹²

10. See Azcarate, P., *The League of Nations and National Minorities: An Experiment*, *op.cit.* p.14.
11. See also Macartney, C. A., 'The League of Nations Protection of Minority Rights', in Luard (ed.) *op.cit.* p.22 and Robinson, J., 'International Protection of Minorities: A global view', (1971) 1 *Isr.Ybk.H.R.* 61 at 65.
12. Walters, *op.cit.* n.5 p.408 supports this - according to him the real purpose was to give stability to the political settlement established by the Treaties of Peace. They were a guarantor of frontiers in return for a degradation of sovereignty. See also Bagley, T H., *General Principles and Problems in the Protection of Minorities*, (Imprim. Populaires, Geneva, 1950) p.42.

Contra Colban, (the first Director of the Minorities Section of the League) Letter to Rosting, Arch. L.N. RI671, 41/20950/20675. See also the Advisory Opinion of the Permanent Court of International Justice *Minority Schools in Albania* (1935) Ser. A/B No.64., p.17

Karbach somewhat fancifully attributes the motive of Cordon Sanitaire against Soviet Russia. Minorities would turn to Geneva and not the Soviet Union for relief of their grievances.^{'13'}

Nobody pretends that the Minorities system worked well.

McCartney^{'14'} wrote:

The system of protection of minorities through the League enjoyed

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

The formal considerations were set out in a letter from Clemenceau, on behalf of the Supreme Council, to Paderewski.

For text see Temperley, *op.cit.* Vol.5 pp.432 et seq.

13. Karbach, O., 'The Crisis of Minority Protection', (1945) 3 *Journal of Legal and Political Sociology* 69.
14. In Luard, E., *op.cit.* p.33; See though the more favourable conclusions of Kaeckenbeeck, below. For typical contemporary polemical outpourings see, Zichy, E., (1931) *Minorités Nationales* 23, and Carliani, A., (1934) *Revue de Transylvanie* pp.153, and 300 for two opinions on the situation in Roumania.

only a few years of life, and it would be hypocritical to pretend that it proved effective even during those years.

Up to 1929 only eight cases got to the Council out of three hundred petitions^{'15'} that reached Geneva and only in two of those did the Council propose any action, that action being to ask the offending State to desist.^{'16'} It must be remembered that the Minority Treaties and the procedure that they prescribed were experimental.^{'17'} Our interest in them is not only in their success or failure but also in the nature of the educational rights granted by them to the minorities. It was recognised that educational rights were essential if a minority was to be protected from a majority. It is not proposed to look at all the minority regimes and all the cases but rather to look at a particular regime as an example.

15. Stone, J., *op.cit.*

16. McCartney, *op.cit.*, later qualifies his earlier judgement, writing: "The fact that only a handful of cases ever came before the Council is misleading; in a very much larger number, the complainants received at least a modicum of satisfaction through negotiation conducted behind the scenes...." See e.g. p.97 below. The role of the Minority Committees of the Council of the League is here important. See Walter F., *op.cit.* p.403 and below p.90.

17. See Baron A. Heyking (1924) 10 *Transactions of the Grotius Society* 143 for criticism of League system.

B. POLISH TREATY

In Article 12 of the Polish Convention it was made quite clear that the obligations imposed upon Poland made the matter of their treatment of minorities as covered by the Treaty a matter of international concern. This removed any possible state claim that its treatment of minorities was solely a matter of domestic jurisdiction. The obligations imposed could be varied. ⁽¹⁸⁾

18. Parry, *Consolidated Treaty Series*, Vol.225 p.412. Article 12 states:

Poland agrees that the stipulations in the foregoing Articles, so far as they effect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations. They shall not be modified without the assent of a majority of the Council of the League of Nations.

Poland agrees that any Member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction, or any danger of infraction, of any of these obligations, and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances.

Poland further agrees that any difference of opinion as to questions of law or fact arising out of these Articles

Amongst the rights guaranteed was the right to establish manage and control at their own expense charitable, religious and social institutions, schools or other educational establishments, within which their own language could be used as the medium of instruction.⁽¹⁹⁾ These stipulations were a matter of fundamental law.⁽²⁰⁾ If there was a large or a considerable proportion of

between the Polish Government and any one of the Principal and Allied and Associated Powers or any other Power, a Member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations.

19. Article 8 states:

Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as any other Polish nationals. In particular they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

20. Article 1 of the Treaty states:

Poland undertakes that the stipulations contained in Articles 2 to 8 of this Chapter shall be recognized as fundamental laws, and that no law, regulation or official action shall

nationals of a minority in a given district or town area then the State had to provide adequate facilities for primary instruction in the language of the minority and additionally if the State disbursed money for educational, religious or charitable purposes then an equitable proportion of public monies had to be allotted to the minorities for their educational religious or charitable purposes. (21)

conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.

21. Article 9 states:

Poland will provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are resident adequate facilities for ensuring that in primary schools the instruction shall be given to the children of such Polish nationals through the medium of their own language. This provision shall not prevent the Polish Government from making the teaching of the Polish language obligatory in the said schools.

In towns and districts where there is a considerable proportion of Polish nationals belonging to racial, religious or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment of the sums which may be provided out of public funds under the State, municipal or

As Evans⁽²²⁾ points out the lack of precision in this provision means that much will depend on the spirit in which it is carried out. School districts could be gerrymandered for instance.⁽²³⁾ In Upper Silesia the minority provisions of the Polish Treaty were supplemented with considerable attention to detail. Thus the Upper Silesian regime, based on the Polish minority Treaty, but expanded, is a good example to look at in order to discover how the educational provisions were fleshed out and implemented in practice.

other budget, for educational, religious or charitable purposes.

The provisions of this Article shall apply to Polish citizens of German speech only in that part of Poland which was German territory on August 1, 1914.

22. *Op.cit.* p.107.

23. According to Azcarate, *op.cit.*, p.83 Czechoslovak legislation assumed that 'considerable proportion' meant 25% of the population.

C. UPPER SILESIA

Introduction

Initially it was proposed that the whole of Upper Silesia be handed over to reconstituted Poland. Strong German protests caused the holding of a plebiscite carried out under Article 88(1) of the Treaty of Versailles.²⁴ However, no clear method of drawing the frontier emerged from the plebiscite, given that economic and geographic factors had also to be taken into account.²⁵

Ultimately, with the help of the Council of the League the

24. Lloyd George apparently avowing 'that one might as well give a clock to a monkey as Upper Silesia to the Poles', See Rose, W., *The Drama of Upper Silesia*, (William and Norgate, London, 1936), esp.Ch.18 for a critical comment on the utility and outcome of the plebiscite. See for a brief general survey, Azacarate, P., *Protection des minorités de la Société des Nations*, (Centre européen de la Dotation Carnegie pour la paix internationale, 1969). Also Weinsten, J.L., *Upper Silesia* (Gebethner and Wollf, Paris, 1931) and Paton, H.J., 'Upper Silesia', (1922-23) 1-2 *Journal of the British Institute of International Affairs* pp.14-28. In the plebiscite Germany obtained 707,605 votes and Poland 479,359. Figures from Temperley, *op.cit.* Vol.6 p.620.
25. See Walters *op.cit.* p.152. cf. Hand, G. J., 'The Irish Treaty of 1921', in Martin F. X., and Byrne, F., (eds) *The Scholar Revolutionary*, (Shannon, 1973) pp.202-203.

Geneva Convention⁽²⁶⁾ was agreed and Upper Silesia was divided between Poland and Germany.

The Geneva Convention concerning Upper Silesia, having to a large extent been imposed upon unwilling countries, and dealing with many matters usually left to the discretion of sovereign States, was particularly rich in devices for securing a fair interpretation and the due application of many of its provisions...⁽²⁷⁾

The Convention is 606 Articles long. As Kaeckenbeeck observed,⁽²⁸⁾ it paid great attention to individual and minority rights. "Never before did the attempt go so far to secure individual rights and protect them internationally". The regime proposed by the Treaty was to last fifteen years. The third Part of the Treaty⁽²⁹⁾

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26. On 15 May 1922, See n.29 below. For League involvement see *passim* Barros., *Office without power*, (DUP, 1979), p.139. Mr. F. Calonder, ex-President of the Swiss Federation, presided over the negotiations that resulted in the Convention. He was later appointed as President of the Mixed Commission. See below p.91.
27. Kaeckenbeeck, *op.cit.* p.2
28. *Id.* p.24, 25.
29. The Germano-Polish Convention relating to Upper Silesia (hereafter the Geneva Convention) of May 15th 1922 was deemed to have been placed in the *League of Nations Treaty Series*

dealt with the protection of Minorities. The Minorities provisions of the Polish Treaty were to be applicable, and for the sake of 'equity and the maintenance of the economic life of Upper Silesia' Germany should accept similar stipulations.⁽³⁰⁾

Poland wished to incorporate the provisions of the Minority Treaty simpliciter in the Treaty with Germany.⁽³¹⁾ Germany wanted the rights spelled out in the Minority Treaty to form part of the Treaty, but, in addition, wanted a clarification of all the vague areas in that Treaty. (i.e., what constituted a 'considerable proportion' etc., under Article 9). Division 1 of the Third Part of the Treaty incorporated the Minority Treaty provisions. Division 2 elaborated on these provisions to ensure that the protection of minorities in the two portions of the plebiscite territory may be based on the principle of equitable reciprocity,

and in order to take account of the special conditions resulting from the transitional regime ... the

Contracting Parties, ..., have agreed to the following

(L.N.T.S.) Vol.IX, but was in fact circulated. See Doc.

C.396.M.243 of June 9 1922. Also n.9B below.

30. Part Three of the Geneva Convention Division 1 para.2;
Kaeckenbeeck *op.cit.*, p.225; Evans, *op.cit.*, p.116.
31. Letter from Mr. Colban to Mr. Calonder 21 February 1922 Arch.
L.N. (1919-1927); R1671 41/20950/20675.

provisions for a period of fifteen years.⁽³²⁾

Procedural Aspects of Minorities Protection⁽³³⁾

Division Three dealt with the methods of protection. There was an individual 'right' of petition to the Council of the League that could actually start the minority procedure, thus allowing the individual minoritarian Upper Silesian an element of capacity on the international plane. Normally petitions under the Minority Treaties would only 'inform' the Council.⁽³⁴⁾ After 1929 the procedure at the League followed that established after the adoption, with modifications, of the Adatci Report (previously being based on the Tittoni Report as implemented by Council Resolutions).⁽³⁵⁾ The

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32. German-Polish Convention relation to Upper Silesia. Division 2. Reproduced in Kaeckenbeeck p.609.
33. See Stone, *Regional Guarantees of Minority Rights*, Harv. U.P., 1933, and more generally Stone, *International Guarantees of Minority Rights*, (O.U.P., 1932).
34. See Stone, J., 'The Legal nature of the Minorities Petition' (1931) 12 *B.Y.I.L.* 76.
35. The Adtaci Report set out the history of the petition procedure of the League and proposed amendments. See *League of Nations O.J. Special Suppl. No.3*. Also Rosting *op.cit.* for a brief over-view of the earlier procedure. Generally *League of Nations, Protection of linguistic, racial and religious*

procedures were heavily used. Between 1921 and 1929 over 150 Minority Committees were established by the Council.³⁶

By 1929 the Council was dealing with so many petty issues³⁷ under the Geneva Convention that the German and Polish Governments under the Presidency of Mr. Adtaci (Council Rapporteur for Minority Affairs) (with President Calonder of the Mixed Commission), opened negotiations with the result that petitions under Article 147 were in future to be placed on a provisional agenda of the Council with a note explaining that the Rapporteur, assisted by the Secretary-General, proposed their removal from the final agenda. If the Council approved this in adopting its agenda in the first session of its meeting then the petitions were struck out. They could then follow the local procedure. If they were already using the local procedure, or if the matter had been taken up by the President of the Mixed Commission under Article 585 then the Article 147 petition would not be put on the agenda unless there were

minorities by the League of Nations, 1931 where relevant resolutions and reports are conveniently bound together.

36. Walters *op.cit.* p.403.

37. See Resolution C.468.1928.I adopted in October 1928 placing time delays on petitions submitted under article 147. These petitions could not be placed on the agenda of the Council until after two months, allowing the relevant government to settle the issue and/or submit observations.

considerable delays in the local procedure.³⁸

There was also a local procedure involving Minorities Offices that were to be established in each part of the plebiscite area.³⁹ The Procedure is set out in Articles 148-158. Petitions were to be addressed to the Minorities Office,⁴⁰ and if no satisfaction was obtained the petition, with the observations of the Minorities office, was forwarded to the President of the Mixed Commission. This post was filled by Mr. Calonder at the request of both countries.⁴¹ The President of the Mixed Commission made such enquiries as he felt fit, and, having given the Parties an opportunity of submitting their observations, as well as hearing any views of the Members of the Mixed Commission, he then communicated

38. L.N. O.J. (1929), 10 pp.166, 993 and 1104 et seq C.272.1929.I.

39. See Stone *Regional Guarantees op.cit.*

40. Article 150 set out some of the procedural requirements for such petitions (largely embodying the 'exhaustion of local remedies' rule). The Minority Offices initially were to conciliate. If that failed they acted for their state before the president of the Mixed Commission. After delivery of the President's Opinion they acted as liaison between the Mixed Commission and the State.

41. Walters *op.cit.* p.157. See n.26 above.

his opinion to the Minorities Office.⁴² Under Article 154 of the Minorities Office then transmitted the opinion of the President of the Mixed Commission to the appropriate authorities, who, as soon as possible, would inform the President of the Mixed Commission of the decision that the authorities had come to in the matter, 'stating whether and in what manner they have taken his opinion into account'.

Azcarate⁴³ felt that this procedure was too legalistic⁴⁴ as there was no coercive enforcement⁴⁵ machinery available to the President of the Mixed Commission, only persuasion. It must be noted though that the President made very good use of Article 585 of the Convention⁴⁶ that allowed him to bring to the

42. The Minorities Offices represented the authorities in relations with the President of the Mixed Commission

43. *Op.cit.*, p.153 et seq.

44. At least partially because of the great campaign waged against Calonder in Poland Arch. L.N. S.535 No.6 Azcarate Report of mission to Upper Silesia in June/July 1927 in which he recommends that Calonder's resignation not be opposed. See Kaeckenbeeck's contrary conclusions *op.cit.*, p.357 et seq.

45. See below p.118.

46. Article 585 states:

1. *S'il vient à la connaissance du Président de la Commission mixte des faits, circonstances ou situations qui,*

Government's attention breaches of the Convention.⁽⁴⁷⁾ This local procedure had numerous advantages.⁽⁴⁸⁾ Its local character allowed accurate assessment and collection of evidence. It acted as a filter for the League and diminished the scope for arousing international tension. Local personal contacts could⁽⁴⁹⁾ work in favour of compromise. Ultimately the petition could be sent to the Council of the League of Nations.⁽⁵⁰⁾ Leaving aside for the moment the difficult question of who belonged to a minority it is now time to look at the specific provisions of the Geneva Convention on

à son avis, ne sont pas conformes aux dispositions de la Convention le président est libre d'attirer sur eux l'attention de l'Agent d'Etat compétant.

2. L'Agents d'Etat est alors tenu de transaettere sans délai la communication à son gouvernement.

47. For example President Calonder, using Article 585, successfully blunted the Nazi anti-Jewish legislation in Upper Silesia. See Kaeckenbeeck p.359 et seq. Attested also by Robinson *op.cit.* p.73 as regards the Bernheim case of 1933 which protected Jews in Upper Silesia from the Nazi racial legislation. Also *id.* p.65 Note 2.
48. See Stone, *op.cit.*, p.205 et seq. and Kaeckenbeeck, *id.*, p.35 et seq.
49. Though at times relations between President Calonder and Polish regime were icy. See n.44 above.
50. See above p.89 et seq.

schooling.

The Schooling Provisions of the Geneva Convention

Introduction

The Geneva Convention contained over thirty Articles on minority schooling questions. It was the most elaborate part of the minority protection system. The schooling issue was bound up in nationalist sentiment.⁵¹ As Kaeckenbeeck pointed out:⁵²

The school fight was a fight for the bilingual Upper Silesian's children, or the children of the incompletely germanised.

President Calonder found that there were many cases relating to schooling especially in the early days.⁵³ Many were the obstructions placed in the way of the German Minority in their attempts to utilise the rights given by the Geneva Convention vis-a-

51. See above chapter 2 section (C) p.57 *et seq.*

52. *Op.cit.*, p.299.

53. Of his first fifteen Opinions eleven concerned education. (1919-1927) *Arch. L.N.* R1673 41/33956/20675. Just between October and December 1923 President Calonder of the Mixed Commission received over 627 petitions via Article 149 concerning only primary schools. (1919-1927) *Arch. L.N.* R1672. Kaeckenbeeck, *op.cit.*, pp.303-16 outlines some of the earlier Opinions.

vis the education of their children.⁽⁵⁴⁾ The Opinion of President Calonder of the Mixed Commission in the Rybnik case is an early example.⁽⁵⁵⁾ The case concerned the state Lycée at Rybnik. On the transfer of sovereignty to Poland the state school became a Polish Lycée. The German pupils looked for alternative accommodation to establish a private school. As President Calonder wrote

La Convention de Genève n'a pas seulement garanti ... et réglé par le détail ... l'enseignement privé, dans la notion duquel rentrent aussi les écoles privées, mais elle a attribué une grande importance aux écoles privées et a, en conséquence, assuré et favorisé leur existence dans la mesure du possible.

However the municipal authorities found no accommodation. Moreover when the pupils found that they could use the building of the girls'

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54. See the private letter of Calonder to De Montenach of 9 November 1922. (1919-1927) *Arch. L.N.* R1671, in which he indicates that he was considering resigning as the situation was so difficult. Also Letter of October 1923 to M. Colban Director of the Minority Section of the League of Nations indicating that thousands of children had their schools closed. (1919-1927) *Arch. L.N.* R1672. He was still considerably concerned about the schooling situation at the end of 1928. See (1926-1928) *Arch. L.N.* S.353.
55. Handed down in June 1923. President Calonder sent copies of his Opinions to the Minorities Section of the League. (1919-1927) *Arch. L.N.* R1672 41/31933/20675.

private school during the afternoon, the school was ordered to be closed (in September 1923) as it was classified as a building not suitable for use as a school. Thus both schools lacked premises. In October they found a Jewish orphanage that was willing to let them use their premises. This was almost immediately requisitioned by the Polish authorities for their railway officials. There were complaints to the Minorities Office and President Calonder undertook an investigation. He inspected the school premises that had been declared unsuitable and found that their condition did not justify closing the school. It was not ideal, but as President Calonder pointed out it was not long after a devastating war and there was a great shortage of housing, people were living in horse stables. In these circumstances unless there was a real and concrete danger to the children, which in this case there wasn't, the school should not have been closed. There was a grave danger to the children's future if they were denied education. He thus found that

... cette fermeture constitue un empêchement à l'enseignement privé, garanti aux minorités par l'article 68 et les articles 97 à 104 de la Convention de Genève, ...

Furthermore it was discriminatory contrary to article 75(2) as was made clear by the fact that a Polish High School was accorded premises even before it was organised properly (it finally opened in May 1923). His avis was ignored by the Polish authorities and the

petitioners appealed to the Council of the League⁵⁶ in October 1923. By Article 157 it was the Minorities Office that had to forward the petition to the League. It did not arrive. Erik Colban, Director of the Minorities section of the League, after consulting the Secretary-General on the matter, got in touch with the Polish delegate to the League, Mr. Olszowski, and over lunch they discussed the question.

Mr. Colban

thought it would be a very good thing to receive information as soon as possible that the question had been settled satisfactorily, as that would do away with any possibility of any Member of the Council, who might through outside channels have heard of the existence of the petition, raising the question in the Council.

Mr. Colban mentioned that he could probably avert this if he could inform such a Member of the Council that the matter was now settled.⁵⁷ The next day the Committee of the Three of the Council⁵⁸ met and Colban informed them of the situation. They agreed that they would have to wait until the Minorities Office

56. Under Article 149.

57. (1919-1927) Arch. L.N. R1672.

58. The procedure was set up to deal with petitions by Resolution of the Council on 25 October 1920 as later amended. See Baron Heyking *op.cit.* p.147 et seq. Also p.89 above concerning the procedural aspects of minority petitions.

forwarded the Petition.⁵⁹ The Polish government promised the petitioners access to the state school building in February 1924.⁶⁰

There are indeed some similarities with the great scholastic wars that shook Belgium and France in the nineteenth and early twentieth centuries. The difference was that there was an international control element in Upper Silesia. The results and conduct of the 'war' are well-recorded. The Permanent Court gave several opinions on the issue. The Council of the League was also occupied by it.

Chapter Four of division 2 of Part 3 of the Geneva Convention dealt with education (Articles 97-139). The first section dealt with private education.

Private Education

Private education was given a wide definition to include all teaching outside the State system, whether it supplemented such state education or was an alternative to it. It included teaching given at

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59. See the Opinion of Dr Van Hamel of the legal section of the League Secretariat on the effects of Arts. 157, 147, and 149. (1919-1927) *Arch. L.N.* R1672.
60. (1919-1927) *Arch. L.N.* R1671. In another Opinion (No. 11) of 3 January 1924 President Calonder found that only 186 of 1650 children were receiving instruction - the authorities using 24 grounds of "bureaucratic pedantry" to obstruct applications. (1919-1927) *Arch. L.N.* R1673 41/35240/2875.

home. Under the terms of Article 98(1) nationals who belonged to a minority had the freedom to 'establish, manage, supervise⁶¹' and maintain at their own expense private schools or private educational establishments and give private teaching' as long as the teachers possessed the 'legally necessary' qualifications,⁶² were domiciled in the State in which the teaching was given, and did not engage in activities hostile to the State, and the safety of children was not endangered. Private instruction outside of school was authorised.⁶³ Access to private schools in Upper Silesia by either German or Polish nationals in either State could not be forbidden.⁶⁴ The official language could not be imposed as the language of instruction in private teaching, but, in the case of private schools that took the place of State schools, it could be imposed as part of the curriculum.⁶⁵ It was the State that decided whether or not the private schooling received (whether received at home or in a school) was 'sufficient' or not to take the place of

61. Subject to the State's over-riding right of supervision to ensure that basic conditions were fulfilled; See Articles 102/3. See the *Rybnik* case above p.95 and the *Lubliniec* case below p.100.
62. Article 100 provided that an official diploma of either State would be sufficient qualification.
63. Article 98(2).
64. Article 101.
65. Article 99.



State education.⁽⁶⁶⁾ If the State decided that it was not then the children could be obliged to attend a State school, or an alternative private school that did provide sufficient schooling. The leaving certificates of private schools had to be recognised by the State as being of equal value to state issued certificates 'if the teaching given in minority schools corresponded to that given in state schools'.⁽⁶⁷⁾

These provisions are clearly designed to prevent a State monopolisation of the schooling of children that could lead to the suppression of minority culture. Nevertheless the State is still left considerable latitude in deciding for instance whether private schooling is 'sufficient' or not in terms of satisfying compulsory education laws. Full advantage seems to have been taken of these potential grey areas by the Polish authorities as the Rybnik case (above) illustrates. The situation in Lubliniec was similar.⁽⁶⁸⁾ Here a German high school became a Polish school on the transfer of sovereignty and the pupils were refused access to the publicly owned premises even when they were not being used. Obstructions were placed in the way of their using other premises. President Calonder in his opinion relied heavily on his earlier opinion in the Rybnik case. He found that

Les autorités n'ont pas montré la moindre volonté pour mettre à

66. Article 103.

67. Article 128.

68. (1919-1927) Arch. L.N. R1672 41/33365/20675.

la disposition de l'école privée allemande l'abri le plus modeste. He went on to castigate the authorities in no uncertain terms for their obstructive attitudes and actions. He specifically rejected the grounds on which the premises of the local *maison paroissiale évangélique* had been rejected as suitable for schooling by the authorities. (47)

69. It is worth quoting this part of his Opinion as it gives a good idea of the amount of detail that the President went into. This documentary aspect was very important given the relative lack of fact-finding ability at the League level and the fact that his Opinions were not strictly speaking binding.

La Maison paroissiale évangélique, comme le Président s'en est rendu compte par lui-même, est tout à fait propre à l'enseignement. Le médecin de cercle a sans doute signalé, d'après le rapport de l'inspecteur ...que la Maison paroissiale évangélique avait besoin de nombreuses réparations avant de pouvoir être utilisée comme école. Toutefois, le Président ne peut se rallier à l'opinion exprimée par le médecin de cercle. La Maison paroissiale évangélique est un immeuble moderne en pierre, très bien construit; l'escalier de fer est suffisamment large et ne présente aucun danger en cas d'incendie. Les salles sont, sans exception, saines et

However though the right to establish private schools and teaching was a very important part of the Geneva Convention's provisions on education it was not the only thrust of the Geneva Convention's education provisions. Great care was taken to ensure that public elementary education was suited to minority needs. Private education was after all at the minority's own expense.⁷⁰ A breakdown of the differing types of educational provision in Upper Silesia is provided in the Archives of the Mixed Commission.⁷¹ This shows a relative increase in the number of private schools in both Polish and German Upper Silesia, indicating perhaps the increasing need of the minorities to resort to them because of

pourvues du chauffage central; l'éclairage est bon.

He went on to say that to apply standards required of few buildings was inappropriate especially given the great shortage of accommodation. He castigated the *médecin de cercle* for requiring petty and unnecessary things such as ordering the windows, doors and corridors to be enlarged.

70. Though see Article 129 *et seq.*

71. (1919-1927) *Arch. L.N.* CB88 Schülstatistik Polnisch-Oberschesien. For example there were 9 private elementary schools in Polish Upper Silesia in 1924/1925 and 70 state elementary schools. In 1935/1936 the figures were 19 and 45 respectively.

problems in establishing suitable public education.⁽⁷²⁾

Public Education

Article 105(2) indicated that minority needs in elementary education were to be catered to by the provision of minority schools and minority classes in schools using the official language. Additionally there were to be minority courses, including language⁽⁷³⁾ and religious courses.

A minority elementary school had to be established⁽⁷⁴⁾ if 'the persons legally responsible for the education of at least 40 children of a linguistic minority' applied, provided that the children were nationals of the State, lived in the same School District, and intended to attend the school. Applications had to be complied with by the next school year providing that they had been submitted at least nine months in advance of the commencement of the school year. Similarly minority language and religious courses were to be provided in elementary schools following an application by a national supported by the parents of 18 and 12 pupils of a linguistic

72. See (1933-40) *Arch. L.N.* R3934 4/25858/7905 and 4/7905/7905 for similar conclusions. In German Upper Silesia the number of both private and state schools fell, but relatively private school numbers fell less. See Kaeckenbeeck *op.cit.*, pp.301, 337, 338.

73. Article 139.

74. Under Article 106, unless the establishment of the Minority school would be inexpedient for special reasons; Article 106(3).

minority respectively. ⁽⁷⁵⁾ Article 108 limited the circumstances in which a minority school could be closed. ⁽⁷⁶⁾ Minority schools and their staff were to be paid for in the same way as State schools. ⁽⁷⁷⁾ School Committees (Boards) were established in which over half the members had to be elected by the persons legally responsible for the education of the pupils in the school. The school committees were to undertake part of the administrative work of the school and have a say in the appointment of teachers. ⁽⁷⁸⁾ Additional provisions were

75. Article 107.

76. Article 108:

1. Les institutions scolaires de minorité ne pourront être supprimées que si le nombre de leurs élèves est, pendant trois années scolaires consécutives, inférieur au nombre prévu pour leur création.

2. Toutefois, la suppression pourra être ordonnée à l'expiration d'une année scolaire, si pendant toute cette année le nombre des élèves a été inférieur à la moitié du nombre prévu.

77. Articles 109, 110. Teachers 'as a rule' had to belong to the minority and be 'thoroughly acquainted with the minority language' (Article 123).

78. Article 112.

made for the language qualifications of teachers.⁽⁷⁹⁾ Minority facilities for secondary and higher public education were similarly provided for,⁽⁸⁰⁾ more pupils being required before such a school or

79. Article 113: En vue de tenir un nombre suffisant d'instituteurs à la mesures suivantes:

1. En principe, ne seront nommés dans une école minoritaire que des instituteurs appartenant à la minorité et en possédent parfaitement la langue.

Il sera établi des cours de langue pour les instituteurs nommés ou appelés à être nommés dans les écoles minoritaires, qui ne possèdent pas au degré requis la langue de la minorité.

2. Il sera créé un nombre suffissant d'établissements destinés, conformément à la législation de l'Etat intéressé, à l'instruction générale de futurs instituteurs, dans lesquels la langue véhiculaire de l'enseignement sera la langue de la minorité.

3. Les diplômes exigés d'un instituteur pour être nommé dans une école primaire publique de l'un des Etats contractants, suffiront pour qu'il puisse être admis à exercer les fonctions d'instituteur de la minorité dans la partie du territoire plébiscité appartenant à l'autre Etat. Toutefois, l'acquisition de la nationalité peut être exigée.

80. Articles 116-130.

class had to be set up.⁸¹ Again a lack of goodwill was evident in the application of these measures. For example the setting of a minority school in a hamlet where none of the minority lived and 45 minutes travelling time away for children of aged six, seven and eight was clear evidence of a general attitude not to implement of Convention in accordance with its spirit.⁸² Although this sort of obstruction was not unusual it was evident that the real question was how a minority was to be defined for the schools and classes would only be established at their behest. If the meaning of what constituted a minority was narrowly drawn then the rights, whatever they may comprise, would be available to a smaller number of people, thus diminishing the obligation of the states parties to the Treaty.

Definition of a Minority

The German Government favoured a 'subjective test' that allowed the minority to define itself. Individuals should be able to decide themselves whether or not they could be included in a minority. The Poles on the other hand felt that past Germanisation should be undone, they thus wished to use language as a criteria for deciding whether one belonged to a Minority or not. Under this

81. See Article 118.

82. (1928-32) *Arch. L.N.* R2097 Case No. 227 14 December 1927.
See Dybaski, R., 'Poland and the problem of national minorities', (1922-23) 1-2 *J.B.I.J.A.* pp.179-200, for a general defence of the Polish record.

formula, all who spoke Polish, whether or not they also spoke any other language and regardless of their wishes, should be considered Polish, and not as belonging to a Minority. In other words an 'objective test'.

The German subjective approach was more favoured in the Geneva Convention. Article 74 stated:

La question de savoir si une personne appartient ou non à une minorité de race, de langue ou de religion, ne peut faire l'objet d'aucune vérification ni d'aucune contestation par les autorités.

In his Opinion 40⁽⁸³⁾ President Calonder of the Mixed Commission found that whether a person belongs to the majority or a minority, under Article 74 of the Geneva Convention, "exclusively depends on the subjective will of that person". As we shall see this question was to reach the Permanent Court of International Justice (P.C.I.J.).⁽⁸⁴⁾

Article 131(1) forbade any tests to determine the language

83. Opinion 40, Case 257, Vol.1, p.396. Doc. P.C.I.J., Series C, 14, II, pp.116-44. L.N. Doc. C66. 1927.I sets out the Opinion in full together with the Polish observations on the Opinion. See (1927) L.N.O.J. 8.
84. Azcarate *op.cit.*, p.145 et seq. calls it the most fundamental of all controversies which occurred in Geneva over minority question ... the controversy gave rise to practically uninterrupted discussion in the Council and before the P.C.I.J. from 1927-1931.

of a pupil or child. The parents' verbal or written statement was decisive. No pressure was to be placed on parents to withdraw applications for the establishment of minority schools.⁸⁵ It is clear from this provision what the primal intent of the Treaty was in relation to education according to parental will.

Article 133 reproduced below emphasises the point:

1. The Contracting Parties undertake not to authorise in any school in their respective parts of the plebiscite territory the use of books or pictorial teaching material liable to offend the national or religious sentiments of a minority.
2. Similarly each of the Contracting States shall take the necessary measures to ensure that, in the lessons given at school, the national and intellectual qualities of the other Party are not improperly deprecated in the eyes of the pupils.

The sensibilities of the Minority was the priority, not the right of the individual to education. Rights came into the picture in the form of parental control in relation to the schooling of their children. However, it was not expected that members of the majority would want their children to receive education in the minority language, yet this is what happened. The main reason for this

85. *P.C.I.J.*, Ser. C, 14, II, p.145, ii-146 (line 3). Over 5,000 were rejected because the children allegedly did not 'belong' to the German minority. (1926-8) *Arch. L.N.* S.353 No. 4.

phenomenon was social pressure. '86'

In 1926 the Polish authorities deleted the names of over 7,000 pupils who had been entered for minority schools (out of a list of over 8,500). '87' This was condemned as contrary to the Geneva Convention by the President of the Mixed Commission in his opinion of 15th December 1926. '88' Poland did not accept his Opinion. They considered that Declarations that did not accord with the facts were an abuse of right, and the prohibition of verification in Article 131 only applied to declarations as such, and not to the question of what language school instruction should be given in. The Council of the League's solution '89' was to allow a test to be applied by the President of the Mixed Commission, assisted by an expert, so that in doubtful cases the pupil could be tested as to his/her linguistic competence, and if it was subsequently considered that 'it would be useless for the child to attend the minority school' then the child

86. See below p.116 et seq.

87. See *Case of the School at Starawies Arch. L.N. R2097.*

L.N.O.J.8. 1928 p.945. See Urrutia Report Annex 942 (n.89 below).

88. See n.83 above.

89. Based on a Report by M. Urrutia *L.N. Doc C. 98. 1927.I* in 1927 O.J. p.376 which summarises the arguments of the Parties and set out the facts.

should be excluded from the school.⁹⁰ As this procedure was a *de facto* one that did not alter the legal position the German Representative accepted it on that basis, not without being the subject of severe criticism subsequently in Germany.⁹¹ The Council had not answered the point raised by President Calonder, that the Polish-speaking parent had a right, under the Geneva Convention to send his Polish-speaking children to a Minority school.

A Swiss school inspector called Maurer⁹² was called in as the expert, and the result of his examinations was that over half the children examined in the 1926/7 school-year were not admitted to a minority school. Kaeckenbeeck wrote

These results were hailed in Poland as an exposure of the system of pressure alleged to have been exercised on behalf of the German minority schools.⁹³

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90. *L.N.O.J.* 1927. 1915 p.401, also *P.C.I.J.*, Ser. A., No. 15 Judgment No. 12, Rights of Minorities in Upper Silesia, p.13, 14. The German representative took the view that the parental attestation was all that counted. Even if the child knew no German at all she could still go to the Minority schools.
91. (1926-28) *Arch. L.N.* 5.353 No. 4.
92. *L.N. Doc C.* 209. M. 82.1927.I, 1970. J.P.621.
93. Kaeckenbeeck., *op.cit.*, p.323.

Kaeckenbeeck quotes from Reichstag Deputy Ulitzka⁹⁴ who explained that nationality and language were not always coincident in Upper Silesia. Thus Polish-speaking parents might well be of German sentiment, and thus desire to send their children to German language schools.

The interim, *de facto*, solution was applied in the next school year.⁹⁵ The German representative thus referred the question to the Permanent Court of International Justice for a legal Opinion under Article 72(3) of the Geneva Convention.⁹⁶

The Permanent Court of International Justice, in Opinion 12, having first considered various jurisdictional issues raised⁹⁷ went on to consider the merits of the case. It first pointed out the relationship between Division I and Division II of Part 3 of the Geneva Convention. It will be remembered that Part three of the Convention was the Part that dealt with Minority rights, and that Division I of that Part comprised the reproduced Minority Rights Articles from the Polish Treaty of June 1919. The Court considered

94. *Oberschlesische Volksstimme*, 19 March, 1927. Kaeckenbeeck *op.cit.* pp.323-4. A fact accepted by the *P.C.I.J.* in the *Rights of Minorities in Upper Silesia (Minority Schools)* case.

95. (1928) *L.N.O.J.* Annex 1003, 1003a. (M217/M218).

96. (1928) *L.N.O.J.* 9 p.156 *et seq.*

97. Establishing jurisdiction on the basis of *forum prorogatum*. See dissenting Opinions of Judges Huber, Nyholm and Negulesco that emphasise the wording of Article 72.

that 'the stipulations of Division II must be construed in the light of the stipulations of Division I'. The last sentence of Article 72(1) made it clear that the provisions of Division I could only be altered by the majority of the Council of the League. Furthermore Article 65 gives the provisions of Division I the authority of fundamental law. The final factor influencing the Court in this interpretation was Article XV of the final Protocol to the Geneva Convention which stated:

Aucune disposition de la Convention ne modifie en rien les stipulations des articles 65-72. (70)

The consequence of this interpretation was that the Permanent Court of International Justice considered that Poland's contention, that the question of whether a person belonged to a minority or not was a question of fact and not solely one of intention, was correct. (77)

The Permanent Court of International Justice then considered

98. None of the provisions of the Convention modifies in any way the stipulations of Articles (65-72.)

Part III Division 1 of the Geneva Convention is reproduced in, Ser.C - N 14-II. Article XV of the Final Protocol can be found in 1922 Doc. C.L. 70. V. This Document explains how the Geneva Convention was first circulated as information on June 9th 1922, but was later deemed to form part of Volume IX of the League of Nations Treaty Series. See n.29 above.

99. *P.C.I.J. Ser. A op.cit.* p.32-3.

the German argument based on Article 74, and rejected it on the grounds that the prohibition of verification therein contained did not automatically mean that the principle of subjectivity was relied upon. The prohibition might have been meant to cater for the difficult cases where the facts were not clear-cut. Nevertheless the Court asserted that a declaration could not be challenged. The Court inferred that 'the declaration must on principle be in conformity with the facts'.¹⁰⁰ The bizarre conclusion then is that who belongs to a Minority is a question of fact, and yet a declaration not in accordance with the facts is not assailable.

The Court also found that, in relation to language of education, Article 131 did not endorse the principle of subjectivity, although subjective elements may be taken into account.¹⁰¹ The result is that Poland could not refuse to admit children to Minority schools if they made the appropriate declaration, but that they could refuse to admit pupils whose parents had not made any declaration, or who had declared that the language of the child was Polish.

The Court's judgment in paragraph (2) emphasised that the declarations must set out what their author regards as the true position

and that

the right freely to declare what is the language of a pupil or child ... does not constitute an unrestricted right to choose the

100. *Id.* p. 35. See extract of Judge Nyholm's dissent below.

101. *Op.cit* p.40.

language in which instruction is to be imparted or the corresponding school.

The Dissenting judgment of Judge Nyholm pertinently commented that the Court could not in law limit the content of a declaration that was unimpeachable.

The requirement according to which the declaration must correspond exactly to the facts is only a pious wish and any limitations as regards its sincerity come solely within a moral sphere.⁽¹⁰²⁾

He further pointed out that in the case of many children in Upper Silesia the language used was a dialect, neither Polish nor German, thus it would be impossible for the declaration to truthfully indicate the language of the child as being either Polish or German. The Court's 'unsanctioned' affirmation of the objective principle was not to be successful in application. The subjective principle was applied in practice.⁽¹⁰³⁾

Another case was to go to the Permanent Court of International Justice before a system of examination of linguistic ability was re-introduced by agreement in 1934. The case involved a Declaration that patently had not accorded with the factual

102. *Op.cit.* p.63.

103. Opinion 86, case 733, Feb., 1930, vol.ii, pp.234 De Bruyter, 1937 (Two vols published in German and Polish) Kaeckenbeeck *op.cit.* p.332.

linguistic ability of the child¹⁰⁴ as tested by Maurer under the Council's test agreed in 1927. President Calonder applied the Permanent Court of International Justice's test¹⁰⁵ and said that the Declaration had to prevail over any language tests. Poland rejected this Opinion. The Council of the League requested an Advisory Opinion from the Permanent Court of International Justice asking it:

Can the children who were excluded from the German Minority schools on the basis of language tests provided for in the Council's Resolution of March 12th, 1927¹⁰⁶ be now, by reason of this circumstance, refused access to these schools?

The Permanent Court of International Justice in its Advisory Opinion

104. See President Calonder's concern and response to this judgement. Also of interest is the response of the Chairman of the Deutscher Volksbund, Prinz von Pless (that Germany and Poland could do without the League). Walters *op.cit.*
105. President Calonder had applied an exceptional policy based on conciliation and equity *vis a vis* the applications for entry to the Minority schools in the 1928-29 school year instead of the strict law. See Dissent of Judge Count Rostworoski, p.27.
106. The Resolution is reproduced in *P.C.I.J.*, Ser. A/B No. 40, p.8, 9. Also in *P.C.I.J.* Ser. C. No. 14-II, pp.161-163.

of 15 May 1931⁽¹⁰⁷⁾ declared that the relevant children could not be so excluded.

In 1934 the proposal of President Calonder to establish Examination Commissions to determine children's linguistic ability, and having done so, to try and persuade the parents' not to insist on their formal rights was accepted. There were few disputes following the establishment of this procedure.⁽¹⁰⁸⁾

Germany left the League in October 1933 and in January 1934 signed an agreement with Poland to the effect that problems affecting the mutual relations between the two countries should be settled by direct understanding. This fateful step, whilst relieving tensions in the short-run,⁽¹⁰⁹⁾ was the first step towards the ruin of 1939.⁽¹¹⁰⁾ Late in 1934 Poland announced that it was no longer going to accept international supervision of the Minority Treaty, a step not unlinked to Soviet Russia's election as a Permanent member of the Council.⁽¹¹¹⁾

Minority schools for Poles in German Upper Silesia never reflected the true numbers of the Polish-speaking minority. Several reasons are adduced for this. Firstly the Polish Minority was

107. Access to German Minority schools in Upper Silesia, *P.C.I.J.* Ser. A/B, No. 40, pp.8 et seq.

108. Kaeckenbeeck *op.cit.* p.335.

109. See Rose *op.cit.* p.332.

110. Walters *op.cit.* p.616 et seq.

111. Karbach, *op.cit.*

accustomed to German schools. Secondly there was the effect of the pressures of an overwhelming German economic and cultural influence. Their future was linked to the German based economy.⁽¹¹²⁾ The English language eclipsed Welsh in a similar fashion. A third reason adduced by Azcarate⁽¹¹³⁾ and others were the social class distinctions between the minorities, the bourgeoisie and aristocracy being German and the proletariat Poles.⁽¹¹⁴⁾ Moreover the number of German minority schools in Polish Upper Silesia was undoubtedly boosted by the activities of the Volksbund.⁽¹¹⁵⁾

Kaectenbeeck⁽¹¹⁶⁾ reflected that the Germans had clearly got the better of the bargain by including, in effect, the principle of subjectivity in the determination of what would constitute a Minority. Their success was so considerable that the resultant inequality

arouse[d] the hostility of [Poland] in such a way that even the patient endeavours of President Calonder, the authority of the Permanent Court of International Justice, and the collective pressure of the League were powerless against it.

112. Kaectenbeeck *op.cit.* p.339 et seq.

113. Azcarate (1945) *op.cit.* pp.32, 84. See von Riekhoff, H., *op.cit.*, p.147 et seq.

114. See also Walters *op.cit.* p.407.

115. Rose, *op.cit.* pp.291-2 who there outlines the benefits received by those who joined the Volksbund.

116. Kaectenbeeck *op.cit.* p.356.

It was therefore the inequality wrought by the different working of the principles of the Convention under different conditions which was at the root of the whole difficulty The Germans had little else to do than let the principles of the Convention work in their favour.

The greater use of the League machinery by the German minority was at least partially the result of factors referred to above and also the fact that the territorial change had been from Germany to Poland, thus the German minority were coming under a new regime, and the Polish minority remained with the same regime.

CONCLUSIONS Upper Silesia

At the end of the fifteen years the Minorities had been greatly diminished in number, or at least in visibility by their assimilation or emigration. Clearly their international protection had not assured their continued thriving existence. But, as Kaeckenbeeck asserts¹¹⁷ the system meant that

... for thousands of individuals, an extension of justice where, had there been no international protection, justice would not have been extended.

SAFEGUARD MACHINERY

The safeguard machinery provided by the Geneva Convention, especially the local Mixed Commission procedure, saw to it that attempts to evade the strict requirements of the law as to

117. *Id.* p.35.

educational provision were brought to light and ultimately remedied. The lack of coercive measures at the local level was clearly strongly felt by the President of the Mixed Commission who had no power to grant redress. The provisions granting minority rights were to be enforced as national law, (but only to a limited extent as supreme national law: see Article 65), and should that fail there was to be resort to the Council of the League.⁽¹¹⁶⁾ Local implementation of human rights is still reliant on national organs today except to the extent that an individual state allows its inhabitants to directly rely on International Law to overcome national law (a rare case).⁽¹¹⁷⁾ The advent of the European Economic Community with its directly enforceable law is slowly changing attitudes to reception of international law in Western Europe and is helping to pave the way for international human rights law to be treated the same way.⁽¹¹⁸⁾ To this extent the safeguard machinery found in the Upper Silesian system was far ahead of its time in providing effective local fact-

118. Also the Permanent Court of International Justice though until the *Minority Schools* case its jurisdiction in relation to Division III was by no means clear.
119. This matter is considered as regards the countries covered by this work below.
120. It has some way to go. Only now in 1987 is there finally appearing a case in the European Court of Human Rights on the question of whether Article 13 of the ECHR requires a state to provide a local remedy; *Boyle* case.

finding bodies and local adjudication of disputes.

The lack of local enforcement powers (after adjudication) was greatly regretted as all too often political embarrassments at the Council of the League prevented effective action being taken. But the right of petition did provide a useful cooling-off period and act as a restraining influence on the behaviour of States towards minorities.⁽¹²¹⁾ To some extent it helped limit Great Power espousal of minority irredentist causes or at least drove such help underground.⁽¹²²⁾

The Council generally felt that it should not be bothered by petitions alleging refusal to open a school and such like especially

121. Von Rieckhoff *op.cit.* p.223. As Kaeckenbeeck observed: ...
the parallelogram of diplomatic support at the League Council often did not correspond to President Calonder's view of the legality according to the Geneva Convention.

op.cit., p.231.

122. The great principle of protection of minorities, from the League point of view, had always been that we protect minorities for their own sake and for the sake of their government, but not on behalf of any country where the minority might have friends.

(1919-1927) *Arch. L.H.* R167 letter from Colban to Rosting concerning the drafting of the Geneva Convention.

as there was, until later, no effective local remedies rule.¹²³ Eventually the procedural reform of the petition system effectively disallowed the direct right of petition granted by Article 147 of the Convention.¹²⁴

As Kaeckenbeeck observed, the local machinery acted as a safety-valve and helped to prevent a cumulation of grievances ending in an explosion. In fact the local fact-finding machinery was essential especially given the reluctance of the League to encourage direct petitions under Article 147 through fear of inundation, and the difficulty of establishing facts,¹²⁵ especially in situations where a Government simply stuck to its version of the facts that did

123. The Council's reluctance is well evidenced in Azcarate (1945) *op.cit.* esp. at p.152 *et seq.*

124. See above p.89 *et seq.*

125. For example a petition from Mr. Hoffman complaining that he couldn't set up a school to teach German in Bydgoszcz (Bromberg) was struck out by the League Secretariat for lack of fact-finding abilities as the letter showed insufficient infraction of the Treaty; (1919-1927) *Arch. L.N.* R1671. The rules on admissibility of human rights claims are very rigorous in modern treaties.

not coincide with the facts alleged by the petitioner.¹²⁶ The system clearly needed a separate high level organ at the League, apart from the Council, to decide on petitions and complaints. In the post World War Two systems such organs have evolved.

Petitioners were however recognised as having capacity in International Law and this in itself was a massive step forward.¹²⁷ The explicit recognition of education as a vital element that had to be protected was a very important step in the development of the right to education in international law. Moreover the system recognised the great importance of language rights in the education of children. The educational aspects are now considered.

EDUCATIONAL PROVISIONS

The educational provisions in the Geneva Convention were only one small ingredient in the Upper Silesian situation, so it would be inappropriate to try and draw any wide conclusions about minority protection in general from this short analysis of their

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126. This problem has been overcome to some extent by the current practice of the Human Rights Committee under the Optional Protocol of the International Covenant on Civil and Political Rights whereby bland general denials by the state are not accepted; Human Right Committee Annual Report 35 UN GAOR Suppl. No.40; UN Doc. A/35/40 (1980) at p.111 et seq.
127. Stone *op.cit.*, Regional guarantees p.21. Also (1928-9) *L.N.O.J.* Special Suppl.73 p.49.

workings. It was clear from the provisions themselves and their operation that the protection of parental wishes was the main concern rather than any individual child's right to education. This position was exacerbated by the way in which minorities were self-defining, the parental statement being unverifiable. Indeed the operation of the educational provisions could result in a child being taught in a language that he did not understand, though it was recognised by the League and President Calonder that this was undesirable and steps were taken to try and stop this occurring. The emphasis on parental will is still reflected today in some of the current human rights treaties.⁽¹²⁸⁾

The right to private education was fully recognised. An independent sector in education was seen as a safeguard for the minority to stop state monopolisation of children, and indeed, as the figures show,⁽¹²⁹⁾ the minorities increasingly resorted to this safeguard. The safeguard of independent minority schools having control over their own curriculum⁽¹³⁰⁾ and some say in staffing matters was considered an essential guarantee for the continued

128. E.g., the ECHR, where however the rights of the child have been emerging as the provisions are interpreted, see below chapter 7 section VI.

129. See above notes 71, 72 and accompanying text..

130. If the independent schools wished their certificates to have the same value as those of state schools their teaching had to correspond to that given in the state schools. See n.67 above.

existence of the minority itself. The essence of minority protection required that they be allowed to develop their own culture; what more obvious way to ensure this than through their own educational establishments! (131) The child's right to education was guaranteed indirectly by the State that had to be satisfied that the education so provided was 'sufficient'.

The Convention recognised however that the guarantee of private education alone was not sufficient. There must also be provision in the state sector to cater to minority needs. The Convention went a long way to explicitly stating exactly what provision was required, much farther than the Minority Treaties that were vague in this respect. Indeed the Geneva Convention is here more explicit than even the post-World-War II provisions on rights in education. Its recognition of a parental right to require that the state provide a specific type of schooling for their children goes farther than even the European Convention on Human Rights. One explanation might be the particular importance of education to help preserve the cultural autonomy of minorities, in contrast to the situation where rights are universally ascribed. (132) The provisions made for minorities are but an explicit mode of requiring a

131. Azcarate (1945) *op.cit.* p.74.

132. Rousseau, Ch., 'Protection des minorités et reconnaissance internationale des droits de l'homme', (1937) 37 *Revue du Droit Public et de Science Politique en France et à l'étranger* p.405 at 415 et seq.

pluralistical society. This theme is taken up shortly as we turn to the Albanian Schools case.

D. The ALBANIAN SCHOOLS case

To widen somewhat the conclusions on the League system on minorities and their educational treatment, it is instructive to look at the Albanian schools case of 1935.⁽¹³³⁾ The case arose after the Albanians decided to abolish all private schools.⁽¹³⁴⁾ The Albanians had made a Declaration before the Council of the League on October 2, 1921 Article 5 of which guaranteed to minorities in Albania

... the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, ... schools and other educational establishments. ...

The Declaration *vis-à-vis* minorities was placed under the guarantee of the League and ratified by the Albanian Government in 1922.⁽¹³⁵⁾

The Albanian Constitution of 1929 had allowed the establishment of private schools

provided they conform with the laws, principles and curricula approved by the State for its own schools, and subject to the effective control of the Government...

This went some way to defeating the purpose of having Minority

133. Kaeckenbæeck *op.cit.* pp.527-8.

134. *Minority Schools in Albania* Ad. Op. *P.C.I.J.*, 1935 Ser. A/B 64.

135. Articles 206-7 of the Albanian Constitution of 1933.

schools as the differing curricula in particular is what made them attractive, and assured a pluralist society and continuance of the cultural heritage of minorities. The Constitutional changes of 1933 left no doubts. Private education was abolished.

The Albanians claimed that their action was in conformity with the Declaration as it was a general measure effecting both the minority and majority. The Council asked the Permanent Court of International Justice to express an Advisory Opinion *inter alia* as to whether the Albania measure was in conformity with the spirit and letter of Article 5 of the Declaration.

The Permanent Court of International Justice thought that two things were necessary to achieve the objectives of Article 5:

(i) non-discrimination

(ii) to ensure 'suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics'.

... there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority. ⁽¹³⁶⁾

In determining what was meant by the phrase 'same treatment and security in law and in fact' the court declared:

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment

136. Its content is almost identical to the respective article in the Polish Minority Treaty; (Article 8).

in order to attain a result which establishes an equilibrium between different situations. (137)

The different situations were represented by the minority and majority aspirations. The abolition of minority institutions would deprive them of equality in fact. Non-discrimination was not enough they required differentiation.

... The institutions mentioned in the second sentence [of Article 5] are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State. (138)

Curriculum and its importance is implicit the Court's judgment here. Why else would they say that the minority schools were so important and that the minority needs could not be satisfied by state schools for minorities?

The Court buttressed its arguments by reference to the

137. (1935) *P.C.I.J. Ser. A/B No. 64* p.17.

138. *Id.* p.19.

history of the provision.¹³⁷ It further maintained that the fact that its was an "equal right" did not empower the government to abolish the right, for that would render the 'right' illusory and lead to a situation of inequality.¹³⁸ The Court also found this interpretation reinforced by the provisions of Article 6 guaranteeing appropriate provision for minorities in the public education system!

The argument was that as Article 6 follows Article 5 on private education it:

appears to assume that state education .. will be something additional to private education, and is not meant to take the place of private education.¹⁴¹

The P.C.I.J. therefore found that Article 5 guaranteed the minority the rights envisaged in the second sentence of Article 5.

However there was a powerful dissenting opinion, by the President of the Court Sir Cecil Hurst, Count Rostworowski and M. Negulesco. They felt that the Court had placed too much emphasis on the purposes of the Declaration.¹⁴² The point of Article 5 was to ensure that the equality between majority and minority was not a mere platonic or paper equality. There is nothing, however, in the wording of the provision to show that this equality in law may be disregarded and replaced by a system of different treatments for

139. Ser. A/B No. 64 *op.cit.*, p.21 et seq.

140. *Id.* p.20.

141. *Id.* p.21.

142. *Id.* p.22.

the minority and majority so as to establish an equilibrium between them.¹⁴³ ...

Furthermore, the suppression of the private schools - even if it may prejudice to some appreciable extent the interests of a minority - does not oblige them to abandon an essential part of the characteristic life of a minority. In interpreting Article 5, the question whether the possession of particular institutions may or may not be important to the minority cannot constitute the decisive consideration. There is another consideration of equal weight. That is the extent to which the monopoly of education may be of importance to the State. The two considerations cannot be weighed one against the other: Neither of them - in the absence of a clear stipulation to that effect - can provide an objective standard for determining which of them is to prevail.

The Clemenceau letter is adduced to show that there was no intention to provide an unconditional right to private schools¹⁴⁴ because of its emphasis on non-discrimination.¹⁴⁵

The majority used a teleological interpretation to get to what they considered to be the core minority right that was available. They considered that minority schools were essential for the continuation of the minority. What of state schools though? One can only think that the curriculum freedom associated with private

143. *Id.* p.25.

144. *Id.* p.29.

145. See Articles 4 and 5 of the Albanian Declaration *Id.* pp.35-36.

schools was considered as being essential. In this respect it is to be noted that under the minority systems in general, as opposed to the Upper Silesian regime, there was no provision for School Committees that reflected the views of the minority who controlled the running of the school and expenditure of funds as well as having a say in the appointment of teachers.¹⁴⁶

The minority dissenters used a literal interpretation. Equality was the key. The fact that Article 5 called for the same treatment and security in law did not entitle them to unconditional right to private education if the majority too are disallowed it. Otherwise there would not be an equal right. The Dissenting judges refused to be lured into an elusive search after a perfect equilibrium.¹⁴⁷ To the Majority of the P.C.I.J the purpose of the Declaration required differential treatment for minorities. The dissenting judges of the P.C.I.J. riposte was 'but that is not what they wrote in the Declaration'.

This is an interesting case just because of this difference. It highlights the importance that the Court placed on education other than through state schools. In the pursuit of a pluralistic society the assertion of parental power through the establishment of private schools was approved of. The State could not satisfy this demand as it had virtually total control over the state sector of education, Article 6 not giving the Minority much say. If equality in fact and

146. *Id.* p.26.

147. See n.143 and accompanying text above.

law required differentiation then the ultimate concept of equality between Minority and Majority rested on the Court's value judgment - the so-called 'elusive search after a perfect equilibrium'. Clearly the majority of the Court found that this equilibrium required parental rights vis-à-vis the education of their children.

It is clear though that the minority system was not designed to cater to the individual rights of the child. No personal right to education was directly conferred. Rather modalities of education were set out and parents were then given the power to choose. No right to a particular education attached to the child.

Kaeckenbeeck's general assessment on the scope of international regulation of rights of citizens was gloomy

The Upper Silesian experiment ... has shown that there is no means - short of the threat or use of force - of successfully extending actual international protection to citizens of any State against the clear political will of the Government and large majority in that State. (148)

The next chapters assess the new United Nations (UN) system for the protection of rights of individuals. We look first at the demise of the League System.

E. DEMISE OF THE LEAGUE SYSTEM

The Upper Silesian system came to an end after the expiration of its allotted fifteen years. The demise of the League

148. Kaeckenbeeck *op.cit.* pp.503.

with the advent of the Second World War brought an end to its system of minorities protection. As Bagley observed⁽¹⁴⁷⁾ it was like one floor of the toppling building.

At the end of the War the League system was considered to have ceased to exist.⁽¹⁵⁰⁾ The framers of the UN Charter certainly considered that the minority treaties were extinct. Capotorti in his *Study of the Rights of persons belonging to ethnic religious and*

149. Bagley, T.H., *General Principles and Problems in the Protection of Minorities*, (Imprim. Populaires, Geneva, 1950), p.126.

The demise of the League in itself would not have the effect of rendering void the obligations undertaken, See *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [the S.W. Africa case] *I.C.J. Rep. Ad. Op.* (1971) p.133.

150. U.N. Doc.E/CN.4/367 and Add. 1, Ch. XIV. See Feinberg's commentary on aspects of this study ['The legality of the undertakings concerning minorities and the clausula rebus sic stantibus'] in (1958) *V Scripta Hierosolymitana* 95. See Bruegel, J.W., 'A neglected field: the protection of minorities', for a commentary on the post World War Two attitudes as regards the protection of Minorities. (1971) 4 *R.D.H./H.R.J.* 413.

linguistic minorities¹⁵¹ confirms this. For example various factors point to the demise of the Polish treaty obligations. Firstly the mass transfers of population as a result of the Potsdam Declaration of 2 August 1945 which caused the transfer of the German minority of Poland back to Germany. The USSR had annexed the Eastern half of the country by the treaty of 16 August 1945 thereby resolving difficulties caused by Ukrainian, Lithuanian, Byelorussian and Russian minorities. As the *Study of the Legal validity of the undertaking concerning Minorities*¹⁵² cryptically points out, there were few Jews left in Poland. Additionally a new Protocol between Poland and Czechoslovakia of 10 March 1947 dealt with the treatment of Czechs and Slovaks in Poland. These factors coupled with the dissolution of the League meant that:

The change of circumstances has been profound and general, and it may therefore be reasonably concluded that the regime established by the 1919 Treaty is no longer in force.¹⁵³

Feinberg surveys the literature and finds that most writers concur in this opinion.¹⁵⁴ He considered that:

the disappearance of the minorities system after the Second World War is one of the rare cases in which international obligations

151. UN Doc. E/CN.4/Sub.2/384/Rev. 1, p.27.

152. This study was prepared by the UN Secretariat at the request of the Economic and Social Council. UN Doc. E/CN.4/367.

153. UN Doc. E/CN.4/367, pp.60 et seq.

154. Feinberg, *op.cit* p.109 et seq.

have lapsed per desuetudinem. (155)

The minorities system was not considered a success and instead was seen as an infringement of the equality of states. The use of minorities as a 'fifth column' was noted. (156) Moreover it was unnecessary if human rights of all people were to be protected. This is what was proposed under the new United Nations system. Some ponder that the system may have been ditched too precipitously and that its use in situations such as Biafra and East Pakistan could have avoided bloodshed. One might add Eritrea and the Lebanon today. (157) The United Nations placed a low priority on the problem of minorities.

155. A conclusion concurred in by Bruegel *op.cit* p.415.

156. See Kunz, J.L., 'The future of the international law for the protection of minorities', (1973) 43 *A.J.I.L.* 89.

157. See Hauser, R. E., 'International Protection of Minorities and the right of self-determination', (1971) 1 *Is.Ybk.H.R.* 92.

CHAPTER FOUR
THE UNITED NATIONS
THE INTERNATIONAL BILL OF RIGHTS

POST SECOND WORLD WAR DEVELOPMENTS: THE UNITED NATIONS

I. INTRODUCTORY

The United Nations

The Declaration of the United Nations on January 1, 1942

intended that

... complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands.⁽¹⁾

President Roosevelt's famous Four Freedoms speech and the Atlantic Charter seemed to ensure that human rights would be high on the list for any post-war settlement. As René Cassin observed

... les atrocités de la deuxième guerre mondiale ont manifestement imposé la protection des droits de l'homme parmi les objectifs essentiels de la nouvelle organisation des Nations Unies...⁽²⁾

However the Dumbarton Oak talks resulted in Proposals that did not give a strong place to human rights. There were mentioned in Chapter One:

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1. U.N., *U.N. for Fundamental Human Rights*, (UN, 1948) I. 12 (Archives).
 2. In the preface to Verdoodt, A., *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme*, (Ed. Nauwelaerts, Louvain-Paris, 1964) p.xi.

Purposes

... 3. To achieve international co-operation in the solution of international economic, social and other humanitarian problems ... and more directly in Chapter Nine for International Economic and Social co-operation

Section A

... the Organisation should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedom.⁽³⁾

A host of proposals for international bills of rights had been prepared all over the world by diverse organisations and individuals.⁽⁴⁾

At the San Francisco Conference there were many suggested amendments relating to human rights, and the Charter of the U.N. in fact mentions human rights several times in various articles.⁽⁵⁾ The

3. U.N., *Conference on International Organisation*, Vol.3 pp.2, 19.

4. See U.N. Doc. E/CN.4/W.16 (January 23, 1947), pp.9-11. For ease of reference the titles to these documents are omitted. They all form part of the collection of archives of the U.N.

5. Notably in Articles: 1(3); 55; 62; and article 76. The legal effect of these Articles was not clear before the International Court of Justice's decision in *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding*

League experience in dealing with minority regime was not alluded to, nor were the minority treaties even considered. There were treated as a dead letter. Clearly the emphasis was now on securing to all people in all States the protection of their human rights. In this way the specific protection of minorities was not seen as necessary, though it was ultimately included in the International Covenant on Civil and Political rights.⁶

At San Francisco Haiti declared that seeing as how ... the first consideration of dictators upon their arrival in power has been to take possession of the youth in the schools ...

something should be done to ensure that this could not happen, and thus proposed that the word 'education' be inserted after 'Economic

Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Rep. 1971, esp. pp.130 et seq. See Schwelb, E., 'The International Court of Justice and the Human Rights Clauses of the Charter', (1972) 70 A.J.I.L. 337; Also Lauterpacht, H., International Law and Human Rights, (1950, Stevens) esp.Ch. 9. Kelsen, H., The Law of the U.N., op.cit. contra.

6. Article 27. Concluded in 1966. See generally Tomuschat, C., 'Protection of Minorities under Art. 27 of the International Covenant on Civil and Political Rights', in Bernhardt, et al. (eds.), *Volkerrecht als Rechtsordnung Internationale Gerichtsarbeitskreis Menschenrechte* (Springer, Berlin/New York 1983), p.949.

and Social'.⁷ The Chinese and Uruguayan delegation likewise proposed that educational and cultural co-operation should be mentioned in the Charter. These proposals were largely accepted.⁸

At the end of the conference President Truman stated, in his closing speech,⁹

Under this document we have good reason to expect the framing of an international bill of rights acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own bill of rights. The Charter is dedicated to the achievement and observance of human rights and fundamental freedom.

In this section of the thesis I am going to trace the evolution of the right to education in the International Bill of Rights and under the U.N. system in general. The bulk of the analysis revolves around the preparation of the norms to be enshrined in the Bill of Rights, as this throws light on what the drafters had in mind in adopting particular language.

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7. U.N. *Conference on International Organisation*, Vol.3 *op.cit.* p.53.
 8. Cultural co-operation is referred to in Article 1(3), and both cultural and educational matters are referred in Articles: 13; 55; 62; and in Articles relating to the Specialised Agencies, non-self-governing territories and in the provisions on trusteeships.
 9. *Id.*, p.717.

II. THE INTERNATIONAL BILL OF RIGHTS

A. The Universal Declaration of Human Rights.

First Session

On June 21, 1946 the Economic and Social Council established the Commission on Human Rights.¹⁰ This body took over from the nuclear Commission on Human Rights and established a Drafting Group (later to be known as the Drafting Committee).

At their first Session where they decided that they had no power to take any action in regard to complaints concerning human rights¹¹ they also examined various drafts including proposals from the U.K. and U.S.A., and a draft prepared by René Cassin. They examined as well a draft prepared by the Division of Human Rights (a subsidiary part of the Department of Social Affairs of the U.N. Secretariat).¹² This Document had attached a copy of articles of

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10. On February 16, 1946 the newly elected Members of the Economic and Social established a nuclear Commission on Human Rights. This met under the Chairmanship of Eleanor Roosevelt in New York on April 29, 1946. It immediately began consideration of the question of an International Bill of Rights.
 11. U.N. ECOSOC Council, 1946 Doc. E/259 p.7, Para 22.
 12. U.N. Doc. E/CN.4/AC.1/3, (June 4, 1947).

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national Constitutions^{'13'} that dealt with human rights from which the text had been derived.^{'14'} At the thirteenth meeting of the Commission on Human Rights they discussed a long list of suggested rights that included the right to education.^{'15'} Several countries submitted draft Declarations that included the right to education, and several more made proposals for an article on the right to education.^{'16'} The working of the First Session will now be examined with regards to the evolution of the Article on the right to education.

The Drafting Committee decided that there should be both a Declaration and a Convention on Human Rights.^{'17'} They set up a

13. U.N. Doc. E/CN.4/AC.1/3 add. 127 Constitutions endorsed the principle of liberty of education (the freedom to establish educational institutions), 38 Constitutions endorsed the principle of the right to education.
14. U.N. Doc. E/CN.4/W.13 (restricted) (January 23, 1947), also prepared by the Division of Human Rights comprised a textual comparison of the provisions related to human rights and fundamental freedoms of the eight Trusteeship Agreements approved by the General Assembly.
15. U.N. Doc. E/CN.4/SR.13 (February 4, 1947).
16. U.N. Doc. E/CN.4/AC.1/3 Add.1, p.290 et seq.
17. See U.N. Doc. E/CN. 4/21 (July 1, 1947).

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temporary working group¹⁸ to deal with the Secretariat's draft Bill. The draft outline of the Division of Human Rights¹⁷ was comprehensive in that it covered not only the right to education (Article 36), but also freedom of education (Article 21), and minority rights (Article 46):

Article 21:

Everyone has the right to establish educational institutions in conformity with the conditions laid down by law.

Article 36:

Everyone has the right to education. Each State has the duty to require that every child within its territories receives a primary education. The State shall maintain adequate and free facilities for such education. It shall also promote facilities for higher education without distinction as to race, sex, language, religion, class or wealth of the persons entitled to benefit therefrom.

Article 46:

In states inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ... minorities shall have the right to establish and maintain out of an equitable proportion of any public funds available for the purpose, their schools ...,

18. U.N. Doc. E/CN. 4/AC.1/SR.6 (June 16, 1947). The group of three consisted of the delegates of the U.K., France and the Lebanon.

19. U.N. Doc. E/CN.4/AC.1/3, (June 4, 1947).

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and to use their language before the Courts and other authorities and organs of the State...

A Chilean proposal submitted on behalf of the Inter-American Juridical Committee⁽²⁰⁾ emphasised the State's right to maintain minimum standards with regard to all educational institutions. René Cassin's original draft also went to the temporary Working Group of the Drafting Committee. With regard to educational rights⁽²¹⁾ it stated:

Article 41

Everyone is entitled to learning and has the right to education. Primary education is obligatory for children and the State shall provide adequate and free facilities for such education. Access to higher education shall be promoted by giving equal chances to all youths and adults without distinction as to race, sex, language, religion, social standing, or financial means of beneficiaries. Vocational and technical training shall be generalised.⁽²²⁾

This was revised after discussion to read:

Article 35

Everyone is entitled to learning and has the right to education. Primary education is obligatory for all children and must be provided for them free.

20. U.N. Doc. E/CN.4/AC.1/3 Add.1 *op.cit.* p.159.

21. Article 44 dealt with minority rights.

22. U.N. Doc. E/CN.4/AC.1/W.2/Rev.1, (June 18, 1947).

Access to technical, professional and higher education shall be promoted by giving equal chances to all youths and adults without distinction as to race, sex, language, religion, social standing or financial means of beneficiaries.⁽²³⁾

The Working Group sent this draft back to the Drafting Committee. The Chairman (USA) suggested⁽²⁴⁾ a redrafting of the article on education thus:

Everyone has the right to education.

Each State has the duty to require that each child within territory under its jurisdiction receive a fundamental education. The State shall maintain adequate and free facilities for such education. It shall also assure development of facilities for further, including higher, education which are adequate and effectively available to all the people within such territories.

Dr. Malik (Lebanon) felt that it was otiose to include both 'entitled to learning' and the 'right to education'. He was also concerned that there was no provision concerning the content of education. To the latter argument René Cassin (France) replied that the right to Association was not elaborated and he saw no reason why

23. U.N. Doc. E/CN.4/AC.1/W.2/Rev.2, (June 20, 1947).

24. U.N. Doc. E/C.4/AC.1/8, p.6 (June 11, 1947). Later amended to include the phrase 'which however shall not be exclusive of private educational facilities or institutions'. U.N. Doc. E/CN.4/AC.1/8 Rev.1. See also U.N. Doc. E/CN.4/AC.1/SR.14 (July 3, 1947).

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the right to education should be either. Both the U.S. and Lebanese delegates were concerned that the position of private education should be protected. Mr. Cassin felt that it wasn't necessary to specifically protect private education. Mr. Loretsky (Russian) opposed the clause suggested on private education.⁽²⁵⁾ In this he was supported by Mr. Wilson (U.K.), who also proposed various changes in the wording of paragraph 2. In particular the phrase 'youths and adults' he felt should be expressed as 'beneficiaries'. Mrs. Roosevelt (U.S.A.) wanted the word 'adult' retained since it wasn't yet generally accepted that adults had a right to education. Mr. Harry (Australia) pointed out that a right to education wasn't the same thing as having compulsory education and thus proposed that instead of an obligation on States to maintain any particular type of educational institutions there should be granted an equal right of access to whatever facilities were maintained.⁽²⁶⁾ Mr. Santa Cruz (Chile) similarly considered that State resources were a restraining factor and put forward the Inter-American Juridical Committee draft which was in the following form:

The state has the duty to assist the individual in the exercise of the right to education, in accordance with the resources of the State. The opportunities of education must be open to all upon

25. See note 24 above.

26. Harry is raising issues of access here that also were raised under the European Convention on Human Rights. See Chapter seven below.

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equal terms in accordance with their natural capacities and their desires to take advantage of the facilities available. (27)

At the end of the 14th meeting the chairman asked Mr. Harry to redraft article 35 (on the right to education) on the basis of the discussions: At the Meeting on June 23, Mr. Harry read his draft Article 35:

Everyone has the right to education and is entitled to primary education at the expense of the state or community in which he resides. There must, in addition, be equal access for all on the basis of merits and without distinction as to race, sex, language, or religion to such facilities for higher education as can be provided by the State or community within the limits of its resources.

The U.S.A. was concerned at the absence of any mention of private education, and Chile regretted the absence of any mention of obligatory education, but the main discussion was postponed until they could all see a written version of the draft article. (28)

Despite the concern of the USA private education was not explicitly mentioned in the final text, though compulsory education was (despite the concern of Mr. Cassin to the effect that some states had not adopted a compulsory system). As the US delegate pointed out the right to education differed from the right to work, the right to education was to be made compulsory for primary education to ensure

27. U.N. Doc. E/CN.4/AC.1/3 Add.1 *op.cit.* p.298.

28. U.N. Doc. E/CN.4/AC.1/SR.15, (July 3, 1947).

that the child's right was protected for him. The draft at the end of the session read:

Everyone has the right to education. Primary education shall be free and compulsory. There shall be equal access for all to such facilities for technical, cultural and higher education as can be provided by the state or community on the basis of merit and without distinction as to race, sex, language, religion, social standing, political affiliation or financial means.⁽²⁹⁾

Thus eight important factors had been mentioned by the end of the first session, but only four of them firmly appear in the final draft article.

1. That state resources must necessarily be involved. (Included in first sentence).
2. That fundamental education is the right of the child and adult. (Included partially in first sentence).
3. That this right, in the case of the child was in fact not an option right but should be compulsory. (Included 2nd sentence).
4. That once beyond the stage of fundamental or primary education then individual talent/merit should determine access. In other words there would be a qualified right. (Included).
5. That the content of education was important. (not included).
6. That the principle of non-discrimination should operate in this field. (Included).
7. That the right to private (independent) education (enseignement

29. U.N. Doc. E/CN.4/21 p.88.

libre) should be recognised. (Not included)

8. That special minority rights in education should be recognised.
(Not included).

Second Session

At the 2nd Session of the Commission on Human Rights there was relatively little change in the Article on the right to education itself. In its final form as presented in the Report of the Commission on Human Rights to the ECOSOC Council³⁰ it read as follows (Article 27):

Everyone has the right to education (droit à l'instruction).³¹
Fundamental education shall be free and compulsory. There shall be equal access for higher education as can be provided by the state or community on the basis of merit and without distinction as to race, sex, language, religion, social standing, financial means, or political affiliation

However a new article on education appeared. This specified the purpose of education. It stated

Education (L'éducation) shall be directed to the full physical, intellectual, moral and spiritual development of the human personality, to the strengthening of respect for human rights and fundamental freedoms and to the combatting of the spirit of

30. U.N. Doc. E/600, pp.20-21. This text is referred to as the Geneva version in Doc. E/CN.4/95, 21 May, 1948.

31. *Instruction* being a narrower term than *éducation*.

intolerance and hatred against other nations or racial or religious groups everywhere.

This new Article was initially promoted by Mr. Easterman of the World Jewish Congress before the Working Group on the Declaration of Human Rights.⁽³²⁾ It was supported by several delegates, and the U.N.E.S.C.O. representative and was adopted by a vote 5 to 0 with one abstention. The Article represented a compromise between those supporting the role of the family in education, and those that emphasised that state's role in this matter. Both could agree on the factors there were important to emphasise in education for the benefit of the recipient, though they could not agree on the matter of who should determine the system of education.

The only other alteration of the drafting the Working Group was to change the word 'primary' for the word 'fundamental'. This change, suggested by the U.S.A., indicates the feeling in the Working Group that there was a core of education that all should receive. The Dutch comments on the draft article on the right to education emphasised this point stating that the first sentence of the article should read everyone has the right to fundamental education. They considered that only fundamental education could be demanded as of right.⁽³³⁾

It was proposed and accepted (by 4 votes to 1 with 1 abstention) that the Commentary on the right to education Article

32. U.N. Doc. E/CN.4/AC.2/SR.8, December 10, 1947, pp.3 et seq.

33. U.N. Doc. E/CN.4/85, May 1, 1946, p.43.

should include the following sentence:

The right to private education shall be respected and in such countries as desire it religious education shall be permitted in the schools.

When the Report of the Working Group was presented to the Commission on Human Rights⁽³⁴⁾ Lord Dukeston (U.K.) suggested an amendment that would dilute the absolute requirement to provide compulsory and free fundamental education by linking the duty to provide such education with the availability of resources.⁽³⁵⁾ The Commission rejected this amendment 11 to 5.⁽³⁶⁾ There was some discussion on the new Article 31a, with the result that the word 'intellectual development' was added to the list of aims of education.

At the second session the discussion as to whether the Declaration or Convention should have priority raged. The U.S.A. and U.S.S.R. were strongly for a Declaration whereas the U.K. and Australia considered the Convention more important.⁽³⁷⁾ Mr. Dehousse managed to get agreement to his proposal that three Working groups should operate one on the Declaration, one on the Convention and one

34. U.N. Doc. E/CN.4/SR.40, December 16, 1947.

35. U.N. Doc. E/CN.4/85, December 10, 1947 for the text of the amendment. Echoing the U.K. legislation. Education Act 1944, 1981.

36. U.N. Doc. E/CN.4/SR.40, *op.cit.*

37. Verdoodt, *op.cit.* P.62 U.N. Doc. E/CN.4/21 Annex F.

on methods of implementation.

Third Session

At the third session the Commission on Human Rights had no time to deal with the Drafting Committee's proposals on the Convention on Human Rights, but examined the Drafting Committee's proposals on the Declaration Article by Article.³⁸ Mr. Quijana (Panama) felt that the draft on the right to education was too long-winded and proposed a new draft to substitute.³⁹ His proposal did not match the brevity of that suggested by the U.K. and India⁴⁰ which simply stated:

Everyone has the right to education.

38. Report of the 3rd Session of the Commission on Human Rights, Lake Success, May 24 - June 18, 1948, U.N. Doc. E/800, 28 June, 1948. See below p.167 for discussion of the International Covenants.

39. U.N. Doc. E/CN.4/SR.67, June 25, 1948.

Everyone has the right to education and to free primary schooling. Education shall be inspired by the principles of human freedom, morality and solidarity. It shall be accorded to everyone without distinction as to sex, race, language, religion or political opinion and shall promote the spiritual, intellectual and physical development of the people.

40. U.N. Doc. E/CN.4/49, May 24, 1948.

However it was felt that the spirit and aims of education should be explicitly stated. The Nazi tyranny in education matters was cited as an example of what damage education with the wrong aims could perpetrate.⁴¹ The proposal was withdrawn, and the U.K and India supported the US draft. This stated:

Everyone is entitled to the right to free fundamental education (instruction) and to equal access on the basis of merit to higher education.⁴²

In the debate on this matter Mr. Malik (Lebanon) mentioned the role of parents in relation to the spiritual education of their children. He preferred the Panamanian draft⁴³ to that of the U.S.A. because it dealt with the question of spiritual education. This is the first time that explicit mention was made to the role of parents in relation to the education of their children.

Mr. Cassin (France) suggested the redrafting of the American text feeling it unnecessary to explicitly mention access to higher education. His draft read:

Everyone has the right to education. Fundamental education shall be free and compulsory.

He also indicated that his delegation could not agree to the deletion

41. U.N. Doc. E/CN.4/SR.67.
42. U.N. Doc. E/CN.4/95, *op.cit.* p.12.
43. See n.39.

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of Article 28. This Article represented a compromise, '44' and the version proposed by the French delegation followed the Geneva text very closely making only minor changes 'in the interest of greater clarity.'

Miss Schaefer of the International Union of Catholic Women's Leagues also strongly supported Article 27 and 28 and emphasised that the correct spirit and aims of education should be made clear. She regretted that the role of parents was not mentioned as they could provide a safety-net against state abuse. '45'

Mr. Chang (China) proposed an abbreviated version of both Article 27 and 28. Mr. Klekovkin (Ukrainian Soviet Socialist Republic) also spoke in favour of retaining both Articles.

A drafting sub-Committee was set up to submit suggestions for redrafting the two Articles on education. '46' The Drafting sub-Committee agreed '47' that the first sentence should read:

Everyone has the right to education.

As they had not been able to agree on the second sentence they presented two alternatives. The first stated:

This right includes free, compulsory elementary education.

44. See above p.148.

45. U.N. Doc. E/CN.4/SR.67, *op.cit.*, p.16.

46. Comprised of the representatives of China, France, Lebanon, Panama, the United Kingdom, the Union of Soviet Socialist Republics and the United States of America.

47. U.N. Doc. E/CN.4/SR.68, June 14, 1946.

The second stated:

This right includes free fundamental education.

They agreed that the third part of the paragraph should read:

...and equal access on the basis of merit to higher education.

The first sentence was adopted unanimously. Consideration of the two versions of the second sentence was relatively lengthy. The Chairman pointed out that several members of the Drafting sub-Committee considered that 'fundamental' included 'the broader concept of education for adults as well as for children and adolescents.'

Mr. Pavlov (USSR) supported the first version. Both Mr. Chang (China) and Mr. Lebar (U.N.E.S.C.O.) favoured the use of the word 'fundamental' rather than elementary, since it also covered adult education, which 'elementary' did not. In the end both words were included.

Mrs. Mehta (India) objected to the use of the word 'compulsory' in relation to a document proclaiming rights, and was supported in this by Mr. Wilson (U.K.).⁽⁴⁸⁾ René Cassin pointed out that the word compulsory in this context did not imply coercion, but rather emphasised the important nature of the right. Neither parents nor the state could 'prevent the child from receiving education.' Mr. Azkoul (Lebanon) proposed a compromise to avoid the use of the

48. The point was also supported by Mr. Chang (China).

word compulsory. '47'

On a vote the word 'compulsory' was retained so Mr. Malik (Lebanon), supported by some NGO's and Mr. Lebeau (Belgium) proposed several alternative amendments, '48' to ensure that parental rights vis-à-vis their children's education and choice of non-State schools were safeguarded. The Chairman and the Ukrainian representative both argued that the use of the word 'compulsory' did not of itself limit choice of schools for parents and the amendments were defeated.

At the end of the third Session the article on education (Article 23) read as follows:

1. Everyone has the right to education (*droit à l'éducation*). Elementary and fundamental education (*L'enseignement élémentaire et fondamentale*) shall be free and compulsory and there shall be equal access on the basis of merit to higher education.
2. Education (*L'éducation*) shall be directed to the full development of the human personality, to strengthening respect for human rights and fundamental freedoms and to combating the spirit of intolerance and hatred against other nations and against racial and religious groups everywhere.

The U.S.S.R. abstained in the vote on the draft Declaration

49. U.N. Doc. E/CN.4/SR.68 p.5. Parents have the right to control their children's education, but cannot prevent them from receiving education.

50. U.N. Doc. E/CN.4/SR.68, p.9.

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on several grounds. They felt that fascism and racism was not sufficiently condemned. There was insufficient mention of duties, and social and economic rights were under-represented, for example the right to education in the maternal language was not incorporated.⁽⁵¹⁾

The Economic and Social Council

The Economic and Social Council considered the Report of the Commission on Human Rights at its seventh session. All praised the work of the Commission though some had reservations about including an article on the right to education.⁽⁵²⁾ The Report was submitted to the General Assembly without a wide ranging discussion on the contents of the Declaration.⁽⁵³⁾

The General Assembly and its Third Committee

The General Assembly passed the draft Declaration to its Third Committee for consideration. Numerous amendments were put down. The right to education was discussed on 19 and 20 November.⁽⁵⁴⁾ There were five main issues.

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51. U.N. Doc. E/800. Reproduced in Verdoodt, *op.cit.* pp.68 et seq.
 52. U.N. Doc. E/SR.215 (August 25, 1948).
 53. See Verdoodt, *op.cit.*, p.71 et seq.
 54. U.N. Doc. A/C.3/SR.146-149 (November 19/20, 1948). The delegates of the USSR were not always to the point, oft waxing strong about their great achievements given their

1. Equal Opportunity

The first issue was expressed as concern that education should be gratuitous to allow equal opportunity for all according to talent. 'pp' This ideal was not achieved in the text except in relation to elementary and fundamental education. It was a clearly recognised aim in the debates though, and it was implicitly necessary at all levels of education, for how else could higher education be open to all solely on the basis of merit? Article 22 of the final Declaration makes it clear that the realisation of economic social and cultural rights indispensable to dignity and the free development of personality were to be gained through national effort and international co-operation and in accordance with the organisation and resources of each state.

2. Compulsion

Secondly the issue of compulsion was again questioned. Some

onerous tsarist legacy. See the contribution of René Cassin for a brief overview of the many amendments and contributions. U.N. Doc. A/C.3/SR.147.

55. See e.g. the contribution of Mr. Kural (Turkey). U.N. Doc. A/C.3/SR.146. Argentine amendment U.N. Doc. A/C.3/257 Cuban Amendment U.N. Doc. A/C.3/261. New Zealand amendment U.N. Doc. A/C.3/267. Turkish amendments U.N. Docs. A/C.3/273 and 273/Rev. 1.

felt that it seemed inappropriate in a Declaration of Rights.⁵⁶ Mr. Pavlov (U.S.S.R.) made the telling point, earlier espoused by René Cassin, in favour of its retention that the child's right to education was absolute and independent of the wishes of its parents and as it could not itself claim the right and defend it therefore it was necessary for education to be compulsory.⁵⁷

3. Vocational and Technical Education

Thirdly, as Argentine and British representatives point out, there was no mention of vocational and technical education.⁵⁸ This point was catered for by René Cassin's amendment which was accepted at the 148th meeting.⁵⁹ The first paragraph of the article now read as follows:

1. Everyone has the right to education, which shall be free at least in so far as elementary and fundamental education are

56. Mr. Corominas (Argentina) U.N. Doc. A/C.3/SR 146. Mr. Watts (Australia) *id.* pointed out that it might be difficult for adults to comply with such a requirement. Mr. Azkoul (Lebanon) *id.* and A/C.3/260. The text was an improvement on the text as it stood at the end of the second session of the Commission on Human Rights (above p.147 *et seq.*) which caused "fundamental" education to be compulsory.

57. U.N. Doc. A/C.3/SR.147.

58. U.N. Doc. A/C.3/SR.146.

59. U.N. Doc. A/C.3/355 (November 19, 1948). U.N. Doc. A/C.3/SR.148 (November 19, 1948).

concerned. Elementary education shall be compulsory.

Technical and professional education shall be made generally available. There shall be equal access to higher education on the basis of merit.

4. Aims of Education

A fourth issue was what should be the aim of education.⁽⁶⁰⁾ This was mainly a question of drafting differences and slightly different emphases i.e. the appropriateness or otherwise of the U.S.S.R. inspired non-discrimination clause that had been inserted in paragraph 2. Some felt it was irrelevant as Article 2 of the Declaration already covered the point, and yet others thought it important enough to be repeated.⁽⁶¹⁾ At the 148th meeting a joint Mexican-American text with a Lebanese amendment was adopted (35 votes 1 abstention). The text of paragraph two thus read:

2. Education (L'éducation) shall be directed to the full development of the human personality, to strengthening respect for human rights and fundamental freedoms and to the promotion of understanding, tolerance and friendship among all nations and racial and religious groups, as well as the activities of the United Nations for the maintenance of the peace.

60. The amendments of Argentina, Cuba (para 2), Mexico, the U.K., France, and U.S.A. / Mexico.

61. Argentina, the Netherlands, Mexico, and Poland.

5. Parental Role

The fifth issue was that the parental role should be respected as a safeguard of the child's right.⁽⁶²⁾ This was opposed by, *inter alia*, Mrs. Roosevelt (U.S.A.) on the grounds that it might be interpreted to allow parents control of school curricula 'which clearly might have undesirable consequences.'⁽⁶³⁾ Moreover the right would be difficult to frame given the interests of the state and child as well. Mr. Contoumas (Greece) further pointed out that an executive parental right to choose the kind of education given to their children was not in accord with 'the evolution of modern society.' René Cassin (France) thought that the question of parental rights was a very delicate one that was best left out. He felt it significant that neither France nor the U.K. or the U.S.A. had felt it necessary to include expressly such a right though all three countries allowed parental choice.

It would be preferable not to raise it in the declaration, thus

62. See e.g. the Lebanese amendment U.N. Doc. A/C.3/260 and contribution U.N. Doc. A/C.3/SR. 147. The Netherlands amendment U.N. A/C.3/263 and contribution U.N. Doc. A/C.3/SR.147. Mrs. Ikramullah's (Pakistan) contribution. U.N. Doc. A/C.3/SR.146. Also contribution of Mr. de Athayde (Brazil) U.N. Doc. A/C.3/SR.147.

63. U.N. Doc. A/C.3/SR.147. Netherlands response U.N. Doc. A/C.3/SR.147.

leaving every country free to maintain its traditions.⁶⁴

Nevertheless the Lebanese amendment⁶⁵ adding a third paragraph to the article on education was adopted by seventeen votes to thirteen despite some ambiguities in the wording.⁶⁶ The third paragraph reads as follows:

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

6. Minority rights

A similar but wider point was raised by the Danish proposal to add a paragraph protecting the right of minorities to establish schools which was not accepted.⁶⁷

Sub-Committee of the Third Committee

By the end of November after a great deal of discussion it was decided to send the Declaration to a sub-committee which would sort out the problem of accurate translations and ensure language correspondence between the different versions.⁶⁸

The sub-committee dealt with the U.K.'s point concerning the

64. U.N. Doc. A/C.3/SR.147.

65. U.N. Doc. A/C.3/260.

66. See U.K. action in sub-committee. Cf. USSR concern about the wide scope of the term children. To be limited to young children. See below in text.

67. U.N. Doc. A/C.3/250 (October 9, 1948).

68. U.N. Doc. A/C.3/SR.166 (November 30, 1948).

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wording of the third paragraph⁶⁹) and made a few other minor changes. The text of the article on the right to education now read as follows:⁷⁰)

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available. There shall be equal access to higher education on the basis of merit.
2. Education shall be directed to the full development of the human personality, to strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance, and friendship among all nations, racial and religious groups, and shall further the activities of the United Nations for the maintenance of the peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

At the 178th meeting of the Third Committee on the sixth December 1948 a minor Chinese amendment⁷¹) to the wording of the first paragraph was accepted and the Russian concern over the use of the word children in the third paragraph was again ventilated but nothing was altered in the text. In the Report of the Third

69. U.N. Doc. A/C.3/SC 4/1 (December 1, 1948).

70. U.N. Doc. A/C.3/410.

71. U.N. Doc. A/C.3/397.

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Committee to the General Assembly⁽⁷²⁾ the article on education became Article 26 of the draft Declaration (Article 2 and 3 of the draft Declaration having been merged). It was accepted by the General Assembly and now forms part of the Universal Declaration on Human Rights.

Conclusions

As I have mentioned above⁽⁷³⁾ the Declaration has no direct legal force, though it is an authoritative statement adhered to by most States. It is certainly a useful guide to the interpretation of the human rights articles of the Charter⁽⁷⁴⁾ of the UN, and also as regards the Covenants that followed it. As Henkin⁽⁷⁵⁾ has observed

The Universal Declaration was not generally conceived as law but as "a common standard of achievement" for all to aspire to; hence its approval without dissent...

It has been argued "that the Charter, the Declaration, repeated resolutions of international organisations and the practice of states have together created a customary international law of human rights

72. U.N. Doc. A/177 (December 7, 1948).

73. See chapter two p.52 above.

74. These themselves being of legal force. See Schwelb, E., 'The International Court of Justice and the Human Rights clauses of the Charter', (1972) 70 *A.J.I.L.* 337.

75. Henkin, L., 'Introduction', in Henkin (ed.), *The International Bill of Rights*, (Col. U.P., 1981), p.9.

outlawing at least persistent and gross violations of fundamental, universally recognised human rights".⁷⁶ This argument has become stronger since the judgment of the International Court of Justice in the *Nicaragua v USA* case,⁷⁷ and the strong reliance placed on resolutions as evidence of the formation of customary law.

Against this background it is now appropriate to assess the significance of the Declaration for the right to education. What can be gleaned from the *travaux préparatoires*? Of all the factors that can be deduced there are two essential elements leaving aside the general and political issues raised by the Declaration.

The first involves trying to categorise the 'right'. 'Everyone' has the right to education. It is clear that there is a 'core' of education that all should receive as a bare minimum. This is called 'elementary' education, but also includes the idea of 'fundamental' education which means elementary education for adults. The importance of this core of education is stressed by the second sentence of Article 26 which asserts that such education shall be free. In the case of the child this education is compulsory. This does not imply a lack of 'right' on the part of the child, but is rather an affirmation of it.⁷⁸ Neither the state nor parent can deny the child this core right. Beyond this elementary stage the

76. *Id.*

77. *Case concerning Military and Paramilitary activities in and against Nicaragua, Nicaragua v U.S.A.*, (1986) ICJ Rep. 14.

78. See above Chapter One p.37 et seq.

right to education becomes more of a traditional 'option' right. Thus 'technical and professional education shall be made generally available'. The right is then limited thus 'higher education' is declared to be 'equally accessible to all the basis of merit.' These limitations on the right to education are real. Thus those without merit have no right to higher education. Furthermore should the resources be insufficient the right to technical and professional education is also non-existent. This limitation must be read together with Article 22 of the Declaration which states *inter alia*

Everyone as a member of society, ... is entitled to the realisation, through national effort and international cooperation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The second issue revolves around the question of what comprises education. What should be the aims of education? This was raised during the second session of the Commission of Human Rights. The first point is that beyond elementary or fundamental education it is up to the individual to decide whether or not to continue with education. They can thus 'choose' the content. Secondly as paragraph 2 of Article 26 makes clear that the full development of the human personality is the primary concern. Thirdly the promotion of human rights and fundamental freedoms, understanding, toleration and friendship among all nations, racial or religious groups and the

furtherance of the activities of the UN for the maintenance of peace are given as aims. These aims are confirmed by looking at Articles 1, 2, 29, and 30 of the Declaration. Article 1 emphasises that 'all human beings are born free and equal in dignity ... and should act to one another in a spirit of brotherhood.' Article 2 provides a general non-discrimination clause. Articles 29 and 30 set out permissible limitations on the rights set out in the Declaration. Article 29 in paragraph one declares that everyone has duties to the community. Paragraphs two and three state

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30 states

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Here we see then that education must promote the purposes of the UN and the other rights enshrined in the Declaration. Noticeable rights in this context include the right to freedom of thought, conscience,

religion (Art. 18), opinion and expression (Art. 19). These are rights that all, including young children, may claim and they must be respected in the education of children.

Against this widely drawn background the respective roles of individuals and the state in the provision of educational institutions was nearly left unanswered. At the last minute paragraph three was added to Article 26 allowing parents "a prior right to choose the kind of education that shall be given to their children." (??) Minority aspirations in the control of education were left out, though as concerned parents they can exercise their rights. The rationale for allowing parental control over the content of their children's education seems to have several foundations not all of which were expounded during the drafting process. It is clear that the immaturity and vulnerability of the young child means that someone must take educational decisions on his behalf. There are sound arguments for allowing parents (or guardians) to undertake this role. Firstly there is the natural close parent/child relationship which itself is recognised in Articles 12 and 16 of the Declaration. Secondly the idea of individual human rights in particular those mentioned in Articles 18 and 19 seem to be posit the idea of a pluralistic society. Within the bounds of respecting human rights and supporting the aims of the United Nations pluralism is to reign. The Declaration unlike the International Covenants does not specify

79. This is clearly not a carte blanche for parents as they too are covered by Articles 29 and 30.

how the parental choice is to be implemented. The reason for this is simply that the East and West could not agree. It is significant though that in the debates on the use of the word "compulsory" some Westerners expressed concern that this would imply a state monopoly in education. Significantly they were assured that this was not so by, *inter alia*, the United States and Ukrainian representatives. (80)

B. The Covenants:

1. Introduction

As we have noted already above (81) the Universal Declaration of Human Rights is not *stricto sensu* obligatory international law except to the extent that has been adopted into customary law, and can be used as an authoritative interpretation of the U.N. Charter. The drafters of the Declaration when it was adopted in 1948, acknowledged that it had no legal force. Post-war enthusiasm for protecting the individual against states meant that the western states in particular were keen on adopting an International Bill of Rights that would be legally binding. The Declaration paved the way and gave an indication of what rights were to be protected. The actual treaty establishing an International Law of Human Rights was to provide the legal basis for international obligation and implementation of these rights.

80. See above p.154.

81. See p.52 above.

As is well known, the International Bill of Rights is composed, in fact, of three documents, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social and Cultural Rights. Initially it was thought to have two documents, the Declaration and a Treaty. However, in the drafting process, ideological differences amongst the nations, and different approaches to implementation of human rights norms, caused the split into two Covenants.

It is proposed to look at the drafting process with an eye to how the right to education fared. The sheer length of the process and mass of proposals makes this a very cumbersome task.⁽⁸²⁾ No summary of the *travaux préparatoires* has been produced. The drafting process was very lengthy. It took from 1946 until the adoption of the Covenants in 1966. Of course not all of it dealt with the right to

82. See Chapter 2 above. Bossuyt, M., *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights*, (Nijhoff, 1987) This was published too late to aid the present writer and does not cover the International Covenant on Economic Social and Cultural Rights. It is a very useful publication, which indicates article by article which are the relevant documents. It is very similar in concept to, though more up to date than, U.N.Doc. A/2929 (1 July 1955) created by the Secretary-General, U.N., GAOR, 10th sess., 1955.

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education, but many of the arguments as to ~~the~~ whether there should be any international legal recognition of socio-economic and cultural rights let alone their implementation are relevant to this right.

The drafting of the Covenants proceeded in two essential phases. In Phase One, from 1947-1954, a great deal of detailed drafting was accomplished by the Commission on Human Rights with the Economic and Social Council (hereafter ECOSOC) and the General Assembly (hereafter GA) deciding major issues of principle⁸³ but basically taking no hand in detailed discussions of actual provisions. The bulk of discussions on the right to education in the first phase took place at the 7th session of the Commission on Human Rights in 1951. From 1954-1966 the General Assembly and its 3rd Committee took over the drafting.⁸⁴ The bulk of discussions on the

83. I.e. the question of the number and scope of the Covenants.

84. Pechota, V., 'The development of the Covenant on Civil and Political Rights', in Henkin, L., *The International Bill of Rights*, (Col. U.P., NY, 1981) p.32. He deals with the general questions concerning the right to self-determination, Federal-state application clause, territorial clause, reservations, and the question of implementation. Except for the latter (to some extent) this work does not deal with these issues. See also Sohn, L., B., 'A Short History of U.N. Documents on Human Rights', in *Commission to study the Organisation of the Peace*, 1st Report (Oceana, N.Y., 1968)

right to education in this later phase took place at the 12th session of the Third Committee in 1957. These two sessions will be concentrated on.

It is proposed to deal with several issues jointly as far as this is possible. The first issue concerns whether international law should have anything to do with putting economic, social and cultural rights in a treaty. The question involves both whether state action in these fields was at all desirable (an internal political question) and the question of the status of individuals in international law and methods of implementation of such rights. The second issue, as dealt with below, revolves around the question of the scope and effect of a particular economic, social and cultural right, the right to education. The first issue has received some coverage in the literature since the adoption of the Covenants, though there is not much material that deals with the drafting of the Covenants.⁸⁵ The second issue has not been tackled by anyone. It is proposed to examine all the issues, concentrating however on the second. How did this right evolve, what was the intent of the authors? The intention is to examine mainly this right, but also to look at the first issues through the lens of the emerging right to education.

p.38 esp. p.120 et seq. on the implementation issue.

85. See n.82 above.

2. PHASE ONE: Consideration of the Covenants by the Commission on Human Rights

1) The first and second sessions

a. Inclusion of socio-economic and cultural rights

The Economic and Social Council at its fourth session established timetables for the formulation of the International Bill of Rights.⁸⁶ The Commission on Human Rights at its second session in Geneva in December, 1947, had considered the preliminary draft of an International Bill of Human Rights prepared by its Drafting Commission at its first session.⁸⁷ The Commission was divided between those thinking that there should be a Declaration or manifesto and those wanting the Declaration to be supplemented by a Convention. At this second session, the draft Convention received very limited consideration. The Commission decided to draw up a draft Declaration and a draft Convention of specific rights that would lend themselves to binding legal obligations. It also would consider the question of implementation. So the original aim of the Commission on Human Rights was a Declaration, an International Covenant and a treaty on implementation. The Commission therefore established three Working Groups.⁸⁸ Thus, it presented to the sixth session of Economic and Social Council a draft Declaration and a draft Covenant. The Declaration was fairly well considered but the

86. International Bill of Rights, Resolution 461(IV).

87. U.N. Doc. E/CN.4/21 (June, 1947).

88. See above p.149.

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draft Covenant was not. The Covenant, designed to be legally binding, was considered to be a first stage only and it would probably be followed by further Conventions giving legal effect to other rights enumerated in the Declaration including the economic and social rights.

b. The right to education

At the second session of the Commission on Human Rights, the drafting committee report to the Commission had included a draft International Covenant which left out the right to education.⁸⁹ The drafting Committee on an International Bill of Rights at its 2nd session in May 1948 considered Articles suggested by Australia. These Articles were designed to give affect to the principles contained in the draft Declaration. On education they read as follows:

Each state shall take steps to ensure that free and compulsory elementary education (*instruction élémentaire*) is available to all persons, and that there shall be equal access to higher education as can be provided by the state or community on the basis of merit.⁹⁰

The Drafting Committee in its Report had set out various alternative articles. There were 3 versions of Article 27, and 2 of Article

89. U.N. Doc. E/CN.4/95 (21 May 1948).

90. U.N. Doc. E/CN.4/AC.1/21, (6 May 1948).

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28. '71' This Committee had considered the Comments of 13 governments that had been received and took into account suggestions from a U.N. conference on Freedom of Information. It redrafted the entire Covenant but had no time to redraft the Declaration, and it did not consider the question of implementation.

These Articles were characterised as progressive by the Chairman (U.S.A.) and were not discussed for lack of time and inclination (the vote being 2 to 3 with 3 abstentions). The split between East and West over the inclusion of socio-economic rights became apparent here, the Western states by and large (France agreeing with Australia's proposals in principle) rejecting their inclusion on the grounds that in a free society the Government did not have the control necessary to implement them. '72'

c. Measures of implementation

The measures of implementation formulated by the Working Group (set up at the second session of the Commission on Human Rights) included five suggestions:

1. that each state should incorporate into its own national law the principles of the Covenant on human rights.

91. The Geneva version, see above note 30 and attendant text; and the versions proposed by America and France. See note 42 and attendant text for the American proposal. The French proposal did not significantly differ from the Geneva version.

92. U.N. Doc. E/CN.4/AC.1/SR.29, (20 May 1948).

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2. that there should be a standing committee to mediate, conciliate and rectify any violations of human rights.

3. that disputes not settled thus should be forwarded to the Commission which would decide whether the case should be sent to an international tribunal.

4. that there be established an international tribunal empowered to give binding decisions on cases thus brought before it and thus setting up precedents.

5. that the General Assembly, because of the powers conferred on it by the Charter with regard to questions of economic and social co-operation, should implement the decisions of the international tribunal, should the necessity arise.

This Working Group's suggestions were not thoroughly considered by the Commission.⁹³

At the ECOSOC Council, sixth session, consideration of the draft Declaration and Covenant was deferred until the next session as the Commission would then have the opportunity to review the draft in the light of the governmental observations. The Australian and Chilean representatives considered that the measures of implementation should be considered to give guidance to the Commission.

93. U.N. Doc. E/600. (17 December 1947).

2) The third to sixth sessions

At the third session of the Commission on Human Rights at Lake Success '44' there had been no time to reconsider the drafting Committee's redraft of the Covenant in order to give the Commission time to discuss implementation. However it did fully consider the Declaration. '45' The Economic and Social Council at its seventh session was short of time but it allowed each member to make a general statement on the draft Declaration. The draft Declaration was subjected to some criticism as being incomplete. '46'

After the adoption of the draft Declaration by the General Assembly in December 1948. The Assembly by Resolution 217(III)E had requested the Economic and Social Council to ask the Commission to continue to give priority to preparation of a draft Covenant on Human Rights and draft measures of implementation. During its eighth

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94. Report of the third session of the Commission on Human Rights U.N. Doc. E/800 (28 June 1948). (Commission on Human Rights Third Session, May - June 1948).
95. Above p.150.
96. Poland in particular considered that it needed a right to education. The Declaration was also criticised for including the right to education in Article 23. This would be in the "province" of UNESCO. 215-218th meetings of the Council, August 1948.

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session, the Economic and Social Council⁽⁹⁷⁾ transmitted the above resolution to the Commission on Human Rights for action.⁽⁹⁸⁾

a. Inclusion of the right to education

At its fifth session the Commission⁽⁹⁷⁾ prepared a draft Covenant using the drafting Committee's text of May 1948. The Commission did not have time to consider articles on the question of minorities nor deal with economic and social rights. The western countries criticised the Soviet draft

Access to education shall be open to all without distinction of race, sex, language, economic situation or social origin and this right shall be ensured by the state by the provision of free elementary education, a system of scholarships and the requisite system of schools.⁽¹⁰⁰⁾

on the grounds that they wanted well-defined legal rights.⁽¹⁰¹⁾ The

97. Res. 191(VIII) (9 February 1949).

98. See GA Resolution 217.

99. Report to the Economic and Social Council: Fifth Session of the Commission on Human Rights, U.N. Doc. E/CN.4/350 (23 June 1949). Commission on Human Rights (Fifth Session, May - June 1949).

100. *Id.* p. 29.

101. *Id.* p. 31.

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Australian proposal for education, presented by Mr. Shann⁽¹⁰²⁾ read as follows:

Everyone has the right to education (*à l'éducation*). Free education shall be available for all at least in the elementary and fundamental stages. Elementary education (*l'enseignement*) shall be compulsory. Technical and professional education shall be equally accessible to all on the basis of merit.⁽¹⁰³⁾

Mr. Shann (Australia) emphasised the importance of the freedom of education and choice of schools.⁽¹⁰⁴⁾ The new Australian draft is clearly couched in terms of individual rights as opposed to state obligations, it also leaves out mention of higher education, in distinction from its earlier draft proposals.⁽¹⁰⁵⁾ Further consideration of these proposals is undertaken in the following section.

b. Inclusion of Economic Social and Cultural Rights

During the debate of the Australian proposal on the right to education the United Kingdom representative (Miss Bowie) stressed the U.K. position that they should not include any socio-economic rights

102. Commission on Human Rights 5th Session, U.N. Doc.

E/CN.4/SR.131 (27 June 1949) p.4.

103. U.N. Doc. E/CN.4/285.

104. U.N. Doc. E/CN.4/SR.131 (27 June 1949).

105. See above p.172.

in the Covenant but that these should be included in another Convention later.⁽¹⁰⁶⁾ Mr. René Cassin (France) supported the U.K. position, stressing the socio-economic rights caused great financial burdens and it would be better not to include them until nations were in a position to apply them in practice. He pointed out that the specialised agencies of the United Nations were in a better position to undertake studies and inquiries into these matters. The Commission on Human Rights shouldn't try and preempt their position.⁽¹⁰⁷⁾ The Danish representative, Mr. Soerensen⁽¹⁰⁸⁾ concurred with the above Western views and put forward a proposal to request the Secretary-General to make a survey of the work of the U.N. Specialised Agencies with regard to matters within the scope of Articles 22 to 27 of the Universal Declaration of Human Rights.⁽¹⁰⁹⁾ His proposal was altered to imply that such rights could be and should be included in the Convention on Human Rights by the adoption of the Yugoslavian amendment.⁽¹¹⁰⁾ The voting on the Soviet

106. *Id.*

107. *Id.*

108. *Id.*

109. Commission on Human Rights, 5th Session; U.N. Doc. E/CN.4/333 (5 June 1949); E/CN.4/SR.132 (27 June 1949).

110. U.N. Doc. E/CN.4/335 adopted see E/CN.4/132 p.3. U.N. E/CN.4/SR.132 (27 June 1949).

proposals was postponed.^{'111'} On the 29th of June, the Soviet representative, Mr. Pavilof, objected to that the Commission was systematically postponing all consideration of socio-economic rights.

The innumerable suggestions for implementation discussed in the Commission showed that the primary aim of some members and their governments was not to draft a satisfactory covenant and effectively guarantee human rights and freedoms but to provide grounds to interfere in the domestic affairs of other states and to spread international friction and conflict.^{'112'}

It can readily be seen that there was severe ideological differences between the drafters of the International Covenants. On the one hand, the Western nations adopted a pragmatic approach which (was ultimately accepted by the separation into two Covenants) that socio-economic rights, costing a lot of money, should not be included in a legally binding document which was to be implemented through

111. This was voted seven to three with four abstentions.

Commission on Human Rights, 5th Session; U.N. Doc.

E/CN.4/SR.133 (28 June 1949) p.22 at et seq.

112. Commission on Human Rights, 5th Session; U.N. Doc.

E/CN.4/SR.135 (29 June 1950) pp.17, 20. France (M. Cassin)

regretted the absence of socio-economic rights, *Id.*, p.21.

legalistic structures.¹¹³ They preferred to see the Specialised Agencies of the United Nations dealing with questions such as the right to work, the right to food, and the right to education. They further argued that working out detailed implementation of economic social and cultural rights would delay the drafting and adoption of the Covenant. They did not rely on their earlier philosophical objections to government involvement in the provision of services to implement such rights.

At the sixth session the Commission had before it various government comments.¹¹⁴ It took as the basis for its work the

113. The common opinion of lawyers in the United States for example was that only a state-planned economy could implement social, economic and cultural rights. The American Bar Association proposed a constitutional amendment to prevent the U.S. ratifying an "unconstitutional" treaty. The Bricker amendment was receiving significant support in the Senate. Eagleton, C., and Swift R, N., *Annual review of United Nations Affairs, 1952*, (N.Y.U.P., New York, 1953), p.4. Also Whitton & Fowler, 'The Bricker amendment: danger and fallacies' (1954) 48 *A.J.I.L.* 23, and Finch, 'The need to restrain the treaty-making power of the U.S. within constitutional limits', (1954) 48 *A.J.I.L.* 57.

114. U.N. Doc. E/CN.4/353 and *addenda*.

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draft Covenant adopted at its fifth session.⁽¹¹⁵⁾ In this session it discussed the question of including in the draft Covenant additional articles on economic, social and cultural rights.⁽¹¹⁶⁾ Some thought that these would be prerequisite for enjoyment of other rights, the majority felt that more detailed discussion was necessary and that they should consult with the specialised agencies, particularly the ILO and UNESCO. It was decided that the draft Covenant relating to individual rights and civil freedoms should be the first of a series of Covenants that eventually would cover the whole range of rights in the Universal Declaration of Human Rights. It decided to proceed at its next session with consideration of additional Covenants and measures dealing with economic, social, cultural, political and other categories of rights.

The United States of America comments suggested that the Soviet and Australian articles on education should form part of a later Convention or a Protocol to the current Convention. Mrs. Roosevelt stressed that given the differing social and economic development of states the feasibility of including such rights should be looked into. To await such feasibility studies now, though, would

115. U.N.Doc. E/1371.

116. U.N. Doc. E/1681, annex 3.

delay the adoption of the Convention.¹¹⁷

The United Kingdom's comments on the drafts are quite revealing. They opposed the inclusion of all social and economic rights,¹¹⁸ matters which should be left to specialised agencies as they needed elaborate provisions. They felt that a brief provision in the draft covenants would be meaningless and completely ineffective. The British comments were also opposed to any right of individual petition on the grounds that there would be difficulty over admissibility of claims as well as constitutional difficulties and an overburden on the international system. They stressed it would be a new departure in international law to have a Covenant expressing rights for individuals. That was innovative enough

117. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/353/Add.1 (4 January 1950). Supported by France as regards timing, U.N.Doc. E/CN.4/353/Add.8 (10 March 1950). India also felt that leaving out socio-economic rights would be acceptable as long as they were to be dealt with in a later convention, U.N. Doc. E/CN.4/353/Add.9 (16 March 1950). This U.S. argument echoes those made earlier by the UK and France, above p.178.
118. U.N. Doc. E/CN.4/353/add.2 (7 January 1950). Supported by the Netherlands E/CN.4/353/add.6 (23 February 1950), Denmark E/CN.4/353/add.7 (27 February 1950), and Norway E/CN.4/353/11 (22 April 1950).

without any implementation machinery.⁽¹¹⁷⁾

The representative of the Philippines was in favour of including social and economic rights⁽¹²⁰⁾ and put forward his own proposed draft for including the right to education.⁽¹²¹⁾ Australia supported its proposal on the grounds that the right to education was essential to allow the majority of the population to enjoy any civil rights, but suggested that the article that they had suggested could go to an optional Part B of the Covenant and thus avoid losing adherents to the convention.⁽¹²²⁾ The non-governmental organisation, the International League for the Rights of Man, strongly supported the inclusion of economic, social and cultural rights if only to

119. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/353/add.2 (7 January 1950), 8 *et seq.*

120. The Federal Peoples Republic of Yugoslavia also felt that social and economic rights should be included.

121. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/353/add.3 (16 January 1950) p.9:

Every child is entitled to parental care, to receive at least free elementary education, and to live in a atmosphere conducive to his physical, moral, and intellectual development.

This draft was taken from the Philippines new civil code, Article 356.

122. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/353/add.10 (22 March 1950).

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avoid the Soviet's propaganda advantage of Western refusal to support such rights.⁽¹²³⁾ It was agreed on the basis of Yugoslavian proposal to consider the socio-economic articles in a Part 2 of the convention. This was agreed by five votes to three with five abstentions.⁽¹²⁴⁾

Mr. Whitlam (Australia) in supporting the proposed Australian articles on the right to education and the right to work⁽¹²⁵⁾ suggested that these were a bare minimum for basic rights. It should be possible to get agreement on the bare minimum articles which were appropriate given the diverse world situation. A future convention could fill out these articles. The United Kingdom position, slightly modified since the comments submitted earlier, was that these rights were not opposed by the U.K. but that they should appear in a separate convention because their elaboration would take too long.

Mr. Jevnemoric (Yugoslavia) stressed that social and economic rights were vital and were an "elementary scientific truth ever since the time of Marx and Engels". The Danish position was that such rights were important for everybody but merely stating them would not

123. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/480 (10 May 1950).

124. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/SR.181 (16 May 1950).

125. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/SR.184 (19 May 1950). U.N. Doc. E/CN.4/353/add.10 and E/CN.4/470.

make them materialise, simple principles weren't enough. Mr. Soerenson stressed that they would need detailed regulations to implement and this the suitable role for the Specialised Agencies.⁽¹²⁶⁾ The representative of UNESCO, Mr. Arnaldo stated that UNESCO had in fact been considering these matters. The upshot of the debate was that it was decided not to include social and economic rights by a vote of 8 to 6 with one abstention.⁽¹²⁷⁾ This decision was deplored by the Yugoslavian representative.⁽¹²⁸⁾

Towards the end of the session the Lebanese delegate proposed a new draft article on education that read as follows:

Parents or guardians shall have the right to freedom from interference to determining the education of their children.⁽¹²⁹⁾

c. Draft Measures of Implementation

Summary of proposals:

The Commission on Human Rights based itself on the reports of the Working Group on Implementation from the second session, the principal proposals were those of Australia, calling for the

126. *Id.*
127. Commission on Human Rights, 6th session; U.N. Doc. E/CN.4/SR.184 (19 May 1950).
128. U.N. Doc. E/CN.4/SR.186 (19 May 1950).
129. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/429 (18 April 1950).

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establishment of International Court of Human Rights to which individuals, NGO's, and states might appeal; a French proposal setting up an eleven member Commission of Experts to supervise observance of human rights, examine petitions of private persons, NGO's, and states and settle by negotiations disputes arising out of alleged violations of human rights; a Guatemalan proposal in favour of a Conciliation Committee presided over by the Chairman of the Commission on Human Rights which would deal with complaints from NGO's, individuals, and states; an Indian proposal suggested that individuals and groups as well as states should have right to initiate proceedings in the case of violation of human rights, whatever system was finally established; and finally a joint U.S.-U.K. proposal that initiation of proceedings should be by states and that *ad hoc* committee should be set up to deal with cases that states were unable to settle by negotiation within six months. Findings of the *ad hoc* committee would be reported to the states concerned and to the secretary General, who would publish them. The French, Guatemalan, and the U.S.-U.K. proposals, also envisaged references to the International Court of Justice.

Debate:

The USSR objected that implementation would amount to interference in internal affairs of a state party to the Covenant, undermining sovereignty and independence of states. The Commission decided to send a questionnaire to all governments asking their opinion on implementation. The Federal Peoples Republic of

Yugoslavia felt that implementation measures would be possible as long as they were put in a Protocol to the Convention. They proposed a Human Rights Committee and a state against state procedure rather than individual petitions.⁽¹³⁰⁾

The right to petition also generating a great deal of debate at this time.⁽¹³¹⁾ No progress on this front was made at the sixth session of the Commission on Human Rights.⁽¹³²⁾ The session was marked by disputes over Chinese representation⁽¹³³⁾ and by Soviet assertions that human rights were a matter of domestic jurisdiction and, therefore, no implementation machinery was necessary.⁽¹³⁴⁾

The Secretary General had reported on the question of the right to petition.⁽¹³⁵⁾ His report alluded to the League of Nations Minority System confirming the direct access of the upper Silesian

130. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/353.add.5 (15 February 1950).
131. *Yearbook of the United Nations* 1948-49, p.440.
132. Commission on Human Rights, Sixth Session, (March - May 1950);
133. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/SR.136 (3 April 1950).
134. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/353 (29 December 1949).
135. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/419 (11 April 1950).

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minority as a precedent for establishing the right of petition⁽¹³⁶⁾ and recognised the rise of the notion of the individual as a subject of international law, in particular pointing to the International Military-Tribunals at Tokyo and Nuremberg as a precedents.⁽¹³⁷⁾ On the question of implementation, there was also a joint United Kingdom-U.S.A. proposal recommending the use of Committees for inter-state disputes and not precluding the use of the International Court of Justice.⁽¹³⁸⁾

As regards implementation, the Commission decided unanimously that some machinery should be included in the draft Covenant. For the first Covenant, it was felt that state complaints should be considered, but it rejected the proposal for the consideration of complaints by NGO's and petitions from individuals, without prejudice to further consideration of these measures of implementation.

3) The Economic and Social Council & General Assembly:

a. The Inclusion of Socio-economic and Cultural Rights

On receiving the report of the Human Rights Commission for the Sixth Session, the Economic and Social Council, having considered the Report of its Social Committee, referred, *inter alia*, the question of whether economic, social and cultural articles should be included in

136. *Id.* page 17.

137. *Id.* p. 38-39.

138. Commission on Human Rights, 6th Session; U.N. Doc. E/CN.4/444 (22 April 1950).

the Convention to the General Assembly.

The Social Committee had considered the substance of the first 18 articles and the problem of implementation and inclusion of economic, social and cultural rights.⁽¹³⁷⁾ At the Committee Denmark, India, Pakistan, U.K., and the U.S.A. felt that it was premature to include such rights in a Covenant.

Austria, Belgium, Brazil, Chile, France, Mexico and Peru felt that immediate or subsequent incorporation was appropriate.

The social committee resolved that decisions on the following major policy questions had to be taken by the General Assembly:-

- (1) the general adequacy of the first eighteen articles
- (2) the desirability of including special articles on the application of the Covenant to federal states and non-self governing and trust territories,
- (3) the desirability of including articles on economic, social, and cultural rights and
- (4) questions relating to the adequacy of the articles on implementation.

It also asked the Commission on Human Rights to reconsider the draft in the light of the directions the General Assembly would generate the views expressed by the council.

The General Assembly at its 285th meeting in September 1950

139. For a summary of discussions of the Social Committee deliberations see U.N., *Yearbook*, 1950, p.52 ~~to 53~~.

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referred the questions to its Third Committee.¹⁴⁰ The Third Committee concluded that the list of rights was incomplete¹⁴¹ and that the rights suggested by Yugoslavia¹⁴² and the Soviet Union should be taken into account.¹⁴³ The General Assembly called for

140. U.N. Docs. A/C.3/SR.287-316, and 318.

141. The Third Committee considered the four questions referred by the Council on which policy decision were necessary. As to the general adequacy B.S.S.R., Czechoslovakia, India, Iraq, Poland, Saudi Arabia, Turkey, U.S.S.R., and Yemen, considered there were important omissions in the catalogue of rights. Other states, including Afghanistan, Brazil, Canada, Chile, Egypt, El Salvador, Ethiopia, France, Lebanon, the Netherlands, the U.K., U.S.A., Uruguay and Yugoslavia, felt that the catalogue was adequate although they had reservations as to the drafting.

142. U.N. Doc. A/C.3/92 (3 November 1950). In the fifth session of the Third Committee of the General Assembly Yugoslavia attempted to include a right for minorities to use their language and to develop their culture.

143. U.N. Doc. A/C.3/L.96. U.N. Doc. A/C.3/L.76 GAOR, Fifth Session, Plenary Meeting, 317th meeting. U.N. Docs. A/1559 and A/1559 Corr.1. Res. 421 (V) of the General Assembly. The Soviet Amendment to the proposed resolution by Brazil which was supported by Turkey and the United States, included

the inclusion of the social, economic and cultural rights.¹⁴⁴ The Western states in the main opposed the inclusion of economic and social rights on the grounds that they would be impossible to have full implementation along with civil and political rights, and that it was not feasible to include the articles in the existing Covenant.¹⁴⁵ The UNESCO representative pointed out that Article 26(1) of the Universal Declaration on Human Rights alone would

the right to work and other social and economic rights but the educational rights are placed high on their list. It included, *inter alia*, the following:

1. The State shall ensure the development of science and education in the interest of progress and democracy and in the interests of ensuring international peace and cooperation.
2. Access to education shall be open to all without distinction of race, sex, language, economic situation or social origin and this right shall be ensured by the state by the provision of free elementary education, a system of scholarships and the requisite system of schools.

144. Res. 421 (V) 4 December 1950. Passed on by ECOSOC to the Commission on Human Rights. U.N. Doc. E/CN.4/525.

145. There were similar East-West divisions over the colonial and federal clauses.

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require several conventions to be implemented.⁽¹⁴⁶⁾ France alone amongst the Western states (apart from Australia) wanted the inclusion of socio-economic rights but felt that they would need further consideration.⁽¹⁴⁷⁾ The West lost the battle.

b. The Right to Education

In the General Assembly Third Committee debates there were numerous proposals made on the right to education and minority rights.⁽¹⁴⁸⁾

The free choice of education was also supported by proposals from El Salvador,⁽¹⁴⁹⁾ Greece,⁽¹⁵⁰⁾ and the Netherlands.⁽¹⁵¹⁾ There were eight proposals for minority rights including educational

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146. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/529 (29 March 1951).
147. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/515/add.15 (23 March 1951).
148. In particular there were articles proposed by the Philippines U.N. Doc. A/C.3/SR.291 (20 October 1950); the Ukrainian SSR U.N. Doc. A/PV.317 para 73 (4 December 1950); and the U.S.S.R. itself U.N. Doc. A/C.3/SR.297 Paras 65 to 66, (30 October 1950) and U.N. Doc. A/C.3/SR.312 para 41 (30 November 1950).
149. U.N. Doc. A/C.3/SR.291 para 59 (Mr. Aguilar) (20 October 1950).
150. U.N. Doc. A/C.3/SR.298 para 25 (Mr. Maccas) (30 October 1950).
151. U.N. Doc. A/C.3/SR.290 para 18 (Mr. Beaufort) (20 October 1950).

aspects.⁽¹²²⁾ In the 290th meeting of the Third Committee the Netherlands representative considered that parental choice of education for children was integrally linked to the freedom of conscience and religion.⁽¹²³⁾ This was supported by El Salvador.⁽¹²⁴⁾

The Danish proposed that states should undertake to promote educational rights with due regard to their organisation, traditions and resources. Their proposal suggested that each party to the Convention would recognise a fundamental human right that elementary education should be free and compulsory for all.⁽¹²⁵⁾

4) The Seventh Session, April - May 1951

By the time the Commission on Human Rights met for its seventh session the General Assembly had adopted a resolution that, amongst other things, called for the inclusion of social, economic

152. Chile, A/C.3/SR.305 para 79 (8 Nov. 1950); Greece, A/C.3/SR.307 para 10 (8 Nov. 1950); Poland, A/C.3/SR.290 para 4 (20 Oct. 1950); Poland, A/PV.317 para 60 (4 Dec. 1950); USSR, A/C.3/SR.289 para 34 (19 Oct. 1950); Uruguay A/C.3/SR.305 para 78 (6 Nov. 1950); Yugoslavia A/C.3/SR.291 para 21 (20 Oct. 1950); Sec.-Gen. A/C.3/53 para 6(2) (28 Sept. 1950).
153. U.N. Doc. A/C.3/SR.290.
154. U.N. Doc. A/C.3/SR.291.
155. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/542 (18 April 1951).

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and cultural rights in the Covenant.⁽¹⁵⁶⁾ The Economic and Social Council resolution of the 23 February 1951 ordered the Commission on Human Rights to implement this General Assembly resolution.⁽¹⁵⁷⁾ At the seventh session of the Commission of Human Rights the Secretary-General of the United Nations sent a memorandum to the Commission on Human Rights on a draft declaration of the rights of the child.⁽¹⁵⁸⁾

With this background the seventh session of the Commission on Human Rights opened. It decided to discuss the question of the

156. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/525 (2 March 1951). This had been particularly proposed by the U.S.S.R. and supported by Yugoslavia. See U.N. Docs. A/C.3/L.96 and A/C.3/L.92 respectively.
157. U.N. Doc. E/1927 (23 February 1951).
158. Commission on Human Rights, 7th Session; U.N. Doc. E/CN.4/512 (19 February 1951). Principle five of the draft declared:

The Child shall be given an education which will bestow general culture and enable him to develop his abilities in individual judgement and to become a useful member of society. Such education shall be free.

This had been adopted as an ECOSOC Council resolution 309C [XI] of (13 July 1950). For full details of the Draft Declaration's import for the right to education see chapter 5 below.

inclusion of social and economic rights first.⁽¹⁵⁹⁾ The debate here was one of the fuller ones dealing with the question of economic, social and cultural rights, so it is outlined in some detail. Where it dealt with specific economic, social and cultural rights the question of educational rights has been chosen.

a. The inclusion of socio-economic rights

In the debate the United Kingdom stressed the need for a Universal Covenant and considered that as many nations were not in a position to implement social and economic rights these rights should not be included. Miss Bowie (U.K. representative) gave three main reasons for opposing the inclusion of economic and social rights. Firstly, people were impatient to have a Covenant, and it would take a great deal of time to draft a Covenant including social and economic rights. Secondly the implementation implied control by a supra national authority and social and economic rights would need very different control methods more like the International Labour Organisation machinery. Again, this would take a long time to set up. Thirdly she felt that specialised agencies were designed to fulfil this task. The French representative (Mr. Cassin) supported this stressing that the economic and social and cultural rights were

159. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/SR.202 (24 April 1951). This session also dealt with questions of equal pay, the right to health, the right of association and striking, as well as the right to work, social security and the right to education.

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protected by the specialised agencies, whereas civil and political rights had no alternative coverage. He stressed the main point in having a Covenant was to implement legal rights.¹⁶⁰ If this was not the main purpose the Declaration would be sufficient alone, there would be no need for the Convention. Given this legal nature of the Convention how could it include rights such as the right to education? For this to be law, applicable law in the member states, they must have teachers to combat illiteracy, for example, and many states would have to wait for years before being able to sign and ratify such a Convention, if it included social and economic rights. He suggested that maybe social and economic rights should be included in a Recommendation.

Mr. Jenks (for the I.L.O.) echoed these Western points of view. Social and economic rights were aspirations not amenable to judicial enforcement but dependent on resources. They were implemented quite often voluntarily by citizens but not necessarily the government and moreover the specialised agencies were already dealing with these issues.

This point of view was opposed amongst others, by the

160. The U.S.S.R. attempted to delete all sections on implementation especially those wherein the individual was recognised, as "an attempt to intervene in the internal affairs of states and violate their sovereignty". Commission on Human Rights: Seventh Session U.N. Doc. E/CN.4/553 (20 April 1951).

Yugoslavian representative who stated

. . . If a government were genuinely interested in the welfare of its people, it could certainly apply economic, social, and cultural rights and so ensure that the purposes of the Covenant were fulfilled.

Mr. Saba (UNESCO) suggested that there was no order of precedence between different types of rights and thus social and economic rights should be included. He did recognise, though, that the implementation of social, economic, and cultural rights was difficult because of the different levels of economic resources of states and because, in some cases, there was private provision of a right as opposed to state provision. These factors made universality in this area difficult and suggested that they should be separate methods and procedures for implementing economic and social rights. He stressed that these were technical problems and should be studied and dealt with by the specialised agencies. An overall conclusion, though, he considered that you could still have a Covenant which stressed ends to be achieved as opposed to accomplishments that were currently available.¹⁶¹ As we shall see, this argument ultimately won the day.¹⁶² The UNESCO arguments were echoed by Mr. Bertrand

161. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/SR.204 (25 April 1951).

162. See Article 2 of the Covenant on Economic, Social and Cultural Rights.

(WHO).⁽¹⁶³⁾

After the debate the Commission transformed itself into a working group to meet with specialised agencies to discuss social, economic and cultural rights in private meetings. The working group first met on the 26th of April 1951.⁽¹⁶⁴⁾ They continued to meet as a Commission as well.⁽¹⁶⁵⁾

Before the session closed the Commission considered the general clause on social and economic rights.⁽¹⁶⁶⁾ The U.S.S.R. opposed this, since it seemed to be separating social and economic rights from civil and political rights and giving them weaker protection. They felt that pledges to secure progressive implementation were not enough. René Cassin put the Western position. Legislation was suitable for civil and political rights but not for social and economic rights, since any change in those rights would disturb any country's social and economic equilibrium.⁽¹⁶⁷⁾ The general clause was also criticised for the phrase included "in accordance with their organisation". This, it

163. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/SR.207 (2 May 1951).

164. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/SR.215; E/CN.4/AC.14/SR.1 (17 May 1951).

165. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/SR.208 (3 May 1951).

166. U.N. Doc. E/CN.4/SR.232 (2 July 1951) *et seq.*

167. *Id.*

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was felt, would provide an escape clause because in some countries there was no state organisation of such matters and thus they would have no obligation. The debate on the general clause, a limiting clause, reflected the different views held by Western capitalist states and the East European communist states on social and economic rights. The Indian Resolution⁽¹⁶⁸⁾ felt that as economic and social rights were not justiciable, they should not be in the Covenant and suggested that the Commission so recommend to the Economic and Social Council. This was rejected by twelve votes to five with three abstentions at the end of the Seventh Session. The I.L.O. proposed that social and economic and cultural rights should be left to the specialised agencies with states reporting to those agencies.⁽¹⁶⁹⁾

b. The right to education

The Director General of UNESCO submitted an article on education for consideration by the Commission of Human Rights.⁽¹⁷⁰⁾ It read as follows: Article (A)

The Signatory states recognise:

1. That everyone has the right to education.
2. That elementary education should be free of charge and

168. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/619 (10 May 1951).

169. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/AC.14/1 (27 April 1951).

170. See U.N. Doc. E/CN.4/541.

compulsory for all,

3. That secondary education of all types (including technical and professional secondary education) should be generally available and made increasingly free of charge.
4. That higher education should be equally accessible to all by virtue of individual merit.⁽¹⁷¹⁾

They accept as a sacred duty the task of carrying these principles into effect in all the territories under their jurisdiction . . . The article went on in Part B to stress that in territory lacking elementary education states would have two years to supply a plan for accomplishing the objectives of Part A. Part C of the article gave fundamental education to all those who missed it, i.e. adults and Part D provided

... education should encourage increasing respect for the rights of man an understanding and tolerance among all nations ..⁽¹⁷²⁾

171. Uruguay felt that higher education too should be made progressively free. U.N. Doc. E/CN.4/SR.226 (27 June 1951).

172. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/541 (18 April 1951). This proposed article was slightly revised, U.N. Doc. E/CN.4/541/Rev.1 (27 April 1951):

The Signatory states recognise

1. That everyone has the right to education.
2. That primary education should be free and compulsory,

He indicated that it would take time to implement this proposal and that fundamental elementary education was vital, thus justifying his proposed two-year plan.¹⁷³ He proposed the UNESCO convene regional conferences for a regional analysis of resources and needs. In particular, he felt education should teach awareness of the dignity of man.¹⁷⁴ Thus his draft proposal suggested that the government should provide primary education, which should be obligatory. Yugoslavia¹⁷⁵ and Uruguay approved the UNESCO proposal.

3. That secondary education, in its different forms, (including technical and professional secondary education) should be generally available and should be made progressively free,
4. That higher education should be equally accessible to all by virtue of individual merit. ...

173. See U.N. Doc. E/CN.4/541; U.N. Doc. E/CN.4/AC.14/SR.1.

174. U.N.Doc. E/CN.4/AC.14/SR.1 (17 May 1951) p.17.

175. The Yugoslavian proposals included the following:

- . . . 5) All children, . . . , shall have the right to assistance . . . against treatment . . . (that) handicap(s) their normal development.
- . . . 7) Everyone shall have the right to education.
Elementary education shall be free and compulsory.
Technical and vocational training shall be made generally available. Access to higher studies

Denmark supported UNESCO ideas of establishing plans for implementing the right to education and adult education. Later Denmark was to withdraw its proposals⁽¹⁷⁶⁾ in the light of the revised UNESCO

shall be opened to all in accordance with their abilities, on a basis of complete equality.

The purpose of education shall be the full development of the human personality and the reinforcement of respect for human rights and fundamental freedoms. Education shall promote understanding, toleration and friendship between all nations and all racial and religious groups, and the development of United Nations' activities for the maintenance of peace.

176. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/AC.14/2/Add.4. The proposal read as follows:

Article 18f:

(1) Each party hereto recognizes as a fundamental human right that elementary education shall be free compulsory for all. Any State, which at the moment it becomes a party to the present pact, has not been able to assure the full application of this right in all territories under its jurisdiction, undertakes to adopt, within a reasonable space of time detailed plans for such measures as will be necessary to realize progressively its full application.

(2) Each State party hereto recognizes that secondary

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proposals. The U.S. (Mr Simsarian) felt it would be desirable to wait and see what the general implementation clause of the Covenant might be before deciding on implementation and plans. Denmark supported the

education, in its different forms, including technical and professional education, shall be established and maintained as a general form of education, and shall be made free progressively.

(3) Each State party hereto recognizes that superior education shall open and accessible to all in equality and on a basis of merit.

Article 18g:

Each State party hereto recognizes that education shall favour the strengthening of respect for human rights as well as understanding and tolerance between nations.

Article 18h:

(1) Each State party hereto undertakes to favour by all appropriate means the maintenance, development and spreading of science and culture.

(2) Each State party hereto undertakes to favour by all appropriate means the material and moral interests deriving for everyone from the production of literary, artistic or scientific works of which he is the author.

United States' proposal as amended by Yugoslavia.¹⁷⁷ The U.K.

177. Commission on Human Rights, Seventh Session; U.N. Docs.

E/CN.4/593 and E/CN.4/598 (3 May 1951). It read as follows:-

Education, Science and Culture

The State Parties to the Covenant recognise:

1. the right of everyone to education;
2. that primary education should be free and compulsory;
3. that secondary education in its different forms, including technical and professional secondary education, should be generally available and should be made progressively free;
4. that higher education should be accessible to all on the basis of merit;
5. that fundamental education for those persons who have not received or completed the whole period of their primary education should be encouraged as far as possible;
6. that education should encourage the full development of the human personality, strengthen respect for human rights and fundamental freedoms, promote understanding, tolerance and friendship among all nations, racial or religious groups, further the activities of the U.N. for the maintenance of peace and enable all persons to participate effectively in a free society;
7. that the conservation, development and dissemination of science and culture should be encouraged in order that everyone may
 - a. take part in cultural life; and

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argued that the UNESCO idea for a plan was more appropriate for a specialised agency to implement rather than to be placed in a Convention granting legal rights.⁽¹⁷⁸⁾ René Cassin felt that the UNESCO plan was realistic.

The United States of America originally proposed that states undertake to promote a high standard of living to help social and economic and cultural programs in development as a compromise possibility.⁽¹⁷⁹⁾ The exact wording of this proposal was as follows:

State . . . undertakes "with due regard to its organisation and resources, to promote conditions of economic, social and cultural progress and development for securing: -

(a) education designed to enable all persons to participate effectively in a free society, to develop fully the human personality, and to strengthen respect for human rights and fundamental freedom;"

The American proposal suggested international cooperation in socio-economic and cultural matters and a bi-annual reporting system.⁽¹⁸⁰⁾

The Soviets objected to the U.S. proposal accurately

b. enjoy the benefits of scientific progress.

178. A view supported by Mr. Whitlam (Australia).

179. Commission on Human Rights; Seventh Session, U.N. Doc. E/CN.4/539 (16 April 1951).

180. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/539/Rev.1 (25 April 1951).

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castigating it as an attempt to avoid endowing social, economic and cultural rights with binding force.^{'181'} René Cassin (France) suggested that there be a general obligation to implement this right, that it should be limited to a basic right to primary education and that, for international implementation, specialised agencies should be used for any technical aspects.^{'182'} Egypt and Chile both felt that the U.S. language was too weak and didn't emphasise "the rights" aspect of education enough.^{'183'} The United States accepted the I.L.O. amendment to their draft^{'184'} with the proviso that rights should not mean legal rights!!^{'185'} Mrs. Mehta (India) emphasised

181. U.N. Doc. E/CN.4/AC.14/SR.2 (7 May 1951).

182. *Id.* p.12.

183. U.N. Doc. E/CN.4/AC.14/SR.1.

184. Commission on Human Rights, Seventh Session; Working Group
U.N. Doc. E/CN.4/AC.14/SR.3 (18 May 1951) p.5.

185. It now read:

1. Each State party to this Covenant undertakes, with due regard to its organization and resources, to promote coordinations of economic, social and cultural progress and development for securing:
 - (a) education designed to enable all persons to participate effectively in a free society, to develop fully the human personality, and to strengthen respect for human rights and fundamental freedoms;

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the vitalness of education to distinguish man from the animals. She criticised the U.S. draft for leaving out fundamental (adult) education. (186)

The UNESCO draft was the most complete and discussion tended to centre around this draft. (187) In the discussion on what was meant by a right to education the following definition was offered by Mr. Elvin (UNESCO):

The right of access to the knowledge (188) and training which are necessary to full development as an individual and as citizen.

He emphasised that the state could do no more than provide access, the final responsibility of such development would rest with the child and parents. He also emphasised that reference, as in the text, to individuals and citizens showed that respect must be given to personality of the individual and recognition of man as a

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(b) the preservation and development of science and culture;

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U.N. Doc. E/CN.4/AC.14/2/Add.4.

186. U.N. Doc. E/CN.4/SR.226 (27 June 1951).

187. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/SR.226 (27 June 1951). France, Chile, and the Lebanon all appreciated UNESCO's proposal though they all suggested various amendments. U.N. Doc. E/CN.4/SR.226 (27 June 1951).

188. He emphasised that knowledge by itself did not constitute education.

social being. He emphasised that primary education related to children where as fundamental education related to adult education to combat illiteracy. '197' Mr. Morosov (U.S.S.R.) gave some boastful Soviet statistics and criticised UNESCO's proposals since they seem to exclude colonies. He also felt it would be desirable to have a specific date by which the plan had to be implemented. '178'

Mr. Bienenfeld (World Jewish Congress) emphasised that education was a fundamental human right and not a "cultural right". He considered it a civil and political right and should be

189. René Cassin favoured the term *éducation de base* as opposed to *éducation fondamentale* as the French equivalent for this concept.

190. The draft suggested by the Soviets read as follows:

Article

The state shall ensure the development of science and education in the interests of progress and democracy, and in those of the maintenance of peace and of co-operation between the nations.

Educational facilities shall be accessible to all, without distinction of any kind as to race, sex, language, means or social origin, and the State shall ensure this right by providing free elementary and general education, scholarship system, and the necessary system of schools.

...

U.N. Doc. E/CN.4/AC.14/2/Add.4

implemented as such.⁽¹⁷¹⁾

c. The role of the Parent; independent education

A large part of the debate on the right to education was taken up with the issue of parental rights. As the Lebanese representative pointed out Article 26(3) of the Universal Declaration had been rejected originally by the Commission on Human Rights but was included by the General Assembly's Third Committee. Mr. Elvin (UNESCO) explained why the UNESCO draft left out any mention of parental rights. This was partly because the General Conference had not given any formal instructions as to the prior rights of parents (as per Article 26 (3) of the Universal Declaration on Human Rights) but also because parental aspirations could outstrip the sibling's aptitudes and abilities.⁽¹⁷²⁾

The World Jewish Congress emphasised that the prior right of parents (Article 26(3) Universal Declaration on Human Rights) was a vital aspect and should be included. Several other religious NGO's supported this attitude.⁽¹⁷³⁾ Mr. Ciasullo (Uruguay) felt that the

191. *Id.*

192. U.N. Doc. E/CN.4/SR.226 (27 June 1951).

193. Mr. Waheed (Pakistan) supported the UNESCO draft but felt that it did need to include something embodying the sense of Article 26 (2) and (3) at the Universal Declaration. He considered that it was especially important to guarantee religious freedom. Mr. Nolde (Commission of the Churches on

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wording and the Universal Declaration on Human Rights Article 26 (2) and (3) should replace Article 5 (C) of the UNESCO draft.¹⁷⁴ Another factor in favour of parental rights, apart from religious motivations, was the desire to protect the existence of private schooling. Mr. Ciasullo (Uruguay) said that in fulfilling the right to choose the state should recognise parents' rights to choose between state or independent schools.¹⁷⁵ The Chairman speaking for the United Kingdom explained that the United Kingdom had accepted Article 26 (3) of the Universal Declaration on the grounds that it was drafted to prevent parents being forced to send their children to state schools.¹⁷⁶ Miss Bowie (U.K.) felt the U.S. draft was

International Affairs) emphasised the importance of respect for parental rights. Mr. Eggerman (International Federation of Christian Trade Unions) felt the parental rights were important and should not be left out. Miss de Romer (International Union of Catholics Women's League) pointed out that "education" was wider than "instruction" and noted the parental role was very important. U.N. Doc. E/CN.4/SR.227 (27 June 1951).

194. *Id.*

195. *Id.*

196. *Id.*

good.¹⁷⁷ As to the UNESCO draft, she proposed an amended Paragraph 2 to Article A. That it should be reworded as follows:

That primary education should be compulsory and freely available to all.

This would emphasize that there were non-state school alternatives. The protection of private education was clearly in the minds of some of the drafters. Uruguay introduced its amendment to UNESCO's draft, inserting a guarantee for freedom of education.¹⁷⁸ Denmark introduced its amendment.¹⁷⁹ The United States was in favour of a parental role and felt the Danish amendment was, therefore, acceptable, but it wished to emphasize that the point of a parental role was solely to protect the interests of the child. France, also, was in favour of parental role as suggested by the Chilean

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197. Though Britain did suggest an amendment to the U.S. draft, Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/602.
198. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/605. (4 May 1951).
199. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/600 (4 May 1951). Thus inserting a guarantee for parents to be able to choose private schooling, as long as it was in conformity with "minimum standards". It also added that state education should respect parental liberty as regards religious education.

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draft.⁽²⁰⁰⁾ Mr. Simsarian for the United States accepted the Chilean amendment as regards Article 26 to the Universal Declaration and also the amendment concerning fundamental (adult) education.

There were arguments raised against giving parents too great a role. Mr. Santa-Cruz (Chile) spoke against the intrusion of a parental prior right of choice in accordance with Article 26 (3) of the Universal Declaration of Human Rights. Since this might be construed as giving parents rights as regards the curriculum to be followed in school. In Chile, he emphasised, the state organised the curriculum.⁽²⁰¹⁾ He added that Chile felt that Article 26(3) imposed too wide an obligation on the state. A parental right to choose a school, or type of school would be alright. Mr. Aznni Bey (Egypt) withdrew his proposal,⁽²⁰²⁾ he supported, instead, the UNESCO and

200. Chilean draft as presented in Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/613/Rev.1. This was an extensive draft based on UNESCO's proposal.

201. *Id.*

202. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/AC.14/2/add.4. The proposals are all conveniently collected in working group document U.N. Doc.

E/CN.4/AC.14/2/add.4. The Egyptian proposal read as follows:

Article 18c:

Everyone shall have the right to education and cultural progress. With a view to implementing and safeguarding this

Chilean proposals. He emphasised that Egypt did respect private education (subject to considerations of morality and public order).

right:

.....

(1) Each party hereto recognizes as a fundamental human right that elementary education shall be free and compulsory for all. Any State which at the moment it becomes a party to the present pact, has not been able to assure the full application of this right in all territories under its jurisdiction, undertakes to adopt, within a reasonable space of time, such measures as will be necessary to realize its full application.

(2) Each State party hereto recognizes that secondary education, in its different forms, including technical and professional education, shall be established and maintained as a general form of education, and shall be made free.

(3) Each State party hereto recognizes that superior education shall be open and accessible to all in equality and on a basis of merit.

(4) (Identical with the text of art. 18g of the Danish proposal).

(5) (Identical with the text of art. 18h(1) of the Danish proposal).

(6) (Identical with the text of art. 18h(2) of the Danish proposal).

He added his voice to those who felt that Article 26(3) of the Universal Declaration was too wide a right for parents. This would be alright if parents were choosing religion, but what if the parent was a Nazi? Mr Soerenson (Denmark) felt that Article 26 (3) would be too wide unless it was limited to religion alone. The concern over this would be dissipated if the objectives of education were set out, because then a parent wishing to instill, say, Nazi principles, would be unable to do so using the Convention.⁽²⁰³⁾ Radical opposition to parental rights predictably came from the Eastern block. Yugoslavia felt that an inclusion of an article similarly to Article 26 (3) of the Universal Declaration was unnecessary. These rights were covered already by Article 13 protecting the right to freedom of thought and the recognition of everybody's freedom to manifest religion or belief in teaching.

Mrs. Roosevelt (U.S.A.) presented another argument against implementing article 26(3). She was concerned about the inclusion of Article 26 (3) of the Universal Declaration since the child should take precedence over any parental choice.⁽²⁰⁴⁾

Summing up the debate as regards the inclusion of something

203. Mr. Dupont-Willenin (Guatemala) thought that Article 26 (3) of the Universal Declaration would be suitable for inclusion if it was amended to indicate that education contrary to the principles of the Covenant would not be allowed. U.N. Doc. E/CN.4/SR.227 *op.cit.*

204. *Id.*

along the lines of Article 26(3) at the Universal Declaration, René Cassin felt there were four opinions. First, nothing should be said at all since any agreement would prove too difficult on the subject. Secondly, the second opinion was that it would be alright to include such a right as regards to religion solely. Thirdly, many states seem to favour both allowing both public and private schools to co-exist. And fourthly, parental power was an acceptable force and the state should provide what they wanted. (205) The Chairman interjected to point out that nobody had suggested his fourth proposal.

d. Minorities' rights

As to the question of minorities' educational rights, Mr. Soerensen felt that such a guarantee would be necessary for some minorities. He recognised that both Chile and Uruguay were against a minority's article since they favoured assimilation. However minorities in other countries could be in a different position. As the Sub-Committee on the Prevention of Discrimination and Protection of Minorities was considering this question, it should be left to them. (206)

e. International co-operation

Mr. Ya (China) felt that the article should include provisions for the exchanges of scholars since this would foster toleration of different societies.

205. U.N.Doc. E/CN.4/SR.227 (27 June 1951).

206. Supported by the U.S.A.

f. Universality

The universality of the right to education was recognised by most states members of the Commission on Human Rights though some felt that the principle was more doubtful beyond the elementary stage. For example the U.K. argued, in relation to UNESCO's proposed article, that it was unrealistic to expect secondary and technical education to be generally available to all throughout the world. Mr Whitlam (Australia) felt that education to combat illiteracy was not necessarily the best thing for some tribes. He favoured the United States' proposal as amended by the United Kingdom⁽²⁰⁷⁾ together with the Danish proposal.⁽²⁰⁸⁾

g. Drafting issues and Voting

A general criticism was made by Mrs. Rossel (Sweden) who observed that the UNESCO draft was rather detailed and long-winded compared with the rest of the Covenant. The U.S.S.R. cast aspersions, in particular, it castigated Australia's treatment of Aborigines. Australia promoted the Danish draft amendment to the U.S. and UNESCO's proposals with some minor alterations.⁽²⁰⁹⁾

207. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/602.

208. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/600.

209. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/SR.229 (28 June 1951). The Danish proposals contained in note 176.

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The first vote was on the U.S.S.R. proposal⁽²¹⁰⁾ which was rejected. The Australians withdrew their proposal.⁽²¹¹⁾ The Chilean compromise proposal⁽²¹²⁾ was adopted next after numerous amendments were dealt with.⁽²¹³⁾

210. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/AC.14/2/Add.4. See extract in note 190 above.
211. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/543.
212. Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/613/Rev.1. This formed the basis of the subsequent voting and the text as adopted is set out on pages 220-221 below.
213. The United States' amendment to Paragraph 1 (Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/593/Rev.2.) was put to the vote. It received eleven positive votes, three negative votes, and two abstentions. Paragraph 2 received the same votes except there were two additional abstentions. The three negative votes were cast by Denmark, Australia, and France because they felt that there was an unnecessary repetition of the non-discrimination clause. Paragraph 3 of the Chilean proposal as amended by the United Kingdom (to add that primary education should be compulsory and available, free to all,) was put to the vote and received sixteen positive votes, no negative votes, and only two abstentions. Paragraph 4 received fourteen positive votes,

no negative votes, and four abstentions. Further amendments were proposed that throughout the text "should" be replaced by 'shall'. The first part of Paragraph 5 up to the word "merit" was then voted on, receiving sixteen positive votes and no negative votes, and two abstentions. The second part of Paragraph 5 (which it will be remembered included the wording of Article 26 to the Universal Declaration on Human Rights) was then voted on as amended by Yugoslavia (Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/607 (5 May 1951). It received thirteen positive votes, no negative votes, and no abstentions. Then Paragraph 5 as a whole was voted on receiving no negative votes, twelve positive, and only five abstentions. The vote was retaken because of the significance of the word 'shall' in Paragraph 5. It then received fourteen votes in favour, and only 4 abstentions. Paragraph 6 was next voted on. This was identical to the U.S. proposal (Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/593/Rev.2.) and was accepted with sixteen positive votes, no negative votes, and two abstentions. The new Paragraph 8 (Commission on Human Rights, Seventh Session; U.N. Doc. E/CN.4/613/Rev.1 (7 May 1951)) was voted on and received thirteen positive votes, no negative votes, and five abstentions. Sweden proposed the

The result was plain, Articles 28 and 29 of the draft Convention on Human Rights proposed in the Commission's report to ECOSOC included the right to education. These articles now read as follows:

word "convictions" for "confessions". France objected to this proposal, on the grounds that parental secularist beliefs should also be protected. The Swedish proposal was rejected ten negative votes to two positive votes and six abstentions. In Paragraph 9 a proposal to change "regard to" to "respect for" was rejected by four votes to three. A short debate on the implications of the new vote followed and finally Paragraph 9 was accepted ten votes to zero with eight abstentions (U.N. Doc. E/CN.4/SR.229 (28 June 1951)). The voting on the Chilean proposal continued with votes on the modified UNESCO plan idea. There were seven positive, three negative votes, and four abstentions. Mr. Morosov (U.S.S.R.) felt it was not specific enough. Mrs. Roosevelt (U.S.A.) also voted against this article, feared this sort of plan was only suitable for a specialised agency such as UNESCO to work on and was out of place in the Covenant. The abstentions were based on the same grounds. Article 3 (old Article 4) was accepted leaving out the section on non-discrimination. The final version of this document is found in U.N. Doc. E/1992 (24 May 1951) and is set in the text below at pp.220-221.

—) Article 28

The States Parties to the covenant recognise:

1. The right of everyone to education;
2. That educational facilities shall be available to all in accordance with the principle of non-discrimination enunciated in Paragraph 1 of Article 1 of this Covenant;
3. That primary education shall be compulsory and available free to all;
4. That secondary education in its different forms, including technical and professional secondary education, shall be generally available and shall be made progressively free;
5. That higher education shall be equally available to all on the basis of merit and shall be made progressively free;
6. That fundamental education for those persons who have not received or completed the whole period of their primary education shall be encouraged as far as possible.
7. That education shall encourage the full development of the human personality, the strengthening of respect for human rights and fundamental freedoms and the suppression of all incitement to racial or other hatred. It shall promote understanding, tolerance and friendship among all nations, racial, ethnic or religious groups, and shall further the activities of the U.N. for the maintenance of peace and enable all persons to participate effectively in a free society;

8. The obligations of states to establish a system of free and compulsory primary education shall not be deemed incompatible with the liberty of parents to choose for their children schools other than those established by the State which conform to minimum standards laid down by the State;
9. In the exercise of any functions which the State assumes in the field of education it shall have respect for the liberty of parents to ensure the religious education of their children in conformity with their own convictions.

Article 29

Each State party to the Covenant which, at the time of becoming a party to this Covenant, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within 2 years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all.⁽²¹⁴⁾

The existence of freedom of education (the right of independent schools to exist) and parental rights are firmly entrenched by this draft. The right to education though is not

214. Commission on Human Rights, Seventh Session; U.N. Doc. E/1992; U.N.Doc. E/CN.4/640 (24 May 1951).

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designed as being immediately available despite the terms of article one. The State though must recognise the right, and, by the terms of article 29 must establish plans to implement it.

5) 13th Session of ECOSOC

a. The inclusion of Socio-economic and Cultural rights

Although the Western states had failed to reverse the decision to have a single Covenant at the seventh session of the Commission on Human Rights they did not give up trying. At the 13th Session of the ECOSOC Council the U.S. (Mr. Kotschnig) managed to get the decision on having a single covenant reversed. The G.A. at its sixth session agreed.⁽²¹⁵⁾ deciding, in Resolution 543 (VI), on two separate Covenants,⁽²¹⁶⁾ one for the civil and political rights and one for social and economic and cultural rights, thus reversing Resolution 421 (V).⁽²¹⁷⁾

215. G.A.O.R. Six sess., Plen.Mtngs, p.518. (Sixth session, November 1951- January 1952). Generally see U.N. Docs. E/CN.4/650, & 657.

216. Discussion took place in 40 meetings on the Covenants.

217. 6th Session General Assembly 375th meeting. The USSR did not give up trying to get this reversed. At the 665 meeting on July 30, 1952, of the Economic and Social Council (Fourteenth Session) the Commission's report was debated. The U.S.S.R. fought for a single covenant. The U.K. argued for two

6) 8th to 10th Session of the Commission on Human Rights

The 8th Session of the Commission on Human Rights was largely taken up with the question of self-determination.⁽²¹⁸⁾ Some time, however, was devoted to the question of the right to education.

a. Member states' observations on the proposed Covenant.

Governmental comments on the Covenant were considered at the eighth session of the Commission of Human Rights. South Africa considered that economic and social rights remained within domestic jurisdiction of states and thus should not be considered as fundamental human rights.⁽²¹⁹⁾

UNESCO observed that it had set up a special committee to

covenants. There were rights of a differing nature and requiring different implementation. Civil and political rights could be legislated. This was not so easy with economic and social rights. He also noted that the U.S.S.R. opposed any implementation. The U.S.S.R. resolution was rejected; ten against, six for and two abstentions.

218. Commission on Human Rights (Eighth Session, April - June 1952), as was the following General Assembly (Seventh session), Third Committee (November - December 1952).

219. Commission on Human Rights, 8th Session; U.N. Doc. E/CN.4/654/add.9 (2 June 1952).

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study the Covenant. It supported the two articles on education, (220)

The Soviet Union (221), Uruguay, (222) and the United

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220. Commission on Human Rights, 8th Session; U.N. Doc. E/CN.4/655/add.4 (17 April 1952).
221. Commission on Human Rights, 8th Session; U.N. Doc. E/CN.4/L.51 (25 April 1952). Corrected for translator's error 7 May 1952. U.N. Doc. E/CN.4/L.51/Corr.1. The essence of the amendment was to bolster the right by forcing the state to ensure its existence by providing the necessary school system. (instead of guaranteeing the provision of an appropriate schools system). The Soviet draft amending Article 28 had proposed that the state must ensure the right to free primary education by providing the necessary school systems. This wording was not adopted though supported by Sweden; U.N. Doc. E/CN.4/SR.288 p.8. The Indian representative pointed out that many Indian classes were held in the open and that teachers were as, if not more, important as schools; U.N. Doc. E/CN.4/SR.289 p.8. It also proposed that state should ensure the right to secondary education by providing a system of scholarships and by providing the necessary system of higher education institutions. U.N. Doc. E/CN.4/SR.285 p.3.

States⁽²²³⁾ proposed amendments to Article 28. The Soviet and Uruguayan amendments attempted to make the article more detailed, that of the United States made it shorter and seems to have been the most influential. The U.S. amendments to Article 28 were as follows:

Delete Paragraphs 1-7 and add the following:

1. The state parties to the Covenant recognise the right of everyone to education, realising that education should be a continuous process designed to facilitate effective participation in a free society, to develop fully the human personality, to strengthen respect for human

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222. Commission on Human Rights, 8th Session; U.N. Doc. E/CN.4/L.61 (28 April 1952); as amended U.N. Doc. E/CN.4/L.61/Rev.1 (8 May 1952). The Uruguayan amendment proposed adding artistic education after professional and technical secondary education. They also proposed a system of scholarships and that the development of physical education should also be provided.
223. Commission on Human Rights, 8th Session; U.N. Doc. E/CN.4/L.80 (2 May 1952) subsequently revised U.N. Doc. E/CN.4/L.80/Rev.1 and E/CN.4/L.80/Rev.2 (May 8 and May 9 1952) respectively. The first U.S amendment would have deleted the first seven paragraphs of article 28 and substituted a general article that recognised the right to education. The revised versions retained article 28 para.1, and a revised version of article 28 para. 7.

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rights and fundamental freedoms, to provide understanding, tolerance and friendship among all nations and racial, ethnic or religious groups, and further the maintenance of peace.

2. The full attainment of this right requires as a minimum that primary education shall be compulsory and free, that secondary education shall be free, that fundamental education for those who have not completed their primary education shall be encouraged as far as possible, and that higher education shall be accessible to all to the extent of their abilities.

They would retain Paragraphs 8 and 9 of Article 28. (224)

This amendment was subsequently modified in a way that ensured that higher education should be free to those not having financial means, either "through scholarships or otherwise". (225) It was unusual for the United States to make such a proposal and it was not to be made again. Nor was it adopted. The wording finally adopted was that it should be made "progressively free".

At the 8th Session the United Kingdom and the United States proposed a draft amendment whose aim was to decrease the length of the Covenant. Mr. Hoare (U.K.) considered that there was no right to

224. Commission on Human Rights, 8th Session; U.N. Doc. E/CN.4/L.80 (2 May 1952).

225. Commission of Human Rights, 8th Session; U.N. Doc. E/CN.4/L.80/Rev.1 (8 May 1952).

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education but rather a right of access to educational institutions on equal terms.⁽²²⁶⁾ An amendment in those terms⁽²²⁷⁾ was criticised by Mr Saba (UNESCO) on the grounds that it would seriously weaken the right to education where schools did not exist.⁽²²⁸⁾ He also criticised the draft for excluding any statement on the aims of education. The purposes of "education" were wider than "instruction". Such aims should be written in to the Covenant to protect the child from "reactionary" education.⁽²²⁹⁾ Chile spoke against the U.S.-U.K. draft amendment, which ultimately did not succeed. A Belgian amendment, *inter alia*, bolstered the provisions in relation to parental rights.⁽²³⁰⁾ At the end of the session the articles on

226. Commission on Human Rights, 8th Session; U.N. Doc. E/CN.4/SR.285 (23 May 1952). The text of the U.K. amended article is in U.N. Doc. E/CN.4/L.85.
227. "The right of everyone to access to educational facilities". U.N. Doc. E/CN.4/L.85.
228. U.N. Doc. E/CN.4/SR.285 p.9. He charitably argued that this perhaps was not the British intention as the draft later required primary education to be compulsory.
229. *Id*, p.10.
230. U.N. Doc. E/CN.4/L95; U.N. Doc. E/CN.4/SR.285 (pp.6-7).

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education became Articles 14 and 15⁽²³¹⁾ of the separate Covenant on Economic, Social and Cultural Rights. Article 14 read:

1. The State parties to the Covenant recognise the right of everyone to education, and recognise that education shall encourage the full development of the human personality, the strengthening of respect for human rights and fundamental freedoms and the suppression of all incitement to racial and other hatred. It shall promote understanding, tolerance and friendship among all nations, racial, ethnic or religious groups, and shall further the activities of the U.N. for the maintenance of peace and enable all persons to participate effectively in a free society.

2. It is understood:

- a. That primary education shall be compulsory and available free to all;
- b. That secondary education, in its different forms, including technical and professional secondary education, shall be generally available and shall be made progressively free;
- c. That higher education shall be equally accessible to all on

231. U.N. Economic and Social Council, 14th Session, Supplement Number 4. Commission on Human Rights: Report of the Eighth Session; U.N. Doc. E/2256; U.N. Doc. E/CN.4/669. Article 14 was adopted, being based on a Lebanese amendment to the U.K. amendment as amended by Polish amendments. U.N. Doc. E/CN.4/SR. 290. The attempt by the U.K. to get article 15 deleted failed. U.N. Doc. E/CN.4/SR.295 p.9.

the basis of merit and shall be made progressively free:

- d. That fundamental education for those persons who have not received or completed the whole period of their primary education shall be encouraged as far as possible.

3. In the exercise of any functions which they assume in the field of education, the State parties to the Covenant undertake to have respect for the liberty of parents and, where applicable, legal guardians^{'232'}, to choose for their children schools other than those established by the public authorities^{'233'} which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious education of their children in conformity with their own convictions.

Article 15 comprised the essence of the UNESCO educational planning idea for states unable to fulfil the right to education in their "metropolitan or other territories".

Article 15:

Each state party to the Covenant which, at the time of

232. The phrase was added in after the speech of the representative of the Agudas Israel World Organisation; U.N. Doc. E/CN.4/SR.287.

233. This is reminiscent of language promoted for inclusion in the second article of the first Protocol to the European Convention on Human Rights. A form of wording not ultimately accepted there. See chapter 7.

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becoming a party to this Covenant, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years to be fixed in the plan, of the principle of compulsory education free of charge for all.

b. Economic and Social Council (Sixteenth session)

The Economic and Social Council at its 16th session in August 1953 in Geneva sent the draft Covenants proposed by the Commission on Human Rights back to the Commission for further work and sent them on to the General Assembly too for consideration at its 8th session (though not on its agenda). The Soviet Union stressed that there should be one Covenant and it deplored that fact that social and economic and cultural rights were not being well enough protected in the draft Covenant.⁽²³⁴⁾ The new U.S. administration had in the meantime reversed the U.S. attitude to the Covenants by declaring that it had no intention of adhering to the Covenants.⁽²³⁵⁾

234. Economic and Social Council, 16th session; 746th meeting. O.R. (3 August 1953).

235. Dulles Memorandum, 'US policy regarding draft international Covenants on Human Rights', in *Foreign Relations of the U.S., 1952-1954*, , vol.3, (Washington, Gov't Printing Office,

At its 744th Plenary meeting in July 1953, the ECOSOC resolved, among other things, that it wanted to see the right to free and compulsory primary education and fundamental education spelled out in any Covenant.²³⁶ The next session of the General Assembly's (Eighth Session) Third Committee (November 1953) was taken up with the questions of the Federal State clause, reservations, and the right of petition.

c. 9th Session of the Commission on Human Rights

(1) Inclusion of Independent Education

At the 9th Session of the Commission on Human Rights the Secretary-General of the United Nations sent a memo to the Commission of Human Rights pointing out that not all civil and political rights of the Universal Declaration were in the draft Covenant. This had been pointed out by the Third Committee of the General Assembly. In particular, they wished to see included the right of parents to choose the kind of education that shall be given to their children.

1979). See generally; Johnson, G., 'The contributions of Eleanor and Franklin Roosevelt to the development of International Protection of Human Rights', (1987) 7 *HRQ* 19; Rusk, D., 'A personal reflection on international covenants on human rights', (1981) 9 *Hofstra Law Rev.* 515; and Hevener, N., 'Drafting the Human Rights Covenants', (1986) 148 *World Affairs* 233.

236. Resolution 496 (XVI) ECOSOC 16th Session 774th meeting (31 July 1953). Supplement One, 16th Session p.8.

This right had been included in the draft, Economic, Social and Cultural Covenant, Article 14.⁽²³⁷⁾ The Netherlands had suggested that it should be in the Civil and Political Rights Covenant.⁽²³⁸⁾

(2) Rights of Minorities

This session was noteworthy for adopting limited protection of ethnic religious or linguistic minorities and recognising their right to culture, language and religion. However, the session did reject any right to establish schools or educational institutions for such minorities.⁽²³⁹⁾ Minorities were defined as

- (i) Non-dominant group possessing and wishing to preserve stable ethnic, religious, or linguistic traditions or characteristics markedly different from those of the rest of the population;
- (ii) Such minorities should properly include a number of persons sufficient by themselves to preserve such traditional characteristics, and
- (iii) Such minorities must be loyal to the state to which they are Nationals.

It was this category of minorities that were considered to be in

237. Commission of Human Rights, 9th Session; U.N. Doc. E/CN.4/674 (2 February 1953).

238. General Assembly, 3rd Committee U.N. Doc. A/C.3/SR.363 (9 and 10).

239. See generally, Commission on Human Rights, 9th Session; U.N. Doc. E/CN.4/689; and U.N. Docs. E/CN.4/SR.368-371.

need of protection. It was pointed out that dominant minorities, and those seeking assimilation, would not need such protection and it was felt that such minorities would find a distinction unwanted and it would block the natural evolution of society, stir up trouble and danger, and encourage very small minorities. Moreover, some minority traditions were abhorrent. These fears largely grounded in the minority practices from the time of the League.⁽²⁴⁰⁾ These worries caused the Commission on Human Rights to send back the proposed definition of minorities to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

The Sub-Commission at its 6th Session carried out a study of discrimination in education. A Rapporteur was appointed to collate information and write a report with appropriate recommendations.⁽²⁴¹⁾ This resulting famous Study was the basis for the UNESCO Convention

240. Where it will be remembered, the system was abused by neighbouring States. For instance, the practice of the German völkbund in Poland. See U.N. Doc. E/CN.4/641 (U.N. Doc. E/CN.4/Sub.2/140) for the position of the Sub-Commission. See above chapter three.

241. 6th Session of the Subcommission on Prevention of Discrimination and Protection of Minorities; U.N. Doc. E/CN.4/703 Para.9; ECOSOC 18th Session Official Records, Supplement 7, p.42.

Against Discrimination in Education adopted in 1960. (242)

(3) Implementation

Implementation was another feature of the discussions. It was proposed that implementation be by the Human Rights Committee (excluding any individual right of petition) and state against state actions were to be permitted before the International Court of Justice. (243) Socialist states were opposed to any such provisions. Many states were still very worried at the prospect of allowing individuals any access to implementation machinery. The main reasons being concern to preserve of national sovereignty and domestic jurisdiction. The idea was mooted that this should be put in an Optional Protocol rather than the main body of the Covenant. The League of Nations practice with minority petitions was considered. The session did not deal with implementation of economic, social and cultural rights.

c. 10th Session of the Commission of Human Rights

The 10th Session of the Commission of Human Rights was dominated by considerations of implementation. Periodic reporting was a method much debated. Another hot topic was consideration of inclusion of a right to own property. As regards periodic reporting the socialist view was that this would allow interference in domestic affairs and it should be the state's duty alone to implement such rights. There was also consideration of whether the Human Rights

242. See Chapter six below.

243. *Id.* p.14.

Committee procedure relating to the first Covenant (civil and political rights) would be appropriate to apply to the economic, social and cultural Covenant.⁽²⁴⁴⁾ The right to petition was also considered as well as a Federal clause for the Conventions, the question of reservations and the question of self-determination. The Commission finalised its consideration of the Covenants with the adoption *inter alia* of the article on periodic reporting for the Economic, Social and Cultural Covenant and other "procedural articles".⁽²⁴⁵⁾ This was confirmed at the Eleventh Session of the Commission on Human Rights when discussing its agenda items for priorities for its 11th Session. The Commission considered that the drafting of the Covenants was now complete and that it was in the hands of the United Nations organs to further their progress.⁽²⁴⁶⁾

3. PHASE TWO: Consideration of the Covenants in the General Assembly

The Third Committee of the General Assembly commenced consideration of the Draft Covenants in 1954. Before we examine the consideration of articles 14 and 15 that deal directly with the right

244. Report of the 10th Session of the Commission of Human Rights, Economic and Social Council O.R. 18th Session, Supplement 7.; U.N. Doc. E/2573.

245. (1954) *Ybk.U.N.* 203.

246. Commission of Human Rights, 11th Session; U.N. Doc. E/CN.4/719 and U.N. Doc. E/CN.4/719/Corr.1. ECOSOC Council Official Records 20th session Supplement 6.

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to education it is important to underline several other articles that were considered by the Third Committee. These articles expand and illustrate the conceptions that the Committee held as regard the aims and role of education. In particular articles 6 and 10 of the Covenant Economic, Social and Cultural Rights directly impinge on educational aims and the role of the family respectively.

1) Article 6 on the right to work

Article 6 on the right to work is important to this study as it ultimately included, in paragraph 2, the "right to technical and vocational guidance and training programmes" which were to be progressively made available by the Contracting States. It was the Guatemalan amendment⁽²⁴⁷⁾ that introduced this phrasing. It was criticised on the grounds that the subject of vocational training was dealt with in article 14,⁽²⁴⁸⁾ but the importance of such training to

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247. U.N. Doc. A/C.3/L.537 that inserted this phrasing. Suggested by Guatemala at the 710th Mtng of the 3rd Committee, UN GAOR, 11th sess., Third Committee, p.421; U.N. Doc. A/C.3/SR.710. Supported by Greece *id.* p.143; and Chile *id.*, p.144. It was formally introduced at the 711th Mtng.
248. The point was raised by France *id.*, p.144 and supported by the U.K., *id.* p.154; U.N. Doc. A/C.3/SR.712. It was also opposed on the grounds that it went into too much detail (India) *id.*, p.154; U.N. Doc. A/C.3/SR.712.

the right to work overcame such objections.⁽²⁴⁷⁾ At the 712th Meeting⁽²⁴⁸⁾ the clause was adopted by 18 votes to 14 with 30 abstentions.⁽²⁴⁹⁾ The significance of this right to our theme is that it emphasises the importance of individual choice as the purpose of the training.

2) Article 10 on the family

There was some debate as to the advisability of having this article at all (especially paragraph 3) given that its subject matter was dealt with in article 22 of the draft Covenant on Civil and Political Rights.⁽²⁵⁰⁾ It was retained to emphasise the importance of assisting the family as a protector of the young.

At the start of the Third Committee's deliberations on article 10 its second paragraph protected children from work likely to hamper their "normal development". At the 733rd Meeting on 16 January 1957 a Working Group was established to consider the

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249. GAOR, Annexes, 11th sess., Agenda Item 31; U.N.Doc. A/3515, p.4. The following spoke in support of the proposal; Ecuador (*id.*, p.148), Chile, Iran (*id.*, p.149), Denmark (*id.*, p.153), Peru (*id.*, p.154).
250. *Id.*, p.153 Guatemala stressed that its proposal would not bind states to establish any specific vocational training establishments. U.N. Doc. A/C.3/SR.712.
251. *Id.*, p.155.
252. U.N. GAOR, 11th sess., Third Committee, Agenda item 31, 730th Mtng, p.248 et seq.; U.N. Doc. A/C.3/SR.730.

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amendments to article 10.⁽²⁵³⁾ The Working Group's Report to the Committee⁽²⁵⁴⁾ sought to ensure that the family (para 1) and mothers (para 2) received special protection when they were "responsible for the care and education of dependent children". Numerous amendments were provoked by the changes wrought in the Working Group.

In particular the Swedish amendment⁽²⁵⁵⁾ sought to delete the phrase "responsible for the care and education of dependent children" in paragraph two, on the grounds that it was repetitious, and that the mother was not solely responsible for the care and education of dependent children.⁽²⁵⁶⁾ Bulgaria proposed⁽²⁵⁷⁾ to add a sentence to paragraph one to ensure that the state maintained and educated "needy children" who had lost both parents.⁽²⁵⁸⁾ This was felt to be too detailed, and why not consider other categories such as the disabled.⁽²⁵⁹⁾ A Romanian amendment⁽²⁶⁰⁾ requiring age limits below

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253. U.N. GAOR, 11th sess., Third Committee, Agenda item 31, p.268; U.N. Doc. A/C.3/SR.733.
254. U.N.Doc. A/C.3/L.570.
255. U.N.Doc. A/C.3/L.571, proposed by Sweden, UN GAOR, 11th sess., Third Committee, p.273; U.N. Doc. A/C.3/SR.735.
256. This amendment was approved. (737th Mtng)
257. U.N. Doc. A/C.3/SR.735. U.N. GAOR, 11th sess., Third Committee, Agenda Item 31, p.273.
258. U.N.Doc. A/C.3/L.572.
259. It was rejected 32 votes to 13. (737th Mtng)

which one could not be employed was adopted. The British representative (Sir Samuel Hoare) felt, *inter alia*, that the word "education" was misleading as the family as such was not responsible, the parents were responsible and in any event in most instances parents could not afford a private tutor, so in fact educational institutions were responsible.⁽²⁶¹⁾ In response it was pointed out that "education" in the article was to be taken in its widest sense as meaning upbringing.⁽²⁶²⁾ The final wording of the Article as adopted by the third Committee declared:

The States Parties to the present Covenant recognise that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses;
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits;

260. U.N.Doc. A/C.3/L.575

261. U.N. GAOR, 11th sess., Third Committee, Agenda Item 31, pp.279-280; U.N. Doc. A/C.3/SR.736.

262. Mr. Macchia (Italy), U.N. GAOR, 11th sess., Third Committee, *op.cit.*, p.284.

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3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

The importance of this article is that it stresses the role of the family in protecting and nurturing the child, and reinforces, especially in paragraph one the importance of education of the child, and the family role in supporting this.

3) Articles 14 and 15 on Educational Rights

In 1956 Res. 833 (IX) (4 December 1954) the Secretary-General was asked to collect the observations of the specialised agencies, and having received them distribute them to governments for comments.

The U.K. government proposed deletion of Article 15 as it was "unrealistic", and in any event should be dealt with by UNESCO. The

U.K. also proposed certain drafting amendments.⁽²⁶³⁾

Australia, in its comments,⁽²⁶⁴⁾ supported the deletion of Article 15 as the right to free and compulsory primary education was protected by Article 14. Article 2 of the Covenant would ensure its implementation.

The Netherlands⁽²⁶⁵⁾ suggested that not all education needed to be made progressively free as long as "finance" was not a barrier to education. Yugoslavia⁽²⁶⁶⁾ and Hungary⁽²⁶⁷⁾ emphasised the unity of civil and political and economic, social and cultural rights. Both stressed that human rights should not be a pretext to violate Article 2(7) of the U.N. Charter concerning domestic jurisdiction.

Articles 14 and 15 were relatively detailed mainly because UNESCO favoured that style.⁽²⁶⁸⁾ It was only towards the end of 1957 that the Third Committee commenced consideration of the articles on the right to education.

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263. E.g. the word "professional" should read "vocational" in Article 14. G.A.O.R., Agenda Item 28 (Part One) Annexes, 10th Sess., N.Y., 1955; U.N. Doc. A/2910/add.1 (27 July 1955).
264. U.N.Doc. A/2910/Add.2 (2 August 1955).
265. U.N.Doc. A/2910/Add.3 (13 September 1955).
266. U.N. Doc. A/2910/Add.5 (4 October 1955).
267. U.N.Doc. A/2910/Add/ (13 October 1955).
268. U.N.Doc A/2924 p.112. A fact regretted by the U.K. G.A.O.R. 12th sess. Third Committee, SR., p.90, and Israel G.A.O.R. 12th sess. 3rd Committee, 782nd Mtng, p.103.

Article 14

The Third Committee considered article 14 at its 779th to 788th meetings.⁽²⁶⁷⁾ The Soviet representative (Mr Morosov) supported Article 14 as it stood,⁽²⁷⁰⁾ as did UNESCO (Mr. Maheu)⁽²⁷¹⁾. At the 782nd meeting (16 October 1955) a Working Group was established to reconcile the amendments, it met three times under the Chairmanship of Mr. Lopez (Philippines).⁽²⁷²⁾ Its proposals are outlined below.

a. Fundamental Education

Canada felt that the expression fundamental education was ambiguous. Did it refer exclusively to adult education or to a type

269. GAOR, Annexes, 12th sess., NY, 1957; U.N.Doc. A/3764 and Add.1, p.1.Ten countries had submitted eight conflicting amendments.
270. GAOR 12th sess., Third Committee, Summary Records, 779th Mtng (11 October 1957), p.87. As did Burma (782nd Mtng), Tunisia and Syria (783rd Mtng).
271. *Op.cit.* 780th Mtng (14 October 1957) p.89.
272. It comprised representatives of all those states that had submitted amendments except the U.K. and Chile. A representative from UNESCO also attended. *Report of the Working Party on Article 14 of the Draft Covenant on Economic, Social and Cultural Rights*, U.N.Doc. A/C.3/L.625 (18 October 1957).

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of education, (reading/writing/ how to live)?⁽²⁷³⁾ UNESCO explained that the term fundamental education referred to "a complete programme of instruction" designed for illiterates that covered not just reading and writing but also technical, and ethical matters. India pointed out that there were many illiterates in India still, but they could not be called uneducated even though they had received no formal schooling they took active interest in the national life.⁽²⁷⁴⁾ Iraq pointed out that once there was universal compulsory primary education available freely to all this section on "fundamental education would be otiose."⁽²⁷⁵⁾

b. Independent Education

Ireland (Miss MacEntee) felt that the article was lopsided as it protected access to education but not the right to educate which was equally important and guaranteed intellectual freedom and high standards. She proposed an amendment to paragraph three of the

273. GAOR 12th sess., Third Committee, Summary Records, 779th Mtng (11 October 1957), p.88.
274. GAOR 12th sess., Third Committee, Summary Records, 780th Mtng (14 October 1957), pp.89-90.
275. *Id.* 780th Mtng, p.90. UNESCO stated that as there were millions of illiterates and many years to go before universal compulsory primary education was achieved the clause should be retained. (781st Mtng). The UNESCO position was also supported by Ceylon (781st Mtng) and Iran (783rd Mtng).

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article that would stress the importance of the parental role⁽²⁷⁶⁾ and the right to educate children outside of school, in the home for example.⁽²⁷⁷⁾ Ireland therefore proposed adding a fourth paragraph to

276. The Irish proposal was supported by Venezuela (782nd Mtng). The proposal of Belgium was to widen the parental choice granted by the third paragraph of article 14 to cover agnostic opinion:

Replace the last 2 1/2 lines of Paragraph 3 by the following:

"To ensure the education of their children in conformity with their religious and philosophical convictions."

U.N. Doc A/C.3/L.623 (15 October 1957).

277. *Id.* Irish amendment proposal. In Paragraph 3 of the article, substitute for the word "liberty" the word "right" and for the word "schools" the words "means towards education". The proposal was supported by India who stressed the importance of private education especially to safeguard the rights of minorities. GAOR 12th sess., Third Committee, SR, 780th Mtng (14 October 1957), p.89. The U.K. cautioned against any wording that may involve the State in any expense (780th Mtng p.90). Turkey opposed the concept of home education (782nd Mtng, p.101). Tunisia and El Salvador opposed the amendment as it might force states to financially support parental choice of non-state schools. It was also opposed by Poland and Iraq (783rd Mtng). The Federation of

article 14.⁽²⁷⁸⁾ This was opposed by Bulgaria.⁽²⁷⁹⁾ Guatemala suggested some drafting changes to paragraph three,⁽²⁸⁰⁾ including the deletion of the phrase ensuring that private schools conform with state minimum conditions as he felt that it was self-evident that schools should be subject to state regulation. The U.K. felt that the phrase should be retained in the interest of the child.⁽²⁸¹⁾

c. Aims of Education

- (1) Development of personality and abilities of the child

Article 14 stated that education should "encourage" the development of the human personality. Pakistan observed that the

Malaya supported the Irish proposals, except that relating to home education. (783rd Mtng).

278. GAOR 12th sess., Third Committee, Summary Records, 779th Mtng (11 October 1957), p.88. General Assembly 12th Session 3rd Committee Agenda Item 33 A/C.3/L.617 (11 October 1957):

4. No part of this article shall be construed so as to interfere with any rights of individuals and/or bodies to establish and control educational institutions, subject always to the requirement that every child shall receive that minimum of education established in the proceeding paragraph.

279. 782nd Mtng.

280. 780th Mtng.

281. 780th Mtng, p.90. This was supported by Uruguay (782nd Mtng).

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right to education should mean that the reasoning powers and moral faculties of the child should be developed to their utmost according to their capacities.

(2) Promotion of internationalism

Pakistan spoke in favour of the promotion internationalism in education and the diminishment of nationalism.⁽²⁸²⁾ The aims of education were wider than those suggested in the draft article and thus Belgium proposed a modified paragraph One.⁽²⁸³⁾

282. He suggested that UNESCO should examine national curricula on history and geography to remove defects. (781st Mtng).

283. U.N.General Assembly, 12th Session, 3rd Committee, Agenda Item 33 U.N. Doc. A/C.3/L.623 (15 October 1957):

1. The states' parties to the covenant recognize the right of everyone to education. They recognize that education shall, on the one hand, encourage the full development of the human personality, a sense of its dignity and respect for such moral and spiritual values as human rights and the fundamental freedoms: On the other hand, that it shall suppress all incitement to racial and other hatred and enable all persons to participate effectively in a free society.

Education shall promote understanding, tolerance and friendship among all nations and all racial, ethnic or

(3) Social mobility

India also that the term "merit" in article 14(2)(c) should be widely interpreted and not just include school marks and examination results, for otherwise "pupils from poor and backward classes of the population would be put at a disadvantage". (284)

(4) Suppression of racial hatred

Guatemala felt that the clause on suppression of racial hatred should be deleted. (285) After the presentation of the Working

religious and spread knowledge of the activities in the United Nations, particularly for the maintenance of peace.

(782nd Mtng).

284. GAOR 12th sess., Third Committee, Summary Records, 780th Mtng (14 October 1957), p.89. Iraq and Ceylon shared this concern *Id.*, p.90, 95. The Indian representative stressed the importance of equal opportunity.

285. 780th Mtng p.90. This was supported by Ecuador (780th Mtng p.91), China (781st Mtng p.93), Egypt, Chile, Venezuela, Australia (782nd Mtng) and the U.K. (783rd Mtng). The Peruvian amendment to paragraph one of article 14, that diminished the references to racial hatred was supported by Sweden. The Peruvian proposed paragraph one read as follows:

The States' Parties to the Covenant recognize the right of everyone to education and that the purpose of

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Groups's report, the phrase concerning racial hatred in paragraph one continued to be the object of contention. The amended paragraph 1 of article 14 was put to the vote and was adopted with only the U.S.A. and Australia abstaining. '200' At the 787th Meeting a Costa Rican-Greek amendment to delete the reference to racial hatred was passed

education shall be the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and shall further the activities of the United Nations for the maintenance of peace and enable all persons to participate in a free society exempt from racial or other hatred.

U.N. Doc. A/C.3/L.624 (15 October 1957).

Only the USSR supported the clause which was aimed at suppressing racial discrimination in schools (782nd Mtng).
286. 787th Mtng, p.131. Australia abstained as it failed to see how such an aim of education could be legally achieved or enforced. Australia had no objections to the aims declared as such.

by 35 votes to 22. (287)

d. Minority rights

Bulgaria, having boasted about Bulgarian educational achievements since the Second World War, supported article 14 proposing that the rights of minorities to be educated in their own language should be assured.

e. Implementation of the right to education

The Netherlands supported the article and introduced an amendment to allow states to vary in the way they realised the right enshrined. (288) The Bulgarians also supported the amendment suggested

287. 787th Mtng, p.130. U.N. G.A.O.R., 12th Session, 3rd Committee, Agenda Item 33, U.N.Doc. A/C.3/L.628 (22 October 1957).
288. 781st Mtng p.93. United Nations General Assembly 12th Session 3rd Committee, Agenda Item 33 U.N. Doc. A/3/L.618 (14 October 1957) Article 14, Paragraph 2: In Subparagraph B replace the words: "And shall be made progressively free" by the words: "And measures shall be taken to ensure that no one shall be deprived of secondary education for financial reasons only". Article 14, Paragraph 2: In Subparagraph C replace the words: "And shall be made progressively free" by the words: "And measures shall be taken to ensure that no one shall be

deprived of higher education for financial reasons only". This was opposed by Ceylon as it could create invidious distinctions in the minds of students. (781st Mtng, p.95). Tunisia opposed it on the grounds that it could force states to support post-primary education of those who lacked the means. This would be impossible in some cases. (783rd Meeting). It was also opposed by the Polish representative who felt that the wording could imply that students could be banned from education for non-financial reasons. (783rd Mtng). This was rebutted by Sir Samuel Hoare (U.K.) who pointed out that the general non-discrimination clause (Article 2) would cover article 14 (783rd Mtng). It was supported in essence by the proposed Belgian amendments. U.N. Doc. A/C.3/L.623 (15 October 1957):

(B) that secondary education, and its different forms including technical and professional secondary education, shall be made generally available and accessible to all by various methods, including the progressive introduction of free education;

(C) that higher education shall be made equally accessible to all, on the basis of merit, by various methods, including the progressive introduction of free education;"

Indonesia also supported the Dutch amendment. (782nd Mtng).

by Romania. This proposal would have added a fourth paragraph thus:

The state parties to this Covenant undertake to ensure enjoyment of the right to education by such measures as the development of a system of schools at all levels and adequate fellowship system and the continuous improvement of the material conditions of the teaching staff so as to enable them to properly to discharge their functions. (287)

This proposal was criticised for making article 14 even more lengthy, setting down immediate obligations (not progressive ones), and being too specific (the Covenant should establish aims), and teacher remuneration was out of place in article 14. (290)

Canada pointed out the difficulties that Federal states would have difficulty in agreeing to the Covenant in the absence of a Federal-state clause. (291) She wished to ensure that the article was seen as being programmatic to ensure a high acceptance of the

Iraq (783rd Mtng) opposed both the Dutch and Belgian amendments as weakening the rights enshrined in article 14.

289. United Nations General Assembly, 12th Session, 3rd Committee, Agenda Item 33; U.N.Doc. A/C.3/L.620 (15 October 1957). The proposal was supported by Mrs Mironova (USSR) (782nd Mtng).

290. Sir Samuel Hoare (U.K.) (783rd Mtng). Miss MacEntee (Ireland) also criticised the proposal. (783rd Mtng).

291. Mr Vela (Guatemala) supported this point. *Id.* 780th Mtng p.90. As did Miss Fujita (Japan) *id.*, p.91 and Mr Pyman (Australia) (782nd Mtng, p.103).

Covenant. (272)

f. The Working Group Proposal

The Working Group proposed the following text to the Third Committee:

1. The States' Parties to the Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society and promote understanding, tolerance and friendship among all nations and all racial, ethnic, or religious groups; to this end it shall suppress all incitement to all racial and other hatred and further the activities of the United Nations for the maintenance of peace.
2. The states' parties to the covenant recognised:
 - (a) That primary education shall be compulsory and available free to all;
 - (b) That secondary education, in its different forms, including technical and vocational and secondary education shall be made generally available and

292. GAOR 12th sess., Third Committee, Summary Records, 779th Mtng (11 October 1957), p.88. Peru supported her in this. *Op.cit.* 780th Mtng, p.90.

accessible to all by every appropriate means, and in particular, the progressive introduction of free education;

- (c) That higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular the progressive introduction of free education;
 - (d) That fundamental education shall be encouraged or intensified for those persons who have not received or completed the whole period of their primary education;
 - (e) That, to achieve these objectives, the development of a system of schools at all levels shall be actively pursued, and adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States' Parties to the Covenant undertake to have respect for the rights of parents and when applicable, legal guardians to choose for their children's schools other than those established by the public authorities which conform to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article 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 principles set forth in Paragraph 1 and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

The second paragraph had been opposed by the Netherlands, the rest being adopted unanimously. Nine countries proposed a further eight amendments in the debate that followed the presentation of this proposal. Yugoslavia preferred the original text of article 14. In particular it objected to the change in paragraph three that states should respect the rights of parents to choose .. (previously a liberty). This could entail obligations on a state to provide schooling of parents' choice.²⁷³ The phrasing was also opposed by Japan²⁷⁴ as the parents should not have an unfettered right as regards the religious education of their children, for the children themselves may have an interest in the matter. It was supported and

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293. 784th Mtng. A plea echoed by El Salvador 785th Mtng, which feared that the separation of Church and State would be threatened by the phrasing used. Ethiopia also preferred the original wording (786th Mtng). The use of the word "liberty" was also supported by Ukrainian S.S.R. (787th Mtng).
294. 786th Mtng. Supported by Mrs. Afnan (Iraq).

welcomed by New Zealand. (275)

Yugoslavia emphasised that the new paragraph 4 would allow states to ensure minimum education standards, in conformity with its "social and political system". Liberia supported article 14. (276) Bolivia supported the intention behind the new paragraph 4 but submitted alternative wording. (277) Poland regretted the inclusion of the new article 14(4). (278) Sweden felt that it was superfluous as

295. 786th Mtng. It was also supported by Denmark, Norway, Greece, and Uruguay. It was further supported at the 787th Meeting by Israel.

296. The new article 14(4) was warmly welcomed by Argentina (784th Mtng). It was also supported by India (785th Mtng), Colombia (786th Mtng), and Israel (787th Mtng).

297. 786th Meeting.

4. Private bodies and persons have the right to establish and direct educational institutions in accordance with the law on such matters in the state's concern and the principles laid down in this article."

U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, U.N.Doc.A/C.3/L.629 (22 October 1957). This was rejected by 22 votes to 17 with 35 abstentions, 788th Mtng, p.134.

298. 785th Mtng.

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the right to attend private schools was already protected. (277)

Argentina regretted the inclusions of the Romanian amendment in Article 2(e) which required the development of a school system and improvement of the 'material conditions' of teaching staff. (300) It was supported by Czechoslovakia.

At the next meeting article 14(2) (a) to (d) were adopted with large majorities. Article 14(2) (e) was adopted by 35 votes to 17 with 18 abstentions. (301) Article 14(3) was amended so that the word right was replaced by the word "liberty" by a vote 34 to 19 with 15 abstentions. The Uruguayan representative then withdrew his

299. (785th Mtng). In this he was supported by the Japanese, Moroccan, and Tunisian representatives (786th Mtng). Also by Mr. Pyman (Australia) (787th Mtng).
300. France was cautious, but also felt that it was out of place in the Covenant (785th Mtng). Canada considered that article 14(2) (e) was unnecessary as its message was implicit in article 14, and specific measures should not be mentioned (785th Mtng). Chile and India felt likewise (785th Mtng). The U.K., El Salvador and Saudi Arabia also opposed its inclusion (785th Mtng). Also opposing it at the 786th Meeting were Japan, Pakistan, Netherlands, Greece, Morocco, Venezuela and New Zealand. It was opposed at the 787th Meeting by Israel, Philippines, and Australia.
301. 788th Meeting. Paragraph 2 was adopted as a whole by 64 votes to none with 6 states abstaining.

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amendment⁽³⁰²⁾ on the understanding that the *rapporteur's* comments would state that no obligation fell on the State to support private religious schools.⁽³⁰³⁾ The amended paragraph 3 was then adopted with no negative votes, and only the U.S.A. and Ceylon abstaining.

Paragraph 14(4) was adopted by 27 votes to 23 (with 25 abstentions).⁽³⁰⁴⁾

Article 14 as a whole was adopted by 71 votes to none with 4 abstentions.⁽³⁰⁵⁾ The Australian and United Kingdom delegations explained that had article 2(e) not been present they would have voted for article 14.⁽³⁰⁶⁾ The final text of article 14 (which after the conclusion of the initial articles of the Covenant became article

302. Made verbally at the 785th meeting, to the effect that states should not be obliged to support religious education.
303. An assurance was given by the Chairman, Mrs. Aase Lionaes (Norway). 788th Mtng .
304. 788th Meeting, p.134. Saudi Arabia explained his vote against article 14(4). He felt that it was dangerous for individuals and groups to have a right to open schools as they might be used for propaganda. States should have the power to refuse such establishments. 788th Mtng. Mexico explained that article 4 of the Covenant, yet to be adopted would cover the Saudi Arabian point.
305. Tunisia, the U.K., the U.S.A., and Australia abstaining. Mtng 788, p.135.
306. 788th Meeting.

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13) read as follows:

1. The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society and promote understanding, tolerance and friendship among all nations and all racial, ethnic, or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The states parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education, in its different forms, including technical and vocational and secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified

as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the Covenant undertake to have respect for the liberties of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article 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 principles set forth in Paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

Article 15

Discussion of article 15 commenced at the 789th meeting of the Third Committee. The U.K. had submitted a proposal that the article should be deleted,⁽³⁰⁷⁾ on the grounds that methods of implementation should be left to the specialised agencies, in this case UNESCO. No other article contained as much detail, why should this one specify actions to be undertaken?⁽³⁰⁸⁾

Iran felt that article 15 added nothing new, and that anything new could be incorporated in article 14(2)(e) just adopted.⁽³⁰⁹⁾ The USSR (Mr Morosov) supported article 15 mainly to underline the desperate situation in the non-self-governing territories where extra attention was needed to implement the rights

307. U.N.Doc. A/2910/add.1; U.N. Doc. A/C.3/L.460 p.25.

308. A position fully supported by Australia that had also proposed to eliminate article 15. 789th Meeting. The Dutch delegate withdrew its amendment to article 15 (U.N. Doc. A/2910/add.3) and supported instead the U.K. position (789th Mtng).

309. 789th Meeting. At the 791st Mtng Ireland suggested the transfer of article 14(2)(d & e) to article 15, so that all the implementation clauses would be together. A proposal supported by Iraq.

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contained in article 14.⁽³¹⁰⁾ France (Mr Juvigny) supported article 15 as the high rate of illiteracy in the world (roughly 50%) justified the exceptional measure.⁽³¹¹⁾ Saudi Arabia accused the colonial powers of attempting to wriggle out of an obligation that would involve them in heavy expenditure.⁽³¹²⁾ The Ukrainian SSR thought that perhaps the colonial powers wished to maintain dependent populations in ignorance and thus prolong their rule.⁽³¹³⁾

The Netherlands sought to explain that there was a constitutional problem for colonial powers, they had to consult the people of the Non-Self-Governing Territories. The UNESCO representative spoke in support of article 15 at the 790th Meeting, emphasised the fundamental nature of the right in question for the exercise of the other rights in the Covenant and the importance of planning in implementing it.⁽³¹⁴⁾

Argentina felt that article 15 imposed unrealistic requirements (for many independent states as well as non-self-

310. A point supported by Mr Rojas (Venezuela) who quoted relevant statistics. (789th Mtng), also supported by Bulgaria (790th Mtng).

311. 789th Mtng.

312. 789th Mtng.

313. 790th Mtng. Supported by Poland (791st Mtng).

314. The Netherlands delegation decided to support the inclusion of article 15 after hearing the UNESCO representative (791st Mtng), though still maintaining its constitutional objection to the phrase "or other territories under its jurisdiction".

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governing territories), and moreover made the Covenant unbalanced as none of the other articles had such detailed implementation plans.⁽³¹⁵⁾

Article 15 in its original form, was adopted by 60 votes to 3 with 8 abstentions.⁽³¹⁶⁾ The meeting then adopted the Iraqi-Irish amendment,⁽³¹⁷⁾ which decision was reversed at the next meeting,⁽³¹⁸⁾

315. 790th Mtng.

316. 793rd Mtng.

317. U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, U.N. Doc. A/C.3/L.632/Rev.1

Article 15:

With a view to implementing fully Paragraph 2 of the proceeding article:

1. Each state party to the covenant undertakes that the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
2. Each state party to the covenant which at the time of becoming a party to this covenant, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education free of charge, undertakes
 - (a) Within two years to work out and adopt a detailed plan

of action for the progressive implementation within a reasonable number of years to be fixed in the plan of the principle of compulsory primary education free of charge for all;

- (b) That fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

Subparagraphs 2(D) and 2(E) were deleted from Article 14.

318. Delegates fearing that a full consideration of the revised Iraqi-Irish provision would take too long. United Nations General Assembly, 12th Session, 3rd Committee, Agenda Item 33, U.N.Doc. A/C.3/L.632/Rev.2

DRAFT INTERNATIONAL COVENANTS ON HUMAN RIGHTS

IRAQ AND IRELAND: REVISED AMENDMENTS TO ARTICLE 15

OF THE DRAFT COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

(E/2573, ANNEX I) 1/

1. Insert at the beginning of Article 15 the following text:

With a view to implementing fully Paragraph 2 of the preceding article:

1. The states party to the covenant undertake that the development of a system of schools at all levels

shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

2. The existing text to become Paragraph 2 of the article.
3. Add to the text as amended the following paragraph:

The states party to the covenant undertake that fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

4. The whole article as amended to read as follows:

"Article 15"

With a view to implementing fully Paragraph 2 of the proceeding article:

1. Each state party to the covenant undertakes that the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
2. Each state party to the covenant which at the time of becoming a party to this covenant, has not been able to

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the Committee voting instead to consider article 16. The form of the articles on education did not materially change from this point on and they were adopted by the General Assembly in 1966. Article 14 (as article 15 became) reads as follows:

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to

secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education free of charge, undertakes within two years to work out and adopt a detailed plan of action for the progressive implementation within a reasonable number of years to be fixed in the plan of the principle of compulsory primary education free of charge for all:

3. The states party to the covenant undertakes that fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.
5. In consequence of the above changes, Subparagraph 2(D) and 2(E) from Article 14 are transferred to Article 15.

be fixed in the plan, of the principle of compulsory primary education free of charge for all.

4. The Covenant on Civil and Political Rights

1) Article 18(4): Parental Rights

Article 18 of the Covenant on Civil and Political Rights (on the freedom of thought, conscience and religion) as adopted by the Commission on Human Rights did not mention parental rights in relation to the education of their children.⁽³¹⁹⁾ The Third Committee discussed the article at its 1021st to 1028th Meetings.⁽³²⁰⁾ A Greek amendment⁽³²¹⁾ suggested adding wording similar to that of article 14(3) of the draft Covenant on Economic, Social and Cultural Rights approved at the 12th session.⁽³²²⁾ The repetition was thought

319. U.N.Doc. E/2573 Annex I B. It does of course protect "religion" and includes the right to "manifest" this in relation *inter alia* to "teaching".

320. U.N. GAOR, 15th sess., Third Committee, Agenda Item 34, (1960-1961) pp.197-231.

321. U.N.Doc. A/C.3/L.875, submitted at the 1023rd meeting, by Mrs. Mantzoulinos; U.N. Doc. A/C.3/SR.1023.

322. See above p.259.

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necessary as some states might not sign both Covenants.⁽³²³⁾ Asked by Mr. Tejera (Uruguay) whether the clause would compel states to provide religious instruction in the faith of the parent's choice,⁽³²⁴⁾ the Greek representative responded negatively.⁽³²⁵⁾ The Greek amendment was adopted 30 - 17 (27 abstentions)⁽³²⁶⁾ despite reservations expressed by states that it was individual rights that article 18 was protecting, not rights of third parties.⁽³²⁷⁾ The east European block voted against the proposal.

2) Article 24: The Rights of the Child

In 1961 Poland introduced a new article on the rights of the child for consideration for inclusion in the draft Covenant on Civil

323. U.N. GAOR, 15th sess., Third Committee, *id.*, p.218; U.N. Doc. A/C.3/SR.1025.

324. U.N. GAOR, 15th sess., Third Committee, *id.*, p.207; U.N. Doc. A/C.3/SR.1023.

325. U.N. GAOR, 15th sess., Third Committee, *id.*, p.209; U.N. Doc. A/C.3/SR.1024.

326. U.N. GAOR, 15th sess., Third Committee, *id.*, p.228; 1027th Mtng.

327. E.g. Pakistan, U.N. GAOR, 15th sess., Third Committee, *id.*, p.211; U.N. Doc. A/C.3/SR.1024. Also Indonesia, U.N. Doc. A/C.3/SR.1027.

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and Political Rights.⁽³²⁸⁾ This was no doubt inspired by the successful conclusion of the Declaration on the Rights of the Child.⁽³²⁹⁾

The new article was considered by the Third Committee at its seventeenth session.⁽³³⁰⁾ On the suggestion of Saudi Arabia⁽³³¹⁾ the matter was referred back to the Commission on Human rights. Several amendments had been proposed fleshing out the rights due a child (and including educational rights) but there were grave misgivings about picking out children as a special group in a universal Covenant.

The Commission on Human Rights considered the new article at its 19th session.⁽³³²⁾ Brazil and Cambodia supported the draft.⁽³³³⁾

328. U.N. G.A.O.R., Agenda Item 35, Annexes, 16th sess., 1961-1962. U.N.Doc. A/C.3/L.943.
329. See below chapter five.
330. U.N. G.A.O.R., Agenda Item 43, Annexes, 17th sess., U.N.Doc. A/5365, paras 5-30.
331. U.N.Doc. A/C.3/L1022 (8 November 1962).
332. E.S.C.O.R., U.N.Doc. E/CN.4/850 (28 February 1963). The Polish draft article (U.N. Doc. E/CN.4/L.649) read as follows:
1. Every child shall be entitled to special protection by the family, society and the state, without any discrimination.
 2. The family, society, and the state shall concern

France⁽³³⁴⁾ considered the proposal "neither opportune nor necessary". The Covenant was universal, adding rights for children would weaken it and make it out of balance. Children's rights should be enshrined in a separate Convention. UNESCO also opposed the

themselves with the physical and spiritual development of children, so that for their own welfare, for the welfare of society, children are suitably prepared for work according to their abilities.

3. Birth out of wedlock shall not affect the rights of the child. The state's party to this covenant shall progressively adopt suitable measures to improve the legal status of children born out of wedlock.
4. Every child shall be entitled from his birth to a name and a nationality.

Chile also suggested a draft (U.N.Doc. E/CN.4/L.650)

The States Party to this covenant recognize special measures should be adopted to protect and assist all children and adolescence, without any exceptional discrimination whatsoever.

333. *Id.*, 1,2. Denmark was also in favour. U.N.Doc.

E/CN.4/850/Add.3 p.1

334. U.N.Doc. E/CN.4/850/Add.2. Supported by the U.K., U.N.Doc.

E/CN.4/850/Add.3, (20 March 1963) p.3, and Australia U.N.Doc.

E/CN.4/850/Add.12 (2 October 1963) p.1. See U.N.Docs.

E/CN.4/SR.749-752 for the summary record of the debate.

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proposed article pointing out that as regards education article 14 of the Economic, social and Cultural Rights Covenant and the Convention Against Discrimination in Education already covered the issue.⁽³³⁵⁾ The Commission was divided and sent the issue back to the General Assembly for final decision.⁽³³⁶⁾ At its eighteenth session the article on children's rights was re-introduced.⁽³³⁷⁾ Again there was division as those in favour of the article (children being in need of special protection) and those against (children, along with everyone else, were already covered by the rights set out in the Covenant).⁽³³⁸⁾ The amended article was adopted by 57 votes to one with 14 abstentions. It now forms article 24 of the Covenant in the form it was here adopted. It is further considered in relation to the

335. U.N.Doc. E/CN.4/851 (add.1) (7 March 1963).

336. U.N. Economic and Social Council Official Records 36th Session, Resolution, Supplement No. 1 (U.N. Doc. E/3816) p.25. Resolution G adopted at the 36th Session, the 1,280 plenary meeting 12 July, 1963, the ECOSOC transmitted to the General Assembly, the Commission's report (19th Session) (E/CN.4/SR.749-752) on the desirability of including an article on the rights of the child in the draft covenants on human rights.

337. U.N. G.A.O.R., Agenda Item 48, Annexes, 18th sess., 1963. U.N.Doc. A/C.3/L.1174.

338. For a summary of the debate see U.N.Doc. A/5411, pp.18 et seq.

proposed convention on the rights of the child. (339)

5. CONCLUSIONS-SUMMARY

It is evident from reading through the archival materials on the drafting of the International Covenants on human rights, particularly when focusing on the evolution of the right to education, that one cannot make too much of these *travaux préparatoires* from a legal point of view. There were many states involved in the complex process that went on for many years. Where particular ideas may have been excluded in one Committee or drafting group in one year, the same proposal often met with favour in another year at a different level in the hierarchy of the drafting forums. One cannot confidently talk of a unity of purpose amongst the drafting states.

1) Welfare rights and international control

However over the years of the negotiations, the parties, in particular the main protagonists (i.e. the East-West parties) were clearly influenced by each other's positions. Each side modified its stance to accommodate in some way the other's attitude. This was a slow process, akin to the grinding down of rocks, and was as much a product of the passing of years and internal domestic changes as any direct negotiating. Thus the American position of non-adoption in the early fifties coincided with an acceptance of economic social and

339. Below chapter 5.

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cultural rights by the West (albeit in a separate covenant). The acceptance was partially to avoid losing the propaganda war with the East during the period of the Cold War, but was also spurred on by the actual emergence of welfare states in Western Europe. At the generic level the debate on whether to include social, economic and cultural rights shows the West ultimately accepting what they had originally fought against, the adoption of legally binding norms in the field of welfare rights. At the same level the East ultimately had to accept a modicum of international control over the norms, thus accepting incursion into its strongly guarded domestic jurisdiction. This is highly important in historical terms. The international platform created for airing internal politico-juridical issues is indeed wobbly³⁴⁰ and in its infancy. The control mechanisms established by the two Covenants are fragile seeds indeed. Yet here, in germination, are created organs for over-sight of state practice in the most delicate arenas of domestic political action. Of course we are here concerned mainly with the micro-picture in relation to one such arena, education, and in one part of the world, western Europe, a part of the globe where such a flower is most likely to blossom, if anywhere. However this is not to lose sight of the fundamental importance of state acceptance of international norms to govern the conduct of internal affairs.

340. Its fragility particularly shown during the recent financial crisis in the U.N. where the human rights programme in general had cuts imposed far above the average.

The East block was keen to legalise the right to education. It wanted a definite obligation imposed on states to create schools systems. The West opposed this. The West was largely concerned that the content of education should not be too much under state control. They thus placed emphasis on parental rights, the right to teach/establish schools (*liberté de l'enseignement*) and pluralism. They opposed the obligation to establish schools as such, considering that if at all acceptable, the right should at least be "programmatic".

2) Equality of opportunity

This is protected by the attempt to make education freely available to all on equal terms. It is guaranteed by compulsion at the primary level. The West was concerned that the rights enshrined should be realistic. The implementation of the rights should not be provided for in a Covenant but rather plans and such programmes were in the province of the Specialised Agencies, particularly UNESCO. In the end article 14 was adopted requiring states to establish a plan of action to secure the right of free, compulsory, primary education, "within a reasonable number of years".

3) Children's Rights

The trend of the development of the Covenants was marked by initial paternalistic attitudes to children, gradually giving way to

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acceptance of children's rights.⁽³⁴¹⁾ There was considerable worry when the article on the rights of the child was adopted that it would be restrictively interpreted in the sense that as this article was specific it could be read to exclude children from the rights elsewhere enunciated. To the extent that this is a tenable interpretation its ill effects will be ameliorated by the adoption of the Convention on the Rights of the Child which is still several years away.⁽³⁴²⁾ Children are clearly recognised as recipients of the right to education in the ESC Covenant. It is compulsory at the primary level only to assure that they receive it.

4) Parental Rights

These, at the micro-level, were a lever that helped establish the place of education rights in the Covenants, against initial Western reluctance. This resulted from their importance in terms of "traditional" rights-analysis. In form, the rights of parental control were within a traditional mould, and thus acceptable. They could form part of the civil and political rights. These were rights exercisable against the state, and requiring no direct state action, but rather state restraint. Thus, for example, American

341. During the drafting of the Covenants the Declaration on the Rights of the Child was passed; see below Chapter 5. The article on the rights of the child was added at a later stage; see above p.268.

342. See chapter 5 below.

jurisprudence since at least the early twentieth century has specifically recognised the importance of the parental role in education.⁽³⁴³⁾ In Western Europe with similar traditions in relation to the role of parents⁽³⁴⁴⁾, and with the recent Nazi experiences in mind, the states involved had already adopted the European Convention on Human Rights and Fundamental Freedoms including in its First Protocol the protection of the parents against state encroachment in this area.⁽³⁴⁵⁾ This aspect of the right to education is established in both the Covenants.

At the seventh session of the Commission on Human rights the implementation of article 26(3) of the UDHR was debated in detail. The protection of non-state schooling (independent schools), minorities' right in relation to education, parental religious and other prerogatives, and the aims (pluralistic, internationalistic schooling) were all clearly in the minds of the speakers promoting the enshrinement of the right. Of these interests only that of minorities in relation to schooling of their children was not ultimately specifically protected.⁽³⁴⁶⁾

343. *Pierce v Society of Sisters* 268 U.S. 510 (1925).

344. See Part Three for further details.

345. See Chapter Seven for full details.

346. It was proposed for inclusion in the UDHR and Covenants by Denmark (see above p.160, 216) and by several other states in relation to the Covenant (see above pp.191-192). Generally

5) Minorities

The seemingly negative experience of the League of Nations had clearly given the protection of Minority rights a pejorative flavour. Most of the South American states were clearly nervous of any rights that might prevent assimilation of their populations, and later this lobby was joined by the newly independent states, who were equally intent on protecting their nation-building interests.⁽³⁴⁷⁾ The state interests clearly prevented minority status having any great impact in the Covenants in relation to education. In this respect the International Bill of Rights is a great step back from the protection according by the Minority Treaties of the period of the League of Nations.⁽³⁴⁸⁾

see also pp.232 *et seq.*

347. U.N.G.A.O.R., Agenda Item 35, Annexes, 16th sess., (U.N. Doc. A/5000) Report of the Third Committee, p.14. The African states were also concerned that "privileged" minorities might entrench their positions using such protection. 1103-1104th Mtngs.

348. See chapter 3 above. See also the recent activity of the Commission on Human Rights which has established a working-group to draft a Declaration on minorities' rights. See U.N.Docs E/CN.4/1986/43; E.CN.4/1987/32.

6) Independent Education

This difference (between the League and U.N. sponsored protection of minorities) could perhaps be justified on the grounds that all parents now had the right to control the education of their children. Clearly this was an aim of the Western representatives⁽³⁴⁷⁾ in the negotiations, but they sought only a limited parental control. Their intent was to ensure the protection of non-state schooling⁽³⁵⁰⁾, and a pluralistic outlook in state education.

349. The use of the term Western here in a general sense is of course ascribing a uniformity of view that is not really justified by the facts. The "western" view of any government varied according to the party in government at the time let alone the differences between different states. It is however too useful a generalisation to give up. Differences between Western positions are outlined in the text. Thus for example the U.K. during the second session of the Commission on Human Rights was all in favour of a binding Covenant whereas the U.S.A. (and U.S.S.R) opposed the idea (p.149 below). Also the Franco-Australian position in 1950, above, p.191.

350. E.g. Above p.145 (U.S.A.); also p.167 (Ukrainian S.S.R.); pp.210-211 (U.K. and others); general consideration in the Third Committee see pp.243 et seq.

7) Content of Education

Whenever the question of parental control of curriculum arose it was opposed.⁽³⁵¹⁾ Even after the inclusion of wording establish firmly the aims of the Covenant (thus excluding the Nazi parent syndrome which justified exclusion of parental control of the content of education),⁽³⁵²⁾ the opposition to parental rights in relation to what was taught continued.⁽³⁵³⁾ Thus parents seeking a particular language of instruction, or historical topic to be taught to further the continuance of the minority to which they belonged would have no rights under the Covenant. Article 18(4) was added late under pressure from the Third Committee⁽³⁵⁴⁾ and is narrowly drafted.⁽³⁵⁵⁾ Article 13(3) of the ESC Covenant is specific in allocating parental rights in relation to religious and moral education, by implication arguably excluding rights in other matters. Of course the freedom of thought conscience and religion protected in article 18 (of the Covenant on Civil and Political Rights) guarantees parental rights in this as in other fields.

351. E.g. USA above p.158. See generally pp.212 *et seq.*

352. Above p.243 *et seq.*

353. See above pp.254 *et seq.*

354. See e.g. the ninth session of the Commission on Human Rights, above n.237 and accompanying text.

355. Above p.266.

B) The Development of the norms

The Covenants differ in their modes of enforcement of the norms they establish. I have not completely outlined the methods of enforcement as finally adopted,³⁵⁶ but merely pointed out their creation. In this section I analyse the question of evolution of the norms since their adoption.

It is not the purpose of this section to assess the efficacy or otherwise of the system of implementation of the Covenant, but merely to assess whether its operation for over a decade has led to any development of the norms relating to education.

It was not until 1976, over ten years after the adoption of the Covenants in 1966 by the General Assembly, that they came into force. Since then their development has been gradual.

356. The evolution of the provisions on implementation has been studied and is summarised in Henkin, 'The United Nations and Human Rights', 18th Report of the *Commission to study the Organisation of the Peace*, (Oceana, N.Y., 1968) pp.120 et seq.

Civil and Political Rights

There have been numerous state reports under the system established by Part IV of the Covenant³⁵⁷ and the Human Rights Committee³⁵⁸ has also heard an increasing number of appeals from individuals under the Optional Protocol to the Covenant on Civil and Political Rights.³⁵⁹ The Committee has advanced the interpretation of the Covenant by issuing "general comments" on individual articles

357. See generally Fischer, D. D., 'International Reporting Procedures' in Hannum, H., (ed.), *Guide to International Human Rights Practice*, (U.Penn.P, Philadelphia, 1984) p.165; Jhabvala, F., 'The practice of the Covenant's Human Rights Committee, 1976-1982: Review of State Party Reports', (1984) 6 *H.R.Q.* 81; Gomez del Prado, J. L., 'U.N. Conventions on Human Rights: The practice of the Human Rights Committee and the Committee on the elimination of Racial Discrimination in dealing with the reporting obligation of State Parties', (1985) 7 *H.R.Q.* 492.
358. See generally Prounis, O. A., 'The Human Rights Committee: Toward resolving the paradox of human rights law', (1985) *C.H.R.L.R.* 103.
359. For a recent survey see Novak, M., 'UN - Human Rights Committee', in (1986) 7 *H.R.L.J.* p.287 and references therein.

of the Covenant. None have yet been issued on article 18,⁽³⁶⁰⁾ whereby, inter alia, the state parties undertake to "have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions".

However there has been a case under the Optional Protocol dealing with article 18(4). In *Hartikainen v Finland*⁽³⁶¹⁾, a Finnish school-teacher⁽³⁶²⁾ claimed that Finnish legislation⁽³⁶³⁾ was in violation of article 18(4) of the Covenant. The law required attendance by all children in classes on the history of religion and ethics, if they were not receiving either religious instruction in school or out of school. Atheists had the option of attending

360. In 1986 the Committee failed to agree a statement of general comments on article 27 dealing with minority rights.

361. Communication R.9/40. Report of the Human Rights Committee, G.A.O.R. Suppl. 40, Annex XV, p.147 (U.N.Doc. A/36/40). The views of the Human Rights Committee on this case are also reported in [1981] 2 *H.R.L.J.* 133.

362. He was also the General Secretary of the Union of Free Thinkers in Finland.

363. School Systems Act of 26 July 1968.

"comparable" courses out of school.⁽³⁶⁴⁾ He alleged that the textbooks used in these classes, written by Christians, imbued the classes with a religious nature. The Finnish government considered that their exemption provisions were a sufficient fulfillment of their Covenant obligations.⁽³⁶⁵⁾ They noted that they had had difficulty in implementing the neutral teaching of the alternative courses. They also argued that it was beyond the competence of the Committee to delve into the formulation of Finnish curricula.

The views of the HRC were that the requirement to study the history of religion and ethics was in itself unobjectionable if such an alternative course of instruction is given in a neutral and objective way and respected the convictions of parents and guardians who do not believe in any religion. The Committee noted the difficulties that the government was having in implementing its plans but nevertheless believed that "appropriate action" was being taken to overcome the problems.

In June 1983 Finland informed the Committee that it had improved the methods of teaching the history of religion and ethics courses. It had appointed a special inspector, intensified training of teachers, and started developing new methods of teaching the

364. The Finnish law provided that where five or more children requested religious instruction in a particular denomination then it should be provided.

365. *Views op.cit., Para.7.1 and 7.2.*

subject. (366)

The case confirms that the Covenant on Civil and Political Rights guarantees pluralism in teaching about religion, in deference to the wishes of parents. This implies a wider societal pluralism.

The most recent threat to the system of implementation has been caused by the financial crisis at the U.N. (367) This has led to abandonment of meetings (368) and the decision to cut back on producing the summary records of the Human Rights Committee. (369)

Economic, Social and Cultural Rights

Shortly after the adoption of the Covenant on January 3 1976 the Economic and Social Council adopted Res/1988(LX) (370) that established (following the directions given in article 17 of the

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- 366. [1984] 5 *H.R.L.J.* 217.
 - 367. The HRC budget was cut by 30%.
 - 368. Report of the Human Rights Committee, U.N.G.A.O.R., 41st sess., Suppl.40. (U.N. Doc. A/41/40) p.98.
 - 369. Human Rights Committee, (1986) 37 *The Review of the International Commission of Jurists*, p.25.
 - 370. The procedural resolutions and decisions relating to this Covenant are conveniently collected in U.N.Doc. E/C.12/1987/1 (17 December 1988) (sic!).

THE INTERNATIONAL BILL OF RIGHTS

The Covenants

Covenant) a staggered biennial⁽³⁷¹⁾ reporting system by states parties to the Covenant. During the first stage the reports on the rights covered in articles 6-9 were to be sent to the Secretary-General by 1 September 1977. The Resolution also made provision for involvement of the Specialised Agencies in accordance with articles 16(2) and 18 of the Covenant.⁽³⁷²⁾ The Resolution established a sessional working group⁽³⁷³⁾ to help it consider reports.⁽³⁷⁴⁾ After various experiments with the composition and appointment of the

371. This is triennial for the second and subsequent cycles of state reports. Dec. 1985/132 *id.*
372. UNESCO has so far produced one rather bland report, comprising mainly of extracts from its own documents; U.N. Doc. E/1982/10 (25 Feb. 1982). A similar one is in preparation for presentation at the 1988 session of the Committee on ESC Rights. UNESCO Doc. 127 EX/48 Rev. (15 Oct. 1987). See generally Alston P., 'The United Nations' Specialised Agencies and implementation of the International Covenant on Economic, Social and Cultural Rights', (1979) 18 *C.J.T.L.* 79.
373. Its composition was established by Dec. 1978/10 adopted in May 1978. Its working methods by Decision 1979/43.
374. The specialised agencies of the U.N. were permitted to participate as appropriate in this working group.

Working group⁽³⁷⁵⁾ it was most recently restructured in 1985. It is now called the Committee on Economic, Social and Cultural Rights,⁽³⁷⁶⁾ and comprised of eighteen experts, serving in their personal capacity,⁽³⁷⁷⁾ elected⁽³⁷⁸⁾ by the Economic and Social Committee by secret ballot from a list of nominees presented by state parties to the Covenant. The new Committee now meets in Geneva⁽³⁷⁹⁾ and started operations in 1987.

Under the first cycle of reporting reports were due on article 13 to 15 of the Covenant from 69 states by 1 September 1981. Only 37 states complied with this requirement.⁽³⁸⁰⁾ The Working group has yet to make any suggestions or recommendations of a general nature as regards the educational provisions of the Covenant.⁽³⁸¹⁾

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375. See Decisions 1978/10, 1981/158, and resolution 1982/33 all set out in U.N.Doc. E/C.12/1987/1 *op.cit.*
376. Res. 1985/17 *id.*
377. They will meet for up to three weeks, and receive travel and subsistence expenses from U.N. resources.
378. For a four-year term.
379. Dec.1986/102.
380. U.N.Doc. E/C.12/1987/3 (9 January 1987) p.3.
381. Its reports to date have largely been concerned with its own methods of operation, and discussions on the format and submission of state reports. See e.g. U.N. Docs. E/1982/56 & Corr.1; E/1983/41; E/1984/83; E/1985/18; E/1986/49. For consideration of the French Report see U.N. Doc.

THE RIGHTS OF THE CHILD:

CHAPTER FIVE

THE RIGHTS OF THE CHILD

I. THE DECLARATION ON THE RIGHTS OF THE CHILD

The Declaration on the Rights of the Child commenced its life in the Social Commission of the United Nations which at its 6th Session in 1950 adopted a draft declaration on the rights of the child.⁽¹⁾ The Social Commission of the United Nations prepared its draft Declaration on the Rights of the Child in 1950 when the drafting of the International Covenants on Human Rights was in its initial stages. The Economic and Social Council⁽²⁾ requested the Commission on Human Rights to consider the draft Declaration as prepared by the Social Commission. The draft declaration on the rights of the child was first placed on the agenda of the 7th Session

1. Official Records of Economic and Social Council (E.S.C.O.R.), 11th Session, Supplement Number 3, Annex 2, Draft Resolution 4. The first debates were in 1946 when the Temporary Social Commission approved the League of Nations Draft Declaration on the Rights of the Child. E.S.C. O.R. Second Session, Annex 6, U.N.Doc. E/41, p.283.
2. Resolution 309 C(XI) (July 1950).The Economic and Social Council discussed it at its 11th Session. See U.N. Docs. E/AC.7/SR.125-128.

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of the Commission of Human Rights in 1951.⁽³⁾ It was not considered by the Commission until its 13th Session.⁽⁴⁾

Principle 5 of this declaration held

The child shall be given an education which will bestow on him general culture and enable him to develop his abilities and individual judgment and to become a useful member of society. Such education shall be free.⁽⁵⁾

The debate on the draft declaration on the rights of the child commenced in the Palais des Nations in Geneva on Monday 8th April. The delegates all emphasised the importance of the draft declaration. Mr. Colban considered that there was no good reason that the declaration should not be in the form of a binding instrument. His government would have no objections to such an instrument. Sir Samuel Hoare (U.K.) emphasised that the rights in the declaration were moral rights. This recognised the fact that guardians and parents and the state, rather than the child, himself,

3. Commission of Human Rights: 7th Session U.N. Doc. E/CN.4/512. U.N. Doc. E/CN.4/512 contains the draft declaration on rights of the child.
4. Commission of Human Rights, Report of the 13th Session, E.S.C.O.R 24th Session, Supplement Number 4; U.N. Doc. E/2970/Rev.1; E/CN.4/753/Rev.1, p.10.
5. Commission of Human Rights: 7th Session U.N. Doc. E/CN.4/512 (19 February 1951).

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could enforce such rights.⁽⁶⁾

Overall it was felt that the Declaration should be one of principle and not too detailed following the model of the Universal Declaration of Human Rights. It could then be implemented by a particular covenant.⁽⁷⁾

Much of the debate focused on the status of illegitimate children.⁽⁸⁾ Apart from that it was mainly concerned with the role of the parent and religious and moral aspects of education. Chief Rabbi Safran from the Agudas Israel World Organisation, speaking at the invitation of the Chairman, emphasised the importance they laid on the fundamental right of the child to enjoy an education in harmony with the religious convictions and cultural affinities of his parents.⁽⁹⁾

Mr. Deloby (International Union of Family Organisations) again, speaking at the invitation of the Chairman, stressed that the state should not, could not, entirely replace parents in the education of a child and the moral factor in education should not be

6. Commission of Human Rights: 13th Session U.N. Doc. E/CN.4/SR.557 (28 May 1957) p.13.
7. See below p.312.
8. For example, see the contribution of Mr. Brillantes (Philippines). Commission on Human Rights 13th Session, U.N. Doc. E/CN.4/SR.556 p.11.
9. Commission of Human Rights, 13th Session; U.N. Doc. E/CN.4/SR.555 (27 May 1957) p.9.

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overlooked. He suggested the following text for Principle Number 5,

The child, in harmony with the wishes of his parents, be given an education which will bestow on him general culture and enable him to develop his intellectual moral faculties and individual judgment to become a useful member of society. Such education shall be free. (The underlining represents the amendments proposed).

Miss de Lucy-Fossarieu (International Catholic Child Bureau) stressed her dismay that principles established by Articles 26(3) of the Universal Declaration of Human Rights was not included in Principle Number 5 of the draft declaration. The parents' freedom to choose the kind of education, particularly religious education, was essential. ⁽¹⁰⁾

After general discussion, the Commission transmitted to the governments the draft declaration together with the record of discussions and proceedings with a view to obtaining comments by December 1, 1957 so the Commission could take them into account in its further deliberations and considerations. ⁽¹¹⁾

By the fifteenth session of the Commission on Human

10. Commission of Human Rights, 13th Session; U.N. Doc. E/CN.4/SR.556 (27 May 1957) p.5.
11. The Economic and Social Council by Resolution 651 E (XXIV) extended the deadline for transmission of comments until December 1, 1958 to be circulated by the Secretary General by the end of 1958.

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Rights⁽¹²⁾ twenty-one governments had replied to the request for comments.⁽¹³⁾ The Preamble was adopted with various amendments. Principle One of the draft as prepared by the Social Commission read as follows:

The child shall be given the means necessary to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and conditions of freedom and dignity.⁽¹⁴⁾

The Commission discussed this principle at its 631st meeting,⁽¹⁵⁾ the original text being adopted unanimously.⁽¹⁶⁾ Poland introduced a new Principle in the discussion that was adopted as Principle Three. It read as follows:

The child shall enjoy protection by law and by other means. Whenever necessary, opportunities and facilities shall

12. Report of the 15th Session of the Commission on Human Rights, Economic and Social Council Official Records, 28th Session, Supplement No. 8; U.N. Docs. E/3229; E/CN.4/789 p.15.
13. The Commission also had Secretary-General's memo (U.N.Doc. E/CN.4/512) to work from.
14. Report of the 15th Session on the Commission on Human Rights, p.19.
15. On 1st April 1959.
16. It then than became Principle Two because the principle of non-discrimination which was originally Principle Ten was elevated to become Principle One.

be provided by law to enable him to develop in accordance with the principles in this Declaration. The best interests of the child shall be the paramount consideration in the enactment of such laws.

Also of interest is Principle 6 of the Commission draft which had originally been Principle 4 of the draft of the Social Commission.. Principle 4, the original, read as follows:

The child shall be given the opportunity to grow up in economic security, in the care of his own parents whenever possible, and in a family atmosphere of affection and understanding, favourable to the full and harmonious development of his personality.

This was discussed at Meetings 633-635 of the Commission on Human Rights in 1959. Various amendments were submitted. The text as added to by a Polish amendment¹⁷ read:

For the full and harmonious development of a personality, the child needs love and understanding. He shall, save where his best interests require otherwise, grow up in the care of his parents, and a young child shall not, save in an exceptional circumstances, be separated from his mother. In any case, opportunity shall be provided to the child to grow up in an atmosphere of affection and moral and material security. Society, as well as public authority, shall have the duty to extend particular care to children

17. U.N.Doc. E/CN.4/L.527/Add.2.

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without a family, although without adequate means of support. The principle stresses the importance of the family and that society (not just the state) should succour parentless children.

Principle Seven (on education),⁽¹⁸⁾ was discussed at the 638 and 639th meetings.⁽¹⁹⁾ Numerous amendments were tabled.⁽²⁰⁾ At the 639th meeting they voted on a substitute text submitted by India, Iran and Iraq which took into account an earlier French amendment. The text read as follows:

The child is entitled to receive free and compulsory education, at least in the elementary stages. The education of the child shall be directed to the full development of its personality and the strengthening of respect of human rights and fundamental freedoms. It shall enable him to enjoy the same opportunities as others to develop his abilities and individual judgement and to become a useful member of society. It shall promote tolerance and understanding of his own as well as other cultures and of the principles and purposes of the United Nations.⁽²¹⁾

The Commission rejected by four votes to three with nine

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18. It was originally Principle Five of the Social Commission's draft.
 19. Supplement 8, E.S.C.O.R., 28th Session.
 20. U.N. Docs. E/CN.4/L.524-530, and E/CN.4/L.536-40.
 21. U.N. Doc. E/CN.4/L.537.

abstentions the Soviet Union amendment⁽²²⁾ which called for the insertion of the following text after the above:

The right shall be ensured by the state through the organisation of an extensive network of schools, adequately staffed, housed and equipped. States should take all necessary steps to extend the principle of free and universal education to secondary schools as well. Every child, including minors in employment, shall have the right to education.

It is clear from this vote that the West was still blocking amendments that would imply necessary state action to implement declared rights. The Commission then voted by parts on an amendment submitted by the U.S.S.R.⁽²³⁾ which amended the last part of Principle Seven⁽²⁴⁾ and a French amendment⁽²⁵⁾ was adopted by the

22. U.N. Doc. E/CN.4/L.539 Rev.1.

23. U.N. Doc. E/CN.4/L.539 Rev. 1.

24. After (shall enable him, enjoy the same opportunities as others) ADD

to develop his abilities and to become a responsible and useful member of society. It shall promote mutual understanding, tolerance and friendship, among all peoples and racial or religious groups as well as understanding of the culture of both of his own people and of other people and of the principles and purposes of the United Nations.

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Commission 11 votes to none with 6 abstentions. It consisted of the following addition.

The best interest of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The Commission then voted on the amended amendment.⁽²⁶⁾ The joint amendment as a whole, as amended, was adopted by 15 votes to none with two abstentions in the following form:

The child is entitled to receive free and compulsory education, at least in the elementary stages.⁽²⁷⁾ The

States shall prohibit the dissemination of war propaganda and racial and national hatred in schools.

The first sentence of the first paragraph of the Soviet amendment was rejected six votes to three with seven abstentions. The second sentence of the first paragraph replacing the last sentence of the joint amendment was adopted five votes to two with eight abstentions. The second paragraph of the amendment was rejected nine votes to three with four abstentions.

25. U.N.Doc. E/CN.4/L.524.

26. U.N.Doc. E/CN.4/L.537.

27. The first part of the first sentence, up to the word education, was adopted unanimously, that is

The child is entitled to receive free and compulsory

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education of the child shall be directed to the full development of his personality and the strengthening of respect and fundamental freedoms; it shall enable him, enjoying the same opportunities as others, to develop his abilities and individual judgement and to become a useful member of society. It shall promote mutual understanding, tolerance and friendship among all peoples and racial or religious groups, as well as understanding of the culture both of his own people and of other peoples and of the principles and purposes of United Nations.

The best interests of the child shall be the guiding principles of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

Principle Nine is also of interest, reading:

The child who is physically, mentally, or socially handicapped shall be given the special treatment, education and care required by his particular condition.

Principle 11 (which had been Principle 8 of the draft of the Social Commission) read as follows after amendment:

education,

The remaining part of the first sentence, namely the words "at least in the elementary stages" was adopted by 14 votes to two with one abstentions. The voting against were the Ukrainian SSR and the U.S.S.R., Poland abstained.

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The child shall be brought up in an atmosphere which will promote understanding, tolerance and friendship among peoples and national, racial, and religious groups and aversion for all forms of national, racial, or religious discrimination. He shall be protected from practices based on any such discrimination. He shall be brought up in a spirit of peace, friendship, and brotherhood among nations in the consciousness that he will achieve his fullest development and derive his greatest satisfaction through devoting his energy and talents to the service of his fellow man, in the spirit of universal brotherhood and peace. (28)

The Economic and Social Council, (27) considered the report of the Commission of Human Rights (30) and transmitted Chapter 7 of the Commission's report relating to the draft declaration together with the records of the discussion of the subject to the

28. The draft Declaration of the Rights of the Child, the original Social Commission version and the text on the Commission on Human Rights version are placed side by side from page 22 to page 24 of the 15th Session Report on the Commission on Human Rights, Supplement Eight of the E.S.C.O.R 28th Session.
29. E.S..C.O.R., 28th Session, 1959. 1088th meeting p.155.
30. Report of the 15th Session of the Commission on Human Rights, E.S.C.O.R., 28 Session, Supplement No. 8; U.N. Docs. E/3229; E/CN.4/789.

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General Assembly for consideration at its 14th Session. (31)

At the 14th session of the General Assembly Principles 2 and 3 of the Declaration were merged into a new Principle 2. An attempt to include a right to life from the moment of conception was narrowly defeated. (32) Principle nine (on the rights of maladjusted children) became Principle 5. (33) Principle 6 was amended slightly. A Soviet amendment indicating the desirability of state assistance to large families was accepted. A Guatemalan/Israeli amendment to include the right of the child to grow up in the religious faith of his parents was roundly rejected. (34)

There were many amendments to Principle 7. (35) The U.S.S.R.

31. E.S.C.O.R., 28th Session, Resolutions Supplement No. 1, Resolution C, draft Declaration on the Rights of the Child p.18. 1088th Plenary Meeting 30 July 1959. For the debate in the Third Committee, see U.N.G.A.O.R., 14TH Sess., 3rd Committee, 907-927th Meetings.
32. U.N.Doc. A/C.3/L.725
33. An attempt by Italy to add the Principle to Principle 7 on educational rights was narrowly defeated.
34. 46 votes to 6 with 16 abstentions.
35. These included those from Afghanistan (UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.716) 29 September 1959: Delete the clause "and of the principles and purposes of the United Nations".); Thailand (UN GAOR, 14th

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Session, 3rd Committee, Agenda Item 64, (A/C.3/L.722) 30
September 1959: ... Replace the entire text of this
principle by the following:

The education of the child shall bestow upon him general
culture, love for peace, understanding of and sympathy
for others, and a spirit of equanimity and gratitude so
as to enable him to develop his abilities and individual
judgment as a useful and peaceful member of society,
devoting his energy and talents to the service of
others.");

the Netherlands (UN GAOR, 14th Session, 3rd Committee, Agenda
Item 64, (A/C.3/L.726) 30 September 1959: ... delete the
first sentence and replace by the following two sentences:

"The child is entitled to receive education. The public
authorities shall provide free education at least in the
elementary stages and make it compulsory.");

Uruguay (UN GAOR, 14th Session, 3rd Committee, Agenda Item
64, (A/C.3/L.729) 30 September 1959: ... the first paragraph
should read as follows:

"The child shall be given an education which will bestow
upon him general culture and enable him to develop his
abilities and individual judgment and his sense of moral
and social responsibility and to become a useful member

of society, etc.");

Mexico, Peru, Romania (UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.730) 30 September 1959:

1. After Principle Seven add the following as a new principle:

"8. The child shall have a full opportunity for play and recreation, which should be directed to the same purposes as education; society and a public authority shall be under an obligation to ensure the enjoyment of this right."

2. Make the consequent changes in the numbering of Principles 8, 9, etc.:

Greece and the United Kingdom (UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.731) 30 September 1959:

... II. Principle Seven; First paragraph: replace all except the first sentence (which should remain) by the sentence:

"he shall be given an education which will bestow upon his general culture, and enable him on a basis of equal opportunity to develop his abilities and individual judgement and to become a useful member of society.");

Italy (UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.732) 30 September 1959: Principle Seven: at the end of the second paragraph, add the following sentence:

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again tried to alter the principle on educational rights⁽³⁰⁾ to spell

"The maladjusted child can be separated from his family without his parent's consent only through the intervention of a specialized judicial authority.");

and Cuba (UN GAOR, 14th Session, 3rd Committee, Agenda Item 64. (A/C.3/L.737) 5 October 1959. (A/C.3/L./626) Principle Seven; add the following after the word "compulsory":

"and provide it in the language spoken in the child's home; the child shall be entitled to respect to his vocational abilities".).

36. United Nations General Assembly, 14th Session, 3rd Committee, Agenda Item 64, (U.N. Doc. A/C.3/L.712) 29 September 1959.

.....

5. In Principle 7, after the words "at least in the elementary stages," add colon.

"The right shall be ensured by the state by the organization of an extensive network of schools, adequately staffed, housed and equipped. States shall take all necessary steps to extend the principle of free and universal education to secondary schools."

At the end of Principle 7 add colon

"States shall prohibit the dissemination in schools of propaganda for war or for racial and national

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out the state's obligation to provide schooling. An amendment put forward by five members³⁷ was eventually adopted with the addition

hatred.

.....

United Nations General Assembly, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.712/Corr.2) 9 October 1959.

Corrigendum

Principle 7

In Paragraph 5 of Document A/C.3/L.712, new text proposed as an addition at the end of Principle 7 should read as follows:

"Utilization of teaching in schools for the propagation of war and racial and national hatred shall be prohibited."

37. UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.743) 7 October 1959. (Denmark, Greece, Netherlands, Thailand and United Kingdom of Great Britain and Northern Ireland: Revised amendments to Principles six and seven of the draft Declaration withdrew their amendments to Principle Six and Seven (reproduced in Documents A/C.3/L.722) (Paragraphs Four and Five, L.724, L.726, and L.731) Sections I and II (in favour of the revised text of these principles presented below. They are not all jointly committed to the passages appearing in square brackets, on which votes by division are suggested.

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of a further amendment on play and recreation. ⁽³⁸⁾ Various Cuban ⁽³⁷⁾

1. Principle 6:

"The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care [and under the responsibility] of his parents, and in any case in an atmosphere of affection and of moral and material security; [a child of tender years shall not, save in exceptional circumstances, be separated from his mother.]"

2. Principle 7:

"The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will bestow him general culture, and enable him on a basis of equal opportunity to develop his abilities and individual judgment and to become a useful member of society.

"The best interest of the child shall be the guiding principles of those responsible for his education and guidance; that responsibility lies in the first place with his parents."

38. UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.748) 9 October 1959. Denmark, Greece, Netherlands, Thailand, United Kingdom of Great Britain and Northern Ireland and Uruguay: Revised amendment to Principle Seven of

the draft Declaration. Replace the present text by the following:

"The child is entitled to receive education, which shall be free and compulsory at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him on the basis of equal opportunity to develop his ability and individual judgment, and his sense of moral and social responsibility, and to become a useful member of society."

"The best interest of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."

39. UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.745) 8 October 1959. Cuba: Amendments to the revised amendments to principle seven (A/C.3/L.743, PARAGRAPH TWO) of the draft Declaration submitted by Denmark, Greece, Netherlands, Thailand, United Kingdom of Great Britain and Northern Ireland.

1. First paragraph, first sentence:

Replace the word "education" by the word "instruction".

Delete the words "which shall be", and transpose the

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words "free and compulsory" to before the word "instruction". Replace "elementary stages" by "elementary school", and add "in his mother tongue" after the word "school".

2. First paragraph, second sentence: ... After the words "equal opportunity" add "and with absolute respect for his vocational aptitudes". For "abilities" substitute "capacities".

3. Second paragraph:

There is no change in the wording of the amendment.

Add the text of the Commission on Human Rights from the sentence beginning "It shall promote . . . ". For reasons of drafting this sentence should begin as follows: "The child's education shall promote . . .".

Principle Seven, incorporating the various amendments, including the sub-amendment and the text of the Commission on Human Rights, would then read as follows:

"The child is entitled to receive free and compulsory instruction, at least in the elementary school, in his mother tongue. He shall be given an education which shall bestow upon him general culture and enable him on a basis of equal opportunity and with absolute respect for his vocational aptitudes to develop his capacity and individual judgment and

to become a useful member of society.

"The best interest of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

"The child's education shall promote mutual understanding, tolerance and friendship among all peoples and racial or religious groups as well as understanding of the culture both of his own people and of other peoples and of the principles and purposes of the United Nations."

United Nations General Assembly, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.751) 12 October 1959. Cuban amendments 1 to the revised amendment of Denmark, Greece, Netherlands, Thailand, United Kingdom of Great Britain and Northern Ireland (A/C.3/L.748) to Principle Seven.

1. First paragraph, first sentence:

Replace the word "education" by "schooling".

Replace the expression "the elementary stages" by "the elementary school".

2. First paragraph, second sentence:

Add after the word "opportunity", the following: "and with the greatest possible respect for his vocational aptitude".

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and Bulgarian⁽⁴⁰⁾ amendments to this text were rejected.

The text of the Principles discussed above, as ultimately adopted, read as follows:

Replace the words "his ability" by "his capacity".

3. Add, at the end of the first paragraph the following sentence: "his education shall promote understanding of the culture both of his own people and of other peoples of the world."

40. UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.752) 12 October 1959. Bulgarian amendments to the revised amendment of Denmark, Greece, Netherlands, Thailand, United Kingdom and Uruguay (A/C.3/L.748) to Principle seven. Amend the second paragraph of Principle Seven as follows:

1. Delete the words "in the first place".
2. Add the words ", as well as with society and the state".

The paragraph will then read as follows:

"The best interest of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies with his parents, as well as with society and the state."

PRINCIPLE TWO⁽⁴¹⁾

The child shall enjoy special protection, and be given opportunities and facilities, by laws and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in the conditions of freedom and dignity. In the enactment of the laws for this purpose the best interest of the child shall be the paramount consideration.

PRINCIPLE FOUR

The child shall be entitled from his birth to a name and nationality.

PRINCIPLE SEVEN

The child is entitled to receive education which shall be free and compulsory at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him on a basis of equal opportunity to develop his abilities and individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; and that responsibility lies in the first place

41. UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.744) 7 October 1959. Text adopted at the 917th meeting on Tuesday, 6 October 1959.

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with his parents.

A child shall have full opportunity for play and recreation which should be directed to the same purposes of education, society and the public authority shall endeavor to promote the enjoyment of this right.

PRINCIPLE EIGHT

The child shall in all circumstances be amongst the first to receive protection and relief. ⁽⁴²⁾

Conclusions

The General Assembly adopted the Declaration on the Rights of the Child ⁽⁴³⁾ on the 20th November 1959.

The Declaration on the Rights of the Child as adopted shows that the prevailing concern of the state sponsors was that the "development" of the child was critical. It was the target of their concern. Principles 2, 4, 5, 6, 7, 9 and 10 all speak to this concern. The states attempted to ensure that it was recognised that the child's environment be appropriate, that is to say non-discriminatory (principle 1). It should provide adequate nutrition,

42. UN GAOR, 14th Session, 3rd Committee, Agenda Item 64, (A/C.3/L.753) 13 October 1959. Text adopted at the 923rd meeting held on 12 October 1959.
43. Res. 1386 (XIV), G.A.O.R. 14th sess., annexes, Agenda Item 64, p.16.

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housing, recreation and medical service (principle 4). He should be protected (principles 2 and 9). The development of the child was to be physically, morally, spiritually and socially healthy (principle 2). The handicapped child was to receive extra care as necessary (principle 5). The family environment (of love and understanding) was integral (principle 6), as was a "spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood" (principle 10). His education was to provide "an equal opportunity" ... "to become a useful member of society". The role of parents had "first place" in educational endeavour "for the best interests of the child" (principle 7). The Cuban effort to give the child a right to education in his mother tongue was rejected.⁴⁴ This clearly echoes the concurrent drafting in UNESCO forums on the Convention against Discrimination in Education.⁴⁵ Clearly the Declaration is mainly concerned with the economic, social and cultural rights of the child.

The Declaration has no legal force except to the extent it might be considered part of customary international law. It was deliberately drafted in a wide and vague fashion. The Soviet attempts to harden and widen the state obligations implicit in the Declaration failed. Probably the only certain aspect that does form part of customary international law is the non-discrimination rule that it contains. The only civil and political rights that it contains are the principle of non-discrimination and the right to a nationality.

44. See note 39 above.

45. See Chapter Six below.

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It is also possible to make an argument that the Declaration, endorsing as it does the right of "development" of the child, reinforces the argument that there is an international law requirement for states to provide at least an "elementary education".⁽⁴⁶⁾ The talk of "equal opportunity to develop *inter alia*, one's "abilities" allows for future expansion of the scope of this rule.⁽⁴⁷⁾

The right to education in the mother tongue originally proposed by Cuba was rejected. Miss MacEntee (Ireland) and the Portuguese representative speaking against its adoption.⁽⁴⁸⁾ The Belgian representative added that the child should be educated in the language of the region where he grew up.⁽⁴⁹⁾ He also suggested that states with large immigrant populations (such as the U.S.A.) would

46. The USSR attempt to include secondary education in Principle 7 failed.

47. At the time of its adoption only 62% of the world's children were in fact enrolled in "primary schools. UNESCO Doc. ED/IBE/CONFINTED.37/Ref.1 (June 1977).

48. U.N.G.A.D.R., 3rd Committee, 14th sess., 921st Mtng.

49. See chapter ten below for details of the Belgian language regime for education, which is essentially based on the residential criterion.

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find the proposal difficult to implement in practice.⁵⁰ Later in that meeting Cuba withdrew the relevant words. Burma supported the idea of learning in a non-mother tongue as being an aid to increase world understanding.⁵¹

It was expressly thought that a later Convention could convert the principles in the Declaration to legally binding obligations, much as was then occurring with the principles declared in the Universal Declaration of Human Rights. This militates against the formation of norms of customary law, though the passage of time and state practice since 1959 heavily support the development of a customary norm protecting a right to elementary education, and the right to equal opportunity in education.

The question of a Convention on the Rights of the Child was raised during 1979, the U.N. Year of the Child. The work on this Convention is now nearing completion. It is to examination of this that we now turn.

50. Brazil (Mr Lima) and Ghana (Miss Addison) supported this.

921st Mtng *op.cit.*

51. 922nd Mtng.

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II. The Draft Convention on the Rights of the Child⁵²

The Commission on Human Rights established a working group on rights of the child at its 35th session.⁵³ It was open to all members of the Commission. The Chairman was Adam Lopatka (Poland). Its first meetings were between 14 February and 2 March at Geneva. The working group adopted that the title of the draft convention and approved four preambular paragraphs. The Economic and Social Council decided to bring the General Assembly's attention to the Commission's work on this subject.⁵⁴ The open working group continued its work

52. See generally Bennett, W. H., "A critique of the emerging Convention on the Rights of the Child", (1987) 20 *C.I.L.J.* 1.

53. U.N. Doc. E/CN.4/1347 (1979). The original inspiration came from a Polish draft Covenant on the Rights of the Child in 1978. U.N. Doc. E/CN.4/1292. Report of the Commission on Human Rights, 34th sess., E.S.C. O.R. Suppl.4, Res.20/XXXIV. This draft was in substance the text of the Declaration on the Rights of the Child, as many governments observed in their comments. As such it was widely considered to be unsuitable as a Convention without further work. U.N. Doc. E/CN.4/324 (27th Dec. 1978).

54. Decision 1979/37 (10 May 1979).

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during 1980, meeting between February 29 and 7 March.⁽⁵⁵⁾ The working group used as its basic text the revised Polish Draft.⁽⁵⁶⁾ The meeting was mainly taken up with adopting the Preamble. It approved five more preambular paragraphs and Article 1 of the draft convention.

At its 1,578th meeting (12 March 1980) the Commission adopted Resolution 36(XXXVI) calling on the Economic and Social Council to authorize further one week session of the working group prior to the 37th Session on the Commission on Human Rights.⁽⁵⁷⁾ The Economic and Social Council⁽⁵⁸⁾ authorized a one week session of the working group prior to the Commission's next session. This pattern of pre-sessional open-ended working groups has continued ever since.

In 1981 the pre-sessional working group had held ten meeting

55. At its 1,526th meeting (Commission on Human Rights, 36th Session, E.S.C. Official Records 1980, Supplement Number 3, U.N. Doc. E/1980/13; E/CN.4/1408.) the Commission decided that an open-ended, informal working group should be established to consider Agenda Item 13 "Question of a convention on the rights of the child". (36th Session *op.cit.* p.93.).
56. U.N. Doc. E/CN.4/1349 (5 October 1979).
57. Report on the Commission on Human Rights, 36th Session, ECOSOC O.R., 1980 Supplement Three, p.197.
58. Decision 1980/138 (2 May 1980).

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from 26 January 1981 to 30 January 1981.⁵⁹ At these meetings the working group had discussions on Articles Two - Nine of the draft convention. Articles 2, 3, 4, 5, 7, and 8 were adopted. We will examine those articles most relevant to our concern.

Article Seven of the revised Polish Draft dealt with the right of the child

who is capable of forming his own views the right to express his opinion in matters concerning his own person and, in particular, marriage, choice of occupation, medical treatment, education and recreation.⁶⁰

The representative of Australia proposed an alternative article.

The State's parties to the present convention shall assure to the child the right to express his opinion in matters concerning his own person, and, in particular, marriage, choice of occupation, medical treatment, education and recreation. In all such matters the wishes of the child shall be given due weight in accordance with his age and maturity.

The Danish Delegation felt that the child should have more than the right to express his opinion, that his opinion should also be influential, according to the child's maturity and therefore the

59. ESC, Commission on Human Rights, 37th Session; U.N. Doc. E/CN.4/L1560/Add.14 (11 March 1981).
60. U.N. Doc. E/CN.4/L.1560/Add.14 *op.cit* p.15, para 71.

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Danish Delegation proposed an appropriate amendment.⁶¹ The United States put forward for consideration a revised version of Article 7. This read as follows:

The State's parties to the present convention shall enable the child, who is capable of forming his own views, the right to express his opinion effectively and non-violently in matters concerning his own person, and in particular, religion, political and social beliefs, matters of conscience, cultural and artistic matters, marriage, choice of occupation, medical treatment, education, travel, place of residence, and recreation.

The idea of a list was opposed since the child should be able to express his opinion on subjects outside of the list. The compromise text was adopted as follows:

The State's parties to the present convention shall assure to the child, who is capable of forming his own views, the right to express his opinion freely in all matters, the wishes of the child being given due weight in accordance with his age and maturity.

Article 8 of the revised Polish Draft read as follows:

Article 8

1. The duty of bringing up the child shall lie equally with both the parents, who in any case, should be guided by his best

61. *Id.* para 73.

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interests and, in keeping with their own beliefs and compliance with the stipulations of Article 7, shall prepare him for an individual life.

2. The States parties to the present convention shall render all necessary assistance to parents and guardians in the performance of their educational function, and shall undertake measures to organize and insure the development of institutions of the children's care.

3. Children of working mothers shall have the right to frequent institutions of day care of children until they have completed school age.

The purpose of Paragraph 1 was to ensure that the responsibility for bringing up children was equally shared.⁶² The text was opposed on the grounds that it should be up to parents how the responsibility for bringing up the child should be divided between them. After debate the United States proposed the following revised text:

Parents have the primary responsibility for the upbringing of the children. States parties shall take all appropriate measures to ensure the recognition of the common responsibility of both parents in the upbringing and development of their children, or, in the case of legal

62. This represented the idea expressed in Article 16 of the Convention on the Elimination of all Forms of Discrimination against Women.

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guardians of the children legally entrusted to their care.

After several amendments Paragraph One was adopted by consensus.⁽⁶³⁾

The final text adopted was as follows:

Article 8

1. Parents or, as the case may be, guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. States Parties shall use their best efforts to ensure recognition of the principles that both parents have common and similar responsibilities for the upbringing and development of the child.

After discussion a U.S. proposed text for Paragraph 2 was adopted. Concern had been expressed that states should not interfere with family life. The text adopted read as follows:

2. For the purpose of guaranteeing and promoting the rights set forth in this Convention, the States Parties to the present Convention shall render appropriate assistance to parents and guardians in the performance of the child-rearing responsibilities and shall ensure the development of institutions for the care of children.

Paragraphs three and four read as follows:

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible.

4. The institutions, services and facilities referred to in

63. U.N. Doc. E/CN.4/L.1560/Add.14, *op.cit.* pp.17-18.

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paragraphs 2 and 3 of this article shall conform with the standards established by competent authorities particularly in the areas of safety, health, and in the number and suitability of their staff.

The informal working group on the draft convention on the rights of the child continued its work before the 38th Session of the Commission on Human Rights.⁶⁴ During this session the working group adopted Article 6,⁶⁵ 9,⁶⁶ and 10. Article 10 is based on Article 11 of the revised Polish Draft and dealt with the situation where a child was deprived of parental care provided that the child should be entitled to protection and assistance provided by the state. In particular, the state was obliged to provide

... appropriate educational environment to the child who was deprived of his natural family environment or on account of his well-being cannot be brought up in such an environment."

64. 38th Session, Commission on Human Rights Report, U.N. Doc. E/1982/12/Add.1: E/CN.4/1982/30/Add.1 (15 March 1982).
65. This deals with the parental right to determine the residence of the child.
66. This deals with the right of the child to access to diverse sources of national and international mass media, including the encouragement of the media to cater to the linguistic demands of minority children. In the 1987 pre-sessional meeting (U.N. Doc, E/CN.4/1987/25) state party encouragement of literacy and reading by children was added.

In 1987 a new sentence was added to ensure that states took due regard of "continuity" in a child's upbringing and the child's "ethnic, religious or linguistic background" when considering "alternative family care".

At the pre-sessional meeting of the working group, in 1983,⁶⁷ Paragraph 3 and 4 of Article 6 were adopted as well as Article 6 bis and 6 ter dealing with adoption. This meeting also considered the United States' proposal for Article 7 bis.⁶⁸ This dealt with a child's freedom of thought, conscience, and religion.

Article 7 bis

1. The States Parties to the present convention shall ensure that the child has the right to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship,

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67. Report on the working group on a draft convention on the rights of the child, 39th Session Commission on Human Rights, U.N. Doc. E/CN.4/1983/L.1 (8 March 1983), and E/CN.4/1983/L.1/Add.1 (10 March 1983).
68. The U.S.A. had proposed a new Article 7 bis at the previous session; U.N. Doc. E/CN.4/1982/WG.1/WP.8 (26 January 1982).

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observance, practice and teaching⁽⁹⁷⁾.

2. The States Parties to the present convention shall ensure that no child is subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. The States Parties to the present convention shall ensure that the child's freedom to manifest his religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present convention shall ensure that the child has:

(a) the freedom to worship or assemble with others in connection with his religion or belief;

(b) the freedom to make, to acquire and to use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

(c) the freedom to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and

69. A child, it is suggested, would seem unlikely to be teaching! The amendment is, it seems, an amalgam of the provisions in American, European and International human rights treaties protecting the right.

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(d) the freedom to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.^{'70'}

The Working Group held 12 meetings in 1984 at which they adopted Article 7 bis, 8 bis, and 9 and 13.^{'71'} Denmark, Finland, and Norway and Sweden introduce a new Article 7 bis.^{'72'}

70. Commission on Human Rights, 38th Session; U.N. Doc. E/CN.4/1982/WG.1/WP.8 (26 January 1982).

71. Report on the working group on the rights of the child, Commission on Human Rights, 40th Session; U.N. Doc. E/CN.4/1984/71 (23 February 1984).

72. Commission on Human Rights, 40th Session; U.N. Doc. E/CN.4/1984/WG.1/WP.17 (1 February 1984).

1. The States Parties to the present Convention shall ensure to the child the right to freedom of thought, conscience and religion.
2. These rights shall include in particular the right to have or to adopt a religion or whatsoever belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief, and the right to have unimpeded access to education in the matter of religion and belief of his choice.

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There were three Articles 7 bis's for consideration. The United States' proposal made in 1982 and amended in 1983 (U.N. Doc. E/CN.4/1983/62) there was also a Canadian draft and a Scandinavian draft. A lengthy debate ensued and an informal working party adopted a draft introduced by the U.K. which read as follows:

1. The States Parties to the present Convention shall recognize the right of the child to freedom of thought, conscience and religion in accordance with the principles of the Universal Declaration of Human Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the International Covenant on Civil and Political Rights, and of other relevant international instruments.

2. These rights shall include in particular the right to have or to adopt a religion or whatsoever belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief, in conformity with public safety, order, health and morals.

3. This right is subject to the authority of the parents or legal guardians to provide direction to the child in the exercise

3. The States Parties shall, subject to the evolving capacities of the child, respect the wishes, freedoms and rights of the parents or legal guardians in the exercise of these rights of the child and shall ensure the freedom to manifest religion or belief, in a manner not incompatible with public safety, order health, and morals.

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of this right in a manner consistent with the evolving capacities of the child.

4. The States Parties to the present Convention undertake to have respect for the liberty of the child and his parents, or, when applicable, legal guardians, to ensure the religious and moral education of the child.

Paragraph one of the new draft referred to existing treaties guaranteeing the freedom of thought, conscience, and religion. This was felt to be unnecessary by some delegates. The United States proposed in the second paragraph the child should have "the right to have unimpeded access to and freedom from coercion with respect to education in the matter of religion or belief." The delegation of Australia shortened this to the formula ultimately adopted "and the right to have access to education in the matter of religion or belief".⁽⁷³⁾ The last phrase of Paragraph 4 was proposed by the Finnish Delegation was designed to ensure that no religious belief was foisted on the child by state interference.

It reads as follows:

Article 7bis

1. The State Parties to the present Convention shall respect the right of the child to freedom of thought, conscience and religion.
2. This right shall include in particular the freedom to have or to adopt a religion or whatsoever belief of his choice and freedom, either individually or in community with others and in

73. U.N. Doc. E/CN.4/1984/71 p.7, para. 25.

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public or private, to manifest his religion or belief, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health and morals, and the right to have access to education in the matter of religion or belief.

3. The States Parties shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his right in a manner consistent with the evolving capacities of the child.⁽⁷⁴⁾

4. The States Parties shall equally respect the liberty of the child and his parents and, where applicable, legal guardians, to ensure the religious and moral education of the child in conformity with the convictions of their choice.

At this session China proposed a new Article 15, Paragraph

(75)

The States Parties to the present Convention shall take measures to guarantee all children compulsory and free education or the afore-mentioned education to be materialized

74. Analysis of this provision see below p.343. When the working group adopted article 15 of the draft Convention an identical clause was inserted there as well.

75. U.N.Doc. E/CN.4/1984/WG.1/WP.22 (3 February 1984).

as early as the circumstance permit.⁷⁶

At the end of the session the representative of the United Kingdom expressed grave reservations of his delegation in regard to nearly all the articles so far drafted and suggested that once the present drafting exercises was concluded all states should have the chance to comment on the result.⁷⁷ In particular, the United Kingdom will have difficulty with its nationality and immigration rules.⁷⁸

The education Articles 15, 16, 17

At the 38th session the working group did not reach the articles on educational rights though at the beginning of the pre-session meeting of the working group a block of NGOs had submitted a series of proposals.⁷⁹ The NGO's approved of Article 15 with the

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76. China also proposed an amendment (Commission on Human Rights, 40th Session; U.N. Doc. E/CN.4/1984/WG.1/WP.23 (3 February 1984). to Article 16(2) of the revised Polish text (U.N.Doc. A/C.3/36/6): Second line of Paragraph 2 delete 'free'.
177. U.N. Doc. E/CN.4/1984/71 p.3, para. 9.
78. The representative of the Federal Republic of Germany shared the concern of the U.K. delegation. *Id.* p.4.
79. Commission on Human Rights, 38th Session; U.N. Doc. E/CN.4/1982/WG.1/WP.1 (14 January 1982).

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addition of the words "spiritual and social" in Paragraph 1. ⁽⁸⁰⁾

The group of NGOs recommended that Article 16 and 17 be amended to follow more closely article 13(2) of the International Covenant on Economic Social and Cultural Rights. ⁽⁸¹⁾

Two NGOs the International Federation of Women in Legal Careers and International Abolitionists Federation supported *inter alia* the French Proposal under Article 17 that courses on human

80. With several slight amendments Article 15 as proposed read:

1. The State's parties to the present convention recognized that every child shall be entitled to a standard of living that guarantees the child normal physical, mental, moral, spiritual and social development.
2. The parents shall, within the limits of their capabilities and material resources, secure conditions of living indispensable for the normal development of the child.
3. The States parties to the present convention shall take appropriate measures to implement this right, particularly with regard to feeding, clothing and housing, and, within their means shall extend the necessary material assistance to parents and other persons bringing up children. Special regard to be given to single parent and deprived families, whether due to the absence of one parent, to lack of parental care, or to extreme poverty.

81. *Id.* p.5, para 9.

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rights should be included in school curricula.⁸²⁾

At the next session of the working group, Articles 12 bis, 14, 15, 16 and 17 were adopted.

Consideration of Article 15

The Working Group considered article 15 of the Draft Convention on the basis of a revised proposal submitted by the delegation of Poland which read as follows:

The States Parties to the present Convention shall guarantee to every child compulsory and cost-free education, at least at an elementary school level, designed to assist the child to develop his or her talents and abilities to their fullest potential, and to prepare the child for future life.

The States Parties to the present Convention shall develop various forms of secondary, general and vocational education, with a view to introducing at this level cost-free education, so as to enable every child to develop his or her talents and interest on a basis of equal opportunity.

States Parties shall ensure that school discipline is administered in a manner reflective of the child's human dignity. Methods which are either physically or mentally cruel or degrading shall be prohibited.

82. E.S.C. D.R., Commission on Human Rights, 39th Session; U.N. Doc. E/CN.4/1983/NGO/33 (17 February 1983) p.5.

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The draft was criticised on several grounds. It was condemned as representing a step backwards from the Covenant on Economic Social and Cultural Rights, in that the right to education was not mentioned,⁸³ and the wording "cost-free" was also challenged⁸⁴ in the discussion as "costs" would have to be borne by someone. An informal *ad hoc* group produced a compromise draft, which after further revision (and watering down), was adopted.⁸⁵ The Japanese representative only accepted the result on the understanding that states were not bound to implement the subparagraph (b) of paragraph

83. The Algeria representative proposed to replace the first paragraph by the following:

The States Parties to the present Convention recognize the right of the child to education and shall ensure the equal and non-discriminatory exercise of this right. The States Parties shall ensure that all children have equal access to schooling and shall guarantee all children free and compulsory education, at least at elementary school level . . .

E.S.C.D.R., Commission on Human Rights, 41st Session; U.N. Doc. E/CN.4/1985/64 (3 April 1985) Report of the working group on a draft convention on the rights of the child. Para. 57.

84. *Id.* paras 58-61.

85. It is set out on page 330 below.

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one.⁽⁸⁶⁾ The working group also added, despite Ukrainian protests,⁽⁸⁷⁾ a provision on higher education that was distinctly weaker than that found in the International Covenant on Economic, Social and Cultural rights. The final wording leaves out all mention of free higher education.

The provision on school discipline was also watered down the second sentence of the original paragraph three being deleted. The Netherlands argued for the inclusion of a parental right along the lines of that included in the International Covenant on Economic, Social and Cultural Rights article 13(3).⁽⁸⁸⁾

Algeria proposed adding an article to promote international cooperation and calling on states to implement the programmes of action adopted by international organisation. In particular it was aimed at helping the developing states to eradicate illiteracy, by giving them access to technology and know-how and modern teaching

86. *Id.* para 74.

87. They proposed including wording to establish free higher education. *Id.* para. 77.

88. *Id.* para 62. Their proposal ran as follows:

The States Parties to the present Convention shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his rights in a manner consistent with the evolving capacities of the child.

Id. para 82.

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methods. The U.S.A., France, Canada and the U.K. all hurriedly put forward amendments to water down this commitment, pointing out that such action programmes were not often obligatory. '87'

The final text of article 15 as agreed by the Working group read:

Article 15

- (1) The States Parties to the present Convention recognize the right of the child to education and, with a view to achieving the full realization of this right on the basis of equal opportunity, they shall, in particular:
- (a) make primary education free and compulsory as early as possible, '88'
 - (b) encourage the development of different forms of secondary education systems, both general and vocational, to make them available and accessible to all children, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.
 - (c) Make higher education equally accessible to all on the basis of capacity by every appropriate means.
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89. *Id.* paras 84-86.

90. The phrasing "as early as possible" means that even this most basic of education rights is programmatic. The Canadian delegate reserved the right to express the programmatic nature of the rights in a general article. U.N. Doc. E/CN.4/1984/71, para. 67.

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- (2) States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner reflective of the child's human dignity.
- (3) The States Parties to the present Convention shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his right to education in a manner consistent with the evolving capacities of the child.
- (4) States Parties to the present Convention shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries. (91)

Consideration of Article 16

The discussion of article 16, dealing with purposes of education was based on a Canadian proposal:

The States Parties to the present Convention recognize that:

1. The education and upbringing of the child should promote the development of the child's personality, talents and abilities to

91. The U.S.A. has served notice (U.N.Doc E/CN.4/1987/25 p.41) that it is going to table amendments to this article.

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their fullest potential and to foster respect for human rights and fundamental freedoms.

2. The child should be prepared for responsible life in a free society, in the spirit of understanding, tolerance and friendship among all peoples, ethnic and religious groups.

3. The child should be educated in harmony with nature and in keeping with the principles of the United Nations. (72)

92. *Id.* para 88. The representative of the Baha'i International Community presented a proposal which was as follows:

1. In addition to academic education, the child shall be entitled to receive guidance, training and education designed to promote his social, spiritual and moral development and well-being.

2. The fundamental objectives of such guidance, training and education shall be:

(a) To promote the harmonious development of the personality of the child and the realization of his full potential;

(b) To protect the child by developing his ability to resist outside influences or pressures likely to lead him into lawlessness or delinquency, or into practices injurious to his physical or mental health or to his social, spiritual or moral well-being;

(c) To prepare the child to exercise the rights and undertake the responsibilities of adult life in a manner

consistent both with his own well-being and with the well-being of others:

(d) To foster in the child a respect for human rights and fundamental freedoms and an attitude of understanding, respect and friendship towards all people, regardless of race, sex, class, colour, nationality, ethnic origin, religion or belief;

(e) To foster in the child an awareness of and a desire to promote the principles of universal peace and brotherhood proclaimed in the Charter of the United Nations.

3. The States Parties to the present Convention, bearing in mind that, in accordance with article 8, the primary responsibility for the upbringing and development of the child rests with his parents or guardians, shall use their best efforts to:

(a) Raise the level of public awareness of the importance of the social, spiritual and moral education of the child, particularly during his early years;

(b) Promote recognition and understanding by all those concerned with the upbringing of the child, most particularly his parents or guardians, of their indispensable role, and the primary importance of their example, in the social, spiritual and moral development of the child;

(c) Encourage schools to develop guidelines and courses of instruction designed to foster the social, spiritual and moral

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The Netherlands proposed an additional paragraph that would secure "the liberty of individuals and bodies to establish and direct educational institutions" subject to "the observance of the principles set forth in this article" and "to such minimum standards as may be laid down by the State".

The text as finally adopted read:

Article 16

1. The States Parties to the present Convention agree that the education of the child shall be directed to:
 - (a) The promotion of the development of the child's personality, talents and mental and physical abilities to their fullest potential and the fostering of respect for all human rights and fundamental freedoms.
 - (b) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance and friendship among all peoples, ethnic and religious groups.
 - (c) The development of respect for the natural environment and for the principles of the Charter of the United Nations.
 2. No part of paragraph 1 of this article 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 principles set forth in paragraph 1 and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the
-
- development of the child.

State.

After the adoption of article 16 new suggestions included one by Algeria proposing a Paragraph 3 were suggested. This read as follows:

Children should be educated in a social climate imbued with the national values and the cultural identity of the children, with respect for civilisations different from their own and for the rights of peoples. In no case may children of countries still under colonial domination and foreign occupation or racist regimes be deprived of their cultural and national identity.

This proposal was considered in 1987^{'73'} and after discussion became Article 16(1)(d) reading as follows:

The development of respect for the child's own cultural identity and values, for the national values of the country in which the child is living, for civilisations different from his own, and for human rights and fundamental freedoms.

The U.S.S.R has proposed a new article 16(1)(e).^{'74'}

93. U.N.Doc. E/CN.4/1987/25 (9 March 1987) p.12.

94. See U.N.Doc. E/CN.4/1987/25 p.43:

education in the spirit of the inadmissibility of propaganda of war and of any advocacy of national or racial hatred that constitutes incitement to discrimination, hostility or violence.

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The U.S.A. (79) proposed an Article 16 bis that read:

The States Parties to the present convention shall ensure that the child shall enjoy civil and political rights and freedoms in public life to the fullest extent commensurate with his age, included in particular, freedom from arbitrary governmental interference with privacy, family, home or correspondence; the right to petition for redress of grievances; and, subject only to such reasonable restrictions provided by law as are necessary for the respect of the rights and legally protected interests of others or for the protection of national security, public safety and order or public health and morals, freedom of association and expression; and the right of peaceful assembly.

This proposal was altered in 1986 to become a proposed article 18quater, and in 1987 was considered by the Working Group as a potential article 7ter. The main obstacle to its acceptance was its lack of recognition that not all children would be in a position to effectively exercise the rights mentioned. The principal of evolving capacity of the child (mentioned in sub-para 5) was felt to be in need of greater emphasis, perhaps existing as an article in its own right.

95. The Algerian and American proposals are found in U.N. Doc. E/CN.4/1985/64 Annex II, p.3.

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The Working Group had 11 meetings before the 42nd session of the Commission on Human Rights, '76'. The new Article 16 bis was considered. The representative of the Four Directions Council, presented a proposal for an article dealing with indigenous children's cultural and educational rights:

The States Parties to the present convention recognize the special needs of children belonging to indigenous populations, which include the right of the child;

- (a) to have, learn, and, if he chooses, adopt the culture and language of his parents;
- (b) to enjoy his family of birth and, if alternate family care or adoption is provided, to care or adopt in an otherwise suitable family or community of the same culture wherever possible;
- (c) to be educated, at least at the primary level, and to the extent practicable within national resources, in the language of his parents as well as an official language of the state.

The Mexican representatives supported this proposal. The Australian representative felt it should cover other minorities apart from just indigenous populations. The Australian representative

96. ECOSOC Commission on Human Rights, 42nd Session; U.N. Doc. E/CN.4/1986/39 (13 March 1986) Report of the Working Group on a draft convention on the rights of the child. Reporter Adam Lopatka (Poland) p.13.

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pointed out that the Sub-Commission working group on indigenous populations was still studying the question. In the 1987 pre-session meeting Norway presented an expanded article 16bis:

In those states in which ethnic, religious or linguistic minorities or indigenous populations exist, a child belonging to such a population shall not be denied the right, in community with other members of its minority or indigenous population, to enjoy its own culture, to profess and practice its own religion, or to use and to be trained in its own language.

The Finnish observer stressed the importance of the right to education in one's own language.⁹⁷ The Norwegian version was favoured as it followed more closely article 27 of the International Covenant on Civil and Political Rights and it was adopted with slight modification,⁹⁸ which effectively eliminated the right to be taught in one's own language.

97. India, Japan, Mexico and the U.S.A. opposed such a right.

U.N.Doc. E/CN.4/1987/25, *op.cit.*, p.13.

98. In those states in which ethnic, religious or linguistic minorities or indigenous populations exist, a child belonging to such minorities or populations shall not be denied the right, in community with other members of its group, to enjoy its own culture, to profess and practice its own religion, or to use its own language.

Consideration of Article 18

In its comments on article 18, '??' the ILO drew attention to the Minimum Age Convention, 1973 (No.138). This Convention requires the establishment of policies aimed at the abolition of child labour and the progressive raising of the minimum age for admission for employment or work to a level consistent with the fullest physical and mental development of young persons.¹⁰⁰ The ILO pointed out that Article 18, Paragraph 3, (of the Polish draft) required states to prohibit the employment of children below the age of 14 in accordance with ILO Convention No. 5 of 1921. The ILO comments pointed out that that convention only concerned employment in industrial undertakings and any event that convention had been revised by the Minimum Age Convention 1973 (No. 138) which was general in scope. The Minimum Age Convention, moreover, showed flexibility in minimum age requirements and distinguished between countries whose economy and educational facilities were insufficiently developed and others where the limit had to be 15 years or the age of the completion of compulsory schooling if hired. In the light of these comments, the ILO proposed a more flexible text. The text now reads:

Article 18

(1) The State Parties to the present Convention recognize the

99. Commission on Human Rights, 40th Session; U.N. Doc. E/CN.4/1984/WG.1/WP.1 (21 December 1983).

100. U.N. Doc. E/CN.4/1984/WG.1/WP.1/ *op.cit.* p.2, para. 4.

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right to the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

(2) The State Parties to the present Convention shall take legislative and administrative measures to ensure the implementation of this article. To this end, and having regard to the relevant provisions of other international instruments, the States Parties shall in particular:

- (a) provide for a minimum age or minimum ages for admission to employment;
- (b) provide for appropriate regulation of the hours and conditions of employment; and
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article.

Under article 18 the protection of the child's development is paramount.

Implementation

In the 1987 pre-sessional meeting initial consideration was given to methods of implementation, including a self-reporting system, and a new (Governmental/Independent) Group of Experts to be established by the Economic and Social Council.

Criticism and Comment

The Chairman of the Working Group hoped that a complete first draft would be ready for presentation by the end of 1988.⁽¹⁰¹⁾ The adoption of the Convention is clearly still several years away.

The actual right to education espoused in article 15 of the draft Convention is weak. The right to free primary education is qualified by the phrase to be made available "as early as possible". That such wording seems to have been accepted, some 20 years after the adoption of the International Covenant on Economic, Social and Cultural Rights, is extraordinary. The Covenant binds State Parties to adopt a plan for distributing primary education to all "within a reasonable number of years".⁽¹⁰²⁾ Clearly the interpretation of this phrase will be highly elastic if this wording of the draft Convention is ultimately adopted. The implication is that a period of over twenty years is not "unreasonable". It dilutes an already dilute right even further.

The draft Convention on the Rights of the Child is certainly no advance for the child's right to education. It must be wondered whether there is any point at all in providing such a weak right. The child would be better off without it, by relying on the earlier

101. U.N.Doc. E/CN.4/1987/SR.55 p.2.

102. Article 14.

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treaty provisions.⁽¹⁰³⁾ This is also true of the "right" to higher education which is also less well established by the current draft than in the Covenant on Economic, Social and Cultural Rights.⁽¹⁰⁴⁾ The new Convention should not be retrograde. It should impose an absolute obligation to ensure that everyone receives primary education. Those states unable to meet the standard should not become Parties until they can do so. Even the Declaration on the Rights of the Child uses firmer language.⁽¹⁰⁵⁾

A clear development, reflected by the mere drafting of the Convention itself, is the growing recognition of the relative autonomy of the child. For example the original article on freedom of expression was heavily amended to allow "due weight" to be taken of the child's wishes.⁽¹⁰⁶⁾ However the rights expressed in the Convention as currently drafted do not appear to grant the child any greater "independence" or "control" over his own education than existing treaties. Possibly there is a slight diminution of parental rights in favour of the child. Article 15 talks of respect of the parental right to "provide direction to the child in the exercise of his right to education in a manner consistent with the evolving capacities of the child".

103. Including the UNESCO Convention Against Discrimination in Education; see chapter six below.

104. See above p.258.

105. See Principle 7 above p.307.

106. See above p.314 et seq.

In article 13 the International Covenant on Economic Social and Cultural Rights there is no mention of "direction" but rather talk of parental "liberty" to choose non-state schools and "ensure the religious and moral education of their children in conformity with their own convictions".¹⁰⁷ Thus parental control of education of their children is weakened by the new formula in favour of the child's interests. However it is not exactly clear what the parents' rights are to provide "direction". Can they choose the subjects to be studied at school? Is the state to act in the child's interest against the parent? The new Convention adds nothing but confusion. Moreover a child seeking to rely on article 15 of the draft Convention on the Rights of the Child, as currently drafted, would have difficulty establishing a "right" from the phrasing used. It is not sufficiently precise.

Again, in article 15, a slight variation of the "due weight" formula is used. The uncertainty induced by the formula could be reduced by having a general article to the Convention expressing the principle of "relative maturity".¹⁰⁸ In a universally applicable

107. See above p.258. Article 18(4) of the International Covenant on Civil and Political Rights is to similar effect; see above p.266.

108. This was in fact suggested in response to the American attempt to incorporate civil and political rights of the child during the 1987 session of the Working Group. See

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treaty it is most unlikely that agreement will be reached to fix "reference points" on that maturity scale. The working group is clearly struggling with the problem of the uneven, and relative, maturity of children to exercise rights. It seems inevitable that a general article on this issue must be drafted.

To the extent that the Convention on the Rights of the Child duplicates rights expressed in other Conventions that grant rights to "everyone", the mere presence of the Convention throws doubt on the rights of the child to avail himself of the rights guaranteed elsewhere.¹⁰⁹ Hitherto the mere existence of the right to education in a treaty has implied that the rights of the International Bill of Rights and the Convention Against Discrimination in Education apply to children. The European Convention on Human Rights has certainly been interpreted as protecting children as well as adults.¹¹⁰ The drafters should definitively establish, in the text of the Covenant,

above. p.336.

109. Especially where the new Convention grants a right to children in narrower terms than in the universal Covenants, e.g. Article 7 of the new Covenant compared to article 19 of the Covenant on Civil and Political Rights. Bennett, *op.cit.* pp.43 et seq. See generally Alston P., "Conjuring up new human rights: A proposal for quality control", (1984) 78 *A.J.I.L.* 607.
110. See the *Campbell & Cosans* case for example. ECHR, Ser. A, No.48, (25 February 1982); 4 *E.H.R.R.* 293.

the relationship between the existing covenants and conventions on human rights and the draft Convention on the Rights of the Child.¹¹¹ When drafting article 7bis, references were made, in the compromise U.K. text,¹¹² to other treaties, but these references were subsequently deleted. In the light of this uncertainty it is not surprising to find that the U.S.A. is proposing article 7ter¹¹³ and is trying to get included in the Convention the civil and political rights of the child. Several of the rights in the Convention, apart from the right to education are also expressed elsewhere.¹¹⁴ The question of the necessity for the Convention is inevitable raised by the existence elsewhere of the rights it enunciates.

The emphasis, in the draft convention, on the child's right to develop is very strong. Most of the articles seek, in one way or another, to protect the child's development. Equal opportunity is again espoused. The recognition of the interests of the child to influence the decisions affecting the child is an important contribution to the previously parent-centred texts as regards

111. Bennett *op.cit.*

112. See above p.322.

113. See above p.336.

114. For instance the kernel of article 18 of the draft Convention, protecting the child from exploitation, is found in article 10(3) of the International Covenant on Economic, Social and Cultural Rights.

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educational provision. The earlier international treaties sought to protect the parent from the state in the matter of educational provision. There is some danger, not to be over-stated, that, in allowing the child's interests to emerge, in legal terms, there will be a corresponding reduction of the parental rights of control in favour of the state which will (allegedly) be acting in the interests of the child. For who else is to arbitrate between the two but the state in some form or other. The pressures on the family will inevitably increase with the legal recognition of the child's interests.¹¹⁵ Despite this possibility, which should be addressed by the draft Convention, one must welcome the recognition shown to the child's interests in his own education and development.

The aims of the development sought by the draft Convention are pluralistic. This was emphasised by the acceptance of the modified Norwegian addition to article 16 that sought to protect the interests of the children of minorities.¹¹⁶ Although the right to learn in one's mother tongue was not accepted it appears that the

115. Article 10 of the International Covenant on Economic, Social and Cultural Rights strongly protects the notion of the family as "the natural and fundamental group unit of society". One of its main functions is to "be responsible for the care and education of dependant children".

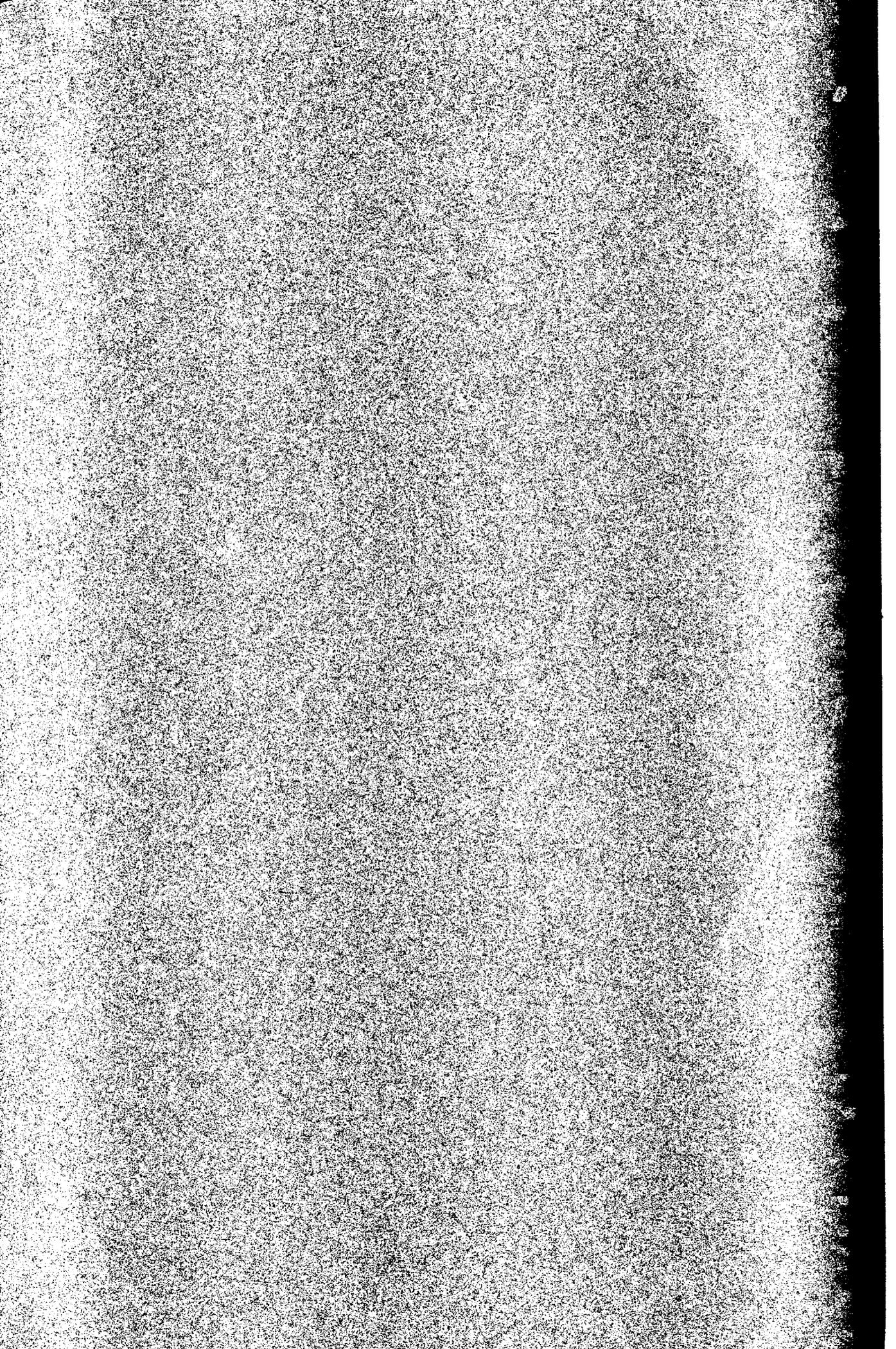
116. See above p.338.

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rights of minorities are making some headway in the U.N.¹¹⁷ To the list of noble causes, to be promoted by education, is added "respect for the natural environment". The influence of this draft Convention as an indicator of trends will be further considered in chapter eight.

117. See the working group currently drafting a Declaration on the Rights of Minorities; U.N. Doc. E/CN.4/1987/32.





THE RIGHT TO EDUCATION

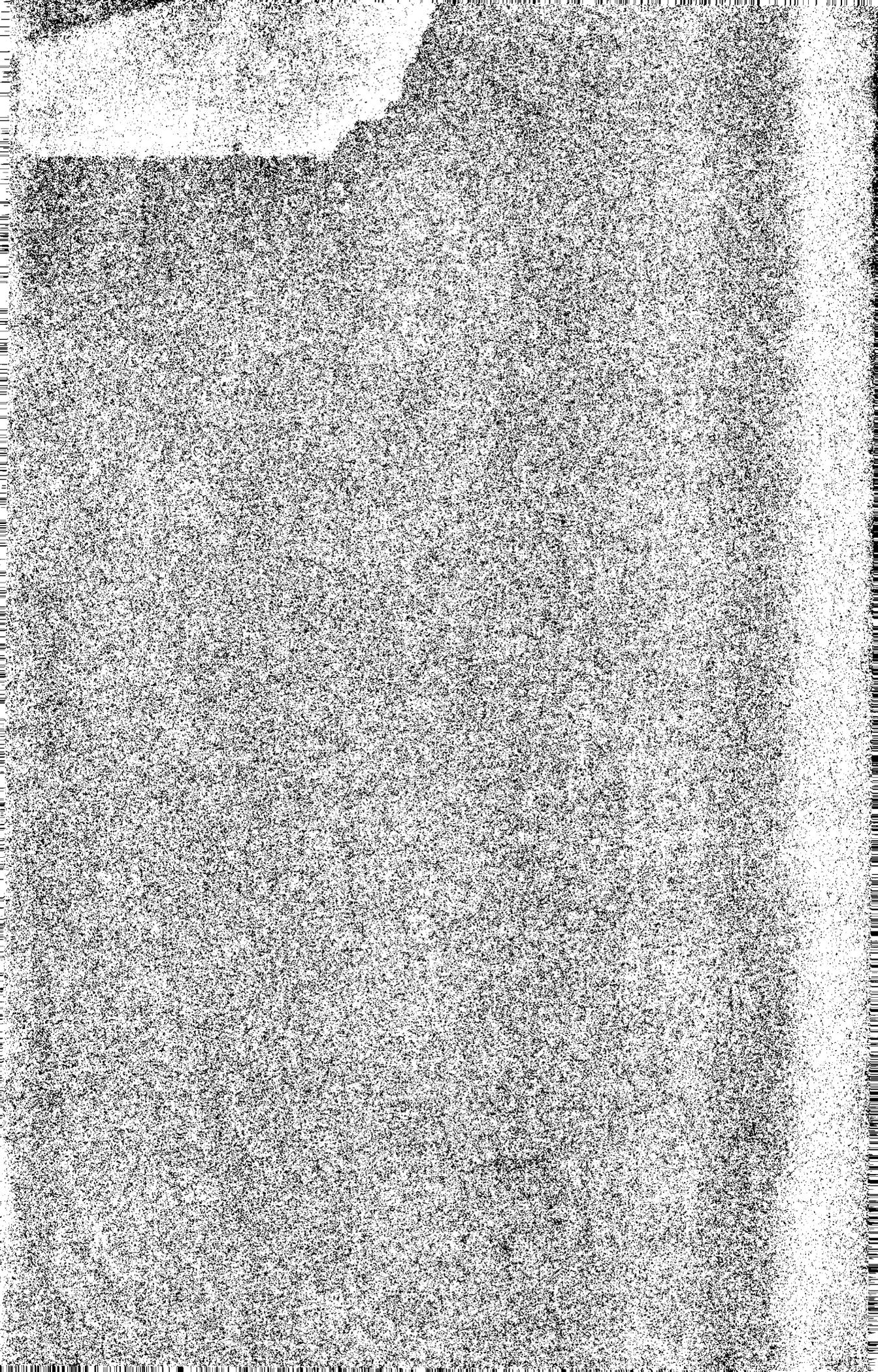
An Analysis of International Law concerning the Right to
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by

JULIAN LONBAY

VOLUME 2

Thesis submitted for assessment with a view
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CHAPTER SIX: UNESCO

I. INTRODUCTION

It is proposed in this chapter to look at UNESCO's record in promoting the right to education. Of particular importance to the emergence of the right to education are the Recommendation⁽¹⁾ and Convention against Discrimination in Education (1960).⁽²⁾

However, as we have seen in the preceding Chapters of Part Two, UNESCO's role goes beyond the establishment and operation of

-
1. Recommendations are adopted by majority vote at the General Conference of UNESCO where all member states are equally recognised. See generally UNESCO, *Rules of Procedure concerning Recommendations to member states and international Conventions covered by the terms of article IV, paragraph 4, of the Constitution*, (published by UNESCO in the *Manual of the General Conference*, (1984)). Article 12 of the above Rules of Procedure sets out the voting requirements for adoption.
 2. Conventions are also adopted by the General Conference of UNESCO, but require a two-thirds majority. They do not come into effect except in relation to those states that ratify them, and according to their terms.

these instruments.⁽³⁾ Its very creation and Constitution show the importance of education not only for international understanding but also for the individual. Therefore in this section the origins and

3. It covers *inter alia* the fight against illiteracy, the promotion of international understanding and helping to draft the educational rights in the U.N. treaties and Declarations. The literature on the UNESCO Convention/Recommendation against Discrimination in Education is very sparse. Saba, H., (legal counsel to UNESCO) wrote a brief summary, Saba, H., 'La Convention et Recommendation concernant la lutte contre la discrimination dans le domaine de l'enseignement', [1960] *A.F.D.I.* 646-652. See also Mertens, P., 'L'application de la Convention et de la recommandation de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement un bilan provisoire', (1977) *R.D.H./H.R.R.* 91, which essentially gives a summary of the first reports under the Convention against Discrimination in Education. Nartowski, A. S., 'The UNESCO system of Protection of the Right to Education ...', (1974) 6 *Pol.Ybk.Int.L.* 289, is an assessment by a Polish political scientist, and Juvigny, P., *The fight against discrimination; Towards equality in education*, (UNESCO, 1962) is a layman's guide to the purposes of the CDE put out by UNESCO though written by an eminent lawyer who was heavily involved in the drafting process. None of these review the *travaux préparatoires*.

Constitutional aims of UNESCO are briefly outlined. This is not designed to provide a complete analysis of all the work of UNESCO,⁴ but to set the background to the analysis of the Convention and other work of UNESCO in the field of the protection of human rights, some of which has already been covered in previous chapters of this Part.⁵

The work of UNESCO reaches out to a near universal audience. In particular UNESCO programmes to eliminate illiteracy are clearly of fundamental importance when trying to analyse any international right to education. As we have seen, during the drafting of the International Bill of Rights, the inclusion of the right to education was often questioned on the grounds that this was a matter more appropriately left to UNESCO. Important as this work is, it is not proposed to delve into it in any great depth as the real thrust and focus of this thesis is directed to the analysis of the establishment of norms in international law on the right to education that are relevant to European States where mass illiteracy is not a problem.

Another theme in UNESCO's work, already examined, has been its efforts to promote international understanding by attempting to encourage the denationalisation of the teaching of history. Its more recent work in this vein (including work on the New World Information

-
4. Nor is it designed to provide a complete analysis of its constitution.
 5. Its work in relation to illiteracy, the promotion of international understanding and in helping to draft the educational rights of the International Bill of Rights.

Order) has proved less than productive and helped to provoke both the U.S.A. and the U.K. to withdraw from the Organisation.⁶ Much of its work in the sphere of intellectual property is not germane to this work and therefore will not be alluded to. Apart from the substantive areas of competence UNESCO also has some interesting procedures to protect human rights. These are looked at in section V as potentially they could help the evolution of an international right to education.

II. The Founding of UNESCO

The United Nations Educational, Scientific and Cultural Organisation (hereinafter UNESCO) was born after the Second World War, the result of allied conferences in London.⁷ The meetings of the Allied Ministers of Education took place over a prolonged period and were wide-ranging. Several Commissions were set up by the

6. See above chapter two, p.57. A matter not dwelt on here. See Hoffer, P. E., 'Upheaval in the United Nations system: United States withdrawal from UNESCO', (1986) XII *Brooklyn J.Intl.L* 161.

7. Where there were many governments in exile from occupied Europe. For a general history see, Krill de Capello, H. H., 'The creation of the United Nations Educational, Scientific and Cultural Organisation', (1970) XXIV *Int.Org.* 1, and works cited therein. Krill de Capello was a member of the UNESCO Secretariat at the time of writing the above, and made full use of the UNESCO archives.

Conference of Allied Ministers of Education,⁹ including the Book Commission (established in 1943), a sub-Committee of which suggested reforms in relation to the unbiased teaching of history.¹⁰

Partly under the influence of René Cassin they elaborated plans for the establishment of an international educational organisation in 1944. Under American influence (a delegation led by Congressman Fulbright) the states turned their minds to establishing an international institution for post-war educational and cultural reconstruction. A drafting Committee meeting at Claridge's Hotel in April 1944 established the "reconstructionist" aims of UNESCO. A fund was to be established, which the U.S., being the main financial contributor, would largely manage.¹¹ The discussion on the establishment of the United Nations Organisation and the San Francisco Conference in April 1945 dealing with the establishment of U.N. had the effect of widening the aims of the nascent educational organisation.¹² The French were keen to have the Paris

8. The USSR sent only observers as it felt that international cooperation in the field of education would infringe on its internal affairs. *Id.* p.5.
9. *Id.* p.4, note 12.
10. *Id.* p.11.
11. Doubts about Congressional approval of reconstruction funds other than on a bilateral basis caused the U.S. to change its tune as to the nature of the organisation being created.
Laves, W. H., & Thompson, C. A., *UNESCO, Purposes, Progress,*

International Institute for Intellectual Cooperation used as a model.^{'12'} The Conference established to create UNESCO met in London in November 1945. Clement Attlee (the British Prime Minister) inspired the Conference with his inaugural speech declaring that "wars began in the minds of men".^{'13'} The promotion of international understanding (and corresponding diminishment of nationalism) was to be one of the main aims of the new Organisation.^{'14'} The Conference

Prospects, (Indiana U.P., 1957) pp.21-22.

12. De Gaulle, miffed at not being invited to the Yalta and Dumbarton Oaks conferences, had refused to co-sponsor the San Francisco conference, and was intent on re-establishing French institutions and ideas. The French threatened to convene their own educational conference, but were mollified when the U.K. government suggested that the invitations to a Constituent Conference be jointly issued by the French and British governments. The French also managed to secure that French be an official conference language along with English.
13. *Id.* p.19 The phrase now forms part of the second recital of the Constitution of UNESCO reading:
... that since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed;
Constitution of the UNESCO, (1947) 4 U.N.T.S. 275, No.52, in force on 4 November 1946.
14. Fostered *inter alia* by exchange programmes and the elimination of illiteracy. *Id.* p.22.

was profoundly influenced by the German totalitarianism that had subjected all activity, especially educational activity, to its fascist aims.¹⁵

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15. This is hardly surprising, given the context. The meeting took place in the only building in London left standing that was large enough to accommodate all the participants. (Institute of Civil Engineers) The human rights treaties were similarly inspired by the horrors of the war. Laves and Thompson report that some of the delegates were still in military uniforms. Laves, W. H., & Thompson, C. A., *UNESCO, Purposes, Progress, Prospects*, (Indiana U.P., 1957), p.3.

III. The Constitution of UNESCO⁽¹⁶⁾

UNESCO is a specialised agency of the United Nations.⁽¹⁷⁾ Its role as a promoter and protector of human rights is reinforced by this association with the United Nations, whose purposes in this matter are well known.⁽¹⁸⁾ The Constitution of UNESCO itself in its Preamble stresses

... that ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, [of] war.

It also accentuates the importance of recognising the equal dignity of all men, and in its 7th recital urges:

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16. Although this has been altered on many occasions, so far the Preamble and Article I establishing the purpose and function of UNESCO have not been altered. UNESCO, *Manual of the General Conference*, (1984 edition). For a history of the drafting see Laves & Thompson *op.cit.*, Chapter 2.
17. Under article 63 of the U.N.Charter it therefore promotes the aims of the United Nations. The text of the Agreement between the United Nations and UNESCO can be found in UNESCO, *Manual of the General Conference*, (1984 edition) p.115.
18. See generally Marks, S., 'UNESCO and human rights: The implementation of rights relating to education science and culture and communication', (1977) 13 *T.I.L.J.* 35. At the time of writing this article Marks worked for the Division of Human Rights and Peace, UNESCO. The article provides useful background information on the role of UNESCO.

For these reasons, the States parties to this Constitution, believing in full and equal opportunities for education for all, ... are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding ...

The acceptance of the liberal ideology of equal opportunity is plain here. It is noteworthy in this context that the Soviet Union and allies were not present during the drafting of the Constitution.⁽¹⁷⁾ Article One of the Constitution states the purposes and functions of UNESCO.⁽²⁰⁾

Article I.

Purposes and Functions.

1. The purpose of the Organisation is to contribute to peace and security by promoting collaboration among the nations through

19. This was because they felt that the newly-created Economic and Social Council of the U.N. should have issued the invitation to states. Laves & Thompson *op.cit.*, p.24.

20. Laves & Thompson *op.cit.*, p.34 note that:

... the record of the debate during the London Conference reveals diversity rather than unity in the intentions of the fathers of the constitution. ... [The] lack of clarity in constitutional language permitted a variety of activities by UNESCO that reflected nearly every idea and interpretation found at London.

education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

2. To realise this purpose the Organisation will:

(a) collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image;

(b) give fresh impulse to popular education and to the spread of culture;

by collaborating with Members, at their request, in the development of educational activities;

by instituting collaboration among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social;

by suggesting educational methods best suited to prepare the children of the world for the responsibilities of freedom;

(c) maintain, increase and diffuse knowledge;

by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions;

by encouraging co-operation among the nations in all branches

of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;

by initiating methods of international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them.

3. With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States Members of this Organisation, the Organisation is prohibited from intervening in matters which are essentially within their domestic jurisdiction.

The whole wording of article 1 stresses that UNESCO has no competence to directly effect educational provision. This prerogative is jealously guarded by the nation-states. This article, in particular in paragraph three, preserves the domestic jurisdiction of states from international intervention, an article that echoes article 2(7) of the U.N.Charter, and which is relied on by, *inter alia*, the Eastern block of states to try to prevent UNESCO investigating human rights abuses within its sphere of competence unless there is a large-scale and flagrant violation.⁽²¹⁾ It certainly prevents UNESCO from coming to any binding ruling on human rights cases, absent some alternative treaty-based attribution of

21. Marks *op.cit.* p.39.

competence. It would also seem to dampen any hope of legally binding UNESCO intervention in relation to the educational systems of its member states whether in pursuit of the diminishment of illiteracy, promotion of international understanding, or detailing the scope of the right to education, except to the extent that such matters, because of state action and the evolution of international law, are no longer to be considered as falling within the concept of domestic jurisdiction.⁽²²⁾ However the Constitution certainly gives UNESCO competence to examine communications from individuals, and issue reports thereon. This matter, along with procedural aspects of UNESCO human rights activity is considered below in section V.

We now turn to the main instruments on the protection of the right to education sponsored by UNESCO. These are the Convention (and Recommendation) Against Discrimination in Education, 1960 (hereinafter CDE). The title of this treaty is somewhat misleading. As the British representative on the Commission on Human Rights observed during the drafting process,⁽²³⁾ many of the principles were not concerned with discrimination but contained important principles relating to the right to education. Those had already been

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22. A relative concept as the *Nationality Decrees in Tunis & Morocco* case made clear, Ad.Op., P.C.I.J., Ser.B No.4, (1923), at p.24. See generally chapter two, pp.57-58 and p.69 et seq.
23. Commission of Human Rights, 14th Session; U.N. Doc. E/CN.4/SR.590 (6 May 1958) p.9.

enunciated in the Universal Declaration of Human Rights and in the draft covenants on human rights. Was it necessary to repeat them?⁽²⁴⁾

IV. The Convention Against Discrimination in Education⁽²⁵⁾

A. Drafting History

The Study on Discrimination in Education written by Mr. Amoun for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities effectively commenced the progress towards the establishment of the Convention Against Discrimination in Education (hereinafter CDE).⁽²⁶⁾ A progress report was tendered by Mr Amoun at the seventh session of the Sub-Commission, and a draft

24. See p.386 et seq. below for text and comment on the relevant provisions.

25. Adopted 14 December 1960 at the 11th General Conference of UNESCO, 429 U.N.T.S. 93. (Entered into force 22 May 1962). See Brownlie, I., *Basic Documents, op.cit.*, p.234.

26. U.N.Doc. E/CN.4/Sub.2/181 (1957). The study was commenced in 1954 at the sixth session after a request by the Sub-Commission (submitted at the fifth session in 1952) to study discrimination in Education was approved by the Commission on Human Rights (at its tenth session) and ECOSOC. The *rapporteur* was given a very wide range of sources to access in writing the study, including all the UN bodies and specialised agencies, as well as writers and scholars, and information obtained from governments and NGO's.

report at the eighth. The study was in three parts. It was extremely influential and even-handedly pointed out the universal nature of the problem. The Eastern bloc states discriminated in educational provision by political criterion and the Western states by social class.⁽²⁷⁾ The Study highlighted the problem of passive discrimination based on inequitable distribution of educational resources with no discriminatory intent, the rural population for example, being notably worse off.⁽²⁸⁾

The first two parts of the Study⁽²⁷⁾ analysed materials that the *rapporteur* had collected. The third and final part of the study contained the proposals and recommendations that he had made to the Sub-Commission. It was on these proposals that the Sub-Commission had drafted the three alternative Resolutions A, B, and C.⁽³⁰⁾ It was

27. U.N. Doc. E/CN./Sub.2/181/Rev.1 p.61 *et seq.*

28. *Id.* p.73

29. These had been fully debated by the Sub-Commission at its 8th Session. U.N. Doc. E/CN.4/Sub.2/L.92.

30. The Commission on Human Rights noted this at its 12th Session and in discussing the Report, Mr. Michailenko (Ukrainian Soviet Socialist Republic) said that discrimination was still rife in education, particularly that based on sex, he also alluded to social discrimination in education. He then eulogized the post-revolutionary Ukrainian system. Commission of Human Rights: 13th Session U.N. Doc. E/CN.4/SR.165 (12 February 1958) p.8.

decided to seek further comments on the draft, particularly from UNESCO and the Commission on the Status of Women, and further revise the draft report at its next session.

At its 12th session (1956) the Commission on Human Rights told the Sub-Commission on Prevention on Discrimination and Protection of Minorities to go ahead submit a draft convention on discrimination in education. The *rapporteur*, Charles Ammoun, had suggested this course.⁽³¹⁾ It was felt that this convention would not be duplicating the covenants since it would end discrimination immediately.⁽³²⁾

At its 9th Session⁽³³⁾ the Sub-Commission continued debating the study of discrimination. In the main it considered

31. U.N. Doc. E/CN.4/Sub.2/181.

32. Against this suggestion it was argued that the Sub-Commission was composed of private individuals; that the Commission had not yet received its report; and that the proposed convention on discrimination in education would compete with the, as yet unadopted covenants, (that is unadopted by the General Assembly).

33. 9th Session of the Subcommittee on the Prevention on Discrimination and Protection of Minorities (February - March 1957).

discrimination in the field of employment and occupation.⁽³⁴⁾ The *Rapporteur's* Study on Discrimination in Education was considered and the Sub-Commission drafted ten fundamental principles and proposals for action to eradicate such discrimination. They suggested three main courses of action to the Commission. These are considered below.⁽³⁵⁾

Chapter IV of the Report of the Sub-Commission dealt with the study of discrimination in education.⁽³⁶⁾ The special *rapporteur*, Mr. Ammoun, who had prepared the study of discrimination in education for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and Mr. Saba, legal advisor to UNESCO, were present at the Commission session dealing with this aspect of the Sub-Commission's report.⁽³⁷⁾

Resolution A contained the study of the special *rapporteur*

34. Commission of Human Rights: 13th Session U.N. Docs. E/CN.4/SR.559 (28 May 1957); U.N. Doc. E/CN.4/740 Ch. V-XI. Chapter X dealt with the question of communications relating to prevention of discrimination and protection of minorities.
35. P.365.
36. Commission of Human Rights: 13th Session U.N. Docs. E/CN.4/740; E/CN.4/743; E/CN.4/Sub.2/181 and Corr.1 and add.1; E/CN.4/Sub.2/L.103.
37. Report of the 9th Session of the Subcommittee on Prevention of Discrimination of Minorities U.N. Doc. E/CN.4/SR.565 (12 February 1958) p.4.

together with the summary records of the discussion of the Sub-Commission at their 8th and 9th sessions. (38)

Resolution B requested the Commission study three possibilities for obtaining the goals set out in those principles. They were as follows:

One, the Economic and Social Council should prepare an international instrument in which the principles would be set forth.

Two, that UNESCO should be asked to consider the possibilities of drafting and adopting an international instrument or instruments to prevent discrimination in education.

Three, the General Assembly should be asked to consider whether these principles had been given due importance in the preparation of the International Covenant on Economic and Social and Cultural Rights.

The Executive Board of UNESCO, without committing itself, considered that, should such a convention be adopted, it should be adopted and drafted by UNESCO itself. Some members supported this, others considered that UNESCO had had little to do with the study of discrimination and education, and that it had been very cautious (39) towards the study after it had been completed.

38. U.N. Docs. E/CN.4/Sub.2/SR.174-188, 198-213.

39. A point echoed at the fourteenth session of the Commission on Human Rights by Mr Morosov (USSR). U.N.Doc. E/CN.4/SR.567, p.8.

Resolution C is a draft of a possible resolution to be adopted by the Economic and Social Council and contains the ten fundamental principles. Paragraph 4 of Resolution C reads as follows:

4. Desiring to elaborate further the principles enumerated in the Universal Declaration of Human Rights,

I. Declares that with a view to eliminating discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, all legislative provisions or administrative measures should be abolished and all practices opposed which for any purpose which, for the purpose of discriminating against any group:

- (a) Deprive any person or distinct group of persons of access to education at any level of any type;
- (b) irrevocably limit any person or distinct group of persons to education of an inferior standard;
- (c) Establish or maintain separate educational systems or institutions for persons or distinct groups of persons.

II. Affirms to that end the following principles should be applied;

- (1) Compulsory education prescribed by law should be assured both in law and, in fact, to every person or distinct group of persons;
- (2) The entrance requirements for admission for scholastic institutions, should, in law and in fact, be the same for all

persons or distinct groups of persons;

- (3) No person or distinct group of persons should be compelled to receive the instruction to which they are entitled in establishments which are deliberately maintained to a lower standard than that of other establishments of the same state or type;
- (4) Respect should be paid to the formal parents and when applicable, legal guardians, to choose for their children scholastic institutions other than those established by the public authorities, provided that those institutions conform to such minimum educational standards as may be laid down or approved by the state;
- (5) No person or distinct group of persons should be compelled to receive religious or anti-religious instructions inconsistent with his or her convictions, and respect should be paid to the freedom of parents and, when applicable, legal guardians, to ensure that religious education of their children in conformity with their own convictions;
- (6) In the case of assistance furnished by the public authorities to educational establishments (in the form of grounds, tax relief etc.), no distinction should be made solely on the grounds that people belong to a distinct group;
- (7) No difference of treatment should be applied by the public authorities as between persons or distinct groups of persons, except on the basis of merit and need, in respect to:
 - (a) School fees and expenses;

- (b) Assistance to people and students (in form of educational material, board and lodging, clothing, scholarships or loans, etc.);
- (8) Special measures should be taken to promote the education of the rural population and of indigenous, nomadic, and other groups whose needs require special attention;
- (9) The members of the distinct group should not be denied the right to carry on their own educational activities, including the maintenance of schools, using their own language, if any, provided, however, that this right shall not be exercised in a manner which interferes with the development of understanding of the culture or language of the general community and participation in its activities, or undermines the national sovereignty of the state;
- (10) No travel restrictions designed to prevent any person or distinct group of persons, directly and indirectly, from making use of educational facilities offered to him or them abroad, should be imposed. (40)

The Sub-Commission report was discussed in general debate which dealt mainly with questions raised by Resolution B adopted by

40. Report of the 13th Session of the Commission of Human Rights Economic and Social Council, Official Records 24th Session, Supplement Number 4, p.18 et seq.

the Subcommittee at its 9th Session⁽⁴¹⁾ concerning the form that any international instruments for the prevention of discrimination in education to be adopted should take. Mr. Colban (Norway) suggested that UNESCO would be the appropriate body to draw up such a convention.⁽⁴²⁾ Mr. Gunewardene (Ceylon) opposed delegating the responsibility to UNESCO for eliminating discrimination from education. He felt it was the U.N.'s responsibility in general to help stamp out that evil. He did though favour the preparation of a convention on the prevention of discrimination in education. Mr. Dominedo (Italy) favoured delegating the drafting of the convention to UNESCO.⁽⁴³⁾ He felt, "It was impossible to affirm the right to education without *ipso facto* recognising the freedom of religious education, for freedom lay at its very root." He emphasised that the state was responsible for ensuring progress in education and guaranteeing citizens freedom to choose the form of education they wished to receive for their children. Mrs. Wasilkowska (Poland) also supported the drafting of a convention as suggested in Resolution B.⁽⁴⁴⁾ Many delegates took the opportunity to extol the virtues of

41. U.N.Doc. E/CN.4/740, Para. 161.

42. Commission on Human Rights, 13th Session: U.N. Doc. E/CN.4/SR.565 (12 February 1958) p.11. He was supported by the Indian delegate, (Mr. Dayal). Commission on Human Rights 13th Session: U.N. Doc. E/CN.4/SR.569, p.6.

43. *Id.* U.N. Doc. E/CN.4/SR565 p.15.

44. *Id.* E/CN.4/SR.565 p.16.

their own educational systems. ⁴⁵

The Chairman, Mr. Serrano (Philippines) suggested that the Commission adopt for working purposes Resolution C of the Sub-Commission's report. ⁴⁶ Resolution C listed ten fundamental principles for preventing and eradicating discrimination in education. The Commission proceeded to a first reading of Resolution C taking into account the comments that had been received.

Mr. Eggermann (International Federation of Christian Trade Unions) emphasised the importance of having implementation procedures should any convention be drawn up. ⁴⁷ He pointed out that the Executive Board of UNESCO had had misgivings about the vagueness of (c) of Sub-paragraph I of operative Paragraph IV which seemed to cast doubt on the right of independent educational establishments catering to specific groups to exist. ⁴⁸ The Executive Board of UNESCO had misgivings about this ⁴⁹ in particular the UNESCO Board in its comments, Paragraph 16, had stressed that Clause C should not be interpreted as implying that educational institutions reserved for

45. *E.g.* Mr. Gunewardene (Ceylon) *id.* E/CN.4/SR.565 p.13.
46. U.N. Doc. E/CN.4/740 Para. 162. Economic and Social Council Official Records, 24th Session, 1957, Supplement 4; U.N. Doc. E/2970/Rev.1 (12 August 1957).
47. Commission of Human Rights: 13th Session U.N. Doc. E/CN.4/SR.566 p.5.
48. For text see above p.365.
49. U.N.Doc. E/CN.4/743 para.16.

people of one sex, confessional schools or schools whose teaching respected the national linguistic traditions of the inhabitants, should be forbidden.

Mr. Eggermann was also concerned with Paragraph 5(C)(3) giving the government power to revise school textbooks. This he felt could be abused. Mr. Morosov (Soviet Union) considered that discrimination in education was rife and extracted from the special *rapporteur's* study the figures for the Belgian Congo. Here the indigenous population of 12,317,326 persons had 409,073 francs spent on their education; for the non-indigenous population of 93,165, the figure being spent was 174,655,000 francs. The indigenous population was getting half of the amount of cash spent on them, even though numerically they massively outweighed the non-indigenous population. On a *per capita* level this was 56 times as great, 108,870 francs as against 33 francs. (20) This is a fairly typical example of diplomatic point-scoring that enlivened the debates on the drafting of the human

50. Commission of Human Rights, 13th Session U.N. Doc. E/CN.4/SR.567 (12 February 1958) p.9 *et seq.* Defended by Mr. Wolf (Belgium): Mr Ammoun, in his comments on the Belgium Congo got it wrong by giving the attendance figures of 1954 which didn't include any girl pupils or girls' schools. Mr. Ammoun had not used official government publications but relied on one unofficial publication. Commission of Human Rights: 14th Session U.N. Doc. E/CN.4/SR.588 (2 May 1958) p.9.

rights treaties.

During the debate several members of the Commission expressed views and amendments on the principles. These were not pressed and the view that the principles as forwarded by the Sub-Commission should be forwarded to governments for examination and comment was generally accepted. The first reading only got as far as Operative Paragraph 4(I) of Resolution C. (91)

In the debate during the 14th session Mr. Maheu (UNESCO) (92) had pointed out UNESCO's contribution to the struggle against discrimination in the field of education. (93) UNESCO could proceed on three lines.

1. It might take normative action by drawing up international instruments.
2. It might try to influence public opinion by other methods.
3. It might define fundamental principles which would be of use as a guide to drawing up international instruments and influencing public opinion.

The Executive Board at its next session was considering whether the question of drawing up a international instrument relating to discrimination in education should be placed on the

51. Operative Paragraph 4(I) of Resolution C. For the text see p.365 above.
52. Commission of Human Rights: 14th Session U.N. Doc. E/CN.4/SR.588 (2 May 1958) p.5.
53. U.N. Doc.E/CN.4/766, para 2.

agenda of the General Conference of UNESCO, to be held in November 1958. The General Conference, alone, was competent to decide whether attention should be given to such an international instrument. That it was up to the Executive Board to decide whether such a question should be placed on the agenda of the General Conference.

Members of the Commission welcomed the decision of the Executive Board of UNESCO to consider at its 50th Session in April 1958 the question of possible inclusion of the question of whether a convention against discrimination in education should be drawn up on the agenda of the UNESCO General Conference (November 1958).

There follows a summary of the main issues debated.

1. Definition of Discrimination in Education

Some members of the Commission felt that the introduction of a subjective criterion of intent was unnecessary ("for the purpose of discriminating against any group" from Para 4 I). Mr Saba (UNESCO) alluded to this problem suggesting UNESCO's position that intent should be required.⁵⁴ The representative of the United States of America suggested that any measures and practices having the effect of discrimination should also be abolished or opposed (regardless of intent).⁵⁵ In the following meeting Mrs. Simon (U.S.A.) defended

54. U.N.Doc. E/CN.4/SR.568 p.5. See also UNESCO comments on the draft, U.N.Doc. E/CN.4/766, para.7.

55. René Cassin (France) considered that it was not necessary to specify intent. Mrs. Lord (U.S.A) observed that intent alone was not a sufficient definition. The effects must equally be

the U.S. position that effects should also be covered. Those guilty of discrimination never admitted their intention. René Cassin (France) spoke against the U.S. amendment on the grounds that some intentional discrimination was permissible, for example, in denominational schools. It would be wrong for people to be forced to accept uniformity. He favoured a U.S. style amendment in relation to the public educational system only. ⁽⁵⁶⁾

Summary of arguments in favour of the U.S. suggestion: ⁽⁵⁷⁾

- (1) Those guilty of discrimination never admitted they intended to discriminate;
- (2) The problems in determining the proof of intent to discriminate therefore justified the use of the word "effects", if the definition of discrimination were limited to that by intent it would be incomplete; ⁽⁵⁸⁾

taken into account. Commission on Human Rights, 14th Session, U.N. Doc. E/CN.4/SR.591 (8 May 1958) p.5. This concern reflected that expressed by the Report of Mr Ammoun, *Study of Discrimination in Education*, U.N. Doc. E/CN.4/Sub.2/181/Rev.1 p.73.

56. Commission on Human Rights, 14th Session, U.N. Doc. E/CN.4/SR.592 (7 May 1958) pp.5-6.
57. U.N.Doc. E/CN.4/769, p.7.
58. Prophetic and ironic in the light of the criticism of *Washington v Davis* 426 U.S. 229 (1976) a U.S. case which requires "intent" to be shown prior to a finding of a

- (3) The Commission was not attempting to produce a legal text, but endeavouring to state a goal towards which states should strive. Its main objective should be to combat any discrimination which lead to unjust political, social, economic or racial relationships. "It should be concerned not with the intention of those who control the school, but with the effect upon those who were being educated."

Summary of arguments against this position:

- (1) Unavoidable inequality in education, due to natural conditions or existing circumstances, should not be confused with intentional discrimination;
- (2) If the phrase "for the purpose of discriminating against" were deleted then measures embodying legitimate distinctions such as single sex schooling, denominational schooling, or special schools for handicapped or gifted persons might be regarded as discriminatory;
- (3) It was contended that the discriminatory intention could be deduced from the facts.

At the end of the fourteenth session Mr. Maheu (UNESCO) proposed⁽⁵⁷⁾ an amendment to the definition of discrimination.⁽⁵⁸⁾ The phrase,

violation of the 14th amendment.

59. Commission of Human Rights: 14th Session, U.N. Doc.

E/CN.4/SR.591 (8 May 1958) p.3.

60. U.N.Doc. E/CN.4/740 p.49) Sub-para 4.I of the Subcommittee's draft Resolution C.

"Which, for the purpose of discriminating" should be replaced by the words, "Which have the purpose or the effect". He pointed out this wording was similar to the wording suggested by the United States. (61)

2. Use of the term "distinct group of persons".

Objection was taken by some delegates to the use of the term distinct which was felt to be too limiting and not sufficiently precise. The suggestion was that it should be replaced by any person or group as being a stronger and clearer term. Other members pointed out that the Sub-Commission had carefully chosen the word distinct to convey the idea of groups which had voluntarily chosen to maintain special characteristics such racial, religious, or linguistic characteristics.

3. Sub-paragraph 4.1c) dealing with separate institutions. (62)

This was criticised by several members of the Commission as being too rigid and not sufficiently clear. While it was intended to deal with segregation on the basis of race or colour, it may also go further and prohibit separate schools for boys and girls or students belonging to different religious denominations or speaking different languages. The hope was expressed that better wording would be found

61. U.N.Doc. E/CN.4/760/Add.2, p.4.

62. See above p.365.

for the sub-paragraph. It was noted that the sub-paragraph was not included in the proposal of the special *rapporteur*. Some argued in favour of the sub-paragraph as it was.

4. Consideration of amendments⁶³ to Operative Paragraph 4(I) of Resolution C.

Members met informally⁶⁴ to try and reach agreement on the common text.⁶⁵ The representative of Iraq presented the Commission, at its 594th meeting, a working paper⁶⁶ containing wording which was almost unanimously acceptable. The proposal suggested the following:

Desiring to elaborate further, in the spirit of the Universal Declaration, the principles enunciated in that declaration with the respect to the right to education, with particular reference to Article 2 and 26:

I. Declares that, with a view to eliminating discrimination in

63. Amendments to the Operative Paragraph 4(I) were submitted by Belgium, U.N.Doc. E/CN.4/L.480; The United Kingdom, U.N.Doc. E/CN.4/L.481; The Philippines, U.N.Doc. E/CN.4/L.402; The United States of America, U.N.Doc. E/CN.4/L.403; India, U.N.Doc. E/CN.4/L.485; and France, U.N.Doc. E/CN.4/L.486.
64. On the morning of March 21st. U.N.Doc. E/CN.4/SR.594, p.3.
65. At the suggestion of Argentina and Iran. Commission on Human Rights, 14th sess., U.N. Doc. E/CN.4/SR.593 (14 April 1958) p.5, 10, 11.
66. U.N.Doc. E/CN.4/L.487.

education, all legislative provisions and regulation, or administrative measures, should be abolished, and all practices opposed which for the purpose of . . . discriminating against any group on such grounds as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . . . *inter alia*:

- (a) Deprive any persons or (distinct) group of persons of access to education at any level or of any type;
- (b) (Irrevocably) limit any person or (distinct) group of persons to education of inferior standards;
- (c) Establish or maintain separate educational or institutions for persons or (distinct) groups of persons

The U.S.A. and China proposed amendments to this working paper.⁶⁷ The U.S. proposed that the words "or effect" should be inserted after the word "purpose".⁶⁸ China proposed that the word "declares" should be replaced by the word "recommends".⁶⁹

The Commission proposed to call for government comments on the Sub-Commission's Resolutions B and C. These comments were to be

67. U.N.Doc. E/CN.4/SR.594, p.4.

68. U.N.Doc. E/CN.4/L.489

69. U.N.Doc. E/CN.4/L.490; U.N.Doc. E/CN.4/SR.594, p.4.

returned to the Commission.^{'70'} At the 595th meeting, the representative of France submitted a draft Resolution^{'71'} proposing that the drafting of the declaration of basic principles on discrimination in education be postponed until the next session in order to take advantage of further comments of governments.^{'72'} A vote on the French proposal was adopted by eight votes to one with nine abstentions. Iraq submitted a counter proposal^{'73'} which suggested the appointment of a committee which would receive the additional comments from governments and UNESCO, and, in consulting with UNESCO, and after studying the deliberations of the Commission at its 14th Session, prepare a draft on the fundamental principles on discrimination in education for consideration by the Commission at

70. Resolution 7 p.20. The ECOSOC Council in Res. 6516 (XXIV) requested the Secretary-General to submit governmental comments and suggestions on Discrimination in Education directly to the Commission on Human Rights. Commission of Human Rights, 14th Session; Economic and Social Council Official Records: 26th Session, Supplement Number 8; U.N. Doc. E/3088; E/CN.4/769 p.5.
71. U.N.Doc. E/CN.4/L.492.
72. Commission on Human Rights, 14th Session, U.N.Doc. E/CN.4/SR.594 (6 May 1958) p.3.
73. U.N.Doc. E/CN.4/L.493.

its 15th Session. This was opposed by members on several grounds⁽⁷⁴⁾ and Iraq withdrew the amendment. The French amendment was then adopted 17 votes to none with one abstention.⁽⁷⁵⁾ This was mainly because the members of the Commission on Human Rights recognised they represented only 18 states out of 81 members of the U.N. and the wider consultation should be brought about. There was general agreement in the Commission on Human Rights that a series of fundamental principles should be prepared.⁽⁷⁶⁾ The debate was then closed.

By the start of the 15th session⁽⁷⁷⁾ additional comments had been received from the governments of Japan, Portugal, and Yugoslavia.⁽⁷⁸⁾ At the 15th Session, the Commission received two

74. (1) It was unlikely to succeed where Commission failed;
 - (2) Committee would need a clear mandate to help in this complex area;
 - (3) Financial implications of the committee.
75. Commission on Human Rights, Report of the 14th session, ECOSOC O.R. 26th sess., Suppl.8, p.8. Eighteen governments had so far submitted comments as well as UNESCO.
76. Commission on Human Rights, 14th sess., ECOSOC O.R., 26th sess., Suppl. No.8; U.N. Doc. E/3088; and E/CN.4/769, p.6.
77. Economic and Social Council, 28th Session, Official Records, 1959, Commission on Human Rights, U.N.Doc. E/CN.4/789; U.N.Doc. E/3229.
78. U.N.Doc. E/CN.4/760/Add.7.

communications from the Director-General of UNESCO. The first⁽⁷⁷⁾ informed the Commission of the decision of the General Conference of UNESCO:

To take responsibility for drafting recommendations to Member States and an international convention on the various aspects of discrimination in education.⁽⁸⁰⁾

and authorising the Director General

To prepare a preliminary report, draft recommendations and a draft convention to be circulated to Member States for comment, and to convene in 1960 a committee of technical and legal experts appointed by Member States with a view to submitting revised drafts of such recommendations and of a convention to the General Conference at its eleventh session.

The second⁽⁸¹⁾ referred to the request that the Sub-Commission had made (at its 11th session) for collaboration in the preparation of the draft instruments on discrimination in education.⁽⁸²⁾ The

79. U.N. Doc. E/CN.4/777.

80. UNESCO Doc. 10 C/Res. 1.34.

81. U.N. Doc. E/CN.4/777/Add.1.Corr.1.

82. The time-table of UNESCO essentially meant that UNESCO wouldn't have a draft text until probably the beginning of April 1960 which would be after the Sub-Commission's meeting in January. Therefore, it would be impossible for the Director General to comply with the Sub-Commission's request, but he thought he would be able to present the Sub-

question then arose for the Commission as to whether it should continuing discussing drafting fundamental principles in this area and how it should collaborate with UNESCO. It did not wish to duplicate the work undertaken by UNESCO. Mrs. Lord (U.S.A.) suggested deferring the Commission's consideration of the study of the question of discrimination in education until 1961, i.e. until after UNESCO had made its recommendation and the governments had submitted their observations. Members of the Commission regretted that UNESCO general conference resolution did not provide for consultation between the Sub-Commission and the Commission on Human Rights and UNESCO⁽⁸³⁾ and the Commission thus adopted a draft resolution⁽⁸⁴⁾ that maintained the question on its agenda for the sixteenth session.

At the sixteenth session⁽⁸⁵⁾ Mr. Saba (UNESCO) reported that a questionnaire had been sent out to Member States of UNESCO on the

Commission with a progress report containing what had happened so far. See pp.25-26 of the report of the 15th session for details of the timetable.

83. ECOSOC, Commission on Human Rights, 15th Session U.N.Doc. E/CN.4/SR.628 (19 August 1959) p.5.
84. U.N.Doc. E/CN.4//L.532.
85. ECOSOC, Commission on Human Rights, 16th Session, U.N. Doc. E/CN.4/SR.665 (22 June 1960) p.7.

2nd of June 1959.⁽⁸⁶⁾ Thirty-six replies had been received so far. Fourteen non-governmental organisation had also replied to the questionnaire.⁽⁸⁷⁾ An international convention (and recommendation)⁽⁸⁸⁾ drafted on the basis of the replies received would be submitted in June 1960 to a committee of experts made up of representatives of all the states members of UNESCO, which would draw up the final draft for submission to the General Conference in November 1960.

The question of the Sub-Commission's report on discrimination in education was examined at the seventeenth session of the Commission on Human Rights.⁽⁸⁹⁾ UNESCO had transmitted the text of the Convention and Recommendation against Discrimination in Education adopted by the General Conference on 14 December 1960.⁽⁹⁰⁾ Mr. Saba

86. UNESCO Doc. CL/1369, a letter asking member states to reply to the questionnaire contained in the Director-General's Preliminary Report (UNESCO Doc., UNESCO/ED/167 (29 May 1959)).
87. There were ultimately several more replies. See UNESCO Doc. UNESCO/ED/167-add.2.
88. He explained that the Recommendation was being drafted to help federal states which were not fully sovereign in respect of educational systems. *Id.*, p.8.
89. At the 682nd to 684th and the 685-694th meetings in March 1961.
90. U.N. Doc. E/CN.4/816.

(UNESCO) outlined^{'71'} its provisions.^{'72'}

A special committee of governmental experts meeting between 13 and 29 June 1960 in Paris prepared a draft text of the instruments submitted to the eleventh General Conference. Charles Amoun (Lebanon), the author of the Study on Discrimination in Education, was elected Chairman.^{'73'} Mr Juvigny (France) was the *rapporteur*. The Committee realised that the adoption of a legal text would not at a stroke enable the realisation of the elimination of discrimination and establishment of equal opportunity, but felt that they would help in the achievement of this aim. The Committee made several alterations to the Director General's draft text.^{'74'} Some of these are considered as appropriate below.

Draft amendments to the texts^{'75'} were submitted during the 11th Session of the General Conference and a working party was set up

91. ECOSOC, Commission on Human Rights, 17th Session, U.N. Doc. E/CN.4/SR.682 (29 March 1961) p.11.
92. U.N.Doc. E/CN.4/815, Annex I.
93. Report of the Special Committee of Experts, UNESCO Doc. 11 C/15, Annex III, para 9. Also in U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961).
94. UNESCO Doc. UNESCO/ED/167 Add.1 Annex 2.
95. UNESCO Docs. 11 C/DR/173-181 (24-25 November 1960).

to consider them.⁽⁷⁹⁾ The working party submitted several proposals to the General Conference which accepted all but two of them. Article 2(A) of the Convention and corresponding provision of the Recommendation provides separate educational systems or institutions to pupils of the two sexes should not be deemed to constitute discrimination though only on strict conditions. One of these conditions taking on the suggestion of the Commission on the Status of Women was that they should afford the opportunity to take the same courses of study. This was not fully adopted. The text adopted by the General Conference read

Afford the opportunity to take the same or equivalent courses of study.

The General Conference also decided to modify Article 8 of the draft Convention which had been submitted to it. This article dealt with dispute resolution under the Convention. It provided for disputes concerning the interpretation or application of the Convention to be referred to the International Court of Justice at the request of the states parties to the Convention. Previously only

96. See Report of the Working Party, UNESCO Doc. 11 C/PRG/36 (10 December 1960). Commission on Human Rights, Report of the 17th Session, Economic and Social Council Official Records, 32nd Session, Supplement No. 8 (U.N. Doc. E/3456; E/CN.4/B17), p.12 *et seq.* Also U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961).

one state party could have referred a matter to the ICJ.⁹⁷

The General Conference also adopted a resolution requesting the Director-General to prepare and submit a report to an *ad hoc* Committee of the General Conference (consisting of governmental experts in which all Member States could take part) a draft of a general Protocol instituting a Conciliation and Good Offices' Committee⁹⁸ competent to seek settlement of disputes between parties on the application and interpretation of the Convention. The *ad hoc* Committee was requested by the General Conference to report for its 12th Session November 1962.⁹⁹ The UNESCO representative pointed out to the Sub-Commission that control over the implementation of the two instruments would be exercised mainly through reports furnished to UNESCO in accordance with its terms of Constitution, the provisions of which permitted the organisation considerable flexibility in determining what subjects such reports should deal with, how often they should be submitted, and what form

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97. UNESCO, Gen. Conf. Rec. Proceedings, 11th sess., (1960), p.476 *et seq.*. The wording was altered at the Plenary session adopting the CDE by a vote 24 to 20 (with one abstention).
Id., p.480.
98. See below p.419.
99. The Sub-Commission report on this is contained in U.N. Docs. E/CN.4/Sub.2/SR.316-319.

they should take.¹⁰⁰

The general debate in the Commission on Human Rights (683-684th meetings) was brief as the Convention and Recommendation had already been adopted. Several members felt that Article 2(A) of the convention was deplorable. Mrs. Lefauchaux (Commission on the Status of Women) regretted that the General Conference of UNESCO had not followed the Commission on the Status of Women's advice in respect of Article 2 (A) of the convention. The Commission on the Status of Women had felt it important that where separate educational facilities for different genders were established the courses of study should be the same and not merely "equivalent".¹⁰¹ Article 13 also came under criticism since it limited state parties to those invited by UNESCO or belonging to UNESCO.¹⁰² It should be open to all states without prior conditions.

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100. p.12 of Report of 17th Session of the Commission on Human Rights. *op.cit.*
101. ECOSOC. Commission on Human Rights, 17th Session, U.N. Doc. E/CN.4/SR.683 (24 March 1961) p.13. Miss Camal (Iraq) agreed with the point made by the Commission on the Status of Women. ECOSOC. Commission on Human Rights, 17th Session, U.N. Doc. E/CN.4/SR.684 (24 March 1961) p.4.
102. ECOSOC, Commission on Human Rights, 17th Session, U.N. Doc. E/CN.4/SR.683 (24 March 1961) p.9. Mr. Sapozhnikov (USSR). ECOSOC. Commission on Human Rights, 17th Session, U.N. Doc. E/CN.4/SR.684 (24 March 1961) p.4.

The Economic and Social Council adopted a resolution on discrimination in education at its 1,171st plenary meeting on the 19th of July 1961, which notes with appreciation the Convention and Recommendation against Discrimination in Education adopted by the UNESCO General Conference at its 11th Session.⁽¹⁰³⁾

V. Analysis of the CDE: Conclusions

Clearly this Convention falls squarely into the frame of reference of this thesis. As Sir Samuel Hoare observed, many provisions in the Convention dealt with the matters covered by article 26 of the UDHR. The Preamble specifically refers to articles 2 and 26 of the UDHR as well as UNESCO's constitution.

A. Discrimination in Education

The CDE seeks to outlaw⁽¹⁰⁴⁾ any discrimination in education. As article 1 states:

1. ... the term "discrimination" includes any distinction, exclusion, limitation⁽¹⁰⁵⁾ or preference which being based on

103. U.N. Economic and Social Council Official Records, 32nd Session 1961, Supplement No. 1 (U.N. Doc. E/3555) September 1961 p.22.

104. Whether implemented by legislation or administrative practice. Article 3 (below p.392) explains the nature of the states' undertaking as regards discrimination.

105. The word limitation was added by the Special Committee (see above p.383). UNESCO Doc. 11 C/15 Annex III p.14.

race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth,⁽¹⁰⁶⁾ has the purpose or effect⁽¹⁰⁷⁾ of nullifying or impairing equality of treatment in education and in particular:

- (a) of depriving any person or group of persons of access to education of any type or at any level;
 - (b) of limiting any person or group of persons to education of an inferior standard;
 - (c) subject to the provisions of Article 2/Section II of this
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106. The Special Committee (above p.383) considered including "intellectual aptitude" in this list (as it might serve as a pretext for discrimination) but rejected the idea as education was to some extent predicated on selection based on capacity. *Id.*

107. U.S. arguments based on the problems of proving discriminatory intent won the day. *Id.*, pp.15-16. See also UNESCO Doc. ED/167 Add.2 p.39. This was unfortunate and unnecessary as the second half of the CDE deals with the question of equality of opportunity and thus the matter of the effects of discrimination whether unintentional or not. See below p.396. It was unfortunate for as the subsequent implementation of the CDE shows states in their reports have not been able to distinguish clearly between the requirements of the first and second halves of this treaty.

- Convention/Recommendation, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.
2. For the purposes of this Convention/Recommendation, the term "education" refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

The problems caused to provision of education based on legitimate distinctions (the handicapped, or rural populations etc)¹⁰⁸ caused by the inclusion of the words "or effects" was dealt with by the Report¹⁰⁹ accompanying the Convention when it was adopted. This states:¹¹⁰

There is no unjustified "preference" when the State takes measures to meet the special requirements of persons in particular circumstances, such as backward children, the blind, populations to whose illiteracy it is desired to put

108. See above p.374.

109. UNESCO Doc. 11 C/PRG/36 (10 December 1960).

110. *Id.* Para 13.

an end by suitable teaching methods, immigrants, etc. ⁽¹¹¹⁾

As the present writer has observed ⁽¹¹²⁾ the leaving out of this wording, which was originally suggested for inclusion in a list of fundamental principles rather than in a binding treaty, would have been preferable. Article 2 of the Convention deals with the problems posed by the existence of single sex schooling, ⁽¹¹³⁾ denominational schooling and private schooling ⁽¹¹⁴⁾. It states:

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article I of this convention:

- (a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or

111. As reaffirmed by the CCR's third Report on the implementation of the Rec. and CDE. UNESCO Doc. 20 C/40, (August 1978) para. 271.

112. Note 5B and accompanying text above.

113. The Commission on the Status of Women strenuously argued for access to identical curricula but as can be seen this was not adopted. UNESCO Doc. 14 C/15 p.16 para 38.

114. This was added by the Special Committee. UNESCO Doc. 14 C/15 p.16 Para.40.

equivalent courses of study¹¹⁵;

- (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;
- (c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

It is to be noted that these provisions, by themselves,

115. See above p.386 for the position of the Commission on the Status of Women's view of this provision. At the Working Party Switzerland proposed the phrase "same curricula" this was rejected by other delegates on the grounds that military academies and nursery school required different curricula. U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961).

do not guarantee in any way the rights to establish private schools, denominational schools or single sex schools. They merely assure that, should such institutions be permitted to exist by a state, then, if the conditions contained in the provisions were fulfilled, their existence would not amount to unlawful discrimination under the CDE. The wording of the first paragraph of this article arose at a late stage during the drafting of the Convention out of Mexican concern that article 2(b) would render its educational system out of line with the CDE. The Mexican system disallowed clergy from holding teaching positions. During the drafting no states contended that this Mexican position was a violation of the freedom to teach, rather a joint French-American amendment catered to the point by adding the first part of this paragraph. It was pointed out that the intention of article 2 was to ensure that no discrimination should be carried out in private or public educational institutions.⁽¹¹⁶⁾

However when article 2 is read together with the provisions of article 5(1) (b) and (c) it may be that in certain conditions states are bound to permit such schools.⁽¹¹⁷⁾

Article 3 of the CDE provides:

In order to eliminate and prevent discrimination within the meaning of this convention, the States parties thereto undertake:

- (a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices

116. ECOSOC D.R, U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961) pp.27-28.

117. See below p.400 for consideration of article 5.

which involve discrimination in education:

- (b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;
- (c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;
- (d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;
- (e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

This last provision (e) largely eliminates the significance of the removal from article One of the phrase "or other status" from the list of discriminatory criteria, and shows that the drafters of the Treaty and State Parties to the Treaty were willing to share their educational resources with non-nationals.⁽¹¹⁸⁾ Article 3 makes it clear that immediate action is required from ratifying states to

118. See below p.418 for an analysis of how the CDE has coped with the U.K. imposition of higher fees on certain foreigners.

eliminate discrimination in education. (117)

B. The Aims of Education

The CDE establishes the aims of education in terms identical to the Universal Declaration of Human Rights (120). By Article 5(2):

the States parties to this convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this article. (121)

Thus state parties to the CDE are obliged to promote international understanding and respect for human rights.

119. A matter also dealt with as regards racial discrimination in the Convention on the Elimination of Racial Discrimination (1965) Article 7.

120. Article 5(1)(a) is in identical terms to article 26(2) of the Universal Declaration:

1. The States parties to this convention agree that:

(a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;

121. It is to be noted that there is no parallel provision in the Recommendation.

The aims of education, elucidated in the International Bill of Rights and CDE, are further elaborated in the *Recommendation Concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms* (hereinafter the 1974 Recommendation).⁽¹²²⁾ UNESCO at the time of its adoption was not looked on favourably by Western states (especially the U.S.A.)⁽¹²³⁾ as it had criticised Israel (over its actions in

122. Adopted 19 November 1974, 18 UNESCO Gen. Conf. Rec., UNESCO Doc. 18C. See generally Buergethal T., and Torney, J. V., *International Human Rights and International Education*, (U.S. National Commission for UNESCO, Department of State, Washington D.C., 1976) esp. p.7 et seq. for a brief drafting history. The aims established in the Guiding Principle of the Recommendation are identical to those found in the UDHR and CI
123. The 1974 Recommendation was approved of in general by the United States, which felt obliged to vote against it as a whole as it included the following:

Education should emphasise the true interests of people and their incompatibility with the interests of monopolistic groups holding economic and political power, which practise exploitation and foment war.

This clause was the result of a Peruvian amendment, Para. 15 of the Recommendation. See Marks *op.cit.*, pp.44-45, Buergethal & Torney *op.cit.*, p.6.

Jerusalem) and blocked its joining the European Regional group.⁽¹²⁴⁾ The 1974 Recommendation continues a history of attempts to use education to further the peace and is clearly quite in accord with the purposes of UNESCO and article 26 of the Universal Declaration of Human Rights. Interestingly the 1974 Recommendation adopted a very broad definition of education, much wider than that adopted by the CDE which is limited essentially to schooling⁽¹²⁵⁾:

I.1.(a) The word education implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities.

C. Equality of Educational Opportunity

The CDE specifically endorses the promotion of equality of educational opportunity.⁽¹²⁶⁾ The ideal of equal opportunity was

124. Lang, G., 'UNESCO and Israel', (1975) 16 *H.I.L.J.* p.676.

125. See above p.389.

126. Mr. Payro (International Labor Organization) had pointed out at the 14th session of the Commission on Human Rights, that the proposed ILO Recommendation on Discrimination in Employment and Occupation had provisions relating to education. By Article 3 each signatory state undertook to ensure observance of the policy of equality of opportunity and treatment of all in vocational guidance and vocational

considered to be a universal aspiration.¹²⁷ Article 4 provides:

The States parties to this convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

- (a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all¹²⁸; make higher education equally accessible to all on the basis of individual capacity; assure
-

training activities under the direction of a national authority. Article 2 of the proposed Recommendation provided, *inter alia*, that all persons should have equal access to vocational guidance and training of their own choice on basis of individual suitability for such training.

Commission of Human Rights: 14th Session U.N. Doc.

E/CN.4/SR.590 (6 May 1958) p.6 *et seq.*

127. UNESCO Doc. ED/167 p.6.

128. Mr. Sapozhnikov (USSR) regretted that the Convention did not adequately guarantee the right of access to education. He thought it would have been desirable not only to provide for free access to education but also to guarantee everyone the same opportunities for the effective enjoyment of that right. ECOSOC, Commission on Human Rights, 17th Session, U.N. Doc. E/CN.4/SR.682 (29 March 1961) p.9.

compliance by all with the obligation to attend school prescribed by law; (127)

- (b) To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the equality of the education provided are also equivalent;
- (c) To encourage and intensify by appropriate methods the education of persons who have not yet received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;
- (d) To provide training for the teaching profession without discrimination.

One can observe here that the educational rights provisions of the UDHR and draft Covenants (as they then were), as well the relevant parts of the Declaration on the Rights of the Child (130) were all given legally binding form. But as article four makes clear they were to be progressively introduced, (131) through the obligation to adopt

129. This seemingly would not disallow home education.

130. See chapters four and five below.

131. This is also implied by article 6 calling for state attention to be given to future recommendations on the subject, and article 7 which deals with the reporting procedure (outlined below p.405). See Also The Final report of the Director-General, UNESCO Doc. UNESCO/ED/167 Add.1 para 22, p.3 which

an appropriate "national policy".

Other UNESCO instruments also emphasise the right of the child to the fullest possible educational opportunities. For example the *Recommendation Concerning the Status of Teachers* (1966)⁽¹³²⁾ also emphasises the right of the child to the fullest possible educational opportunities and free access to a flexible system of schools, "so that nothing restricts the opportunities for each child to progress to any level in any type of education".⁽¹³³⁾ It is echoed in the *Revised Recommendation concerning Technical and Vocational Education*,⁽¹³⁴⁾ especially in Para. 6(a)(ii) calling for "the creation of open and flexible educational structures" and 6(a)(iii) which calls for "the taking into account of individuals' needs Paragraph 6(b) stresses the importance of

improving the quality of life by permitting the individual to expand his intellectual horizons ...

Paragraph 7 emphasises that technical and vocational education should be "... (b) ... freely and positively chosen". By paragraph 8 "the needs and aspirations of individuals" are to be taken into account.

talks of "gradual stages" in implementing equal opportunity.

132. *Recommendation Concerning the Status of Teachers*, adopted 5 October 1966, by a special inter-governmental conference on the Status of Teachers, (1967) 14 UNESCO Gen. Conf. Rec., UNESCO Doc. 14C/Resolutions, at p.29.

133. *Id.* para 10f.

134. Adopted by the UNESCO General Conference on 19 November 1974.

Paragraph 54 on "guidance" also emphasises that the individual should make educational and occupational choices.

The importance and significance of these Recommendations are enhanced by article 6 of the CDE by which member states are bound to:

... pay the greatest attention to any recommendations hereafter adopted by the General Conference of the UNESCO defining the measures to be taken against the different forms of discrimination in education and for the purpose of ensuring equality of opportunity and treatment in education ...

when applying the provisions of the CDE.

D. Parental Rights

The liberty interests of parents, to choose independent schools, and, as regards religious instruction of their children, are also protected.⁽¹³⁹⁾ Article 5(1)(b) states:

135. René Cassin (France), who had taken part in the UNESCO debates, pointed out that an atmosphere of understanding had prevailed and the article on religious education had thus been adopted unanimously. ECOSOC Commission on Human Rights 17th Session U.N. Doc. E/CN.4/SR.683 (24 March 1961) p.4. But during the debate of the Working Party of the General Conference of UNESCO the USSR proposed to add "or atheist" to

1. The States parties to this convention agree that:

...

b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum education standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their convictions;

...

By article 5(2) ¹³⁶ this provision must not be thwarted, but aided, by state action. When combined with article 5(1)(c) (dealt with in the next section) it calls into question the liberty of states to disallow private educational initiative seemingly permitted by

list of education that had to be in conformity with the parental will. Why should only religious education be protected? A French proposal to implement this oral amendment was rejected 10-6 (2 abstentions). U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961).

136. See above p.394.

article 2(c).⁽¹³⁷⁾ The phrasing "to ensure in a manner consistent with the procedures followed in the State for the application of its legislation," in relation to the liberty of parents with regard to the religious and moral education of the children in conformity with their own convictions was adopted by the Working party⁽¹³⁸⁾ to counter Soviet and East bloc fears that they would be compelled to teach religion in state schools.

E. The rights of Minorities

Minority rights in education are also recognised. Article 5(1)(c) states:

1. The States parties to this convention agree that:

...

c) It is essential to recognise the right of members of national minorities to carry on their own educational activities including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

(i) That this right is not exercised in a manner which

137. See above p.391.

138. UNESCO Doc. 11 C/PRG/36 pp.6-7.

prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty:

- (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) That attendance at such schools is optional.

In the Special Committee delegates argued for the inclusion of the term "national minorities" to stop "immigrant minorities" from having the right to establish their own schools.¹³⁷ In the Working Party attempts by the Federal Republic of Germany to widen the concept of minorities failed.¹⁴⁰ Amendments that would have bound states to establish schools for minorities were dropped. Clearly the protection offered to minorities by this provision falls far below that offered under the Minority treaties that followed the First World War, let alone the Germano-Polish Convention on Upper Silesia.¹⁴¹ Minorities are to be allowed to create their own schools at their own expense. They may use their own language in such

139. A German proposal to use the phrase "ethnic or linguistic" was rejected. States themselves wished to determine what amounted to a minority. U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961) p.32.

140. *Op. cit.* p.8.

141. See above Chapter three.

schools only if the state so permits, and, even if it is allowed, they must also learn the national language and culture. The right to education in one's own language was made subject to each state's educational policy.⁽¹⁴²⁾ The fear of pluralism, and the desire of the majority of states to use schooling as a tool for nation-building are strongly evident in this provision.

The provision when combined with article 5(1)(b) on the liberty interests of parents to choose a school other than those maintained by the state would seem to compel a state to allow private educational initiative, thus dispelling the implications of article 2 that such a matter was entirely within state discretion. Article 5(1)(b) does not grant parents a right but a liberty, this does not detract from the conclusions reached in the text as that state could hardly guarantee the existence of private schooling, and it is to be recalled that by article 5(2)

The States parties to this convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this article.

From this examination of the provisions of the CDE one can conclude that a great many educational rights are therein enshrined. It does not solely deal with the question of discrimination in

142. This phrasing was inserted by the Working Party *op.cit.*, pp.7-8.

education as its title implies, rather it includes the right to establish private schools, the right of parents (or guardians) to decide on the religious and moral upbringing of their children and the right to equal educational opportunity. It is proposed now to examine the implementation procedures available within the CDE and Recommendation itself, and more broadly within UNESCO in general⁽¹⁴³⁾ to assess whether and how these rules can be assured to the individual, and whether, as one might expect, the norms themselves may evolve during their interpretation and application.

VI. Conclusions: Procedures established by the Convention against Discrimination in Education

The scrutiny of individual complaints and denunciations by UNESCO is dealt with below. It is proposed now to examine the methods used by UNESCO to follow up state implementation of the Convention (and Recommendation) Against Discrimination in Education.

A. Reports

Under articles VIII and IV (para 6) of the Constitution of

143. The Recommendation is "binding" on all the Member States of UNESCO, being adopted by the General Conference and thus coming under the terms of Article VIII of the Constitution.

UNESCO, and by the terms of the Convention and Recommendation itself.⁽¹⁴⁴⁾ states must report on the action taken in conforming with Recommendations and Conventions. The Committee on Conventions and Recommendations (CCR)⁽¹⁴⁵⁾ draws up a detailed questionnaire which, when adopted by the General Conference, is sent out to state parties. The state replies are then analysed by the secretariat and examined by the CCR, which reports to the Executive Board, which itself transmits the CCR Report with Comments to the General

144. Article seven of the Convention states:

The State Parties to this Convention shall in their periodic reports submitted to the General Conference of the UNESCO on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken in the application of this Convention, including that taken for the formulation and development of the national policy defined in Article 4 as well as the results achieved and the obstacles encountered in the application of that policy.

There is a similar provision in the Recommendation.

145. It had several names before this one was decided in 1978. UNESCO Doc. 104 EX/Dec.3.3. It was established by UNESCO decision 96 EX/Dec. 8.2, as amended by UNESCO Doc. EX/Decisions 9.4, 9.5, 9.6.

Conference. These questionnaires and Reports as regards the Convention (and Recommendation) on Discrimination in Education are now analysed.

1. The Reports under the CDE

UNESCO is about to send out its fifth questionnaire⁽¹⁴⁶⁾ on the implementation of the Recommendation and CDE. The CCR is due to report to the General Conference next in 1991. The procedure for the handling of Reports is dealt with above. This section assesses the Reporting system and seeks to evaluate the utility of the reporting procedure used and assess the scope of the CDE.

The fruits of the first set of reports from states parties to the CDE and Recommendation were digested at the Fourteenth General Conference in 1966.⁽¹⁴⁷⁾ These reports submitted by 44 states⁽¹⁴⁸⁾ and represented the first substantive reports received by UNESCO from the member states.⁽¹⁴⁹⁾ The Special Committee of the Executive

146. UNESCO Doc. 125 EX/2 (3 October 1986). The questionnaires go into considerable detail. The draft questionnaire is 14 pages long.

147. UNESCO Docs. 12 C/29

148. Only 31 reports were submitted in time to be considered by the Special Committee.

149. UNESCO Doc. 14 C/29 add. (19 October 1966), p.3 para. 5.

Board¹⁵⁰ assigned to examine the Reports noted that the intentions of the CDE were, *inter alia*, to achieve the objectives set out in Article 26 of the UDHR.¹⁵¹ The Special Committee in the general section of its report, chastised, without naming them,¹⁵² those states that answered the questionnaire by a bland assertion that no discrimination in education existed in that state.¹⁵³ The Special Committee emphasised the interim nature of its report, in particular it wished to ask many of the states for further and better information in order for it to evaluate properly their replies. This would take time. There was no mention of any state party actually being present and questioned directly during the consideration of their Report.¹⁵⁴ The Special Committee did occasionally point out that the data received in the report was not consistent with "other

150. The Committee on Convention and Recommendation in Education (now the CCR) took over for subsequent reports.
151. *Id.* pp.4-5.
152. *Id.* p.7.
153. E.g. Albania (UNESCO Doc. 14 C/29, p.13); Jordan *Id.* p.101. The Irish response was very brief, UNESCO Doc. 14 C/29 Add.III pp.20-21. The French Report was fairly comprehensive UNESCO Doc. 14 C/Add.II pp.2-8; Belgium did not submit a Report.
154. As is the case under the Covenant on Civil and Political Rights system.

data".⁽¹⁵⁵⁾ There is no evidence at this stage that the Special UNESCO Committee utilised NGO's as a source of information.⁽¹⁵⁶⁾

The first section of the CDE questionnaire⁽¹⁵⁷⁾ asked questions concerning the legal effects of the Convention in domestic law. The second asked questions about what action had been taken to prevent and eliminate discrimination in education (articles 1 and 3 of the CDE). Part III dealt with the question of separate educational systems or institutions (article 2 of the CDE). Part IV related to the educational treatment of national minorities (article 5 of the CDE).⁽¹⁵⁸⁾

In its report the Special Committee made general observations on each part followed by a brief synopsis of the replies of each state. Where a state failed to reply it pointed this out.⁽¹⁵⁹⁾ In its

155. *Id.*, p.30 para 102. In para 25 (p.7) it refers to these discrepancies in relation to UNESCO and UN publications.
156. See below pp.412, 418.
157. There were two questionnaires one for states parties to the Convention and one for states parties to the Recommendation. They are both set out in UNESCO Doc. 14 C/29 Add. pp.9-18.
158. Part V dealt with the aims of education (article 5 CDE); Part VI dealt with equality of opportunity and treatment in education (article 4 CDE); and Part VII had a single question asking whether the state was party to any other treaty relating to the topics covered by the CDE.
159. E.g. *id.* p.21 para 50, p.27 para 86.

conclusions the Special Committee emphasised that the reports were part of a cooperative procedure designed to discover the problem as well as the cure. The procedures were not designed to put states in the dock but rather to increase the state's understanding of the problems by having them squarely face the issues raised by the questionnaire.

The Special Committee observed that the questions and replies would need to be more detailed for a full evaluation of a state's true position to emerge. It gave the example of equal facilities if there was gender separation in the educational system. Detailed statistics on attendance, examination pass rates, *per capita* expenditure, teacher qualifications, etc would be necessary before the true position became known. State replies outlining the legal or theoretical position were not sufficient. A full evaluation could only take place over time so statistics could be compared and allow the Committee to note changes that had occurred. It recommended changes in both the questionnaire and replies thereto.

The Executive Board of UNESCO commented on the Report of the Special Committee, '160' and in doing so endorsed its recommendations. It is interesting that it struck a note of caution as regards the Special Committees proposed follow-up questions. Any additional information requested had to be made through the intermediary of the Director General.

160. At its 74th session. UNESCO Doc. 14 C/29 Add.IV (10 November 1966).

The final report of the Special Committee on the first questionnaire¹⁶¹ was tendered in August 1968. Sixty one member states of UNESCO had not bothered to reply at all to the questionnaire, a fact deplored by the Special Committee as making its task of analysing the extent of implementation of the CDE very difficult, "unless some conclusion can be drawn from the fact that half the states did not report at all within the required period".¹⁶² This is clearly a potential veiled threat that the worst might be assumed in the absence of a report though its earlier report had stressed the "friendly" nature of the reporting system. The Special Committee did find a series of "reasonable explanations" for the absence of state reports (particularly excusing the developing countries that had failed to reply). The Special Committee still felt that it was without sufficient information on some points to come to a final conclusion on them. Further particulars had been requested of some states either by letter or by direct consultation (where there appeared to be a discrepancy between the report and the supplementary information).¹⁶³ In some cases no further information was forthcoming from the states concerned. The Special Committee also

161. UNESCO Doc. 15C/11 (5 August 1968) dealt with 61 state reports. 28 states had sent requested supplementary information. The original questionnaire was revised and enhanced UNESCO Doc. 15C/11 (Annex C) (5 August 1968).

162. *Id.* p.28.

163. *Id.* p.4.

cautioned that the replies were of variable clarity and completeness. It considered the possibility of sending out teams of investigators but felt that this procedure would be extremely expensive and would require state consent⁽¹⁶⁴⁾, whereas states were already bound by the UNESCO Constitution and the CDE itself to report. The Special Committee observed that the primary purpose of the Recommendation and CDE was firstly to protect the individual's right to education, but that this protection would give great economic and social benefit to the states protecting it. This fact should encourage a greater willingness to report.

The Special Committee made various recommendations including that the regional conferences held by UNESCO should study the question using consultants and NGO studies if available.⁽¹⁶⁵⁾ The role of NGO's that were "concerned essentially with education" was recognised though they were not formally invited to observe the sessions of the Special Committee, their comments were welcomed at that stage and they were formally present during the later stages of the reporting processes before the General Conference.⁽¹⁶⁶⁾ It also

164. *Id.* p.35.

165. *Id.* pp.36-37.

166. They had in fact received no communications from NGO's by April 1968. UNESCO Doc. 15C/11 (5 August 1968). None had been received before consideration of the results of the second consultation of Member States in 1971. UNESCO Doc. 17C/15 (15 September 1972) p.10 Para. 33.

recommended that UNESCO be prepared to send out teams of specialists to help countries having difficulty implementing the CDE or recommendation to help them plan implementation and complete the necessary reports. Moreover it suggested that the rest of UNESCO activities be informed by the requirements of the CDE and recommendation. It recommended a further reporting cycle to be completed by 1972 using a less rigid questionnaire of the type used by the ILO in dealing with the ILO Convention concerning Discrimination in respect of Employment and Occupation (1958).⁽¹⁶⁷⁾ These recommendations were endorsed by the General Conference.⁽¹⁶⁸⁾ A new questionnaire was prepared⁽¹⁶⁹⁾ and the results of these reports

167. *Id.* p.38. A representative from the ILO was present as an observer during the consideration of the Special Committee's report. UNESCO was reciprocally present as observer at the ILO Committee of Experts on the application of Conventions and Recommendations at meetings with regard to discrimination in employment and professional life.

168. Res. 29.1, 15th sess Gen. Conf.

169. The UNESCO secretariat with the help of four consultants drafted a preliminary questionnaire in October 1969. It was decided by the CCRE (the new name for the Special Committee, which later became simply the CCR) that the questionnaire should cover part of the CDE/RDE the rest being covered in more detail later. UNESCO Doc. 84 EX/6.

were presented to the seventeenth General Conference.⁽¹⁷⁰⁾

Of 129 states sent the questionnaire only 41 responded, and again the CCPE pointed to the poor quality of some of the responses.⁽¹⁷¹⁾ Especially criticised were the responses that indicated blandly that no discrimination existed and that only detailed the *de jure* position of the state, thus preventing the CCPE from being able to assess whether the state was in fact complying with the provisions of the CDE.⁽¹⁷²⁾ It specifically avoided finding that these states were in fact in compliance with the CDE.⁽¹⁷³⁾ Only 19 states attempted to provide the requested statistics. Of the 33 States Parties to the CDE that replied within the time limits (out of 56 States Parties) 25 were from Europe.⁽¹⁷⁴⁾ The CCPE wistfully

170. UNESCO Doc. 17C/15 (15 September 1972). By a decision of the 16th General Conference (UNESCO Doc. 16C/14, Resolution 38) the full reports were not published but rather summaries of state replies. This measure was taken on the ground of economies to be made by not reproducing the full text of state replies.

171. Id. p.9.

172. Id. p.41.

173. Id. p.42.

174. The figures for Africa were 8 replies from 37 members of UNESCO and Latin America 4 replies from 24 members of UNESCO. UNESCO Doc. 17C/15 op.cit. p.41. 24 state parties to the CDE failed to respect article 7, and 71 members of UNESCO ignored

referred to both the ILO and the CERD procedures that allowed for further and better particulars to be extracted from states, in the latter case not only by direct contact (by sending an ILO emissary to the state concerned), but also by the fact the reports were sent to professional organisations in the state concerned that commented on them. It was uneasy that it could not "verify" the information sent and regretted that it could only meet for two days which was insufficient for a full examination of the state reports. The CCRE felt that "great steps forward" had been made in the planning and provision of education to promote equality of opportunity.⁽¹⁷⁵⁾ As regards national minorities the CCRE "was convinced that the possibility of using the mother tongue in teaching is an important factor in the equality of treatment of pupils".⁽¹⁷⁶⁾ Certain benign discrimination in favour of the under-privileged was considered permissible.⁽¹⁷⁷⁾ It repeated its recommendations made in its first final report noting in particular that some states giving partial reports had indicated that the lack of qualified personnel was the cause. It thus recommended strongly that UNESCO should be prepared to send consultants to such states to help them analyse the problems they confronted. It also strongly recommended that the CCRE meet at

the reporting requirement of UNESCO's Constitution.

175. Id., p.45.

176. Id., p.45.

177. A position echoed in its third report. UNESCO Doc. 20C/40 (18 August 1978), p.59.

least twice, firstly to analyse the initial reports and decide what further information should be requested from states and secondly to digest the further information forthcoming and draw up its report. It recommended that the fruits of the next consultation be reported to the General Conference in 1978, and that no questionnaire should be sent out, but rather a general letter containing a copy of the current report. The Executive Board decided to simplify the questionnaire and require only some states to respond on some aspects during each cycle of reporting. ⁽¹⁷⁰⁾

The third Report was presented to the General Conference in 1978. ⁽¹⁷¹⁾ Again there was a low response rate. ⁽¹⁷²⁾ The CCRE meeting in 1976 for its initial assessment of the reports received (29 reports at that time) requested additional information from 16

178. UNESCO Doc. 94 EX/CR/3. The CCRE with the help of the Secretariat drafted the questionnaire. UNESCO Doc. 18C/21 (20 September 1974). For the text of the questionnaires see UNESCO Doc. DG/1.1/311/2(C) and UNESCO Doc. DG/1.1/311/2(R). It was sent to all member states of UNESCO.
179. UNESCO Doc. 20C/40 (18 August 1978). The title of the CCRE was changed to CCR in 1978. UNESCO Doc. 104 EX/Dec. 3.3
180. 54 replies were received within the time limits set. 34 from states parties to the CDE (the total number of state parties in 1978 being 66). UNESCO Doc. 20C/40 p.5. The total number of member-states of UNESCO being 144 at the time.

states. Only 11 of these states responded to this request.¹⁸¹ Essentially the report of the CCR echoed the complaints of the earlier reports.¹⁸² The report on the fourth consultation was received by the General Conference in 1985.¹⁸³ There were still 25 state parties to the CDE who sent in no report. Moreover the CCR states in its report that it was not in a position to request state for further details when there replies were too vague.¹⁸⁴ It recommended that the practice should be reinstated.¹⁸⁵

There has been very little movement in the norms though one or two points have been clarified. For example positive (or reverse) discrimination for underprivileged groups has been held to be in accord with the CDE and recommendation.¹⁸⁶

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181. Of the reports sent in late additional information was requested of ten states, only four complying with the request. *Id.* p.6.
182. UNESCO Doc. 20C/40 p.57 *et seq.* The General Conference considering the Report of the CCR adopted Resolution 1/1.1/2 inviting states that had not responded to the questionnaire to do so. This extension of the third consultation netted a further 11 state reports. UNESCO Doc. 21C/27.
183. UNESCO Doc. 23C/72 (August 1985). 84 states out of 155 members responded.
184. *Id.* p.64.
185. *Id.* p.69 *et seq.*
186. *Id.* pp.64-65, and p.68.

The state reporting system seems to have declined from the initial high aspirations expressed in the first Report of the Special Committee where true comparisons and evaluation by statistical methods and interrogation of states via the Director General were expected, to the fourth consultation where the CCR was able to boast that more states had responded to the consultation but still many did not respond at all, many sent in useless reports, and that none of the vague reports were followed up at all. Moreover the state reports are no longer published in full and it seems that the Secretariat in fact carries out the bulk of the analysis and summary of the reports received. The resulting summaries are extremely difficult to analyse. They are often vague, using terms such as "several states ..." or "many countries ...", and use selective examples. It is difficult to tell which states sent in the full and complete reports and which the "bland assertion" type of report. In the absence of effective statistics, or any follow-up questions, to say nothing of any independent input from NGO's⁽¹⁸⁷⁾ or professional bodies within the states, the utility of the entire process may be questioned.

Practices which may seem contrary to the spirit if not the letter of the CDE are commented on in an entirely abstract and neutral fashion. Thus, for example, the fact that the U.K. charges

187. At the CCR meeting in May 1985 members of the Committee were unaware of even the possibility of accepting unsolicited NGO information as had previously been decided. UNESCO Doc. 121 EX/51 (30 May 1985) p.3.

non-nationals higher fees than nationals for higher education, a practice that would seem to directly fly in the face of the requirements of Article 3(e), is merely laconically noted. The conflict with Article 3(e) is not even mentioned.¹⁸⁸ As the articles of the CDE in relation to discrimination are to be directly implemented and are not aims to be gradually achieved (as is the objective of equal opportunity), this seems a very feeble form of chastisement if it can be called chastisement at all. The effort to appease states and encourage reports seems to have gone too far. The acceptance of bland and vague reports and indeed the entire lack of any report at all (over one third of the UNESCO membership are in this position) seems to be carrying the friendly, non-adversarial approach entirely too far. When a situation calls for criticism it is sometimes given but normally without mentioning which are the offending states unless the state itself has mentioned the defect in its report. In the absence of the state reports it is not possible to pin down which states may not be fulfilling their legal obligations. As the Fourth report itself weakly notes:

The following conclusions can ... do no more than reflect the general views and judgements on the situation and conditions of education as they are described in the reports examined by the Committee.

This hardly amounts to independent or effective scrutiny of state practice. The scrutiny of state reports is not the only means open to

188. UNESCO Doc. 23C/72 p.9.

UNESCO to protect and promote human rights, there is also a procedure for dealing with state complaints, a matter that is now turned to.

2. State Complaints

The Protocol Instituting a Conciliation and Good Offices Commission to the Convention on Discrimination in Education⁽¹⁷⁰⁾ was adopted in 1962 and entered into force in 1968. A permanent Commission of eleven members elected by the General Conference from candidates nominated by state parties to the Convention, and serving in their personal capacity,⁽¹⁷¹⁾ deals with communications from state parties to the Protocol that complain about the performance of Convention obligations by other states parties to the Convention. This procedure is mandatory⁽¹⁷²⁾ for states parties to the Protocol, and voluntary for other state parties to the Convention, but not party to the Protocol.⁽¹⁷³⁾ The Commission establishes the facts and lends its Good Offices to further a resolution of the dispute in

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189. Protocol Instituting a Conciliation and Good Offices Commission to the Convention on Discrimination in Education, adopted 10 December 1962 by the 12th General Conference of UNESCO, 651 U.N.T.S. 362.
190. An *ad hoc* member may be appointed where there is no national of a state party to a dispute.
191. Article 8. Local remedies must first have been exhausted.
192. Since October 1974. See article 13 of the Protocol.

accordance with the Convention.⁽¹⁷³⁾ The ICJ may be asked for an Advisory Opinion on any legal questions arising.⁽¹⁷⁴⁾ If a friendly settlement is reached the Commission makes a brief report⁽¹⁷⁵⁾ stating the facts and the solution reached, otherwise it recommends a solution. This procedure has never been used.⁽¹⁷⁶⁾

3. The International Court of Justice

The jurisdiction of the International Court of Justice over any dispute relating to the Convention arising between state parties, and at their request is granted by article 8 of the Convention. This jurisdiction has never been used.⁽¹⁷⁷⁾

4. Recommendations

The creation of recommendations by the General Conference is

193. *Id.* Article 17.

194. *Id.* Article 18.

195. To which the written and oral opinions of the Parties are attached. There is provisions for separate opinions of the Commissioners. Article 17.

196. See UNESCO Docs. 16C/64 (31 August 1970), and subsequent reports to the General Conference in accordance Article 19 of the Protocol, the latest being UNESCO Doc. 23C/66 (27 Sept. 1985)

197. The USSR threatened to refuse to ratify the CDE unless the wording of this article was changed to ensure that state consent was necessary. U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961) p.32.

an accepted method of advancing and promoting UNESCO's aims.⁽¹⁷⁷⁾ As mentioned above⁽¹⁷⁷⁾ by Article 6 of the CDE states are bound to pay "great attention" to them in the application of the CDE. Several pertinent recommendations have been approved by the General Conference. The CCR in its reports has mentioned them.⁽²⁰⁰⁾ One can legitimately be sceptical of the efficacy of such measures as many states have refused to comply with the more fundamental treaty requirements of the Constitution and CDE to provide reports, however they do have a use in elucidating the norms and are appropriately noted in this regard. UNESCO is following up the implementation by states of the Recommendation on Education for International Understanding, Co-operation and Peace by issuing a questionnaire to its member states on their implementation of the Recommendation. The replies are to be scrutinised by the Committee on Conventions and

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198. As pointed out above states are bound by article VIII of the Constitution of UNESCO to report on how they carry out, *inter alia*, recommendations.
199. See above p.400.
200. See UNESCO Doc. 20C/40 *op.cit.* p.66 where the CCR avers to the 1974 Revised Recommendation concerning Technical and Vocational Education (also in text above p.399), the 1976 Recommendation on the Development of Adult Education as well as the 1974 Recommendation Concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms.

Recommendations.⁽²⁰¹⁾ We now turn to assess how UNESCO deals with the individual complaint or denunciation concerning human rights violations.

B. UNESCO'S GENERAL HUMAN RIGHTS PROCEDURES

1. The individual complainant: "Communications"

A procedure analogous to the United Nations ECOSOC resolution 728F procedure is used by UNESCO to deal with individual complaints. UNESCO is extremely cautious in dealing with "communications" and unduly deferential to state interests. This is possibly the result of an earlier public row over the situation in Chile.⁽²⁰²⁾ Chile

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201. UNESCO Docs. 126 EX/17 (16 June 1987); 126 EX/SR.1-21, p.295.
202. See UNESCO Docs. 95 EX/10.1; 97/EX36. Here Chile was publicly called to account by the CCRE in regard to 16 complaints. The Director-General laid a Report before the Executive Board (UNESCO Doc. 97 EX/33 which detailed the complaints (e.g. 40% of teachers sacked by Junta for political reasons, the rest having salaries lowered, censorship of curriculum, and reports of soldiers overseeing schools, repression in universities etc.). A representative of the Director-General visited Chile in March 1975, *id.*, p.19. The Chilean government's response (UNESCO Doc. 97 EX/33 Add. (29 April 1975)) detailed the situation as seen by that government in an attempt to rebut the case made. For a particular response to the Director-General's report see UNESCO Doc. 98 EX/39 (10

bitterly complained that UNESCO was acting beyond its juridical capacity.⁽²⁰³⁾ Possibly states realised that what had been meted out to Chile⁽²⁰⁴⁾ might in turn be meted out to them, in any event a review of the way in which UNESCO dealt with human rights complaints was undertaken resulting in a new procedure.⁽²⁰⁵⁾

The latest procedure decided in 1978⁽²⁰⁶⁾ provides that

September 1975).

203. UNESCO Doc. 97 EX/34 (3 April 1975). c.f. UNESCO Doc. 98 EX/39 Add. (15 Sept. 1975).
204. UNESCO Doc. 93 EX/Dec.8.2, outlined complaints made by the Cuban National Commission for UNESCO, and then went on (para 11) to apply the procedure of 77 EX/Dec.8.3 "in respect of complaints regarding the violation of human rights" leaving out the clause "in so far as they may effect the purpose and functions of UNESCO" phrase and thus widening the scope of UNESCO competence. Moreover according to para 12 the Director-General is to apply this procedure to Chile, implying that the widened scrutiny will not apply to other states.
205. See below p.430, where the question of how UNESCO deals with the "question of massive violations" is dealt with. See generally, Alston, P., "UNESCO's procedure for dealing with Human Rights Violations", (1980) 20 *Santa Clara Law Review* 665.
206. UNESCO Doc. 77/EX/Decision 8.3 was replaced by UNESCO Dec. 104 EX/Dec. 3.3 (26 April 1978) which has been applied since September 1978. See generally UNESCO Doc. Gen. Conf. 23C/17

admissible⁽²⁰⁷⁾ complaints are sent to the CCR⁽²⁰⁸⁾ if the author of the complaint agrees.⁽²⁰⁷⁾ The process ensures that the state knows the identity of the complainant.⁽²¹⁰⁾ By the beginning of 1984 there

(8 October 1985) which contains an evaluation of the UNESCO human rights complaints procedures.

207. The 10 conditions of admissibility are set out in paragraph 14 of Dec 104 Ex/Dec. Complaints must be signed, relate to an actual victim or be by a person, group or NGO "having reliable knowledge of those violations" (reliance on mass media not sufficient), non-repetitious (not dealt with already under different provisions), not an abuse of the process, and involve human rights violations falling within UNESCO's sphere of competence. They must be submitted within a reasonable time, and contain details of any attempts to exhaust local remedies. UNESCO Doc. 104 EX/Dec.3.3 is reproduced as annex III to UNESCO Document 120 EX/17.
208. The Committee holds two regular session each year normally coinciding with the meetings of the Executive Board. See UNESCO Doc. 120 EX/17 p.5.
209. The complainant must fill in a fairly lengthy form detailing the complaint or denunciation (of a situation) and agreeing to his identity being divulged to the Committee and respondent state before the "communication" is laid before the CCR.
210. A most regrettable inhibiting factor in the UNESCO process.

had been 601 complaints in all. The complaint is sent to the government concerned, which may send a reply to the Committee. The Committee examines the complaint in private. The government may be heard by the Committee at its request. The individual concerned has no such right.⁽²¹¹⁾ During the search for an "amicable solution" the Director-General often plays a fruitful role.⁽²¹²⁾ The process is considered to be top secret by UNESCO "in order to avoid giving the impression that UNESCO wants communications to be submitted to it".⁽²¹³⁾ One complaint was even dropped when the complainant breached this confidentiality.⁽²¹⁴⁾ This stress on secrecy is designed to foster the success of the friendly settlement, but hardly seems compatible with UNESCO's constitutional commitment to

 further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex,

211. The question was raised but not pursued in 1981. UNESCO Doc. 110 EX/40 Priv. referred to during the review of the procedure in UNESCO Doc. 120 EX/17, p.7. The Committee can in "exceptional circumstances" seek authorisation from the Executive Board to hear the complainant in person. *Id.*, Dec.3.3 para 14(g).
212. *Id.* p.8.
213. UNESCO Doc. 120 EX/17 p.9.
214. *Id.*.

language or religion, by the Charter of the United Nations.²¹⁵ The bulk of cases so far received and dealt with were "settled" pre-admission (a practice that the Executive Board and Director-General reviewing the process felt pointed favourably to the current practice). However as the admission of a case entails no publicity at that stage, it seems a difficult conclusion to draw. The review of the procedure (carried out by the Secretariat for the Executive Board and Director-General) felt that the practice did no harm to alleged victims as behind the scene activity by the Director-General, or other personage offering good offices, was often taking place simultaneously in the search for amicable settlement.²¹⁶ The Report emphasised that by keeping applications "on the boil" kept the possibility of finding a solution more open, rather than finding violations which would lead to an impasse.²¹⁷ Putting the state in the dock did not help the victim, hence the justification for the lack of publicity about the procedure and its outcomes. The fact that UNESCO receives less than 150 complaints a year, compared with the thousands received by other UN bodies attests to the "success" of this policy. One might legitimately wonder how many complaints it might receive should people know that there was a possibility of some redress.

The Secretariat may never act directly to provide assistance

215. Article I. See above p.356.

216. UNESCO Doc 120 EX/17 p.13.

217. *Id.* p.31.

to authors of communications.⁽²¹⁸⁾ The Review by the Executive Board and the Director General felt that a positive feature of the system was that states often defended themselves by sending high-powered representatives, and it "boasted" of one case where the Solicitor-General of an African country came to deal with a case concerning the expulsion of a student from University.⁽²¹⁹⁾ This seems to the present observer not to merit congratulations but rather the reverse. Who argued the student's case before the Committee against this "heavy" political figure? The Report observed cryptically that the Committee endorsed the Solicitor-General's explanation's! The fact that the states are defending "domestic" affairs in this fashion hardly seems a great or novel step forward especially given such "inequality of arms". The affairs so defended can no longer be considered to be purely matters falling within the domestic jurisdiction of states. The Convention against Discrimination in Education does not have a domestic jurisdiction clause. Although the Preamble recital 4 mentions "respecting the diversity of national educational systems" it goes on to stress that UNESCO has the duty "not only to proscribe any form of discrimination but also to promote equality of opportunity and treatment for all in education".⁽²²⁰⁾

218. UNESCO Doc. 112 EX/CR/HR 5 Paras 57 - 61.

219. 120 EX/17 p.19.

220. Moreover the motive for introducing this part of the Preamble lay in Mexican concern (expressed during the work of the Working Party of the General Conference of UNESCO, 26th

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This though is not the sole basis of jurisdiction for UNESCO which relies on its Constitution (note though article I(3)) and relevant articles of the Universal Declaration of Human Rights to establish the norms within its sphere of competence.

On the more positive side a state failing to be represented when a communication concerning it is under consideration is informed that the CCR may consider the allegations as uncontested, or even declare the communication admissible.⁽²²¹⁾ UNESCO also carries out on the spot investigations, and has on occasion requested its Chairman or the Director-General to start consultation with the state involved.⁽²²²⁾ Another positive feature of the system is that the

November - 8th December 1960)) that article 4 of the CDE would make its non-denominational educational system, in which all clergy were banned from teaching, unlawful. A French proposal replaced the Mexican amendment with this 5th recital thus keeping article 4 intact. U.N. Doc. E/CN.4/Sub.2/210 (5 June 1961).

221. This is a much weaker position than that taken by the Human Rights Committee under the Optional Protocol procedure, where the allegations are considered founded in the absence of convincing state rebuttal.
222. 120 EX/17 p.29. This information is tucked away in a footnote in the section of the Report dealing with the ILO procedures. No details of any kind are given regarding the number of on the spot investigations that have taken place nor the

UNESCO procedure is available against all member states of UNESCO regardless of what human rights instruments they have ratified, and the consideration of the complaint does not depend on the establishment of a gross pattern of violations of human rights.

The Committee reports to the Executive Board of UNESCO, which makes "appropriate" decisions.⁽²²³⁾ The Committee has considered making special reports in the case of complaints against countries that do not cooperate in the friendly settlement process, but has in fact (at least until 1985) made no such reports on specific cases.⁽²²⁴⁾ It has made general reports on its work in particular cases.⁽²²⁵⁾ In these it may recommend action. The complainant does not receive a copy of the Report though the state against which the complaint was made does.

If a complaint relates to a general situation, or a series of violations of human rights, then the complaint might be considered to raise "questions" of human rights.⁽²²⁶⁾ These are not confidential

outcomes.

223. It publicly endorsed the report directed against Chile. 99 UNESCO Executive Board, UNESCO Doc. 99 EX/Dec. 9.5 (1976). Marks *op.cit.* 61.
224. UNESCO Doc. 120 EX/17 p.9.
225. These are of course "confidential".
226. By Spring 1984 264 complaints had been examined, and 92% of these related to individual complaints. UNESCO DOC. 120 EX/17 p.15.

under 104 EX/ Dec. 3.3. procedures, '227' but are to be considered by the Executive Board and General Conference in public meetings. '228'

C. Conclusions

The CCR reviewed the Secretariat's Report on the workings of the system '227'. Some members felt that the Report itself should have been secret! '228' The members were clearly divided as to the value of the system. Some wanted to abandon the procedure altogether as duplicating work done elsewhere, politicising the UNESCO, and wasting money. Others felt that more time and resources should be devoted to the enterprise as it relieved pain and suffering of individuals. One

227. *Id.* para 18.

228. However a matter is only a "question" if there is a massive, systematic or flagrant violation of human rights... in a consistent pattern or resulting from state practice whether *de facto* or *de jure*. To determine this preliminary question the Committee uses the following sources: complaints, information obtained by the Director-General. It decides the issue only after an attempt at reaching a friendly settlement, and the Committee would be "extremely prudent" before forwarding such a "question" to the Executive Board which itself also had to consider the matter such a "question". UNESCO Doc. 120 EX/17 p.10.

229. UNESCO Doc. EX 23 C/17, contained in Doc. 121 EX/49 (30 May 1985).

230. *Id.* p.3.

member apparently (and mysteriously) regretted leaving the decision on admissibility to the Secretariat.⁽²³¹⁾ This implies that the Committee takes a very passive role in the process. Formally-speaking under Dec. 104/Ex Dec 3.3 the CCR itself decides on admissibility.

At the Executive Board Meeting⁽²³²⁾ considering the above reports, Yugoslavia (Mr Margan)⁽²³³⁾ clearly resented the possibility of political pressure being brought to bear on States by individuals pursuing complaints. He proposed a small Working Group to make a preliminary sifting of the complaints, prior to contacting the states concerned or notifying the Committee, he also wished to strengthen the standards of admissibility against individuals. He felt it anomalous that specific state consent was not necessary prior to considerations of complaints against a state. M. Pompei spoke eloquently in defence of the Committee's role.⁽²³⁴⁾

The debate spoke volumes concerning the great fragility of the international human rights protection mechanism. Here an almost unheard of procedure, that had in 7 years of operation considered relatively few cases, about 100 of them successfully, was under threat of demolition because of the minute "political" embarrassment that it caused. It clearly showed the efficacy of publicity as a

231. Id. p.5.

232. 121st session (19 June 1985), UNESCO Doc. 23 C/17 Annex III.

233. Supported by Algeria and India. *Id.*, p.5.

234. Supported by Belgium. *Id.* p.7. and the U.K. *id.*, p.8.

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sanction for human rights violations, and illustrates the weakness of human rights protection internationally. The weak seedling of international scrutiny of human rights violations, without specific prior state consent survived. Whether it will withstand the winds of financial stringency now blowing through UNESCO following the withdrawal of both the U.S.A. and the U.K. from that organisation has yet to be seen. (235)

The scrutiny of individual complaints and denunciations relates only to human rights norms within the competence of UNESCO, which clearly include the right to education as expressed by article 26 of the Universal Declaration of Human Rights, and in its own Constitution. Given the secrecy surrounding the procedure it seems impossible to establish how such rights have been interpreted, or may evolve. Clearly the procedure itself is still not firmly established, and until it is, it is most unlikely that any evolution or public interpretations of the rights in question will arise.

The CDE elaboration of educational rights goes further than

235. In this context one can but sadly observe the effects of financial cutbacks at the U.N. itself (largely, but not solely, due to U.S. refusal to pay its apportioned share of costs), the Sub-Commission could not meet in 1986. This body screens individual complaints to assess admissibility and establish whether the persistent pattern of gross violations has occurred. The result was that no "communications" were processed in August 1986.

the International Covenants that followed it. It not only directly affects national policy⁽²³⁶⁾, but its provisions on equalisation of opportunity are more explicit. It guarantees a wide access to education for all persons (not just citizens). Individual choice is protected. UNESCO also deals directly with individual complaints. It has established a reporting procedure (both under the CDE and its own Constitution) which suffers problems familiar also to other human rights self-reporting procedures, but which, one can hope will slowly be strengthened. The fragility of the complaints procedure, and its secrecy, are explainable in terms of its newness. The early days of the European Commission on Human Rights were also marked by notable restraint. Once states are more familiar with the procedures a more dynamic interpretation is likely. One must note that what the Executive Board has established may be disestablished if states distrust the system. The recent review clearly indicated that some states felt threatened by the new procedures and wished to tighten the conditions of admissibility⁽²³⁷⁾ and otherwise make the procedure even more favourable to states. Clearly in these circumstances it is wise for UNESCO to tread cautiously. This means that the implementation procedures are unlikely, at least in the near future,

236. See also article 14 of the International Covenant on Economic, Social and Cultural Rights.

237. These are slightly more generous to the individual than comparative U.N. procedures. For details see Alston, *op.cit.*, p.678-679, 695.

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to help elucidate or expand the rights protected by UNESCO.

CHAPTER SEVEN
THE EUROPEAN DIMENSION
THE EUROPEAN CONVENTION ON HUMAN RIGHTS
AND
THE EUROPEAN SOCIAL CHARTER

I. INTRODUCTORY

The European Convention on Human Rights and its Protocols are generally considered to have established the most advanced regional international system for the protection of human rights today. Conceived in post-war Europe, after the Universal Declaration of Human Rights, one of its break-through achievements was considered to be the right of petition granted to individuals. This right was not automatic but was based rather on specific state consent (through Article 25). This was not new in international law but it continued the momentum, built up by the Upper Silesian system, towards recognising the individual as a subject in international law.¹⁾ The Convention was conceived to protect civil and political

1. Some writers consider that the recognition of an individual in such a forum is solely a post World War II phenomenon e.g. D'Amato, A. *International Law Process and Prospect*, (Transnational Publishers, N.Y., 1986), p.89.

rights and these were the 'generally accepted' rights by the states concerned.

This chapter first reviews the obligations imposed by the European Social Charter (hereafter ESC).⁽²⁾ It then examines the nature of the obligations imposed by the European Convention for the Protection of Human Rights and Fundamental Freedom (hereafter either European Convention on Human Rights or ECHR)⁽³⁾. In particular the aims of the Treaties are looked to to assess the likelihood of the emergence of some common European standard as regards the right to education. The reader is assumed to have a basic knowledge of the ECHR and ESC implementation machinery. The following sections analyse two further general questions. Firstly an assessment is made of the potential for evolution of the rights guaranteed by the ECHR. This is an important question for early on the Commission and Court were very cautious in their interpretations of the Convention provisions on education.⁽⁴⁾ If an evolutive approach is possible this has great potential for the right to education. Secondly the concept of the "margin of appreciation" is briefly explained as it has the potential to severely limit the scope of the rights guaranteed under the Convention system. Consideration of these initial issues make up the third section of the Chapter.

2. E.T.S. No.35: 529 U.N.T.S. 89.

3. E.T.S. No.5: 213 U.N.T.S. 221, (includes the first Protocol).

4. Article 2 of the First Protocol to the ECHR, hereafter referred to as article 2P.

The fourth main section of the chapter examines the evolution of the right to education during the drafting of the ECHR. The fifth looks at the subsequent ECHR case-law, and the final section analyses the emergence of a right to education in Europe.

II. THE EUROPEAN SOCIAL CHARTER

A. Introduction

The European Social Charter⁽⁵⁾ (hereafter ESC) is not as famous as the European Convention on Human Rights, but is nonetheless an important Treaty for us to consider.⁽⁶⁾ All three countries under study have signed the ESC, though Belgium has, as yet, not ratified it. In section D of this section (II) of the thesis the rights of the ESC will be illustrated by reference to the French and Irish

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5. It was signed in Turin in 1961 and entered into force on 26th February 1965. The text of the ESC is also to be found in Brownlie, I., *Basic Documents on Human Rights, op.cit.*, p.301. A useful work on the ESC is Harris, D., *The European Social Charter*, (Virq.U.P., Charlottesville, 1984). See also the report of the Colloquium of the Institut d'Etudes européennes, *La charte sociale européenne: Dix années d'application*, (Ed. Univ. Brux., Bruxelles, 1978).
6. Even though Harris, *op.cit.* p.11 considers that the ESC does not overlap at all with the ECHR as regards the right to education.

positions. Its provisions were designed to complement the ECHR⁽⁷⁾ and in the main deal with the social and economic rights which were not included in that Convention.⁽⁸⁾ In accordance with the then

7. See below p.474. Also Council of Europe. Cons. Ass., Doc. No.403, the first three recitals of the Draft Recommendation on the Adoption of the ESC. Baron Van Asbeck in an article critical of the weaknesses of the ESC considered:

On ne peut parler de la charte comme un "complément" de la convention que dans un sens formel. La charte ne contient aucune "sauvegarde" des droits sociaux qu'elle énumère et définit, . . .

van Asbeck, F. M., 'La charte sociale européenne: sa portée juridique, la mise en oeuvre', in Baugniet, J. et al. (eds.), *Mélanges offerts à Henri Rolin*. (ed. Pedone, Paris, 1964), 427 at p.447.

8. Paragraphs Two, Three, Four, and Five of the Preamble to the ESC state:

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms;

prevailing philosophy, the rights contained in the ESC were not defined for direct legal application, (7) and there is no system of

Considering that in the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950, and the Protocol thereto signed at Paris on 20th March 1952, the member States of the Council of Europe agreed to secure to their populations the civil and political rights and freedoms therein specified:

Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin:

Being resolved to make every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations by means of appropriate institutions and action.

9. Confirmed by the Appendix to Part III (which is an integral part of the Treaty by virtue of article 38) which states:

It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof.

It could be argued that this relates to inter-state disputes

individual redress via a petition procedure provided. The rights are considered to be non-self-executing. The ESC lists, in Part One, a series of rights and principles which are a declaration of the aims which each Contracting Party will pursue "by all appropriate means".⁽¹⁰⁾ Principles 9,⁽¹¹⁾ 10⁽¹²⁾ and 15⁽¹³⁾ relate most closely to our concern. It is important to observe here that these principles could be considered as evidence of "general principles of

and would not affect an individual seeking redress in a national court. See Janssen-Pevtschin *op.cit.*

10. Paragraph One of Part one ESC provides:

The Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realized:

11. (9) Everyone has the right to appropriate facilities for vocational guidance with a view to helping him choose an occupation suited to his personal aptitude and interests.
12. (10) Everyone has the right to appropriate facilities for vocational training.
13. (15) Disabled persons have the right to vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability.

international law" at least as amongst the state parties.⁽¹⁴⁾ This potentially elevates the legal status of Part One of the ESC, as in some countries this category of international law may have some internal effectiveness, if only in aiding local courts to interpret domestic legal provisions.⁽¹⁵⁾

B. DRAFTING

The drafting of the Charter started in earnest in the European Consultative Assembly in 1953.⁽¹⁶⁾ The Committee on Social

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14. See Kahn-Freund, O., 'The European Social Charter', in Jacobs, F. G., (ed.) *European Law and the Individual*. (North Holland, Oxford, 1976) p.181.
 15. See Ireland, Chapter eleven, and, France, Chapter nine below.
 16. Recommendation 14 (7 December 1951) of the Committee of Ministers called for the adoption of a "politique sociale commune". See generally Janssen-Pevtschin, G., 'Les engagements des contractantes et la mise en oeuvre de la charte sociale européenne', in (1966) 39 *R.Ins.Soc.* 9. Consult.Ass. 5th sess., Texts Adopted, Opinion No.5 p.11. It is clear that European unity and the suppression of discrimination on grounds of nationality were major motivating factors, *id.* p.12.

Questions of the Consultative Assembly⁽¹⁷⁾ produced a draft which was presented in October 1955 by the *rapporteurs* MM. Hevman and Dehousse.⁽¹⁸⁾ This elaborated a series of legal rights to be enforced by a European Economic and Social Council.⁽¹⁹⁾ The rights included the rights of children and the rights of cultural development of the human person.⁽²⁰⁾ In particular there were included several detailed

17. Council of Europe, Cons. Ass., 6th sess., Doc. No.312. This Preliminary Report on the preparation of the ESC by M. Hevman of the Committee on Social Questions emphasised that the principles to be protected included the protection of the dignity of persons and

the maintenance of a social environment which is conducive to the fullest development of the individual and the family. *Id.* p.1249

Council of Europe, Cons. Ass., 7th sess., Doc. No.403 (26 October 1955).

18. Council of Europe, Cons. Ass. Doc. No.403 (26 October 1955) 7th Session.

19. This proposal was linked to the ill-fated European Political Community. Report of M. Haekkerup of the Committee on Economic Questions, Doc. No.488 *op.cit.* p.25.

20. Part One

Preamble

....

articles on the right to education.

Article 15 provided:

Children and young persons have the right:

(a) to the welfare services and education necessary for their well-being and their moral, intellectual and physical development.⁽²¹⁾ in accordance with the provisions of Articles 12 and 17 of this Part of the Charter:

(b) to protection from exploitation in their employment, in accordance with Article 3 of this Part of the Charter.⁽²²⁾

4. In particular, in carrying out their economic and social policy, the Governments will adopt no measures incompatible with human dignity and the integrity of the family. The supreme aim of their social policy will be to develop the human personality and to allow the individual the opportunity of exercising his natural gifts to the full, with due regard for his duty to other individuals and to the community in which he lives.

...

21. Note the similarity to the Irish Constitutional provision.

See chapter 11 note 214.

22. Article 15

Les enfants et adolescents ont le droit :

(a) de bénéficier de la prévoyance sociale et de

l'instruction nécessaires à leur bien-être ainsi qu'à leur

Article 17 provided:

Everyone has the right to education.

This education should be based on respect for the values and traditions enshrined in the European spirit.

The High Contracting Parties will undertake the necessary steps in order :

(a) to make primary education compulsory and free to all;

(b) to make secondary education, in its different forms, including technical and professional training, available to everyone up to the age of 18 years and to make it increasingly free;

(c) to do everything possible to ensure a basic education for those persons who have not received or have not completed their primary education;

(d) to make university and other higher education accessible

développement moral, intellectuel et physique, conformément aux dispositions des et physique, conformément aux dispositions des articles 12 et 17 de la présente partie de la Charte:

(b) d'être protégés contre l'exploitation dans le travail, conformément aux dispositions de l'article 3 de la présente partie de la Charte.

to all who are capable of benefiting by it. (23)

Article 18 provided:

In the exercise of any functions and duties which they assume in the field of education, the High Contracting Parties undertake to respect and facilitate the right of parents to choose how this education shall be accorded to their children in conformity with their own religious and philosophical convictions, as provided for under Article 2 of the Protocol to the Convention for the

23. Article 17

Toute personne a droit à l'éducation.

Cette éducation doit se fonder sur le respect des valeurs et traditions dont s'inspire l'esprit européen.

Les Hautes Parties Contractantes s'engagent à prendre les mesures nécessaires afin de "

(a) rendre l'enseignement primaire obligatoire et le dispenser à tous gratuitement;

(b) généraliser l'enseignement secondaire, sous ses différentes formes, y compris la formation technique et professionnelle, jusqu'à l'âge de 18 ans et le rendre progressivement gratuit;

(c) encourager l'éducation de base dans toute la mesure du possible pour les personnes qui n'ont pas reçue jusqu'à son terme;

(d) rendre l'enseignement supérieur et universitaire accessible à tous ceux qui ont les aptitudes nécessaires.

Protection of Human Rights and Fundamental Freedoms. (24)

It is quite apparent that article 18 was redundant the exact wording being lifted from the ECHR. But article 17 set out some new clear and precise positive obligations in this sphere, whilst Article 15 established the 'aims' of the education to be provided. In the

24. *Article 18*

Dans l'exercice des attributions et l'accomplissement des devoirs qui leur incombent en matière d'éducation, les Hautes Parties Contractantes s'engagent à respecter et à faciliter l'exercice de la liberté des parents dans la façon d'assurer cette éducation à leurs enfants conformément à leurs convictions religieuses et philosophiques, selon les dispositions de l'article 2 du Protocole additionnel à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales.

Article 19 provided:

Everyone has the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications.

The High Contracting Parties undertake to respect the freedom necessary for scientific research and creative activity.

The High Contracting Parties also undertake to do everything appropriate for the diffusion and development of science and culture.

ensuing debate the Economic Committee objected to various aspects of the draft (especially the loss of power of the Consultative Assembly itself implied by the creation of a new organ for implementation) and the Plenary Assembly required the two Committees to work together to come up with a new draft.⁽²⁵⁾ This second draft (April 1956) altered the definition of various rights. The rights which had been drafted as subjectively granting 'legal' rights (including within the definition the steps necessary to concretise them) were transformed into "moral" rights. The Social Committee accepted this change by majority vote.⁽²⁶⁾ The wording of the rights of the family⁽²⁷⁾ was

25. Cons. Ass. 8th Sess. Doc. No.488 (14 April 1956).

26. M. Heyman introducing the new draft explained that the right to work could not be considered a legal right as this would "raise vain hopes" and it would create disappointment to call ideals rights. Doc. No.488 *op.cit.* p.19 *et.seq.*

27. *Article 11 Rights of the Family*

1. With a view to ensuring the economic and social protection of family life, the High Contracting Parties will foster and protect the family as a fundamental unit of society.

2. They undertake to make available, or to encourage the provision of the following facilities and advantages :

(a) the grant of allowances in proportion to the number of children;

(b) measures to educate young persons for marriage;

altered as was the wording on the Rights of mothers and children, (22)

(c) cheap loans for the founding of homes;

(d) preferential allocation of housing to families and persons wanting to marry, and rent reductions for low income families with many children;

(e) allowances to families whose breadwinners are subject to military services;

(f) tax reductions related to the size of the family;

(g) organisation of home help services.

28. Article 12: *Rights of Mothers and Children*

1. The High Contracting Parties will take all necessary measures for the effective protection of mothers and children, including the establishment or maintenance of appropriate institutions for the purpose.

2. They undertake, for the protection of mothers :

(a) to provide the necessary economic and other assistance during a reasonable period before and after childbirth, in all cases not covered by social security or otherwise;

(b) to provide directly or in collaboration with appropriate voluntary organisations, a sufficient number of maternal and infant welfare centres.

3. They undertake, for the protection of children :

(a) to establish or maintain specialised organs with powers to prevent the neglect of children;

The right to education was altered to read:

(b) to ensure that every minor is provided with a guardian and that guardianship is regulated by law;

(c) to provide special services for homeless children, for children and young persons who are physically or mentally handicapped, and for juvenile delinquents.

Con. Ass. Doc. No.488 *op.cit.* pp.10-11.

Article 14

The right to education

1. The High Contracting Parties undertake to make primary education for children compulsory and free.

2. They will introduce progressive measures in order :

(a) to make facilities for secondary education, in its different forms, including technical and professional training, available to everyone at least up to the age of 18 years and to make it increasingly free;

(b) to ensure a basic education for those persons who have not received or have not completed their primary education;

(c) to make university and other higher education accessible to all.

Article 14

Droit à l'éducation

1. Les Hautes Parties Contractantes s'engagent à rendre l'enseignement primaire obligatoire et gratuit.

2. Elles prendront progressivement les mesures nécessaires afin de :

(a) Généraliser l'enseignement secondaire sous ses différentes formes, y compris la formation technique et professionnelle, jusqu'à l'âge de 18 ans au moins et le rendre progressivement gratuit;

(b) assurer une éducation de base aux personnes qui n'ont pas reçue jusqu'à son terme;

(c) rendre l'enseignement supérieur et universitaire accessible à tous.

Article 15

The choice of education

In the exercise of any functions which they assume in relation to education and to teaching the High Contracting Parties will respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 15

Choix de l'éducation

Dans l'exercice des fonctions qu'elles assumeront dans le domaine de l'éducation et de l'enseignement, les Hautes Parties Contractantes respecteront le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques.

The draft left out the right to take part in cultural life and to enjoy the benefits of scientific advance as being out of place.⁽²⁷⁾ It also left out the previously proposed Economic and Social Council, but its main difference, apart from weakening the formulation of the rights, was in the enforcement provisions. It

29. *Id.* p.21. The right to protection of workers savings and progressive opportunities to own real and personal property were excluded as it was considered that the proposed obligations would not be acceptable as obligations to governments. Interests in scientific, literary and artistic production were left out as being covered elsewhere.

relied on existing Council of Europe institutions to enforce the rights. Disagreements centred largely on the question of enforcement.⁽³⁰⁾ It called for a regional tripartite conference to be convened by the ILO to discuss the ESC.

The Committee on General Affairs of the Consultative Assembly, together with the above mentioned committees elaborated a third 'compromise' draft by October 1956, entitled the European Convention on Social and Economic Rights.⁽³¹⁾ The preamble is identical to Part One of the Charter proposed in Document 488. The right to education enshrined remained the same but the wording was slightly altered. It now read:

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30. Wiebringhaus, H., 'Rapport introductif sur la charte sociale européenne', in Institut d'études européennes, *La charte sociale européenne, op.cit.*, 25 at p.28. Wiebringhaus is Head of Social Affairs at the Council of Europe. See also the Report by M. Heyman introducing the second draft. Cons.Ass. Doc. No.488 *op.cit.* p. 15 *et seq.*
31. It was called on to do so by the Consultative Assembly, see Doc. No.488 8th sess. Cons. Ass. Amendment 1, p.20. M. Toncic, the *rapporteur* presented the report, see Doc. No.536. 8th sess. Cons. Ass. (27 Sept. 1956). Cons. Ass., 8th Sess.. O.R. p.760.

M. *The right to education*

With a view to ensuring the exercise of this right, the High Contracting Parties :

1. Undertake to make primary education compulsory and free;
2. Will introduce measures :
 - (a) to make facilities for secondary education in its different forms, including technical and professional training, available to everyone at least up to the age of 18 years and to make it increasingly free;
 - (b) to ensure a basic education for those persons who have not received or have not completed their primary education;
 - (c) to make university and other higher education accessible to all;

M. *Le droit à l'éducation*

En vue d'assurer l'exercice de ce droit, les Hautes Parties Contractantes:

1. s'engagent à rendre l'enseignement primaire obligatoire et gratuit;
2. prendront les mesures nécessaires afin de :
 - (a) généraliser l'enseignement secondaire sous ses différentes formes, y compris la formation technique et professionnelle, jusqu'à l'âge de 18 ans au moins, et le rendre progressivement gratuit;
 - (b) assurer une éducation de base aux personnes qui n'ont pas reçu d'instruction primaire ou qui ne l'auraient pas reçue jusqu'à son terme;
 - (c) rendre l'enseignement supérieur et universitaire accessible à tous;

3. Will respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

3. respecteront le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques.

A new enforcement procedure was envisioned.⁽³²⁾ This draft was forwarded to the Committee of Ministers (without a vote on the actual text proposed).⁽³³⁾

The Social Committee of the Committee of Ministers was concurrently working on a draft Charter, that was to detail and define legal obligations and to take into account Recommendation 104 (1956) that embodied the draft of the Committee of General Affairs of the Consultative Assembly.⁽³⁴⁾ The final result included no right to

32. Doc. No.536 *op.cit.*, p.25 et seq. Also Rec. 104 (1956) of the Consultative Assembly 8th Session Texts Adopted; Cons. Ass., 8th Sess., O.R. 912, 978.

33. Deprez, U., 'Articles 2, ..., 9, ..., [et] dix', in Institut d'Etudes européennes, *La charte sociale européenne: Dix années d'application*, (Ed. Univ. Brux., Bruxelles, 1978), p.116, at p.121.

34. Committee of Ministers, Resolution 56 (25) (15 December 1954). Cons. Ass., 9th Sess., Doc. No. 635 at p.18.

education as such.⁽³⁹⁾ It was not to reappear. Instead there were inserted articles on vocational guidance and vocational training.⁽⁴⁰⁾

35. Cons. Ass. Doc. No.927 (19 January 1959). The Social Committee finished its consideration of the ESC at its 6th Session. 23-27 November 1957. Cons. Ass., Doc. No. 770. See section on the right to education, p.471 below for further details.

36. Adopted at its 5th Session. 15-19th July 1957. Cons. Ass., 9th Session. Doc. No. 710 at pp.15-16.

Article 9 The right to vocational guidance

With a view to ensuring the effective exercise of the right to vocational guidance, the Contracting Parties will endeavour :

1. to provide or promote assistance to individuals so as to enable them to solve problems related to occupational choice and progress, with due regard for the individual's characteristics and their relation to occupational opportunity; such assistance to be available both to young persons, including school children, and to adults;
2. to encourage the full utilisation of the facilities provided, by appropriate measures such as reducing or abolishing any fees or charges.

The draft was submitted to the tripartite conference in Strasbourg. The conference was held to gain the technical expertise of the ILO,

Article 10 The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake:

1. to provide or promote, as necessary, the technical and vocational training of workers;
2. to provide or promote a system of apprenticeship;
3. to provide or promote, as necessary, special facilities for re-training of adult workers where this is necessary as a consequence, particularly, of technological developments or of dislocations of the employment market;
4. to encourage the full utilisation of the facilities provided, by appropriate measures such as:
 - (a) reducing or abolishing any fees or charges;
 - (b) granting financial assistance in appropriate cases;
 - (c) including in the normal working hours time spent on supplementary training, taken by the workman with the consent of his employer, during employment;
 - (d) ensuring, through adequate supervision, the efficiency of apprenticeship arrangements and the adequate protection of apprentices.

workers, trade unions and employer's organisations.⁽³⁷⁾ It had only an advisory role.⁽³⁸⁾ The results of the tripartite conference⁽³⁹⁾ together with this proposal, were considered by the Consultative Assembly⁽⁴⁰⁾ which made various amendments including amendments ultimately adopted in part, to articles 9 and 10 on vocational guidance and training respectively.⁽⁴¹⁾ The next section considers

37. Each state sent two government representatives, one employer and one employee representative. See ILO, 'The European Social Charter and International Labour Standards', (1961) 84 *Int.Lab.Rev.* 354, and 462.
38. Cons. Ass. Doc. No.942 (20 January 1959), Communication of M. Birkelbach on the Tripartite Conference. Cons. Ass., 10th Session, O.R. p. 930 (1959). See also ILO *op.cit.*
39. Cons. Ass. Doc. No. 924 contains them. The Consultative Assembly were asked to review these results. Cons. Ass. Doc. No.975 (para 38) (13 April 1959).
40. Cons. Ass. Deb. 23rd and 24th sittings (19 January 1960). Cons. Ass. 11th sess. Opinion 32 (1960).
41. Amendments in bold. Where phrases have been omitted the word preceding the omission is in italics.

Article 9 The right to vocational guidance

With a view to ensuring the effective exercise of the right to vocational guidance, the Contracting Parties

undertake to provide or promote, as necessary, free of charge, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress with due regard for the individual's characteristics and their relation to occupational opportunity; such assistance to be available both to young persons, including school children, and to adults.

Article 10 The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake

1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in collaboration with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, solely based on individual aptitude ;
2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls, in their various employments;
3. to provide or promote, as necessary, adequate and readily available training facilities for adult workers and similarly

these provisions in more detail. During the consultative Assembly's debate on the ESC⁽⁴²⁾ only Mr. Boardman stressed the importance of protecting a child's education. The Committee of Ministers passed Opinion 32 of the Consultative Assembly to its Social Committee for

to provide or promote special facilities for the retraining of adult workers where the need arises from such causes as technological development or dislocations of the employment market:

4. to encourage the full utilisation of the facilities provided, by appropriate measures such as :

(a) reducing or abolishing any fees or charges;

(b) granting financial assistance in appropriate cases;

(c) including in the normal working hours time spent on supplementary training, taken by the workman with the consent of his employer, during employment;

(d) ensuring, through adequate supervision, in collaboration with the professional employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers and the adequate protection of young workers generally.

11th Sess., committees, T.A. Opinion 32 (1960) pp.9-10.

42. Cons. Ass., O.R., 11th Sess., p. 656 *et seq.*

consideration.⁽⁴³⁾ The final decision on the wording was taken by the Committee of Ministers.⁽⁴⁴⁾

C. PART TWO OF THE ESC

The Charter, in Part Two, elaborates on the rights and principles contained in Part One. By virtue of article 20(1)(b) each Contracting state undertakes to consider itself bound by at least five of a specified set of articles in Part Two. The articles dealing with vocational education are not included amongst these favoured provisions. Article 20(1)(c) requires the states parties then to select "not less than ten articles or 45 numbered paragraphs" by which it will consider itself to be bound. France and Ireland have accepted article 9, 10 and 15 that deal with various educationally-related matters.

The realisation of the (Part Two) rights is overseen by a three-tier Committee system. On the basis of State Party Reports⁽⁴⁵⁾ the Committee of Independent Experts draws up Conclusions which are then submitted (with the Reports) to the Governmental Committee of

43. Cons. Ass., Doc. No. 1114, 12th Sess. p.9

44. The papers of the Committee of Ministers and its Social Committee are not yet available under the thirty year rule.

45. The biennial reports are now staggered so that the workload of the supervisory bodies is more evenly spread. The State reports are not published.

the Social Charter, '46' which in turns makes a Report to the Committee of Ministers of the Council of Europe. The Committee of Ministers receives these Conclusions and Reports together with an Opinion of the Parliamentary Assembly '47' of the Council of Europe on them and may make recommendations to individual State Parties in the light of them (by a two-thirds majority). '48' The Recommendations are not binding and none have yet been issued. '49'

46. In contrast to the ILO committees this is made up solely of governmental representatives (article 27 ESC). This may help explain the apathy with which the ESC is treated by employees and employers alike. ILO *op.cit.*, p.467.
47. Previously called the Consultative Assembly.
48. The power to make specific recommendations is stronger than the power granted to the Human Rights Committee under the International Covenant on Economic, Social and Cultural rights.
49. A fact deplored by the Committee of Experts in its fourth cycle of *Conclusions*, p.xvii. Cons. Ass. 25th sess. Opinion 64 (1973) calls for the Committee of Ministers to issue recommendations. Wiebringhaus, H., 'La charte sociale européenne: vingt ans après la conclusions du traité', (1982) 28 *A.F.D.I.* 934, at pp.938-939 points out that the wording of the Committee of Minister's resolution have become more specific as regard lapses, though they still do not mention

The state reports are considered to be confidential by the Council of Europe. The ESC has resulted in states altering their legislation to comply with its provisions.⁽⁵⁰⁾

D. THE OBLIGATIONS UNDERTAKEN

1. Protection of the child

Article 7(1) of the ESC has not been accepted by Ireland but has been by France.⁽⁵¹⁾ The Committee of Independent Experts has found that France was not complying with this provision as regards the French law on employment of children in family businesses, in particular on family farms.⁽⁵²⁾ Article seven reads:

defaulting states by name.

50. For examples see Wiebringhaus, *op.cit.* p.945.
51. Only five contracting states have adopted this obligation. Commission of Independent Experts (hereafter CIE) on the ESC, *First Report on certain provisions of the Charter which have not been accepted*, (Council of Europe, 1981) p.12.
52. CIE, *Conclusions VIII*, p.101. Also *Conclusions IX (2)* pp.128-129. Harris *op.cit.* p.82. Also Italy was found to be not fulfilling its obligations under this article. Wiebringhaus, H., 'Article 7 Le droit des enfants et des adolescents à la protection', in Institut d'études européennes, *La charte sociale européenne*, *op.cit.* p.213, at p.216. Ireland has yet to adopt this article and needs in particular to draw up its "prescriptive list" to comply with its provisions. See CIE

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:

- (1) to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;

Clearly the aim is to protect the child from exploitation and to promote, *inter alia*, his education.⁵³ This is strongly confirmed by sections three and four of article seven which state:

- (3) to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;
- (4) to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;

Both Ireland and France have accepted these paragraphs.

Whilst the regime in France has provisionally been considered compatible with the obligations imposed,⁵⁴ the CIE has consistently found Ireland not be fulfilling its obligation in this respect. The

First Report, op.cit. p.13, 17 et seq.

53. Article 17 is designed to protect the pre-school child.

54. Though not in the latest cycle of supervision. CIE

Conclusions IX(2), 1986, p.127.

CIE consider that article 7(3) requires implementation by a legal regulation of what constitutes light work and legislation to prevent violations occurring.⁽⁵⁵⁾ with no exception being made for employment in the family in respect of domestic or farm work.⁽⁵⁶⁾ The Governmental Committee considers that such legislation is unnecessary as long as a state enforced its compulsory education laws and "controlled the employment" of people under the school-leaving age.⁽⁵⁷⁾ The seriousness with which the CIE takes the importance of the child's right to "full benefit of his education" is shown by the condemnation of Dutch legislation that allowed school children to do a newspaper round before school.⁽⁵⁸⁾

55. CIE, *Conclusions II*, p.31.

56. The CIE and Consultative Assembly view is that a list of permitted jobs (or a list of forbidden jobs) should be drawn up. Council of Europe, CIE, *First Report op.cit.* p.12; *Conclusions IX(2)*, 1986, p.136. The governmental Committee takes the opposite view, *Fifth Report*, p.10. See Council of Europe, *Case-law of the ESC*, (Strasbourg, 1982) p.68. Harris *id.*, p.84.

57. Governmental Committee 3rd Report pp.6-7.

58. CIE, *Conclusions VIII*, p.107 *et seq.* and *Conclusions IX*, pp.60-61.

2. Provision of Vocational Guidance

Article 9⁽⁹⁹⁾ binds the state to provide or promote vocational guidance⁽⁹⁹⁾ to all persons, this specifically includes school-children. Vocational guidance is designed to ease the

59. Article 9 provides:

With a view to ensuring the effective exercise of the right to vocational guidance, the Contracting Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including school children, and to adults.

See generally Deprez, U., 'Articles 2, ..., 9. [et] dix', in Institut d'Etudes européennes, *La charte sociale européenne: Dix années d'application*, (Ed. Univ. Brux., Bruxelles, 1978), 116.

60. The article overlaps with article 1

With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:

...

- (4) to provide or promote appropriate vocational guidance, training and rehabilitation.

transition from the educational system to the working world.⁶¹ The service promoted or provided

should solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity ...

Clearly the wording here reflects the promotion of one of the aims of education, the development of the personality and abilities of the child. It also clearly reflects the purpose of education as a 'sorter' of life chances.⁶² Both Ireland and France are considered by the CIE to be complying with this provision.⁶³ This is the only incorporation of this right in international law. It reflects the importance that the European states give to the development of personal choice and individuality through training to give a true choice of career.

61. CIE, *Conclusions IV*, p.xiv. Harris *op.cit.* pp.98-102.

62. See Chapter One p.24 *et seq.*

63. CIE, *Conclusions IX(2)*, 1986, p.133, p.127 respectively.

3. The right to vocational training

Article 10(1)⁽⁶⁴⁾ guarantees the right to vocational training. This obligation⁽⁶⁵⁾, as regards the promotion of technical and vocational training, has been fulfilled by the contracting states with "little difficulty".⁽⁶⁶⁾ The requirement of access to higher education has not been interpreted to mean higher education

64. Article 10(1) provides:

With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake:

- (1) to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organizations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;

. . .

65. The obligation is subject to article 33 that, in effect, allows states to comply with it if the "great majority" of workers are covered. "Great majority" is interpreted as 80%.

66. Harris *op.cit.* p.101.

generally, but only "vocational" higher education.⁶⁷ Whilst the Committee of Independent Experts has called for wider access by making fees "reasonable" and providing financial assistance to students⁶⁸ there is no requirement that all with the "individual aptitude" be actually admitted.⁶⁹ The wording of the text makes this interpretation of the obligation perfectly respectable. The states must only provide or promote the training as necessary.⁷⁰ But it is worthy of note that states should provide or promote such training. the obligation undertaken requires an end result, the provision of facilities.

67. Harris *op.cit.* p.101 note 535, where he recounts the *travaux préparatoires* to this effect, noting also that the Committee of Ministers excluded a right to education for the same reasons.
68. Article 10(4) makes these requirements appropriate by calling on states to utilise such measures. But they have an independent existence under article 10(2), see CIE, *Conclusions VII*, p.62.
69. Harris *op.cit.* p.102 n.540 where he observes the U.K. system has been held to be in conformity with the obligation by the Committee of Independent Experts although it operates a selective entrance system to Universities.
70. Deprez, *op.cit.*, pp.132-133 considers that this wording does not allow the states to wriggle out of their obligation. The "necessity" can be tested, and indeed maybe itself a source of obligation.

The reliance on individual aptitude in this article shows that the ESC protects the idea of equality of opportunity in education. But it does so very incompletely, and, it is suggested, mainly for the lower status range of jobs. For example "vocational" higher education includes, *inter alia*, the study of law and medicine, (considered as high status professional jobs), the normal matriculation requirements for which are more "academic" than the vocational training certificates that might result from the training envisaged in this article. Moreover given that the normal route to university and higher education is through secondary education it is odd that there is no mention of general educational rights in the ESC. This is especially so as at the time of the drafting of the ESC numerous European states charged fees for secondary education.⁷¹

Article 10(2) further spells out the obligation by providing:
With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake:

...

- (2) to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments:

Article 10(3) specifies the requirements as regards adult

71. See below Part Three.

training and article fifteen⁽⁷²⁾ requires specialised provision for the handicapped as regards vocational training and their employment.

4. The right to education

As we see from the above provisions the Charter is clearly concerned with protecting children and ensuring that their education is not detracted from by diversion of the child to employment. The rights and obligations granted and imposed dance around the question of a right to education. We see that the notion of compulsory education is acknowledged in article seven, and that homage is paid in article nine to the necessity for vocational guidance to help a child utilise his or her abilities. We see moreover that natural aptitude is to be the sole criterion for admission to (vocational)

72. Article 15 provides:

With a view to ensuring the effective exercise of the right of the physically or mentally disabled to vocational training, rehabilitation and resettlement, the Contracting Parties undertake:

- (1) to take adequate measures for the provision of training facilities, including, where necessary, specialized institutions, public or private;
- (2) to take adequate measures for the placing of disabled persons in employment, such as specialized placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment.

higher education, which is to be encouraged by reducing fees payable and granting financial assistance. It has been pointed out above that this provisions was somewhat ridiculous in respect of professional vocations, such as law, for which an academic schooling was (and is still) required. This is so because the ESC failed to guarantee or even require the states to provide such an education, let alone a cost-free education.

Whilst the above articles promote the vocational aspects of education the ESC is clearly missing any endorsement of the right to education itself.⁽⁷³⁾ As we shall see when we discuss the *travaux préparatoires* of the ECHR⁽⁷⁴⁾ a rationale for the non-inclusion of the right to education in that document was that it should be separately protected in a later Convention covering Economic and Social rights. It is therefore surprising not to find any mention of it directly in the ESC. We saw that in initial drafts of the Consultative Assembly the right was included. The decision not to include any right to education was taken by the Committee of Ministers.

The arguments apparently used to justify the omission were that the right to education was not a "social" right, and was moreover already protected by the provisions of article 2P of the

73. Commentators note this serious defect. See Harris *op.cit.* p.192.

74. Below p.499.

ECHR.⁷⁵ Whilst this is true as regards parental rights, as we shall see it was much less clear whether the right to education in article 2P endorsed positive rights.⁷⁶ Harris hypothesises that problems in drafting a suitable text guaranteeing free education also took its toll.⁷⁷ This seems an unlikely reason given that the drafting of the International Covenant on Economic, Social and Cultural Rights at that time included quite detailed obligations as regards educational rights.⁷⁸ Also the first drafts of the Social and Economic Committees of the Consultative Assembly were fairly detailed. The text proposed by the Consultative Assembly included the right, albeit in a weak formulation.⁷⁹ The Social Committee of the Committee of Ministers probably dropped the right at its 5th session in July 1957 when it adopted the text on vocational training.⁸⁰

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75. Harris, *op.cit.*, p.192.
76. See below Section IV Les travaux préparatoires, Conclusions p.528, esp. p.533.
77. As well as the problems of Federal states where education was not within the Federal field of competence. Harris *op.cit.* p.192.
78. See above chapter four.
79. See above p.442 *et seq.*
80. The Social Committee completed its consideration of the ESC at its Sixth session in November 1957. Cons. Ass. Doc. No. 770. The papers of these meetings have not yet been released under the thirty year rule so it is not yet known why it was

In 1978 the Parliamentary Assembly proposed the addition, *inter alia*, of a right to basic education.⁽⁸¹⁾ The Committee of Ministers is considering adding such a right to the ESC. One of the factors that prevent its addition is that the right has perhaps already been enshrined in the ECHR. It was also proposed to add the same right to the ECHR.⁽⁸²⁾ This matter is considered below in the concluding section of the chapter. But one may say that the lack of a Protocol including such a right, together with the initial rejection of such a right, is perhaps evidence that the Contracting states believed that the right was already enshrined in the ECHR. The 81st session of the Committee of Ministers adopted a Protocol to the ESC on 26 November 1987. It does not contain an article on the right to education.⁽⁸³⁾

We turn now to assess the nature of the ECHR.

III. THE NATURE OF THE ECHR

1. Introduction

I have stated, in chapter one, *inter alia*, that one of the matters that this thesis seeks to analyse is the extent to which the

dropped. The Committee of Ministers considered the matter in the course of 1958.

81. Cons.Ass. 30th sess. T.A. Rec.839 (78) p.5. It also suggested a European Court of Social Rights and a right of petition to the Committee of Independent Experts. *Id.* p.8 *et. seq.*

82. Harris, *op.cit.* p.199.

83. Council of Europe Doc., I(87) 68 (26 November 1987).

international law has established a right to education. It also assesses whether the rights established have infiltrated and permeated national decision-making, especially the legal decision-making of the courts.⁸⁴ It also examines the potentially integrative effects of enshrining such rights in international law. The actual term used were "international constitutionalism". Clearly the impact that this has will very largely depend on how the rules of the national systems incorporate or give effect to the norms contained in the ECHR and other international treaties examined. A detailed consideration of the reception that is given by the three countries under scrutiny is set out in chapters 9, 10, and 11.⁸⁵ Sections IV and V of this chapter on the ECHR concentrate principally on the evolution of Article 2P and its subsequent interpretation. This section reevaluates the role of the Convention and its means of harmonising or creating a common legal standard in this area.

The obligations imposed on the states parties to the ECHR are concrete. The *Rice & Boyle* case⁸⁶ currently before the European

84. See below Part three.

85. See sections starting on the following pages 747, 836, and 954.

86. *Boyle v U.K.*, Application 9659/82 (1986) 8 *E.H.R.R.* 274 (admissibility); Commission Report. See European Commission of Human Rights, Doc. DH (87) 5 Def. The case is currently being considered by the European Court of Human Rights in

Court will deal with the scope of articles one and thirteen of the ECHR.⁹⁷ All the Contracting Parties to the ECHR must provide a remedy in accordance with articles one and thirteen of the Convention.⁹⁸ In the recent *Lithgow* case⁹⁹ the European Court

plenary session.

97. Article One declares:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article Thirteen states:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

98. See in this sense Golsong, H., 'Implementation of the International Protection of Human rights', (1963) 110 *Rec. des Cours* 1, at p.138. See generally for a summary of views of different authors, Drzemczewski, A., *European Human Rights Convention in Domestic Law: A comparative study*, (Clarendon Press, Oxford, 1983) Ch.2. and articles and works cited therein. The early position of the Commission was that the obligation contained in article one was best fulfilled by the legal recognition of the rights of the Convention in the domestic system. The case of *Abdulaziz, Cabales and*

institutions stand at the end of a long "internal quest" for justice by a litigant. The length of this internal quest will vary according to the national positions as regards protection of human rights. There is no direct inter-linking between the Strasbourg institutions and the national Courts.⁹⁰

There are several effects that the ECHR system has in its normal operation that will enhance the emergence of some common legal rules or standards. There are also some countervailing effects. The following sections outline the factors that determine the extent of the emergence of a common European rule as regards human rights, and the right to education in particular. The European Social Charter is considered here as it is relevant to the question of emergent European norms.

2. Factors promoting the emergence of common standards

One can recognise that the drafters of the ECHR clearly wished to establish a common legal standards for the protection of

90. As there is for example between the European Court of Justice of the European Communities and national courts by virtue of article 177 of the Treaty of Rome. This allows for questions of interpretation and validity of Community law to be referred to the European Court of Justice for binding (as to the meaning or validity) elucidation.

Article 53 ECHR states:

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

held that

Although [by virtue of article Thirteen] there is ... no obligation to incorporate the Convention into domestic law, by virtue of Article One of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting states.

The Court went on to find however that article 13 did not require adhering states to

guarantee a remedy [by] allowing a Contracting State's laws as such to be challenged before a national authority on the grounds of being contrary to the Convention or to equivalent domestic norms.

There is no obligation then to set up a system of constitutional review of legislation as long as a remedy is available to vindicate the rights enshrined. This highlights one area of relative weakness for the ECHR system. It relies in the first instance on the Contracting states themselves to implement the rights laid out. There is no rule of supremacy for the provisions of the ECHR nor any system of courts to enforce the rules it establishes. The Strasbourg

Balkandali v U.K. ECHR Ser.A, No.94 (28 May 1985) at 93; (1985) 7 *E.H.R.R.* 471, is illustrative of the obligation imposed by article 13.

89. *Lithgow v United Kingdom* ECHR Ser. A, No.106 (1986) 8 *E.H.R.R.* 329 at p.397 (205).

Human Rights. As the Preamble⁽⁷¹⁾ states:

... Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms; Reaffirming their profound belief in those Fundamental Freedoms ... which ... are best maintained by a common understanding and observance of ... Human Rights ...

The second recital of the Preamble of the ESC in very similar terms emphasises:

... the aim of the Council of Europe is the achievement of greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realization of human rights and fundamental freedoms.

The ESC has been accused of being a conservative and vague document, but does in fact seem to represent a set of fundamental social and economic principles accepted by many West European

91. The Preamble first notes that the U.N. Universal Declaration of Human Rights aimed to secure "universal and effective recognition of the rights therein declared".

states,⁹² and is likely to bring about some uniformity in this field despite its lack of direct legal effect inside the contracting states.⁹³

From its earliest days authorities in the field of the ECHR have recognised its uniqueness.⁹⁴ At the time of its drafting it

92. For a defence against these charges raised, *inter alia*, by Schoetter, 'La charte social européenne; considerations critiques', (1966) 39 *R.Ins.Soc.* 111, see Evans, M., 'The European Social Charter', in Bridge, J., (ed.) *Fundamental Rights*, (Sweet & Maxwell, London, 1973), 278. It is also criticised for leaving out rights such as the right to housing or leisure. See Delpérée, A, 'Les droits sociaux et la charte social européenne', (1968) *H.R.J./R.D.H.* 549, at p.577. The right to education is also left out, see above p.471.

93. Kahn-Freund, *op.cit.* Cons. Ass. 37th sess. Rec.1022 (June 1986). See also pp.461-463 above.

94. Robertson, A, H., *Human Rights in Europe*, (MUP, Manchester, 1977) p.231 (the ECHR is neither domestic law nor international law, but represents rather a new legal order giving rights to individuals that are enforced both nationally and internationally). To the same effect see Evrigenis, D, J., 'Le role de la Convention européenne des Droits de l'Homme', in Cappelletti, M., (ed.) *New*

was well-known that it would have *sui generis* status simply by according individual procedural status in an international arena.⁹⁵ This alone it was thought would generate significant interest amongst the mass media and thus enable the wider diffusion of the aims and norms of the European system.⁹⁶ Certainly in the United Kingdom the

Perspectives for a Common Law of Europe. (de Gruyter, Berlin/New York, 1979), 352. Also Fawcett, J.E.S., 'The application of the ECHR', in Friedmann, W., Henkin, L., and Lissitzin, D., (eds.), *Transnational Law in Changing Society. Essays in honour of Philip C. Jessup*, (1972) 228 at 237 where the interpenetration of Convention and domestic law is pointed to as evidence of its transnational character. See also Drzemczewski, A., *European Human Rights Convention in Domestic Law*, (Clarendon Press, Oxford, 1983), especially Chapter One.

95. A status enhanced by the recent (1982) changes in the rules of the European Court to allow individuals to be directly represented before the European Court. Rule 30.
96. Of course the press also distorts news concerning the ECHR. In Britain the present writer well remembers the headlines, BRITAIN IS CLEARED OF USING TORTURE (The Guardian, p.8, 19 Jan. 1978) and STRASBURG COURT CLEARS U.K. OF TORTURE (The Times, p.1, 19 Jan. 1978) when the Court ruled that it had violated Article 3 of the ECHR in being inhumane and

existence of this external Bill of Rights has been seized on by lawyers and human rights groups as in many instances there is no internal redress for human rights violations available.⁹⁷ In other

degrading in its treatment of detainees in Northern Ireland. In Sweden in the past the Press has been largely hostile to the ECHR and ignored it where possible. This was evident when the case against Turkey, which was initiated, inter alia, by Sweden, was settled. The settlement was not reported in the Swedish Press. Sundberg, J, W, F.. 'Human Rights in Sweden', (1986) 47 *Ohio State Law Journal*, 951 at 977

Time and again it would be discovered that the media had deliberately suppressed news forthcoming from Strasbourg.

See Sundberg, J., 'Introduction', in Sundberg, J.. (ed.) *Laws, Rights and the European Convention on Human Rights*, (Rothman & Co., Colorado, 1986), where this theme is amplified.

97. The classic instance of this occurring is the *Malone* case. *Malone v Commissioner of Police (no.2)* [1972] 2 All ER 620, esp. at 626 et seq. *Malone v United Kingdom*, ECHR Ser. A, No.82 (August 1984); (1985) 7 *E.H.R.R.* 14. See also Lord Bridge's dissent in *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at p.346. Another instance where the Convention has become a political issue is as regards education. The

states as the European rights become more widely known one can expect an increase in the number of complaints.⁹⁸ This is likely to occur in the Republic of Ireland in regard to religious issues as well as educational and family law issues. It is also likely that there will be an increase in the number of applications from France as knowledge of the system spreads.⁹⁹ The fears¹⁰⁰ of the negotiating states that the right of petition would be abused by individuals for political and other reasons led to a strict standard of scrutiny of

Independent Schools Information Service took out full page advertisements in the recent U.K. elections that pointed out the possibility that the Labour party's plans for independent education would violate the ECHR. See *The Times* June 3rd 1987. See also Lester, A., and Pannick, D., *The Legal Case*. (I.S.I.S., 1987). There is now it seems a perennial ritual Parliamentary attempt to incorporate the provisions of the ECHR into U.K. law.

98. The recent explosion of Swedish applications is a case in point. See Sundberg *op.cit.*, and Sundberg, J., (ed.) *Laws and Rights and the European Convention on Human Rights*, (Rothman & Co., Colorado, 1986).
99. France having only relatively recently accepted the right of individual petition under article 25. See chapter nine below.
100. These fears themselves are proof enough of the "constitutional" potential of this treaty. See *passim* Mann F. A., 'Britain's Bill of Rights', (1978) 94 *L.Q.R.* 512.

petitions.¹⁰¹ The conditions of admissibility that weed out the vast bulk of applications¹⁰² also have the effect of causing the European Convention provisions to be pleaded in the domestic forum as part of the process of exhausting local remedies.¹⁰³ This clearly has an educational effect even though in instances where the Convention has not been internalised the domestic judiciary can but

101. This fear was also met, in part, by the inclusion of Article 17 in the Convention. See below p.607 for the text of this article.

102. On 1 January 1986 there had been 31,146 applications and only 450 of them had been admitted. The figures up until the end of 1985 were that of 11,891 individual registered applications, only 450 were declared admissible. European Commission on Human Rights, *Stock-taking on the European Convention of Human Rights*, (Council of Europe, Strasbourg, 1986), p.128. 109 cases involving 157 applications had been brought before the Court since its creation. *Id.* p.138. 57 cases concerning 123 applications were dealt with by the Committee of Ministers. In recent years more applications have emanated from the United Kingdom than any other country.

103. Article 26 ECHR states:

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.

wring their hands in despair.¹⁰⁴ A further factor enhancing the emergence of a common standard with integrative effects is that the European Commission stresses the importance of the "general interest" in seeking a friendly settlement between the parties once a dispute has passed the admissibility stage.¹⁰⁵ This too leads to the promotion of pan-European rights.

As the experience of the lawyers taking cases to Strasbourg increases it is likely that the numbers of petitions declared

104. *Malone and A-G v Guardian Newspapers* in note 97 above.

105. Article 28 (b)

it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement on the matter on the basis of respect for Human Rights as defined in this Convention.

This concern is also reflected in the 8th Protocol to the ECHR which will amend the ECHR in various respects when it come into force. By Article 6 of the Protocol the Commission is empowered to strike out applications for various specified reasons, including withdrawal of the application by the applicant. However even in the event of such a withdrawal, "the Commission shall continue the examination of a petition if respect for human rights ... so requires".

admissible will greatly increase.⁽¹⁰⁶⁾ Another factor encouraging recourse to the European Commission on Human Rights is the fact that the procedure is free,⁽¹⁰⁷⁾ and that the Court can and does increasingly award costs as part of the "just satisfaction" under Article 50 of the ECHR. Moreover as the European Convention expands

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106. This is probably already happening. It has led to a great deal of concern that the part-time Strasbourg institutions will not be able to cope with the increased case-load. It has been suggested that the current procedure is wasteful in that the merits are often examined twice over, once by the Commission and once by the Court. See generally the Proceedings of the Second Seminar on International Law and European Law at the University of Neuchâtel, *Merger of the European Commission and European Court of Human Rights*, published in the (1987) *B.H.R.L.J.* The 8th Protocol to the ECHR (1985) is designed to help alleviate this problem by *inter alia*, allowing the Commission to create chambers. See Council of Europe, *Explanatory Report on Protocol No. 8 to the Convention ...*, (March 1985), p.1 §3.
107. Legal aid is available. Committee of Ministers Resolution (63) 18 (25 October 1963). Rule of Procedure Addendum.

its scope, from "preventing state restrictions on freedom"¹⁰⁸ to demanding "positive rights" in the fulfilment of the Convention provisions¹⁰⁹ the number of applications is bound to increase.

The increase in the numbers of admissible applications, and the concern of the Strasbourg institutions to establish pan-European norms¹¹⁰ would, it seems, lead to an inevitable increase in European integration.¹¹¹ The Council of Europe also takes overt

108. See the section on the evolution of the rights, below p.493. The traditional liberal scope of the rights is reflected by article 18 which declares:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

109. See below p.493.

110. Aided by applicants whose lawyers often cite Supreme Court cases from many jurisdictions.

111. Article 1 of the Statute of the Council of Europe, Eur. T.S., No.1, p.2, establishes the aims of the Council of Europe:

Chapter I.-- Aim of the Council of Europe

Article 1

(a) The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles

which are their common heritage and facilitating their economic and social progress.

- (b) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.
- (c) Participation in the Council of Europe shall not affect the collaboration of its Members in the work of the United Nations and of other international organisations or unions to which they are parties.
- (d) Matters relating to National Defence do not fall within the scope of the Council of Europe.

On this theme see generally: Plaza, W., 'L'expérience d'intégration au sein du Conseil de l'Europe', (1977) 81 *R.G.D.I.P.* 667; Frowein, J., Schulhofer, S., and Shapiro, M., 'The Protection of Fundamental Human Rights as a vehicle of Integration', in Cappelletti, Seccombe and Weiler, (eds.), *Integration through Law*, Vol.1 Book 3, (de Gruyter, Berlin/New York, 1986) at p.231, and especially Frowein, J., 'Fundamental Human Rights as a vehicle of Legal Integration in Europe, in Cappelletti et al. *id.* p.300. See also Modinos,

measures to help disseminate information about the ECHR. They have even produced a handbook for teachers.¹¹²

Other European Conventions also play a more modest but more specific role in creating an integrative effect as regards education. Thus the European Cultural Convention of 1954¹¹³ is designed, *inter alia*, to encourage states to promote the study of each others languages, history and civilisation.¹¹⁴ The European Convention on the Equivalence of Diplomas¹¹⁵, although it has been overtaken to

P., 'Effects and Repercussions of the European Convention on Human Rights', (1962) 11 *I.C.L.Q.* 1097, esp. at p.1107.

112. Council of Europe. *Human rights education in schools: concepts, attitudes, skills.*, (Strasbourg, 1984).

113. E.T.S. No. 18; (1955) 218 U.N.T.S. 139. France, Ireland and Belgium have all ratified this convention.

114. E.T.S. No. 18, Article 2.

115. European Convention on the equivalence of diplomas leading to admission to universities, E.T.S. No. 15; (1955) 218 U.N.T.S.

125. Belgium, France and Ireland have all ratified the Convention. The Convention was extended by the Protocol to the European Convention on the equivalence of diplomas leading to admission to universities, E.T.S. No.49.

The European Convention on the equivalence of periods of University Study, E.T.S. No. 21, also promotes mutual recognition of university studies, in particular for modern

some extent by the activities of the European Communities in this field,¹¹⁶ is designed to help student mobility as regards tertiary education. The European Convention on the Academic Recognition of University Qualifications¹¹⁷ allows pan-European recognition and use of academic degrees, and recognition of the degree for the purposes of academic study.

languages (Art. 2(1) but also for other disciplines (Art. 2(2)).

116. The EEC's activities in this field relate primarily to educational rights of workers and their families, and also to equivalence for the purposes of cross-border provision of services and establishment. The persons covered, as regards worker's rights, are essentially to be accorded the same rights as nationals. As to the situation for professionals seeking intra-community mobility under the provision of services and establishment there was initially a positive effort to harmonise the actual requirements of courses of study. The emphasis now is on mutual recognition of diplomas. See *passim* Lonbay, J., 'Kangaroos jump better than crocodiles: The Single European Act in perspective', in *Boston College International and Comparative Law Review* forthcoming issue. The Council of Ministers has recently approved the ERASMUS programme which will, *inter alia*, fund student mobility within the EC's.

117. E.T.S. No. 35.

3. Factors opposing the emergence of common standards

As against these integrative forces one can point to several factors that detract from successful integrative effects. The legal status of the ECHR is considerably weaker than the domestic law in the internal legal systems of the countries which this study uses as examples. The Convention clearly cannot be directly used in Ireland,⁽¹¹⁸⁾ though its position in France⁽¹¹⁹⁾ and Belgium⁽¹²⁰⁾ is slightly stronger. Another weakness of the system relates to its methods of enforcing its decisions.⁽¹²¹⁾ This, in the last resort is left to the Committee of Ministers.⁽¹²²⁾ As we shall see (when

118. See below Chapter 11, p.954 et seq. and 998 et seq.

119. See below Chapter 9, p.747 et seq.

120. See below Chapter 10, p.836.

121. The meaning of articles 1 and 13 of the Convention are shortly to be further clarified in the *Rice & Boyle* case. See above n.89 and accompanying text for an analysis of the *Lithgow* case.

122. Article 54 ECHR states:

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

Their supervision under article 54 of the Convention is not reviewable by the European Commission on Human Rights. See Application No. 10243/83 *Times Newspapers Ltd. and Others v*

looking at the *Fourons* case) this often leaves much to be desired.¹²³ A two thirds majority is necessary before any decision is possible and the Ministers are open to considerations of political character in taking their decisions. There is also the possibility that the Convention organs may be overwhelmed by their success and the sheer number of applications.¹²⁴

Further factors of considerable importance in this matter are the questions relating to the evolution of the Convention's rights and the margin of appreciation that is left to states in determining the scope and application of the rights by the case-law of the Convention organs. Clearly the wider this margin is the less one can talk of common European standards, except perhaps as minimum standards. These questions as they relate to educational rights are considered more fully below.

United Kingdom (1986) 8 *E.H.R.R.* 54 at pp.59-60. Of course individual victims are entitled to bring a new action based on Articles 1 and 13, should the remedy provided by the settlement not be adequate.

123. See below p.586.

124. See above Neuchâtel conference. n.106.

4. The evolution of the rights guaranteed by the convention

The ECHR is open to dynamic evolution. The *Tyler* case⁽¹²⁵⁾ made this quite plain. Both the European Court and Commission looked to recent developments in the Contracting states legal systems to come up with a new standard that forbade judicial corporal punishment. The same elevation of standards occurred in the *Campbell and Cosans* case.⁽¹²⁶⁾ It is clear however that there are limits to the possible evolution of the standards set by the ECHR. In the case of *Johnston*⁽¹²⁷⁾ the European Court of Human Rights was considering the question of whether Articles 8 and 12 of the Convention included a right to divorce. An "evolutive" approach might suggest that given the position in the majority of the Contracting parties as regards divorce this "right" might now be found within these articles. However the Court found that the *travaux préparatoires* deliberately excluded such a right, and that whilst the

Convention and its Protocols must be interpreted in the light of present-day conditions ... the Court cannot by means of an evolutive interpretation derive from these instruments a right

125. *Tyler v U.K.* ECHR Ser.A, No.26 (25 April 1978); 2 *E.H.R.R.* 1.

126. See below p.610.

127. *Johnston v Ireland* ECHR Ser.A, No.112

that was not included therein at the outset.⁽¹²⁸⁾

This interpretation was strongly buttressed by the provisions of the seventh Protocol and its Explanatory Report which, whilst extending rights to spouses "notably in the event of dissolution of marriage", wrote that

the words "in the event of dissolution" found in article 5 "do not imply any obligation on a state to provide for dissolution of marriage or to provide any special form of dissolution."⁽¹²⁹⁾

So clearly if the *travaux préparatoires* make clear that certain matters were deliberately omitted, this will prevent their later inclusion via an "evolutive" interpretation.

A further element, relevant to the discussion of the evolution of the rights enshrined in the ECHR, is that the ECHR undoubtedly requires positive action from states in some circumstances. The *Airey* case⁽¹³⁰⁾ made this very clear as regards legal aid financing to make access to the Court "effective". The *Marckx* case⁽¹³¹⁾ required Belgium to take positive steps to protect

128. Ser.A No.112 Para. 53. The Court was here following the European Commission's report, paras 93-103. See also the *Glasenapp* case, Ser.A No.104, esp. para 48.

129. *Id.*

130. *The Airey* case, ECHR Ser.A, No.41 (6 February 1981).

131. *Marckx* case ECHR Ser.A, No.31, (13 June 1979).

family life.¹³² More recently the *Johnston* case whilst recognising that article 8 may impose "positive obligations" as these were "inherent in an effective respect for family life"¹³³ recalled that the notion of respect was not "clear-cut". The respect required would vary considerably from state to state because of the "diversity of the practices followed and situations obtaining" in the different states. Frowein even expostulates that potentially "leaving someone to starve on the streets" would amount to a violation of Article 3 and thus a "social security" remedy might be available to victims in such circumstances.¹³⁴ The question of whether article 2P has any positive aspects will be considered below. But one can note here at the outset that in the first case to come before the Court dealing with Article 2P the Belgian Government argued the classical liberal theory that state abstention and restraint were all that Article 2P required, hence its negative terms. Neither the Commission nor the Court accepted this argument.¹³⁵

5. The concept of the margin of appreciation

The concept of the margin of appreciation provides further limitations on the extent of the possible evolution of the

132. Confirmed also by *X and Y v The Netherlands*, ECHR Ser.A, No.91, (26 March 1985), at p.11 (23)
133. *Johnston v Ireland* ECHR Ser.A, No.112 (55).
134. Frowein *op.cit.*, p.337 *et seq.*.
135. See below p.545.

Convention's rights in the light of the present-day circumstances. The Dudgeon case illustrates the operation of the margin of appreciation, and is chosen as an example as we shall be referring to it later in the Chapter on Ireland. In the *Dudgeon* case⁽¹³⁶⁾ laws, applicable in Northern Ireland, that forbade, *inter alia*, buggery and gross indecency between males were challenged as being contrary to article 8. The Court found that all states regulated sexual conduct⁽¹³⁷⁾ but the question remained as to whether the rules applicable in Northern Ireland were "necessary in a democratic society" "for the protection of morals". In the *Handyside* case⁽¹³⁸⁾ the term "necessary" had been considered to reflect "some pressing social need". Here a margin of appreciation was allowed to the state in evaluating what amounted to such a need. The *Sunday Times* Case⁽¹³⁹⁾ had established that this margin varied according to the interest to be protected.⁽¹⁴⁰⁾ As regards the need to protect morals this, it had been established in the *Handyside* case, allowed a wide margin of appreciation for the state authorities that were in "direct

136. *Dudgeon v U.K.* ECHR Ser.A, No.45 (22 October 1981): 4

E.H.R.R. 149.

137. *Id.* pp.20-21.

138. *Handyside v U.K.* ECHR Ser.A, No.24 (7 December 1976): 1

E.H.R.R. 737.

139. *Sunday Times v U.K.* ECHR Ser. A, No.38 (6 November 1980): 3

E.H.R.R. 317.

140. *Id.* p.36 (§59).

and continuous contact with the vital forces (*les forces vives*) of their countries" and were thus "in a better position" to judge the necessity of the restrictive rules.

As the *Dudgeon* case involved "the most intimate aspect of private life" there had to be "particularly serious reasons" before interference by public authorities would be legitimate. The Court went on to recognise that in Northern Ireland the prevailing moral and social position may require the government to enforce differential provisions (in relation to the rest of the U.K. where the same acts performed by consenting adults were not unlawful). In particular it stated:

Where there are disparate cultural communities, ... , it may well be that different requirements, both moral and social, will face the governing authorities. (141)

Despite the state's margin of appreciation it was for the Court to make the final evaluation as to whether the ... interference complained of was proportionate to the social need claimed for it. (142)

The Court noted the "marked changes" in the attitudes to homosexual practices amongst the majority of the member states of the Council of Europe, and, applying this common standard found that the measures

141. *Id.* p.22.

142. *Id.* p.23.

could not be considered necessary in a democratic society. (143)

From this brief perusal we can see that the concept of the margin of appreciation if widely interpreted could significantly narrow the scope of any pan-European rules that may emerge from Strasbourg. Initially we can also note that there seems no basis, as regards article 2P, for the Court to "balance" in this fashion as regards the right to education for there is no limiting clause attached to article 2P allowing states to detract from the rights therein protected. This is in marked contrast to the other rights encapsulated in the ECHR.

Although the ECHR is generally considered to cover only civil

143. The concept of a democratic society includes "tolerance and broadmindedness". *Id.* p.21. The phrase "democratic society" is taken from the limiting clause article 8 (2) which states:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In applying this test the Court seeks to ensure that the governmental measure in question is proportionate to the legitimate aims pursued.

and political rights it could be argued that some socio-economic-cultural rights did find their way into the First Protocol to the Convention. Included amongst these was the right to education. This had been recognised by the Western states in the Universal Declaration. What form would they give it for close application in their regional mechanism? The following section traces the emergence of this right at the European level from the drafting of the ECHR. We have already examined the provisions of the European Social Charter.¹⁴⁴ The next section details the drafting of the article that covers educational rights. The case-law before the European Court and Commission are then dealt with in the next two sections. The final section is an analytical examination of the right to education as it has emerged under the ECHR and ESC and assesses its potential for the future.

IV. THE TRAVAUX PRÉPARATOIRES

A. INTRODUCTION

Some academic writers dealing with the European Convention on Human Rights (ECHR) have cautioned against placing too much emphasis on the *travaux préparatoires*. Jacobs¹⁴⁵, considering that the Convention should be interpreted dynamically, concluded that the *travaux préparatoires*

144. European Social Charter, 18 October 1961, 529 U.N.T.S. 89; E.T.S., No. 35.

145. Jacobs, F., *The European Convention on Human Rights*, (Clarendon Press, Oxford, 1975), p.18.

should be invoked, if at all, as a guide to the general intentions of the Parties rather than to delimit strictly the scope of the articles.

Castberg⁽¹⁴⁶⁾ states:

The *travaux préparatoires* to the Convention may sometimes be a useful aid to its interpretation, but they cannot be regarded as decisive.

Bearing these cautions in mind a fairly lengthy consideration of the *travaux préparatoires* is still thought to be justified for the purposes of this study. For as Fawcett⁽¹⁴⁷⁾ has observed the magnitude of the difficulty of formulating the right to education is shown by its deferment to the First Protocol, by the length and complexity of the preparatory work, and by the reservations or declarations made in respect of the article by contracting States.

During the course of the preparation of the ECHR the Article that caused the most discussion was that dealing with educational rights. It was quite clear as Mr. Ungoed-Thomas pointed out⁽¹⁴⁸⁾ at an early stage that the matter was the subject of differing policies by different political parties in each country. Indeed Mr.

146. Castberg, F., *The European Convention on Human Rights* (Sijthoff, Leiden, 1974), p.8.

147. Fawcett, J., *The Application of the European Convention on Human Rights*, (Clarendon Press, Oxford, 1969), p.352.

148. *Collected Edition of the Travaux Préparatoires*. (Sijthoff) Vol.2, p.56.

Philip⁽¹⁴⁹⁾ thought that the political issues raised would prove too much for the proposed Court. Differences over religious, public and private education were all to be the subject of debate during the drafting process.

B. DRAFTING OF THE EUROPEAN CONVENTION

The European Movement's Draft Convention started the process of movement creating a European Convention for the protection of Human Rights and Fundamental Freedoms. It did not contain a right to education within its provisions. The right was implicitly subsumed in the rights of the family found in Article 1g of Part 1.⁽¹⁵⁰⁾ In the preliminary debate in the first Session of the Consultative Assembly of the Council of Europe, Mr. Yetkin (Turkey) raised the question of education. He considered that it was vital for the future generation, because it would help ensure the freedom of the individual and allow him to develop his aptitudes and talents.⁽¹⁵¹⁾ This approach, that emphasised the recipients' rights, was not explicitly to be adopted.

The task of drafting a suitable Convention was passed to the Assembly's Committee on Legal and Administrative Questions. Mr. Teitgen was appointed Rapporteur. On the 27th August 1949 the Committee decided that the principal rights enshrined in the U.N.

149. *Id.*, Vol.2, p.72.

150. *Id.*, Vol.1, p.296.

151. *Id.*, Vol.1, pp.124, 126.

Universal Declaration of Human Rights should be effectively enjoyed by the persons within the territory of the Member States of the Council of Europe.¹⁵² The Committee asked Mr. Teitgen to draw up a list of such rights. Thus rights in relation to education appeared for the first time in Mr. Teitgen's proposal. It read as follows:

Rights of parents in regard to the education of their children, in accordance with Article 26(3) of the U.N. Declaration.¹⁵³

It will have been noticed that this proposed right is in fact considerably weaker than the right contained in the Universal Declaration of Human Rights.¹⁵⁴ No right to education is forthcoming, nor is there any provision for free schooling, nor any explanation of the aims of education. To some extent this was explained when Mr. Teitgen presented the Report of the Committee to the Consultative Assembly. It is clear from the draft report in paragraph 9 that even the limited right of parents included had had objections raised against it on the grounds that it was not a 'political' right.¹⁵⁵ Paragraph 9 of the Report was in fact slightly altered by the Committee before being presented to the Consultative Assembly. The words 'political rights' were dropped in

152. *Id.*, Vol.1, p.166.

153. The proposal was adopted ten votes to five on the 30th August. *Id.*, Vol.1, p.176.

154. See above Chapter 4.

155. *Collected Edition of the Travaux Préparatoires, op.cit.*, Vol.1, p.198.

favour of the more neutral and wider formulation of 'rights essential for the functioning of democratic institutions'. The objections to the inclusion of even these limited parental rights were based on a very narrow conception of the appropriate scope for the Convention that was to have legal force. However, the majority in the Committee motivated by fear of potential totalitarian excesses 'thought that ...the forced regimentation of children and young persons...should be absolutely prohibited'.⁽¹⁵⁶⁾

Mr. Teitgen, speaking in support of the Report at the seventeenth Sitting of the Consultative Assembly⁽¹⁵⁷⁾ recalled the horrors inflicted by totalitarian regimes of the recent past and declared that:

On account of these memories, the majority of the Committee considered it desirable to include these fundamental rights. It considered that the father of the family cannot be an independent citizen, cannot feel free within his own country, if he is menaced in his own home and if, every day, the State steals from him his soul, or the conscience of his children.

Thus, at this early stage in the drafting process, no right to education had been mentioned at all, merely a parental right to choose the kind of education that should be given to their children. An amendment at the eighteenth Sitting that would have deleted paragraph 11 of Article 1 (containing Mr. Teitgen's proposal) and

156. *Id.*

157. *Id.*, Vol.1, p.270.

substituted the following:

The right of access for every child to culture by educational methods which will allow the gradual development of his individual personality

was cancelled as inappropriate.⁽¹⁵⁸⁾ Clearly the Convention was to secure political rights, not social or cultural rights.

During the debate that followed the presentation of the Report, Lord Layton proposed the deletion of the provision relating to education.⁽¹⁵⁹⁾ He considered that the primary task of the Convention would be to protect political democracy. This was the urgent task. It would be very difficult to guarantee parental rights, and this would take a long time. In any event he considered that the horrors of totalitarian education would not have occurred had there been true political democracy available.⁽¹⁶⁰⁾ Mr. Unged

158. Proposed by Mm. Philip, Mollet and Rasquin, *id.*, Vol.2, p.12.

Their attitudes are also displayed in the debates on the drafting of the French Constitution of 1946 where Mr. Mollet was President of the Constitutional Commission. See Errera. R., 'La Convention et les problèmes de la laïcité et de l'enseignement', (1970) 3 *R.D.H.* 572.

159. Along with paragraphs 10 and 12 on the right to marry and the right to own property.

160. *Collected Edition of the Travaux Préparatoires, op.cit.*, Vol.2, p.48 *et seq.*

Thomas, amongst others, supported Lord Layton.¹⁶¹ Many Members spoke up in favour of the right to education. The disagreements in the Assembly reflected in the debate caused them to send the question of the right to education and the right to own property back to the Committee on Legal and Administrative Questions by a very close vote of 40 to 43. In the vote on the report itself it was apparent that there were many misgivings at the leaving out of the rights of parents in relation to their children's education. These were reflected more in abstentions than in voting against the Report because no-one wished to destroy the progress that had been made towards the creation of a European Convention on Human Rights.¹⁶²

Educational rights were thus voted out of the Report and the recommendation went forward to the Committee of Ministers without it. The Committee of Ministers on receiving the Recommendation from the Consultative Assembly set up a Committee of Legal Experts to draft a Convention that would serve as a basis for future discussion. The Committee of Experts, despite some concern,¹⁶³ decided not to make any proposals in the relation to educational rights as it was a

161. *Id*, Vol.2, p.56.

162. The voting was as follows: In favour 64; Against 1;
Abstentions 21. *Id*, Vol.2.

163. Notably raised by the Irish delegate Mr. Cecil Lavery *ibid*,
Vol.3, p.218. See Council of Europe *Doc. CM/WP1 (50)15*.

political question as to whether or not it should be included.¹⁶⁴

The Committee of Ministers then referred the draft Convention to a Conference of High Officials in order to settle the outstanding political questions as to methods of enforcement and access of individuals to the proposed Commission. This Conference postponed any discussion on the right to education. At the fifth Session of the Committee on Ministers on the 4th August 1950 a sub-committee on Human Rights adopted a draft Convention that contained no right to education. This in turn was adopted by the Committee of Ministers on the 7th August.¹⁶⁵

Meanwhile the Consultative Assembly's Committee on Legal and Administrative Questions set up a drafting sub-committee to work out the details of a right to education (and the right to own property).¹⁶⁶ It is evident that the drafting Committee had differences as to the precise nature of the right to be

164. *Id.*, Vol.3, p.262. Greece, Norway, the Netherlands, and the U.K. were all for well defined and enforceable political rights.

165. *Id.*, Vol.5, p.120. *Doc. CM/HP. 4 (50) 19 p.6.*

166. The members were Mm. Bastid, Rolin, Pernot, and Schmal. *Collected Edition of the Travaux Préparatoires Doc. H(61)4 Vol.III*, p.698. As the published version is not yet fully available, the present writer for later events refers to documents *H(61)4* and *CDH (67)2*, (previously confidential) kindly sent by the Council of Europe.

protected.⁽¹⁶⁷⁾ Mr. Rolin proposed:

Responsibilities in the field of education assumed by States shall not infringe the right of parents to bestow on their children moral and spiritual training in conformity with their own religious convictions and philosophical beliefs.

The sub-committee proposed:

All persons are entitled to education. The responsibilities assumed by the state with regard to education may not encroach on the right of parents to ensure the spiritual and moral instruction of their children in accordance with their own religious and philosophical beliefs.⁽¹⁶⁸⁾

Clearly the first sentence added by the sub-committee is critical. On the 8th August the full Committee considered the Report of the sub-committee. Mr. Bastid, Rapporteur, emphasised that the textual differences between Mr. Rolin, and the sub-committee were only of form.⁽¹⁶⁹⁾ The sub-committee's text was adopted by 8 votes to 0 with three abstentions. The abstentions were largely the result of the opinions held by some that social rights should not be included

167. Doc. CH(50)57 5 Sept., 1950, p.3.

168. *Toute personne a droit à l'éducation. Les responsabilités assumées par les Etats en matière d'enseignement ne peuvent porter atteinte au droit des parents de donner à leurs enfants une formation spirituelle et morale correspondant à leurs propres convictions religieuses et philosophique.*

169. Doc. CDH(67)2, p.58.

in the Convention, or, that if they were to be included, then they should all see the light of day. Some felt (notably Mr. Vallée Poussin) the right did not go far enough to safe-guard the rights of parents. (170)

Interestingly the French version of the sub-committee's text altered between acceptance by the Committee and presentation to the Consultative Assembly in the Committee's Report. Here are the two versions:

Toute personne a droit à l'instruction. Les fonctions assumées par l'Etat, en matière d'éducation, ne peuvent empiéter sur le droit que possèdent les parents d'assurer l'enseignement intellectuel et moral de leurs enfants, conformément à leurs propres convictions religieuses et philosophiques.

Le droit à l'instruction. Les fonctions assumées par l'Etat, en matière d'éducation, ne peuvent empiéter sur le droit que possèdent les parents d'assurer l'instruction spirituelle et morale de leurs enfants, conformément à leurs propres convictions religieuses et philosophiques.

170. Doc. CDH (67) 2, p.59; H (61) 4 p.822; CH (50) 96 14 Dec. 1950.

No explanation is given in the *travaux préparatoires* for these linguistic changes in the French version.⁽¹⁷¹⁾ The English version does not alter. Clearly the last version, which was presented to the Assembly in a supplementary Report,⁽¹⁷²⁾ is much more ambivalent in its declaration of the right to education in the first sentence, and in its second sentence protects parental rights only in relation to spiritual and moral instruction, rather than the wider intellectual and moral teaching found in the version adopted by the Committee. The second sentence in fact corresponds better with the English version adopted by the Committee.⁽¹⁷³⁾

During the second Session of the Consultative Assembly, at its sixth Sitting, regret was expressed by Mr. MacEntee and several of his colleagues that the right to education had not been included in the draft Convention by the Committee of Ministers.⁽¹⁷⁴⁾ During the Sitting, Sir David Maxwell-Fyfe, Chairman of the Committee on Legal and Administrative Questions, summed up the arguments for and against the inclusion of the right to education (and the right to property). There were three factors that weighed against its

171. See *passim* n.31 in chapter four above.

172. *Collected Edition of the Travaux Préparatoires*, Vol. 5, p. 216; *CDH (67) 2*, p.59. *Doc. 30* (8 August 1950) of the Consultative Assembly of the Council of Europe.

173. Above p.507.

174. *Doc. CDH (67)2*, p.60.

inclusion. Firstly, there would be the difficulty of interpretation and enforcement of the rights. Secondly, such rights, he considered, were not usually found in national Constitutions, at least not in the sections of the Constitutions that gave rise to possible judicial remedies. Thirdly, why single out only these two social and economic rights, as there were many other rights of this nature that could be included. As against these arguments, and in favour of including the rights was the fact that they formed the very basis of freedom. Personal and political freedom would be impaired if they were not guaranteed. Mr. Azara (Italy) approved of the text proposed by the Committee on Legal and Administrative Questions.⁽¹⁷⁵⁾ All spoke in favour of it.⁽¹⁷⁶⁾

At the suggestion of Sir David Maxwell-Fyfe the draft Convention of the Committee of Ministers was referred to the

175. *Collected Edition of the Travaux Préparatoires...*, *op.cit.*, p.246.

176. Mr. Schmal considered that the right to education should include the right to found schools with the help of State subsidies, *id.*, p.250; Mr. MacEntee refuted Sir David Maxwell-Fyfe's arguments against the inclusion of the right to education since the argument could be applied to any of the rights in the Convention, *id.*, p.310; Mr. Norton and Mr. Beaufort both regretted that the draft proposed by the Committee of Ministers did not include the right to education, *id.*, p.272, 326.

Committee of Legal and Administrative Questions for consideration and report.⁽¹⁷⁷⁾ In the Committee Mr. Teitgen proposed a motion that would request the Committee of Ministers (from the Consultative Assembly) to include, *inter alia*, the right to education in the Convention.⁽¹⁷⁸⁾ The proposed Article read as follows:

Every person has a right to education.

The functions assumed by the state in respect of education and of teaching may not encroach upon the right of parents to ensure the spiritual and moral education and the teaching of their children in conformity with their own religious and philosophical convictions.⁽¹⁷⁹⁾

Mr. Teitgen's motion was adopted 17 to 3 with no abstentions.⁽¹⁸⁰⁾ This formulation gave parents almost complete control over their children's education.

On the 25th August Sir David Maxwell-Fyfe presented the

177. *Doc. H (61) 4, p.861 bis; Doc CDH(67)2, p.71.*

178. *Doc. H (61) 4, p.875; Doc. CDH (67) 2, p.72.*

179. *Toute personne a droit à l'instruction. Les fonctions assumées par l'Etat en matière d'éducation et d'enseignement ne peuventempiéter sur le droit que possèdent les parents d'assurer l'éducation spirituelle et morale et l'instruction de leurs enfants conformément à leurs propres convictions religieuses et philosophiques.*

180. *Doc. CDH (67) 2, p.78 in the final English version, 'function' read in the singular.*

Report to the Consultative Assembly. Several speakers in the ensuing debate considered that the right as expressed did not go far enough.⁽¹⁸¹⁾ Others dropped their opposition to the inclusion of the right in the Convention.⁽¹⁸²⁾ Sir David Maxwell-Fyfe reassured the Assembly that

the object of this Article is to meet what we all know was the terrible aspect of totalitarianism, namely, that the youth of the country were brought up so much under the dogmatic teaching of totalitarianism...that it was impossible for their parents to bring them up to their own religious and philosophical beliefs.⁽¹⁸³⁾

Mr. Bastid affirmed that the Article 'did not in any way affect the internal scholastic organisation of states'.⁽¹⁸⁴⁾ The vote on the amendment was carried by 97 votes with 15 abstentions.

The Consultative Assembly's proposals were considered by a

181. de Valera *id.*, pp. 89, 90; Mollet *id.*, p.90 regretted the absence of the declaration of the child's right to education in an atmosphere of liberty.

182. Notably Mitchison who withdrew his amendment requesting the deletion of the proposed right, *id.*, pp.82, 88. Lord Layton indicated that he would abstain, as the Article, being contentious, would make it more difficult for the national Parliaments to ratify the Convention

183. *Doc. CDH (67) 2*, p.93; *Doc. H (61) 4*, p.936.

184. *Id.*

meeting of Representatives of the Ministers of Foreign Affairs in November 1950, immediately prior to the meeting of Representatives of Government that was to sign the European Convention on Human Rights. As unanimity could not be reached as regards the Article on education, they proposed that the matter be left to the Committee of Ministers, and suggested that it might be possible to include it, along with other matters about which there was no unanimity, in a Protocol to the Convention. The Committee of Ministers desirous to sign the Convention took up this suggestion and sent the Consultative Assembly's proposals that they could not agree upon to a Committee of Government Experts.⁽¹⁸⁵⁾ The Convention was signed the next day, without including any Article relating to the right to education. The Assembly was bitterly disappointed. It was to take a further year and four months for the Protocol containing the article on education to be signed.

The Secretary-General of the Council of Europe prepared a Note on the amendments proposed by the Consultative Assembly.⁽¹⁸⁶⁾ Two points were considered as requiring further study as regards the article on education. The first was the extent to which the article would oblige the State to organise or subsidise education 'in accordance with the religious or philosophical convictions of all members of the community' and the second was whether the enemies of the rights and freedoms enshrined in the Convention would be entitled

185. *Doc. CDH (67) 2, p.103; Doc. H (61) 4, p.1020.*

186. *Dated 14 November 1950, Doc. CDH (67) 2, p.122.*

to educate their children in accordance with such aims. The Secretary-General wrote to the Governments suggesting that in order to expedite agreement on the Protocol each Government should submit a text which it could approve of.⁽¹⁸⁷⁾ Belgium and the United Kingdom both submitted texts. The Belgian text read as follows:⁽¹⁸⁸⁾

Every person has the right to education. Parents have the right to ensure the religious education and teaching of their children to conformity with their own religious and philosophical convictions. The State in the organisation of public instruction shall respect this right of parents and shall undertake the necessary measures to ensure its effective exercise.⁽¹⁸⁹⁾

The United Kingdom text was as follows:

No person should be denied the right to education. In the exercise of any functions which the State may assume in relation to education and to teaching it shall have regard to the liberty of the parents to ensure the religious education of their children

187. Letter 18 November 1950, *Doc. H (61) 4*, p.1077.

188. *Doc. CDH (67) 2*, p.125; *Doc. H (61) 4*, pp.1084-4.

189. *Toute personne a droit à l'instruction. Les parents possèdent le droit d'assurer l'éducation spirituelle et l'instruction de leurs enfants, conformément à leurs propres convictions religieuses et philosophiques. L'Etat doit, dans l'organisation de l'enseignement, respecter ce droit des parents et prendre les mesures nécessaires pour en assurer l'exercice effectif.*

in conformity with their own convictions. (170)

The Committee of Experts examined these two texts along with the proposals that had been made by the Consultative Assembly. First they debated the merits of the United Kingdom's approach that couched the right to education in negative terms. The United Kingdom, supported by the Danish, German and Norwegian delegations, considered that the formulation provided a safeguard against an interpretation that might impose heavy obligations on a government to take effective measures to ensure that everybody could receive the education he desired. The other delegations disagreed, considering that the positive formulation entailed no obligation. The Swedish delegation pointed out that the positive formulation did impose an obligation to provide education to all those otherwise not receiving it, if it did not mean this, it would have been redundant.

The delegates were also divided as to whether parents should have a choice only over the religious education of their children or over the whole of their education. The French delegation reserved their position on this point. The Irish delegation preferred the Belgian text, but were prepared to accept the majority opinion that

190. *Nul ne peut se voir refuser le droit à l'éducation. Dans l'exercice de toute fonction que l'Etat assumera dans le domaine de l'éducation et de l'enseignement, il tiendra compte de la liberté que possèdent les parents d'assurer l'éducation religieuse de leurs enfants conformément à leurs propres convictions.*

only parental preferences concerning religious education should be respected. The Committee finally agreed to disagree on an amended United Kingdom text that read as follows:

Everyone has the right to education. (No person shall be denied the right to education). In the exercise of any functions which it may assume in relation to education and to teaching, the State must respect the liberty of parents to ensure the religious education of their children in conformity with their own convictions. (171)

As the Committee of Experts had not come up with a draft Protocol to the Convention, the Committee of Ministers meeting on the 16th March 1951 decided to send the question back to them for further consideration and to find a Protocol that would be 'acceptable to as many Governments as possible'.

The Committee of Experts met on the 18th and 19th April. The majority of the Committee (Danish, German, Greek, Irish, Italian, Luxembourg, Netherlands, Norwegian and the United Kingdom) agreed on

191. *Toute personne a droit à l'instruction. (Nul ne peut se voir refuser le droit à l'instruction). L'Etat, dans l'exercice de toutes fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement, doit respecter la liberté que possèdent les parents d'assurer l'éducation religieuse de leurs enfants, conformément à leurs propres convictions.*

Doc. CDH (67) 2, p. 128.

the following text:

No person shall be denied the right to education. In the exercise of any functions which it may assume in relation to education and to teaching the State shall⁽¹⁹²⁾ have regard to the liberty of parents to ensure the religious education of their children in conformity with their own convictions.⁽¹⁹³⁾

The Belgian and French delegations would have preferred a text more expressly endorsing the principle of freedom for private teaching, and so abstained along with the Saar and Swedish delegations. The Swedish delegation would have preferred the word 'convictions' to have been replaced by the word 'creeds'. The Danish delegation put forward an additional right to choose the language of instruction other than the language of the country in question. This was opposed on the grounds that it related to the problem of ethnological minorities and was thus outside the scope of the Convention. The text was referred to the Committee of Ministers

192. 'shall/tient' originally read 'must/doit tenir'. Doc. CDH (67) 2, p.134 at p.136 corrig.

193. *Nul ne peut se voir refuser le droit à l'instruction. L'Etat, dans l'exercice de toutes fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement, tient compte de la liberté que possèdent les parents d'assurer l'éducation religieuse de leurs enfants, conformément à leurs propres convictions.*

along with a Turkish proposal.⁽¹⁷⁴⁾ Clearly the majority opinion was against any positive formulation for the right to education. Only parental convictions over religious education were 'to be regarded' by States in exercising their functions in relation to education and teaching.

The Consultative Assembly during its Third Session in May 1951 expressed concern that the matter of the Protocol had again been referred to the Committee of Experts in view of the great difficulties it had overcome and political compromises that had gone into its draft proposals. They felt that, before a Protocol was signed, they should be consulted again.

The Committee of Experts, in their June meeting,⁽¹⁷⁵⁾ once again thrashed out the wording of the text of the Article enshrining educational rights. The Danes withdrew their language proposal. The Swedish proposal to substitute 'creeds' for 'convictions' was adopted, and to satisfy the Belgian and French desires to ensure the

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194. *Doc. CDH (67) 2*, p.135. The Turkish delegate suggested that the following sentence be added to the text of the Article on the right to education:- 'The State shall also refrain from interfering in the education of minors for political purposes'.
195. The matter had again been referred to them by the Committee of Ministers.

freedom of private education an extra sentence was added on to the end of the article thus: '176)

....creeds. and to the	...croyances, et du droit
right of parents to send	des parents d'envoyer
their children to schools,	leurs enfants dans des
other than those	écoles autres que celles
established by the State,	établies par l'Etat, mais
which conform to the	qui répondent aux
standards laid down by	prescriptions de la loi.
law.	

The Committee of Ministers' Advisors, having approved the text of the Experts, adopted an amendment based on a proposal presented by the United Kingdom. The French and Italian representatives reserved their position as they had received no instructions on the amendment. '177) The final decision on this

196. Doc. CDH (67) 2, p.146.

197. The Ministers' Advisors accepted the United Kingdom's proposals on 17 July 1951 and requested Governments to inform the Secretary-General by 1 August if they were willing to accept it or not. It read:

'...creeds and, where schools have been established by the State, to send their children to any other schools

amendment and a proposal by the Turkish Government to delete the extra sentence was to be considered by the Committee of Ministers themselves at their ninth Session (2nd - 8th August 1951). The Ministers adopted a text that left out the wording that specifically protected the right of parents to opt for non-state schools (thus adopting the Turkish proposal). The Committee of Ministers sent the new Protocol to the Consultative Assembly for an opinion. The text of the article on education now read as follows: ⁽¹⁷⁰⁾

of their choice, provided that such school conforms with the requirements of the law.' But in their Recommendations to the Committee of Ministers, dated 1 August it seems that they were unanimous in recommending the text subsequently adopted by the Committee of Ministers. *Doc. H (61) 4*, p. 1152.

198. *Doc. CDH (67) 2*, p.150.

No person shall be denied the right to education. In the exercise of any functions which it may assume in relation to education and to teaching, the State shall have regard to the rights of parents to ensure the religious education of their children in conformity with their own creeds.

Nul ne peut se voir refuser le droit à l'instruction. L'Etat, dans l'exercice de toutes fonctions qu'il assuera dans le domaine de l'éducation et de l'enseignement, tiendra compte du droit des parents d'assurer l'éducation religieuse de leurs enfants conformément à leurs confessions.

The Secretariat of the Council of Europe produced a Commentary on the text of the Protocol (18 September 1951).⁽¹⁷⁷⁾ This document attempted to explain to the Assembly why the Committee of Ministers had wrought such changes in the text of Article 2 in relation to education.

The negative formulation of the right was adopted to avoid a duty on the states to provide education (for example; to illiterate adults) where at present it was not provided. The dropping of

199. Doc. CDH (67) 2, p.151; Doc. H (61) 4, pp.1162-8.

parental rights in relation to 'moral' education and the limitation of the parental rights to - education 'in conformity with their own creeds' - as opposed to - education in conformity their 'religious and philosophical convictions' - was undertaken for two reasons. Firstly they wanted to avoid enabling parents, who were fundamentally opposed to democracy and human rights, from being able to educate their children into the same beliefs. Secondly, at least one Member State had legislation which permitted parents to educate their children in their own creeds, but failing which they would be brought up in the State religion.

The Committee on Legal and Administrative Questions of the Consultative Assembly met in October. It rejected most of these reasons for altering its texts but raised no objection to the negative formulation of right to education. It was clear that there was no question of the State having to support 'schools corresponding to the various trends of opinion in the population', 'this question should be considered as entirely outside the scope of the Convention'.⁽²⁰⁰⁾ There were several other aspects of the Ministers' text that they considered unsatisfactory.

Firstly, they felt that the phrase 'have regard to' was not strong enough language to protect parental rights, and thus they

200. Opinion of the Legal Committee. *Doc. CDH (67) 2*, p.155.

changed it to 'shall respect.'⁽²⁰¹⁾ Furthermore, the rights of parents should not be limited to religious education. they should also cover general education. All of a child's education should be able to be protected by the parent from the ravishes of the State. The problem of the anti-democratic parent they considered would be covered by the provisions of Article 17 of the Convention. The fact that some of the States enforced education in State religion seemed anachronistic and certainly should not stop other States from adopting the traditional concept of freedom of education. The Committee's proposed text was thus as follows:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.⁽²⁰²⁾

The meeting of Ministers' Advisors held at Strasbourg in November 1951 felt unable to adopt these ideas of the Assembly's

201. The formula originally proposed by the Belgian Government.
See p.514 above.

202. *Doc. CDH (64) 2, p.756* Nul ne peut se voir refuser le droit à l'instruction. L'Etat, dans l'exercice de toutes fonctions qu'il assume dans le domaine de l'éducation et de l'enseignement, l'Etat respectera le droit des parents d'assurer cette éducation et cet enseignement conformément à leur convictions religieuse et philosophique.

Committee but rather reverted to an earlier text which they had agreed (bar Turkey) with the added last sentence regarding parental choice as to non-state schools.⁽²⁰³⁾ They considered that time was of the essence and that this version should be the final one, they thus recommended that the Consultative Assembly should only be 'informed' of this decision by the Committee of Ministers. This advice was adopted by the Committee of Ministers.⁽²⁰⁴⁾

The Committee on Legal and Administrative Questions was very annoyed that most of its suggestions had been ignored and voted 13 to 0 (1 abstention) that the text proposed by the Committee of Ministers was inadequate. Mr. Teitgen was appointed *Rapporteur ad hoc* to report to the Consultative Assembly on the matter.

In the debate following on Mr. Teitgen's hard-hitting speech presenting the Report of the Committee on Legal and Administrative Questions⁽²⁰⁵⁾ several speakers emphasised the importance of parental rights. Some were dubious about protecting philosophical convictions. Mr. Renton pointed out that 'the introduction of the

203. The Turkish delegate did not oppose this proposal so unanimity was achieved. Turkey declared that it would make a reservation on this point. See above p.519 et seq. for text of the proposed Article.

204. *Doc. CDH (67) 2*, pp.159, 160.

205. *Id.*, pp.164-167.

philosophical factor invite[d] endless controversy'.²⁰⁶ Mr. Crosbie thought that the philosophical factor was there to cater to atheistic beliefs.²⁰⁷ Mr. Teitgen²⁰⁸ explained that philosophical convictions were included to avoid

the requisitioning, the monopolisation of young people by the State, the obligation, enforced upon all children, independently of the will of their parents, of joining the State youth organisations where they will receive an abominable totalitarian training - ... We are familiar with the suppression of free or private educational institutions, the obligation imposed upon all parents to place their children in the educational institutions of the State; we have seen children brought up from the age of five to worship force, violence, racialism and hatred. That is what we wish to avoid.

The Assembly voted: 75 Ayes, 23 abstentions. The Recommendation was adopted.

The Ministers' Advisors meeting in late February 1952 adopted the Assembly's wording. The Netherlands delegate considered that the State should be obliged to provide funds to enable parents to exercise their rights. The Greeks indicated that they would put in a

206. *Id.*, p.176.

207. *Id.*, p.180. Mr. Pernot, *ibid.*, p.186 affirmed this.

208. *Id.*, p.194.

reservation to Article 2,⁽²⁰⁷⁾ and the United Kingdom delegate, having failed to get the Advisors to agree to its proposal, indicated that it would also make a reservation to the Article to the effect that the principles affirmed in the second sentence of Article 2 'is accepted by the United Kingdom only in so far as it is compatible with the provision of efficient instruction and training, the avoidance of unreasonable public expenditure'.⁽²¹⁰⁾ Clearly the pressure from the Assembly had influenced the Advisors. The Committee on Legal and Administrative Questions had indicated that there would have been difficulties in getting the Ministers' text through the national Parliaments.⁽²¹¹⁾ The Committee of Ministers also endorsed the text of the Consultative Assembly, and the Protocol was signed on the 20th March 1952. The Netherlands and Irish ministers made the following respective Declarations:

In the opinion of the Netherlands Government, the State should not only respect the rights of parents in the matter of education but,

209. This reservation has now been withdrawn. Council of Europe, (1986) 22 *Information Bulletin on Legal Activities*, p.3.
210. *Id.*, p.207. The Greek reservation concerned the use of the word 'philosophical'. It was withdrawn by letter of February 1985 with effect from 1 January 1985. Council of Europe, *Information Bulletin on Legal Activities*, Vol. 22 (1986), p.3. Sweden and Turkey were also to make reservations. *Id.*, p.208.
211. *Id.*, p.164.

if need be, ensure the possibility of exercising those rights by appropriate financial measures.

At the time of signing the Protocol, the Irish delegate puts on record that, in the view of the Irish Government, Article 2 of the Protocol is not sufficiently explicit in ensuring to parents the right to provide education for their children in their homes or in their schools of the parents' own choice, whether or not such schools are private schools or are schools recognised or established by the State.⁽²¹²⁾

The final wording of the Article on the right to education was exactly the same as that suggested by the Assembly in its Recommendation 15 (8 December 1951).⁽²¹³⁾ The Governments were clearly anxious to agree a Protocol as soon as possible. As they noted in the letter from the Chairman of the Committee of Ministers to the President of the Consultative Assembly (28 November 1951),⁽²¹⁴⁾ it was desirable to sign a Protocol 'at the earliest possible date, having regard to the fact that ... a number of Governments have postponed initiating the legislative activity necessary for the ratification of the Convention until the Protocol is signed'.

212. *Id.*, p.209.

213. *Doc. H (61) 4*, p.1234.

214. *Id.*, p.1185.

C. CONCLUSIONS

The right to education is expressed negatively. It was clear that all sides considered that there was no duty imposed upon the Government to subsidise education according to parental preferences. Indeed this is verifiable from the exchange that took place between the minister from the Netherlands (Mr. Stikker) and the Danish minister (Mr. Kraft) on the day before the Protocol was signed. Mr. Kraft was reassured by Mr. Stikker that the Netherlands Declaration was not an interpretation of the Convention but merely an expression of the attitude of the Netherlands Government.⁽²¹⁵⁾ Most of the States were clearly reluctant to take on the burden that would be imposed by the enshrinement of a economic-social-cultural right that entailed the provision of education according to parental wishes.

This is illustrated if one looks at the Declarations and reservations made. They fall broadly into two categories. On the one hand those expressing regret that subsidies were not required of the State,⁽²¹⁶⁾ and on the other hand those⁽²¹⁷⁾ such as the United

215. *Id.*, p.1256.

216. Both Ireland and the Netherlands made Declarations to the effect that the duty to provide education according to parental convictions did not go far enough. See above pp.526-527 for the text.

Kingdom's reservation that clearly limited any potential right by reference to the necessity for avoiding 'unreasonable public expenditure'.

Was it envisaged that the Article should protect the existence of private education? One of the things that stands out, after reading the *travaux préparatoires*, is that there was a desire to protect alternative schooling. But yet when the Committee of Ministers adopted a text⁽²¹⁸⁾ that specifically expressed this right, in recognition of what they correctly saw as the Assembly's desire that the principle of independent schooling (*enseignement libre*) should be recognised, the Consultative Assembly rejected this express

217. The text of the reservations made by United Kingdom, Greece, Malta, and Turkey can be seen in the *Collected Texts: European Convention on Human Rights* published by the Council of Europe (1978), at pp.608, 606, 607, and 608 respectively. The Federal Republic of Germany made a Declaration similar to the above reservations the primary purpose of which was to limit the obligations to respect parental wishes under the second sentence of Article 2P. They were not directed against the first sentence of the Article. The Swedish reservation, *id.*, p.607 was designed to limit parental power to gain exemption from religious education.

218. See above p.519 ; *Doc. H (61) 4*, p.1186.

wording. (217) Does this mean that the Article does not recognise this principle? In the debate of the Consultative Assembly leading up to Recommendation 15 Mr. Teitgen the *Rapporteur ad hoc* considered that the formula proposed by the Committee of Ministers raised too many questions and doubts. Did it mean for instance that the right of parents as regards teaching was only to be guaranteed insofar as independent schools existed? That would be unacceptable if true. The Assembly also wanted parental convictions to be protected *vis à vis* state schools. But, at the same time, as many interventions pointed out, they were motivated by the dread fear of a State monopoly in education. As Mr. Teitgen so eloquently expressed it

... it is essential for our protocol to protect the rights of parents in the field of education and teaching against the dangers of nationalisation, absorption, monopolisation, requisitioning of young people by the State, irrespective of whether they have religious convictions or merely philosophical convictions of traditional humanism. (220)

The resulting article is ambiguous in this respect and questions are raised by the wording finally adopted. Could the State, by allowing the establishment of private schools, then consider that its obligations as regards parental rights were fulfilled, and thus ignore the convictions of parents who sent their

219. The Committee of Ministers themselves had previously rejected it in August 1951. See above p.520.

220. *Doc. H (61) 4*, p.1230.

children to state schools? This was strongly argued to be the case by the Danish Government in the case of *Kjeldsen, Busk Madsen, and Pedersen*.⁽²²¹⁾

Another ambiguity was elucidated by Mr. Modinos⁽²²²⁾ who pointed out the wording of the article did not make it clear whether the State's respect for parental convictions implied teaching in accordance with those convictions or ignoring them. This is a real difficulty with the text. Could a parent insist on the inclusion in the curriculum in state schools of a theory dear to his philosophy? There was a fear that communists and totalitarians would use parental rights to insist on their philosophy being propagated to their children. These fears were met with the argument that Article 17 would prevent the enemies of human rights from abusing them.⁽²²³⁾ But what if one's philosophy is not anti-democratic, or attempting to limit or destroy the rights set out in the Convention? This point has been partially answered by the European Court of Human Rights in the *Campbell and Cosans* case.⁽²²⁴⁾

221. *Kjeldsen, Busk Madsen and Pedersen*, December 7, 1976, Ser.A., No.23; 1 *E.H.R.R.* 711; below p.590 et seq.

222. In a Memorandum of 3 September 1951, *id.*, p.1235.

223. See for example Mr. Teitgen Doc. CDH (67) 2, p.169.

224. *Campbell and Cosans*, February 25, 1982, Ser. A., No.48; (1982) 4 *E.H.R.R.* 293; below p.610. The Swedish SIA case brought by Lars Rosengren (Application 9498/81) which

These and other points will be examined in the light of the subsequent work of the European Commission of Human Rights and the European Court of Human Rights. The *travaux préparatoires* themselves are not sufficiently clear. As Verhoeven⁽²²⁵⁾ points out it must be remembered that although the *communis opinio* as expressed in the *travaux préparatoires* is in principle the main criterion for interpreting texts that are not clear... .

Il paraît toutefois vain de prétendre restaurer une certaine univocité au départ de documents, fruits d'apports hétérogènes, élaborés et discutés par près de dix-huit Etats, poursuivant chacun sans doute un intérêt propre...

One thing that is without doubt from our perusal of the *travaux préparatoires* is that one primary consideration was in the minds of the drafters ... that parental convictions should be respected and this implied that alternative schooling should be available to parents. A State monopoly in education is not totally ruled out,⁽²²⁶⁾ but might prove difficult and expensive.⁽²²⁷⁾

The wording of Article 2 of the First Protocol seems to

squarely faced this issue was withdrawn in December 1983.

225. (1970) *R.B.D.I.* 353, at p.360. The *travaux préparatoires* were still confidential when he wrote.

226. Vasak, K., *La Convention Européenne des Droits de l'Homme*, (Paris, 1964), p.58.

227. Lonbay, J., 'Rights in education under the European Convention on Human Rights', (1983) 46 *M.L.R.* p.345.

protect the right to education. No-one shall be denied the right to education. This is forceful language. Furthermore, in contrast to many of the rights and freedoms established by the Convention, there is no limiting clause. This suggests that all persons have a Hohfeldian right 'stricto sensu' to receive education. The only limitation on the State's duty to secure this right to everybody lies it seems in the definition of the term 'education'.⁽²²⁸⁾ State reservations to this Article tended to concentrate on a limitation of the State's duties as regards respecting parental rights, and not *vis à vis* the first sentence of the Article. It is proposed to turn now to the case-law of the Commission and Court of Human Rights in order to discern what answers have been given to some of these questions and to find out what is actually protected by Article 2 of the First Protocol.⁽²²⁹⁾

228. Private alternative educational provision might aid the State in fulfilling this duty.

229. Also the decisions of the Committee of Ministers where relevant.

V. CASE-LAW

A. INTRODUCTION

As we have seen, the Court, Commission and the parties to the cases²³⁰, have all referred to the *travaux préparatoires*. In the analysis of the case-law it is proposed to deal with the three major Court cases in chronological order and to intersperse the Commission case-law as appropriate but not necessarily chronologically. Naturally the weight of the Commission's 'precedent' is heaviest where it rules on aspects of the law that have not yet received authoritative rulings by the Court of Human Rights. The repercussions of this *mélange* of European case-law upon the national legal systems will be analysed in the appropriate national sections.

230. Through the Commission as presented in its Reports and via the delegates of the Commission. With the recent change in the Rules of the Court the Applicant can now be directly represented before the Court. See Duffy, P., 'Procedural innovations at the European Court of Human Rights', [1983] *P.L.* 32.

B. *The Case relating to certain aspects of the Laws on the use of Languages in Education in Belgium* (hereafter the Belgian Linguistic cases).⁽²³¹⁾

1. Introduction

The first case of the Court on Article 2 of the First Protocol (Art. 2P) was the *Belgian Linguistic case*.⁽²³²⁾ The case dealt with an important and sensitive aspect of Belgian schooling provision, namely the question of the language in which education should be given. The Belgian Language laws are more fully explained below.⁽²³³⁾

These cases comprised six applications to the European Commission of Human Rights from groups of parents residing in different areas of Belgium. The applications were joined as they all concerned, in varying degrees, the same issue.⁽²³⁴⁾ They pleaded that Article 2 of the First Protocol, and Articles 8, 9, 10 and 14 of the European Convention on Human Rights had been breached by Belgium. The 'nub' of their complaint was that their children could not receive an education in their maternal language, or the language of

231. *Case relating to certain aspects of the Laws on the use of Languages in Education in Belgium*. ECHR Ser.A., No. 6 (23 July 1968).

232. July 23, 1968, Ser. A., No. 6; 1 *E.H.R.R.* 252.

233. See below chapter 10, p.857 *et seq.*

234. The *Fourons case*, below p.586, was not joined because the Commission felt that a friendly settlement was possible.

their parents choice, at their place of residence. For instance, applicants 1691/62, comprising parents from around Antwerp, considered that

their personal, absolute and inalienable right that (their) children should have the same intellectual and cultural background (as themselves) ⁽²³⁵⁾ had been violated, and that this violation was contrary to the provisions of the ECHR and the 1st Protocol, Article 2.

2. The European Commission of Human Rights

Before the Commission the complaints based on articles nine and ten were found to be manifestly ill-founded. ⁽²³⁶⁾ The reasoning of the Commission was as follows:

Whereas, in the last analysis, the Applicants are claiming the right to have the stamp of their own personality and of the culture which they claim as their own, take first place among the factors conditioning the education of their children, in order that their children's thinking should not become alien to their own; whereas, however, it appears that the guarantee of this right is outside the scope of article 9 and 10... ⁽²³⁷⁾

However the same plaint considered as a violation of Article 8 received a great deal more attention, although ultimately the

235. ECHR Ser. B *Belgian Linguistic cases* Vol. I, p.30.

236. Articles Nine and Ten deal with the freedom of thought, religion, and conscience, and the freedom of expression.

237. ECHR ser. B, *Belgian Linguistic cases*, Vol. 1, pp.81-2.

Commission found that there was no violation of Article 8 (Eustathiades, Vice-President, and Ermacora dissenting). It is useful for our purposes to examine the arguments of all sides concerning Article 8, as this helps to throw light on the right to education itself, and parent-child relationships. Article 2P on the right to education must be considered in the context of the whole Convention and not in isolation.

Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁽²³⁸⁾

The applicants argued that the rights guaranteed by this article were infringed by the 1963 Education and Language laws.⁽²³⁹⁾ They pointed out that a family was a primary social unit, and that it had a much greater impact on the child than 'schooling'. Here they

238. See Brownlie, I., *Basic Documents in International Law*, 2nd ed., (Oxford, 1981, OUP), p.246.

239. See below p.861.

emphasised the difference between *l'éducation* and *l'instruction*.⁽²⁴⁰⁾ They contended (and this was not disputed) that *l'éducation* (up-bringing) was a family duty, and that *l'instruction* of a child was a subsidiary part of his/her education. They argued moreover that the child itself had a right to education, to develop its personality to the fullest.⁽²⁴¹⁾

The parents, having a duty to bring up their children, thus have a right to decide the types of scholastic up-bringing that their child would receive, including whether it should be religious or not, or in a state school or a private school. They considered that this parental choice included *inter alia* the right to choose the language of tuition for the child.

They pointed out that the 1914 Educational Act⁽²⁴²⁾ had allowed the child to be educated in the maternal tongue. This was to be interpreted so as to allow a free choice between tuition in French or Flemish, as long as the child was capable of receiving such

240. See above n.171.

241. This aspect of the right to education was raised initially by Mr. Yetkin in the Consultative Assembly (above p.501) but, as we have seen was not the primary aim of the rights to be protected as perceived by the drafters of the Convention.

242. Loi 19 May 1914, as amended in 1926-27. See below chapter ten.

instruction.⁽²⁴³⁾ The Education Act of 1932, in section 9 for secondary education, also safeguarded this right.⁽²⁴⁴⁾ However, the 1963 legislation caused linguistic teaching to be dictated not by parental choice, but by residence. Thus parental rights guaranteed by the Convention were violated.

The Belgian Government countered this argument by pointing out that parental choice was in no way hampered by the 1963 legislation. Parents who wished to do so could send their children to a private school, or alternatively, to a public school outside Flanders.

The Applicants responded that the alternatives offered would cause unacceptable hardship. Private schools that taught in French in the Flemish region were deprived of all state subsidies, and furthermore their certificates did not receive homologation. As a

243. Possibly mindful of the experience in Upper Silesia after the First World War? See above chapter three.

244. Loi 14 July 1932, section 2:

Les enfants dont la langue maternelle ou usuelle n'est pas la langue régionale ont le droit de recevoir l'enseignement dans leurs langue maternelle...

Section 9:

Les sections linguistiques spéciales existantes seront maintenues aussi longtemps que leur fréquentation, par les élèves appartenant à l'une des trois catégories ci-après, justifiera leur maintien; ...

consequence these schools were rare and extremely expensive. The 'scholastic emigration' to Wallonia or Brussels was also harmful in that it could entail the breaking up of the family.

The parents' argument, summed up in their Memorial to the Commission,⁽²⁴⁵⁾ expressed the basic philosophical issue that was at stake here. They considered that:

To be able to control the thinking of one's children, to bring them up, to guide them, to give them an understanding of what one understands oneself and one day to find in them the continuation of one's own way of thinking, is not this the ideal of every father of every family? Why do we have children?... Is it in order that our life may have a continuity after we are gone? Is it in order to give up our children to the State?..

The parents were loath to send their children to a local Flemish school, they feared that their children would 'jabber a bastard tongue', and that parent-teacher relationships would be strained.

The Belgian government ignored such subjective fears and considered that sending the children to a Flemish school would enable the children to become bilingual and would help in the formation of a Flemish intelligentsia. Furthermore the Belgian government considered that the applicants were rich enough to send them to private schools if they wished. The lack of homologation of private school certificates didn't really matter, as the bulk of the French private schools' pupils were girls who were filling in the year

245. ECHR Ser. B *Belgian Linguistic cases*, Vol. I, p.141.

'decently', and didn't need a diploma. The contempt shown by both sides in their Memorials is astonishing, and reflects some of the divisions in Belgian society.

The Belgian government further suggested that travel to Wallonia should not be too difficult given the 'density' of the Belgian railways. Thus the government did not directly answer the questions raised in the Applicants' Memorial.

The Commission, with two dissents, decided that both the Belgian government and the Applicants were wrong in assuming that Article 8 contained any right that encroached on or extended the parental rights given in Article 2.⁽²⁴⁶⁾

But they did note that the state had made primary education compulsory. This could constitute state interference with 'private and family life.' They agreed that sending children abroad, or educating them at home was impossible for the majority of parents, as was the setting up of a private French school. They also agreed that commuting within Belgium to an official or private school caused real hardships; and this, they declared, was tacitly acknowledged by the state in that the 1914 Education Act provided that education was only compulsory if there was a school within five kilometers. However, there was nothing to stop the parents from sending their children to the local Flemish school, as parents, if living in the Flemish

246. *Id.*, pp.290 et seq.

region, would normally know the language.⁽²⁴⁷⁾ So much for jabbering bastard tongues, and the density of the Belgian railway system. The Commission found no violation of Article 8.

Mr. Eustathiades and Mr. Ermacora however, implicitly accepted the applicants arguments that there was a violation of Article 8. Mr. Eustathiades considered that legislation which caused scholastic emigration, which was a serious hardship, did interfere with the family's right to respect of private and family life. However the extent of this interference was unknown in the present cases, and more information was needed to determine the matter.⁽²⁴⁸⁾

Consideration of Article 2P

Of course it is the arguments in relation to Article 2P that form the core of the Commission and Court's examination of the scope of the right to education.

The Applicants Case

The Applicants argued that the Belgian Language Laws violated both the right to education enshrined in this Article, and the right of parents to choose appropriate religious and philosophical education. They naturally considered that the Article gave rise to

247. The Commission 'did not concern itself' with parental arguments as to the harm done to children through premature exposure to a second language as this was a problem of an educational nature.

248. ECHR Ser. B *Belgian Linguistic cases*, Vol. I, pp.298-302.

obligations on the part of the State. The spirit and letter of the Convention were geared to the protection of rights.⁽²⁴⁷⁾ Secondly, some of the Reservations and Declarations of Article 2P indicated that there was an obligation. In particular Ireland's Declaration to the effect that Article 2P was not sufficiently explicit in ensuring parental rights, and the United Kingdom's reservation implied that Article 2P could be interpreted expansively - why else would they limit their acceptance to 'avoid unreasonable public expenditure'?⁽²⁴⁸⁾ They noted that Belgium had not made a Reservation. The first sentence of Article 2P showed that the child had a right to be educated, it did not just entail the freedom to teach. The Applicants tried to discount the negative formulation of the right by insinuating that it had been so changed during the drafting because it was felt that people should make an effort to avail themselves of the right. This particular contention does not

249. Article 1:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

This applied to rights set out in the Protocol via Article 5 of the Protocol. Article 14 of the Convention also talks in terms of the rights in the Convention being secured.

250. See Council of Europe, *Collected Texts: European Convention of Human Rights* for texts. See above p.526 *et seq.*

seem to be borne out by the *travaux préparatoires*.⁽²⁵¹⁾ In sum, they considered that Belgium had violated the first sentence of Article 2P because it had made primary education compulsory and free, and in doing so had discriminated against French teaching in Flemish areas by providing no education at all. At the very least it would cause educational disadvantage. They pointed out that the resources for providing French language existed.

As to the second sentence of Article 2P the wording had been changed from 'have regard to' to 'shall respect'.⁽²⁵²⁾ This clearly implied the necessity for positive governmental action.

Philosophical convictions included language and culture. As the Belgian Government had taken on educational functions, it must then respect the philosophical convictions of the parents, according to the second sentence of Article 2P.

The fact that private schools existed did not relieve the Government of their obligations. The schools received no subsidy if they failed to obey the Language law, and in any event some higher educational facilities were only available from State-provided institutions. Many private schools, deprived of subsidies, were being forced to close down.⁽²⁵³⁾ Furthermore private schools that were not in receipt of state subsidies, for failure to fulfil the language requirements of the 1963 Act, did not have their leaving

251. See above section IV, esp p.528 et seq.

252. Above p.522 et seq.

253. Ser. B *op.cit.* p.173 et seq.

certificates homologated by the State. Thus Diplomas were withheld. This meant that entrance to some Universities and professions was not possible. They admitted that passing an examination of the Jury Central was a possible way of getting homologation, but this avenue was recognised as being difficult, for, instead of taking exams year by year, they all had to be taken together. Finally the Applicants contended that the Government's aim of linguistic homogeneity had no technical or administrative justification. It was arbitrary and discriminatory.

The Belgian Government's Case

The Belgian Government in a Preliminary Objection expressed the opinion that the organs of the Convention had no competence *ratione materiae* as the matter of language legislation was one that was 'reserved to the State'.⁽²⁵⁴⁾ Furthermore they considered that the Convention imposed 'no obligation' on the State

254. In the first Memorial; European Court of Human Rights. Ser. B, *Linguistic Case*, Vol. 1, p.404 et seq. This argument was rejected by the Commission *ibid.*, p.469 and ultimately by the Court in its judgment of February 9, 1967. *Case relating to Certain aspects of the Law on the use of Languages in Education in Belgium*, (Preliminary Objection) Ser. A, No. 6. See Vanwelkenhuyzen, A., in (1967) *C.D.E.* 423.

to act, but rather to refrain from acting.⁽²⁵⁵⁾ If it were to impose an obligation on the State it would lead to absurd results, such as having to provide schools for the minorities ... for instance, Italian schools. The negative wording of the first sentence of Article 2P made the intention clear, the State was free to subsidise whatever it wished but was not obliged to. The question of subsidies and homologation was outside the scope of the Convention. The Belgian Laws were not discriminatory because Flemish parents in Wallonia were in the same position as French parents in Flanders. Furthermore the Belgian Government emphasised that the laws were democratically passed.⁽²⁵⁶⁾ The final Belgian point was that there could not be a violation of Article 14 without a previous violation of a separate Article of the Convention. As in this case there had not been a violation of Article 2P, because of its limited nature, then Article 14 could not be called into play.

The Commission's Decision:

First Sentence of Article 2P

The Commission of Human Rights, by a majority, considered

255. Ser. B, *Linguistic Case*, Vol. 1, p.493. The Commission considered the theory underlying this attitude to be out-of-date, Vol.1, p.519. Belgium persisted; Vol.1, p.525, Vol.2, pp.57-58, p.142 et seq.
256. See Me Bayart's presentation at the Public Hearing in November 1967, Ser. B, *id.*, Vol.2, pp.108 et seq., esp. at p.116.

that the first sentence of Article 2P contained no obligation at all. They reached this conclusion after a consideration of the ~~text~~ préparatoires, (257) combined with consideration of the negative wording of the text. This opinion was modified at the Public Hearing in November 1967. The Court asked the Commission (and the Government) 'what rights of freedom does the right to education', the denial of which is forbidden by Article 2 of the Protocol, comprise for the purposes of the complaints submitted to the Court in the present case?' (258) Mr. Welter, for the Commission, replied that the right was not defined and varied 'from one time or place to another', and could signify 'more or less' according to economic and social circumstances'. Observing that Belgium was a highly developed country, the Commission submitted that the right to education included 'entry to nursery, primary, secondary and higher education' and the 'right to draw full benefit from the education received'. The right to education was protected by Article 2P or it would be pointless. (259) Mr. Welter said that the right of access 'is a

257. Noting in particular that the Committee of Ministers had rejected the positive wording of the Consultative Assembly.

258. Ser. B, *op.cit.*, Vol.2, p.163.

259. The Government's answer to the Court's question was that:
in the absence of primary education, to take an example,
the State would not be able to oppose the establishment
of schools by individuals, ...

necessary corollary to the right of education'.⁽²⁶⁰⁾

Thus a full right, in the Hohfeldian sense is to be guaranteed with a correlative duty imposed upon the State. But the duty is not to create or subsidise schools, but rather, having created them, not to deny the individual's access to them. The right of the individual, on this interpretation, is not to education itself, but rather not to be denied access to educational institutions, if they exist. Under this interpretation the right to education would amount only to a privilege, the correlative of which is not right. One could not demand education as of right, but merely claim access to it if the State, in its wisdom, created any suitable institutions. This does not, in the opinion of the present writer, fit well with the actual wording used. The text does not say 'No person shall be denied access to education', but 'No person shall be denied the right to education'.

The President of the Commission, Mr. Petré, and Mr. Sperduti also considered that there had not been a violation of Article 2P in

The right could not be variable. Ser. B, *id.*, Vol.2, p.190.
In other words not even the freedom to establish alternative schooling was protected. It is perhaps not surprising that the Court did not ultimately accept this interpretation. See below p.556 et seq.

260. Ser. B, *id.*, Vol.2, p.163 *in fine*.

this case.⁽²⁶¹⁾ They agreed with the majority but for different reasons. The wording of Article 2P implied a right to education that must be guaranteed to all persons under the state's jurisdiction in accordance with Article 1 of the Convention. They interpreted Article 2P as providing 'a right to education' in the Hohfeldian sense of full right. Mr. Petrén adding that education for these purposes must mean 'basic education such as makes possible a pupil's integration into the life of the society to which he belongs'.⁽²⁶²⁾ Whilst 'the precise level of such education might vary from one country to another according to social and economic conditions peculiar to each ... it should correspond to compulsory primary education' in general.⁽²⁶³⁾ Thus there was a duty on the State to provide education. The Declarations and Reservations made by States to Article 2P were intended only to limit the content of education that could be demanded by individuals. Mr. Petrén made it clear that education must be given in a language that the pupil could

261. *Id.*, Vol.1, p.279 et seq.

262. *Id.*, Vol.1, p.340.

263. *Id.*, p.340. He observed that in this case the Applicants did not contend that their children could not cope with teaching in Flemish, - a not very credible finding given the Applicants submissions, above pp.242 et seq., Ser. B., *id.*, Vol. 1, p.341 et seq.

follow.⁽²⁶⁴⁾

This mode of interpreting Article 2P seems significantly closer to the meaning of the text. If there was no State schooling, or fees were charged to pay for state schooling, then the poorest section of society might well 'be denied the right to education.' The right can only be meaningful if 'education' is actually demandable as of right. Clearly if this is to be practical there must be a limit as to what constitutes education for the purposes of the Convention.⁽²⁶⁵⁾ It is possible that fear of the extent of State obligations, if the right to education itself were to be guaranteed, caused the majority of the Commission to be cautious. After all, all the States that were Parties to the Protocol actually had extensive educational systems, thus positing right of access would, in practice, have the same effect as interpreting Article 2P to allow a 'right to education'. The interpretation adopted fits in less well with the text, indeed it is a distortion of text. What would happen if the State were to decide to throw the burden of education on

264. Unfortunately Mr. Petrón was taken ill and did not appear before the Court as Principal Delegate for the Commission (Ser. B., *id.*, Vol.1, p.469); later he asked to resign as Principal delegate, and Mr. Sorensen took over. Ser. B., *id.*, Vol.2, p.38.

265. See, for example the wide aims envisaged by the Universal Declaration of Human Rights, - could the individual insist on 'the full development' of his 'human personality'?

private enterprise? (266) The majority interpretation here fails the individual. His right would not exist.

Three members of the Commission could not agree with the majority's decision on the meaning of the first sentence of Article 2P. Mr. Balta gave a Dissenting Opinion with which both Mr. Ermacora and Mrs. Janssen-Pevtschin concurred. (267)

The fact that the first sentence of Article 2P simply states the right to education in a negative manner and without any reference to the States's duty does not in itself rule out any positive obligation on the State in respect of national education under the European Convention on Human Rights (and annexed documents). (268)

Mr. Balta emphasised that the right to education was a universal right in that 'no-one shall be denied it'. This universality could not be achieved in the absence of schools which were 'materially and financially within reach of all'. The provision of schooling need not necessarily be undertaken by the State itself, thus there was 'no question of a positive obligation on the State except in so far as other means do not exist or are inadequate'. (269) Article 2P gave the obligation on the State to make school institutions accessible subject to 'material possibilities' and

266. A question that was actually posed by the Commission but left unanswered by the Court. Ser. B., *id.*, Vol.2, p.164.

267. Ser. B., *id.*, Vol.1, pp.283-287.

268. *Id.*, p.284.

269. *Id.*, p.285.

educational considerations.²⁷⁰ He thus considered that it was incompatible with Article 2P for the Belgian State to disallow French-speaking persons resident in the Flemish unilingual Region or Brussels periphery from attending French schools in their vicinity, because the right to instruction implies 'some freedom of choice'. Thus, having stated that Article 2P did not guarantee the right to education of one's desire, the dissenters then found that, although Flemish schools were undeniably available to French-speakers, the refusal to allow them access to French-language schools in the vicinity seemed 'incompatible with the first sentence of Article 2P'. They found that there should be a right of access to all available schools. They had either accepted, it seems, the arguments of the Applicants that Flemish education amounted to no education for French-speakers, or interpreted Article 2P very widely indeed.

A further consideration was that primary education was compulsory in Belgium. The State had thus imposed an obligation on individuals 'in a matter which affects some of their rights or freedoms'. Thus the refusal to organise or subsidise French education in the Flemish areas could not be reconciled with Article 2P. The refusal to allow homologation of school-leaving certificates issued by non-subsidised schools was 'tantamount to a partial denial of the right to education'.

This dissenting opinion also assumes that the right to

270. Including the requirements arising from the particular institutions. *id.*, p.285.

education throws a duty on the State to provide schooling. Thus five members of the Commission considered that, at least in some circumstances, Article 2P imposes a positive obligation on the State Parties.

Second sentence of Article 2P

As regards the second sentence of Article 2P the Commission was unanimous that it was 'not intended to guarantee respect for preferences or opinions in cultural or linguistic matters'.⁽²⁷¹⁾ The Commission noted that there were no definitions of 'religious or philosophical convictions' in the *travaux préparatoires*, and that a specific suggestion to include linguistic rights had been rejected.⁽²⁷²⁾ The majority of the Commission thus considered that Belgium had no duty to open French schools in Flanders or Flemish schools in Wallonia, nor to subsidise any schools in either Region. Admission to such schools as existed could be regulated as the State saw fit.

Article 14

271. *Id.*, p.282.

272. See above pp.517-518.

As regards Article 14 of the Convention the Commission was of many minds.⁽²⁷³⁾ The refusal to subsidise or organise French education in the Flemish region did not amount to a violation of Article 2P or Article 14.⁽²⁷⁴⁾ The State was under no duty to establish any schools and thus if it chose to establish a school it would have a margin of discretion as regards the 'organisation of curricula'.⁽²⁷⁵⁾ The majority (7-5) found that the first sentence of Article 2P combined with Article 14 did cause the Belgian language laws to fall foul of the Convention if the result was that a school lost all its subsidies if it had even one non-subsidised class teaching in the non-regional language. This was an 'unjustifiably harsh measure'.⁽²⁷⁶⁾ Secondly, the legislation also violated Article 2P in conjunction with Article 14 *vis a vis* access to French language schools in the Special Status Communes on the periphery of Brussels (7-5) and in Louvain (8-4), in so far as the criterion for access was

273. I do not set down all the opinions. See Ser. B., Vol.1, p.327 *et seq.*

274. Nine members of the Commission agreed as to this result. Five set out a Joint Opinion and four gave separate opinions. The main issue on the effect of Article 14 as supplementing the other rights in the Convention, even when they were not individually breached, was agreed.

275. Joint Opinion of Mrs. Janssen-Pevtschin, and Mm. Sorensen, Sigurjohnsson, Fawcett, and Welter.

276. Ser. B., Vol.1, p.330.

parental residence. Thirdly, the refusal to homologate school-leaving certificates solely on linguistic grounds was also incompatible with the Convention (8-4).

The right to education would be only an illusion if it did not include the right to draw full benefit from education. If it were accepted that Article 2P did no more than guarantee the right to a purely humanistic education it would be meaningless. (277)

3. The European Court of Human Rights

After sweeping aside the Preliminary Objections raised by the Belgian Government (278) the European Court of Human Rights dealt with the Merits of the case in its judgment delivered on 23rd July 1968. (279) It went right to the heart of the matter by considering

277. *Id.*, p.336.

278. Ser. A., No.5 (Preliminary Objection).

279. Ser. A, No.6. Direct commentaries on this case include the following: Lepaffe, J., 'L'arrêt de Strasbourg du 23 juillet 1968', [1969] *J.T.* 380; Pelloux, R., 'L'arrêt de la Cour européenne des droits de l'homme dans l'affaire linguistique belge', (1968) 14 *A.F.D.I.* 201; Verhoeven, J., '...L'arrêt du 23 juillet 1968 dans l'affaire relative à certain aspects du régime linguistique de l'enseignement en Belgique', (1970) *R.B.D.I.*

the meaning of the relevant Articles first. (200)

Article 2P. first sentence

The first Article to be examined was Article 2P. Looking at its first sentence they found that there was no doubt but that Article 2P did enshrine a right because 'this provision uses the term "right"'. Also the Preamble to the Protocol indicated that the Protocol was designed 'to ensure the collective enforcement of rights and freedoms'. (201) However the negative formulation of the right, combined with a perusal of the *travaux préparatoires*, indicated that there was no obligation for States to establish or subsidise education of any particular type. Thus the line adopted by the majority of the Commission seems to be followed (202) and the criticism earlier directed at the Commission's position applies also to the Court. (203)

Noting that all the states had school systems the Court found that whilst there neither was, nor is now,

... any question of requiring each State to establish such a system, but merely of guaranteeing to persons subject to the

353; Maroy, P., 'L'arrêt de Strasbourg du 23 juillet 1968',

[1969] *Annales de Droit* 169.

280. Having first set out the facts.

281. Ser. A., No.6 p.31 (Para. 2).

282. See below pp.560 and 578 *et seq.* where the author puts forward a 'new' interpretation to this case.

283. Above p.548 *et seq.*

jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time. (284)

It went on to state that, although Article 2P gave no details, the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language, or in one of the national languages. .. (285)

So the first sentence of Article 2P guaranteed a right of access to educational institutions existing at a given time, but such access constituted only part of the right to education.

For the right to education to be effective it is further necessary that, *inter alia* the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, ..., official recognition of the studies which he has completed. (286)

284. Ser. A., No.6, *id.*, p.31.

285. *Id.*, p.31.

286. *Id.* This aspect of the Court's ruling has been applied restrictively by the Commission. In *X v Belgium* (7010/75) 3 *Decisions and Reports* the holder of a military diploma was refused civil equivalence. The Commission felt that this military certificate was sufficient as he had received it in accordance with Belgian law. On a strict reading this is a

Thus the Court interpreted the extent of the 'right' taking into account the fact that educational systems were in fact in existence in the territories of the Contracting Parties. Had there been different material conditions prevailing at the time of this judgement this interpretation would undoubtedly have been different. The emphasis is on the fact that the application of the European Convention of Human Rights and its Protocols is a practical affair. The Court may also have been influenced by the Belgian arguments put forward during the Preliminary ruling stage concerning the negative status of the rights and freedoms protected by the Convention and Protocol. (287)

The Court went on to consider that the 'right to education' by its very nature requires State regulation, but this regulation must not 'injure the substance of the right' nor 'conflict with other rights enshrined in the Convention'. The regulation could 'vary in time and place according to the needs and resources of the Community

permissible interpretation. But the spirit of the Court's ruling was that the certificate should enhance the 'effectiveness' of education received. Effectiveness would be enhanced by equivalence. In fact identical diplomas issued after 1965 were accorded equivalence. In *X v Belgium* (7864/77) 16 D and R 82 a Roumanian doctor was required to undergo an examination prior to equivalence being granted. This seems a reasonable requirement.

287. See above p.587 et seq. Also Ser. A, No.6 op.cit. p.47.

and of individuals'. The Court thus makes it clear that its interpretation of the right is linked to social and economic development of the Contracting Parties. The Convention 'implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter'.

Conclusion: first sentence Art. 2P.

The Court by balancing these interests is entering the political arena. This is not unexpected in a body designed to decide whether human rights have been violated or not. It is only regretted that they could not have found a positive right to education in Article 2P. The text warrants it, a substantial minority in the Commission found it. The Court's 'noting' of the fact that all the Contracting Parties had established educational systems probably indicates that this was the factor that caused them to adopt the Commission's position. The right of access was sufficient in practice to assure that the right to education was effectively protected. But what if less happy times arise? Surely the Convention is there to protect the rights enshrined whatever the 'resources' of the Community? Two further observations are called for. Firstly, Article 2P contains no limiting clause of the type found in other articles of the Convention.⁽²⁸⁸⁾ The significance of

288. For example in Article 8 where the right to respect for private and family life, home and correspondence in para (1) is qualified by para (2) which states:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

this omission is reinforced by the fact that Article 15 of the Convention specifically limits the possibilities of derogation 'in time of war or other public emergency'.⁽²⁸⁷⁾ Thus reasonable regulation of the right must always strongly favour the individual if at all permissible.⁽²⁸⁸⁾ Secondly, the Court has embarked on a balancing act. If it were to have found a right to education existed, rather than merely a right of access to existing educational institutions, it would have required no extra nerve to balance what exactly constituted 'education' for this purpose. The 'education' required in the right to education would equally vary according to the needs of the Community taking into account the general interest, etc. The task would have been no more onerous than balancing what access was necessary, and it would, in the opinion of this writer, have been truer to the spirit and text of the Convention and

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

289. This, by implication, is the only possibility of derogation and is controlled. See Reports of Stein, T., and Kelly, J.M., at the Fifth International Colloquy about the ECHR, *Doc. H/Coll.80* (6) and (3).

290. Judge Wold in his dissenting opinion to this part of the judgment strongly objected to this 'regulation' in the absence of a limiting clause.

Protocol. (271)

Judge Wold was the only one to dissent from this part of the Court's judgment. He considered that the Court had gone too far even in finding a right of access to educational institutions. He compared the right to education found in Article 2P to the right to freedom of thought, conscience and religion in Article 9 and the right to freedom of expression in Article 10. These rights he pointed out do not involve the member States in any positive obligations, (272) such as giving access to State churches. Verhoeven (273) has pointed out the misconception here. Articles 9 and 10 talk of the right to freedom of, whereas Article 2P refers to the right to education not the right to freedom of education.

291. The 'universality' of the human right to education would have been affirmed. Balancing the 'content' or 'extent' of the education would have been a necessary and natural operation. Access would still have formed part of the right. The present writer suggests below a way of reconciling the *Belgian linguistic case* with a wider interpretation, which, if adopted would render the criticisms made here without force.

292. Ser. A., No.6 *op.cit.*, p.106.

293. *R.B.D.I. op.cit.*, p.357.

Art. 2P: Second Sentence

As to the second sentence of Article 2P the Court found that this did not guarantee a right to education. The words 'religious and philosophical convictions' must be given their ordinary and usual meaning. They did not cover the linguistic preferences of parents.²⁹⁴ The Committee of Experts had rejected a proposal to cover linguistic rights. Thus the Article's second sentence was irrelevant.

Article 8

The Court dismissed Article 8 equally quickly. They pointed out that Article 8 dealt with the protection of private and family life. Measures taken in the field of education could affect these rights, for instance, if children were to be arbitrarily separated from their parents. But Article 8 did not guarantee 'a right to education or a personal right of parents relating to the education of their children'.

294. Judge Maridakis in his partly dissenting opinion ventured *inter alia* into the 'dangerous' area of the relationship between language and thought processes. It was the thought processes and internal views that were protected by the Convention not the 'idiom in which it tries to externalise itself'. Thus the language of education was not protected. Ser. A., No.6, *op.cit.*, p.98. See Verhoeven's criticism *op.cit.*, p.365.

Article 14

Article 14 of the Convention complements the other Articles protecting rights and freedoms. This was the core of the Court's affirmation of a wide interpretation of this Article in this case.⁽²⁹⁵⁾ Professor Pelloux has described the Court's interpretation of this Article in this case as 'sans doute l'apport le plus original de l'arrêt'.⁽²⁹⁶⁾

Article 14 provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Court found that whilst a State may have no obligation to set up a particular kind of educational establishment, if it did so it could fall foul of Article 2P in conjunction with Article 14, if, for example, it laid down discriminatory entrance requirements. It pointed out that not all discriminatory requirements were necessarily contrary to the Convention. Some may be justified if, for instance, they were designed to correct factual inequalities. The Court, drawing on principles extracted from the legal systems of democratic

295. Ser. A., No.6 *op.cit.*, p.32 (Para. I(7)).

296. Pelloux *op.cit.*. See *passim* Fawcett, J., 'Human Rights: the applicability of international instruments; in Dowrick (ed.) *Human Rights* (1979), *op.cit.*, p.78 at pp.85 et seq.

States, considered that 'the principle of equality of treatment' would be violated if the distinction made had no objective and reasonable justification. But not only must there be a 'legitimate aim' but also the means used must be proportional to the aim. Arbitrary distinctions were banned. The factual and legal features that characterise the State in question must be analysed to discover whether arbitrary distinctions have occurred. However, Articles 2P and 14 do not guarantee a right to education in the language chosen by a child or parent, they only guarantee that the right to education shall be secured without discrimination on the ground, *inter alia*, of language.

In coming to this conclusion the Court noted that absurd results would otherwise follow, '277' and that where language rights were given the Contracting Parties had written them in specifically (e.g. Art. 5(2) and Art. 6(3)(a) and (e)). But would it not have been possible for the Court to consider the right to choose between national languages as reasonable? After all the Court had stated earlier that the right to education would be meaningless if it were not 'in one of the national languages'. '278'

297. These 'absurd' results have now been 'achieved' by those Contracting Parties to the ECHR who are also Members of the E.E.C. See directive 77/486 EEC (27 July 1977).

298. See Verhoeven to this effect. *Op.cit.*, pp.371-2.

First question

Having given its opinion *in abstracto* on these Articles the Court then turned to the six questions referred to it. The first was whether the language laws violated the relevant articles of the Convention by disallowing the establishment or subsidisation by the state of schools not in conformity with the language requirements in the unilingual regions. The Court found that the language laws did not violate the Convention or Protocol. Article 2P only gave a right of access and this was not denied.⁽²⁷⁷⁾ The Court recognised that the consequences of the Belgian laws were 'harsh' but they were not contrary to Article 8, because any ensuing separation of the family was not 'imposed' by the legislation.⁽³⁰⁰⁾

The Court noted that the law did not prevent the establishment of private schools.

As to Article 14, the Court felt that this too was not

299. The Court stated that Article 2P 'contains no linguistic requirement'. Article 2P 'does not enshrine the right to the establishment or subsidising of schools *in which education is provided in a given language*'. Ser. A., No.6, *op.cit.*, p.42.

300. The separation being for example caused by the sending away of the child to a distant French language school. Verhoeven considers the distinctions made here by the Court to be a very restrictive interpretation. *Op.cit.*, p.368. See Evrigenis, D., 'Recent case-law of the ECHR on Articles 8 and 10 of the ECHR,' (1982) 3 *H.R.L.J.* 121.

violated. The distinctions made by the Belgian law were objectively justified being based on the existence of two Regions 'in which a large majority of the population speaks only one of the two national languages'. The measures were not disproportionate to the requirements of the public interest in promoting language homogeneity within the unilingual regions.

Second question

The second question was whether the refusal of subsidies to schools that provided any education in a non-regional language, even in non-subsidised classes, was a violation of the relevant Articles. The Commission had considered that this did constitute a violation (7-5).⁽³⁰¹⁾ The Court did not follow the Commission. The discrimination was justified by the policy of supporting unilingual teaching only in the unilingual regions. It was not for the Court to determine whether this aim could be achieved in any other way. It seems here that the Court is not applying the test of proportionality that it set itself earlier.⁽³⁰²⁾ However the law did not prevent French-speaking parents from providing private education or from sending their children to school in the Greater Brussels area or in Wallonia. Thus

...the legal and administrative measures in question create no impediment to the exercise of individual rights enshrined in the Convention with the result that the necessary balance between

301. Ser.A, No.6, *op.cit* pp.54-55.

302. Ser.A, No.6, *op.cit.* pp.55-56.

the collective interests of society and individual rights is guaranteed.³⁰³

This implies that closing off alternative education might have been considered disproportionate by the Court, and thus contrary to the right of access enshrined by Article 2P.

Third question

The third question concerned the Special Status area on the periphery of Brussels.³⁰⁴ In this 'traditionally Dutch-speaking' area³⁰⁵ the Belgian legislator had departed from the principle of territoriality to allow French-speaking education if sixteen Heads of family requested it. The parent had to be resident in the Commune,³⁰⁶ and French had to be the usual or maternal language of the child. Even then Dutch had to be studied in depth, whereas Dutch-speakers could automatically receive education in Dutch, and, for them, the study of French was optional. As no person had been denied access to education the Court found no violation of

303. Ser. A., *op.cit.*

, p.50.

304. See generally below p.861 *et seq.*

305. The Court categorised the area as a special status district 'neither part of the 'Dutch-language region' nor 'French language region', nor 'the greater Brussels area''. Ser. A., No.6, *op.cit.*, p.15.

306. The aspect of the case being dealt with separately under question five. *Id.* p.61. See also below p.569.

Articles 2P, 8, and 14. (307)

Fourth question

The fourth question concerned parents living outside the Greater Brussels area who sent their children there for schooling. Were the conditions under which they enrolled a violation of Articles 2P, 8, or 14? (308) The general rule was that the language of instruction was to be the maternal or usual language of the child. But for children whose parents resided outside of Brussels it was the language of the Region of their residence unless the Head of the family made a Declaration to the contrary which was approved by the Language inspectorate. The Court, applying its interpretation of Articles 2P, 8 and 14, found that there was no violation of the Convention in the present case. The lack of choice between the two languages for any person whether resident or not, was not in issue before the Court, and it accordingly declined to rule on this aspect. (309)

Fifth question

The fifth question concerned the 'occupation requirements' that had to be satisfied before access was allowed to the French-speaking schools at Louvain and Heverlee, and the

307. The Court recalled that Article 2 of the Protocol does not require the Contracting states to establish educational establishments. *Id.* p.56

308. See generally below chapter 10 section three (C) pp.857 *et seq.*

309. See *X v Belgium* (4372/70) below p.584.

residence requirement that had to be satisfied before access to the French-speaking schools at the six Special Status peripheral Communes (also mentioned in question three). The limitations of access at Louvain and Heverlee were in pursuance of legitimate objectives, namely allowing for the bilingual nature of the University of Louvain and international courtesy to certain foreign children.⁽³¹⁰⁾ The limitations of access at the six peripheral Special Status Communes, which belonged to the agglomeration surrounding Brussels, the Capital of a bilingual State and international centre were different. The Court found a violation (eight votes to seven) because access was based for the French-speakers on residence within the Communes whereas Dutch-speakers had access regardless of residence, even from outside the Communes. Therefore the discrimination was based on language and not on the need for unilingual territorial homogeneity. Thus the right of access to existing schools was not secured to everybody without discrimination. This was in violation of Articles 2P and 14.

There was one further question before the Court, but as the seven dissenting judges all considered that there was no violation of the Convention by Belgium, and this was the only violation found by the Court, it seems appropriate to examine their dissent *in situ* as it were.

310. Ser. A., No.6, *op.cit.*, p.64.

Dissenting Opinions on Question Five

Five of the dissenting Judges (Holmback, Rodenbourg, Ross, Wiarda and Mast) gave a collective opinion.³¹¹ They pointed out that the French-speaking residents living in the Dutch unilingual region adjacent to the Special Status Communes were in the same position as every other French-speaking person living in that area. The Special Status Communes were 'situated in unilingual territory'. The finding that the language rules in the six Communes were in 'derogation' from the general system of the unilingual region, and that the Belgian legislator 'did not intend to renounce the principle of territoriality' lies at the heart of the dissent.³¹² Clearly if the Communes à facilités were but a special part of the Dutch unilingual region, then the discrimination mentioned above is indeed justified, in the same manner as it was for the majority of the Court

311. Judges Wold and Maridakis both dissented but on different grounds. For Judge Wold this conclusion followed naturally from his interpretation of Art. 2P. See above p.562. Ser. A., No.6. *op.cit.*, p.103. Judge Maridakis felt that 'the intentions behind the legislation taken as a whole did not conflict with the intention of the Convention as a whole'. *Id.* p.96.

312. *Id.* p.92. The five dissenting judges had concurred in the majority opinion where the Court, in answering question three, had stated that the system in the six special status Communes departed from 'the principle of territoriality'. *Id.*, p.56.

This can be distinguished from 'renouncing the principle of territor

in relation to the first question.⁽³¹³⁾ In this respect it is to be remembered that the majority considered that the six Communes in question 'no longer form part of the Dutch unilingual region, but belong to the agglomeration surrounding Brussels, the capital of a bilingual State and an international centre'.⁽³¹⁴⁾

In the opinion of the Minority the six Communes' geographical position 'in the unilingual region' constitutes a justification for the discrimination.⁽³¹⁵⁾ In the opinion of the Majority their geographic position 'next to Brussels' meant that there was no objective justification for the discrimination. These alternative emphasises on the consequences of the 'geographical position' of the Special Status Communes are based on an appreciation of the aims of the Belgian legislature. This highlights the fact that, whilst both the Minority and Majority considered that the linguistic regions were objective factors that justified a differentiation (because they were created in pursuance of a legitimate aim), they could not agree on their geographic area and yet, even when confronted with this split of opinion within the Court, the Judges, apparently, did not consider whether the 'objective factor' of linguistic regimes was, in fact,

313. See p.566 above. Pelloux *op.cit.*, agrees with the dissenting minority.

314. Ser. A., No.6, *op.cit.*, p.69.

315. See also *id.*, p.90 where the Minority talks of the six special Communes as though they were in Flemish territory.

objectively justified itself.⁽³¹⁶⁾ The linguistic frontier is an objective fact. But it is not necessarily an objective fact that automatically justifies action that is based upon its existence.⁽³¹⁷⁾

There are statistics that suggest that there is in fact a majority of French-speakers in the six Special Status communes.⁽³¹⁸⁾ If these statistics were in any way reliable then the dissent, based as it is on the supposition that the area is within the Dutch

316. In relation to Question One the Court had clearly stated

Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances....,

yet they did not objectively assess this problem. Ser.A., No.6, *op.cit.*, p.44.

317. Verhoeven *id.*, p.375. See the *Fourons* case below p.586.

318. Commission Report Ser. B., Vol. 1, p.314 (Para. 411) where figures were given showing that at Kraainem (one of the Special Status Communes) 61.18% were French-speakers in December 1961. These figures were repeated at the Public Hearing on the Merits. Ser. B., Vol.2, p.99. The figures were disputed by the Belgian government only in their last submission before the Court (remarks Me Bayart para. 7). Ser. B., Vol.2, p.183. See also Verhoeven *op.cit.*, p.377 for statistics given in a Parliamentary reply that indicated that in 1968 67.82% of ID cards were issued in French in Kraainem. The overall figure for the six Communes was 60.25% ID's in French.

unilingual region, seems less tenable, as it would be more justifiable to consider the Special Status communes as being of a special character as did the Majority of the Court. If the linguistic frontier is not objectively justified then the justified discrimination based upon it also falls. It is to be noted that it is the geographic factor that determines the language of publicly supported education in both the unilingual regions and to some extent in the Greater Brussels area. The Court itself is in a difficult position⁽³¹⁷⁾ to critically assess the highly controversial matter as to where the linguistic boundary should be positioned. The Belgian Government itself had suppressed the Linguistic census for fear of the consequences.⁽³²⁰⁾ The Commission, which could have gleaned more figures, did not do so.⁽³²¹⁾ Nevertheless this is an important consideration for as Verhoeven states it is

la réalité humaine qui seule importe s'agissant de la protection

319. Ser.A., No.6, *op.cit.*, p.35. In assessing proportionality the Court 'cannot assume the role of the competent national authority'. Nor was the Court allowed to forget that the policy had been decided by the Belgians themselves by an overwhelming majority in their democratic process. Ser. A., No.6, *op.cit.*, p.56; Ser. B, Vol.2, p.181 (para. 4 remarks of Me Bayart).

320. Maitre Bayart, Ser. B., Vol.2, pp.114-115.

321. Under Article 28 ECHR. The Belgian government did not dispute the figures until their last submission before the Court.

des droits de l'homme. (322)

Sixth Question

The final question before the Court concerned the homologation of school-leaving certificates. This was refused to schools that failed to comply with the Language laws. The Court considered that the existence of the Jury Central rendered the refusal of homologation in conformity with the Convention. It was not excessively difficult to pass the exam that could be taken in two stages. (323) The failure rate was in no way abnormal. (324) In certain circumstances the effects of the rule might constitute a violation of the right to education combined with Article 14 but it did not in these cases.

4. Conclusions

Thus the language laws of Belgium in relation to education were largely exonerated by the Court. Only in the case of the Special Status communes did the Court find a violation. The Court did not follow the Commission which, with a majority 7/15, found a violation of Article 2P combined with Article 14 in relation to the withdrawal of subsidies for schools providing any instruction in

322. Verhoeven *op.cit.*, p.377.

323. See chapter ten p.857 below.

324. Ser. A., No.6 *op.cit.*, p.86.

French in the Dutch unilingual region (and vice versa).³²⁵ Nor did it agree that Belgium had violated the Convention with its rules on homologation as the Commission had thought (8-4).

The Court considered the meaning of the right to education as enshrined in Article 2P in some depth in relation to the Belgian language laws. What are its conclusions on the nature of the right therein protected? The Court, it seems, concluded that the first sentence of Article 2P did not provide a right to education. The Article, according to the Court, does not impose upon the State any duty to establish an educational system.³²⁶ Indeed the Court ruled that Article 2P 'guaranteed, in the first place, a right of access to educational institutions existing at a given time'. I have criticised this aspect of the judgment.³²⁷ The Court also found that:

For the right to education to be effective it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received,³²⁸

thus the individual also has the right to official recognition of the

325. The Commission considered that this provision was not justified as it bore hard on French-speaking children without giving any advantage to Dutch-speaking children.

326. Ser. A., No.6, *op.cit.*, p.31.

327. See above p.560, below p.578 *et seq.*

328. Ser. A., No.6, *op.cit.* p.31.

studies that he has completed 'in conformity with the rules in force in each State'. By virtue of Article 14 access to existing educational institutions must not be limited in a discriminatory way. Article 14 supplements the rights contained in the Convention. Any discrimination had to be justified and must be in proportion to the legitimate aim pursued.

The Court found that, in general, the right to education could be regulated. This 'regulation' must respect the substance and nature of the right. The mere fact that regulation of the right was admitted was shocking to some³²⁹ in the absence of a limiting clause. The Court found that the right could vary according to the needs and resources of the community. Thus the universal human right is brought down into the work-a-day world and applied in a practical manner. The balancing act carried out by the Court is a natural and expected phenomenon. What one regrets is that, at first sight, the Court's practical approach seems also to have been applied to the section of the judgment where it analysed *in abstracto* the nature of the right to education protected by Article 2P.³³⁰ The Court seems to have adopted the line taken by the majority of the Commission, as indicated in its Report³³¹ and at the Hearing before the

329. Notably Judge Wold. *Id.* pp.103-104.

330. Judge Wold regretted the Court's excursion into a 'discussion of 'problems of a more general character''. *Id.* p.103.

331. Ser. B., Vol.1 p.162.

Court.⁽³³²⁾ If this is correct, it seems, that it may have departed from the literal meaning of the text and given undue weight to certain aspects of the *travaux préparatoires*, sacrificing theoretical considerations.

It is time now to assess whether the traditional interpretation of this case cannot be challenged by a new one. Most commentators agree that the *Belgian Linguistic case* shows that Article 2P provides no positive right of education in Hohfeldian terms, but rather only a right of access to educational institutions that exist at a given time.⁽³³³⁾ In only two places in its judgment does the Court make such a general and unqualified claim,⁽³³⁴⁾ although it is implied in several places.⁽³³⁵⁾ The major reason given by the Court for this limited interpretation lies in the negative formulation of the right and in the 'intentions' of the

332. Ser. B., Vol.2. p.81.

333. E.g. Nedjati, Z.M., *Human Rights under the European Convention on Human Rights*, (Elsevier-North Holland, New York, 1978), p.190; Kiss, A.C., 'La protection internationale du droit de l'enfant à l'éducation' (1973) 6 *R.D.H./H.R.J.* 467 and 472-3, where he considers that one should not reproach the Court for its restrictive interpretation. Wildhaber, *op.cit.*, p. 155 et seq. where the perceived lack of obligation is welcomed *inter alia* on the grounds of justiciability.

334. Ser. A., No.6, p.31.

335. *Id.*, p.31, 56.

drafters.

The negative form itself implies no weakness that can justify this interpretation, especially in the absence of any limiting clause.³³⁶ The positive formulation of the right to education was changed by the Governmental Experts in 1951 at the initial suggestion of the United Kingdom Government.³³⁷ The right was couched in negative terms to prevent the burden on the State of providing everybody with the education *he desired*.³³⁸ Indeed the Swedish delegate pointed out that the Article would be superfluous if it did not at least provide a right to education to those otherwise not receiving it. It is conceded that the other delegates³³⁹ considered that the Article, even in its positive formulation, entailed no State obligation. However the logic of the Swedish submission seems strong, and whatever the intention of the drafters, the wording chosen does imply some positive right. This is further reinforced, or at least not negated, by the Declarations and reservations made in respect of the Article.³⁴⁰ Indeed the Court itself did in fact find a positive obligation to ensure respect for 'such a right as is protected by Article 2 of the Protocol'. The Court noted that

336. *Passia*, Finnis, *Natural Law ... op.cit.*, p.211.

337. See above p.514. Also *H (61)4*, p.1080.

338. See above p.515.

339. All bar the U.K., Danish, Swedish, German, and Norwegian.

340. See above p.526 et seq.

The negative formula indicates, as is confirmed by the 'preparatory work' . . . That the Contracting Parties do not recognise such a right to education as would require them to establish at their expense, or to subsidise, education of any particular type or at any particular level.⁽³⁴¹⁾

The use of the word 'particular' could imply that there was nevertheless a duty to provide general or basic education. However, the Court, bearing 'in mind the aim of this provision', and noting the existence of 'general and official educational systems' in all Member States of the Council of Europe at the time of the opening of the Protocol to their signature, found that:

There neither was, nor is now, therefore, any question of requiring each State to establish such a system, but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time.⁽³⁴²⁾ The Convention lays down no specific obligations concerning the extent of these means and the manner of their organisation or subsidisation.

341. (My emphasis) The Court could have had 'language' in mind as being the 'particular' type of education - given the case before it. Ser. A., No.6, *op.cit.* p.31.

342. As can be seen this formula seen in context does not seem to clear-cut as to exclude any duty upon the state in some circumstances. *Id.*

Two points can be made here. Firstly, had there been no 'general and official' educational systems in the member States of the Council of Europe, then, a *contrario*, there may have been a 'requirement' to establish them. In other words it is only the actual existence of the educational systems that stopped the States being obliged to provide them. Secondly, the Court said that there were no 'specific' obligations concerning the 'extent' of the means of instruction. Could this imply that there is a general obligation to ensure that 'a general and official' educational system exists. This would fit in with the use of the word 'particular' earlier.

Furthermore the Court also stated that the right to education.

would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages.⁽³⁴³⁾

If one has the right to be educated in a national language, one must first have the right to be educated at all. Similarly the right to obtain official recognition of studies was held to be an integral part of the right to education. Again the right pre-supposes that education has taken place. The recognition of these *ancillary* rights indicate at least a part of the Court's conception of what should constitute education, and show that the Court's interpretation assumes that such education exists and is available. If confronted with the absence of such educational provision the Court might be

343. *Id.*.

able to distinguish this case by pointing to these factors.

The regulation of the right to education, that the Court acknowledged could take place, is equally necessary in any interpretation of the right that posits a duty on the State. The Convention gives no clue, as other treaties do, as to what might constitute education. (344)

The Court's formula in the *Belgian Linguistic case* actually works well in helping to delimit the scope of the right to education if one adopts a wider interpretation of Article 2P. We have already seen what constitutes education and the aims inherent therein from one point of view in the Universal Declaration of Human Rights. (345) During the course of the preparation of the first Protocol several speakers mentioned what they considered to be the aims of education. (346) From these sources one can start to deduce what the 'minimum provision' should be. Mr. Petren in the Commission's Report in the *Belgian Linguistic cases* suggested that it should cover at least 'elementary education'. (347) Education to enhance the development of the individual may be an aim that can be regulated according to the needs and resources of the community. The Court in the *Belgian Linguistic cases* established that a balance should be

344. See Article 13 of the Covenant on Economic, Social and Cultural Rights for example.

345. See above chapter four.

346. See pp.499 et seq.

347. See above p.549.

made. On the facts of the case it did not need to go further as the complaints concerned linguistic provision rather than the extent of the educational system.

If the Court's judgment can be interpreted in a way that actually gives the individual a right to education as the present writer suggests, it is submitted that three benefits would follow. Firstly, the text of the Article would be better served. Secondly, the universality of the right would be more assured. It can hardly be said that a right of access can be sufficient universally, as in some cases that would mean no education at all.³⁴⁸ In fact the concept of universality helps to define the one variable in the first sentence of the Article, 'education'. Thirdly, it would avoid setting a poor precedent that might be followed in other parts of the world where it would be inappropriate.

The interpretation of the Court's judgment in a way that allows for a wider and deeper right to education is satisfactory for all these reasons. But it must be admitted that the Court seems to have founded its interpretation not on a legal analysis of what might constitute a right to education, but rather on the fact that, in practice, the States in question all had educational systems, and therefore all that was legally needed was a right of access.

The present writer thinks that this approach was

348. Generally see above chapters 4, 5 and 6 for an indication of the problems at the universal level. The Court interpreted this Article in a European context.

unnecessary. The Court could have found a Hohfeldian right to education, and then interpreted the extent of the right in terms of defining what constituted education for this purpose. If it had adopted this approach explicitly qualms about limiting access without there being a limiting clause attached to the Article would not have arisen.

The wider interpretation of the Court's judgment that ensures that no-one is left without education will be tested in the light of the Court's later cases. Even if not ultimately found to be followed by the Court it still helps in providing a valuable argument that might allow the Court to alter its stance in the future should that prove necessary. If the interpretation is rejected the criticism remains.

The Belgian Linguistic cases did not deal fully with the second sentence of Article 2P, as the Court considered it irrelevant to the questions before it. However the Article must be read as a whole, and the subsequent cases brought before the Court were to involve the second sentence. Before we look at these judgments it is as well to deal with several cases that arose in the aftermath of the *Belgian Linguistic case*.

In *X v Belgium*³⁴⁹ a Greek worker resident in the Brussels periphery at Anderlecht wanted his daughter to be educated in French. He had previously resided in the Dutch unilingual region and thus her first year of schooling had been in Dutch. He now wished, having

349. *X v Belgium*, Application 4372/70 37 Coll. Dec.

moved to Brussels, for her to continue her education in French. Thus the question of choice of language in the Belgian Capital that the Court had declined to speculate upon arose.⁽³⁵⁰⁾ In this case the Language Inspectors backed by the Jury for Language Inspection⁽³⁵¹⁾ and ultimately the *Conseil d'Etat* all considered that in the application of the Belgian law his daughter should continue to receive her education in Dutch.

The European Commission of Human Rights, referring to the Court's ruling in the *Belgian Linguistic cases*, considered that as the Applicant was trying to get access to an existing school, the question to be answered was; is there an objective and reasonable justification for the refusal of the authorities to allow the girl to be educated in French? The girl's maternal and usual language was Greek, but as her first year of schooling had been in the Dutch language it would be easier for her to continue her education in Dutch. This 'objective factor' justified the stance of the Belgian authorities, and thus the Commission found the Application was manifestly ill-founded.

The decision at first sight seems to be applying a restrictive interpretation of the right to education, as defined by the Court in the *Belgian Linguistic cases*. The Court had 'boldly' stated that the Article guaranteed at least the right of access to existing educational institutions. The French schools in Brussels

350. See above note 309 and accompanying text.

351. Loi 30 July 1963, s.18. See below pp.857 *et seq.*

existed, thus no financial or administrative justification could prevail, nor, in the bilingual Capital could linguistic homogeneity hold sway. However it must be remembered that the Court had also clearly stated in the *Belgian Linguistic cases* that the 'right enshrined' in the first sentence of Article 2P by its very nature required regulation, as long as the regulation did not infringe the substance of the right.⁽³⁵²⁾ In this case the child's interest weighed the balance to prevent access to French schooling.

The case of *Roger Vanden v Belgium*⁽³⁵³⁾ also concerned the linguistic regime for education in the Brussels area. The father wanted his son to be educated in French and thus made a statement to the effect. This was rejected by the language Inspectorate, and after a year out of school the father relented and allowed him, against his will, to be educated in Dutch simultaneously bringing the action. The Commission applied the Court's ruling in the *Belgian Linguistic case* and found no violation of Article 2P since education was available in a national language. The right to education had been regulated. The Commission did not explicitly consider the 'reasonableness' of this regulation.

In the *Fourons case*⁽³⁵⁴⁾ inhabitants from six communes on the linguistic frontier in Belgium objected to the regime imposed upon them in relation to the language of education for their children.

352. Above p.577.

353. *Roger Vanden v Belgium Application 2928/66* [1968] Ybk ECHR p.412.

354. *Fourons case, Application 2209/64* [1974] Ybk ECHR p.542-645.

This case had not been joined to the *Belgian Linguistic case* because that Commission had thought that a friendly settlement might be achieved. The area had formed part of the Province of Liège, but was made part of the Dutch unilingual region by the Law of 8 November 1962 establishing the linguistic frontier.⁽³⁵⁵⁾ The Belgian rules in this case provided that there could be subsidised French schools provided that at least sixteen heads of family requested it and there was no French school in existence within four kilometres.

These rules were considered by the Commission in its Report of 30 March 1971 to be particularly harsh. There was no objective justification for Dutch to be favoured. In one of the Communes, Remersdael, there existed a Dutch school that had no pupils at all,⁽³⁵⁶⁾ and at Fourons St. Pierre fifteen of a total of nineteen heads of family requested a French school. The Commission unanimously found that there had been a violation of the Convention and protocol. Fourons was not a traditionally Dutch-speaking area,⁽³⁵⁷⁾ it had previously formed part of the Province of Liège. There was no justification for the discrimination against French schooling.

The case was not referred to the European Court of Human Rights

355. See below pp.857 *et seq.*

356. 1974 *Ybk E.C.H.R.*, p.582 *et seq.*

357. *Id.* p.592.

and so the Committee of Ministers dealt with it. (358)

Their handling of the case has been strongly criticised (359) because they failed to decide whether or not there had been a violation of the Convention. They took note of the fact that subsidies were now available for French schools in the Communes and that French schools had in fact been established, and thus decided that no further action was called for. The adverse finding of the Commission undoubtedly helped the inhabitants of Les Fourons.

Before looking at other cases decided by the Commission of Human Rights it is proposed to evaluate the Court's other cases on Article 2 of the First Protocol. As we saw in the *Belgian Linguistic cases* the second sentence of Article 2P did not guarantee a right to education. It guaranteed only that the religious and philosophical convictions of parents should be respected by the State when it exercised any functions in relation to education and teaching. Linguistic convictions did not amount to 'religious or philosophical' convictions. As we have seen this sentence was hotly debated during the drafting of the Article. (360)

358. Res. DH(74)1 in [1974] Ybk ECHR p.614.

359. Morgan, A., 'Article 32: What is wrong?' (1976) H.R.R. 157.

360. Above section on the *travaux préparatoires*, p.499 et seq.

Opsahl⁽³⁶¹⁾ considered that the second sentence of article 2P encapsulated the right of the parent to refuse compulsory education where it conflicted with their religious or philosophical convictions. It implies a freedom of choice. In contrast Vasak thought: ⁽³⁶²⁾

Cette disposition ne protège pas la liberté de l'enseignement. Il n'exclut pas le monopole de l'Etat; il l'oblige seulement à assurer la liberté de penser dans l'enseignement public et à laisser les parent libre de faire dispenser aux enfants, à l'école publique, l'enseignement de leurs convictions religieuses ou philosophiques.

In order to assess the scope of the Article it is necessary to look at the *Kjeldsen, Busk Madsen, and Pederson case*⁽³⁶³⁾ and the more

361. Opsahl, T., 'The Convention and the right to respect for family life, particularly as regards the unity of the family and the protection of the rights of parents and guardians in the education of children,' in Robertson, A.H., *Privacy and Human Rights*, (M.U.P. 1973), p.182.

362. Vasak *op.cit.*, p.58.

363. *Case of Kjeldsen, Busk Madsen and Pedersen* (7 December 1976) ECHR Ser. A., No.23. The previous main case had been *Karnell and Hardt* where Sweden had refused to exempt pupil members of the Evangelical Lutheran Church from religious instruction. Before a decision on the Merits was made the Swedish government

recent case of *Campbell and Cosans*⁽³⁶⁴⁾

C. THE KJELDSEN CASE

1. Introduction

The three applications to the Commission of Human rights were joined in July 1973, having been declared admissible.⁽³⁶⁵⁾ They all concerned Danish legislation on sex education.⁽³⁶⁶⁾ The Law of 1970 entered into force on 1 August 1970. It provided, when combined with the delegated legislation of general application issued thereunder,⁽³⁶⁷⁾ that sex education was to be compulsory and integrated in the Danish curriculum in public schools. Private schools did not have to teach sex education.⁽³⁶⁸⁾ The education was designed to partially counteract the growing incidence of unwanted

relented and allowed such pupils exemptions. *Karnell and Hardt*
Applications 4733/71 *Coll. dec. 39.*

364. *Campbell and Cosans*, E.C.H.R. (23 February 1982) Ser. A., No. 48.

365. Not all aspects of the case were admissible as local remedies had not been exhausted in relation to some administrative measures. See n.367 below.

366. Act No. 235 of 27 May 1970.

367. The Court concluded that it was called upon to decide on the Act and general delegated legislation but not on the implementing legislation. Ser. A., *op.cit.* p.23.

368. They were compelled to teach about the reproduction of man within the biology syllabus.

pregnancies and venereal disease.⁽³⁶⁹⁾ Section 1(1) of the Executive Order no. 274 of 8 June 1971 set out the objectives of sex education, it was to impart to pupils knowledge which could:

- (a) help them avoid such insecurity and apprehension as would otherwise cause them problems;
- (b) promote understanding of a connection between sex life, love, life and general human relationships;
- (c) enable the individual pupil independently to arrive at standpoints which harmonise best with his or her personality;
- (d) stress the importance of responsibility and consideration in the matter of sex.⁽³⁷⁰⁾

369. See Summary of the Report on 'Sex Education in State Schools' in the Court's judgment. Ser. A., *op.cit.*, p.10; Commission Report Paragraph 163, Ser.B, Vol.21 p.13 *et seq.*

370. See judgment *id.*, p.12, also Commission Report Paragraph 23. This was replaced by Executive Order No. 313 of 15 June 1972, section (1) of which states

The objective of the sex education in the *Folkeskolen* shall be to impart to the pupils such knowledge of sex life as will enable them to take care of themselves and show consideration for others in that respect.

2. The European Commission on Human Rights

All the Applicants had requested the Danish authorities to exempt their children from the compulsory sex education but without success. They maintained that the Danish law on sex education violated Article 2P and Articles 8 and 14. They particularly relied on the second sentence of Article 2P which they considered imposed an 'absolute' obligation on the State 'even when parents are free to send their children to private schools or to educate them at home'. (371) (372)

The Danish Government maintained for its part that the Applicants had not been denied the right to education as interpreted by the Court in the *Belgian Linguistic* case. They had free access to

371. Commission Report, Ser. B., Vol.21, Paragraph 58, pp.22-23.

372. Commission Report Paragraph 90. Ser. B., No.21, p.126, 127.

The Danish government in an attempt to show that the applicants had political motivation, alleged before the Court, in their Memorial of 11 March 1976, that the Applicants had considered that the law was 'a terrible, demonical power' exercised by 'this mafia, consisting of atheistic, darwinist sexologists, biologists, pedagogues, sociologists and psychologists ... and was a manifestation' of decadence that foreshadowed the collapse of civilisation' the next stage being 'dictatorship'. The Commission in its Memorial calmly quoted the less lively complaints of the Applicants and the attempt to denigrate by selective extracts failed.

state schools, private schools, or education provided in the home. The second sentence of Article 2P did not guarantee the right to education, nor, they claimed, did it over 'public schools'. The State they argued, is only called upon 'to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. In the context of the full sentence however, the Government then admitted that 'such' could refer to education provided by the State, but only at the cost of leading to extravagant results. What about parents who are faddists or cranks? Thus their primary submission was that they had fulfilled their obligations by allowing access to alternative education, and that if this submission failed their subsidiary arguments were based on the fact that public education 'would be impossible' if parents were allowed to get exemptions based on religious and philosophical convictions. The Commission in its Report was split 7/7 as to whether the Danish law constituted a violation of parental rights under Article 2P. The President cast a deciding vote and thus the Commission found no violation.

The Majority of the Commission considered that the right of the child to education was the 'primary right' of Article 2P.⁽³⁷³⁾

373. Commission Report Paragraph 149, Ser. B *id.*, p.43. Supported more strongly before the Court in June 1976 (*id.*, p.185-6) where Mr. Frowein, the Commission delegate for the majority, emphasised the importance of the child's right for it allowed

They did not accept the Danish Government's argument to the effect that the existence of alternative schooling fulfilled the State's obligations imposed by the second sentence of Article 2P.

Even from a merely literal interpretation of the Article such a conclusion hardly seems possible ... Besides, it is clear that the State is not obliged by Article 2 to finance completely private schooling. The result would be inevitably that the 'respect' clause would only grant rights to the wealthier part of the community.

As Article 2P protects a universal right such an interpretation was excluded. (374)

The majority felt that Article 2P prevented States from stopping alternative education and required the state to respect parental convictions within the public schools. (375) The Commission acknowledged that respecting parental philosophical convictions posed difficult and 'many-faceted problems', and found that the primary concern of the 'respect' clause was not to protect children from information of a religious or philosophical character, but to protect

the child to take advantage of the other rights enshrined in the Convention. He emphasised this by reference to Article 13 of the UN Covenant on Economic, Social and Cultural rights. Ser. B., p.185.

374. Commission Report Paragraph 152 Ser. B., p.43 et seq.

375. Commission Report Paragraph 153. Ser. B, p.44. (referring to the UN Covenant Articles 13 and 14).

them from indoctrination in 'unacceptable beliefs'.⁽³⁷⁶⁾

The State had the right to regulate education⁽³⁷⁷⁾ and this right had to be balanced against parental rights in the second sentence of Article 2P. This could be achieved by allowing exemption from specific classes, but there was 'no general right of exemption from all subjects where religious and philosophical convictions' were involved for otherwise 'the State could not guarantee the right to education of all children where it assumes educational functions as is presupposed in this Article'.⁽³⁷⁸⁾ The present writer finds the import of this last sentence encouraging. The Commission seems to be implying that children have a right to education in the Hohfeldian sense, and not just a right of access. The right to education is guaranteed by the first sentence of Article 2P and not just where 'the State assumes educational functions'.

The balance between the State's right to regulate and parental rights could be achieved by the State having good reasons to introduce the topic that may interfere with parental rights, and by ensuring that respect is shown for the convictions of the parents in the way in which the topic is taught. The Commission looked to the

376. Commission Report Paragraph 156 Ser. B, p.45.

377. *Belgian Linguistic cases* Ser. A, p.32. The regulation must be 'according to the needs of the resources of the community and of individuals'.

378. Commission Report Paragraph 158, Ser. B, p.46.

French and Dutch examples in their schooling systems.⁽³⁷⁷⁾ Applying these considerations to the case before them the Commission felt that Denmark had good reason to introduce sex education.⁽³⁸⁰⁾ and was not attempting to impose a certain ethical or moral view of life on children.⁽³⁸¹⁾ The Commission found (7-4 with 3 abstentions) no violation of Article 14.

Two separate but concurring opinions were given. Mr. Kellberg stressed the right of the child itself.

It is hardly conceivable that the drafters would have intended to give parents something like dictatorial powers over the

379. Commission Report Paragraph 161, Ser. B, pp.46-47.

380. Commission Report Paragraph 163, Ser. B, p.47.

In one country after another, it has become increasingly apparent that knowledge in sexual matters must be imparted to children. Governments have had to act to deal with the alarming situation of the increase in unwanted pregnancies, of venereal disease, etc. The Commission considers that it is reasonable for a legislature to decide that the schools should be the centres for such education in order that this subject is taught as satisfactorily and objectively as possible.

381. Commission Report Paragraph 167, Ser. B, p.47.

education of their children.⁽³⁸²⁾ The child too might have philosophical or religious convictions, in a modern society like Denmark the best interest of child demands that knowledge in sexual matters should be imparted to him.

Mr. Opsahl considered that, whilst agreeing with the Conclusions of the majority, the Government's primary argument was right: 'parents cannot ultimately ask for more than the right to withdraw their children from the public schools'.⁽³⁸³⁾ Seven members of the Commission gave a joint dissenting opinion.

The dissenting opinion

They found that Article 2P concerned three inter-linking rights. The right of the child to education, the right of the State to regulate such education, and the right of the parents to have their religious and philosophical convictions respected by the State in the exercise of any functions that it assumed. The child's rights may conflict with those of his parents, but 'only in very exceptional

382. Opinion of M. Kellberg Paragraph 2 Ser. B, p.50 *et seq.* The majority had talked of the rights of the state and the rights of the parents being balanced. This reminder of the child's rights was therefore timely. See also the dissent of the minority.

383. Opsahl, Separate Opinion Ser. B, p.53. He found that if the state found it undesirable or difficult to accommodate parental convictions then the parent should be able to withdraw their children. He was the only Commissioner to support the government's argument. The judges unanimously rejected it.

circumstances' could the State contravene parent's convictions on the pretext of ensuring the child's right to education.³⁸⁴ They considered, in line with the majority opinion, that the Danish Government had an obligation to respect parental convictions within the public schools. They felt that the State was obliged to show such respect throughout the educational system.³⁸⁵ As the sex education in question clearly involved philosophical and religious issues, as the majority too agreed, the minority considered that the Government was bound to respect the parental convictions shown by the Applicants. Parents could not 'un-teach' their children about sex and contraception. Thus the Danish law on sex education violated Article 2P because such education was compulsory. The State was free to introduce sex education but it was not free to make it compulsory. The minority considered that the majority finding that the introduction of sex education was justified 'was hardly convincing'.³⁸⁶ Mr. Welter, the Commission delegate at the Hearing before the Court that represented the minority viewpoint, emphasised that Article 2P was a mandatory provision that allowed of no derogation. Thus the majority's balancing act had no basis in the

384. Ser. B, p.55 Paragraph 4 of the Dissenting Opinion.

385. This seems to go beyond the wording of Article 2P.

386. Justifications given in Paragraphs 162 of the Commission's Report. The children in question were 9,10 and 11 years of age. Moreover it was not compulsory in private schools. Ser. B, *id.*, p.60.

Convention.⁽³⁸⁷⁾ Thus parental rights in the second sentence of Article 2P were absolute. It was impossible to teach religious and philosophical issues neutrally. For example one could not be neutral about masturbation.⁽³⁸⁸⁾

387. See Ser. B, p.192 *et seq.*, and above note 290 and accompanying text dealing with the *Belgian Linguistic cases*.

388. *Id.*, p.200.

CONCLUSIONS

There are two important trends in the Commission Report. Firstly, the Commission found that Article 2P guaranteed to all children the right to education. This progressive step seems to be a considerable advance over the Commission's majority in the *Belgian Linguistic cases* where they found that the first sentence of Article 2 contained no obligation at all.³⁸⁹ Commissioner Kellberg's Opinion introduces more modern ideas about what is "in the best interest of the child". This is very welcome as is his firm affirmation of the child's right to education.

Secondly, as the dissenting opinion also confirms, this article is developing dynamically. The state's right to regulate the rights of parents and children must be narrowly construed. They found that the element of compulsion in the Danish system for sex education went beyond what was permissible. Clearly this is in line with the general jurisprudence of the organs of the Convention where the margin of appreciation is being progressively narrowed.³⁹⁰ The majority gave the state slightly more leeway.

389. See above p.594.

390. See Kelly, J., *op.cit.*, and Doswald-Beck, 'The meaning of the right to respect for private life under the ECHR', (1983) 4 *H.R.L.J.* 339. Also see generally Morrisson, C.L., *The dynamics of the development in the European Human Rights Convention system* (Nijhoff, Netherlands, 1981).

3. The European Court of Human Rights

Article 2P

After the Danish Government withdrew its Preliminary Objection³⁹¹ the Court decided on the Merits in its judgment delivered on 7 December 1976. First of all, in relation to the Danish argument that, by allowing the freedom of private education and subsidising private schools it had fulfilled its obligations under Article 2P (second sentence), the Court stated that:

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.³⁹²

It went on to say that the second sentence of Article 2P must be read in the light of the first sentence 'which enshrines the right of everyone to education', and does not distinguish between state and private teaching. The Court observed that 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,

showed that although many attached importance to the freedom to establish private schools, the final text 'does not expressly enounce that freedom', and the drafters were concerned that parental

391. After a Parliamentary debate. Ser. B, *op.cit.*, p.109, 114.

392. Ser. A, p.24.

convictions should also be respected in State teaching. The Court continued

The second sentence of Article 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 be realised. (373)

The Court thus found that Danish State schools were covered by Article 2P, but did take into consideration Danish support of private schooling in assessing whether or not there had been a violation of Article 2P. the Article 'enjoins the State to respect parental convictions, ..., throughout the entire State education programme'.

The Court then explicitly reaffirmed its ruling in the *Belgian Linguistic cases* by stating that Article 2P guaranteed to everyone within the Contracting State's jurisdiction

a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he has completed, profit from the education received. (374)

By specifically extracting only this section of the judgment of the *Belgian Linguistic case*, the Court, by not repeating various phrases

393. Ser. A, p.25.

394. *Belgian Linguistic cases* pp.30-32 paragraphs 3-5. Ser. A, No.6.

and words³⁹⁵ that suggested that its earlier ruling may have a wider significance, seems to be affirming a narrow scope to the right enshrined in Article 2P. However, it must be noted that they referred to the rights of parents in the second sentence as being an "adjunct" of the fundamental right to education.

The Court went on to assert that

It is in the discharge of a natural duty to their children - parents being primarily responsible for the 'education and teaching' of their children - that parents may require the State to respect their religious and philosophical convictions.³⁹⁶

Parental rights deriving from this natural duty, and the right to education, had also to be considered in the light of Articles 8, 9, and 10 of the Convention, that gave everyone, 'including parents and children', *inter alia* the right to ... freedom ... to receive and impart information and ideas'. Thus only indirectly are the rights of children accorded notice.³⁹⁷

The casting of parents as being 'primarily responsible' for their children's education does not exclude the possibility of the State too having a duty to provide education under Article 2P. In Hohfeldian terms the right (*stricto sensu*) to education is now linked to its correlative - the duty which falls *primarily* on the parent.

395. See the comments above p.578 *et seq.*

396. Ser. A., p.26.

397. They had been given prominence in the Opinion of Mr. Kellberg and by the Minority of the Commission.

The qualification *natural* duty and the use of the word *primarily* does indicate that there is a *secondary positive* duty lurking.

Conceivably under Article 2P the State may be co-responsible in law for providing educational means. Particularly as the Court concludes from this paragraph that the setting and planning of the curriculum in principle falls to the State.

The Court then established what was meant by the second sentence of Article 2P. When it called upon the State to respect parental convictions

[It] does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. (378)

Parents cannot object to such teaching or education 'for otherwise all institutionalised teaching would run the risk of proving impracticable'. Such information or knowledge must be

conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. (377)

The Court implicitly acknowledges then that the State is the primary provider of education, and that such education had to be pluralistic 'to promote the ideals and values of a democratic society'.

398. Ser. A, p.26.

399. *Id.*

In applying these considerations to the facts of the case, the Court found that the Danish legislation on sex education did entail teaching information that involved considerations of a moral order. But

[t]he instruction on the subject given in State schools is aimed less at instilling knowledge they [children] do not have or cannot acquire by other means than at giving them such knowledge more correctly, precisely, objectively and scientifically.⁽⁴⁰⁰⁾ Furthermore the considerations of a moral order were very general in character and [did] not entail overstepping the bounds of what is democratic State may regard as the public interest.⁽⁴⁰¹⁾

The Danish legislation did not amount to an attempt to indoctrinate. Abuses were possible, but were not in issue before the Court. The first sentence of Article 2P had not been violated because the Applicants' children had not been denied access to educational institutions existing in Denmark, nor refused 'official recognition of their studies'. The Court thus invoked its judgment from the *Belgian Linguistic cases* once more according it a limited interpretation.⁽⁴⁰²⁾ The Court found, six votes to one, that there had been no violation of Article 2P.

400. *Id.*, p.27.

401. *Id.*

402. See below *Campbell and Cosans case*.

Article 14

As to Article 14, combined with Article 2P, the Court found no violation, since the alleged discrimination between treatment of religious education (where exemption was allowed) and sex education (where no exemption was allowed) was justified because the former disseminated 'tenets' whereas the latter disseminated 'mere knowledge'.

Judge Verdross gave a separate opinion in which he disagreed with the Court's interpretation of the second sentence of Article 2P. The Applicants had religious convictions, and thus the State was bound to respect them. Nowhere in the Convention is there a restrictive clause limiting the State's obligation to the duty not to 'indoctrinate'. The sex education in question was not concerned only with facts that were neutral. It dealt with issues such as contraception.⁽⁴⁰³⁾ The Applicants moreover, if they were not entitled to exemption, would be unjustifiably discriminated against contrary to Article 14, for the provision of education, whether at home or in private schools, entailed material sacrifices for the parents. He did not, regrettably, consider the Court's decision on the first sentence of Article 2P.

4. CONCLUSIONS

In the *Kjeldsen* case the Court has once again adopted a

403. Factual information on human sexuality was possible - e.g. in relation to natural sciences Ser. A, p.32.

restrictive interpretation of Article 2P. But it is to be noted that it recognised the fundamental nature of the right to education. It held that

the disputed legislation in no way offends the applicants' religious or philosophical convictions to the extent forbidden by the second sentence of Article 2 of the Protocol, interpreted in the light of the first sentence and of the whole Convention.⁴⁰⁴ (My emphasis)

This wording implies that some 'offense' to parental convictions is permissible. The wording of the second sentence of Article 2P nowhere admits of this possibility as the minority of the Commission and Juge Verdross point out. Moreover Article 17 of the Convention indicates that

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein⁴⁰⁵ or at their limitation to a greater extent than is provided for in the Convention. (My emphasis).

The Court arrived at its restrictive interpretation by balancing the

404. Ser. A, p.27 (Paragraph 54).

405. Applicable to the Protocol via Article 5 of the Protocol.

'general interest' (406) and children's interests (407) ~~and~~ parental interests. The *travaux préparatoires* were elevated to be of a 'particular significance' in order to justify the dynamic, if restrictive, interpretation. Again the practical interest emerged - schooling would be impossible if parents had a general right of exemption. Thus as long as information was conveyed in an 'objective, critical and pluralistic manner' that was sufficient to protect parental convictions. The 'setting and planning of the curriculum' fell in principle within the competence of the Contracting State.

This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and era. (408)

In making this decision the Court specifically, on two

406. In having workable educational institutions and reducing the number of unwanted pregnancies, abortions, and incidence of venereal disease.
407. In education (including sex education) and in respect of their rights under Articles 8, 9, and 10 of the Convention.
408. Ser. A, pp.26-27 (Paragraph 53). The question of control of the curriculum is a vital issue in respect of rights in education, and will be fully discussed below for the Court expanded on this in the *Campbell and Cosans* case.

occasions,⁴⁰⁹ pointed to the fact that in Denmark parents had the right to educate their children outwith the State system, either in highly subsidised private schools, or at home, and indicated that this was a relevant consideration in determining the issue as to whether Denmark had violated Article 2P. Thus one can conclude that the existence of private schooling does not in itself satisfy the requirements of the second sentence of Article 2P, but does 'weigh-in' in the State's favour. The Court did not express an opinion on the Commission's conclusion that *enseignement libre* was protected by Article 2P.⁴¹⁰ However if a State established an educational monopoly it would clearly impose upon itself greater burdens in trying to respect all parental convictions.

The Court has clearly not travelled as far as the Commission in this case especially with regard to the right to education, although they did emphasise much more the position of Article 2P in the Convention as a whole emphasising the links between the first sentence of Article 2P and the rights enshrined in Articles 8, 9, and 10.

409. Ser. A, p.25 (Paragraph 50 *in fine*, Paragraph 54 *in fine*).

410. See above p.394.

D. THE CAMPBELL AND COSANS CASE

1. Introduction

In the case of *Campbell and Cosans*⁽⁴¹¹⁾ Article 2P was again under consideration. This time two Scottish mothers applied to the Commission of Human Rights maintaining that the use of corporal punishment as a disciplinary measure in the schools attended by their children constituted a failure to respect their rights as parents to ensure their sons' education and teaching in conformity with their philosophical convictions, as guaranteed by Article 2P.⁽⁴¹²⁾ Mrs. Cosans also maintained that her son's suspension from school violated the first sentence of Article 2P.

First sentence of Article 2P

The Commission, voting eight to one (with five

411. *Campbell and Cosans*, ECHR Ser. A, No. 48 February 25, 1982; 4 *E.H.R.R.* 293.

412. They also complained of a violation of Article 3. See Lonbay *op.cit.*, (1983) 46 *M.L.R.* 345. This was not upheld as the children had not in fact been corporally punished. The Commission in *X v. UK* (17 December 1982) reached a friendly settlement in which the mother of a girl who had been caned at a school received £1,200 *ex gratia* payment and legal costs. In addition the U.K. government agreed to circulate to all Local Education Authorities a letter indicating that 'corporal punishment in certain circumstances amounts to treatment contrary to Article 3 of the Convention'.

abstentions), had considered that this issue was absorbed by their finding in relation to the second sentence of Article 2P, and therefore a finding on this point was unnecessary. The United Kingdom Government had pleaded that the right of access in Article 2P could be regulated by reasonable requirements including disciplinary ones.⁴¹³ Thus exclusion from school on disciplinary grounds could not *per se* violate the right to education.⁴¹⁴ Had the Court followed the decision of the Commission it would have been most regrettable. Instead they took their lead from the dissenting Opinion of Mr. Kiernan in the Commission, who had disagreed with the Commission on this point.⁴¹⁵ He in fact found that 'regulation' of access of a disciplinary nature fell outwith the type of regulation that the Court had had in mind in the *Belgian Linguistic case*⁴¹⁶ when it stated that State regulation of the right to education must never injure the substance of the right to education nor

413. In Application 6598/74 (16 May 1977) *Digest op.cit.*, p.782 the Commission had held that conditional access to higher education was permissible. Similarly in Application 8399/78 (7 May 1979) *Digest id.*, p.783 State requirements of academic conditions before entry to secondary education was permissible.

414. A curious and unjustified argument that was not followed by the Court. See below p.614.

415. Commission Report in the *Campbell and Cosans* case 16 May 1980, p.43 *et seq.* Ser. B, No.____.

416. Ser. A, p.32.

conflict with other rights enshrined in the Convention. He concluded that parental rights had been violated, and thus the regulation by the State violated a right enshrined in the Convention and its Protocol.

Second sentence Article 2P

Turning now to the aspects of the case dealing with the second sentence of Article 2P there were several matters in dispute. The Government of the United Kingdom submitted that corporal punishment constituted a disciplinary measure, and was thus not a 'function' assumed by the State in 'relation to education and teaching'. It also submitted that even if it were such a 'function' the Government had not assumed it as the teachers themselves had *in loco parentis* under the Common Law. The Government also argued that parental convictions on corporal punishment did not amount to philosophical convictions.

The Commission, relying on the *Kjeldsen* case, considered that the functions of the State in relation to education and teaching had to be interpreted widely⁽⁴¹⁷⁾

...the right guaranteed by the second sentence of Article 2P extends primarily to the content of the school curriculum and the manner in which it is conveyed to school children, it also *inter alia* covers, ... the organisation and financing of public

417. *Kjeldsen* paragraph 50.

education.⁽⁴¹⁸⁾

The Commission then pointed out that

the term *education* is generally understood as meaning not only theoretical instruction in a strict sense, but also the development and moulding of children's character and mental powers.⁽⁴¹⁹⁾ The fact that the draftsmen of Article 2 found it necessary to refer both to 'education' and to 'teaching', a term the ordinary meaning of which is more restricted, supports this view.

The structure and object of the Article also supported this interpretation.

As to whether parental views on corporal punishment amounted to philosophical convictions the Commission considered that the word philosophy had 'no single determinate meaning', and therefore

the notion of 'philosophical convictions' had instead to be given an independent content in the light of the context of the second sentence of Article of the Protocol and the object and purpose of that provision.⁽⁴²⁰⁾

The Commission went on to point out that though it had said in its Report in the *Belgian Linguistic case* that

at a certain point in the 'preparatory work' the text referred

418. Commission Report *Campbell and Cosans* paragraph 80.

419. cf. See Commission Report in the *Kjeldsen* case paragraph 148.

420. *Campbell and Cosans* paragraph 88.

solely to the protection of religious opinions but that philosophical opinions were added, the right to have religious and philosophical convictions respected was the right of the parents. Thus there were two separate issues involved, and so the Court had to rule on the first sentence of Article 2P. The Court then reiterated its ruling in the *Belgian Linguistic cases*. The right to education could be regulated as long as such regulation

did not injure the substance of the right or conflict with other rights enshrined in the Convention or its Protocols.⁽⁴²¹⁾

The Court then found, in particular that a

condition of access to an educational establishment that conflicts with another right enshrined in Protocol No. 1 cannot be described as reasonable, and in any event falls outside the State's power of regulation.⁽⁴²²⁾

Two points need to be made in relation to this part of the Court's ruling. Firstly, the judgment strongly affirms that 'conditions of access' that conflict with other rights protected by the Convention and Protocol are not possible. Thus, even if one is not suspended, but refuses to attend an educational institution because of certain conditions on access that conflict with a right that is protected, one can be held to have been denied the right to

421. *Belgian Linguistic cases*. Ser. A, p.32.

422. *Campbell and Cosans* Ser. A, paragraph 41.

education.⁽⁴²³⁾ For example suspension from school for wearing a turban or CND badge would constitute a violation of Article 2P,⁽⁴²⁴⁾ as ones right to freedom of religion and expression are protected by Articles 9 and 10 of the Convention respectively.⁽⁴²⁵⁾ Similarly if one felt unable to attend school for the same reasons, these conditions of access being unreasonable, one would have been denied the right to education.

Secondly, the wording of the judgment suggests that it might even never be possible to suspend a pupil or student because such regulation would injure the substance of the 'right to education'.⁽⁴²⁶⁾

Thus whilst conditions of access might constitute reasonable

423. In the *Belgian Linguistic* and *Kjeldsen* cases there was no denial of the right to education as no other right protected by the Convention had been violated.

424. Cf. *Mandla v Dowell Lee and another*, [1982] 3 All ER 1108.

425. cf. *Tinker v des Moines Independent Community School District* 393 U.S. 503 (1969).

426. N.B. Article 5(1) (d) ECHR

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure proscribed by law; ...

(d) the detention of a minor by lawful order of the purpose of educational supervision...

regulation, suspension might not. The French wording⁴²⁷ of the judgment confirms this conclusion as not only does it literally support it, but it also places a semicolon before the final phrase thus emphasising its separateness.⁴²⁸

Thus the right of access to educational institutions is strongly protected by the Court. Sir Vincent Evans, in his dissent, considered that as in his opinion there had been no violation of parental rights the regulation of access was reasonable. Thus he did not support the above contention, but nor, apparently, did he consider it.

The court ruled that
the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.⁴²⁹

So the Court found that

[t]he use of corporal punishment ... is an integral part of the process whereby a school seeks to achieve the object for which

427. The English text of the judgment being the authentic text.

428. '...; elle va en tout cas au-delà du pouvoir de réglementation que l'article 2 laisse à l'Etat.' Ser. A, p.19 paragraph 4 *in fine*.

429. Ser. A Paragraph 33.

it was established, including the development and moulding of the character and mental powers of its pupils.⁽⁴³⁰⁾

The Court clearly followed the Commission on this question.

It went on to deal with the Government's contention that it was not the State but the teachers individually that dealt with disciplinary matters.⁽⁴³¹⁾ The Court swept aside this argument. The Government was responsible for the general policy in State schools, including matters of discipline. The fact that the State supervised the Scottish educational system in general meant that it had to respect parental convictions of a religious or philosophical kind. Article 2P, in this sense, was to be widely interpreted. The parental convictions had to be respected in each and every function that the State undertook.

The Court considered that the word 'conviction' denotes views that attain a certain level of cogency, seriousness, cohesion and importance,⁽⁴³²⁾

The word 'philosophical' not being capable of 'exhaustive definition' the Court noting that 'little assistance as to its precise significance was to be gleaned from the *travaux préparatoires*, went on to state that the phrase 'philosophical convictions' in the present context denoted

430. *Id.*

431. U.K. Memorial of 21 April 1981, Doc Cour (81) 22, and the Lord Advocate Mackay at the Hearing before the Court. Doc Cour/Misc/129.

432. Ser. A, p.16.

such convictions as are worthy of respect in a democratic society .. and are not incompatible with human dignity; in addition they must not conflict with the fundamental right of the child to education. (433)

In coming to this conclusion the Court had regard to the Convention as a whole, and mentioned in particular Article 17, as being an interpretative guideline. (434) Because the applicants' views related to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, they could be distinguished from mere 'opinions'. The Government's submissions were not accepted.

One cannot help but compare this view of what constitutes a 'philosophical conviction' with the Court's judgment in the *Belgian Linguistic case*. Surely the language one speaks and learns is a 'weighty and substantial aspect of human life and behaviour', especially when one considers that Court's interpretation of what constitutes 'education' in the present case.

the whole process whereby in any society adults endeavour to transmit their beliefs and culture ... to the young. Language is an essential part of culture. Thus convictions concerning language could be considered philosophical convictions.

433. *Id.*

434. For the text of Article 17 see above p.607.

What a long way the Convention has come in thirteen years. (435)

Applying the criteria of *Campbell* and *Cosans* to the *Belgian Linguistic* cases one could easily imagine a different outcome. The *Kjeldsen* case had affirmed that the organisation and financing of public education was, or could be, a 'function' under Article 2P. (436) The Belgian subsidy rules look much more fragile in this light.

The Court, in *Campbell* and *Cosans*, having found that parental convictions on corporal punishment were philosophical convictions, then dismissed the Governments last submission. The Government's policy of gradual elimination of corporal punishment did not constitute 'respect'. (437)

The Court now turned to the reservation that had been made by the United Kingdom to the second sentence of Article 2P. This states

... the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is

435. The Court on numerous occasions has noted the 'living' nature of the Convention, e.g. *Tyrer* (Paragraph 36) and *Dudgeon* (Paragraph 60) cases. See above pp.493, 496.

436. See above note 417.

437. See Ghandi, S., 'Spare the rod: Corporal punishment in Schools and the ECHR', (1984) 33 *I.C.L.Q.* 488 for an assessment of the U.K. government's implementation of this ruling. It was finally implemented by the Education Act 1986.

compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure. (438)

The United Kingdom argued that to show 'respect' would necessitate 'unreasonable public expenditure'. (439) The Court, whilst noting that the relevant law 'was no more than a re-enactment' of the earlier law and thus not contrary to Article 64, (440) considered that whilst some solutions, such as the establishment of a dual educational system, would be incompatible with the reservation, a simple system of exemptions would not be. (441) The Court here is not suggesting that, in the absence of such a reservation, the United Kingdom would be obliged to establish a dual schools system. That would be a startling but, in the present writer's view, a good departure from its previous case-law.

The Court found that Mrs. Campbell and Mrs. Cosans had been victims of a violation of Article 2P. Only the British judge, Sir Vincent Evans, dissented. He felt that the Court had given too wide an interpretation to Article 2P. He referred the more restrictive

438. See above p.526.

439. Sir Vincent Evans took this view in his dissent. Ser. A., p.21

440. Ser.A., *op.cit.* p.17.

441. See Lonbay *op.cit.*

approach of the Court's earlier cases.⁴⁴² He felt that the second sentence of Article 2P was concerned with

the content of information and knowledge imparted to the child through education and teaching and the manner of imparting such information and knowledge and that the views of parents on such matters as the use of corporal punishment are as much outside the scope of the provision as are their linguistic preferences.

The second leg of his dissent was that a wide interpretation could 'give rise to very considerable difficulties in practice'. Thus the State might find it very difficult to accommodate philosophical and religious convictions that conflicted on matters such as

the segregation of the sexes, the streaming of pupils according to ability or the existence of independent schools.⁴⁴³

442. Sir Vincent Evans in his dissent considered that, even if the wider interpretation of the second sentence was correct, the United Kingdom's reservation had limited the obligation so that there was no violation of Article 2P. He considered that a system of discipline that treated children differently according to their parent's philosophical convictions was not practical because it could lead to 'a sense of injustice' being generated that would have harmful consequences.

443. This view seems palpably correct in the light of the *travaux préparatoires*, but in fact already in the case of *Kjeldsen*, one of the cases to which he leans for support of his argument, the

Conclusions

As the present writer has noted, and indeed as Sir Vincent Evans has pointed out, the Court has previously adopted a restrictive interpretation of Article 2P. In the *Kjeldsen* case it permitted some offense to parental convictions, particularly if respecting such convictions 'would cause all institutionalised teaching to be impractical', and in the light of the subsidies that the state provided for private schools. A case before the Commission of Human Rights on comprehensivisation helps to illustrate the issues.⁽⁴⁴⁴⁾ The Commission found the case inadmissible, and it is interesting, in the light of Sir Vincent Evans's dissent, to see its reasons for doing so. The Commission found that Article 2P covered such matters as comprehensivisation (following *Kjeldsen*), but then applied the Court's 'indoctrination' test to limit the State's obligation to respect parental convictions. It found that 'in the present case' there was no question of the system of secondary education .. having been organised in pursuit of any aim of indoctrination.

The Commission's reasoning is somewhat artificial. It is one thing to say that information is being imparted objectively⁽⁴⁴⁵⁾ and thus respect had been shown, but another to say that school

Court had found that the second sentence of Article 2P included functions 'consisting of the organisation and financing of education'.

444. *X and Y v UK* (Application No. 7527/76) 11 DR 147.

445. Itself a dubious concept. See above p.599 and environs.

organisation has been impartial. Clearly it has not been impartial, though it is true that it has not tried to indoctrinate. However, regardless of the merits of this reasoning the difficulty lies in the fact that the Court in *Campbell* and *Cosans* seems to have abandoned its indoctrination test. They did not find that corporal punishment was an attempt to indoctrinate, it simply fell foul of parental convictions. This seems to be an adoption of the dissenting position in *Kjeldsen*. How, in the absence of the 'indoctrination' test, are the Court and Commission going to reconcile parental convictions that affect the organisation and structure of educational systems?

The answer lies in the fact that whilst the Court has abandoned the 'form' of the indoctrination test, it has not abandoned its substance.⁴⁴⁶ Parents rights in the *Kjeldsen* case were interpreted in a restrictive fashion. In the *Campbell* and *Cosans* case they were not. The present writer's analysis of the *Kjeldsen* case⁴⁴⁷ found that the Court had balanced the general interest and the child's interest against the parent's interests to arrive at its conclusion. It is submitted that the Court has done the same in the *Campbell* and *Cosans* case. Thus in matters such as ability streaming, sex segregation, and comprehensivisation, the general interest, combined with the children's interests, may prevail over parental

446. No doubt in a future case on curriculum matters the 'form' will be resurrected, as the Court did in fact refer to it in *Campbell* and *Cosans*.

447. See above p.600 and pp.606 et seq.

interests. This is especially so if the State tolerates or supports private education, for, as the Court held in the *Kjeldsen* case, this is a relevant consideration.⁽⁴⁴⁸⁾

As for Sir Vincent Evans's appeal to considerations of practicality one might doubt that this should be at all relevant in interpreting a human rights treaty. It might be most impractical to provide fair trials, and certainly it would be cheaper if they were done away with.

The *Campbell* and *Cosans* case undoubtedly will encourage parents to assert their rights given by the second sentence of Article 2P. What constitutes a philosophical conviction has been widely interpreted. They must nonetheless be convincing. In *Brock v U.K.*⁽⁴⁴⁹⁾ parental failure to inform the school authorities of their conviction about corporal punishment -- despite their child being beaten on 14 separate occasions -- was fatal to their application.⁽⁴⁵⁰⁾ It is interesting to observe how the Court disparaged the *travaux préparatoires* in this case to achieve this result, whereas in the *Kjeldsen* case the *travaux préparatoires* were

448. See above p.609.

449. *Brock v U.K.* Applic. 8566/79 (1983) 5 *E.H.R.R.* 265; Also Application No. 9114/80 (1986) 7 *E.H.R.R.* 462.

450. *K v U.K.* Applic. No.11468/85 Council of Europe, Doc. DH(86)7 held admissable by the Commission on 16 October 1985 is yet another school corporal punishment case against the United Kingdom.

considered to be of particular importance⁴⁵¹ and in that case the Court cut down the 'respect' that had to be shown to parental rights. In fact the level of 'respect' that must be shown to parental convictions has remained the same, but more 'convictions' must be respected.

Other aspects of the case are no less interesting. The Court has given a wide interpretation to what constitutes 'education' of children.

It 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.

Naturally corporal punishment fell within this wide definition. Having found that discipline was a function in relation to education the Court then found that the State had assumed this function on the basis of its responsibility for formulating general policy in regard to education. This interpretation means that no State is ever likely to be able to claim that it has not 'assumed' a function in relation to education and teaching.

The Court has only contemplated this wide definition of education in the context of the second sentence of Article 2P. Applied to the first sentence it shows the shallowness of its 'practical' but limited interpretation of that sentence.

451. See above p.608.

Nevertheless *Campbell* and *Cosans* has significantly reinforced the importance of the first sentence of Article 2P. Firstly by not following the Commission's line, and considering the right of the child to education to be a separate issue.⁴⁵² Secondly by asserting that the imposition of conditions of access alone, without suspension, could constitute a denial of the right to education.⁴⁵³ A condition of access that could cause a violation of any rights of either the child or parent will constitute a violation of the right to education under Article 2P. This emphasis on the first sentence was substantially reinforced by the Court's Article 50 judgment delivered on the 22 March 1983. Jeffrey Cosans was awarded three thousand pounds damages.⁴⁵⁴ The Court stated that

the applicant must be regarded as having suffered some non-

452. See above p.611.

453. This seems to overrule the Commission's *obiter dictum* in *Association X v Sweden* 6094/73 9 DR/5 where a students union operated a closed shop. The Rector thus 'denied access' to all students not members of the Union. The Commission considered that even if there has been a violation of Article 11 it 'would not follow that they would be denied their right to education'.

454. The U.K. has since settled the cases of three further families whose children received corporal punishment. See *The Independent*, 25th September 1987. Anthony Durairaj received £4,000 as his suspension from school violated his right to education.

pecuniary loss. In addition to initial mental anxiety, he must have felt himself to be at a disadvantage as compared with others in his age-group. Furthermore, his failure to complete his schooling perforce deprived him of some opportunity to develop his intellectual potential.⁽⁴⁵⁵⁾

The Court also took into account the 'material damage' that Jeffrey had suffered in arriving at its equitable figure of three thousand pounds.⁽⁴⁵⁶⁾ In fact the Court in *Campbell and Cosans* emphasised that the Child had a 'fundamental' right to education.⁽⁴⁵⁷⁾

This emphasis on the child's right must not be allowed to limit the wording of the first sentence that indicates that the right is universal. There have been several Applications before the Commission that have dealt with the scope of the right *ratione personae*. In *X v U.K.*⁽⁴⁵⁸⁾ the Commission held that very young children (in this case two years old) only had a potential right to education, not being 'of an age to benefit from public

455. *Campbell and Cosans* (Article 50) Paragraph 26.

456. It also took account of various other facts, such as, for example, the fact that it was Jeffrey's breach of the disciplinary rules that sparked off the incident.

457. See above p.618.

458. *X v U.K.*, Application No. 7626/76 11 DR 80.

education.⁴⁵⁹ More controversial have been a series of cases where the Commission has indicated that it might be only elementary education that is protected by Article 2P. In *X v U.K.*⁴⁶⁰ it was not possible for a prisoner to study technology. The prisoner claimed that he had been denied the right to education. The Commission considered that the right to education was concerned primarily with elementary education and not necessarily advanced studies such as technology. There seems to be no justification whatever for this view, especially in the light of the Court's narrow approach to Article 2P, (i.e. in allowing a right of access only). Had there been an obligation on States to provide education some limitation might have been necessary. The Commission might have found here that as no educational institution existed for prisoners then the prisoner had not been denied the right to education, or, it might have found that lack of access to educational institutions was a natural consequence of incarceration.⁴⁶¹ It might even be that, as the Commission was ahead of the Court in both *Kjeldsen* and *Campbell and Cosans* in asserting the right to education be a substantive right it is merely reaffirming this jurisprudence.

459. *Guzzardi v Italy* Application No. 7367/73 DR 185, at 197.

460. *X v U.K.*, Application No. 5962/72 2 DR 50.

461. cf. Lord Wilberforce in *Raymond v Honey* [1982] 1 All ER 756, at 758. A prisoner retains all rights which are not taken away 'expressly or by necessary implication'.

In *15 Foreign students v U.K.*⁽⁴⁶²⁾ the Commission repeated *obiter* the same statement. However more recently in *X v U.K.*⁽⁴⁶³⁾ a student at the University of B. was refused readmission to repeat his first year (having failed his first year exams and had a poor record of attendance at compulsory classes). The Commission found the application to be manifestly ill-founded since it was a reasonable exercise of the regulation of the right to education. Thus limiting access to higher education to those of a sufficient academic standard was permissible.⁽⁴⁶⁴⁾ This is much more in line with the spirit of Article 2P and the Court's judgments.

With regard to the scope of parental rights in the second sentence the Commission has found that the rights are linked to custody of the child. Thus a parent without custody has no further rights with regard to his/her child's education.

VI. CONCLUSIONS: THE EMERGENCE OF THE RIGHT TO EDUCATION

462. *15 Foreign students v U.K.*, Application No. 7671/76 9 DR 85.

463. *X v U.K.*, Application No. 8844/80 23 DR 228.

464. The earlier case with similarities is *X v. Austria* (Application 5492/72 Coll. Dec. 44, p. 63), where an Iranian student who failed his medical exams after 7 years at University and was consequently refused a second chance under Austrian law was held not to have been denied his right to education.

A. INTRODUCTION

So far our analysis of Article 2P of the ECHR has, in the main, followed a detailed chronological case-by-case approach. This makes for difficulties in analytical presentation. It is proposed in this section to attempt to synthesise what we have learned concerning how this article is to be applied in a more analytical fashion. This allows a framing of the issues in a way that makes the requirements of the ECHR as regards education more amenable to clear application in the countries under study. The ESC is taken into account as necessary.

This section first looks to see whether there has emerged any sign of a positive right to education. It then assesses what might be the content and scope of such a positive right. It then assesses the power of the state to regulate in this field and the rights of parents to determine the limits of such regulation, in particular as regards the setting of curricula and the protection of non-state schooling.

B. POSITIVE OBLIGATION TO PROVIDE SCHOOLING?

465. Apart from the analysis of the *travaux préparatoires*.

We have seen above that the Convention sets out common human rights standards, and that these standards can evolve. We now turn to assess the standard set in the field of the right to education. After considering the *travaux préparatoires*⁴⁶⁶ it was concluded that the right to education was expressed negatively deliberately so that it was made clear on all sides that there was no duty imposed upon the Government to subsidise education according to parental preferences.⁴⁶⁷ Most of the States that were involved in the drafting of the Protocol were clearly reluctant to take on the burden that would be imposed by the enshrinement of an economic-social-cultural right that entailed the provision of education according to parental wishes.⁴⁶⁸ In the main "positive" rights of this type were to be included in the European Social Charter not in

466. See above p.528.

467. The Court noted that

The negative formula indicates, as is confirmed by the 'preparatory work' . . . That the Contracting Parties do not recognise such a right to education as would require them to establish at their expense, or to subsidise, education of any particular type or at any particular level.

Applied restrictively by the European Commission on Human Rights in Application 10476/83 v Sweden. (1987) 9 *E.H.R.R.* 247.

468. See above p.528 *et seq.*

the ECHR.⁴⁶⁹ This fact at least implies that no positive obligation was meant by the original drafters.

The negative wording adopted though did not imply that the article entailed no obligation at all for the State. At the least it would imply a minimalist "negative" freedom from governmental interference with the private exercise of the right.⁴⁷⁰ This represents the classical liberal tradition concerning the appropriate role of governments. In fact, as noted above, the Court rejected Belgian arguments to this effect in the *Belgian Linguistic* cases.

From a literal reading the wording of Article 2 of the First Protocol it seems to protect the right to education. "No-one shall be denied the right to education." The Court in the *Belgian Linguistic* cases confirmed that the first sentence of article 2P does indeed "enshrine a right".⁴⁷¹ This interpretation of the first sentence of article 2P is in accordance with the modern view of rights, rights that impose some positive obligation to act on the state. The ECHR undoubtedly requires positive action from states in some circumstances.⁴⁷²

However the European Court in the first case dealing with Article 2P found that there was no obligation on the states to establish official education systems. The Court, it seems, concluded

469. See above p.439.

470. See e.g. Castberg *op.cit.* p.174.

471. Ser.A., No.6, *op.cit.* pp.30-31.

472. See above p.494 *et seq.*

that the first sentence of Article 2P did not provide a right to education in the sense that the States Parties were obliged to establish an educational system. Could parents then not insist on state provision of schooling at all?

The Court before finding no obligation to establish educational systems in the Contracting states had noted the existence of 'general and official' educational systems in the member States of the Council of Europe.⁴⁷³ In other words it is possibly only the actual existence of the educational systems that stopped the States being obliged to provide them. Secondly, the Court said that there were no 'specific' obligations concerning the 'extent' of the means of instruction. This implies that there is a general obligation to ensure that 'a general and official' educational system exists. The Court did not make this clear and was unwilling at this stage to determine what amounted to "education" for the purpose of this article. The Court took as the basis for its decision on the scope of the obligation to positively establish an educational system, wherein the right to education could be vindicated, the socio-cultural positions prevailing at the time of its decision. We have noted above that, in determining the scope of obligations undertaken, and matching them to evolving standards, the Court looks to the actual position in the various parties to the Treaty. This is especially to

473. Ser. A., No.6, *op.cit.*, p.31.

be expected when dealing with a socio-cultural right.⁴⁷⁴

Whilst there was no obligation to establish an educational system the Court ruled that Article 2P 'guaranteed, in the first place, a right of access to educational institutions existing at a given time'. The Court also found that

For the right to education to be effective it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received,⁴⁷⁵

thus the individual also has the right to official recognition of the studies that he has completed 'in conformity with the rules in force in each State'. Furthermore the Court also stated that the right to education:

would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages.⁴⁷⁶

If one has the right to be educated in a national language, one must first have the right to be educated at all. Similarly the right to obtain official recognition of studies was held to be an integral part of the right to education. Again the right pre-supposes that education has taken place. The recognition of these *ancillary* rights indicate at least a part of the Court's conception of what should

474. See generally Chapter One.

475. Ser. A., No.6, *op.cit.* p.31.

476. *Id.*

constitute education, and show that the Court's interpretation assumes that such education exists and is available.⁴⁷⁷

Because there was no obligation on the Contracting parties the Court could find that the right to education varied according to the needs and resources of the community. This result would also occur should a positive right have been found as education is a relative "social" right, but it could be subject to a minimum European guarantee. Thus the right to education is indirectly recognised as a right of access and a right to benefit from education received. But as the state had no positive obligation to establish schools the extent of education available would be a matter for each state to decide as sovereign, with no external control exercised from Strasbourg. The major reason given by the Court for this limited interpretation lies in the negative formulation of the right and in the 'intentions' of the drafters.

This judgment it must be remembered was only the sixth judgment to have been delivered by the Court, and was moreover bound up with issues of the utmost political sensitivity to Belgium at a time when its Constitution itself was under reform. It is hardly surprising that the Court adopted a cautious approach. Also the facts of the case related to questions of language of instruction in schools. This in itself helped the Court adopt a restrictive attitude as it was clear from the *travaux préparatoires* that rights in this field had been excluded, at least as regards the protection of

477. See n.283 above and accompanying text.

linguistic minorities.⁴⁷⁸ Moreover the question of the best method of second language learning and whether children who are early exposed to second languages benefit or not in the long-term are questions that are extremely unsettled and controversial,⁴⁷⁹ and indeed one that even courts experienced in constitutional litigation try to avoid.⁴⁸⁰ It is to be noted that the Court itself did in fact find a positive obligation to ensure respect for 'such a right as is protected by Article 2 of the Protocol'.

The *Kjeldsen* case showed some advance from this position particularly by the Commission. There are two particularly important trends in the Commission Report. Firstly, the Commission found that

478. See above p.517.

479. For a brief summary of U.S. social studies concerning bilingual education see Rossell, C. H., and Ross M, J., 'The Social science evidence on Bilingual education', (1986) 15 *J.L. & Educ.* 385. Generally see American Institute for Research in the Behavioural Sciences, *Evaluation of the impact of Elementary and Secondary Education Act Title VII Spanish/English bilingual programs*, Vols.1 and 2 (1977), Vols 3 and 4 (1978). Also McFadden, B, J., 'Bilingual education and the Law', (1983) 12 *J.L. & Educ.* 1. See chapter three above for the language provisions under the Upper Silesian regime.

480. *Lau v Nichols*, 414 U.S. 563 (1973) (decided on statutory grounds), *Castenada v Pickard* 648 F.2d 989 (5th Cir. 1981), 781 F.2d 456 (5th Cir. 1986).

Article 2P guaranteed to all children the right to education. This progressive step seems to be a considerable advance over the Commission's majority in the *Belgian Linguistic cases* where they found that the first sentence of Article 2 contained no obligation at all. Secondly Commissioner Kellberg's Opinion introduces more modern ideas about what is "in the best interest of the child". However the Court in the *Kjeldsen* case once again adopted a restrictive interpretation of Article 2P, though it recognised the fundamental nature of the right to education. The Court did emphasise much more the position of Article 2P in the Convention as a whole emphasising the links between the first sentence of Article 2P and the rights enshrined in Articles 8, 9, and 10. This is especially important when it comes to considering "control" of education.

The *Campbell and Cosans* case decided in 1982 significantly reinforced the importance of the first sentence of Article 2P. Firstly the Court refused to follow the Commission's line (that the first sentence of article 2P need not be at issue), and thus considered the right of the child to education to be a separate issue. Secondly the Court asserted that the imposition of conditions of access alone, without suspension, could constitute a denial of the right to education. A condition of access that could cause a violation of any rights of either the child or parent will constitute a violation of the right to education under Article 2P. This emphasis on the first sentence was substantially reinforced by the Court's Article 50 judgment delivered on the 22 March 1983. Jeffrey

Cosans was awarded three thousand pounds damages. The Court noted that the applicant failure to complete his schooling had perforce deprived him of some opportunity to develop his intellectual potential.⁴⁸¹

We see then that the Court is increasingly strengthening its interpretation of article 2P but has not yet ruled that states have an obligation to provide a "particular education". No appropriate case has yet arrived in which it might be required to do so. In the light of the case-law to date though it seems most probable that should a state refuse to provide any schooling in a part of its territory this would amount to a breach of article 2P as individuals would thereby be denied the right to education. It is clear that should the right only amount to one of access to existing institutions then there would be no right in such a circumstance. In this shifting of emphasis from access to a minimum guarantee the Court is able to use the evolutionary approach, and has also selectively used the *travaux préparatoires*. In the *Belgian Linguistics cases* they were of especial significance in determining parental rights, in the *Kjeldsen* case this line was followed too, they were said to be of particular significance. In the *Campbell and Cosans* case though the *travaux préparatoires* were disparaged by the Commission as being "of limited value". The Court echoed this indicating that the *travaux préparatoires* were "of little assistance"

481. Note, *Campbell and Cosans* (Article 50 judgment) Paragraph 26.

in determining what was meant by philosophical convictions.⁽⁴⁸²⁾ This is a sign that the Court is switching approach to the question of protecting educational rights.⁽⁴⁸³⁾

It is not at all unlikely that the Court will develop a positive right to the provision of some schooling. If it does not this right may be included in the European catalog of rights by the contracting parties adopting a protocol adding such a right to those already protected. In 1978 the Consultative Assembly considered the question of including a right to education in the ECHR. Jacobs has argued that the right to education can be considered as suitably fundamental and universal to be included in a Protocol to the ECHR.⁽⁴⁸⁴⁾ But he noted that its addition could stunt the growth of article 2P, as the Court and Commission could argue that rights contained in the new Protocol were by implication not to be found in the original article. Thus individuals in states that had not ratified the new Protocol would perhaps find that their "right to education" limited by the adoption of an additional article. This argument is certainly persuasive in the light of the *Johnston*

482. Ser.A No.48 *op.cit.*, p.16.

483. The dissenting opinion of Sir Vincent Evans confirms this.
Op.cit. p.21.

484. Jacobs, F. G., 'The extension of the European Convention on Human Rights to include economic, social and cultural rights', (1978) 3 *H.R.R.* 166, at p.176.

case.⁴⁸⁵ There has been no movement to add the right to education yet. This leaves room to hope that the European Court of Human Rights will recognise it in an appropriate case.

Before the Strasbourg institutions could arrive at some positive obligation on the state in relation to educational rights, beyond the general obligation of open access, and possibly an obligation to provide schooling, it is quite apparent that two further factors must be determined. Firstly what is meant by "education". Is there some content to this notion that could allow it to be juridically applied? Questions of types of facilities required and content of the curriculum are notoriously political issues. However as we have seen, early drafts of the ESC contained detailed requirements of facilities to be provided,⁴⁸⁶ as does article 13 of the International Covenant on Social, Economic and Cultural Rights and the UNESCO CDE, as well as the draft Protocol to the American Convention on Human Rights⁴⁸⁷ and draft Convention on the Rights of the Child.⁴⁸⁸ The content of the curriculum, as the Court itself has already acknowledged, must be pluralistic, objective, and promote human rights, in that it must conform to the ECHR rights of the

485. Where this occurred in relation to the "right" to divorce. See above p.493.

486. See above p.442 *et seq.*

487. See below chapter eight.

488. See above chapter 5, section II.

participants. (487)

Secondly, but very closely linked to this question, once one has determined what may be constituted by education, the further question arises as to who "controls" the content. Does the state have a right to regulate in this field in the absence of a limiting clause in article 2P? The next section tackles the question of content of education, and then the question of control of content will be examined.

C. CONTENT OF THE RIGHT TO EDUCATION (490)

If the right to education is to have a "positive" content available on demand to individual litigants the content of the right must be determined. There are undeniably difficulties in establishing a positive right to education in a judicially enforceable treaty. The federal judiciary in the United States (having the longest experience of determining constitutional rights in the Western world) have been spared the direct necessity of determining such issues by the absence of any educational rights in the Federal Constitution. They have nonetheless recognised the supreme importance of education to

489. This result was also arrived at by the Human Rights Committee in the Hartikrainen case, see above p.280 *et seq.*

490. It will be recalled that the scope of the right *ratione personae* extends beyond the rights of children though in this analysis we concentrate on the situation as regards children.

individual welfare⁴⁹¹. They have indirectly had to deal with the issue when it has been raised under the Fourteenth Amendment in relation to the "equal protection" clause.⁴⁹² In almost all the cases the Courts have declared that educational issues *per se* are inappropriate for judicial determination,⁴⁹³ though naturally in the school desegregation cases they have had to venture in to this arena. The fact the "education" is an imprecise science and that diametrically opposed opinion about what is appropriate provision can be validly held is one reason for the judicial reticence. The conservative judges on the Supreme Court also emphasise the importance of local political control over the educational curriculum and are most unwilling to substitute their opinions for those of the local Board of Education. The Courts have intervened to protect the

491. Not only in the famous *Brown* cases but also in the more recent *Plyler v Doe* case, 457 U.S. 202 (1982), at pp.221-222.

492. For example in the "special needs" educational cases, e.g. *Mills v Board of Education* 348 F.Supp. 866 (D.D.C. 1972), though not in the later cases which were decided on a statutory basis. e.g. *Board of Education v Rowley* 458 U.S. 176 (1982).

493. Especially pronounced in the so-called educational malpractice suits, where attempts to establish a tort liability for deficient education have fallen on stony ground. See for example *Hoffman v Board of Education, op.cit.*

liberty interests of Americans in the field of education.⁴⁹⁴ Even the *Rodriguez*⁴⁹⁵ case, where the Supreme Court declared that the right to education was not a fundamental right under the Constitution, implied a recognition of a minimally adequate education.⁴⁹⁶

The content of the right need not be determined with absolute precision, certainly not at the European level.⁴⁹⁷ The European role is to guarantee a minimum basis.⁴⁹⁸ Indeed it would be absurd to establish a high standard of enforceable rights that would not relate to the actual situation in the states where the right is to be granted. Thus a definition that established a fixed pupil-teacher ratio for example is likely to be unworkable at a

494. *Wisconsin v Yoder* 406 U.S. 205 (1982), at p.221; Also *Abington School District v Schempp* 374 U.S. 203 (1963).

495. *San Antonio Indep. Sch. District v Rodriguez* 411 U.S. 1. (1973).

496. See general conclusion for further consideration of the U.S. position.

497. Not all European states centrally establish a curriculum, though the states that we are considering all do. The U.K. for instance leaves it up to local decision-makers, including the headmaster, Local Education Authority, individual teachers, (i.e. Governing Bodies of individual schools). The Conservative government now in power wishes to establish a centrally-dictated core curriculum.

498. As for example was established by the *Campbell and Cosans* case as regards methods of discipline to be used in schools.

national level let alone in a pan-European dimension, and is in any event is the sort of criteria that is most unlikely to emerge from the case-law of a judicial body. The content of the right is likely to vary according to the context of the individual's position and to be interpreted in the light of the economic and social conditions prevailing in the state in which the right is claimed. The starting point for any such determination of content is bound to revolve around the concept of a minimum guarantee. From this guarantee one could work upwards according to social conditions. This "relativity" in socio-cultural rights is what sets them apart from the traditional civil and political rights and freedoms. The category of economic, social and cultural rights are more normally differentiated from civil and political rights by the fact that they require state action, or state finance.⁴⁹⁹ With these opening warnings in mind we now turn to look at the jurisprudence of the Commission and Court to assess the likelihood of a genuine "social" right emerging in this area.

We have already seen what constitutes education and the aims inherent therein from one point of view in the Universal

499. See below chapter twelve p.1024 *et seq.* See for example Bossuyt, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels' (1975) VIII *R.D.H./H.R.J.* 783.

Declaration of Human Rights.⁽⁵⁰⁰⁾ During the course of the preparation of the First Protocol several speakers mentioned what they considered to be the aims of education.⁽⁵⁰¹⁾ From these sources one can start to deduce what the 'minimum provision' should be. Mr. Petren in the Commission's Report in the *Belgian Linguistic cases* suggested that it should cover at least 'elementary education'.⁽⁵⁰²⁾ The majority of the Commission submitted that the right should include a right of entry into the education system from the nursery level to higher education. The Court's judgment in the *Belgian Linguistic cases* actually works well in helping to delimit the scope of the right to education if one adopts a wider "positive" interpretation of Article 2P. The Court held that individuals had a right of access to existing institutions, a right to be educated in one of the national languages and a right to "draw profit from the education received", a right which required the state, in accordance with its laws, to officially recognise the completed studies of the individual. In drawing these conclusions the Court noted that the right had to be "effective".⁽⁵⁰³⁾ The use of this term is familiar

500. Article 26, see above chapter 4, section II(A).

501. See for example p.504.

502. See above p.582.

503. c.f. notes 115-116 above and accompanying text, where it is pointed out that the value of such diplomas is recognised and extended in a series of Council of Europe Conventions, as well

from the later cases where the Court established positive rights.⁵⁰⁴ Implicit in the Court's view is the notion that education should enhance the development of the individual. This notion is made explicit in the later cases. The Court, in the *Belgian Linguistic* cases on the facts of the case, did not need to go further as the complaints concerned linguistic provision rather than the extent of the educational facilities.⁵⁰⁵

In the Danish sex education cases the question of the content of curriculum and the related question of who should determine it were at issue. The Court held that the "setting and planning of the curriculum" fell "in principle within the competence of the Contracting States". It went on to state that

This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and era.⁵⁰⁶

But as the *Dudgeon* case⁵⁰⁷ shows the Court is the final arbiter of these issues.

The *Kjeldsen* case made it perfectly plain that the knowledge to be transmitted cannot be designed to indoctrinate in a

as various European Community laws, to allow the diplomas to be used beyond the confines of the nation-state.

504. See *Airey* case above note 130 and text accompanying.

505. See above p.558.

506. Ser. A, pp.26-27 (Paragraph 53).

507. See above p.497.

particular belief or way of life, with the major exception of promoting human rights ideas themselves. Any parts of the curriculum that are controversial must be handled "objectively, critically and pluralistically".⁵⁰⁸ What would happen if, for example, a state left out a whole area of knowledge, for example mathematics. It may do so for "budgetary reasons". Would a child be able to avail himself of any redress using article 2P? The Convention's aims, taking into account not only the other articles of the ECHR but also article 9 and 10 of the ESC, should forbid such a truncated version of "education".⁵⁰⁹ The child has a right to be "socialised" and take a place in society in accordance with his wishes and abilities. Leaving out of their education a core element is clearly destructive of such an aim. Of course what amounts to a "core" in these circumstances is difficult to say. Does it simply mean mathematics at an elementary level, need it even include mathematics at all? In answering these questions it may well prove that the Court itself is in a better position than national authorities to determine the issue. It can assess the practice in all the Contracting European states to come up with a common minimally acceptable standard, as it did with the

508. The question of parental blocking of such education as they disapprove of is considered in the section E below.

509. The views of the countries under study as well as the U.S. law's view on this matter are canvassed in the general conclusions at the end of Part Four of the thesis.

question of judicial corporal punishment in the *Tyrer* case.⁽⁵¹⁰⁾ The core may also be determined by the individual that is seeking the education. This possibility is now assessed.

We have seen that the state can implement a "hidden curriculum" of socialisation, This is made clear in the *Campbell and Cosans* case where the Court gave a wide interpretation to what constitutes 'education' of children in the context of the second sentence of article 2P:

It 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.⁽⁵¹¹⁾

The Court found that

[t]he use of corporal punishment...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.⁽⁵¹²⁾

The Court has only contemplated this wide definition of education in the context of the second sentence of Article 2P.

510. See above p.493.

511. Corporal punishment fell within this wide definition. Even though one could hardly claim that it "taught" children, they clearly learn a lesson from such an experience.

512. *Id.* p.14.

Applied to the first sentence it shows the width of the child's right to education. The child is to be moulded in order to develop his character and mental power. His knowledge and intellectual development are to be enhanced. Presumably state activity that counteracted this would amount to a denial of education. Likewise the state is also bound to protect the child from any similar parental abuse. Thus the "core" of necessary education may well vary not only according to societies' needs, but more importantly according to the needs of the individual recipients. This interpretation is strongly reinforced by the provisions of the European Social Charter. In particular articles 9 and 10 recognise that the development of the abilities of the recipient, and the recipients rights to seek his/her appropriate career are for the individual to determine, and for the state to help implement even to the extent of giving "financial assistance". Although from a theoretical viewpoint this interpretation is logical, the Court in its first case on the issue, set a precedent that there was no right to a *particular education*. It may prove difficult to dislodge this precedent, though the "evolutionary" approach of the Court makes it easier, and it is certainly not bound by precedent in a strict sense.

The *travaux préparatoires* have been held to be of little assistance, when it suits the Court. Though if the drafters deliberately excluded a right then the Court uses that fact in its

interpretation.⁽⁵¹³⁾ They contain nothing that would prevent children from demanding a "suitable education" to match their abilities. It is true that they do, in the main, rule out the parent from "choosing" any particular education, but in enshrining a right to education in the first sentence, which certainly adheres to children, there is room for hope that children in Europe will receive an education to suit them for their future self-determined social role. This outcome is brought about through an interpretation of the word "education". Education is a social activity, and in Western Europe it is recognised that distribution of social chance occurs through such education. The pluralistical and democratic society that the ECHR is predicated upon, and supports, realises that it is not up to the state alone to decide on the individual's role in society. The ECHR provisions on education were mainly placed in the Convention in recognition that state monopolisation of outcomes for children was opposed to the aims of European society. It is certain that mere toleration of private educational endeavour is not a sufficient "minimum" guarantee of the child's right in this sense. It was not even sufficient to "respect" the parental role enshrined in the second sentence of article 2P.⁽⁵¹⁴⁾ This outcome is also supported by the *Kjeldsen* case where the children were held, in effect, to have a right to accurate knowledge as regards sexual matters to protect themselves when they entered the mainstream of society.

513. See above n.128 and attendant text.

514. See above p.563.

The right to education in this sense must be limited to children for reasons of practicality, else all could demand to have their abilities stretched and talents brought out throughout their lives, clearly a proposition that is probably not financially possible even in Western Europe.⁽⁵¹⁵⁾ This implies some sort of arbitrary age limit, or else the right could be limited to those who had not had the opportunity or had not taken advantage of the opportunity during their childhood.

In fact a state is unlikely to abandon teaching about a whole area of knowledge throughout its territory. What is more likely to occur is a local shortage of particular subjects. The Commission in the *Guzzardi* case has held that one has no right to education in a particular place.⁽⁵¹⁶⁾ This may be a mistaken view. If it is impossible to receive the relevant education locally the child may have its "family life"⁽⁵¹⁷⁾ threatened if he can no longer live with his parents and receive instruction in the particular subject, though this complaint too was rejected in the *Belgian Linguistic cases*.

515. And apparently not expected even by the ESC. See above section II(C)

516. See above note 459 and accompanying text.

517. Protected by article 8 of the ECHR.

D. STATE REGULATION OF THE RIGHT

In contrast to many of the rights and freedoms established by the Convention Article 2P has no limiting clause. This initially might suggest that all persons have a Hohfeldian right 'stricto sensu' to receive education. From the wording of the article it seems that the drafters felt that there were no factors necessary to democratic society that justify interfering with the right. The only limitation on the State's duty to secure this right to everybody lies, it seems, in the definition of the term 'education'.⁽⁵¹⁸⁾ However the concept of the margin of appreciation clearly effects how the Court may interpret article 2P. This is so even though article 2P itself contains no limiting clause.

In the *Belgian Linguistics* cases the Court found that the state could regulate the right to education.⁽⁵¹⁷⁾ This regulation of the right to education, could

vary in time and place according to the needs and resources of the community and of individuals

though it could

never injure the substance of the right to education nor conflict with the other rights enshrined in the Convention.⁽⁵²⁰⁾

The Court justified the possibilities of limiting the right to

518. Private alternative educational provision might aid the State in fulfilling this duty.

519. Judge Wold strongly dissented on this point.

520. *Belgian Linguistics* cases *op.cit.* p.32.

education by indicating that the Convention required

a just balance between protection of the general interest of the community and the respect due to fundamental human rights whilst attaching particular importance to the latter.⁵²¹

Thus the principle was established in the Convention jurisprudence that the states retained the right to regulate education.

In the *Kjeldsen* case the Court permitted some 'offense' to parental convictions. The wording of the second sentence of Article 2P nowhere admits of this possibility, as the minority of the Commission and Juge Verdross point out. Moreover Article 17 of the Convention indicates that

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein⁵²² or at their limitation to a greater extent than is provided for in the Convention. (My emphasis).

The Court arrived at its restrictive interpretation by balancing the 'general interest'⁵²³ and children's interests⁵²⁴ against

521. *Id.*, p.32.

522. Applicable to the Protocol via Article 5 of the Protocol.

523. In having workable educational institutions and reducing the number of unwanted pregnancies, abortions, and incidence of venereal disease.

parental interests.⁵²⁵ The Court held that the "setting and planning of the curriculum" fell "in principle within the competence of the Contracting States". It went on to state that

This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and era.⁵²⁶

As we have seen the state may regulate education and here this power is exemplified in that the state can clearly set the curriculum. The state in its power of regulation can also implement a "hidden curriculum" of socialisation, both powers being subject to both the recipient and the parent's rights as ordained in the Convention. This is made clear in the *Campbell and Cosans* case.

As was pointed out above⁵²⁷ such balancing is equally necessary in any interpretation of the right that posits a duty on the State to provide "education".

524. In education (including sex education) and in respect of their rights under Articles 8, 9, and 10 of the Convention.

525. The *travaux préparatoires* were elevated to be of a 'particular significance' in order to justify the dynamic, if restrictive, interpretation.

526. Ser. A, pp.26-27 (Paragraph 53), subject to the *Dudgeon* case ruling that shows the Court to be the final arbiter.

527. See p.561.

E. THE PARENTAL RIGHT TO CONTROL THE EDUCATION OF THEIR CHILDREN⁽⁵²⁸⁾

In *X, Y, and Z v Sweden*⁽⁵²⁹⁾ parents complained that the Swedish Code of Parenthood forbade them from corporally punishing their children. The complaint was dismissed as manifestly ill-founded on the grounds that the Code was not "legally enforceable". However in the course of its opinion on admissibility the Commission recognised that

... the upbringing of children remains essentially a parental duty, encapsulated within the concept of family life.⁽⁵³⁰⁾

We have noted that the transmission of beliefs, culture and other values are also implicit in education, and this has been recognised by the Court. However though the state may regulate education it does not have a free hand in deciding in what fashion and with which values a child shall be moulded. The question of control of content is now assessed.

528. With regard to the scope of parental rights in the second sentence the Commission has found that the rights are linked to custody of the child. Thus a parent without custody has no further rights with regard to his/her child's education.

529. *X, Y, and Z v Sweden*, Applic. No. 8811/79 (13 May 1982), (1982) 5 *E.H.R.R.* 147. The application was renewed when the applicants submitted further evidence *Felderer v Sweden* (1986) Application No. 11001/84 6 *E.H.H.R.* p.91, but was again rejected.

530. *Id.* p.156.

1. The rights in relation to state schools

We have seen that the content of the right to education might include the right to schooling at the very least up to a "basic level", and potentially beyond that level to an individually determined level, perhaps with some flexible, but arbitrary age cut-off point or a limit based on the amount of education already received. In a case before the Commission of Human Rights on comprehensivisation⁵³¹ in the United Kingdom, which the Commission found inadmissible,⁵³² the Commission found that 'in the present case' there was no question of the system of secondary education ... having been organised in pursuit of any aim of indoctrination.

It seems that parental choice of content of education by choosing a particular type of school is not protected, at least in the jurisprudence of the Commission. It is clear that schools are permitted to apply academic entrance requirements.⁵³³

This was confirmed in the *Campbell and Cosans* case. The

531. *X and Y v UK* (7527/76) 11 DR 147.

532. After applying the Court's (*Kjeldsen*) 'indoctrination' test to limit the State's obligation to respect parental convictions. See also Applications 10228 & 10229/82, (1985) 7 *E.H.R.R.* 141.

533. See Application 6598/74, Council of Europe, *Digest of Strasbourg Case-law relating to the European Convention on Human Rights*, (Heymanns Verlag, Berlin, 1985) Vol.5, p.783.

'form' of the indoctrination test, though not its substance, was abandoned. The Court had balanced the general interest and the children's interest against the parent's interests to arrive at its conclusion. Thus in matters such as ability streaming, sex segregation, and comprehensivisation, the general interest, combined with the children's interests, may prevail over parental interests. This is especially so if the State tolerates or supports private education, for, as the Court held in the *Kjeldsen* case, this is a relevant consideration in assessing state respect for parental convictions.⁵³⁴ An applicant seeking the establishment of a particular type of institution in order to suit his needs would not succeed at this stage in the development of the Convention rights. The Strasbourg institutions were clearly wary of being called in to resolve bitter internal disputes⁵³⁵ in states over what educational provision the state should make. It is clear that an omission to cater to at least basic educational needs would amount to a violation of the Convention.

534. See below section VI(E)(2).

535. See for example the situations in France and Belgium, below chapters nine and ten.

2. The protection of non-state schooling

One of the things that stands out, after reading the *travaux préparatoires*, is that there was a strong desire to protect alternative schooling even though express wording to that effect was not accepted. As we have seen the second sentence of article 2P was hotly debated during the drafting of the Article. Opsahl⁽⁵³⁶⁾ considered that it encapsulated the right of the parent to refuse compulsory education where it conflicted with their religious or philosophical convictions. It implies a freedom of choice. In contrast Vasak thought the opposite⁽⁵³⁷⁾. Our conclusion was that freedom of education, and the right to establish private schools was protected by article 2P. The right of parents to educate their children at home or otherwise is also protected though subject to state regulation.⁽⁵³⁸⁾

536. Opsahl, T., 'The Convention and the right to respect for family life, particularly as regards the unity of the family and the protection of the rights of parents and guardians in the education of children,' in Robertson, A.H., *Privacy and Human Rights*, (M.U.P. 1973), p.182.

537. Vasak *op.cit.*, p.58.

538. See Wilhaber *op.cit.*, p.157, for a contrary opinion.

3. The limits to control over the curriculum

We have observed above that the horrors of Nazi tyranny were in main part the motivation for article 2P, especially its second sentence. So it is not surprising that the state's right to regulate the rights of parents and children in relation to education must be and has been narrowly construed. The minority of the Commission in the *Kjeldsen* case found that the element of compulsion in the Danish system for sex education went beyond what was permissible.⁵³⁹ But practical considerations prevailed. It was successfully argued that schooling would be impossible if parents had a general right of exemption from anything conflicting with their philosophical and religious convictions or that the state could not

539. This is in line with the general jurisprudence of the organs of the Convention where the margin of appreciation is being progressively narrowed. See Kelly, J., *op.cit.*, and Doswald-Beck, 'The meaning of the right to respect for private life under the ECHR', (1983) 4 *H.R.L.J.* 339. Also see generally Morrisson, C.L., *The dynamics of the development in the European Human Rights Convention system* (Nijhoff, Netherlands, 1981).

teach about any subject that might be controversial.⁽⁵⁴⁰⁾ Thus as long as information was conveyed in an 'objective, critical and pluralistic manner' that was sufficient to protect parental convictions. The *Kjeldsen* case permitted some offense to parental philosophical and religious convictions.⁽⁵⁴¹⁾

But parental convictions could not be used to deny the child a right to education especially a right to certain accurate knowledge as regards sexual matters. Thus both the parent and the state had their powers balanced in favour of the child's rights. The case-law of the Strasbourg institutions has not covered any other basic curriculum requirements that make up the basic right to education. Almost certainly there is a right to be taught how to read, write and speak in a national language. Knowledge to enable the child to survive in society must also be transmitted. Beyond this relative standard, the states and parents clearly have a wide margin of discretion in establishing what the content of education shall be. It must reflect a pluralistic outlook, and the present writer has argued above that there is a potential West European standard available: the right of the child itself to determine its own future.

540. It has not been considered impossible in the U.S.A., at least by the District Court in *Mozert et al. v Hawkins County Public Schools, et al.* (December 1986). (Over-ruled by the Court of Appeal (6th cir.) 827 F2d 1058. (October 1987).

541. The *Campbell* and *Cosans* case expanded what constitutes a philosophical conviction.

THE EUROPEAN DIMENSION: CONCLUSIONS

CONCLUSIONS

This is certainly supported by the European Social Charter, the philosophy behind the European Convention, and by the current wave of enthusiasm for children's rights.⁵⁴²

The next chapter analyses recent developments under the Inter-American system for the protection of human rights.

542. Marked by the drafting of the Convention of the Rights of the Child. See chapter 5 above.

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CHAPTER EIGHT: TRENDS

THE DRAFT PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

Introductory

We can observe that social, economic and cultural rights, and the rights of the child (including the right to education) are getting more popular and acceptable amongst nations. A clear indication that this is so can be seen not only within the UN where a draft Convention on the Rights of the Child is underway (Chapter five above), but also in the recent developments in the Inter-American System for the protection of human rights. The new African Charter of Human and Peoples' Rights (1986) confirms this.¹ This chapter briefly assesses some recent proposals emanating from the Inter-American Commission on Human Rights in the field of economic, social and cultural rights.

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1. See in particular articles: 17 (right to education); 18 (rights of the family); 22 (right to economic, social and cultural development). Article 25 reads:

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations are understood.

For the text and a bibliography on the African Charter see: Nowak,

M., "Introduction and selected bibliography", (1986) 7 *H.R.L.J.* 399.

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The American Convention on Human Rights⁽²⁾

Although the American Convention on Human Rights (ACHR)⁽³⁾ currently contains no provisions that grant rights concerning education⁽⁴⁾, they are not absent from the system, but are to be found in the American Declaration of the Rights and Duties of Man of

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2. See generally: General Secretariat of the Organisation of American States (OAS), *Handbook of Existing rules pertaining to Human Rights in the Inter-American System*, (OAS, Washington, 1985).
 3. American Convention on Human Rights (ACHR) O.A.S.T.S. No.36 at 1. In force July 18, 1978 (signed Nov.22, 1969).
 4. Parental rights as regards moral and religious education of their children are guaranteed in article 12(4). Article 19 states:

Every minor child has the right to measures of protection required by his condition as a minor on the part of his family, society and the state.

Article 26 talks of the obligation of the parties to adopt measures to progressively realise the "economic, social, educational, scientific and cultural standards" implicit in the Charter of the OAS (as amended by the Protocol of Buenos Aires).

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1948.⁽⁵⁾ This Declaration, although originally non-binding, has taken on binding legal force by virtue of the Protocol of Buenos Aires (1967) that amended the Charter of the OAS.⁽⁶⁾ Article XII of the American Declaration states:

Right to education

Every person has the right to education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.

Every person has the right to receive, free, at least a primary education.

This article is clearly fully in accordance with the traditions of "liberal equality" principles outlined in the

5. American Declaration of the Rights and Duties of Man of 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States. See Brownlie *op.cit.*, p.381 for text.
6. Case 2141 (U.S.), IACHR, *Annual Report, 1980-1981*, Res.23/81. Also partially reproduced in Buergethal, T, Norris, R, and Shelton, D., *Protecting Human Rights in the Americas*, (International Institute of Human Rights/Engel, Strasbourg, 1982), pp.29 et seq.

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Introduction (chapter one). Education is seen as both a socialising and a liberating event for the individual. Article XII overtly displays the liberal ideology of equal opportunity, and distribution of social goods based on meritocratic principles and natural talents.⁷

Economic, social and cultural rights

The Inter-American Commission on Human Rights (hereafter the IACHR) in its Reports on the Human Rights situation in the members states of the OAS has consistently assessed the protection given to the economic social and cultural rights found in the American Declaration.⁸ Ironically then the catalogue of rights for non-Parties to the ACHR is wider than for those who have accepted the ACHR. For example there is no protection of the right to education in the ACHR whereas it is protected by the Declaration. The Commission has used the rights protected by the U.N. Universal Declaration of Human Rights, and the International Covenant on Economic, social and

7. Clearly not in accordance with the Rawlsian difference principle.

Above Chapter One, p.19.

8. For those states not parties to the ACHR the provisions of the American Declaration are applied by virtue of Article 1(2) of the Statute of the IACHR. See OAS, *Handbook*, *op.cit.* pp.13, 105.

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Cultural Rights, to buttress its interpretation of such rights.⁹ The IACHR felt that although the Inter-American Charter of Social Guarantees (1948) and the Charter of the OAS itself include certain economic social and cultural standards¹⁰, these were not legally

9. See for example the IACHR, *The Situation of Human Rights in Cuba, Seventh Report*, 1983 Doc.OEA/Ser.L/V/II.61; Doc.29 rev.1 (4 October 1983) (OAS, 1983), p.161 et seq. (on education). In this report the IACHR found that illiteracy was the first test to assess the states implementation of the right. It was "an index of a people's potential for future educational development" (p.165). It found a 93% literacy rate, and that primary education was "practically universal". Whilst the system was praised on grounds of access, it was criticised for failing to respect parental rights as regards moral education, and choice of schools (private schools being banned)(p.173). Political discrimination was also condemned. In the *Schmidt* case before the Inter-American Court of Human Rights the Court also assessed the European jurisprudence in coming to its decision. The Court's decision (Advisory Opinion of Nov. 13, 1985, No. OC-5/85) can be found in full in (1986) 7 *H.R.L.J.* 74.

10. Including the right to education. See OAS Charter, article 47:

Article 47

The Member States will exert the greatest efforts, in

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recognised and enforceable human rights standards but rather aspirations.¹¹ It has been pressing the importance of the social, economic and cultural rights throughout the 1980's,¹² and promoting the idea of a Protocol to the American Convention on Human Rights to cover economic, social and cultural rights. In its 1986-1987 report the Commission underlined

accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:

- a. Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge;
- b. Middle-level education shall be extended progressively to as much of the population as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and
- c. Higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.

11. IACHR, *Annual Report of the IACHR, 1983-1984*, p.138.

12. Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, Doc.8 Rev.1 (26 Sept. 1986), p.195.

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the close relation between the observance of economic, social and cultural rights and that of civil and political rights, since the two categories of rights constitute an indissoluble whole, based on recognition of the dignity of the individual.¹³

The draft Protocol

The General Assembly of the O.A.S. supported the Commission, and in 1982 instructed the General Secretariat to draft an additional Protocol that would include such rights. The Commission organised a seminar in Mexico (1984) and set about drafting a code of rights and implementation procedures¹⁴ based on the Secretariat draft of 1983. In 1985 the General Assembly¹⁵ asked the Commission to submit a draft Additional Protocol, the Permanent Council was to give the opinion of the Member states on the draft, and set up a Working Group for that purpose.¹⁶

The draft itself contains three fairly lengthy articles that deal with education. The Commission took as its point of departure the fundamental nucleus comprised of labor, health and education

13. *Op.cit.*, p.197.

14. Res. 778 (XV-0/85).

15. AG/RES. 781 (XV-0/85).

16. The Working Group was set up by the Committee on Political and Juridical Affairs of the Permanent Council.

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rights.¹⁷

Article 14 states:

Right to education

1. Everyone has the right to education.
2. The State Parties to the present Protocol agree that, in general, education should be directed towards the full development of the human personality and human dignity, and ought to strengthen respect for human rights, fundamental freedoms and peace. They agree, also, that education ought to equip all persons in the task of achieving a decent existence and enabling one to participate effectively in a democratic society.
3. The States Parties to the present Protocol recognize that, in order to achieve the complete exercise of the right to education:
 - a. Primary education shall be compulsory and accessible to all without cost;
 - b. Secondary education in its different forms, including technical and professional secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
 - c. Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

17. Report 1985-1986 *op.cit.*, p.198.

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- d. Basic education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
- e. Programs of special education shall be established for the handicapped, so as to provide special instruction and training for persons with physical disabilities or mental deficiencies.

This article clearly has borrowed extensively from the International Covenants and European experience. It affirms the importance of the development of the individual and then recognises certain conditions as being essential to the securing of the right to education. Clearly for the American continent primary education comprises the essential core.⁽¹⁸⁾ Article 14(3)(a) and (d) recognise this as an essential minima. Secondary education is to be made generally available and accessible by the progressive introduction of free education. A novelty perhaps lies in article 14(3)(e) which guarantees the rights of the handicapped to special educational

18. This sensibly reflects the less developed status of the region. For example in the IACHR, *Report on the situation of Human Rights in Haiti*, of December 1979 the Commission found, (based on UNESCO statistics) that nearly 77% of the population was illiterate, and that 85% had had no schooling at all.

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programmes.⁽¹⁴⁾ This seems hardly necessary as implicit in the concept of education, which all are guaranteed, by section one of the article, is that it should be appropriate for the individual.⁽¹⁵⁾

Article 15 states:

Right to freedom of education

1. The State Parties to this Protocol undertake to respect the liberty of parents and, where applicable, legal guardians to choose for their children schools other than those established by the public authorities, provided they conform to such minimum educational standards as which may be laid down or approved by the State, and to ensure the religious and moral education of their children in conformity with their own convictions.

2. No provision of this Article shall be construed so as to interfere with the freedom of individuals and organizations from establishing and directing educational institutions, subject to the observance of the principles set forth above and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

-
19. Though this is expressed in the Declaration of the Rights of the Child, and is present in the draft Convention on the Rights of the Child.
20. Whose essential dignity and equality have been fully recognised in article II of the American Declaration, and articles 1, 3 and 24 of the ACHR.

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This guarantees the right of parents (and guardians) to choose non-state schools, to establish schools, (subject to minimum conditions of permissible state regulation) and to ensure that religious and moral education of their children is in conformity with their own convictions. As this is a traditional type of negative liberty, the Commission has proposed that it be made subject of the individual petition procedure set forth in the ACHR.⁽²¹⁾ The article, by its wording (para.2), guards against the problem of this "new right" being used to deny its existence for those states who do not accept the new protocol.⁽²²⁾

Article 7 on the just and satisfactory conditions of work details in section (d) that the work day of minors under the age of sixteen

will be subordinated to the provisions regarding compulsory education and in no case will it constitute an excused absence from classes or a limitation on benefitting from education received.

This seem weaker than the provisions in the European Social Charter. Though the last phrase is similar to that used in the European Social Charter, the reference to excused absence implies that all other hours are open for the child to work. It would be better to drop that phrase as being included in the wider notion of "no permissible limitation on the benefits of education". This would strengthen the

21. See the proposed article 21 of the Additional protocol.

22. See The European Dimension, p.493.

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article.

Education is also recognised as important in the context of the right to health.⁽²³⁾ It is also featured in article 17 on the rights of the family, section (3)(b) of which guarantees children adequate nutrition "both during nursing and while attending school", and section (c) of which declares:

- ... c. To adopt special measures for the protection of adolescents in order to guarantee the full development of their physical, intellectual and moral capacities.

Article 18 further expounds the rights of the child and includes the sentence:

Every child has the right to free and compulsory education, at least in its basic phase, and to continue at higher levels of the education system.

Article 20 on the protection of the disabled, guarantees them the

23. Article 11(2)(e) states:

...

- 2. To that end, the States Parties undertake to recognize health as a public good and in particular to guarantee this right by means of the following:

....

- e. The education of the population concerning the prevention and treatment of health problems;

...

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right "to fully develop their personality".

The Protocol is to be monitored by the Commission which may make reports, and ask the state to submit reports. Clearly in these reports the Commission will highlight any perceived deficiencies in individual states.

Conclusion

The Additional Protocol has not yet been finalised let alone adopted. However it provides clear and convincing evidence that the right to education is considered to be of fundamental importance. The method of protecting it, under the proposed Protocol, reflects the level of education generally reached in Central and Latin America. The U.S.A. has not ratified the ACHR and is unlikely to do so. The current government will not accept the proposed Additional Protocol.

Under the Protocol primary education is to be fully ensured and access to higher levels progressively increased. It recognises that education should promote a pluralistic society, and specifically guarantees the freedom to establish schools independent of the state, though subject to minimum conditions imposed by the state. As to content or specific level the child is guaranteed access, and individual development is recognised in article 14.⁽²⁴⁾ This is reinforced by the Preamble, paragraph six

Bearing in mind that, although fundamental economic, social and cultural rights have been embodied in earlier international

24. Also in article 17 on the rights of the disabled.

TRENDS: THE INTER-AMERICAN SYSTEM:

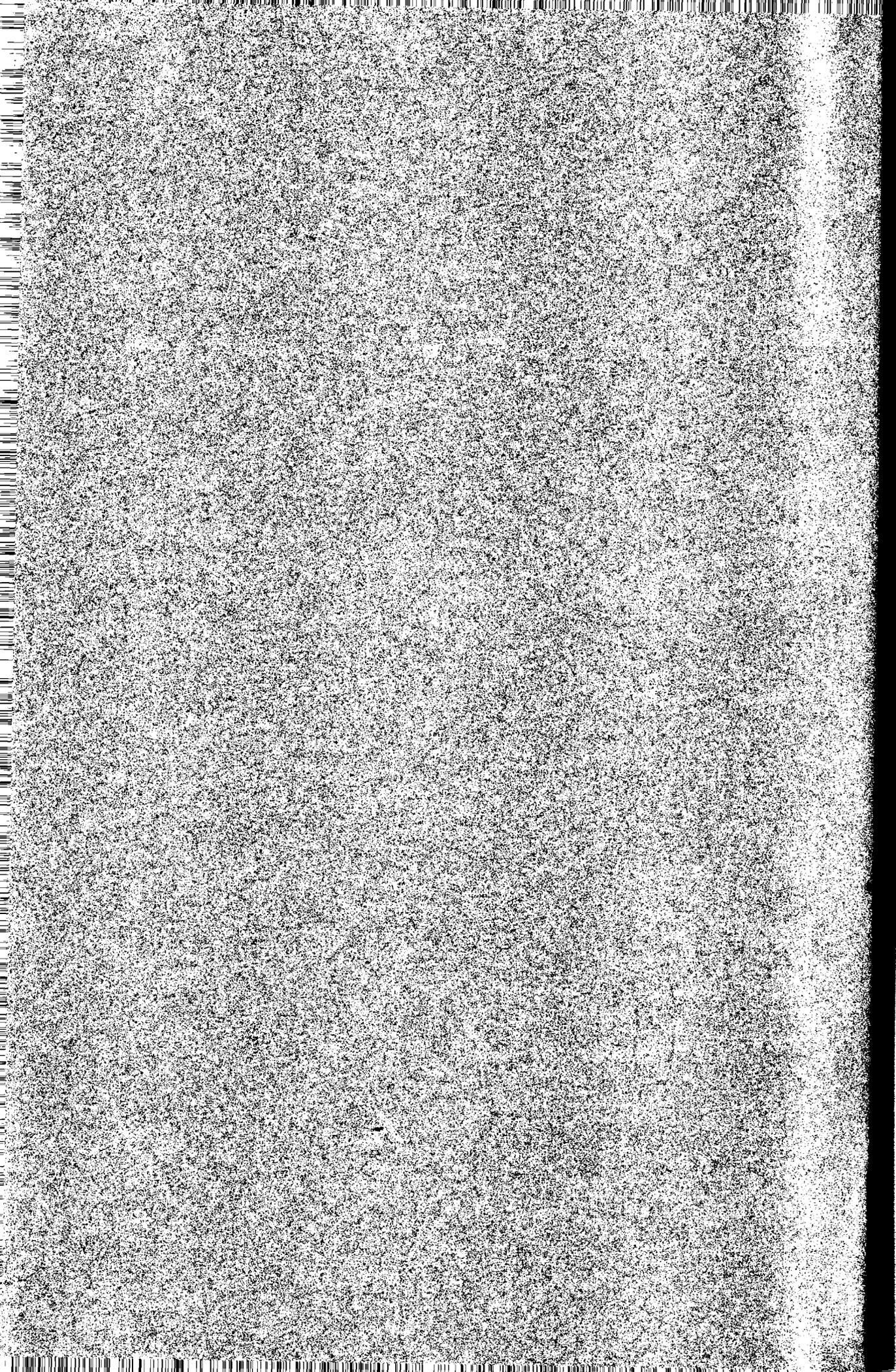
instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed and perfected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal, in accordance with international law, of their wealth and natural resources; ...

These aspects of the draft Protocol will allow an expansive and evolutive interpretation to the right as the level of educational development progresses. The Protocol as currently drafted seems to support the present writers contention that the right to education has been emerging from its civil-political rights classification shell.²⁵

We now turn to assess the legal position of the right to education in three West European states.

25. See further Part Four chapter, twelve, section III(B)(2).





THE RIGHT TO EDUCATION

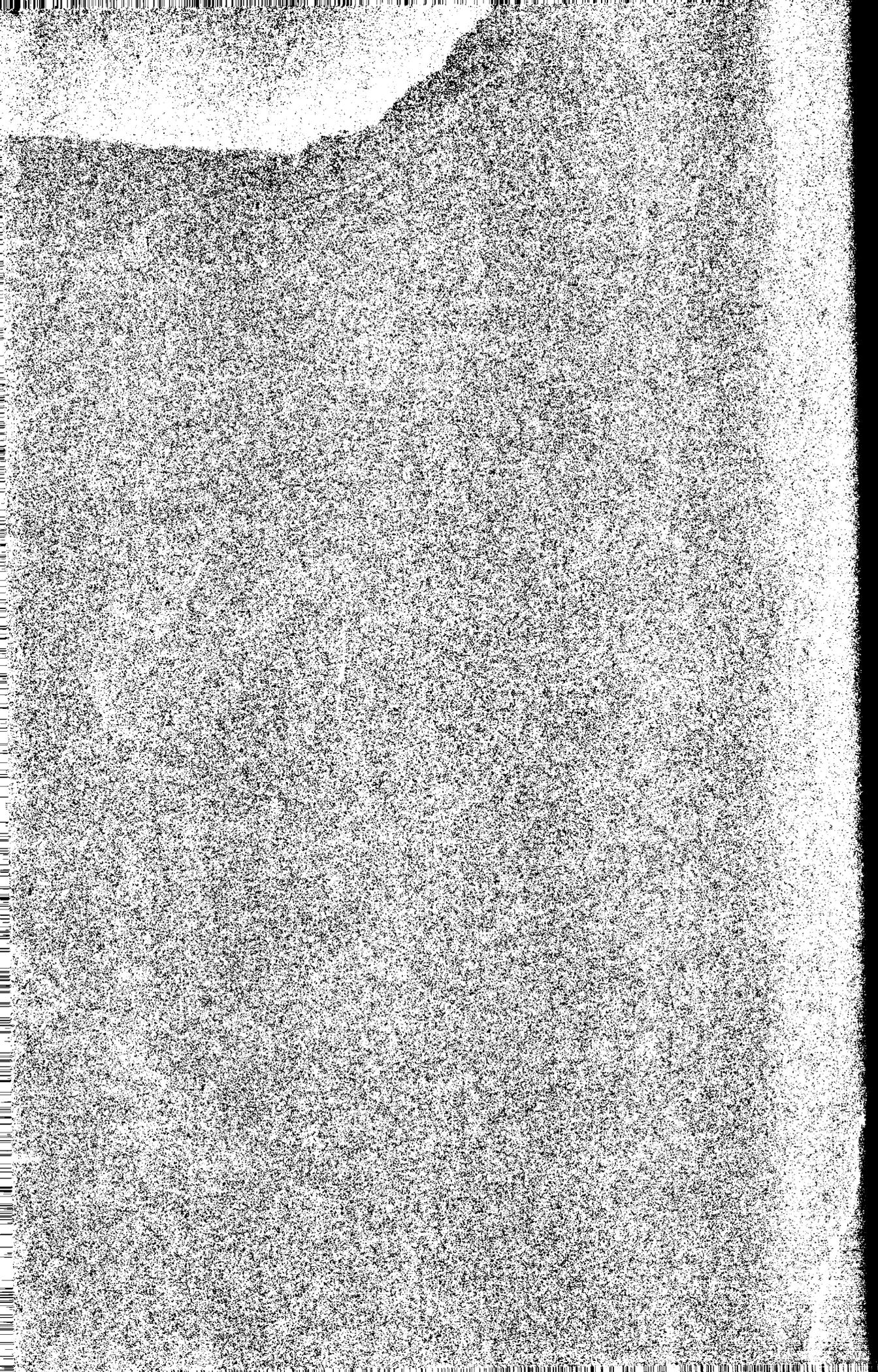
An Analysis of International Law concerning the Right to
Education and Its Application in Belgium, France and Ireland

by

JULIAN LONBAY

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Thesis submitted for assessment with a view
to obtaining the Degree of Doctor of the
EUROPEAN UNIVERSITY INSTITUTE
FLORENCE, ITALY



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THE RIGHT TO EDUCATION

An Analysis of International Law concerning the Right to
Education and Its Application in Belgium, France and Ireland

by

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VOLUME 3

Thesis submitted for assessment with a view
to obtaining the Degree of Doctor of the
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PART THREE

THE NATIONAL SYSTEMS

INTRODUCTION TO PART THREE

INTRODUCTION

This part of the thesis examines three West European countries to analyse how they have coped with educational rights. The choice of continental countries to study was influenced by the writer's linguistic abilities and the availability of source materials in England where much of the research for this thesis was undertaken. France was one the states chosen to be studied. One can justify examining the French system for several reasons. Firstly it was, and is, an extremely influential system on the continent of Europe. Secondly France and the French to a large extent popularised various key concepts relating to educational rights. Thirdly, as the history of both the legal and educational systems show, the distribution of rights in the sphere of education was and still is key political issue. The position in France is considered up until the end of 1986.

Belgium is also examined in this thesis. The present writer's interest in the whole subject was first developed on reading the *Belgian Linguistic cases* judgment of the European Court of Human Rights. Since 1831 freedom in education has been written into the Constitution. The linguistic wars that still shake the country and its history of scholastic battles over the role of religion and language in education also make it of interest. However the examination of the Belgian regime is only taken until the end of 1982. This is primarily because there were insufficient library resources to hand.

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The third state is the Republic of Ireland. Several considerations caused the writer to choose Ireland as a country to examine. Firstly Ireland has a common law basis to its legal system onto which has been grafted a rigid Constitution. This alone makes it an object of fascination for anyone interested in constitutional law and trained in the United Kingdom. Furthermore the Constitution adopted included a set of fundamental rights. These fundamental rights place a strong reliance on natural law and include a very strong emphasis on family and educational rights. The aspects take up over half of the constitutional provisions on fundamental rights. Further factors add to this enticing mixture; an acceptance of the main treaties enshrining the right to education; an unusual schooling system by which the state itself runs a total of only 12 national schools, a system that allows a strong religious influence to permeate schools and that has been described by one commentator as "theological totalitarianism" and yet is considered successful because of the absence of any "scholastic wars"; a system that seeks to use the schools to revive a language whose usage had been decimated by the "adoption" of English. These factors make Ireland an object worthy of study in a thesis that attempts to assess the meaning and impact of a right to education. The position of Ireland is taken up until mid-1987.

There is a certain chicken and egg dilemma in describing the evolution of an educational system. Large portions of how the system currently operates critically depend on the Constitutional, statutory

INTRODUCTION TO PART THREE

and general legal background, and yet in these country studies the legal system itself is not analysed until after the establishment of the educational system has been discussed. Reversing the order of the sections would not resolve this dilemma as to examine how the legal system treats educational questions without first explaining the nature of the educational system is probably a worse alternative. This work attempts to resolve this dilemma by leaving some of the more legalist aspects of the analysis to be dealt with in the third section of the chapters entitled Education and the Law. The writer has attempted to provide a fairly extensive cross-referencing where necessary.

The legal position is hopefully accurate until the times stated above for each country. Wherever possible later events of significance have been included.

PART THREE

CHAPTER NINE: FRANCE

SECTION ONE
EDUCATIONAL SYSTEM
HISTORICAL PERSPECTIVE

A. INTRODUCTION

In this Chapter, which sets out the background of the French schooling system and the relevant legal provisions, it is proposed to highlight in particular some of the detailed proposals that derive from the French revolutionary period (at the end of the eighteenth century). The ideas emanating from this period are still influential. The period popularised various educational ideas, and some ideas of rights in education can be traced back to this time. Whilst placing more emphasis on that particular period, it is also the intention to deal, rather more thoroughly than will be the case with Belgium, with the historical evolution of the French educational system, treating it as an example of the problems found in continental catholic Europe. It was a system that exercised great influence and for that reason deserves rather more complete treatment.

B. HISTORICAL PERSPECTIVE

The evolution of the French school system from the Middle Ages to the present day represents a most fascinating picture.

In France, . . . the Christian Church has from the earliest times

recognised the duty, and asserted the right, of organising and controlling public education. (1)

Ce qui frappe avant tout dans l'enseignement populaire de l'Ancien Régime, c'est la place occupée par l'église

-
1. Arnold, M., *The Popular Education of France*, (Longman, Green, Longman and Roberts, London, 1861), p.8. Arnold can be considered an authoritative contemporary commentator on the French educational system in the 19th century. He was the foreign Assistant Commissioner of the Newcastle Commission (1861) instructed to check on the French, Swedish and Dutch systems. He was also assistant Commissioner to the Schools Enquiry Commission under Lord Taunton, with special responsibility for France, Germany, Sweden and Italy. In 1885 he dealt with the questions of free, compulsory and teacher training education for the Department of Education. He is recognised as one of the earliest writers dealing with comparative education. See Anderson, C, A., 'Methodology of Comparative Education', (1961) 7 *Int.Rev.Ed.*, 1 at p.1. Generally Fitch, Sir Joshua., *Thomas and Matthew Arnold, and their influence on English Education*, (Heinemann, London, 1905

catholique.⁽²⁾

Thus in Rheims. *une des grandes métropoles religieuses de l'Occident*, Saint Remi, Bishop of Rheims for more than seventy years, from 495 AD, believed in and promoted elementary education in his parishes.⁽³⁾

In the sixth century, barbaric invaders from the Germany coincided with the founding of many monasteries - learning fled to quiet spots. Monastic and cathedral schools were starting. On March 23 799, by Capitulary, Charlemagne ordered that:

the servants of God shall minister not only to young serfs but also to the sons of freemen. Children's schools be established for the teaching of reading. The Psalms, music, singing, arithmetic, and grammar shall be taught in all monasteries and bishoprics.⁽⁴⁾

In fact Charlemagne tried to restore much of what had already

2. Gontard, M., *L'enseignement primaire en France, de la Révolution à la loi Guizot*, (Ministère de l'Éducation Nationale, Lyon, 1959) Thèse principale pour le doctorat des Lettres, p.6.
3. Devèze, M., 'L'enseignement en Champagne, in Actes du 95e Congrès National des Sociétés Savantes, *Histoire de l'enseignement de 1610 à nos Jours*, (Bibliothèque Nationale, Paris, 1974).
4. Debiesse, J., *Compulsory Education in France*, (UNESCO, Paris, 1951), p.11.

existed in the sixth century, created by Bishops.⁽⁵⁾

Such injunctions were generally not adhered to. Louis the Pious, in a Capitulary of 825 exhorted the Bishops:

Do not neglect to organise schools well, so that they teach the sons and ministers of the church properly, as you have promised us this before at Attigny, and as we have ordered you to do it ...⁽⁶⁾

The church's need for clergy was the primary motive for their promoting any education⁽⁷⁾, although, after the Reformation, basic indoctrination in catechism and faith could also be safely imparted through schools for the poor.⁽⁸⁾

Pierre Riché indicates that the state did play a role in education, not only by exhorting the Church to create its own schools, although there is only limited documentary evidence to establish to what extent such schools were created. The Gregorian

5. C'est Charlemagne ... qui prit les mesures les plus importantes en faveur de la restauration des écoles.

Riché, P., 'Les écoles de l'Etat en Occident du Ve au Xe siècle', in Preaux, J., (ed.), *Eglise et enseignement*, (Université Libre de Bruxelles, Bruxelles, 1977) p.37.

6. Riché, *op.cit.*, p.39 Translated from the French.

7. Gontard, *op.cit.*, p.6 ... leur enseignement orienté vers la satisfaction des besoins du culte catholique et la formation des clerks.

8. Chartier, Julia et Compère, *L'éducation en France du XVIe au XVIIIe siècle*, (C.D.U et Sedes, Paris, 1976) pp.54-57.

reform of the Church left the Bishops more independent of the 'Princes', and thus in charge of the Episcopal and Parish schools.

Il faut attendre le XIVe et le XVe siècles pour que les rois et les empereurs, profitent d'une nouvelle crise de l'Eglise, reprennent leurs droits sur les écoles ... et mettent les institutions scolaires au service de l'Etat.⁽⁷⁾

The third Lateran Council of 1179 decreed that each cathedral should appoint a teacher to instruct the poor. A precentor was to be in charge of such appointments. Such schools as were created were sparsely attended however.

The sixteenth century was one of the transition. The surge of the Reformation, and the tides of humanism threatened to demolish the Catholic Church's monolithic grip on society. The Catholic Church:

which had control of education, was the most effective instrument for combatting the heresies of the Reformers; this is one of the reasons at any rate for the revival of interest in elementary education at this period.⁽¹⁰⁾

The Council of Chartres 1526 recommended that every Parish should have a free school. The Ordinance of Orleans, 1560, renewed the prescription of the Third Lateran Council, adding that the precentor should be jointly appointed by the municipality and the Church.

9. Riché, *op.cit.*, p.45.

10. Barnard H, C., *The French Tradition in Education*, (C.U.P., Cambridge, 1922), pp.42-3.

However enforcement was impossible as there were insufficient funds, and consequently teaching was held in low esteem. There was little popular desire for education.

Michel de Montaigne decried the dull memory-exercises that comprised most of the education at this time:

Je retombe volontiers sur ce discours (sujet) de l'ineptie de notre institution (éducation). Elle a eu pour sa fin de nous faire non bons et sages, mais scavons: Elle y est arrivée. Elle ne nous a pas appris de suyvet embrasser vertu et la prudence, mais elles nous en a imprimé la dérivation et l'etymologie...⁽¹¹⁾

Talking of how his ideal governor would teach in a letter to Madame Diane de Foix, Comtesse de Gurson, written in late 1579, he wrote:

Qu'il ne luy demands pas seulement compte des mots de sa leçon, mais du sens et de la substance, et qu'il juge du profit qu'il aura fait, non par le tesmoignage de sa memoire, mais de sa vie.

Memory without understanding is like vomited meat, undigested by the stomach.⁽¹²⁾

The religious character of education was typified in the schools of the Society of Jesus. Recognised by the Pope in 1540, the Jesuits were

11. Montaigne, *Essais*, édition de M. Rat (Guarniers, Paris 1962) vol. 2, p.64.

12. Montaigne, *id*, Vol. 1, p.161.

the spearhead of the militant Catholic Church and their educational aims and policies were entirely subordinated to the ends of the spiritual supremacy of Rome.⁽¹³⁾

The Protestants too realised the value of schooling.⁽¹⁴⁾ In 1552 the parlement of Paris forbade any protestant to teach, and took measures against unlicensed *petites écoles*. Towards the end of the sixteenth century, under the aegis of Calvin, the protestant schools in France really began to spread. Sporadic outbreaks of civil war between the Huguenots and Catholics hindered but did not stop their development. In 1593 the Ordinance of Nantes granted the protestants the right to educate their children in their own schools. In 1595 the Jesuits were banned from France, and Huguenot education really leapt forward. (The famous Edict of Nantes 1598 freed them from all civil disabilities and disallowed religious discrimination).

However this state of affairs did not last long, the Jesuits were soon readmitted into France, and the seventeenth century was one of war fare and persecution. When the Huguenots were banned from creating or using their own schools, they resorted to *écoles buissonnières* an extraordinary parallel to the hedge schools of Ireland.⁽¹⁵⁾

The burdens which the reign of Louis XIVth was destined to

13. Hans, N., *Comparative Education*, (R.K.P., London, 1958) p.107.

14. See Luther's 'Sermon on the necessity of sending children to school', 1530, cited by Gontard, *op.cit.*, p.9.

15. See Ireland, Historical Perspective, p.867.

bring upon the Huguenots, and the renewed persecutions which they were soon to endure, rendered the proper maintenance of their educational works well-nigh impossible. (16)

In 1685 the Edict of Nantes was revoked. The government of Louis XIVth on December 13th 1698 issued a Royal Edict proclaiming that all the children of heretics (aged over five years old) should be taken from their families, and be brought up in catholic schools. As these schools did not yet exist, a taxing power was granted to pay for the teachers. In fact this measure was never actually put into effect, and was re-enacted in 1724. However this episode indicates an awareness of the formative power of education, and the politico-religious uses to which it might be put. Such legislation was not unique to France. (17)

The experience of the Huguenot schools had awakened a realisation of the importance of schooling. During the seventeenth century many Teaching Orders sprang up. In 1611, Pierre de Berulle had founded the Oratorians in France. (18) Originally a seminary for the improvement of clerical education, under de Condren, his successor, its secular teaching increased. The Oratorians were essentially gallican and national. They introduced history into their curriculum, although they did not go so far as to use the

16. Barnard, *op.cit.*, p.102.

17. See chapter 11, Ireland, Historical Perspective, p.867.

18. In 1612 he received Royal Letters, and in 1613 a Papal Bull of Confirmation.

vernacular.

Possibly the most important of the new societies, was that founded by Jean-Baptiste de la Salle, canon of the cathedral church of Rheims, in 1684, *l'institut des Frères des Ecoles Chrétiennes*, or, more commonly known as the Christian Brothers (Ignorantins being a nickname that was often used in contemporary France). De la Salle is considered the inventor of the 'simultaneous method' of teaching (class teaching), and his methods were related to reality. Thus he used French in teaching, and in learning to read and write pupils used 'decent Christian texts'.⁽¹⁹⁾ In 1724 the Christian Brothers received the Bull of Papal confirmation and approbation. By 1785 they were teaching approximately 30,000 pupils. Temporarily dispersed during the Revolution, when reconstituted they were practically left in charge of primary education. In 1848 they had 19,414 schools, teaching 1,354,156 children.⁽²⁰⁾ Especially in the towns charity schools were established. In Paris the *Maîtres-écrivains* were constantly trying to enforce their teacher-licensing

19. See Zind, P., 'La méthode pédagogique de Jean-Baptiste la Salle au début du XVIIIe siècle', and Prevot, A., 'Une pédagogie réaliste et adoptée: Jean-Baptiste de la Salle et ses disciples', both in *Actes du 95e Congrès National des Sociétés Savantes, Histoire de l'enseignement de 1610 à nos Jours*, (BN, Paris, 1974).

20. C.f. Edmund Rice and the Irish Christian Brothers.

powers granted by their Letters Patent (1970).⁽²¹⁾

The eighteenth century was one of enlightenment. The ideas of Locke and Comenius on the childishness of children, and the importance of early childhood education had started seeping into public awareness, largely through Pousseau's book *Émile*.⁽²²⁾ As the century progressed an increasingly anti-clerical fervour, especially pronounced amongst the philosophes, was evident. In the 1750's many of the *Parlements* started attacking and banning the Jesuits, the symbol of dogmatic and ultramontane christianity.⁽²³⁾ In 1762 Louis-René de Caradeuc de la Chalotais, the first to adumbrate the modern lay and national systems of education.⁽²⁴⁾ wrote the *compte-Rendu des constitutions des jésuites* for the *Parlement* of Rennes, an important and influential document, helping to cause the downfall of the Jesuits. Rolland d'Erceville, President of the Paris *Parlement*, presented a scheme for national education to the parlement in 1768. The banishing of the Jesuits in 1762 had left a large gap in educational provision, hence the spate of plans that appeared around

21. Chartier, Julia and Compère, *L'éducation en France du XVIIe au XVIIIe siècle*, (C.D.U. et Sedes, Paris, 1976) pp.54-57.

22. There were of course many other who spread these ideas. See Axtell, J.L., *The Educational Writings of John Locke*, (CUP, Cambridge, 1968).

23. They also attacked the Jesuits for their strict curriculum.

24. Barnard H. C., *op.cit.*, p.233; also Mallinson, 'Church and State in French Education', 1966 *World Yearbook of French Educat*

this time.⁽²⁵⁾ At this time many new *conservatoires* were created. In 1775 Anne-Robert-Jacques Turgot included plans for an educational system in a memorial on municipal organisation.⁽²⁶⁾ He was dismissed the following year and nothing became of the plan.

Although education was increasingly the subject of public debate, and a national or state involvement in education was more and more recognised as necessary, universal education was not generally recognised as a desirable goal.

Locke, in many ways the forerunner of modern educational thought, considered that

'... of all the men we meet with, nine parts of ten are what

25. Chartier *et al. op.cit.*, p.208 write that between 1762-1765 35 books on education were published.

26. Mark Bouloiseau attributes this *Mémoire sur les Municipalités* to Du Pont de Nemours.

Le *Mémoire* eut un destin mouvementé que nous avons exposé dans une conférence récente à la faculté des lettres de Nice. Il a été inséré dans les *Oeuvres de Turgot*, publiées et annotées par G. Schelle, p.578-621.

Bouloiseau, M, 'Du Pont de Nemours et l'éducation nationale', in Actes du 95e Congrès Nationale des Sociétés Savantes, *Histoire de l'enseignement de 1610 à nos Jours*. (B.N., Paris, 1974) p.172 and footnote 3.

they are, .. by their education'.⁽²⁷⁾

Locke nonetheless did not believe that all should be educated. Most of the *philosophes*, including Voltaire, considered that state responsibility for education did not entail provision of equal education for everybody, as this would raise the expectations of the masses, who would become dissatisfied with their lot.⁽²⁸⁾ La Chalotais also wrote, in 1763, *Essai d'éducation nationale ou plan d'études pour la jeunesse*, in which he emphasised the need for good textbooks, and limited universal education. He reasoned that:

Parmi les gens du peuple il n'est presque nécessaire de savoir lire et écrire qu'à ceux qui vivent par ces arts du à ceux que ces arts aident à vivre.⁽²⁹⁾

Even Rousseau wrote:

Ceux qui sont destinées à vivre dans la simplicité champêtre n'ont pas besoin pour être heureux du développement de leurs facultés et leurs talents enfouis ... N'instruisez point

27. Locke, 'Some Thoughts Concerning Education', in Axtell *op.cit.*, p.114.

28. Trenard, L., 'Les finalités de l'enseignement primaire de 1770-1900', in Actes du 95e Congrès National des Sociétés Savantes, *op.cit.*, p.38.

Les philosophes et les constituants ... ne croient pas en la vertu d'une instruction généralisée.

29. Chalotais, *op.cit.* in text, p.26, quoted by Chartier *et al.*, p.38.

l'enfant du villageois car il ne lui convient pas d'être instruit.⁽³⁰⁾

One can agree with the conclusions of Chartier, Julia and Comère that:

L'hostilité des élites administrative et politique à une scolarisation massive de la paysannerie constitue un courant majeur qui traverse le XVIIIe et le XIXe siècles.⁽³¹⁾

Jean Debiesse estimated that 'primary education at the end of the eighteenth century was a luxury reserved for less than forty percent of the children in the country'.⁽³²⁾ Professor Gaudemet considered that:

... la diffusion de l'enseignement élémentaire et sa qualité étaient d'ailleurs très inégales dans la France de 1789.⁽³³⁾

Dominique Julia, examining the results of a questionnaire sent out to parishes in the diocese of Rheims by the co-adjutor, Alexandre-Angélique de Talleyrand-Périgord at the end of 1773, found a wide disparity in responses to the two articles containing questions on the state of education. Her conclusions support the contention that what education existed was very unevenly distributed, even in the

30. Rousseau, *La Nouvelle Héloïse, Oeuvres Complètes*.

31. Chartier et al., *op.cit.*, p.37.

32. Debiesse, *op.cit.*, p.15.

33. Gaudemet, J., 'Le droit à l'éducation', tiré à part de "L'enfant" *Recueils de la Société Jean Bodin*, T.39 (1975), p.50.

area of Champagne that was generally considered to have a high density of educational facilities.³⁴ Secondary education by contrast

étaient très également réparti sur toute la surface du territoire. ...

(et était) sous l'ancien régime et sans qu'il coûtât presque rien au trésor, dans un état de prospérité ou il n'est parvenue de nos jours qu'au prix de longs efforts et de grands sacrifices.³⁵

The French Revolution was a period rich in educational projects, laws and ideas.³⁶ Many of the ideas of the *Lumières* were declared and legislated upon. But in practice little was actually accomplished. Matthew Arnold asked Guizot (who had been Minister of Education under the July monarchy) what he thought the French Revolution had contributed to popular education, he replied:

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34. Julia, D., 'L'enseignement primaire dans le diocèse de Reims à la fin de l'ancien régime', in Actes du 95e Congrès National des Sociétés Savantes, *op.cit.*, Also Zeldin, T., *France 1848-1945: Intellect and Pride* (CUP, 1980) p.143.
35. Duruy, A., *L'instruction publique et la Révolution*, (Hachette Paris, 1882), p.26-7.
36. Mirabeau, Talleyrand, Condorcet, Lathenas, Romme, Lepeletier, Daunou, Sieyes, and Chaptal, all, *inter alios*, either put forward or defended plans for education. It is not intended to go into the details of all these plans here.

Un déluge de mots, rien de plus. (37)

One could add that the Revolution had only destructive effects in the short term.

Après avoir jeté bas toutes les fondations de l'ancien régime, constituants, législateurs, et conventionnels entreprennent successivement d'élever sur ses ruines un monument grandiose, et s'épuisent en d'interminables et fastidieux efforts sans y parvenir. (38)

Many of the *Cahiers de Doléances* had included pleas for the establishment of an educational system, though not necessarily a state-run system.

Quand on parcourt les cahiers présentés par les Etats Généraux, on est frappés de voir combien sont nombreuses les communautés qui demandent la création d'un plan d'éducation nationales. (39)

However the first acts of the revolutionaries, in educational matters, were to destroy its financial basis, by abolishing tithes (4th August 1789, 20th April 1790), and confiscating the property of the clergy (2nd November 1789). Seigneurial dues and the octrois, an indirect tax, were also abolished. The suppression of the Teaching

37. Arnold, *op.cit.*, p.33.

38. Duruy, *op.cit.*, p.51.

39. Grimaud, L., *Histoire de la liberté d'enseignement en France; depuis la chute de l'ancien régime jusqu'à nos jours*, (Université de Grenoble, 1898), p.6.

orders, and the imposition of the Civic Oath on the clergy disastrously reduced the teaching force.⁴⁰

*La Révolution ... ne voulut rien conserver du passé*⁴¹, it swept the plate clean, and then was unable to refill it. All educational endowments were confiscated (Decree March 8th 1793). The grip of the Church on education was destroyed. Education was destroyed. The Revolution legitimised and to some extent gave birth to the idea of state endeavour in the educational realm. Thus were spawned the seeds of future conflict, and the consequent evolution of French conceptions on *la liberté de l'enseignement*.

The Declaration of the Rights of Man and of the Citizen published on the 26th August 1789, did not include the right to education in its provisions, although it might be considered an implicit requirement - if all men were to help form the law, personally or through their representatives. Title One of the Constitution of 1791, *alinea 11* declared:

Il sera créé et organisé une instruction publique commune à tous les citoyens, gratuite à l'égard des parties d'enseignement indispensables pour tous les hommes et dont les établissements seront distribuée graduellement, dans un

40. From March 22nd 1791, the oath was imposed on all teachers.

Grimaud, *op.cit.*, p.22.

41. Duruy, *id.*, p.55.

rapport combiné avec la division du royaume.⁴²

Throughout the Revolutionary period, despite the chaos raging all around, Committees of the various Assemblies considered the question of public education. The first report to appear was presented by Talleyrand, ex-bishop of Autun, to the Constituent Assembly on September 10th, 11th and 19th 1791, just before it dissolved itself.

The Report was referred to the Legislative Assembly. It recommended universal compulsory primary education. This was to be gratuitous, although the first stage there would be a generous scholarship system. Pupils for secondary education were to be selected on their merit. A secular morality was to pervade the schools. He did not recommend a state monopoly of schools.

car c'est du concours et de la vivacité des efforts individuels que naîtra toujours le plus grand bien.

Thus he was in favour of *liberté d'enseignement*.⁴³ No action was taken on the Report. The Committee of Public Instruction of the Legislative Assembly presented its Report on the 20-21 of April 1792, through the Marquis of Condorcet.⁴⁴ It recommended gratuitous universal education, but did not advocate a public monopoly of educational provision, because the competition of private

42. Godechot, J., *Les Constitutions de la France depuis 1789*.

(Garnier-Flammarion, Paris, 1970), p.37.

43. Talleyrand, *Archives Parlement* t. XXX (Harper, N.Y.) p.448.

44. See section three below.

schools would keep the state system on its toes, and would ensure the freedom of thought. They recommended that there should be a primary school teacher for every village of four hundred or more inhabitants. There should also be a network of secondary schools, also gratuitous, but less densely distributed (One per town of 4,000 plus.)

Institutes and Lycées, crowned by a National Society of Sciences and Arts, would complete the system. Religious teaching would be replaced by ethical teaching. In fact the State's role in this system would be limited to that of paymaster. Condorcet recognised that education of the people was necessary for a true democracy.

Les hommes ne sont rassemblés en sociétés que pour obtenir la jouissance plus entière, plus paisible et plus assurée de leur droits naturels, et, ... on doit y, comprendre celui de veiller sur les premières années de ses enfants ... (47)

War with Austria was declared as Condorcet was introducing the Report. No action was taken by the Assembly on the Report, and the king's veto on war legislation in June (1792) and the subsequent *chute du trône* led to the dissolution of the Legislative Assembly and the creation of the Convention. The trial and execution of Louis XVI and the drafting of the new Constitution did not stop the Convention from decreeing on 12th December 1792 that

Les écoles primaires formeront le premier degré

45. Guillaume, *Procès-verbaux du comité de l'instruction publique sous l'Assemblée législative. (Imprimerie Nationale, Paris 1889)*, p.231.

d'instruction. On y enseignera les connaissances
vigoureusement nécessaires à tous les citoyens...⁽⁴⁶⁾

On December 18th Lathenas, a member of the Committee of
Public Instruction, presented a Plan that recommended obligatory
primary schooling for four years, to be provided by the Communes.

The discussion got out of hand until Marat on December 18th observed

Vous rassemblez à un général qui s'amuserait à planter,
déplanter des arbres pour nourrir de leur fruits des soldats
qui mourraient de faim.⁽⁴⁷⁾

His plan was reduced to one article declaring the function of the
primary schools, and their teacher's title, *instituteur*. Two days
later Romme presented a Report recommending a two-tier system which
was criticised by Leclerk for not making the education compulsory.
Leclerk considered that all those who might refuse to send their
children to state schools to be either aristocrats or sacerdotal, and
thus they should be deprived of their rights. No action was taken on
either of these two initiatives. The Girondin/Jacobin conflict was
near to bursting into violence as the *Déclaration des Droits* was
adopted in May 1793; a compromise document. Article 22 of the
Declaration read as follows:

L'instruction est le besoin de tous. La société doit

46. Hippeau C. *L'instruction publique en France pendant la
Révolution*, (Didier & Cie, Paris, 1883), t.ii pp.2-3.

47. Hippeau, *id.*, p.29.

favoriser de tout son pouvoir les progrès de la raison publique, et mettre l'instruction à la portée de tous les citoyens. (48)

On 30 May 1793 another Decree declared free and obligatory instruction. In June the downfall of the Girondins, left the Jacobins in power, and shortly thereafter a new Constitution was adopted, and endorsed by public referendum.

Le principal mérite de la Constitution de 1793 ne réside pas dans ces possibilités d'application. Il tient surtout dans les principes qu'elle a proclamés pour la première fois (les droits sociaux)... (49)

Amongst these droits sociaux were guaranteed, à tous les Français une instruction commune (Art, 122).

A project for a National System of Education drafted by Sieyès, Daunou and Lakanal was dismissed by the Jacobins (Gontard Duruy), but a project found amongst the papers of the 'martyr' Louis-Michel Lepeletier, ex-Marquis de Saint-Fargeau (assassinated by a Royalist after voting for the execution of the King), was read to the Convention by Robespierre on July 13th. Albert Duruy considered that the project was

un mauvais pastiche, un mélange de rudesse .. prenez ... ce travail et pressez-le tant que vous voudrez vous n'en ferez

48. Godechot, J., *id.*, p.82.

49. Godechot, J., *id.*, p.76.

pas sortir une idée juste et raisonnable.⁽⁵⁰⁾

This radical project radiated equality and suggested the creation of *Maisons d'égalité*. Children belong to the Nation, and not to parents, thus all should be educated away from home, issued with the same clothes and made to eat the same food. Manual labour was to be a major part of the curriculum. The programme was criticised for the expense that it would entail, and after being modified to allow for non-boarders, a Decree was passed initiating the system of August 13th 1793 ... of course it was never implemented. This was the time of the Reign of Terror, civil war and foreign invasion disrupted the country.

[L]a période qui suit n'offre à l'histoire qu'une succession de projets incohérents, et de débats aussi pauvres de forme que de fond.⁽⁵¹⁾

Revolutionary fervour declared that schools were unnecessary. People should learn from real life, membership of political clubs, and national Fetes. On October 21st 1793 another decree was passed (Romme's), which was little more than a copy of Condorcet's. Education was to have been universal and gratuitous at the primary level ... Priests and nobles were to be excluded from education. On the 19th December 1793 the Bouquier Decree declared compulsory schooling. It allowed independent schools to be set up by all certified as having *bonnes moeurs* and *civisme*. This decree

50. Duruy, *id.*, pp.93-94.

51. Duruy, *id.*, p.97.

fut loin d'atteindre le but qu'elle poursuivait.

L'instruction universelle...

In fact decrees flew thick and fast, and none of them were ever implemented.

During this time the 'requirements indispensable for all men' reached their apogee. The Decree of 17 November 1794 (Lakanal/Sieyes) replaced the Bouquier Decree which would have established the teaching of geography, history, Republicanism, and physical exercises, military drill, and visits to hospitals and factories, in all primary schools. In June 1794 the Cult of the Supreme Being had been unleashed, a republican religion, replete with catechisms and hymns. It appears not to have taken root, although its influence must not be underestimated.

The next educational Decree of the Convention was based on Lakanal's Report (December 16, 1794, adopted on 25 February 1795), it decreed the establishment of Central Schools, secondary schools of which there were to be one per 300,000 of the population.⁵²

In April 1795, Commissioners (including Lakanal) that were investigating the state of education in the country were shocked by its dismal barbarity. After the downfall of Robespierre the Thermidorians set about drafting a new Constitution that would help

52. [Mais il fallut attendre un an, deux ans, parfois trois selon les lieux, avant d'organiser ces écoles et de trouver surtout les enseignants capables, ... et républicains.

Devèse, M., *op.cit.*, p.22.

to secure the advantages gained by the bourgeoisie. Thus Universal Suffrage was abandoned in favour of a property qualification (those who paid a direct tax). It was promulgated on the 22 August 1795. Many of the social rights, including the right to education were omitted from the *Declaration des droits et des devoirs de l'homme et du citoyen*. However Title Ten included six articles (296-301) on instruction publique:

Art. 296: Il y a dans la République des écoles primaires ou les élèves apprennent à lire, à écrire, les éléments du calcul et ceux de la morale. La République pourvoit aux frais de logement des instituteurs proposés à ces écoles.

Art. 297: Il y a, dans les diverses parties de la République, des écoles supérieures aux écoles primaires, et dont le nombre sera tel, qu'il y en ait au moins une pour deux départements.

Art. 298: Il y a, pour toute la République, un institut national chargé de recueillir les découvertes, de perfectionner les arts et les sciences.

Art. 299: Les divers établissements d'instruction publique n'ont entre eux aucun rapport de subordination, ni de correspondance administrative.

Art. 300: Les citoyens ont le droit de former des établissements particuliers d'éducation et d'instruction, ainsi que des sociétés libres pour concourir aux progrès des sciences, des lettres et des arts.

Art. 301: Il sera établi des fêtes nationales, pour entretenir la fraternité entre les citoyens et les attacher à la Constitution, à la patrie et aux lois.⁵³

A Report by Daunou resulted in the law of 25 October 1795 (3 Brumaire An IV) being promulgated. Although the Convention ceased to exist the next day, Daunou's law was to some extent implemented, and this fact makes it 'one of the most important pieces of educational legislation passed during the Revolutionary period'.⁵⁴ It was 'l'oeuvre capitale de la Convention en matière d'instruction'.

There was to be one primary school per Canton, which had the duty to maintain the school. Fees were to be charged, although up to a quarter of the places could be reserved for the very poor. Not all Cantons did provide schools. However, independent schools could exist, and many in fact sprang up as many parents disliked the anti-religious stance adopted by most Cantonal schools. The law also reaffirmed central schools in their role, although it introduced several curriculum changes. There was to be one Central school per Department. These schools gave the pupil an independent choice of subject, with an emphasis on science subjects within the curriculum. Religious teaching was replaced by the Cult of Reason.

53. Godechot, *op.cit.*, pp.133-4. The *Fêtes Nationales* were not an original innovation. The Revolutionary period's educational provision was 'famous' for the success of its Fetes.

54. Barnard, *Education and the French Revolution, op.cit.*, p.179; Duray, A. *id.*, p.137.

This was the last work of the Convention regarding schooling. In its simplicity it reflected the vanished hopes of the Revolution ... hopes for obligatory gratuitous schooling were abandoned. Reading and writing was the basis of the curriculum. However the public school, such as it was, had a lay curriculum and was ran by lay administrators. The freedom of education had been established. As Gontard expressed it⁵⁵

La Convention, après avoir rêvé d'enfanter un monde scolaire nouveau, accouchait à peine en brumaire an IV d'une minuscule souris, ridiculus mus.

The Directory was so occupied by the wars that it was waging, that it had little time to spare for educational activity. Finally the gradual erosion of the position of the public schools by private schools finally became so dramatic as to cause great concern to the government. The lack of money, buildings, and teachers, that had always hindered revolutionary educational reform, were taking their toll.

... cette liberté consacrée particulièrement par la loi du 3 brumaire, avait donné naissance à un grand nombre d'établissements libres, dont l'esprit était notoirement hostile aux institutions politiques nouvelle.⁵⁶

Opponents of the Revolution increasingly came into the open and found schools an ideal target for their wrath. They complained

55. Gontard, *id.*, p.155.

56. Hippeau, *op.cit.*, p.228.

that the schools ignored Sunday and God, were immoral and ruined the souls of the children. The Republican catechism and its textbook were strongly and easily criticised especially by priests who often refused first Communions and confessions to those who went to the state schools. On the 13th December 1795 the Constitutional Bishops published Rules to re-establish the discipline of the Gallican Church. The last chapter of the rules emphasised the importance of having a school in each parish. On November 17 1797 a law entitled *Arrêté pour faire prospérer l'instruction publique* was passed requiring attendance at a Republican school as a prerequisite for unmarried persons who wished to have a job in the government administration. All those who were married had to prove that their children attended a Republican school. Thus the Directory tried to control the growing numbers of private schools.

Laws were passed to reserve state buildings for use as schools and to allow local rates to be raised to help provide teachers with lodgings. On the 5th February 1798 in order to ensure that proper republicanism was taught in the private schools, it decreed that all private schools should be inspected at least once a month (unannounced) by Canton authorities.

The government by circulars tried very hard to implement the arrêté of 5 February 1798.⁽⁵⁷⁾ It wanted

... porter enfin le dernier coup à ces institutions
monstreuses ou le royalisme et la superstition s'aqitent

57. Grimaud, *op.cit.*, p.65-66.

encore ...

But this had little effect in reducing the number of private schools.

... [C]es mesures plus vexatoires ou efficaces ne purent avoir raison d'un esprit religieux encore profond, qui faisait préférer les écoles privées. (58)

Professor Barnard states that in April 1797 in the Department of Doubs there were 336 private schools, and only 90 state schools. (59)

The government attacked the freedom of education in the names of the Republican State. But the Constitution allowed the *liberté de l'enseignement*. (Art. 300)

The Constitution of 25 December 1799, instituting the Consulateship, had no Declaration of Rights preceding it, and made no mention of *instruction publique* throughout. On November 9 1800 the Minister of the Interior, Chaptal, presented a Report on Education. He strongly deplored the lack of educational facilities and recommended that there should be at least one *école municipale* per Commune, financed by the State.

The teachers should be chosen by the parents, and their salaries paid half by the Commune and half by the *arrondissement*. He further recommended that an *école communal* be set up in every *arrondissement* for secondary education provision. Independent schools should be allowed with minimal state interference (i.e. Oath

58. Gaudemet, *op.cit.*, p.133-4. Gontard, *op.cit.*

...les résultats sont négligeables.

59. Barnard, *Education and the French Revolution, op.cit.*

of fidelity, french citizenship, etc.) This liberal report was not implemented by Napoleon.

Chaptal's criticism of the Revolution's failure to provide adequate educational facilities was strong. One might well ask here what the Revolution accomplished for education. The answer is that its accomplishments were not practical, except for the Central schools experiment, and some achievements in higher education. They were in the realm of theory, and in the transmission of new and forceful ideas that could later be accepted and implemented. It is from this period that many modern educational principles derive.⁽⁶⁰⁾ For instance, universal, free, compulsory and equal education were principles recognised, albeit by only a few, as legitimate aims for the State to achieve.

The formative powers of education, and education as a

60. If not original they received here widespread diffusion and legitimation - viz. Comenius in his *General Consultation of the Reform of all things Human, Part Seven Panpaedin*, written in the mid-seventeenth century, declared that only 'non-humans could be excluded from human education', in other words education should be universal, and for the betterment of society. Thus universality, also implicit in Rousseau's *Emile* was not a new concept.

⁶⁰See, Kyrasek, J., and Polisenky, J.V., 'Comenius and All-embracing Education', in *Convergence*, Vol. 1, 1968.

fundamental human right were explicitly recognised.⁶¹

... la Révolution depuis la Constituante jusqu'à la fin du Consulat s'est inclinée, sauf pendant quelques semaines devant la liberté de l'enseignement⁶²

On the 15 July 1801 a Concordat with the Pope was made: catholicism was once more the State religion in France. But the clergy were to be paid by the State. In May 1802 Fourcroy a member of the *Conseil d'Etat* presented a new educational project. On 1 May 1802 it became law. (11 Floreal).

It was a kind of compromise between the fundamental reforms for a complete democratic state system, which earlier revolutionaries had put forward, and the reaction to a despotic system ...⁶³

Local communal primary schools were to be established, where not more than a third of the pupils could be exempt from fees. Communes could share primary schools (Art.2.), and teachers were not paid by the State but by parents, although their lodgings were to be provided by the municipalities. Secondary schools could be communal or private, and could not be established without government authorisation (Art.8(1), also Lycées were introduced at government

61. These themes are more fully examined in Chapter one and the relevant chapters of Part two of the thesis.

62. Grimaud. *op.cit.*, p.82.

63. Barnard, *id.* p.209.

expense.⁶⁴ Admission to the Lycée was by competitive examination, there were also to be state-scholars who had their fees paid (half such scholarships being reserved for the children of military officers and civil servants). In April 1804 the Christian Brothers were allowed to resume work as an Institute. In fact they soon came to dominate primary education.

For Napoleon the main concern of education was that it should provide the Nation's man-power needs.⁶⁵ By allowing religious orders to dominate primary education social stability was achieved. Also knowing the very poor state of educational provision he probably wished to encourage primary education, and at the same time save the state expense. The Church was the only non-State organisation with nation-wide representation. The Imperial University was created (10 May 1806, 17 March 1808) and given strong control over all teaching. A tax was imposed on all private secondary schools.⁶⁶

On November 15 1811 the Imperial University was ordered (by

64. Legée, G., 'Cuvier et la Réorganisation de l'enseignement sous le Consulat et L'Empire' in Actes du 95e Congrès National des Sociétés Savantes, *Histoire de l'enseignement de 1610 à nos Jours*, (B.N., Paris, 1974) gives an account of the methods used in establishing Lycées in Marseilles and Bordeaux.

65. Prost, A., *op.cit.*, p.23.

66. 1/20th of a boarding fee for each pupil. This was abolished finally in 1844. Prost, *op.cit.*, p.29.

Decree) to ensure that teaching in the primary schools was limited to the three R's. Nothing could be clearer. The same Decree limited all non-State secondary education. Secondary lay schools in a town where there was a state school could only repeat the same courses as the Lycée. Junior seminaries (*petits séminaires*) were limited to one per Department (Art. 27), and none in a town where a Lycée existed.

The University's monopoly was absolute, only parents had the right to educate their children, without getting government authorisation first. By establishing Lycées 'a diploma elite replaced the former traditional elite'.⁶⁷ The revolutionary goal of individual attainment had been sacrificed to efficiency and stability. The educational changes reflected and perpetuated the post-revolutionary system of stratification'.⁶⁸ The Imperial University, and the Lycée are probably the two most important educational creations of Napoleon.⁶⁹ The Consulat and the Empire did not recognise the *Liberté de l'enseignement* except for primary schools.

The First Restoration dissolved the Imperial University

67. Vaughan and Archer *op.cit.*, p.191.

68. *id.* p.191.

69. The Lycée remained at the pinnacle of the French School System for 150 years, without evolving radically from the Napoleonic conception of its function in society.

Halls, W.D., *Education, Culture and Politics in Modern France*, (Pergammon Press, Oxford, 1976), p.4.

replacing it with 17 provincial universities by the Ordinance of 17 February 1815. An Ordinance of 5 October 1814 had freed the *petits séminaires* from their Napoleonic restrictions. But Napoleon returned before this could be implemented, and after his final defeat the second Restoration was not so inclined to let central control wither. Also the fact that the Imperial University had not completely achieved a State monopoly of education allowed it to survive the fall of Napoleon. The Imperial University became the Royal University. From this time on education became a political issue in France, and 'there is a recurring conflict between the Church and the State as to the control of public instruction.'⁽⁷⁰⁾ War was declared on the University, Lammenais opened the battle. In June 1815 the *Société pour l'Instruction publique* was founded, a group strongly in favour of secular education.

Jusqu'en 1817 les adversaires de l'Université ne s'étaient trouvés que dans les partisans de l'Eglise, parmi les Royalistes catholiques ultramontains. En 1817 l'école classique française, suivant les théories d'Adam Smith, demande elle aussi la liberté de l'enseignement.⁽⁷¹⁾

An Ordinance of 29 February 1816 provided an annual grant of 2,000 livres for the provision of schoolbooks, model schools and recompense for deserving teachers. Communes were obliged to provide gratuitous education for poor children. Cantonal Committees

70. Barnard, *op.cit.*, p.223-4.

71. Grimaud *op.cit.*, p.132.

including the Curé, two local officials, and four Notables appointed by the Sector, were established to watch over discipline, morality, and religious instruction in primary schools. the Christian Brothers, who had been campaigning for a group certification of their teachers, started in 1818 to ignore the University and its *Brevets*. In February 1818 certificates were automatically granted on presentation of the Letters of Obedience to the Commission of Public Instruction. The increasing catholic influence was even more felt when a Roman Catholic Bishop, Denis-Luc Frayssinous was appointed Grand-Master of the Royal University. Soon after his appointment religious instruction became compulsory in all the Royal Colleges (formerly Lycées), and the *Ecole Normale* that trained secondary education teachers, was suppressed as lacking in religious spirit. On August 26 1824 the Ministerial Offices of Ecclesiastical Affairs, and Public Instruction were merged. According to liberal opinion, France was 'being plunged into the shadows of the *Ancien Régime*. Guizot lost his professorship of Modern History. On the 8 April 1824, by Ordinance the primary schools were delivered into catholic hands, by the removal of the lay element in the Cantonal Committees. Religious schools sprang up outside the University's structure.

The official admission in May 1826 that the Jesuits had returned to France, and were using seven schools, sparked off a liberal resurgence. A Report, whose main author was Conseiller Ambroise Rendu, noted this Jesuit return, and also insisted that the *petits séminaires* should only prepare pupils for *grands séminaires*.

and not compete with other colleges. M. de Vatimesil, Minister of Instruction, restored the lay element in Cantonal committees allowed dismissed teachers a right of appeal against the Rector, and replaced the primary schools under the control of the Royal University. The Ordinance of June 1829 placed all Jesuit schools under the authority of the University, and limited the curriculum of the *petits seminaires*. The legislation of this period 'fluctuated between concession to the Church and their withdrawal in favour of secular interests, reflecting the political vicissitudes of the clerical and liberal parties'.⁽⁷²⁾ In 1829 the funds available for education were doubled. There were thirteen *Ecoles Normales*. However as Matthew Arnold pointed out⁽⁷³⁾ appearances are deceptive:

In nine cases out of ten, the Rector named as his delegate the Curé of the Parish for which a schoolmaster was required, and the Curé then could choose the teacher.

On February 14 1830 an Ordinance decreed that there should be created, compulsorily, one school per commune, and the State would help towards the cost. This Decree was overtaken by events that led to the creation of the July Monarchy.

On October 11 1830 an Ordinance destroyed the ecclesiastical preponderance in local committees. On April 18 1831 all exemptions for teaching certificates were done away with. The Charte Constitutionnelle of 14 August 1830 Article 69 was being

72. Vaughan and Archer, *op.cit.*, p.126.

73. Arnold, *op.cit.*, p.46.

applied: (74)

Il sera pourvu successivement par les lois séparées et dans le plus court délai possible aux objets suivants: ...

B L'instruction publique et la liberté de l'enseignement.

But far too slowly for de La Mennais, Montalembert, Lacordaire, and others of the Agency for the Defence of Religious Freedom who decided to open a school without obtaining prior authorisation of the University, the school was forcibly closed by the authorities. (75)

Rien de plus facile à comprendre, l'Eglise et le clergé étant au nombre des vaincus de Juillet, le pouvoir étant passé en des mains hostiles ou indifférentes les catholiques privés de l'appui ou des complaisances du pouvoir, se voyaient contraints de revendiquer, au nom des libertés publiques et de la Charte, des droits et facultés qu'en autre temps le plupart d'entre eux eussent réclamés comme une part inaliénable de leur héritage historique, comme des prérogatives imprescriptibles de l'Eglise (76)

Guizot, a member of the *parti de la résistance*, (i.e. Conservative) became the Minister of Public Instruction in 1832. His survey of the state of education had found 'dilapidated horrors'

74. Godechot, *op.cit.*, p.252.

75. *Oeuvres de M. le comte de Montalembert*, tome 1. (Lecoffre, Paris, 1892) p.1. Grimaud, *op.cit.*, pp.215-228.

76. Leroy-Beaulieu, *Les catholiques libéraux, l'Eglise et le libéralisme de 1830 à nos Jours*, (Plon Nourrit & Cie, Paris, 1885).

being used for classrooms, and numerous drunken teachers and other misfits.⁷⁷ The law of 1833 was 'a very important landmark' in French primary education.⁷⁸ It has been described as a 'kind of Concordat between Church and State, with perhaps a certain advantage to the former.'⁷⁹

Every Commune, (or conjunction of two Communes), had to maintain a primary school. This could be done together with the Church. Poor children were to be admitted to the school without a fee. Parents wishes as to religious education had to be respected. Teachers had to be certificated for both capability and morality. The Communes were empowered to levy a tax to help pay for the school, and if not enough money was raised in this way, the Department could also raise a tax, and if this too did not provide enough money the Ministry of Public Instruction would make up the difference. A local Committee consisting of the Mayor, the Priest and three Councilors would supervise the day-to-day running of the school. A District Committee would control the appointment and dismissal of teachers.

The law provided for a minimum teaching salary, that was to be augmented by fees. Each Department was required to establish a

77. Arnold, *op.cit.*

78. Arnold, *op.cit.*, p.50.

Trenard, L., *op.cit.*, p.42.

79. Barnard, *op.cit.*, p.226. Gildea, R., *Education in Provincial France 1800-1914*, (CUP, 1983) p.39 et seq..

Normal School.⁸⁰ and *écoles primaires supérieures* were to be established in each town with a population of over 6,000 (Art. 19). Thus *liberté de l'enseignement* was achieved for primary schools.

Strong resistance was encountered in some Communes to this initiative, and thus an Ordinance (16 July 1833) enabled the government to raise the tax specified if the Commune or Department concerned failed to do so. This law had two major weaknesses. Firstly it relied on Communal Committees to set up the schools, and they were often not zealous enough, or capable of fulfilling it.⁸¹ And secondly, the teachers, despite their minimum salary, were miserably underpaid, and often on the brink of starvation.⁸² This fact often forced them to work for the Curé, or find other work. A project to free secondary education from University control was blocked by anti-clerical elements, and government instability after 1837. In 1841 a project of Villemain's was still-born after episcopal protest. The embittered primary school teachers largely supported

80. The necessity of this provision was not generally recognised.

See, Tresse, R., 'Diffusion de l'instruction primaire au Conseil d'arrondissement de Grasse 1833-1870', in Actes du 95e Congrès National des Sociétés Savantes, *Histoire de l'enseignement de 1610 à nos Jours*, (B.N., Paris, 1974), pp. 827-844.

81. *Id.*

82. See Julia, D., *op.cit.* for the pre-revolutionary description of teachers' low salaries, and the resultant effects. As Zeldin confirms *op.cit.*, p.15 *et seq.*

the 1848 Revolution,⁸³ which, recognising their support, promptly increased their salaries.

In the elected Assembly, which was drawing up a new Constitution, there were vivid debates on education. There was no question but that it should be included. Montalembert, though, was trying to remove the State's shackles on religious education.⁸⁴ His arguments to this effect are interesting. Religion, he argued, secures the defence of property,⁸⁵ thus religious education should be promoted. He did not persuade the Assembly though and Article Nine was left intact. Article VIII of the Preamble declared. inter alia:

La République doit protéger le citoyen ... et mettre à la portée de chacun l'instruction indispensables à tous les hommes; ...

Thus the Revolutionary formula of *l'instruction indispensable à tous les hommes* was revived. Chapter Two of the new Constitution

83. It was a regime whose ideals and aspirations were close to their own, and which promised to give them a new sense of dignity, to back them in their struggles with the *Curé*. Anderson, R.D., *Education in France 1848-1870* (O.U.P., Oxford, 1975).

84. viz. The *Baccalaureate examinations* could only be taken by those who had been to *écoles publiques*. Grimaud, *op.cit.*, p.261. See Trenard, L., 'La liberté de l'enseignement à la veille de 1848', 1967 *Revue du Nord* p.421 for a more detailed accou

85. Prost, A., *op.cit.*, p.173.

concerned *Droits des Citoyens garantis par la Constitution*, Article nine of which declared:

L'enseignement est libre. La liberté d'enseignement s'exerce selon les conditions de capacité et de moralité déterminées par les lois, et sous la surveillance de l'Etat. - Cette surveillance s'étend à tous les établissements d'éducation et d'enseignement, sans aucune exception. (86)

Louis Bonaparte, elected President, soon collected a group of catholic ministers around him, in deference to their electoral support. Thus Armand de Falloux became his Minister of Public Instruction. The loi Falloux of March 1850 'represents the high-water mark in the ebb and flow of ecclesiastical influence on education.' (87) But yet this law signals the defeat of catholic liberalism, as expressed by La Mennais, who wished for Church disestablishment and independence in education. The Church by accepting this law now accepted the Napoleonic ideology of State

86. Education was also mentioned in Article 13L:

La Constitution garantit aux citoyens la liberté du travail et de l'industrie. La société favorise et encourage le développement du travail par l'enseignement primaire gratuit, l'éducation professionnelle, ...

Godechot, *op.cit.*.

87. Halls, W.D., *op.cit.*, p.6. The pope expressed his satisfaction with the law.

control in education, and the Church operating within the confines of the system.

The *loi Falloux*, crowning the progress towards freedom of education allowed anybody with at least five years teaching experience, and a Diploma, to open a secondary school, subject to inspection by the University.⁸⁸ It must be noted that the Diploma was only required for teachers, and not their assistants. Thus the Christian Brother in Lille, as elsewhere, had a certified Director, and he ran all the schools, the other *Frères* being *adjoints* and thus subject to no legal restraint regarding diplomas. For some Orders a Letter of Obedience was equivalent to a Diploma.⁸⁹

The *loi Falloux* allowed the Jesuits to return, and led to:

88. The inspection was only to verify that education ... *n'est pas contraire à la morale, à la Constitution et aux lois ...*
loi Falloux Article 21.

89. See Hemeryck, R., 'La laicisation des écoles de Frères à Lille en 1868', in *Histoire de l'enseignement de 1610 à nos Jours. op.cit.*, This article gives an interesting account of the Municipal Council of Lille's battle to get the Teaching Associates of the Christian Brothers' withdrawal from the Commune's schools, and establishment of their own private schools. The process was at times very 'heated', and his description of the pressures exerted on parents by the Christian Brothers to cause them to send their children to their schools, is very revealing.

great increase in the number of *petits séminaires*.⁹⁰ However, it split the Catholic Party, the intransigent section, which controlled *l'Univers* the 'catholic' newspaper, denouncing the loi Falloux as a sell-out. This attitude convinced many that Catholic liberalism was simply a disguise to get their own way, and that once they had power they would show scant respect for the liberty of others.

Montalembert himself acknowledged that this was the case.⁹¹ (In Belgium in the same year a law was passed allowing a massive increase in state provision of secondary education.⁹²) Communes and Departments were empowered to give financial aid to private

90. Les Congregations passant de 59 en 1856 à 116 en 1877. Les écoles primaires congréganistes triplant de 1850 à 1863 ... Dans l'enseignement secondaire la part des effectifs des écoles libres passe de 28% en 1850 à 40% en 1875 et à 52% en 1897. Gaudemet, *op.cit.*, p.41 footnote 52.

'Les établissements libres se multiplieront; en deux ans, il s'en créa 257' Grimaud p.437.

91. Montalembert, *Oeuvres complet* Avant-propos. p.xv, see his speech before the *Assemblée Nationale Législative*, at its sitting on the 17 January 1850, and first reading of the *loi Falloux*, *Oeuvres*, (1892) *op.cit.*, p.310 et seq.

92. See Belgium, Historical Perspective. p.784.

schools,⁹³ and the Mayor and Religious minister were placed in charge of primary instruction. The Departmental Council was given great power by being allowed to regulate the fees chargeable in primary schools. The law of 14 June 1854 (Art. B) gave the Prefect the power of nomination, suspension and dismissal of teachers.

On December 31 1853 a Decree created 'supply teachers', women, who could be paid less than the new legal minimum salary. Soon the Communes took advantages of this 'lower-status' teacher to save money, and all the old evils related to underpaid teachers returned.

'Under the domination of the new law denominational schools are the rule, and common schools are the exception' noted Matthew Arnold. He had been assured by protestant leaders that the religious liberty of parents had been respected. The religious animosity in Languedoc smoldered on, but

[I]t is not that the State persecutes the protestants: it is that the protestant and catholic mobs still have sometimes the impulse to persecute each other, and that the State has hard work to keep the peace between them.⁹⁴

The Communes were liberal in allocating free places in primary schools, since their contribution was limited, and thus over the limit it was not the Commune that paid. This fact led to the Decree

93. Many Communes did in fact support private schools. Art. 69, *loi Falloux*, made it cheaper to do this than to support a Council School. Prost. *op.cit.*, p.29.

94. Arnold, *op.cit.*, p.71-72.

of December 1853 (Art. 13) which gave the Prefect the power to indicate the maximum number of free places possible per school.

Under Victor Duruy the extension of state education was encouraged, and the Ministry gave support to Communes that were struggling to set up lay schools. (75) Pope Pius IX's Syllabus gave impetus to their creation it seemed as though:

L'Eglise, à la grande joie de ses pires adversaires comme des ses enfants aveugles semblait confesser elle-meme son compatibilité avec la civilisation et le progrès modernes. (76)

Events that led to the setting up of private schools by the Christian Brothers in Lille, and the 'battles' that accompanied it were repeated throughout France. (77)

On the 4 September 1870 the Third Republic was declared in Paris. The new Constitutional laws of 1875 were all concerned with the setting up of institutions, and made no mention of the rights of man.

Jules Ferry became the Minister of Education whose 'golden rule' was that one sixth of national income should be spent on education.

95. Minister of Public Instruction 1863-1869. His law of 10 April 1867 encouraged the creation of girl's schools, added geography and history to the curriculum, and was very influential in the creation of libraries.

96. Leroy-Beaulieu, A. *op.cit.*, p.195.

97. Hemeryck, R., *op.cit.*.

and who boasted in 1882 that:

My Ministry has turned into a regular factory for schools. It is building on average three schools or classrooms a day. We are turning out schools as fast as baker makes bread. (78)

Of course this great extension of State provided education roused considerable opposition amongst the catholics, and cries of 'Godless school' rent the air after the Law of 28 March 1882 made primary education secular and compulsory. (79) A Law of 16 June 1881 had made primary schools free for everyone. This was a period when the *lutte scolaire* was really fierce. (80) In 1880 the State was given control over examinations resulting in titles/awards guaranteed by the State. Private-educational establishments were free to use their own methods of assessment and system of awards/titles. However only state certificates were recognised for entry into certain

98. Quoted in Debiesse, J., *op.cit.*.

99. Schooling was made compulsory from the ages of 6-13 years old.

Also all teachers in private schools had to be certificated.

100. Tant que l'opinion croit à l'influence décisive de l'école, la conception de sa finalité suscite des débats acharnés. La finalité de l'école est ainsi devenue une des plus importantes questions de la vie politique, philosophique et religieux de la France contemporaine.

Trenard, L., 'Les finalités de l'enseignement primaire de 1770 à 1900', *op.cit.*, p.49.

professions (e.g. medicine). The Republican secularists believed that ethics could be distilled from reason, and that revealed truths should be a private matter for the family and Church. Similar arguments had been heard in Belgium where the *loi de malheur* (1879) had secularised and extended state education.⁽¹⁰¹⁾ Thursday was made a school holiday, and time was thus allowed for the religious instruction of those who wanted it. Many Catholics were also in favour of this reform. A decree of 23 December 1881 allowed Chaplaincies to be set up in secondary schools to teach religious education to children whose father wished it.⁽¹⁰²⁾ This religious education had to take place outside normal school hours, but could take place within the school. The teachers of such courses had to be approved by the state.

In 1886 all ecclesiastics were forbidden to teach in State schools.⁽¹⁰³⁾ Article 2 of the law declared that there were only two types of primary schools - state or private. The *Conseil d'Etat* deduced from this that state supported private schools were a legal impossibility. It therefore annulled decisions granting subsidies except in cases where the subsidy was directed to relieve poverty and

101. See Belgium, Historical Perspective, p.784.

102. *Loi de 21 déc.* 1880 had previously allowed religious instruction in girl's schools outside timetable hours.

103. Law of 30 October 1886, Art. 17.

was not a disguised school subsidy.⁽¹⁰⁴⁾ Parents still had the freedom to choose private school, and they need not necessarily send their child to the nearest public school, any school was sufficient. The children could also be taught at home. The Mayor and the Municipal Council were responsible for ensuring that the compulsory education laws were enforced. By the Law of 19 July 1889 primary school teachers were paid by the State.⁽¹⁰⁵⁾ In the 1890s the relatively 'liberal' Pope Leo XIII allowed a temporary *Ralliement* of Catholics to the Republic.⁽¹⁰⁶⁾

The Dreyfus case reopened and inflamed semi-dormant passions. The Catholic Church was linked to elements that prolonged injustice.⁽¹⁰⁷⁾ In 1901 all congregations had to be authorised by Law, and their schools by decree. Some congregations had been previously authorised and others had been tolerated without authorisation (such as the Jesuits). Coombes was intent on destroying the Congregations, and in July/August 1902 he closed over 2,5000 schools that were run by Congregations that had not renewed their authorisation. This was considered an outrageous violation of

104. *Avis of CE 19 juillet 1888; CE 19 juin 1953 Commune de Chambéry*
Rec. 279. -

105. Prost, *op.cit.*, p.95.

106. Compared for instance to Pope Pius IX in the 1860s. The *ralliement* was also aided by the spectre of socialism.

107. The case of a Jewish Army Officer, convicted of treason and later exonerated.

the principle of non-retroactivity of laws, and went contrary to the assurances of the previous cabinet (Waldeck-Rousseau) that reauthorisation was not necessary. It became apparent that teaching congregations would not be authorised.

In 1904, legislation banned all non-authorised religious orders from teaching - even in Catholic schools. Even authorised religious orders were to be banned within ten years. In 1905 the Church was separated from the State, though state funds could still be used to support the work of schools chaplaincies.⁽¹⁰⁸⁾ From now until the War there was the *incessante guerilla scolaire*. Similar invidious practices to those seen in the Belgian scholastic battles occurred. (Refusal of sacraments, pressure by landlords, etc.) In 1907 Church property was put under government supervision. These radical measures failed to crush catholic education.

Catholic schools were re-opened by individual teachers and groups of parents, but in fact they remained under the strict control

108. In 1907 it was agreed that funds would not be so used in future cases, and that families would have to pay fees for religious education. Texier, A., 'Les aumôneries dans l'enseignement secondaire', (1984) *R.D.P.* 105 at p.136 et seq. The Conseil d'Etat in *l'affaire Chaveneau et autres*, *C.E.*, 1949 *Rec.* p.161 upheld the pupils right to liberty of conscience in accordance with the law of 1905 that specifically allowed the possibility state funding of Chaplaincies in state schools.

of the Church.¹⁰⁷ The advent of the First World War, prevented the full implementation of the 1904 legislation.

After the War the *Compagnons de l'Université Nouvelle*, campaigned for an *école unique*, a common primary school for all, and free secondary education with selection by merit. In 1919 the Astier Law 'is generally reckoned to have laid down the foundations for modern vocational training in France'.¹¹⁰ It created many State training institutions, and allowed finance for catholic private ones.

In 1924 the Radicals and Socialists formed a weak alliance (*Cartels des Gauches*). They tried to introduce a common curriculum into the primary schools. But before they succeeded their government fell, and a government of 'National Union' under Poincaré assumed power.

Herriot, leader of the Radicals, became the Minister of Public Instruction. His main achievement was in implementing a policy to phase out fees in secondary education. (In 1933 this was finally

109. Hans, N., *op.cit.*, p.291; Halls, W.D., *op.cit.*, p.9.

... Many catholic schools ostensibly became non-religious private institutions whose teachers doffed the cassock for the frockcoat.

110. Halls, D.W., *op.cit.*, p.99. Recognised technical schools in the private sector can receive state aid as long as they are not profit making. *Décret* 8 avril 1931.

achieved).¹¹¹ In 1936 the Government of the Popular Front proposed to raise the school-leaving age to fourteen. Jean Zay was appointed Minister of National Education in 1937.¹¹² He proposed far-reaching reforms, but the outbreak of World War Two put an end to his experiments with an 'orientation' year in secondary education.¹¹³ Between the Wars there was a growth in the numbers of private secondary schools....¹¹⁴ in effect the Catholic Church has a monopoly of all teaching in the private sector.¹¹⁴ Little reform was actually accomplished during these years.

The Vichy regime (the government of Marshall Petain) was pro-catholic, and its reactionary educational programmes re-opened the *lutte scolaire*. Teacher-training schools were abolished, teacher's Unions banned, and the *Ligue de l'enseignement* disbanded. Religious Orders were re-allowed to teach in State schools at state expense, Jews and Freemasons were excluded from the teaching profession. A

111. *loi 27 dec. 1927* (Art. 89)

loi 30 dec. 1928 (Art. 106)

loi 16 avril 1930 (Art. 157).

112. In 1932 the Ministry of Public Instruction, changed its name to become the Ministry of National Education.

113. Zay was imprisoned and, in 1944, was shot under the Vichy regime.

114. Mallinson, V., 'Church and State in French Education', in *Wld. Ybk. Ed.*, 1966, p.70. Approximately 90% of private schools are Roman catholic.

decree re-introduced compulsory religious instruction. The attempt to enforce this in State schools caused such an outcry that the Decree was withdrawn within a year. Subsidies were made available for private schools.

After the War was over, the catholics naturally wished to retain many of the privileges that they had been granted, and as a result, many bitter battles were fought before the Debré Law of 1959 worked out a compromise solution. (See below p. ? La Paix Scolaire)

During the War a study group under René Capitant (Commissioners of National Education) had produced the Algiers Plan, however it was the Langvin-Wallon Plan of 1947 that really influenced, and still guides today, the post-War French educational reforms.⁽¹¹⁵⁾ Although at the time other problems over-shadowed educational priorities the

115. The Commission based itself on the following educational aims:

1. That children should have an equal right to maximise their talents, and develop their abilities.
2. That democratic legislation should protect the weak, especially children.
3. That cultural standards should be raised by diffusion, not selection.
4. That manual tasks should have more esteem.

Langevin-Wallon Plan has slowly been introduced.¹¹⁶

In 1963, another most important 'De Gaulle era' reform was the establishment of the *Collèges d'enseignement secondaire*, comprehensive lower secondary schools, these started the structural reforms designed to improve the equality of educational opportunity. This work is carried on in the latest reforms, those of René Habé, set out in the law of 11 July 1975.¹¹⁷ The law enshrines the principles of the child's *droit à l'instruction*, and equal educational opportunity.¹¹⁸ It also explicitly recognises the parents' role in education. The move towards continuous assessment caused serious problems for private education vis a vis state control over public examinations. Most of the 1880 law was repealed in 1979 and replaced by a less rigid system.

The Habé reforms that created the lower secondary schools (Collèges) with mixed-ability classes were reviewed in a Report by

116. The Langevin-Wallon Commission recommended compulsory education from 6-18 years in three distinct stages; 6-11, 11-15, and 15-18, this last being the determination phrase. The 11-15 stage was to be one of orientation.

117. See Habé, R., 'Pour une modernisation du système éducatif', in a special edition of *La Documentation française* (Paris, 1975).

118. Education Act 75-620, 11 July 1975 (Art. 1).

Louis Legrand.⁽¹¹⁹⁾ The report found several contradictions most notably the fact that a common national curriculum hampered the schools in their efforts to deal with mixed ability groups. The pressure to follow the national curriculum in effect was thwarting the attempt to allow true mixed ability teaching. The report recommended, inter alia, local autonomy for schools. This would have the effect of increasing the choice of the child within the school system.

M. Chevènement, the Minister for National Education in the Socialist government, also pursued the reform of the collèges. Further teacher in-service training being major element in the reform programme. At a press conference in November 1984 he declared, in language reminiscent of the previous century's reformers, that

pour donner connaissances indispensables en permettant à chacun d'aller au bout de ces possibilités,⁽¹²⁰⁾

one must allow differentiated education allowing pupils to develop at their own pace. Again one sees the more modern emphasis on the right of the recipient to education peeping through. The outcome of the socialists' attempt to dismantle the *paix scolaire* are outlined in section three of this chapter. There follows immediately a set of TABLES.

119. Legrand, L., *Pour un collège démocratique, (La documentation française, Paris, 1983).*

120. Council of Europe, *Newsletter/Faits Nouveaux*, (5/84)

(Documentation Centre for Education in Europe) p.13 et seq..

FRANCE

TYPE OF EDUCATION / INSTITUTION	AGE	ENTRANCE REQUIREMENTS
1. <u>Pre-Primary</u>	2	State duty to provide one per Commune of 2.000 plus.
a) <u>State schools</u> écoles Maternelles	3	No entry requirements.
b) <u>Private schools</u> Jardins d'enfants Classes enfantines	4	Fees payable
	5	These are usually attached to a Primary School
2. <u>Primary Schools</u>	6	Entrance is flexible as regards to age, according to ability.
a) <u>State schools</u>	7	
b) <u>Private schools</u>	8	
i) Contract of Association	9	
ii) Simple Contract	10	
iii) Completely Independent	11	
3. <u>Secondary</u>	12	Again age is not a strict requirement.
First Cycle		
a) <u>State schools</u> (CES) Collèges uniques	13	
b) <u>Private schools</u> Various	14	
	15	
Second Cycle	16	
a) <u>State schools</u>		
i) Centre de formation		CFA's mainly for those who reach d'apprentis (CFA) School Leaving age before finishing the CES.
	17	
ii) Lycée d'Enseignement Professionnel (LEP)	18	
iii) Lycée d'Enseignement Général et Technologique (LEGT)		
b) <u>Private Schools</u> Various		

CLASS NO / CYCLE	CERTIFICATES	CURRICULUM
Petits	Only State examinations are recognised for official purposes.	
Moyens	Most private schools enter their pupils	
Grands	for the State exams.	
Cours Préparatoires		Reading, writing, arithmetic.
Cours Elémentaires 1		French 9 hrs. Arithmetic 6 hrs. History / Geography / Science / Technology / Morals / Civics / Art / Music 7 hrs.
Elémentaires 2		Homework forbidden, as is corporal punishment (the latter form all schools).
Cours Moyens 1		
Cours Moyens 2		
Fin d'études 1		<u>Secondary First Cycle</u> Common Core Curriculum 21 hrs. Observation Cycle with one for language. Consolidation. This is the Orientation Cycle. Second two years, common core plus options
Fin d'études 2		a) Academic b) Pre-vocational
6e		
5e		The BEPC is an optional exam at the end of the first cycle or 'lower' secondary education
4e		LEP's courses leading to vocational qualifications, normally two-year courses. Known as 'Short' cycle. LEGT's 3 year 'long' cycle courses, leading to the Baccalauréat
3e	Brevet d'études du premier cycle (BEPC)	
2e	Certificat d'Aptitude Professionnelle (CAP)	
1e	Certificat d'Education Professionnelle (CEP)	
Terminale	Brevets d'Etudes Professionnelles (BEP) Baccalauréat professionnel Brevet de Technicien (BT) Baccalauréat de Technicien (BTn) Baccalauréat	

FRANCE

SECTION TWO

THE LEGAL ORDER

FRANCE: The legal system

A. GENERAL INTRODUCTORY

Until relatively recently the French legal system had no constitutional protection of human rights. The great and frequent Declarations of Rights, although at the heart of previous Constitutions, were not constitutionally entrenched under the Third Republic. Under the Third Republic ...

the true protection of human rights was to be established by positive law and public opinion, operating at the legislative rather than the constitutional level.⁽¹²¹⁾

There was not even a Declaration of Rights. The 1946 and 1958 Constitutions, adopted following referendums ended this situation.⁽¹²²⁾ Article 34 of the 1958 Constitution reserves to the legislature the power to deal with "the fundamental guarantees granted to citizens for the exercise of their rights".⁽¹²³⁾ But apart

121. Rivero, J., 'Les garanties constitutionnelles des droits de l'homme en droit française', (1977) 26 *R.I.D.C.* 9 at p. 11. Translation by Cras, A., and Osborough, W.N., in (1977) 12 *Ir.Jur.* 1 at p.3. cf. *The Conseil d'Etat and its principes généraux de droit* (below).

122. See the abortive referendum on an extensive Bill of Rights in 1946.

123. Article 34 allocates the legislature various areas of competence, but is not the only Article of the Constitution to do so, see for instance, arts.72-74.

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from a few scattered articles⁽¹²⁴⁾ what rights are protected? The answer is found in the Preamble of the Constitution that declares:

"Le peuple française proclame solennellement son attachement aux droits de l'homme ... tels qu'ils sont définis par la déclaration de 1789, confirmé et complétée par le préambule de la Constitution de 1946 ...".

The contents of the Declaration of the Rights of Man 1789 are well-known. The Preamble of the 1946 Constitution declares that "principles necessary for our time" should be protected, and then gives a long list of economic and social rights, (including both the right to obtain employment and the right to education). It also protects the "fundamental principles recognised by the laws of the Republic". It does not specify which Republic, or to which laws it refers, but it is generally assumed that it is the Third Republic.⁽¹²⁵⁾ The constitutional 'value' of this preamble has been

124. For instance Article 2 declares *inter alia*; that the Republic will:

assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion ...

125. On the Fourth Republic, see Cocatre-Zilgien, A., 'La liberté de l'enseignement est-elle en peril', (1977) *R.D.P.* 779 at p.787.

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recognised by the Courts in France.⁽¹²⁶⁾ As there are many human rights mentioned in both these documents, and as the formulas used in the 1946 preamble are so generous, the category of rights protected is potentially enormous.⁽¹²⁷⁾ It is clear that there can be no backtracking to restrictions on human rights more severe than those imposed in the Third Republic, provided somebody refers the relevant law to the *Conseil constitutionnel*.

Article 89 deals with matters appertaining to the revision of the Constitution.⁽¹²⁸⁾ However both in 1962 and 1969 the President of the Republic overrode the procedure provided for, invoking instead the powers under Article 11.⁽¹²⁹⁾ Thus Parliament was not consulted about the revisions. In 1969 it was claimed that the 1962 revision had established a constitutional convention allowing this method (referendum) of reform of the Constitution. The failure of the 1969

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126. By the *Conseil Constitutionnel* decisions of 16 July 1971. J.O. p.7114, 15 1975 J.O. p.671 and more recently Déc. 81-132. . *Conseil d'Etat* decisions 26 June 1959 *Syndicat général des ingénieurs conseils*. Rec. 394 and 12 February 1960 Soc. Eky 1960 D., 263.
127. Including such right as gratuitous education.
128. Article 89 guarantees, *inter alia* the Republican form of government.
129. Berlia, C., 'Le problème de la constitutionnalité du referendum du 28 Octobre 1962', (1962) *R.D.P.* p.936. Burdeau, G., *Droit constitutionnel et institutions politiques*, 18th ed. (CGDJ Paris, 1977) p.90 et seq.

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referendum, and the views expressed by the Parliament at that time, have probably put paid to this executive method of reform, that could conceivably have affected the protection of human rights. In 1974 the revision of the Constitution extending the seisin of the *Conseil constitutionnel* used the prescribed formula.⁽¹³⁰⁾ In the Summer of 1984 when President Mitterrand was considering a reform of Article 11 of the Constitution it was article 89 that he turned to.⁽¹³¹⁾ It is proposed now to turn to general consideration of protection of legal rights in France (B 1 and 2), followed by a review of the position with regard to educational rights (Section three).

B. Legal Order

1. National Law

Considering that the *Conseil constitutionnel* is the only body that can review the constitutionality of laws, it is as well to look at its jurisdiction, and its limitations.⁽¹³²⁾ Once the *Conseil constitutionnel* has declared a law, or part of a law unconstitutional, then that law cannot be promulgated or put into

130. As did the 1963 Reform of Article 28.

131. Robert, J., 'L'aventure référendaire', 1984 D.Chr. 243.

132. I only deal with one aspect of its jurisdiction, that which affects the protection of human rights the most.

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effect.¹³³ Articles 56-63 of the Constitution deal with the *Conseil constitutionnel*. Article 61 is especially important in this respect:

Les lois organique, avant leur promulgation, et les règlements des assemblées parlementaires, avant leur mise en application, doivent être soumis au Conseil constitutionnel qui se prononce sur leur conformité à la Constitution. Aux memes fins les lois peuvent être déférées au Conseil constitutionnel, avant leur promulgation, par le Président de la République, le Premier Ministre, le Président du Sénat ou soixante députés ou soixante sénateurs..."¹³⁴

The first limitation of the *Conseil constitutionnel* is, of course, that *lois* need not necessarily be referred to it, although the fact that the *Conseil constitutionnel* can be seised by a group of sixty Deputies or Senators makes it unlikely that a Law affecting human rights would pass by without being submitted to the *Conseil constitutionnel*. Indeed since 1981 the vast and increasing use of

133. See *Conseil d'Etat Arright* 6 November 1936, D. 3 at p. 8.

and, *C. Cass., Schiavon* 26 February 1974 D.J. p.273,

indicating the *Conseil d'Etat* and *Cour de Cassation's* lack of competence in this respect.

134. As amended by the *loi constitutionnelle* 74-904 of 29 October 1974.

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the *Conseil constitutionnel* has caused some disquiet.⁽¹³⁵⁾

The second limitation is the self-imposed rule following its decision of 6 November 1962, that laws adopted 'by the people, following a referendum, constituting the direct expression of national sovereignty' were not within its jurisdiction to review.⁽¹³⁶⁾ Thus General de Gaulle could push through his constitutional reform without hindrance from the *Conseil constitutionnel*.⁽¹³⁷⁾ However, here again, it is unlikely that this method could be used to infringe human rights. Would the French people approve a law that restricted their human rights?

The first and most celebrated case of the *Conseil constitutionnel* showing its willingness to protect human rights was its judgement concerning the freedom of association, that has been

135. Philip, L., 'Le développement du contrôle de constitutionnalité et l'accroissement des pouvoirs du juge constitutionnel', 1983 R.D.P. 410, at p.410 states:
On peut se demander si l'on en arrive pas au point où le rôle de plus en plus prééminent du Conseil constitutionnel risque de fausser le fonctionnement de notre système constitutionnel en mettant en cause le pouvoir d'appréciation des autres pouvoirs publics.

136. Favoureu, L., & Philip, I., *Les Grandes Décisions du Conseil Constitutionnel*, (Sirey) (Paris 1975), p.181 et seq. and, Burdeau, G., *op.cit.*

137. See note 129 above.

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well-described elsewhere.⁽¹³⁸⁾ More recently the *Conseil constitutionnel* by its decision of 23 November 1977⁽¹³⁹⁾ has recognised the constitutional validity of the freedom of education, despite the fact that this freedom was deliberately left out of the Preamble of the 1946 constitution (by a vote 274/272)⁽¹⁴⁰⁾. The *Conseil constitutionnel* was seized on June 28th 1979 concerning a law that would limit the right to strike in favour of the continuity of public service. (Radio/TV). The *Conseil* allowed both these principles a constitutional validity and ruled that part of the law should be struck out as unconstitutional.⁽¹⁴¹⁾ As Professor Legrand noted:

Les conflits politiques majeurs aboutissent de plus en plus fréquemment dans le prétoire du Conseil constitutionnel

138. J.O., 18 July 1971 p.7114, Favoreu *op.cit.* p.267, and references cited therein. Some would claim this honour should go to the decision of 28 Nov. 1973, see Madiot n.145 below at p.2.
139. J.O., 25 November 1977, p.5530.
140. See Plouvin, J.Y., 'La notion "des principes fondamentaux de l'enseignement" au sens de l'article 34 de la constitution', (1979) *R.D.P.* 53. See note 3.
141. J.O. 27 July 1979 n. See 20 September (1979) *A.J.D.A.* p.42 *et seq.*
142. Professor Legrand 20 March (1980) *A.J.D.A.* 191.

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This reflects the political role of this innovative institution.⁽¹⁴³⁾ The *Conseil constitutionnel* in balancing constitutional rights has greatly extended its own power.⁽¹⁴⁴⁾ However the *Conseil constitutionnel* is not the only body in France concerned with the upholding of human rights. Indeed Professor Rivero has shown⁽¹⁴⁵⁾ that its decisions alone are not enough to ensure the upholding of constitutional rights.

There are many laws that can be misapplied. Executive acts must be reviewed. This is clear from *Conseil constitutionnel*'s decision of 12 January 1977⁽¹⁴⁶⁾ declaring unconstitutional a law that would have empowered the police to stop and search vehicles. The *Conseil* is an increasingly important sieve that tries to catch laws contrary to the Constitution before they are enforced but some

143. See Wacquet, 'La protection des droits fondamentaux en France', *F.I.D.E. VII*, (Brussels, 1975), II/7. See though Favoureau *op. cit.* pp.364-5 on the *Conseil Constitutionnel*.

144. Philip, L., *op.cit.* p.414

Il en résulte un pouvoir d'appréciation très large du juge constitutionnel puisqu'en définitive, il est amené à élaborer une hiérarchie des règles de valeur constitutionnelle pour faire prévaloir un principe sur l'autre.

145. Rivero, J., note, (1978) 20 A.J.D.A. 215. Madiot, Y., 'Du Conseil Constitutionnel à la Convention Européenne', 1975 D. Chr. I.

146. J.O. 13 January 1977 p.344.

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can get through. It is recognised, as in the United Kingdom, and elsewhere, that most infringements of human rights derive from the government in its application of the law.

In France the complicated repartition of responsibilities between the legislature and the government is a constant source of uncertainty.⁽¹⁴⁷⁾ The *Conseil constitutionnel* was also designed to decide on the repartition of competencies.⁽¹⁴⁸⁾ The Conseil has not shrunk from this duty for example in its decision of 2 December 1982.⁽¹⁴⁹⁾ The long and very distinguished role played by the *Conseil d'Etat* in controlling the administration is a well recounted story.⁽¹⁵⁰⁾ Basically this control is equivalent, though more

147. Luchaire, F., 'Les sources des compétences législatives et réglementaires', 1979 *A.J.D.A.*, D.3.

148. See also Bermann, G., 'French Treaties and French Courts' (1979) 28 *I.C.L.O.* 458 at 680.

149. *Décision 82-147 de 2 Déc. 1982*. Philip, *op.cit.* draws the conclusion that

Le développement du contrôle de constitutionnalité et l'accroissement des pouvoirs du juge constitutionnel rendent ainsi indispensable une réhabilitation de référendum législatif.

150. See *inter alia*, Robert, J., 'Le juge administratif et la liberté individuelle', in *Mélanges offerts à Marcel Waline*, (LGDJ, Paris, 1974) p.719. The *Conseil d'Etat* also has a preliminary vetting role to play under Articles 37, 38 and 39

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extensive, to the English doctrine of ultra-vires. The rule (règlement) must conform to the law (loi) that authorises it in this case of the Constitution Article 37. This jurisdictional control (*respect de la légalité*) exists inherently as a general principle of law (*principe généraux de loi*) applicable to the administration.¹⁵¹ The administrative courts' review cannot be excluded¹⁵², except by acts of government (*actes du gouvernement*)¹⁵³, the definition of which includes action taken by the President of the Republic under

of the Constitution. However the *avis* that it gives on these occasions is not published by the government, and is kept secret. The government, moreover, need not follow the advice given. For instance the *avis* concerning the constitutionality of the referendum of October 1962 which was negative has never been published. See Letourneur, M. et al., *Le Conseil d'Etat et les tribunaux administratifs*, (Colin, Paris, 1970), p.62 et seq. Fourgère, L. ed. *Le Conseil d'Etat 1799-1974* (Centre national) Paris 1974) p.850 et seq. *J.O. Deb. parl. Sénat* 18 December 1968, p.2138. See p.935 for Ireland, p.821 for Belgium.

151. *Conseil d'Etat* 17 February 1950, *Ministre de l'agriculture v. Dame Lamotte*, Rec. 110.

152. *Conseil d'Etat* 19 October 1962, 18 *affaire CANAL* Rec. 552.

153. Virally, M., 'L'introuvable acte du gouvernement', 1952 R.D.P. 317; Chapus, M., 'L'acte du gouvernement, monstre ou victime', D. 1958 Chr. II p.5.

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Article 16 of the Constitution.⁽¹⁵⁴⁾ The role of the Administrative Tribunals has been augmented by the decentralisation law of 2 mars 1982⁽¹⁵⁵⁾ which allows the representative of the State to refer acts of Communes to the Administrative Tribunaux to test their legality.⁽¹⁵⁶⁾

Similarly criminal prosecutions can be annulled by attacking their legal basis (*l'exception d'illégalité*). Article 66 declares:

Nul ne peut être arbitrairement détenu. L'autorité judiciaire, gardienne de la liberté individuelle, assure le respect de ce principe dans les conditions prévues par la loi.

This goes some way towards mitigating the traditional public hostility to judicial control. In the administrative tribunals, once locus standi has been established, an action may be brought within two months⁽¹⁵⁷⁾ against any non-legislative act of the

154. *Conseil d'Etat* 2 March 1962 *Rubin de Servens autres*, Rec. 143, and pp.18-19 above.

155. 82-213 J.O. 3 mars 1982, p.730; and J.O. 6 mars 1982, p.779.

156. Loi 82-213, article 3.

157. *cf. l'exception d'illégalité* that makes inapplicable any individual regulation, vitiating any decision made under it.

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executive⁽¹⁵⁸⁾. The *Conseil d'Etat* has built up from the earliest times a series of *principes généraux de loi* that played an important part in filling the gap left by the lack of a written Bill of Rights under the Third Republic. These principles are still vitally relevant today⁽¹⁵⁹⁾ as a standard against which to judge regulations, and interpret legislation ...

There are of course limits to the efficacy of this *ex-post facto* control⁽¹⁶⁰⁾. The main hindrance however is that a law that infringes human rights that gets through the mesh of the *Conseil constitutionnel* will not be checked by actions of the *Cour de Cassation* or *Conseil d'Etat*. It can be seen from this brief resumé of the mechanisms designed to prevent the infringement of human rights in France that the judges and *Conseillers* have been very inventive in their protection of new categories of rights, viz. the general principles of law of the *Conseil d'Etat*, and the vast Christmas stocking that the *Conseil constitutionnel* can dip into in

158. Including *ordonnance* (Article 92 of the Constitution) and Article 16 decisions taken by the President of the Republic of a legislative nature.

159. Viz. The principle of proportionality. Also Barel 1954 D.Jur 594. See Morange, M., 'Une catégorie juridique ambiguë: les principes généraux de droit', 1977 *R.D.P.* p.761.

160. C.C. 28 November 1973 1974 A.J.D.A.; *Cass. Chbre crim.* 26 February 1974 D. 1974 p.173. Note Vousin, R., and Note de Soto, J. 1974 *R.D.P.* 889. See Rivero and Madiot, n.145 above.

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its preventive role. They have been brave, and they have been weak.⁽¹⁶¹⁾ It is now time to examine the extent that they have been able and willing to call to their aid those international norms that call for the respect of human rights.

2. International Law

Article 52-55 of the Constitution govern the acceptance of international law in France. The President of the Republic has a general power to negotiate and ratify treaties (Art. 52), subject to Article 53 limitations, whereby especially significant Treaties⁽¹⁶²⁾ have to be ratified or approved by a law, thus involving the Parliament. Article 55 states:

Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son

161. Duverger *Le Monde* 7 August 1971, quoted by Fenet, A., *Les libertés publiques en France*, (PUF, Paris, 1976), p.204.

162. Art. 53 of the Constitution:

Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale ceux qui engagent les finances de l'Etat, ceux qui modifient les dispositions de nature législative, ceux qui sont relatifs à l'Etat des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi ...

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application par l'autre partie.

The reciprocity clause in this article is peculiarly inappropriate as regards to human rights treaties. The rights here accrue to the individual, no particular rights are created as between states.¹⁶³ From the Constitution it is not clear how international law will relate to constitutional law, but Article 54 provides that if the *Conseil Constitutionnel*, having been seised of the matter, declares that a Treaty includes a clause contrary to the Constitution, then the Constitution must be revised before the Treaty can be ratified.¹⁶⁴ There have been several important decisions taken by the Courts in this field, even if they show a lack of uniformity.

The *Conseil Constitutionnel* in its judgement on the Veil abortion law¹⁶⁵ declared its lack of competence to judge laws by Treaty standards, which were distinguishable, by their nature, from constitutional standards. Clearly the *Conseil Constitutionnel* could have decided that it had jurisdiction, indeed the general expectation was that it would so decide. Why did it choose to limit its jurisdiction? Two reasons have been put forward. Firstly its distinction as to the nature of treaties (relative and contingent), and constitutional law (absolute and definitive), and secondly, the

163. Though see European Convention on Human Rights Arts. 46. 48 and Treaty of Rome Arts. 169-170. See below p.751.

164. See *Conseil Constitutionnel*, J.O. 21 June 1970 p.5806.

165. J.O. 16 January 1975 p.671. See Favoreu *op. cit.* p.357.

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traditional respect for national sovereignty, and the unwillingness of judicial bodies to act as final arbiters over parliament.⁽¹⁶⁶⁾ However, these reasons are not entirely convincing. The *Conseil Constitutionnel* did in fact have to decide the issue, but on the basis of constitutional norms. Also, as regards to the relative and contingent nature of Treaties, it is clear from the *Conseil Constitutionnel*'s own case-law that the range of constitutional rights to be protected is vast and uncertain.⁽¹⁶⁷⁾ See, for example the conflicts on their interpretation between the different jurisdictions⁽¹⁶⁸⁾. As to reciprocity, this condition will be looked to below whilst evaluating the *Cour de Cassation*'s position in regards to human rights treaties. The *Conseil Constitutionnel* having declared itself unable to judge on the validity of laws vis-a-vis

166. The *Conseil Constitutionnel* declared in the course of its judgment:

Considérant que l'article 61 de la Constitution ne confère pas au Conseil Constitutionnel un pouvoir général d'appréciation et de décision identique à celui du Parlement

...

167. Though of course because of the reciprocity clause they might be considered 'relative and contingent' depending for their enforcement on the full implementation by other parties.

168. See note ____.

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Treaties, (167) could the *Conseil d'Etat* or *Cour de Cassation* step into the breach?

The *Conseil d'Etat* in its decision *Syndicat general des Fabricants de Semoules de France*⁽¹⁷⁰⁾ showed its inability to judge the legality of a legislative act, regardless of article 55 of the Constitution. Thus for the *Conseil d'Etat* the rule of *lex posterior derogat legi priori* is observed. (171)

The *Cour de Cassation* however in its decision *Cafe Jacques Vabre*⁽¹⁷²⁾ decided that if applying a Treaty was not a constitutional

169. The *Conseil constitutionnel* has rejected an appeal based on the grounds that an earlier international treaty being abrogated by a later treaty was contrary to the Constitution. See Fromont, M., 'Le Conseil constitutionnel et les engagements internationaux de France', in Bernhardt, et al., (eds), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte*, (Springer, Berlin, 1983).
170. Also C.E. 22 October 1979 *Union Démocratique de Travail*, Rec. Lebon, p.383.
171. 1968 D. 285, [1970] *C.M.L.R.* 395. Dubois, L., 'Le juge administratif française et les règles du droit international', (1971) *XVII A.F.D.I.* 9.
172. 1975 D. 497, [1975] 2 *C.M.L.R.* 336. Piralle-Gerouville, 'La primauté du droit international et la spécificité de l'ordre communautaire dans l'affaire Jacques Vabre', (1976) 12

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issue (per *Conseil Constitutionnel* 15 January 1975) then it was competent to decide whether a subsequent law should be applicable or not.¹⁷³ More interestingly the *Cour de Cassation* went on to declare that, in the Community legal order, a failure of its obligations by one member State did not entitle non-compliance by another member State¹⁷⁴, as article 169 and 170 of the Treaty of Rome were specifically provided in order to prevent self-help. It follows from this, in my view, that similarly under the European Convention on Human Rights, Article 25,¹⁷⁵ 46 and 48 could be said to provide for the eventuality of failure by a State Party. In this way the ordinary courts in France, at least might have the key to using the European Convention on Human Rights provisions. Furthermore, as the ordinary courts in France, interpret international law for themselves as regards to private rights, it would seem that the European Convention on Human Rights might have a

R.T.D.E. 215.

173. *Cour de Cassation* 15 December 1975. [1976] *C.M.L.R.* 152.

174. [1975] 2 *C.M.L.R.* p.336 at 369 in French at p.379.

175. See Cocatre-Zilgien, A. 'De quelques effets actuels et éventuels de la ratification de la Convention européenne de droits de l'homme sur la politique et le droit français', (1978) *R.D.P.* 645, for an impassioned plea for acceptance of individual petition rights. President Mitterrand has rectified this omission.

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considerable influence in the French Courts. (176)

In interpreting the European Convention of Human Rights the case-law of the Commission and Court used to be ignored by the *Conseil d'Etat*. (177) The *Cour de Cassation*, in contrast, has referred to the judgments of the European Court of Human rights in its case-law. (178) The *Conseil d'Etat* refers all matters of interpretation law to the Ministry of Foreign Affairs, as it is considered an *acte de gouvernement* and hence unsuitable for the Courts to fulfil this function. (179) This clearly limits their capacity to use international norms to their advantage. Though the case-law of the European organs has now been used by the *Tribunal Administrative de Strasbourg* in a case involving the issuing of passports. (180) In this context, one must remember that the theory of *acte clair*,

176. *Cour de Cassation, Case of the Duke of Richmond*, 24 June 1839 S 1839 I, p.577.

177. C.E 2 October 1981. *Mama M'Bodj*, Rec. p.345. See generally Flauss, J-F., 'Le juge administratif français et la Convention européenne des Droits de l'homme', (1983) *A.J.D.A.* 387.

178. 10 January 1984 R. c/Conseil de l'ordre des avocats de Strasbourg. 20210.

179. Since *l'affaire Rougement* 3 September 1823. See generally Dubois *op.cit.*, p.37 et seq.

180. A reference to the Minister was made as regards the import of the ECHR. Dalloz (31 May 1984) J. p.300.

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considerably reduces the scope of these referrals to the Minister.

France is also a monist country as regards to accepting generally recognised principles of international law.

The ordinary Courts seem more than willing to accept customary international law, although the matter does not seem to arise very often. In the case of *Ministère Public v. Lourido Fernandes*¹⁸¹ a Spanish fisherman's fine was upheld by the Court of Appeal of Rennes by virtue of the fact that a new customary international law had been created as regards to the economic zone 'notably by the works of the Conferences on the law of the sea'. Certainly this shows a very avant-garde attitude. The *Conseil d'Etat* is, however, most unwilling to use this source of law,¹⁸² and in fact rarely does so.¹⁸³ Dubois found absolutely no references at all to customary international law in the jurisprudence of the *Conseil d'Etat*.¹⁸⁴

As to secondary law created by international bodies the *Conseil d'Etat* has varied its position in different cases. It refused to recognise the force of the Universal Declaration of Human

181. Cour d'appel de Rennes 29 May 1978. See Vallée, C. (1979) 83 *R.G.D.I.P.* 220 at p.235, and p.240 for a contrary decision.

182. Dubois *op.cit.*, p.27.

183. Vallée *op.cit.* p.238 and references therein.

184. *Op.cit.*, p.27 et seq.

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rights¹⁸⁵ on the grounds that it was not subject to ratification. This seems not unreasonable given the date of the judgment. It can hardly be said the the UDHR immediately had any legal force at all.

In 1984 the Ministry of External Affairs established a Consultative Commission on Human Rights¹⁸⁶ to advise him on human rights matters in relation to foreign affairs.¹⁸⁷ In 1986 a post of Secretary of State for Human Rights was established within the government and the remit of the Consultative Commission was extended to cover internal human rights matters.¹⁸⁸

185. Dubois *op.cit.*, pp.23-24. *Arrêt Elections de Nolay* (18 avril 1951) rec. p.181.

186. Decree 84-72 (30 janvier 1984). See briefly, 'France's Consultative Commission on Human Rights', (1984) *I.C.J.Rev.* 47.

187. It is composed of forty members drawn from Parliament, the Administration, NGOs and eminent persons in the field of human rights. cf. U.N.Doc. CCPR/C/46/Add.2 p.7 (26 August 1987).

188. Decree 21 November 1986.

SECTION THREE
EDUCATION AND THE LAW

Having set out the main elements of control of constitutionality in France we must now assess to what extent the rights in education are available and legally protected. The analysis commences with an examination of the settlement in the 1950's of the "private" and "religious" schools question, and the re-opening of the battles by the Socialists in the early 1980's. It then turns to examine the concept of the right to education followed by a detailed look at the *liberté de l'enseignement* and the principle of neutrality.

A. LA PAIX SCOLAIRE

In September 1951 two highly controversial laws had allowed catholic schools to receive indirect subsidies. These were the Barange and Marie Laws. The former gave a grant of Fr. 1300 per term per school-age child to parents. If their children attended a state school this money was paid to the local education authority. If their children attended a private school, it went into a fund to improve teachers' pay. Decree 51-1395 assumed that this was paid only if the child attended school. The Marie law gave state bursaries to 'qualified' pupils who attended secondary schools. Thus ended, (except for the period under the Vichy regime) fifty years of independent financing of religious schooling. As the money was paid to parents it gave rise to the growth of the relatively powerful

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parents' associations who disbursed the cash.

In 1959, the same year as the signing of the *Pacte Scolaire* in Belgium, the *loi Debré* worked out compromise solutions between state and private educational provision, amidst a blaze of controversy.⁽¹²⁷⁾ A Commission had been set up, to conciliate between differences headed by Mr. P-D Lapie, a Socialist. For this association he was expelled from the Socialist Party. The law passed in the National Assembly by 427 votes to 71, and was based on the proposals of the Lapie Commission. The large increase in the school-age population coupled with the state's inability to cope alone helped the reform get parliamentary approval.

The law gave private schools four alternatives.⁽¹²⁸⁾ They could

189. The *Comité d'action Laïque*, for instance, denounced the project as 'assassination' of the state school.

190. Special schools for the handicapped (the responsibility of the Ministry of Health) were allowed to use the 1959 law provisions for "simple" contracts only in 1978. Décret 78-254, 8 mars 1978. Agricultural schools were also belatedly included. Their relationship with the State has recently been reorganised by the Loi 84-1285 31 déc. 1984 Article 1 of which declares:

Les établissements d'enseignement et de formation professionnelle agricoles privés ... relèvent du ministre de l'agriculture. Leurs enseignements sont dispensés dans le respect des principes de liberté de conscience, d'égal

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continue outside the State system, being completely independent and without any State aid. They could also adopt a complete integration within the system.⁽¹⁷¹⁾ The third and fourth modes were by contrast. This emphasised that private schools supported within the state sector were "autonomous", and thus avoided the need for any state dealing with the religious hierarchy.⁽¹⁷²⁾ In fact the decree implementing the law authorised contacts between the Departments and diocesan authorities.⁽¹⁷³⁾

A third mode of semi-integration is the Contract of Association. To apply for this the school must be at least five years old, and be fulfilling 'a recognised educational need'. The *Conseil d'Etat* in *Ministre de l'Education c/ Institut privé de Dunkerque, 25 avril 1980*, recognised that parental wishes and not just availability of schooling in the area should be taken

accès de tous à l'éducation et de liberté de l'enseignement

...

191. Also *Décret 60-388*, 22 avril 1960. See *Loi de Finance pour 1986*, No.85-1403 du 30 décembre 1985, article 73. Here the results of integration of several previously private schools were written into the budget of the state.

192. *J.O. (Débats, Ass.)* 23 déc. 1959.

193. Teese, R., 'Private schools in France: Evolution of a system', (1986) *Comp.Ed.Rev.*, 247 at p.252.

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account.¹⁷⁴ Under the Contract of Association the school can opt to be partially integrated. Those parts assimilated must be ran on exactly the same lines as a State school, with exactly the same curriculum, books, etc.

The Commune de Saintes case¹⁷⁵ shows that the *paix scolaire* formula did not always run smoothly. The *Institut privé de Dunkerque* case established that the 'recognised educational need' criterion was relatively easy to comply with if there were enough pupils registered at the school. The *Conseil d'Etat* also emphasised aspects of the *liberté de l'enseignement*; parental choice was a factor to be reckoned with in assessing whether there was a *besoin scolaire reconnu*. This ruling was reinforced in the *Commune de Bouguenais (Loire-Atlantique)* case,¹⁷⁶ where the *Conseil d'Etat* ruled that a *besoin scolaire* could exist even if the commune's state school was not full.

The fourth type of integration, which proved to be the most popular,¹⁷⁷ was that of the simple contract, valid for nine years

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194. See below *Communes de Bouguenais (Loire-Atlantique)* case.
195. *Communes de Saintes, Conseil d'Etat* 19 juin 1985, No. 43.062.
196. *Commune de Bouguenais (Loire-Atlantique)*, 19 juin 1985, No.33.120.
197. In the 1979-1980 year the statistics were as follows:

PRIVATE SCHOOLS

	<u>Primary schools</u>	<u>Secondary schools</u>
contrat d'association	169,000 pupils	900,000 pupils

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with the possibility of a three year extension. This contract obliges the school to prepare pupils for state exams, (177) and teaching and curricula must be harmonised to that of the state schools. The schools become subject to inspection - in return teachers' salaries are paid by the State, and maintenance costs (of a non-major kind) by the local education authorities. The Communes could only support schools within these parameters. (177)

Article 1 of the *loi Debré* states:

.... l'Etat assure aux enfants et adolescents dans les établissements publics d'enseignement la possibilité de

contrats simple	803,000 pupils	17,000 pupils
no contrat	12,000 pupils	<100.000 pupils.

198. This was no hardship, as most private schools did this anyway. State certificates are the only legally recognised certificates. The judges decline to review the substance of examination results or tests, which need not be reasoned. Generally C,E 20 mars 1987, *affaire Gambus*, (1987) A.J.D.A. 550, obs. Prétot. At the university level the principle of equality prevents radically different scales of marks being given to groups of students sitting the same exam, but marked by separate professors. C.E. *Affaire Mme Lombardi-Sauvan et autres c/ Université de Montpellier*, No.44439, (27 mai 1987). (1987) A.J.D.A. 551.

199. *Ministre de l'Education National c/ Association des parents écoles privés de Mahalons*, CE 11 mars 1966, Rec. 203.

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recevoir un enseignement conformes à leurs aptitudes dans un égal respect de toutes les croyances.

L'Etat proclame et respecte la liberté de l'enseignement et en garantit l'exercice aux établissements privés régulièrement ouverts.

An Act of 1 June 1971, extended these possibilities and the loi Germeur fully fleshed out some of the details. Article 4 para 3 of the loi Debré as amended by the loi Germeur⁽²⁰⁰⁾ read as follows:

Les dépenses de fonctionnement des classes sous contrat d'association sont prises en charges sous la forme d'une contribution forfaitaire versée par élève et par an et calculée selon les mêmes critères que pour les classes correspondantes de l'enseignement public.

This law was designed to allow the private system to catch up with

200. 27-1285 25 nov. 1977. Now repealed by loi 85-97, 25 jan. 1985, Article 18. This article re-instates the wording of the loi Debré. The question of the amount of cash available to private schools is justiciable; see 13 March 1987, *Fédération nationale des organismes des gestion de l'enseignement catholique et al.*, note Errera. [1987] P.L. 289.

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the state system financially. (201) There is a legal obligation to support such schools. (202)

In the early 1980's the Socialist government threatened la *paix scolaire* by proposing to change the split nature of the French school system primarily by integrating the state supported private sector that educates approximately 1/6th of all French school children with the public sector. (203) This plan, in one form or another has been a longstanding commitment of the left. As Rivero states:

un programme électorale de gauche ne pouvait se dispenser d'y faire référence... (204)

M. Alain Savary, then Minister of National Education, proposed to commence negotiations with both the public and private educational

201. Schools with both types of contract receive state support for new technology. See Arrêté du 18 juin 1987, J.O. 7 July 1987 p.7408. See e.g. arrêté du 18 mars 1987, J.O. 8 avril 1987 p.3986 for the amounts of subsidy available to supported private education classes.

202. C.E. *Ministre de l'Interieur et de la Decentralisation et Ministre de l'Education Nationale c/ Organisme de gestion de l'école catholique "La providence" a Saint-Brieuc*, (26 June 1987) No.67.727.

203. *Le Monde* 20 octobre 1983.

204. Rivero, J., 'Libertés publiques 1981-1983: essais de bilan', 1983 *A.J.D.A.*, p.633 at p.637.

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sectors in December 1982 (after a year of preliminary consultations) with a view to establishing a unitary system of education in France.

The problems intended to be dealt with included the difficulty caused by the fact the state schools could only be opened if there were sufficient pupils locally, whereas private schools were able to open classes more generously, *selon besoin scolaire reconnu*.⁽²⁰⁵⁾ Moreover parents then had a choice of educating their children either in a public school near to where they lived or at a private school anywhere. The Savary proposals intended to limit their choice geographically vis à vis private education. If that part of the private sector that was supported by the state financially did not go along with this plan, then their finances would be progressively reduced. The private schools that went along with the proposals would be called *établissements d'intérêt public* and would be managed by an Administrative Council made up of the representatives of the State, local government and the Association.

Both state and the new private schools would be given a measure of local discretion in pedagogical matters. A local Committee would decide on a *project d'établissement*. The teaching personnel of the private sector were to be merged into the same categories as the teachers in the public sector of education.

The private sector (mainly catholic but also jewish) refused

205. See above p.758.

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to join in the negotiations, rejecting the proposals. (206)

It was never really envisioned that there would be an enormous decentralisation of the educational system. The law allows administration decentralisation, and to a limited extent financial decentralisation, but with regards to pedagogical matters the centre still rules. For example the state has introduced the teaching of two additional subjects: civic education and science and technology in all primary schools as from September 1985. (207)

The law of 22 juillet 1983 (No. 83-663) continued the Mitterrand packages of decentralisation started by the Law of 7 January 1983 (No. 83-8). In particular it dealt with the question of education that was left largely untouched by the earlier law of 7 January 1983. It divided up responsibilities for school education between the Communes, Departments, Regions and the State. (208) It left aside the controversial problems of the relations between public and private education (no agreements having been reached). (209)

Primary schools henceforth were to be the responsibility of the communes, the collèges the responsibility of the Départments, and

206. *Le Monde* 21 décembre 1982, et 11e and 14 janvier 1983.

207. Council of Europe, *Faits Nouveaux*, (1/85), *op.cit.*, p.9 et seq.

208. See e.g. the circular of 18 August 1987 on extracurricular activities.

209. The law of 22 July itself has been heavily amended especially as regards to private education by the law of 25 January 1985 (No. 85-97).

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Lycées the responsibility of the Regions. These bodies became owners/tenants of the relevant property, and were responsible for paying their costs. The transfer of competences was to be eased by newly created *Commissions de Concertation*.⁽²¹⁰⁾ *Conseils d'éducation nationale* were established in all the Departments and Academies,⁽²¹¹⁾ to perform an essentially consultative role. The Communes also paid the costs of their students attending lower secondary schools and for Lycées situated in their territory.

Communes can decide, after the advice of the state representative, when to establish a school or class.⁽²¹²⁾ More innovative are the powers granted to the Departments and Regions in these matters with respect to Collèges, and Lycées respectively (i.e. secondary education). The state handed over funds to allow the Departments and Regions to carry out their new duties. The new budgetary measures are to be implemented for 1986.

M. Savary, so strongly rebuffed in January, presented in October 1983,⁽²¹³⁾ after the decentralisation law of July 22 1983, new proposals for reform of the French school system. He made it clear

210. Article 27(B) of the law of 22 July 1983 as amended by the law of 25 Jan. 1985. See circular of 9 December 1985, J.O. 20 déc. 1985 p.14850 for details of how they were set up and their functions.

211. Law of 83-663 of 22 July 1983.

212. Article 13 of Law of 23 July 1983.

213. *Le Monde* 20 octobre 1983.

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that the government felt that the current system was divisive, and that it needed to be reformed, even if only to fit in with the decentralisation that was being implemented. He emphasised that the principles of equality, liberty of teaching, and freedom of conscience in education were basic to the French system of education and would not be challenged by the reforms. The reforms were proposed only in the broadest outline and main proposal being for a series of discussions with all the parties involved. The opponents of these proposals mounted massive public demonstrations, notably on March 4th 1984 at Versailles. (214)

The government climbed down from their secular unification plans. In March 1984 the Government proposed the financing of private schools on the same basis as state schools, and that the opening and shutting of classes would no longer be at will, though parents would still retain their choice of private schools. Moreover private school-teachers would be allowed to enter into contracts with the state. (215)

After debate in the Senate the Savary educational proposals were rejected (June 1984) and President Mitterrand riposted with a

214. Times 6.3. 1984.

215. Times 19 March 1984. See Décret 86-1242 (5 déc. 1986), J.O. 7 déc. 1986 p.14718, determining the rules for access to the state pay scales; also Décret 87-751 10 sept. 1987, J.O. 13 sept. 1987 p.10630; Arrêtés du 1 octobre 1987, J.O., 15 octobre 1987, p.11986.

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proposal to enlarge the scope of Article 11 to cover the guarantee of fundamental liberties.⁽²¹⁶⁾ Massive marches through Paris by opponents of these educational plans caused President Mitterrand to withdraw the Bill. Mr. Savary resigned and a new cabinet was formed.

On the 10th October 1984 the National Assembly passed the non-budgetary elements of the proposals of M. Chevènement on reform of the educational system, including private education. The law was designed to bring about smoothly the structural changes made necessary by the decentralisation that was also being implemented. The geographical widening of parental choice in the state system, enabling parents to choose the schools of neighbouring Communes was established. The Commune of Residence would pay the costs. Whereas for private education this payment was not obligatory. It was proposed that Communes be given a say in whether private schools or classes should exist or not.⁽²¹⁷⁾

This law was finally passed in December 1984. The law has been put into effect by decree 85-348 of 20th March 1985.⁽²¹⁸⁾ It was the subject of a reference to the *Conseil constitutionnel* (18 Jan. 1985 84-185). The law amended that of July 1983 (that realised the repartition of competence between the new

216. The Senate in September 1983 had passed a motion calling on President Mitterrand to seek a referendum on the question of reform of the educational system in accordance with Article 11.

217. *Le Monde* 27 mars p.3384.

218. *J.O.* 21 mars p.3384.

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hierarchies of French administration) and added the all important sections on private education. It is these that were the object of the constitutional challenge. The *Conseil constitutionnel* considered that the challenge to the law, based on the affront to freedom of education, was unfounded as the proposed legislation did not porter atteinte à la liberté de l'enseignement which it recognised as being a constitutionally protected value. The proposed added article 27(2) was rejected as contrary to the Constitution. It would have given interested *Communes* a say in whether there should be a contract of association, thus making *les conditions essentielles d'applications d'une loi organisent l'exercice d'une liberté publique* dependant on Communal wishes. This was unacceptable to the *conseil constitutionnel*. (217)

Several *Communes* in the wake of their new-found financial and economic autonomy, and with ministerial encouragement, decided not to make provision or to make insufficient provision for private school support in their budgets.

In *l'arrêt Commune d'Aurillac* the *Conseil d'Etat* had had to rule on the legality of the decree that implemented *la loi Germeur*. It found that the *Communes* were indeed legally obliged to finance

219. See further below p.776.

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l'enseignement privé du premier degré (220) even though the law did not expressly indicate exactly which authority had to pay. The Conseil d'Etat looked to the *travaux préparatoires* to reach this conclusion. It was clear from the *Aurillac* case, decided in February 1982, that the obligation in the *loi Germeur* as implemented by decree was not *expressément décidé par la loi* as required by the Law of 2 March 1982.

Support for private schools under Contract of Association was required by the Debré law as amended by Article 11 of the main decentralisation law of 2 March 1982. (221) This states, inter alia, that Communes must pay all expenses incurred that are required by law:

Ne sont obligatoires pour les Communes que les dépenses nécessaires à l'acquittement des dettes exigibles et les dépenses pour lesquelles la loi l'a expressément décidé.

Article 11 allows all with an interest to bring the matter before the Regional Chamber of Accounts (*chambre régional des comptes*) that can *adresse une mise en demeure* to the Commune. The Minister considered that this law over-ruled the earlier case of *Commune d'Aurillac*. The law had not expressly decided that this was a legitimate expense, it

220. *Conseil d'Etat, 12 fév. 1982 Ministre de l'Intérieur c. Commune d'Aurillac, 1982 D. 415. Also 1982 A.J.D.A. 469, note Gaudemet.*

221. *J.O. 3 mars p.730, et rectificatif J.O. 6 mars p.779, 1982: 1982 A.J.D.A. 276.*

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was a decision of the Conseil d'Etat clarifying the law that had had that effect. Between the beginning of 1983 and mid 1984 over 2,000 cases on this issue were decided.⁽²²²⁾

The various Communes that denied their responsibility to contribute to private educational establishment were supported by some Regional *Chambres des comptes*.⁽²²³⁾ Other *Chambres* made it clear that the expenses in question were clearly obligatory in the sense of the Law of March 2. Some *Chambres* buttressed this result by interpreting this question to the effect that the law did not intend to disallow legal charges from being inscribed on the Communal budget.

Further conflicting decisions arose over whether the Communes had to support private *écoles maternelles*⁽²²⁴⁾, and whether Communes whose pupils attended private schools in neighbouring Communes had to pay.⁽²²⁵⁾ Article 4 of Decree 85-728⁽²²⁶⁾ dictates that for classes under *contrat d'association* the commune must pay resident's expenses.

222. Deby, M., 'La participation des communes au fonctionnement des écoles privées', 1984 *A.J.D.A.* 586.

223. See Deby, *op.cit.*, p.589 et seq..

224. *Commune de Quingey*, 10 January 1986 Rec. p.3.

225. *C.E. Association de gestion de Notre Dame de Verneuil*, (21 Nov. 1986), No.64.062 infers that the Commune of residence must pay.

226. Altering article 7 of Decree 60-389 (22 April 1960); Decree 85-728 (12 July 1985), *J.O.* 18 July 1985.

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and the commune of the non-residents can agree to pay their residents expenses. Moreover it was not clear exactly how the expenses for such education were to be worked out.

These issues came to a head in a series of cases before the *Conseil d'Etat*. In *Ministre de l'Education Nationale c/ Association d'education populaire de l'école Notre-Dame d'Arc-lès-Gray*²²⁷ the Commune refused to pay the private school's expenses for 1981 and 1982 even though it had had a contract of association since 1978. The school requested the *Commissaire de la République* (Representative of the State) to write the amount necessary into the accounts of the Commune. He refused to do so having been advised by the Minister that the expenses so incurred were not "obligatory" in the sense of article 11 of the Law of March 1982.²²⁸ The *Conseil d'Etat* read article 11 of the Law of March 2nd in conjunction with the Code of Communes, which the law of March 2nd expressly reaffirmed, concluding that the expenses of the schools flowed *directement* from the latter law.²²⁹

227. Reported in 1985 *A.J.D.A.* 451; 1985 Rec. p.167.

228. On August 19th 1982.

229. C.E. *Ministre de l'Interieur et de la Decentralisation et Ministre de l'Education Nationale c/ Organisme de gestion de l'école catholique "La providence" a Saint-Brieuc*. (26 June 1987) No.67.727.

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The law of 25 January 1985⁽²³⁰⁾ reinstated the wording of the loi Debré, and the conseil constitutionnel found that this wording in no way infringed the freedom of education. Thus, thanks to the ruling of the Conseil d'Etat in *Arc-lès-Gray* (and the earlier commune d'Aurillac case), the expenses of private schools under contracts of Association have been obligatory for Communes since the notion was introduced in 1959 by the loi Debré.

The *Arc-lès-Gray* case also resolved the issue of whether it was obligatory for the Communes to pay for the expenses incurred by non-resident pupils attending schools with contracts of Association.⁽²³¹⁾ The expense was only obligatory for the Commune if the state schools of the Commune of residence were full. For private schools the law of 25 janvier 1985 makes it clear that the expenses is not obligatory for Communes.⁽²³²⁾

B. LE DROIT A L'INSTRUCTION

230. Its effects are spelt out in a circular of 23rd April 1985.

231. The situation was same as for public schools since the law required Communes to pay for private schools under contract of Association in the same way as for public schools.

232. Note that Article 23 of the Law of 22 juillet 1983 deals with this question with regards to state schools. Communes must agree on a division of expenses failing which the Representative of the State on the advice of the Council for National Education decides.

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The 1946 Constitution talked of *le droit à l'instruction et à la culture*.⁽²³³⁾ According to Robert⁽²³⁴⁾ this deals with the ability of the state to provide *un enseignement gratuit et laïque à tous les degrés* as outlined in the Preamble of the 1946 Constitution. The decision of the *conseil d'Etat* in *Commune de Quingey*⁽²³⁵⁾ firmly held that article 1 of the law of 15 June 1881, setting out the principle of free primary education operated for all primary education (including for those children younger than the age of compulsory schooling) and regardless of residence. An attempt by the commune to charge non-residents F500 thus failed.

La liberté de l'enseignement was not specifically mentioned in the 1946 Constitution. It was not a human right as was the right to education. It was seen as an essential adjunct to *la liberté de conscience*, moreover to recognise it threatened the rights of the child itself.⁽²³⁶⁾ The Constitution did however recognise the *principes fondamentaux reconnus par les lois de la République*, and later it was from this category that the Conseil Constitutionnel was to draw when it recognised *la liberté de l'enseignement* as being a principle of constitutional stature.

233. For children and adults alike regardless of nationality.

Preamble line 13.

234. 1984 D. Chr. at p.249.

235. C.E. No. 58.908, 1986 Rec. p.3.

236. See the *Epoux Mousset* case below p.776.

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C. CONCEPTIONS OF LIBERTE DE L'ENSEIGNEMENT

In France la liberté de l'enseignement has legislative origins in the loi Guizot coupled with the loi Falloux, and was expressed to be a fundamental principle of the Republic in the law of 31 March 1931. There is however no definition in French law of what is meant by *liberté de l'enseignement*. In the past it was often associated with the right to open a school, and this right itself closely linked to the right of freedom of thought and conscience. In modern times it has come to mean more as we shall see in the *Mousset* case. Nowadays, in discussing the notion, the rights of the child to receive education are also given weight, along with the right of establishment and rights of the teacher.⁽²³⁷⁾

In 1977 the *Conseil Constitutionnel* declared that *la liberté de l'enseignement* was amongst the:

principes fondamentaux reconnus par les lois de la République, réaffirmés par le préambule de la Constitution de 1946 et auxquels la Constitution de 1958 a conféré valeur constitutionnelle.⁽²³⁸⁾

The effect of this decision is that the legislator cannot infringe

237. Sabine Montchambert in her book *La liberté de l'enseignement* (PUF, 1983) goes through the various ideas that this and similar phrases meant to various French authors who have considered the subject.

238. 1978 A.J.D.A. p.565, note Rivero, J.

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the *liberté* in legislating.⁽²³⁷⁾ If it does so, and the *Conseil constitutionnel* is seised of the matter, it can declare that the proposed law is not in conformity with the Constitution. Thus a dualistic education system is guaranteed in France. The lay state is not prohibited from supporting private education. The law so supported by the *conseil constitutionnel* provides that teachers in "private" schools must respect the "character" of the institution, but that this obligation to "be reserved" could not be interpreted in such a way as to violate their liberty of conscience.⁽²⁴⁰⁾ Thus it appears that the situation deplored (by the present writer) in relation to the Irish *Flynn* case could lawfully occur in France, with the important difference that the state, in France, supports a full structure of secular schools.⁽²⁴¹⁾

By its decision of 20 January 1984 the *Conseil constitutionnel* has confirmed that its conception of *liberté de l'enseignement* revolves around the guaranteed existence of the

239. See Dec.84-185 (18 January 1985), Rec.36,

Considérant que les lois ordinaires ayant toutes la même valeur juridique, aucune règle ou principe de valeur constitutionnelle ne s'oppose à ce qu'une loi abroge des dispositions législatives antérieures; qu'il serait autrement que si cette abrogation avait pour effet de porter atteinte à l'exercice d'un droit ou d'une liberté ayant valeur constitutionnelle;

240. 23 Nov. 1977, p.42.

241. See Chapter eleven, p.972.

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private 'free sector' of education.⁽²⁴²⁾ The case concerned freedom of thought and speech in universities. The *Conseil Constitutionnel* was seised *inter alia* on the ground that the potential law⁽²⁴³⁾ infringed *la liberté de l'enseignement*. Its response was thus:

Considérant que les dispositions critiquées ne touchent pas à la liberté de l'enseignement mais sont relative à l'organisation d'un service publique et aux droits et obligations des enseignants et chercheurs chargés de l'exécution de ce service et associés de sa gestion et, comme tels, relevant d'un statut différent de celui des personnes privées...

Clearly the Senators who seised the *Conseil Constitutionnel* had a larger conception of *liberté de l'enseignement* than the *Conseil Constitutionnel*, a conception that allowed independence within the state sector itself.⁽²⁴⁴⁾ To France, with its centrally structured curriculum in schools, this does not fit in with the traditional notion of *liberté de l'enseignement* which is historically conditioned to allowing an independent sector. Though the current decentralisation movement would seem to indicate more local control

242. Dec. 83-165, Rec,30.

243. D. jur 1984 p.593 and note Luchaire, F. Gaudemet, Y., 'L'indépendance des professeurs d'Université, principe commun des droits constitutionnels européens', 1984 D. Chr. p.125.
Also Boulois, J., Note, 1984 *A.J.D.A.* p.163.

244. See below section on Educational choice.

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and diversity within the state sector, this cannot be carried too far without infringing the principle of equality. The *Conseil Constitutionnel* however did allow that *professeurs* were covered by a principle of independence.

The *conseil constitutionnel* in its ruling on the Finance law for 1985,²⁴⁵ ruled that the reduction in credits for the support of private education had to be viewed in the light of general reductions, that were also applicable to public education, and thus, *dans ces conditions* the reductions did not clash with *la liberté de l'enseignement*.

In its decision of 18 January 1985 the *conseil constitutionnel*²⁴⁶ reaffirmed that *la liberté de l'enseignement* was constitutionally protected, but indirectly indicated that its implementation by law to make it a reality was not necessarily constitutionally protected. Thus the *loi Germain* could be repealed. The positive aspects of the right were dealt with by ordinary law and could thus be altered, as long as the *caractère propre* of the institution was respected. As we have noted above the *conseil constitutionnel* declared article 27(2) of the law contrary to the constitution in that it left a constitutional right in the hands,

245. Dec 84-184, Rec.54.

246. See above p.766.

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inter alia, of the *communes*. Favoreu and Philip⁽²⁴⁷⁾ consider that this decision⁽²⁴⁸⁾ guarantees state subsidies as an essential element of the constitutional principle of *liberté de l'enseignement*.

Dès lors, on peut affirmer qu'il découle des décisions 184 et 185 DC que l'aide de l'Etat aux établissements d'enseignement privé est, ..., une *condition essentielle* de la liberté de l'enseignement et qu'à ce titre, elle est donc constitutionnellement obligatoire, ...⁽²⁴⁹⁾

The question of whether the right to receive an education was a *liberté publique* or not was raised in the *Epoux Mousset* case.⁽²⁵⁰⁾ In this case the Mousset's wished their son, Laurent, aged five, to go to school. Education is not compulsory until the age of six in France. However it is possible, exceptionally, to allow five year olds into school. The relevant authorities rejected their request that her son be admitted. Their decisions were not reasoned. She sought to have them annulled on this ground as the loi of 11 juillet 1979 requires certain categories of decision to be reasoned, including any decision that *restreignent les libertés publiques*. The Administrative Tribunal of Lyon found the arguments convincing and annulled the decision since, *inter alia*, the liberty to receive an

247. Favoreu and Philip, *les grandes décisions du conseil constitutionnel*, (4th ed.) (Sirey, 1986), p.377.

248. Together with decision of the Finance law for 1985.

249. *Id.*

250. 1983 D. 647.

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education was in point here.

Before the Conseil d'Etat the *Commissaire du gouvernement* (Mr. Franc) considered that *les libertés publiques* were an expanding and changing category. Quoting Rivero and Burdeau, he considered that some *libertés* needed state positive action to allow them to become real liberties available to all. Although *la liberté de l'enseignement* wasn't anywhere exactly defined he found that the Administrative Tribunal of Lyon was correct. He also pointed out that the Ministerial Circular that indicated what was included in the relevant category included,

la liberté de donner ou de recevoir un enseignement ou une formation

The Conseil d'Etat did not follow him. However they recognised the positive aspects that had crept into the concept of *libertés publiques*, although in this case they considered that the *liberté* had to fall within the area of the law that provided a positive obligation on the state before it could be considered a *liberté* in the positive sense. Thus the appeal of the Minister was successful and the Moussets lost their case. From this case we can conclude that there exists a positive right to education in France but only within the fixed age limits that define the period of compulsory education. The positive aspect of the right is not then, it appears, of a constitutional value, and thus could be overcome by legislation. This interpretation matches those given by the Conseil d'Etat in 1977 and 1985 when it reaffirmed the lawfulness of

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state subsidisation of private schools and allowed the bulk of the Chevenement proposals to go through. One must remember in this context that the law implementing the Haby reforms of 1975 declared that all children had a right *une formation scolaire qui, complétent l'action de sa famille, concourt à education.*

1. Educational choice

Thus *liberté de l'enseignement* is guaranteed in France by a dualistic schooling system. The fears of many that the dualistic system would be scrapped were unfounded as the Socialist government withdrew its most radical proposals.

The rights of the child (and his parents in the case of primary schools) are guaranteed by the role allowed to their representatives on the School Councils.⁽²⁵¹⁾ The School Councils deal with the non-academic running of the school.

Parents also now have the liberty to choose between state schools.⁽²⁵²⁾

For secondary education there is a limited decentralisation

251. Since the Haby reforms of 1975. See Montchambert *op.cit.* p.319 et seq.

252. Art. 23 loi 83-663 du 22 juillet 1983 allows for this if the local schools are full or if the Mayor of the Commune of residence approves. It is subject to local agreement between Communes. Thus modifying the rigours of the decision of the Conseil.

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of pedagogical competence.⁽²³²⁾ According to these provisions an Administrative Council is set up (1/3 elected teachers 1/3 elected parents and pupils and 1/3 representatives of the local authority, school administration, and one or more qualified persons). Article 15(3) sets out (non-exhaustively) the powers of the Administrative Councils. They include notably the fixing of the budget, making annual reports on the schools, and implementing pedagogical decentralisation. This latter mainly referring to the internal regulations of the schools as the teaching curriculum is still set by the State.

As to which type of education the child will follow this is decided during the orientation cycle.⁽²³³⁾ If the family's view on the child's future does not coincide with the views of the class council⁽²³⁴⁾ (for example because they felt the child did not have the necessary talent or aptitude), a designated teacher informs the

253. Art. 9 loi 85-97 du 25 janvier 1985 which alters article 15 ch loi 83-663 du 22 juillet 1983 as implemented by Art. 3 décret 85-348 du 20 mars 1985.

254. See Figure One setting out French school system.
Montchambert *op.cit.* p.324 et seq.

255. Composed of teachers, parents, pupils, and counsellors. See Montchambert *op.cit.* p.325. The case of *Ministre de l'éducation Nationale c/ Mlle Atallah* (19 April 1985) confirmed that the pupil representatives must be present else the decisions can be quashed for *excès de pouvoir*.

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family of the conseil de classe's viewpoint and discussions ensue. The Conseil de classe then meets again and indicates its provisional proposals, which are transmitted to the family with further discussion ensuing. The Conseil de classe takes the final decision, and if the family's wishes have not been met then the *chef d'établissement* must give a reasoned opinion as to why the family's wishes were not fulfilled. The case can then go either to arbitration before an Appeal Commission or the pupil may be required to sit an exam, which if it is passed will allow him to proceed down the chosen path.

The rules in France regarding choice of schools and allowing a limited say in curriculum are new and, as of the end of 1986, no cases (to the knowledge of the present writer) have come before the Courts challenging on behalf of pupils the type of education provided in the schools. In this respect one must note that the government has recently liberalised the curriculum, in particular by according significant value to regional languages.⁽²⁵⁶⁾ In the public sector the principle of equality seems to outweigh local autonomy with

256. See for example the recent setting up of a National Council for Regional Languages and Cultures. (1985) 37 *Cahiers de l'Education Nationale* p.10.

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regards the setting of the curriculum. (257)

2. Language

French is the language of instruction, but special language instruction is possible in the various regions.

3. Neutrality: Religion & Politics

In State schools religion may not be officially taught. However there is time off for religious instruction and in secondary schools state sponsored chaplains are permitted and even obligatory if necessary to allow for the freedom of conscience of the pupils. (258) Moreover the state subsidises private schools, most of which have a religious character. The curriculum of the religious schools have tended to adopt a more secularised curriculum because of the academic pressure imposed by the exam system, and the fact that, as elsewhere, the decline in the numbers of priests and members of

257. This principle was most recently invoked by the *conseil d'Etat* to prevent a *collège* from closing for three weeks before the end of the school year "to help" students taking their *baccalauréat*. C.E. *Toucheboeuf et M^{me} Royer*, (13 February 1987) 1987 Rec. 45.
258. *Conseil d'Etat, Association professionnelle des aumôniers de l'enseignement public* 28 Jan. 1955, Rec. p.50. See Texier, A., 'Les aumôniers de l'enseignement secondaire: incertitudes d'une institution', 1984 *R.D.P.* 105.

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religious orders, in general, was reflected in the numbers of such teachers. The "character" of the school forms an essential part of the *liberté de l'enseignement*.⁽²⁵⁹⁾ The *conseil constitutionnel* has made it clear that this *caractère propre* applies to the classes given by teachers in private state-supported schools. It also allows the *chef d'établissement* to veto appointments of unsuitable candidates for posts in his school.

Schools in the state system proper must remain neutral. This neutrality relates not just to religious matters but also to political issues. In *Ministre de l'Éducation Nationale v Rudent*⁽²⁶⁰⁾ the *Conseil d'État* struck down a decision of the Headmaster of a Lycée that authorised political meetings amongst students on school premises, outside school hours, and under appropriate supervision by the *conseil d'établissement*. It reasoned that such meetings threatened the principle of neutrality which schools were bound by. This 'general principle of law' is a case-law creation and in this instance was used to protect the pupils' freedom of conscience.⁽²⁶¹⁾ It also assures "neutral" teaching in state schools, including over

259. Dec 77-87 DC Rec.42; Dec. 84-185, Rec.36.

260. C.E. 8 Nov. 1985.

261. It is the same principle as justified the existence of chaplaincies in public schools.

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choice of textbooks.⁽²⁶²⁾ However its utilisation in this instance is open to objection. If all political groups were equally treated, and no outsiders were involved, then it seems that no harm has been done to the principle of neutrality, and the rights of free expression of opinion have been advanced. The Conseil though chose the safe "trouble-free" option of "neuter" neutralisation, as opposed to "pluralistic" neutralisation. It thus avoided the potential problems of pupil propaganda for political ideas. It forbade only political meetings along "party" lines, not meetings discusses particular political issues. Still as religion can be, and is, taught in state schools the banning of pupil political meetings seems odd for a secular state.

262. C.E., 20 janv. 1911, *Sieur Porteret, Sieur Pichon, Dame Chapuis*, Rec. p.69, concl. Pichat; C.E. 14 janv. 1916, *Association es familles de Gamarde-les Bains*, (1916) R.D.P. p.52 concl. Corneille. Also 28 avril 1938, D¹¹ Weiss Rec. p.247. Generally, (1986) R.D.P. concl. Llorens.

PART THREE
CHAPTER TEN
BELGIUM
SECTION ONE
THE EDUCATIONAL SYSTEM

A. HISTORICAL PERSPECTIVE

In 1830 Belgium became an independent state. Her varied historical background is reflected in her present educational system. Both religious and language factors are of great importance.

It is generally agreed that

Pendant tout le Moyen-âge et les Temps modernes jusqu'à la Révolution française, l'enseignement a été le monopole de l'Eglise.⁽¹⁾

The French Revolutionaries had attempted, with some success, to reverse the monopoly of the Catholic Church in educational matters, and to entrust this task to the State. In 1808 the Imperial University was created by Napoleon,⁽²⁾ and was given control over all

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1. Perin, F. *Cours de Droit Constitutionnel*, (Presses Universitaires de Liège, 1974). Greyson, E., *L'enseignement public en Belgique, Aperçu historique et exposé de la législation*, Vol. 2 (Brux. 1983), p.ix.
 2. See chapter 9, section 1 above.

education bar primary education.⁽³⁾

During the Union with the Dutch⁽⁴⁾ the 'Fundamental Law' published on August 24 1815 became the 'Constitution of the United Netherlands'. Article 226 of this law proclaimed that:

L'instruction publique^{no} est un objet constant des soins du gouvernement. Le Roi fait rendre compte, tous les ans, aux Etats-Généraux, de l'état des écoles supérieures, moyennes, et primaire.

The Belgian Bishops immediately started fomenting discontent.⁽⁵⁾ William I of Holland was an enlightened despot, and attempted serious and sensible reforms of the Belgian education system. However the days of the despot were over and he succeeded only in irritating

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3. Naturally the French language was further encouraged during this period.
 4. During this period all the new state secondary school classes were taught in Dutch, throughout Belgium.
 5. Mallinson, V., *Power and Politics in Belgian Education*, (Heinemann, London, 1963), quotes McEllen, *Histoire de l'Ecole Populaire et de la Lutte Scolaire en Belgique*, (Bruxelles, 1933), at p.19, showing the Bishops' protest against Article 226:

Jurer une loi qui confère au roi, ce qui pis est, à un roi qui ne professe pas notre sainte foi, le droit de régler l'instruction publique, serait trahir d'une façon scandaleuse les droits les plus sacré de l'Eglise Catholique

Belgians of all beliefs and languages.

The Catholics were upset by any State interference with their educational prerogatives. The Communes, with a long tradition of independence, were irritated at having to pay for schools that they did not want, and had not voted for. In 1823 Dutch was made the official state language. This infuriated the French-speaking middle-classes. Between 1817-1828 William I built or repaired 1,146 primary schools, and provided 668 school-houses for the accommodation of teachers.⁶ He inaugurated teacher-training colleges (*Ecoles Primaires Royales*), and established a system of state licensing for teachers, including teachers at religious schools.

In 1825 three controversial Royal Decrees placed all schools under State supervision, and government permission had to be granted before a new school could be opened. No-one could teach without a Diploma, and those educated abroad, (as was the custom amongst well-to-do Catholics), could not afterwards study at a Belgian university, nor join the *Collège Philosophique*, nor become a public appointees.⁷

In 1827 William I made a Concordat with the Pope, which the Catholics assumed would lead to the dispersal of the *Collège Philosophique*, at Louvain. William announced that this was not the

6. Mallinson, *op.cit.*

7. The *Collège Philosophique* was instituted by William and attendance was essential for all those intending to become priests. It was hated by the Catholics.

case. This was the last straw and finally the Catholics and the Liberals allied against William, and, from then on,

a bourgeois coalition movement of Catholics and Liberals, which he had forced into being, fought him mainly on scholastic issues and thrust these issues for all time into the forefront of Belgian politics.⁽⁸⁾

One result of this pressure upon William was a series of compromises on educational issues.⁽⁹⁾

After the successful revolution against the Dutch in 1830⁽¹⁰⁾, and as part of the backlash against William's policies and suppression of Communal power, a Decree, in October 1830, granted the Communes independence in educational issues.⁽¹¹⁾ 'L'Etat hors de l'école', was the battlecry. Articles 17 of the Constitution

8. Mallinson, *op.cit.*, p.25.

9. Including a Decree (7 June 1830) that made teaching in Dutch no longer compulsory.

10. See, Nothomb, P., *Les trois saisons de 1830*, (Editions Libris, Bruxelles, 1943) for a general account of the actual Revolution.

11. Decree of 16 October 1830 abolished all monopolies. It proclaimed the principle that

... aucune autorisation préalable ne sera exigée pour la fondation et l'organisation d'un établissement scolaire quelconque.

Perin, F., *op.cit.*, p.138.

asserted their educational wishes. (12)

French became the official state language in the new Kingdom, although translations were available in Flemish and German-speaking areas. Flemish was not yet a standardised tongue. The bourgeois revolutionaries admired and spoke French.

The Catholic-Liberal alliance, which was to last until 1839, held together partly by fear of William I, (who did not accept the fact of Belgian independence until 1839), disagreed over the amount of independence that the Communes should have. (13) A compromise was reached in 1836, (14) whereby the Crown was granted the right to appoint the Burgomaster and *échevins*, (Deputy Mayors) from amongst those elected to the Communal Council. New schools had to be approved by the *Conseil*, of the Province who helped to finance them. The State had no control over the deliberations of the Commune which could control the appointment and dismissal of teachers.

Immediately after the Revolution however, the Communes had closed down many schools and laid off numerous teachers. In effect William's reforms were destroyed, and the Catholic clergy and

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12. See, Belgium Section 3, p.846. This article was a 'liberal compromise' to the Catholics, who in turn compromised on freedom of the Press.
 13. Rogier (liberal) wanted some central control of the Communes
Dumortier, wanted complete communal autonomy.
 14. Decree 20th March 1836.

Teaching Orders flourished.⁽¹⁵⁾

In 1842 the loi Northomb was passed to regulate primary education. It has been described by Mallinson⁽¹⁶⁾ as

" ... a Bill that did not resolve the problem, but which merely put it on one side by seeking to grant concessions to both parties.⁽¹⁷⁾

Celle-ci était un compromis entre les principes apparemment incompatibles des deux parties au pouvoir: les libéraux, qui exigeaient pour l'Etat le droit d'organiser l'enseignement public, obtenaient par l'article 1er qu'il existât dans chaque commune, ..., au moins une école primaire; aux catholiques il était accordé, par les articles 2 et 3, que la Commune pouvait adopter une ou plusieurs écoles privées réunissant les conditions légales pour tenir lieu de l'école communale.⁽¹⁸⁾

There were only 3 votes against the law in the Chamber of Deputies. Verhaegan, a Free Mason, cast one of these claiming that

15. Desmed, R., 'La franc-maçonnerie belge et la laicisation de l'enseignement, in Preaux, J., *Eglise et enseignement*, (U.L.B., 1977).
16. Mallinson, *op.cit.*, p.47.
17. This Law is generally considered to be a compromise; See Versyen, B., in his Preface to Verhaegan, P., *La lutte scolaire en Belgique*, (A. Siffer, Gand, 1906).
18. Desmed, *op.cit.*, p.20.

the law practically recognised the Catholic religion as the state religion and was thus contrary to article of the Constitution that proclaimed the *liberté des cultes*.

The School law of 1842 obliged each Commune to support at least one primary school. Religious and moral instruction was the responsibility of the clergy (with a conscience clause for Protestants and Jews). If the Commune had as a result a budget deficit, they could receive a state subsidy provided that they allowed for government inspection. All text-books had to be approved by both the state and the church. Instruction was to be in the language of the children, so that in Flemish areas, Flemish was the medium of instruction. The Catholics were well pleased with this law.

In 1847 Charles Rogier formed a Liberal Government. Their avowed aim was compulsory education for all. In 1850 a School Law was passed to alleviate secondary education from the Catholics virtual monopoly. 50 *écoles moyennes* were established, and ten new *athénées*. The 1850 School Law provided that teachers and inspectors were to be nominated by the government, which was also to draw up a general programme of studies. Religious ministers could be invited to give instruction in the new schools.

The Church was outraged at this attempt to deprive it of its 'inalienable' right to educate. The Pope expressed "*sa douleur à la vue des périls que menaient en Belgique la religion*

catholique".⁽¹⁷⁾ Catholics boycotted the new *athénées*. 'La lutte scolaire' had started. The Liberals legislation was harshly felt especially when contrasted to the French 'loi Falloux', which had just given back to the Catholic Church the freedom to open schools as it wished in France.⁽²⁰⁾

The School Law of 1850 (art. 21) also made Dutch an obligatory second language to be taught in all secondary schools in the Flemish Provinces.⁽²¹⁾ It was to have parity of esteem with other modern languages in non-Flemish areas. However there was a shortage of qualified teachers, and it was not until much later that Dutch speaking, university-trained teachers were available.

In 1856 the 'Flemish Commission'⁽²²⁾ was established by the government to examine the demands of the Dutch-speakers (Flamingants). It recommended that Dutch be the sole language of instruction in all primary school and *écoles moyennes* in Flanders. It also recommended the use of Dutch in "official life", ranging from the Courts to the Army. The Report, presented on the 1 March 1857, was too radical, and the Minister did not dare have it published. It

19. Pirenne, H., *Histoire de la Belgique*, (Bruxelles, 1932) Tome III, p.170.
20. See France, chapter 9, Section 1, p.718.
21. I.e. West Flanders, East Flanders, Antwerp, Limbourg, and Brabant.
22. *Commission des greffs flamand*, set up by M De Decker.
See generally Ruys, M, *The Flemings*, (Lanoo, Tielt and Bussum, 1981), (translated by Schoup, H.).

was finally published by the Commission itself in 1859.

In 1854, at what became known as the Antwerp Convention, the Chamber of Deputies agreed (86 votes to 7) that the Catholic idea should permeate all education, and that there should be two hours every week devoted to religious instruction.

In 1857 the Liberals were again in the majority (1852-57 being years of a coalition government with Catholic predominance). In 1864 the Ligue de l'enseignement was created by Charles Buls and Auguste Couveur; inspired by the Dutch example, they wished to establish free compulsory education. It almost immediately became a successful lobbying and activist organisation, was supported by the Liberals, and, had as an aim, the reform of the 1842 School Law. It believed that the State had the right and the duty to make schools accessible to all.

In 1879 the reform of the 1842 School Law was finally undertaken. It had been on the agenda of the Liberal Party since their Conference at Brussels in 1846, where the 1842 Law had been condemned as unconstitutional. Dubbed the '*loi de malheur*' by M Malou the Catholic Party leader, the School Law of 1879 set the *Lutte Scolaire* ablaze. *Guerre scolaire* may be a more appropriate appellation, as even M Malou wrote to Pope Leo XIII on 5th September 1879 ... *en s'élevant contre la decision de l'épiscopat de refuser l'absolution au personnel des écoles communal.*⁽²³⁾

23. Desmed *op.cit.*, p.214, Note 62.

The Catholics considered that the law was a Freemasons plot. (24)
They had always considered that

... l'Etat n'a d'autre obligation que d'encourager
l'initiative privée et de suppléer à son insuffisance, mais qu'il
est tout à fait incompétent pour diriger lui-même un enseignement

24. L'abrogation de la législation de 1842 fut donc décidé dans
les Loges.

Guillaume Verspeven, Preface to Pierre Verhaegan *La Lutte Scolaire
en Belgique*, (Gand, 1906) p. 7.

Le but, plus ou moins dissimulé, mais certain et avéré, de
cette législation nouvelle [1879 Law], marquée de sceau
maçonnique, était de déchristianiser la Belgique et de
paralyser administrativement l'enseignement primaire libre,
en organisant le monopole de fait en attendant qu'on p t
proclamer le monopole de droit.

Ibid.

Arracher des âmes à l'Eglise de préférence les âmes de ceux
qui n'ont pas les moyens de se défendre, tel était, en effet,
le but véritable de la loi ...

Verhaegan, *La lutte scolaire en Belgique*, *op.cit.*, p.56.

See also Desmend, *op.cit.*, p.124.

national.⁽²⁵⁾

The Liberals on the other hand had always considered

l'Etat investi par la Constitution de la mission d'enseigner,
d'établir et de diriger un enseignement public.⁽²⁶⁾

This did not necessarily entail a total state monopoly though.⁽²⁷⁾

One of the first things that the new Liberal Government did was to create a Ministry of Education. The first Minister was Pierre van Humbeek, a leading Freemason, member of the *Ligue de l'enseignement*, and notoriously anti-Catholic.⁽²⁸⁾

25. Verhaegan *op.cit.*, p.22

M Deschamps in 1835 had stated the Catholic view of state education.

Celui-ci ne peut pas plus élever un enseignement public à ses frais, ou plutôt aux frais de la nation, qu'il ne peut fonder un culte séparé ou une presse rivale.

Quoted in Marion Coulon. *Jeunesse à la Dérive*, (Silène, Bruxelles, 1945). In 1879 this view had not changed.

26. Verhaegan, *op.cit.*, p.22.

27. Bartier, J., 'Les milieux laïques et la liberté de l'enseignement en Belgique ...' in Preaux, J., *Eglise et Enseignement*, *op.cit.*

28. He had likened the Catholic Church to a corpse, and hoped that they would be able to push it in the pit, dug for it by the Revolution. Naturally this sort of talk was highly

The School Law of 1879 gave the government the power to decide how many schools a Commune needed (Art. 2)⁽²⁷⁾, and how many teachers/classes there should be per school (Art. 2). Teachers to be state functionaries, state trained at State Colleges. Only 'officielle écoles normales' could present candidates for the *Diplôme de Capacité*,⁽²⁸⁾ No other Diplomas were recognised. All religious teaching was banned at official training colleges. Communal Authorities were no longer to have absolute rights of supervision or dismissal of teachers (Art. 7). They could only choose teachers with a *Diplôme de Capacité*. All teachers were to be paid a minimum salary.

Furthermore text-books were to be approved by the Minister (not the clergy) (Art. 6). The Communes were responsible for school maintenance, and 'free' schooling at State schools of poor pupils (Art. 3). Private schools lost all their subsidies, and Communes were forbidden to adopt private schools anymore.⁽²⁹⁾ Religion was to be taught at the parent's discretion (in a room provided by the school), and *enseignement moral* took its place on the curriculum.

distasteful to Catholics. Verhaegan *op.cit.*, p.35, where his speech is quoted.

29. Each Commune must have at least one school (Art. 1).

30. Article 43.

31. Previously, under the 1842 law, there had to be at least one school per Commune, but the Commune could choose to 'adopt' a private school, rather than create its own school.

The Law also widened the curriculum, and instigated the possibility of a two year extension (*Quatrième Degré*), a poor man's secondary school.⁽³²⁾ On the 20th July 1880 another Law modernised the curriculum and set forth new programmes of study based on those at Charles Buls's 'model School'.⁽³³⁾

The Catholics were outraged and stunned at these reforms, especially the *loi de malheur*, which was discussed in the Chamber

32. C'est essentiellement l'école moyenne du pauvre de ce pauvre doublement pitoyable qui, joignant à sa matérielle une égale pénurie de moyens intellectuels, n'a en attendant le travail d'autre parti à prendre que celui de ces études gratuites et sans prestige.

Coulon, *Jeunesse à la dérive*, Tome III. p.154.

33. This second was set up in 1875 by the *Ligue de l'enseignement*.

The Catholics considered that

Les programmes scolaires du gouvernement furent surchargés d'une foule de matières inutiles, que les écoliers n'étaient pas plus en mesure de comprendre ni de retenir, que la plupart des maîtres n'étaient capables de les enseigner.

Verhaegan, *op.cit.*, p.146.

from April 22nd until June 6th.⁽³⁴⁾ They reacted quickly,⁽³⁵⁾ threatening both parents and teachers with excommunication if they sent their children to these state schools, or taught in them. Priests were forbidden to enter the schools, because

Il était évident que le prêtre ne se rendrait pas dans des écoles ou l'on ferait tout pour lui rendre la vie impossible ... , son enseignement devait être surveillé par l'Etat, contrecarré par l'instituteur, qui arrachait sans cesse de l'âme des enfants les germes de foi.⁽³⁶⁾

The Catholics played upon the Communes' traditional aversion to central control and shrieked about 'taxes' and 'liberty'. They expanded⁽³⁷⁾ a fund (*denier des écoles*) and quickly established 'free' schools everywhere. They agitated against the new law, and even made up a new prayer for Sunday services:

34. *Jamais la tribune belge n'avait vu un débat aussi long, aussi solennel ...*

Verhaegan, *op.cit.*, p.77.

35. The Belgian Bishops sent a letter to the government on June 12, warning that they would interdict the Schools. The law passed in the Chamber on the 6th June, and in the Senate on the 16th.

36. Verhaegan, *op.cit.*, p.37.

37. Established in 1876, it is estimated that in 1879 alone the fund collected approximately 40 million francs, Verhaegan, *op.cit.*, p.12.

*Des écoles sans Dieu et des maîtres sans foi, délivrez-nous,
Seigneur.* (38)

*L'interdit dont les évêques avaient frappé l'enseignement officiel
ne tarda pas à porter ses fruits.* (39)

Teachers began to resign from the official schools. In November 1879 the government had to admit that 168 State schools were empty. (40)

From June 15th 1883 onwards all lower secondary forms in instruction was available.

At the next election (1884), the Radical Left of the Liberal Party deserted Frère-Orban over the issue of universal suffrage and the Catholics came into power.

The Ministry of Education was immediately disbanded, and no more curriculum programmes were issued. In September 1884 a new School Law was passed. The Communes were once more to decide how many schools and teachers they needed. Once again they had discretion as to which teachers to appoint and control over their educational budgets. They could once more adopt schools of their choice (as long as they were efficient), and *écoles libres* were again subsidisable if adopted.

Religious instruction was not obligatory, but if twenty

38. Verhaegan, *op.cit.*, p.61.

39. *Ibid.*, p.97.

40. By 1884, 2,253 teachers had resigned, despite a circular of 27 March 1880 declaring that teachers leaving their posts would not receive a pension. Verhaegan, *op.cit.*

families petitioned a Commune for religious instruction, because the State did not provide it, then the Commune was obliged to adopt a 'free' school. A state (neutral) school could be obtained in the same fashion.

This law horrified the Liberals who set up a fund to support low-paid state-teachers, whose salaries were now Commune-controlled, and, as a result, in many places ridiculously low. Ever since the 1879 law there had been public furor over educational matters. Scandalous and dastardly threats had been used in the *chasse à élèves*. Education was the issue in politics.⁽⁴¹⁾ There were bloody riots when M Jacobs (the Catholic Leader) pronounced his new educational law (Sept. 1884), and King Leopold took the opportunity of asking for this ultramontane's resignation. By the new law the Communes were granted *l'autonomie communale la plus complet'*, and *beaucoup d'écoles, ... établies par le gouvernement précédent, furent supprimées.*⁽⁴²⁾

The Catholics were to remain in power until 1919. On the 15

41. Ainsi, l'école belge à tous les degrés devenait plus que jamais une arène politique...

Coulon, Tome I, p. 38 *op.cit.*

42. Coulon, M. *Jeunesse à la dérive*, Tome I, pp. 39-40.

September 1895 a new law⁽⁴³⁾ made religious instruction compulsory for one period a day. The instruction could be Protestant, Catholic or Jewish. Parents could opt out for their children, in which case moral instruction took its place. In 1897 another law created a new school programme, and reduced the number of *écoles moyennes* and *athénées*. In 1898 Dutch was made an official language of Belgium.

Towards the turn of the century the professional teachers organisations were also pushing for compulsory education, and thus supporting the Socialists and Liberals. The Catholic Party had most support from the Flemish voters, and the Liberal and Socialist Parties from the Walloons. In 1899 voting by proportional representation was introduced, in part to try and stop this polarisation.

It was not until 1911, when the Catholics had a majority of only six in the Chamber of Deputies (1910 election), that a compromise Bill on education was proposed, and rejected. The Liberals and Socialists wanted compulsory education that would not favour the Catholics.⁽⁴⁴⁾ The election of 1912 gave the Catholics a

43. This law also made all 'adoptable' schools eligible for grants/subsidies equal to those received by schools actually adopted.

44. The 1911 Education Bill would have given state subsidies to education to schools in proportion to the number of pupils that they recruited. Each Head of family would receive a

majority of eighteen, nevertheless the *loi Poullet* of 19 May 1914 was passed.⁴⁵ This made education from the ages six to twelve compulsory immediately, and the *quatrième degré* was to be compulsory by 1921 at the latest.⁴⁶ The child's legal guardian was to have freedom of choice as regards to which school the child should attend. Article 12 of the Law helped to secure this choice by making it an offence to try to bribe or coerce the legal guardian in his choice, punishable with fines.⁴⁷

The *loi Poullet* established that all schools were entitled to State subsidies, with the proviso that 'free' schools must have

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45. This law in the main implemented after the War by Jules Destrée, in 1919.
46. The *Quatrième Degré* was essentially a two year extension course tacked onto the Primary school course for brighter pupils who could not attend *école moyenne*, because there was not one locally available (rather similar to the Irish Secondary Tops). The course usually finished when the pupil was aged 14. See n. 32 above.
47. This to some extent helps to indicate the depths of the *lutte scolaire*.

Belgian, 'certified' teachers (with various transitional concessions). All teachers salaries were raised.

After the war a series of Socialist Ministers expanded state education by the creation of new schools.⁴⁸ The *lutte scolaire* was muted by post-war co-operation. Though the *Parti Ouvrier Belge* in its 1932 Congress voted to laicise education, a theme taken up by the Liberals. They lost the ensuing elections.⁴⁹ In 1924 the Decree Nolf (20 Sept)

Plaça les écoles moyennes dans l'orbite des athénées, donnant enfin à leurs élèves l'accès direct au secondaire supérieur et autorisant d'y créer des sections latines.⁵⁰

In 1922 a new programme of study for primary schools was established. It was an improvement on the old one, but it still took

48. The number of State Schools had been diminished by the School Law of 1884, Article 1 of which limited the number of *athénées* and *Collèges Royaux* to twenty, and the number of *écoles moyennes* to 150 (100 boys, 50 girls).

49. Beaufays, J., *Les Partis catholiques en Belgique et aux Pays Bas 1918-1958*, (Bruylant, Bruxelles, 1973) p.174.

50. Coulon, M., 'La planification de l'enseignement en Belgique', in *Etudes de sociologie de l'éducation* (Université libre de Bruxelles 1966), p. 20.

a very academic approach to education. Dr. Decroly's⁽⁵¹⁾ influence was increasingly felt, especially as the programme did not dictate what methods might be used to achieve its aims.

In 1931 (by Decree 31 March) education was made compulsory for all mentally and physically handicapped children, and Communes were obliged to make provision for them.

In 1933 (to be adjusted again in 1953) technical education, which, apart from a superficial organisation after the European Congress on Technical Education (1889), had remained largely uncontrolled, (and based on a mixture of private and local initiatives), was finally organised to take on its present form. In 1948 the State built its first technical school. However the

51. Dr Decroly was a very influential educationalist of his time (early twentieth century), famous in particular for theories on learning through play. See Decroly, D., and Monchamp., *L'Initiation à l'activité intellectuelle et motrice par les jeux éducatif*, (3rd ed., Ed. Delachaux & Niestlé S.A., Neuchatel and Paris, 1925). Also Hamaide, A., *The Decroly Class*, (Transl., Dutton & Co., , New York, 1924); Dalhem, L., *Contribution à la méthode De Croly*, (2nd ed., Ed. Lamerton, Bruxelles, 1932). His methods received wide attention, see: Washburne, C., *New Schools in the Old World*, (John Day, New York, 1926) Ch.6; Bravo, L. R., *El Sistema Decrolyano*, (Cuenca, Ecuador, 1942). Also Gunnar Stadius, *Les jeux éducatifs de Decroly dans l'enseignement*.

programme soon ran into trouble as being unconstitutional.⁵²

In 1936 the Bovese Plan was published. It was heavily indebted to Dr. Decroly's educational ideas, and was implemented after World War Two. The Catholics meanwhile had set up two Commissions that endorsed similar ideas.

Another important development in Belgium just before the War was the so-called Vanderpoorten law (17 June 1939), which made school-building a State responsibility, if the Communes wished. Financial exigencies ensured that most of them would so wish.

After the War there was a great educational boom, with the State financing most of the building. The main area of battle was here. The problem was caused by the greatly increased demand for secondary education, that the 'free' institutions lacked the resources to meet. However

both the liberal and Socialist Parties in Belgium desired scholastic peace. This could only be established by recognising and subsidising Belgian Catholic education.⁵³

The *lutte scolaire* had raised its ugly head, to have it chopped off by the famed *pacte scolaire*. This 'treaty' was signed by all the major political parties, and translated into the law of 19

52. See below p.856.

53. S., de Coster 'Church and State in Belgian Education', 1966
World Yearbook of Education.

May 1959.⁵⁴ This law is still the basis of educational provision in Belgium, together with the law of 1963, which settled the 'language' issue.⁵⁵

54. Only the Communists voted against this law.

55. See below, p.857 *et seq.*

B. PRESENT DISTRIBUTION OF ADMINISTRATIVE AND FINANCIAL
RESPONSIBILITY REGARDING EDUCATION

The present system of education in Belgium is largely based on the law of 29 May 1959, as amended by the laws of July 11 1973 and July 14th 1975. The spirit of the Constitution and its relevant articles also has its influence. (56)

In Belgium responsibility for school education is divided. There is no single controlling body.

Belgium is split into four linguistic areas: the French language area, the Dutch language area, the bilingual area of Brussels, and the German language area. Each Commune belongs to one of these areas. (57)

No There are three 'cultural communities', the French, the Flemish and the German. (58) Each cultural community has a Council, (the German
No Council's powers and organisation being set up by the law of 10 July 1973, and not by the Constitution). (59) These Councils (excluding
No the German Council) have legislative autonomy in certain areas. (60)
One of these areas is education, but only concerning matters not

56. See sections two and three below, esp pp.848-852.

57. Article 3bis of the Constitution.

58. Article 3ter of the Constitution. There are +/- 100,000 in the German area. See generally p.835 et seq for the 1980 reform of the Constitution.

59. Articles 59bis, 2 (a) (b) of the Constitution.

60. Legislation by Decree, Article 59 (a) 2.

related to the *Pacte scolaire*.⁶¹ They have competence in deciding which language should be used in schools, curricula matters⁶², administration, physical education, setting up libraries, etc. The Brussels area has two Committees, one Flemish, and one French,⁶³ both of which have some responsibility for education.

In addition there are two Ministries of Education, the Ministry for National Education (and French Culture) and the Ministry for National Education and Flemish Culture).⁶⁴ There are also Provincial, and Communal authorities.

The *Pacte Scolaire*, made provisions for the financing of education, and these as amended, are as follows:

State Education: Equipment and operating costs borne by the State.

Subsidised Education: (including, provincial, municipal, and 'Free' schools).

There are various conditions that must be met in order for schools to be subsidised. There are contained in Chapter V of the law of 29 May 1959: Article 24 Para. 2:

Une école ou section d'établissement d'enseignement gardien, primaire, moyen, normal, technique ou artistique est subventionné lorsqu'elle se conforme aux dispositions légales ou réglementaires

61. See, *la Paix Scolaire*, p.848. Art. 59bis § 2.

62. See Appendix Curriculum change Belgium.

63. Set up by the law of 26 July 1971, See Art. 108ter §4 of the Constitution.

64. Since 1966.

concernant l'organisation des études et l'application des lois linguistiques. Elle doit, en outre:

1. Adopter une structure existant dans l'enseignement de l'Etat ou approuvée par le Ministre de l'Instruction Publique;
2. Respecter un programme conformes aux prescriptions légales ou approuvé par le Ministre de l'Instruction Publique;
3. Se soumettre au contrôle et à l'inspection organisée par le Roi. Cette inspection porte spécialement sur les branches enseignées, le niveau des études et l'application des lois linguistiques à l'exclusion des méthodes pédagogiques;
4. Etre organisé par une personne physique ou morale qui en assume toute la responsabilité;
5. Compter par classe, section, degré ou autres subdivisions le nombre minimum d'élèves fixé par arrêté royal délibéré de Conseil de Ministres sauf dispense accordée en raison de circonstances particulières et exceptionnelles, par le Ministre de l'Instruction Publique;
6. Etre établi dans des locaux répondant à des conditions d'hygiène et de salubrité;
7. Disposer du matériel didactique et de l'équipement scolaire répondant aux nécessités pédagogiques;
8. Former en ensemble pédagogique situé dans un même complexe de bâtiments ou, en tous cas, dans une même commune ou agglomération, le tout sauf dérogation accordée par le Roi dans des cas exceptionnels.

9. Dispose d'un personnel susceptible de ne pas mettre en danger la santé des élèves et soumis des lors au contrôle prévu à l'article 28, f 4;9.
10. Se soumettre au régime des congés tel qu'il sera organisé par l'application de l'article 7 de la présente loi. ⁽⁶⁵⁾

If the institution fulfills these conditions, the State will finance the salaries of the teaching staff, including the 'Headteacher', and some of the administrative staff, (according to *Arrêté royal*). ⁽⁶⁶⁾ It will also receive a per capita contribution towards operating costs. Various equipment purchases may also be subsidised up to 60% of purchase price. ⁽⁶⁷⁾ It is argued that these subsidies are not sufficient to meet full operating costs, and this is a recurrent grievance.

The school building provisions provided for in the law of 29

65. This Article lays down further conditions concerning the qualifications of teachers, e.g., they must be Belgian and not deprived of their civil and political rights (*inter alia*). It has been amended by Article 7, loi 11 July 1973.
66. These must be the same as for State schools, and are determined by *Arrêté royal*.
67. Chapter VI of the loi 29 mai 1959, as amended by Arts. 6-13 of loi 11 juillet 1973, deal with this subsidy. They are paid on the same scale as for teachers in state schools. 12. See, articles 36, 36 bis, and 37, Law 29 May 1959/Law 11 July 1973, for details.

May 1959, have been completely replaced by those laid down in the law of July 11th 1973.⁶⁸ The former law established a National Fund for School Building, which could not be utilised for building 'free' schools, and could only be utilised to pay 50% of building costs for Provincial and Communal schools, whilst state schools could have their costs 100% reimbursed. Under the new Articles on School-building there are four Funds.⁶⁹ Only schools conforming to a general 'Rationalisation Plan', promulgated by the Council of Ministers, are eligible for help from the Funds.⁷⁰

The General Fund for School Building:

This has provided the money for all schools built after 1 January 1973 (if it has been asked to do so by the Managing body of the new school). Schools built with money from this fund remain the property of the State.⁷¹

68. See article 5, *loi juillet 11, 1973*.

69. See article 13, Para 1, *ibid*.

70. See article 13, Para 4, *ibid*. This plan never having been promulgated the Statute of 8 July 1966 is still in force. Thus a special Ministerial Committee co-ordinates and receives the funds.

71. See article 16, Para 8, *ibid*.

The Building Fund for State Schools:

This Fund provides for State Schools built before 1 January 1973. It can be used to build extensions to these schools, and to provide temporary housing for new schools.

The Building Fund for Provincial and Municipal Schools:

This provides up to 60% of costs for Provincial and Municipal school building. (72)

The National Guarantee Fund for School Buildings:

This Fund guarantees the reimbursement of loans contracted by 'subsidised establishments' in order to adapt, modernise, or increase the size of existing buildings, or to create new building for an existing establishment. It also provides 'for the same loans, an interest' grant equivalent to the difference between the actual rate of interest, and a 1.25% rate of interest. (73)

It is clear that the 'free' schools gain enormous benefit

72. Article 28, Para 1, *ibid.*

Le fonds des bâtiments scolaires provinciaux et communaux a pour objet de subventionner a concurrence de 60 p.c. les travaux de construction, de modernisation, d'agrandissement et d'aménagement de batiments destinés aux établissements scolaires provinciaux et communaux subventionnés ...

73. See Article 22, Para 1, *ibid.*

from these provisions, which allow all their 'new' schools to be constructed at the State's expense, and 'interest relief' on all their old loans. Previously they had to be self-financing as regards to school construction.

C. TABLES AND CHARTS

TYPE OF EDUCATION / INSTITUTION	AGE	ENTRANCE REQUIREMENTS
1. <u>Pre-Primary</u>	2.5	
a) <u>State schools</u> Ecoles Maternelles	3	
Kleuterschool		
b) <u>Private schools</u>	4	
	5	
2. <u>Primary</u>	6	
Ecoles primaires		
Basisschool		
a) State Schools	7	
b) State subsidised schools		
i) Provincial		
ii) Communal	8	
iii) Free		
b) Independent schools	9	
	10	
	11	
3. <u>Secondary</u>	12	Entrance to secondary education in Dutch sector is:
a) <u>State schools</u>	13	1. By successful completion of the year of primary education; or,
Athenium/Lyceum		2. By being twelve years old and entrance exam; or,
Technical School		3. By completing an adaption year having the approval of the Class Council.
Vocational School	14	
"Modern School"		
Other	15	
b) State-supported schools		In the French sector entrance is:
Collège/Institut	16	1. By successful completion of primary school; or,
c) Independent schools	17	2. By completion of the fifth or sixth year of primary school, and having the agreement of the Class Council
	18	3. By being at least twelve years old and having the agreement of the Class Council.
	19	

CLASS NO / CYCLE	CERTIFICATES	CURRICULUM
		<p><u>Pre-primary</u>: In the French language sect special regulations govern pre-school education, and 'precise directives have been issues on language, mathematical - activity, musical education and psychomotor function'. In the Dutch language sector there are no seperate regulations for pre-primary education, but the regulations are contained within the rule for general education.</p> <p>In both language sectors pre-school education is based on the premises of Dr Decroly; namely that education should be life-promoting, that ideas are formed fr general precepts, then analysed, and finally synthesised; that knowledge is acquired by observation, association, and expression. Education here is free but no compulsory.</p> <p><u>Primary</u>: Education is compulsory, and fr The maximum number of children per class thirty. Education is co-educational. The teaching of the three R's is the basic ai of primary education. Those not continuer to secondary education, continue for two years in primary school before leaving school (Quatrième Degré).</p> <p><u>Secondary</u>: The distinctions between <i>athér</i> and <i>Lycée</i>, and <i>collège</i> and <i>institut</i> are purely historical, and bear no relation a more to the teaching methods or curricula used. There are four types of secondary education.</p> <p><u>General education</u>: The traditional educational curriculum is described at p. . Since 1 Sept. 1969 this has been gradually been replaced by the <i>enseignement renové</i>. The secondary school is divided into three cycles and less emphasis is placed on academic studies.</p> <p>The rigid barrier between types of secondary education is being broken down, and pupils wishing to change course after doing four years of secondary education m do so by using an 'extra' year. 32-38 hours/week. <u>Technical Education</u>: 36 hours/week. <u>Arts Education</u>: Two main branches: a) Plastic Art; b) Musical training. <u>Vocational Education</u></p>
1 ière année d'étude <u>Leejar</u>		
2 ème année d'étude Leejar		
3 ème année d'étude Leejar		
4 ème année d'étude Leejar	Certificat de fins d'études primaires;	
5 ème année d'étude Leejar	<u>Proefwerken.*</u> ?	
6 ème année d'étude Leejar		
6 ème année d'étude Leejar		
<u>.....Observation Cycle</u>		
5 ème année d'étude Leejar		
4 ème année d'étude <u>Leejar</u>	Certificat de l'enseignement secondaire inférieure.	
<u>....Orientation cycle</u>		
3 ème année d'étude Leejar		
2 ème année d'étude <u>Leejar</u>	Certificat d'études moyennes supérieures, Diplôme d'aptitude à accéder à l'enseignement supérieure.	

QUICK REFERENCE GLOSSARY

1. State School: A school set up by the State, State-finance, and always 'neutral'.

2. Official School: A school set up by a Public Authority, could be by the State, Province, Commune, or other Public Body. ('Les écoles officielles sont celles qui sont organisées par l'Etat, les provinces, les communes, les associations de communes ou par toute personne de droit public' Art. 2 Para 1 loi mai 29, 1959).

3. Free School: Any school not set up by a public authority. Normally they are non-profit. They are predominantly Roman Catholic orientated. ('Les écoles qui ne sont pas officielles sont dites libres'. Art. 2 Para 2 loi mai 29, 1959.)

4. Neutral School: A school respecting all philosophical or religious views that are held by parents, providing that three-quarters of the teaching staff hold a Certificate from an Official, neutral institution. (Parmi les écoles citées ci-dessus sont réputées neutres celles qui, respectent toutes les conceptions philosophiques ou religieuses des parents qui leur confient leurs enfants et dont au moins trois quarts du personnel enseignant sont porteurs d'un diplôme de l'enseignement officielle et neutre'. Art. 2 Para 4, loi mai 29 1959, comme reformée par Article 2, du loi 11 Juillet 1973.)

5. Independent School: A school receiving no state subsidy.

6. Pluralistic School: A school representing the Communities different 'group tendencies', open to all, governed by a body representative of the Community, who ensure a pluralistic education, which includes *inter alia*, free choice between diverse religious and moral courses for the parents, an open spirit, etc. (Precise details law 14 July 1975, Article 1.)

7. Jury Central: This Board can examine pupils, and if they pass the examination award Diplomas. It was set up to allow access to Diplomas for pupils, who for any reason, did not attend a school whose certificates were automatically homologated.

8. Curriculum change in secondary education

The post-war pressures for secondary education for all, were felt in Belgium as elsewhere, and the realisation that the wealthier classes were managing to occupy 'more than their share' of the General Education (Secondary) places that led to higher education, led to demands for reform.⁷⁴ Thus in 1969 a few French Sector

74. Its advantages are firstly that it puts off the choosing of a course of studies until much later, ('general' studies may be followed until university is reached), and thus restrains choices made through socio-cultural environmental pressure. And

official schools adopted the *enseignement secondaire renové*. By 1977 all the official schools were practising the reformed secondary education, as were many of the free schools. However some of the latter remained attached to the traditional secondary education system.

9. Traditional Secondary Education

This is a six year course, and although some schools (*écoles moyennes*) offer only the first three year cycle, most offer both three year cycles. In the official system of schools, *athénées* are boys' secondary schools, and *lycées* are girls' secondary schools. In the free education system these are respectively, *Collèges*, and *Instituts*. There are three basic types of traditional secondary education.

(i) Technical and Vocational Education

There is a difference between these two types of education. Technical education is more theoretical than vocational education (professional), which instils more practical skills. The Lower Cycle (three years) of vocational education leads only to its higher cycle, whereas lower technical education leads to either the higher technical education cycle, or the higher vocational education cycle. Four years are allowed for each

secondly its curriculum is much wider, and less academic than the old 'General' education, and less rigid than the old technical/vocational education.

three year cycle to be completed. The pupil must choose between technical and vocational education after the first year. Only a few sections of technical education lead to higher (tertiary) education. None from the vocational sections do.

(ii) Art Education

This is divided between musical education and education in the plastic arts. The latter is not well developed, and caters to painters, sculptors, etc., as well as to architects, by preparing them for higher education.

(iii) Music Education

There are schools of music (mainly communal), and royal conservatoires, ('⁷⁹') within the official system of education. The free system of education has equivalent institutions. Pupils proceed in two year cycles, according to talent, normally starting at a music school, and progressing to a royal conservatoire. These types of school were specifically excluded from the *pacte scolaire*.

10. Reformed Secondary Education, (Enseignement renové Instellina ?
voorvernieuwd secundair onderwijs.)

This system of secondary education, now in universal use in the

75. There are six Royal Conservatories.

official system, '76' replaced the traditional secondary education's vertical subdivisions, and has three two year cycles.⁷⁷ It is an option-based system, with equivalent and interchangeable options. Its advantages are firstly that it puts off the choosing of a course of studies until much later. 'General' studies may be followed until university is reached. This helps prevent choices being made being made through socio-cultural environmental pressure. Secondly its curriculum is much wider and less academic than the old 'general' education.

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76. The law of 19 July 1971, sanctions the new reformed educational system, and sets out its structure. The royal decree of July 31 1971 designated the *enseignement renouvé* as Secondary Education Type One, leaving Traditional Education to be designated Type Two; this merely ratified *de jure* a *de facto* situation.
77. The first cycle is called, the *Observation Cycle*, then comes the *Orientation Cycle*, and finally the *Determination Cycle*. The first year is the same for all pupils; during the second year the pupil has a limited option choice; during the second cycle a pupil can choose an option that will lead to early specialisation, but the need not do so; during the third cycle, choice of options can determine whether or not the student will continue on to university or enter *la vie active*.

BELGIUM

SECTION TWO

THE LEGAL SYSTEM

SECTION TWO: BELGIUM

A. GENERAL INTRODUCTORY

Belgium is a quasi-unitary state. Title VII of the Constitution contains provisions pertaining to the amendment of the Constitution. After a declaration that certain parts of the Constitution need revision, the Parliament is dissolved, and the next elected Parliament is constituent. At least two thirds of the Deputies and Senators have to be present during the deliberations and to vote for a revision of the Constitution in order for it to be adopted. No revision can take place in time of war, or when the Chambers cannot meet freely on Belgian territory (1968 Amendment). There is no provision for a referendum to be held. The constitutional reforms of 1968-1971⁽⁷⁸⁾ added a regional (neo-federal) element to its structure by the inclusion of Cultural Councils which have limited regional competence.⁽⁷⁹⁾ The limits of the competence can

hat
about
1980?

78. See, Paul de Stexhe, *La revision de la constitution belge 1968-71*, Larcier, Brussels, 1972. Wigny, P., *La troisième revision de la constitution*, Bruylant, Brussels, 1972. Wigny, P., *Cours de droit constitutionnel*, Bruylant, Brussels, 1973. p. 259 et seq.

79. See, Coppietiers, F., *The Community problem in Belgium*, (Inst. Belge d'Information et de Documentation, Bruxelles). N.B. Laws of 1 Aug. 1974 and 27 July 1977, implementing Art. 107 Quater of the Constitution, concerning regionalisation, a reform which is still under discussion. The dispersal of authority in the

now be adjudicated before the *Cour d'arbitrage*.⁽⁸⁰⁾ Moreover it has four distinct linguistic regions, and three cultural communities.[?] Attempts to regionalise the country have not yet succeeded, thus[?] whilst the cultural Councils have authority over educational matters (not touching on areas covered by the *pacte scolaire*) they have no[?] power to raise taxes.

The Belgian constitution came into force on the seventh of February 1831⁽⁸¹⁾. It is a 'liberal' constitution⁽⁸²⁾, and, as such,

cultural area has caused some problems in the international arena where the Minister for Foreign Affairs is responsible for external relations. See Dehousse, J. M. (Minister for French Culture), 'Les relations culturelles internationales de la Communauté française de Belgique', 1979 *Studia Diplomatica* p. 477. For example over whether to sever cultural links with South Africa.

Also Lejeune, Y., 'L'assentiment des conseil culturels aux traités internationaux de la Belgique relatifs à la coopération culturelle', (1978-9) *R.B.D.I.* 167.

80. See below p.836.

81. See, Ganshof van der Meersch, W.J., 'Les droits de l'homme et la constitution belge', in *Mélanges offerts à P. Modinos A. Pedone* Paris, 1968, p.147 and Note 5.

82. Smythe, C., 'The Story of Belgium', London, Hutchinson, 1900 p.339

... the Belgian Constitution represents in many respects

includes in Title 11 a 'list' of human freedoms and rights.⁸³

These have not been altered except by the addition of Article 6 bis in 1970.⁸⁴ Other reforms to Title 11 articles have

the high-water mark of liberal tendencies ...

Mallinson, V., *Belgium*, London, Ernest Benn Ltd., 1966, p.

22 The Belgian Constitution ... is still regarded today as a model of its kind because of the wide and tolerant outlook it reflects.

83. Wigny, P., *Cours de droit constitutionnel op.cit.*, p.137

Les constituants ont accordé une importance primordiale au statut constitutionnel de l'individu. Ils ont défini dans le Titre 11, avant même d'organiser les pouvoirs de l'Etat dans le Titre III.

Ganshof van der Meersch, W.J., *op.cit.*, p. 147

La constitution, oeuvre d'émancipation et d'indépendance, est largement inspirée de la méfiance à l'égard de pouvoir.
p. 148.

Elle sera à l'époque la plus libérale d'Europe et servira de modèle à de nombreux Etats.

84. This reinforced the principle of equality before the law by emphasising non-discrimination, and requiring that 'rights and freedoms' of ideological and philosophical minorities should be guaranteed by laws and decrees. It was largely inserted as an additional safeguard, though necessary because of the creation of the Cultural Councils with legislative power.

been proposed, but not implemented.⁸⁵ As Professor Ganshof van der Meersch pointed out, quoting Errera,⁸⁶

Les dispositions du titre II de la constitution sont 'des barrières pratique éléyées contre l'action gouvernementale et même législative, des règles constitutionnelles qui s'imposent aux pouvoirs constitués et qui écartent du domaine de la liberté individuelle toute intervention autre que celle du juge, s'il y a des abus à réprimer.'⁸⁷

B. LEGAL ORDER

1. National Law

The Constitution is the highest national legal norm in Belgium. In chapter three of Title 111 concerning judicial power, there is no express clause empowering judicial review of legislation.

85. See below p.854-856 concerning the proposed reform of Article 17 of the Constitution.

86. Ganshof van der Meersch, W.J. *op.cit.*, p.156, quoting Errera, P. 'Traité de droit public belge', Brussels, 1918, p.43.

87. Wigny, P., *La troisième revision de la constitution, op.cit.*, p.12

La constitution belge se borne à designer les autorités qui sont les organes de pouvoir souverain, à fixer leur compétence respective, à déterminer la procédure selon laquelle elles prennent des décisions. En face de ces autorités, elle consacre les libertés de l'individu, elle réserve à celui-ci champ clos que le pouvoir ne peut envahir.

Article 107 of the Constitution states:

Les cours et tribunaux n'appliqueront les arrêtés et règlements généraux, provinciaux, et locaux qu'autant qu'ils seront conformes aux lois.

Thus, it can be argued a contrario that laws infringing the Constitution are unjustifiable. However in the case law the *Cours de Cassation* (*Hof van Cassatie*) has followed a precedent set down in 1849 that establishes the principle that

...il appartient pas au pouvoir judiciaire de rechercher si la loi est ou non en harmonie avec la constitution. '88'

88. Cass. 23 July 1849, Pas. 1849, I, p.443 at 449.

Wigny, P., *Cours de droit Constitutionnel*, *op.cit.*, p.65 et seq.

Les tribunaux se refusent à contrôler la constitutionnalité des lois.

Wigny, P., *Droit Constitutionnel*, Tome 1, (Bruylant, Bruxelles, 1952), p.196

...en droit positif belge le contrôle judiciaire de la constitutionnalité des lois n'est pas expressément exclu par un texte pourrait être justifiée par les principes généraux, mais a été sagement écarté pour les raisons politiques.

e.g. C. Cass. 29 juin 1939, Pas., 1939, I, 341.

Perin., *op.cit.*, p.72

...(L)e pouvoir législatif est seul juge de la manière dont

The Conseil d'Etat (Raad van Staat) has also followed this precedent.⁹⁷

Thus whilst the Constitution does not prohibit the Courts from exercising a review over the constitutionality of laws the Courts have declined to adopt a position similar to that adopted by Chief Justice Marshall in *Marbury v. Madison*.⁹⁸ Instead they have invoked the theory of the 'Separation of Powers,' and fear of a *gouvernement des juges*, to restrain themselves from offering their interpretation of the Constitution, and forcing it on the State.⁹⁹

[L]es tribunaux se refusent à contrôler la constitutionnalité des lois,⁹²

thus

le pouvoir législatif est le seul juge de la manière dont

il exerce sa mission, sous réserve du contrôle de l'opinion publique. Il n'y a pas, en droit belge, de contrôle de la constitutionnalité des lois, par une haute juridiction.

89. Trousse, P.E., 'Le contrôle juridictionnel des lois. Etat de la question', in *Journée d'études juridiques Jean Dabin Actualité du contrôle juridictionnel des lois*, (Larcier, Brussels, 1973), pp. 299 et seq.

90. *Marbury v. Madison*, 1 Cranch 137 (1803).

91. Ganshof van der Meersch, *op.cit.*, p.158

Il n'existe donc pas de garantie contre le pouvoir sans limite des majorités parlementaires.

92. Wigny, *Cours de droit constitutionnel, op.cit.* p.65.

il exerce sa mission, sans reserve du contrôle de l'opinion publique. Il n'y a pas, en droit belge, de contrôle de la constitutionnalité des lois, par une haute juridiction.⁽⁹³⁾

More recently lawyers and jurists have argued that the courts can police the Constitution.⁽⁹⁴⁾ This debate was stirred up by Mr. Ganshof van der Meersch in his conclusions (as *Procureur-général*) in the case of 3 May 1974.⁽⁹⁵⁾ The case raised the question of the control of constitutionality of laws, and especially of certain types of delegated legislation. It is necessary to explain these methods of delegation before resuming the argument about judicial review.

There are three types of enabling laws, known as *lois cadres*, *lois de pouvoirs spéciaux*, and *lois de pouvoirs extraordinaires*. The latter need not concern us here as such laws were only used during the last two world wars, when the normal functioning of the Constitution was impossible. A 'normal' *loi cadre* will not delegate to the executive the power to amend and change laws, but simply the power to implement the law. Thus, they fall strictly under article 107 review, within the limits of article 67.

93. Perin, F., *Cours de droit constitutionnel*, (O.U.J.) Liege, 1977), Livre II, p.72.

94. See Perin, F., *op.cit.*, p.281 et seq. Also, Mast, A., 'Le contrôle juridictionnel de la constitutionnalité des lois', in *Revue critique de jurisprudence belge*, 1975 pp.216-228.

95. Cass. 3 May 1974, Pas., 1974.

Article 67 states:

Il (le roi) fait les règlements et arrêtés nécessaires pour l'exécution des lois, sans pouvoir jamais ni suspendre les lois elles-mêmes, ni dispenser de leur execution.

An enabling law that allows the executive to amend laws, normally within a specified field, and often subject to ratification by parliament, is called a *loi de pouvoirs spéciaux*. Arrêtés made under the authority of such a law must be intra-vires of the enabling act (art. 107) and the Constitution.⁹⁶ The Courts have recognised such arrêtés as executive rather than legislative acts.⁹⁷ Thus, if the Courts did not look to the constitutionality of a *loi de pouvoirs spéciaux*, the executive could be delegated power that would enable it to infringe the Constitution. Such a delegation in itself might be considered to be contrary to article 67, as this article seems to exclude specifically the executive's power of interference with

96. Perin *op.cit.*, p.172

... les tribunaux ont pour seul tâche de vérifier si les arrêtés sont conformes à la loi d'habilitation ... Les lois de pouvoirs spéciaux attribuent au Roi la capacité de prendre, par arrêtés, des mesures dans les matières qu'elles déterminent et de modifier, ... les lois en vigueur sur ces matières.

See Lejeune et Simonet *op.cit.*, pp.342 et seq.

97. Conclusions of Ganshof van der Meersch, *J.T.*, 1974, p.565.

laws.⁽⁹⁸⁾

In the 1974 case, referred to above, the *Cour de Cassation* in effect stated that *lois de pouvoirs spéciaux* were constitutionally based upon article 78 that reads:

Le roi n'a d'autres pouvoirs que ceux que lui attribuent formellement la Constitution et les lois particulières portées en vertu de la Constitution même.⁽⁹⁹⁾

This discrete interpretation of the Constitution is in fact an implicit review of the legality of the *lois de pouvoirs spéciaux* in question. In combination with the fact that the Court found that article 20 of the Constitution had not been violated, another review of constitutionality, one is tempted to agree with Vanwelkenhuyzen⁽¹⁰⁰⁾ that a *revision silencieuse* has taken place.

Même si le vice d'inconstitutionnalité dont l'arrêté de pouvoirs spéciaux est affecté; trouve son origine dans la loi d'habilitation elle-même, l'application de l'arrêté pourra être écartée en vertu de l'article 107 de la Constitution: le 'tabou' de la loi a disparu, il ne saurait

98. Perin, *op.cit.*, p.173.

99. See generally Lajeune Y., et Simonet, H., 'L'article 78 de la Constitution ou la faculté d'étendre le pouvoir réglementaire royal', 1980, XL *Annales de droit (rev. tri. de droit belge)*, p.313

100. Vanwelkenhuyzen, A., 'L'attribution de pouvoirs spéciaux et le contrôle judiciaire de la constitutionnalité des lois', *J.T.* 1974, pp.577-584, 597-688.

plus se répercuter sur l'arrêté pris sur ~~sa~~ fondement et l'immuniser à l'égard du contrôle de sa constitutionnalité. Désormais, dès que l'arrêté est contraire à la Constitution, le juge doit refuser de l'appliquer, sans plus devoir se préoccuper de sa conformité à la loi d'habilitation, puisque celle-ci ne saurait donner au roi le pouvoir de violer la Constitution, que le législateur lui-même ne possède pas.⁽¹⁰¹⁾

Naturally, this interpretation is not without its detractors, notably Professor Mast⁽¹⁰²⁾, who scoffs at the idea of 125 years of case-law being overturned by such a silent reform, especially when one considers the careful reasoning in the *Frowagerie Franco-Suisse (le Ski)* case.⁽¹⁰³⁾ The debate was strong enough however to cause the Senate to pass a private bill which would have specifically disallowed the Courts to exercise judicial review of legislation, had it become law.⁽¹⁰⁴⁾ Most commentators do not

101. *Id.*, p.583.

102. Mast, A., 'La contrôle juridictionnel de la constitutionnalité des lois'. Note sous Cass. 3 May 1974, *R.C.J.B.* 1975, pp.

103. Cass. 27 May 1971, *Pas.* 1971, I, 886.

104. Proposition: 'Les cours et les tribunaux ne sont pas juges de la constitutionnalité des lois'. v. Doc. Sénat 602 (1974-75). *Annales Parlementaires, Sénat*, 26 juin 1975, p. 2671 et seq.

consider that this case has in fact changed the position regarding judicial review, although it might seem to be a first step forward.⁽¹⁰⁵⁾ In the words of Moureau, 'cet arrêt marque un tournant dans la jurisprudence.'⁽¹⁰⁶⁾

In the past the legislator has deviated from the provisions of the Constitution if the circumstances have demanded it.⁽¹⁰⁷⁾ There has been no case yet that actually does review the constitutionality of laws. Naturally rules of interpretation help the judges interpret laws so as to be conformity with the Constitution.

The adoption of a new Chapter IIIbis of the Constitution in

105. Ganshof van der Meersch, 'La protection des droits de l'homme en droit constitutionnel comparé', *Rapports généraux au IXe Congrès international de droit comparé*, (Bruylant, Brussels, 1977), p.654.

Moureau, L., 'Remarques sur le contrôle de la constitutionnalité des lois', in *Administration Publique*, t.1, 1976-77, p.16, p.21.

De Visscher, P., 'La Sauvegarde de la suprématie de la Constitution', in *Administration Publique*, t.2, 1976-77, p.93 et seq.

Delpérée, F., Note sous Cass. 20 November, 1975, *R.C.J.B.* 1978, pp.450-459.

106. Moureau, L., *op.cit.*

107. Viz. e.g.'s given by Mast A, *op.cit.*, p.222.

1980⁽¹⁰⁸⁾ and the resulting creation of a *Cour d'arbitrage* has established the principle of constitutional review in Belgian law. All courts and tribunals may refer questions to the new *Cour d'arbitrage* which has the power to rule on their validity (i.e. the competence/capacity of the relevant organ to generate the law or decree).⁽¹⁰⁹⁾ It cannot assess the challenged measure against the Constitution in general but only to ensure that the division of jurisdiction established by the constitutional reforms is respected.

There exists in Belgium a pre-enactment scrutiny of legislation. The *Conseil d'Etat*, created in 1946⁽¹¹⁰⁾, has a 'vetting' role *sur la constitutionnalité des projets et de certains propositions de loi.*⁽¹¹¹⁾ Its legislative section scrutinises bills

108. *Moniteur Belge* 30 juillet 1980, adding article 107ter. This ensured the the creation of a *Cour d'arbitrage* to adjudicate on clashes of jurisdiction between the new organs of state.

109. This work does not seek to delve into or resolve the difficult question of conflicts not arising from *un excès de compétence*. See the solution adopted by the *Cour de Cassation* (Vandenplas and Van Hoet) 11 juin 1979, *J.T.* 1979, p.642; 30 mars 1981, *J.T.* 1981, p.411) and discussion in the Reform Commission, 1983 *Pasinowic op.cit*, p.776 et seq.

110. Loi 23 Dec. 1946.

111. Art. 2 *ibid.*, Wigny, *Cours de droit constitutionnel, op.cit.*, p.66.

in the legislative process and gives 'advice'⁽¹¹²⁾ on their content and form, including their compatibility with existing laws and the Constitution. Thus there is a form of control over the constitutionality of laws.

However, this advice need not be followed. In 1976, the Conseil d'Etat gave an adverse report on the bill regarding forms of international cultural cooperation designed to implement article 59 bis(2) of the Constitution.⁽¹¹³⁾ This bill was nevertheless adopted by Parliament in 1978. Recently there have been murmurings that apart from the cases where the advice is ignored (rare), the government has misused the title of Budgetary Bill or rather included non-budgetary matters in Budgetary Bills.⁽¹¹⁴⁾

The Belgian Constitution acts as a moral guide to the legislature.⁽¹¹⁵⁾ The judges use it in interpreting legislation. The effect of a lack of judicial review of legislation is limited for

112. This 'advice' need not be taken.

113. See Verhoeven, J., 'Les formes de la cooperation culturelle internationale et la loi du 20 janvier 1978', *J.T.*, 10 June 1978, p.373.

114. *J.T.* 1978, p.378, note by Pierre Fontainas. There is an analogy in British constitutional history - the device known as 'tacking'.

115. For example the law of 12 July 1934 permitting the state to create schools has only one article and was passed solely to conform to constitutional requirements.

several reasons. Firstly, the Courts consider that many of the constitutional provisions are directly applicable. Secondly, many of the human rights articles in the Constitution are proof against revision or erosion by *arrêté* by their wording that excludes any restriction, except those created by law. The rights and freedoms of Title II of the Constitution are often formulated in a way that allows 'review' by the Courts, by, for example, using the phrase *toute mesure preventive est interdite*,¹¹⁶ or requiring that exceptions or enforcement are regulated only by laws, thus disallowing *Arrêtés-Royaux* to regulate such areas, although in the latter example the control is rather feeble.¹¹⁷ Thirdly all the political balancing factors, such as public opinion and ministerial responsibility, are in action. And fourthly, the effect of international law, dealt with below, strengthens human rights protection in Belgium.

116. Ganshof van der Meersch, *op.cit.*, p. 154,

Les règles relatives aux libertés publiques sont des prescriptions de droit positif directement applicables, qui modifient le droit existant ...

See e.g. below section 3 Education and the Law.

117. Perin, *op.cit.*, p.75.

Decrees ⁽¹¹⁸⁾

The decrees adopted by the ~~Cultural~~ Councils have the force of law, in the respective language areas. ⁽¹¹⁷⁾ The advent of Cultural Councils has muddied the clear waters of applying a simple *principe de légalité* to discover the lawfulness of a given measure. All decrees, except those of the budget for culture, must be vetted by the *Conseil d'Etat*, which, if it finds an *excès de pouvoir*, causes that decree to be unadoptable except by majority of the whole Parliament. ⁽¹²⁰⁾ These provisions were scarcely used at all before the fourth constitutional reform envisaged their demise. ⁽¹²¹⁾ The Constitutional amendment of 1980 extended the jurisdiction of the *Conseils culturels* to *matières personnalisables* and also renamed them

118. See Article 59bis of the Constitution, and *Loi de 3 Juillet 1971*.

Also the loi du 8 août 1980. The law of 17 July 1980 also allowed the Regional Councils authority to issue decrees.

See Vanwelkenhuyzen, A., 'Les conflits entre loi et décret et entre décrets', 1980 *J.T.* 609, at p.610.

119. Article 59bis Para. 4 of the Constitution.

120. See Article 59bis Para 2 of the Constitution. Vanwelkenhuyzen, A., *op.cit.*

121. *Rapport fait au nom de la Commission de la Révision de la Constitution et de la Réforme des Institutions par M^{me} Herman Michielsens et M. Lallemand* Doc. Parl. Sess.1981-1982, No.246/2 du 30 mars 1983. 1983 *Pasinomie* 748 et seq.

as *Conseils de Communauté*.

What about Regions.

The creation of a *Cour d'arbitrage*¹²² to adjudicate on the respective competencies and legality of actions taken by the new regional and cultural bodies (in the light of the Constitution) should help avoid and resolve clashes of jurisdiction that are bound to occur when several legislative bodies have closely linked jurisdiction. Its powers include the capacity to suspend or annul laws and decrees. It also has a role in deciding references from courts involving these questions.¹²³

2. International Law

Since the decision of the *Cour de Cassation* in the *Fromagerie Franco-Suisse (Le Ski)* case, the courts in Belgium have recognised the supremacy of self-executing provisions of a treaty over all national legal norms. As the Court stated:

... lorsque le conflit entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir...

Even though the courts do not exercise judicial review over the constitutionality of laws, the *droit interne* can be considered to

122. *Loi portant l'organisation, la compétence et le fonctionnement de la Cour d'arbitrage* 28 juin 1983, 1983 *Pasinomie* p.733.

123. Chapter two of the Law of 28 juin 1983.

include constitutional provisions.⁽¹²⁴⁾ This jurisprudence was affirmed by the Cour de Cassation⁽¹²⁵⁾ in 1985.⁽¹²⁶⁾ A constitutional reform, that would have formalised this decision, in effect, narrowly missed adoption because of the dissolution of Parliament in 1971.⁽¹²⁷⁾

124. 27 mai 1971, Pas., 1971, I, 886.

125. Cass. 26 September, 1978, Pas. 1979 I 126; Also (1985) R.C.J.B. 22, note, Waelbroeck, M.

126. (1987) R.C.D.B. 5, note, Rigaux. He comments on two cases dealing with the outcome of the European Court of Human Rights decision in the *Marckx* case.

127. This reform would have added an article 107bis to the Constitution,

Les cours et tribunaux n'appliqueront les lois et arrêtés qu'autant qu'ils sont conformes aux règles de droit international et notamment aux traités en vigueur régulièrement publiés.

See Perin, *op.cit.*, Livre II, p.202. Stexhe, *La revision de la Constitution belge 1968-1971*, (Larcier, Brussels, 1972) pp.241-248.

L'article 107bis était attendu avec impatience par les cours et tribunaux, pour clarifier le problème des conflits de plus en plus fréquents entre la loi interne et les lois internationales ou supranationales. (p.241)

It was also proposed that article 68 should be modified.

The courts have held that parliament in approving treaties does not exercise a normative function⁽¹²⁷⁾ but is merely ratifying the executive's action. Belgium is thus a 'monist' country with regard to international law. Most of the provisions of the European Convention on Human Rights are considered to be directly available⁽¹²⁸⁾ within the Belgian legal order.⁽¹²⁹⁾ The International Covenant on Civil and Political Rights was considered to be non-directly applicable by the *Conseil d'Etat* in its criticised⁽¹³¹⁾ *avis* of 1 December 1976.⁽¹³²⁾

Article 68 of the Constitution governs the negotiation and acceptance of Treaties. It seemingly allows the central authorities a monopoly on the negotiation and conclusion of international treaties:

Le Roi ... fait les traités de et ceux qui pourraient
grèver l'Etat ou lier individuellement des Belges n'ont pas
d'effet qu'après avoir reçu l'assentiments des Chambres ...

128. Parliament in certain cases has to give its assentiment. See article 68.

129. See generally, Verhoeven, J., 'La notion "d'applicabilité directe" du droit internationale', (1980) *R.B.D.I.* 243.

130. Bossuyt, M. J., "The directly applicability of international instruments on human rights", (1980) *R.B.D.I.* 317, at p.320. But see note 125.

131. Bossuyt, M., *op.cit.* at p.326.

132. *Doc. parl. Chambre.* 1977-1978, no.188/1, 29.

The constitutional reform of 1970, creating cultural councils with the power to regulate (rule) by decree, *inter alia* sur la coopération entre les communautés culturelles ainsi que la coopération culturelle internationale has caused legal problems. According to the Constitution, a special majority was to adopt a law detailing the methods of such cooperation. Such a law was finally adopted on 20 January 1978. It reads:

Art. 1er: L'assentiment à toute traité ou accord relatif à la coopération culturelle dans les matières visées à l'article 59 bis 2 10 et 20 de la Constitution et à l'article 2 de la loi du 21 juillet 1971 relative à la compétence et au fonctionnement des conseils culturels est donné soit par le conseil culturel de la communauté culturelle française, soit par le conseil culturel de la communauté culturelle néerlandaise, soit par ces deux conseils.

Art. 2: Les traités visés à l'article 1er sont présentés au conseil culturel compétent sous la responsabilité du ministre qui à la matière concernée dans ces attributions.

The extraordinary history of this legislation is recounted by Joe Verhoeven.¹³³ The Conseil d'Etat in an avis had considered

133. Verhoeven, J., *Les formes de la coopération culturelle internationale et la loi du 20 janvier 1978*, J.T., 10 June 1978, p. 373, et seq. See also Lejeune, Y., 'L'assentiment des conseils culturels aux traités internationaux' in (1978-1979) 74

that the bill would be unconstitutional if passed, being contrary to article 68. The government continued with the project anyway, obtaining the advice of four experts, who all agreed that it would not be unconstitutional. Whether the law is unconstitutional or not, it certainly creates the possibilities of conflicts. What if one *conseil culturel* refuses to approve a relevant treaty? What if a relevant treaty is also subject to approval by the parliament under article 68? (Those in favour argue that article 59 has implicitly amended article 68). Are the areas of Belgium outwith the areas of competence (i.e., Brussels, German cultural community) to be deprived of international cooperation in the field of culture? In effect, the new law, in addition to complicating the internalising of treaties, by extending the number of treaties needing approval, also creates more problems than its benefits would warrant. What are the effects of the law? Given the *conseils culturels* have already exclusive legislative competence in linguistic affairs, and the power of legislation in other cultural areas, the new law does not seem to add to their competence. As Verhoevan notes, *pas grand chose*.⁽¹³⁴⁾ One 'benefit' is said to be that as the King still has the power to make treaties the necessity of gaining approval from the *conseils culturels* will cause him to take need of their advice. The Courts have yet to deal with the problems that might be raised by this new law, and which could conceivably affect human rights in cultural

R.B.D.I. 167.

134. *Ibid.*, p.376, col.2.

areas. ⁽¹³⁵⁾

The law was updated by a law of 8th August 1980 reforming the Belgian institutional structures. ⁽¹³⁶⁾ This confirmed the King's exclusive Treaty making power. ⁽¹³⁷⁾ Controversy has been caused by the fact that the French Cultural Council by Decree of 8 July 1983 supported to bring into force the European Social Charter. ⁽¹³⁸⁾ and by Decree of 25 January 1983 also incorporated the International Covenant on Economic, Social and Cultural Rights, ⁽¹³⁹⁾ but most of

135. See Lejeune, Y., 'L'assentiment des Conseils Culturels aux traités internationaux de Belgique relatifs à la coopération culturelle in (1978-1979) 14 R.B.D.I. p. 167.

136. See n.118 above.

137. In article 81.

138. (1983) *Pasinomie* p.1105. They also approved and gave effect to the European Convention on the Recognition of Studies and Diplomas of Higher Education (1979), 1983 *Pasinomie* 646. The adhesion to the ESC has not been generally recognised. The lack of personality at the international level ensures that the Community Councils cannot make treaties binding in international law. Belgium is not listed as adherent to the ESC by either the (1987) *H.R.L.J.* nor the Council of Europe.

139. (1983) *Pasinomie*, p.59. Both International Covenants are adhered by Belgium *Mon.Belge* (6 juillet 1983). But Belgium is in default on producing its report under the International covenant on Economic, social and cultural rights.

all by the agreement made with Quebec in 1982.⁽¹⁴⁰⁾

The new Cour d'arbitrage was originally to have had the capacity to rule on the conformity of laws and decrees with international law. This was not followed through as it would have met with severe difficulty as regards the effects due to European Community law.⁽¹⁴¹⁾ Originally the Belgian government only allowed that the Executives of the Regions and Communities be involved in the initial preparation of negotiating positions but not to actually make treaties.⁽¹⁴²⁾ More recently it seems to have accepted a treaty-making power within their spheres of competence. M Moureau (President of the French Community executive) claimed that the Treaty between the French Community and Benin, signed in 1984 was the first bilateral treaty entered into by the French Community.⁽¹⁴³⁾ A later agreement with Nicaragua was not opposed by the central government

140. See Ergec, R., 'De quelques avatars des compétences internationales des communautés et des régions belge', (1984-85) *R.B.D.I.* 529 at p.530.

141. It would clearly be contrary to the *Sissenthall* doctrine of the ECJ, and was round criticised on this ground by the *Conseil d'Etat* in its *avis* on the matter. Doc. Sénat 246 (1981-1982 No.1. See M. Lallemand., *Exposé introductif, Pasinomie*, 28 juin 1983, p.750, at p.755.

142. Basing itself on article 68 of the Constitution and article 81 of the law of 8 August 1981. See Ergec. *op.cit.*, p.533.

143. Ergec, *op.cit.*, p.545.

that believed that the French Community had the authority to make such a treaty.¹⁴⁴ The new government position is that such treaties do not bind Belgium. We have in this practice the making of a constitutional convention that flies against the strict letter of the constitution.

The Communities argue that article 16 of the Law of 8 August 1980, coupled with article 59bis implicitly grant them competence within the scope of their general internal legislative competence.¹⁴⁵ The argument runs that these two articles have implicitly reformed article 68 of the Constitution. In particular article 16 (2) requires that the Executives of the Communities present treaties for the approval of the Councils. From this provision it is argued that the executive must have a hand in creating the treaty so presented, or it would have no interest in actually doing so. The responsibility for cultural matters, no longer being in the hands of the central authorities, it must have fallen into the hands of the regional bodies. It is considered however that this argument cannot stand against the explicit wording of article 68 of the Constitution and article 81 of the law of 8 August 1980, both of which confirm the exclusive competence of the King to conclude

144. *Id.*, p.546.

145. Using a similar argument to that used by the European Communities to establish its "parallel" competence to make treaties. .

international treaties. (146)

The new competencies have also caused "internal" difficulties as regards the representation of Belgium in international fora where the topic under discussion falls within the competence of the Communities. In the EEC for example the difficulty is resolvable, at the international level, by following the Treaty of Rome's provision that each state shall be represented by one delegate. (147) The Communities were annoyed not to have been at the Conference of the Ministers of Education in Dublin, 1983. (148) Representation at UNESCO, or at least in the Belgian National Commission for UNESCO, are still matters of controversy. (149)

In Belgium, there is no agreement over the effects of generally recognised principles of international law. Since 1906, (150) their effects have been considered not to prevail over national legal norms. The *Le Ski* case was not concerned with non-treaty law, and so the position is still unclear, although generally speaking later national law prevails.

146. See Ergac, *op.cit.*, esp. note 40 and works cited therein.

147. Article 146 of the Treaty of Rome.

148. Ergac, *op.cit.* p.550.

149. The Germanophone Community apparently still not being party to the latter. Ergac, *op.cit.*, p.551.

150. Cass. 25 January 1906, Pas. 1906, I., 95.

BELGIUM

SECTION THREE

EDUCATION AND THE LAW

SECTION III EDUCATION AND THE LAW

In the above sections I have set out the general constitutional and legal framework of Belgium as regards to judicial review and the hierarchy of laws. Now the position of education within this framework must be considered. The recognition of educational rights within the international legal order has been considered in Part two above.

In Title II of the Belgian Constitution there is one article concerning education, that is article 17. It reads as follows:

L'enseignement est libre; toute mesure préventive est interdite la répression des délits n'est réglée que par la loi. L'instruction publique, donnée aux frais de l'Etat est également réglée par la loi.

This article has remained the same since its inception in 1831. There are two main forces behind Article 17. Firstly there was the desire to ban any monopoly in education.⁽¹⁵¹⁾ Secondly it was a Catholic concession to the Liberals' desire to allow the State to create a school system, hence paragraph two of the article.

The struggle to implement this principle of article 17 continued from the time of its inception until the *Pacte Scolaire*,

151. See above section 1, Historical Perspective, p.787 et seq.

and has been a major feature of Belgian political life.⁽¹⁵²⁾

The *Pacte Scolaire*⁽¹⁵³⁾ settled these issues, and since then the laws made in pursuance of the Pacte have ensured relative peace. However there was an attempt to update, and amend, Article 17 of the Constitution in the 1968-1971 reforms. Also responsibility for educational issues was divided by the new article 59bis of the Constitution.⁽¹⁵⁴⁾

152. Stexhe, *op.cit.*, p.86,

L'histoire politique belge apprend que l'enseignement a été, pendant près d'un siècle, un sujet de heurts politiques, parfois violents: la guerre scolaire prit hereusement fin, en 1958, avec la conclusion d'un Pacte Scolaire...

Mallinson. V. Belgium Ernest Benn Ltd. London 1966, p. 191

Education has been a major political issue throughout Belgium since the break away from Dutch rule. The reality of the differences which divide the Belgians in language, religion, politics, and social standing finds its fullest expression in education ...

See above, section 1.

153. See, Belgium *La Paix Scolaire*, p.848.

154. See, Belgium, Present distribution of administrative and financial responsibility regarding education, p.806.

A. LA PAIX SCOLAIRE

The *Pacte Scolaire* defined the boundaries between 'official' and 'free' education.⁽¹⁵⁵⁾ Both sides made large concessions: the Catholics conceded the right of the State to create its own schools, the Liberals and Socialists agreed to allow the Church parity of esteem. No fees were to be charged for nursery, primary and secondary education.⁽¹⁵⁶⁾ One of the basic principles of the *Pacte Scolaire* was that there should be a guaranteed free choice by parents between 'neutral' schools and 'religious' schools. For this to work there must be sufficient numbers of both types of

155. Laws of 29 May 1959, 11 July 1973, 14 July 1975.

'A final attempt to end the quarrel of the schools ...'

Mallinson, V., *Power and Politics in Belgian Education*,

Appendix 3, p. 241 The *Pacte Scolaire* applies to all education up to University level bar musical education.

(Art. 1, loi 29 mai 1959).

156. Art. 12 loi 29 mai 1959:

L'enseignement gardien, primaire, et secondaire est gratuit dans les établissements de l'Etat et dans ceux qu'il subventionne en vertu de la présente loi ... La délivrance des livres et objets classiques se fait sans frais dans l'enseignement gardien et primaire, quatrième degré inclus.

school, and the Law provides for this.¹⁵⁷ It also provides for transportation to the nearest school.¹⁵⁸

There are two hours per week of religious instruction in

157. Art. 4 loi 29 mai 1959: Le droit des parents de choisir le genre d'éducation de leurs enfants implique la possibilité de disposer à une distance raisonnable d'une école correspondant à leur choix...

Thus the State, apart from its power to create schools where the need is felt (Art. 3 *ibid.*), must,

à la demande de parents qui désirent un enseignement non confessionnel et ne trouvent pas à une distance raisonnable une école dont au moins les trois quarts du personnel sont titulaires d'un diplôme non confessionnel, soit d'ouvrir une école d'Etat ou une section d'école d'Etat soit d'assumer les frais de transport vers une telle école ou section, soit d'admettre aux subventions une école libre non confessionnelle existante; ... (Art. 4 Para 1, *ibid.*)

and if parents want a confessional school, under the same conditions, the State must allow an existing confessional school to be subsidised. (Para 2, *ibid.*)

158. Loi 14 juillet 1975.

official schools⁽¹³⁷⁾, and a choice must be made by the pupil's legal guardian, between Catholic, Protestant, Jewish or ethical instruction.

To ensure equality between the various education networks, all certificates have an equal validity provided that certain minimum conditions are observed. All major reforms must be preceded by consultations.⁽¹⁴⁰⁾

159. Art. 8 loi mai 29 1959. The guardian must sign a special Declaration wherein he declares that he has the freedom to choose the religion that he wishes, that he had done so without any undue pressure, and that he may change his mind within three days of having signed the Declaration, Art. 9 *ibid.*, declares who may give the religious instruction, and makes provision for inspection of such instruction, by members concerned. Art. 10 deals with the same issues for the morals course. The 'free' schools are free from any regulations on these issues.

160. Art. 5 loi 29 mai 1959, remplacé par Art. 3 loi 11 juillet 1973:

Les réformes fondamentales de l'enseignement font l'objet d'une concertation préalable entre les pouvoirs organisateurs. Par réforme fondamentale, il faut entendre une modification dans l'orientation générale a la durée des études et dans les conditions d'admission

Article 41 as amended by article 14 of the loi 1973, is very interesting, and helps to show the depths of *la chasse à élèves* that accompanied the *lutte scolaire*.

Tout activité et propagande politiques ainsi que toute activité commerciale sont interdites dans les établissements d'enseignement organisés par les personnes publiques et dans les établissements d'enseignement libres subventionnés. Tout pratique déloyale est de même interdite dans la concurrence entre ces établissements. La propagande en faveur d'un enseignement doit rester objective et exempte de toute attaque contre un autre enseignement.

In fact the whole of Chapter IX (Art. 41-44) deals with this question. A Commission is established to look into infractions of Article 41, and the Minister of Public Instruction is given power to punish for contravention.

Each institution can organise its own timetable, and with ministerial approval can organise its own programme.⁽¹⁶¹⁾ However

et de passage des élèves.

161. Art. 6 loi 29 mai 1959:

A condition de respecter un programme et un horaire minimum légalement fixés, chaque pouvoir organisateur jouit pour son réseau d'enseignement, et même pour chaque institution d'enseignement, de la liberté

there is a basic, legal minimum timetable that all must respect. Teaching methods are not subject to control.

The *Pacte Scolaire* has not been substantially modified, except in regards to its building programme which was completely replaced by the law of 11 July 1973. The original article 14 allowed an extremely ambitious building programme.¹⁶² In 1966 a law of 8 July, entitled the *loi tendant à freiner temporairement le développement des réseaux scolaires*, did just that.

There was one main worry about the *Pacte Scolaire*, that was the fear of State domination, (via its power to validate diplomas, and the fact that it held the purse-strings). This, it was felt,¹⁶³ might lead to a disappearance of the many types of school hitherto existing, and lead to a system of State-Catholic hegemony and confrontation. However these fears have not been justified by events, and the law of 14 July 1975 provides a model for a new

d'aménager ses horaires et, sous réserve d'approbation ministérielle, en vue d'assurer le niveau des études, d'élaborer ses programmes ...

162. See Belgium Present distribution of administrative and financial responsibility regarding education, p.806.

163. S. de Coster, Church and State in Belgian Education, in 1966, *World Yearbook of Education*, Section III, pp. 332-38.

pluralistic school. (164)

B. CONCEPTIONS OF "LIBERTÉ DE L'ENSEIGNEMENT"

The *liberté de l'enseignement* is seen to have two aspects. One allows the free creation of educational establishments, and the other the free choice from amongst the resulting institutions.

In wider terms the *liberté* is seen as an attribute of a pluralistic democratic society in contradistinction to dictatorships. (165)

La liberté de l'enseignement est au fondement même de la démocratie...

The freedom of conscience lies behind *liberté de l'enseignement*. The ideas of individual worth and independence also underlie it. Schooling can be seen as a social task

Il fut préparer les enfants à devenir les citoyens libres. (166)

The consequences of allowing *liberté de l'enseignement* are twofold.. Firstly State schools must respect pupils consciences in what they teach and how they teach it. Secondly the State must

164. 1975 *Pasinowic*, 1174. See above p.815, in the Quick Reference Glossary for a brief explanation.

165. Wigny, P. *Droit constitutionnel*, Tome I Brux. Bruylant, 1952, p. 363ff.

166. Wigny *op.cit.*, p.364.

tolerate alternative schools.

Naturally these libertarian conceptions are laced with some utilitarianism, thus, for example, it is considered permissible for the state to require standards for certain professions (e.g. the medical profession), and in consequence interfere by setting diploma standards. Likewise, hygiene, being for the public good, can outweigh the right to create schools.

An interesting aspect of the *pacte scolaire* is its implications for social equality. We see that the Social Christian party is order to ensure state subsidies for (what is essentially) catholic education has recognised the principle of equality, in the sense of equal outcomes. Thus arguments in favour of subsidies rest on the "equal" rights of "fathers" to choose the education of their children,¹⁶⁷ and are moreover supported, especially after the second world war by appeals to equal education for the children.¹⁶⁸ This means equal recognition of diplomas and equal pay for teachers regardless of the school in which they teach.

In Belgium the original *liberté* has been expanded to cover the provision of subsidised private education. Thus the choice implicit in the *liberté de l'enseignement* is made more real for all citizens. The state thus acknowledges the economic and social dimensions in the right to education. By heavily subsidising

167. Supported also by the argument that tax-payers money equally raised should be equally distributed.

168. Beaufays, *op.cit.*, p.174 et seq.

alternative education the state gives its citizens a wider choice of schooling. Having made education compulsory it would have had to pay for the schooling the nation's children in any event.

The acceptance of the economic and social aspects of the right to education narrowly missed being adopted in 1968-70 when the Constitution was being reformed.

The main reason for constitutional reform in 1968-71 was that

les tensions entre flamands et wallons deviennent insupportables. Elles risquent de mettre en danger la vitalité ...de la nation. (197)

It was a major task just to 'settle' this issue, and thus none of the Title II reforms were implemented, except for article 6bis which was adopted to ensure Liberal support.

The Title II reforms were attempted in order to update the Belgian Constitution's classical, democratic political rights', and convert[?] them into more modern economic and social rights, that have become the new social goals. The implications of this attempted reform will be dealt with more fully in the Chapter twelve.

After many meetings, the following text was proposed by the Commission for reform of the Chamber of Representatives:

Chacun a droit à l'instruction, à l'éducation et à la culture. L'enseignement est obligatoire dans les limites fixées par la loi; l'enseignement donné ou subventionné par

l'Etat est gratuit. La loi facilite l'accès à l'enseignement à tous les niveaux et sous toutes ses formes à tous ceux qui en ont les aptitudes et le désir. Chacun a le droit d'être initié, de contribuer et de participer librement aux activités culturelles et sociales. La loi facilite et encourage cette participation.

The emphasis on culture is reflected in this article, and the creation of the Cultural Councils by the same reform, indicates the concern over this matter. The reform however was never implemented as the Parliament was dissolved.

Nevertheless article 17 of the Constitution is not without effect as the *Cour de Comptes* showed in relation to technical education. The *Cour de Comptes* was set up even before the Constitution was established. It was recognised in article 116 of the Constitution.⁽¹⁷⁰⁾

La principale attribution de la Cour des Comptes et le visa qu'elle accorde au mandat de paiement sur le Trésor public par les ordinateurs de dépenses, c'est à dire les Ministres responsables ou leur fonctionnaires délégués.⁽¹⁷¹⁾

If the Court considers the expense illegal it can refuse its stamp. If it does so the documents go back to the issuing office with the

170. See Wigny, P., *Droit Constitutionnel*, Vol. 2, (Bruylant, Brux., 1952) p.

171. Perin, F., *Cours de Droit Constitutionnel*, Livre 2, (P. U. Liege, 1977).

reason for the refusal appended. The Council of Ministers can override the *Cour de Comptes*. But if it does so the *Cour* will inform the Chamber of Representatives.

The government had organised their Technical education programme by *arrêté-royal*. The Constitution in article 17 declares in its second sentence that, *L'instruction publique, donné aux frais de l'Etat, est également réglée par la loi*. The *Cour de Comptes* therefore found that a provision for such schools in a budgetary law was not a sufficient legal basis, and thus refused to certify expenses for the creation of further technical schools. The government was forced to table a *loi organique* in the 1950-51 session.

The question of educational rights within the Belgian legal system was squarely raised in the battles over language. This prompted both national and international review of the Belgian language laws. For the international review see section two above, and chapter seven above.

It can be seen that the Belgian conceptions of rights with regards to education have similarities to those of the other countries under study, and yet have a specific Belgian feel. This is particularly so in the area of language in education, to which we now turn.

C. THE LINGUISTIC REGIME FOR EDUCATION

Earlier in this section some indications were given of the

linguistic regime as it effected schooling in the past. Ever since Jan Willems organised the *Société pour le progrès de la langue et de la littérature néerlandaise* in 1836, there has been a continual pressure for the resurrection of the Dutch language (and culture), and its recognition by the state (1898). In an *Arrêté-Royal* of 21 Nov. 1864 it was laid down that the Dutch language to be used in administration, translations, and education *devrait rattacher purement et simplement son orthographe au système suivi par le Grand Dictionnaire étymologique de la langue néerlandaise*.¹⁷² This official uniformity greatly helped the language to recover.

Nevertheless in official institutions the process of francisation was apparent in that everything in Flanders above a certain level was done in French. In social life the francisation policy was revealed in the fact that any Flemish speaking person who succeeded in climbing the social ladder was obliged to become francised if he wished to be received in good society,¹⁷³ otherwise he would be virtually ostracised.

By the 1930's there was a strong Flemish nationalist anti-Belgium movement, and it was to remove this 'real' danger to the Belgian state that the 1930's language laws were passed. They were designed to re-ally the middle and lower-classes to authoritative

172. Coulon, M. *Jeunesse à la Dérive*, (Silène, Bruxelles, 1945)
Vol.1, p.96.

173. ECHR Ser. B. Linguistic cases, Vol. 11, p. 109. Me Bayart
Counsel for the Belgian government.

all very superficial
institutions from which they had become alienated by the use of the French language.

One of the results of the flexibility of the 1930's legislation was an expansion of the French-speaking area. This caused 'traumatic shock' amongst the Dutch-speakers, who accused the French-speakers of 'geographic imperialism', and demanded territorial integrity. The French-speakers meanwhile accused the Flemings of 'demographic imperialism', the 1947 Census indicating that the French-speakers were largely outnumbered.

The idea of a fixed language-barrier became more acceptable when it seemed that linguistic census taking would create bitter confrontations between different communities. It was that the government decided on fixed unilingual regions for its 1960's legislation. This arrangement was ratified by the constitutional reforms of 1968-71.

? | Since the implementation of the *Pacte Scolaire*, the main controversy in education has been over the language to be used in schools. Indeed the language laws were the subject of the *Belgian Linguistic cases* before the European Court of Human Rights in Strasbourg.¹⁷⁴ In the twentieth century there have been three main legal developments on this problem: The Laws of 1932 and 1963; the *Belgian Linguistic cases*; and the Constitutional reform of 1968-1971.

The Language Law of 14 July 1932

174. See below p.535.

The 1932 Language Law (for education) was flexible; every ten years the results of a census would cause variations in the linguistic regime. The *loi* of 24 July 1961 disallowed the Census from asking any questions on linguistic issues. (175)

Under the 1932 Law instruction was to be in the language of the Region. (176) Section 2 of the law allowed that if the maternal or usual language of the child was not that of the Region, then he could receive instruction in his own language. The 'reality of this need' and the expediency of meeting it were to be judged by the Communes and management of the schools. In their third year children in such classes de transmutation had to be also learning the language of the Region. In secondary education there were some special classes where instruction could be in the language other than that of the Region, but conditions of admission were very limited and strict. (177)

The parents of 25 or more children could demand that a second language be taught from the fifth year of schooling onwards. In Communes that had a twenty percent (or greater) language minority the second language could be taught from the third year onwards.

In the Brussels agglomeration schools teaching in both languages were allowed, and the father could declare which language

175. Implemented by *arrêté-royal* 3 November 1961.

176. Ministère de l'Éducation Nationale et de la culture, *Enseignement Primaire*, 1961, p. 53.

177. See Section 9 of the 1932 Law.

should be used in the upbringing of his child (subject to verification in cases of doubt). As in the transmutation classes second language learning was compulsory from the third year onwards.

La législation de 1932 était un compromis ... , entre l'individualisme bourgeois de 1830 et la prise de conscience populaire flamand du xxe siècle⁽¹⁷⁸⁾.

The Language Law of 30 July 1963

The 1932 legislation created numerous inequalities which have been markedly aggravated by the 1963 legislation.⁽¹⁷⁷⁾ The 1963 legislation, in contrast to the 1932 legislation, was strict.⁽¹⁸⁰⁾ The law of 8 November 1962 had established a linguistic frontier.⁽¹⁸¹⁾ This was not as dramatic as it sounds the 'frontier' having been there in fact for centuries. It did however cause

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178. Perin, F., *Cours de droit constitutionnel*, Livre 11, *op.cit.*, p.11.
179. Dissenting Opinion of Mr. Eustathiades, Vice-President of the European Commission of Human Rights, *Belgian Linguistic Cases* ECHR Ser. B Vol.1, p.156.
180. See ECHR Ser. B Vol. 1, p. 156.
181. Perin, *op.cit.*, p.14

... la frontière linguistique est pratiquement immobile depuis des siècles.

Also Wigny, *op.cit.*, pp.108-109.

controversy, particularly in the six Communes of Fourons,¹⁸² and over the issue of the size of the bilingual area of Brussels. The Law of 1963 provided a more rigid structure for the use of language in schools. *La langue de l'enseignement est désormais la langue de la région ou l'institution est établi, ...*¹⁸³ Special rules applied to the Brussels capital (a 19 Commune agglomeration) Communes on the periphery of the Brussels capital, and Communes on the linguistic frontier.

In the Brussels capital area instruction was to be in the maternal, or usual, language of the child. However this was not determined solely by the father, but also had to be confirmed by two language inspectors (one for the French language, and one for the Dutch language). This aroused such passions that it was finally reformed by the law of 26 July 1971, made after the constitutional reforms of 1968-1971. Second language learning is compulsory in both primary and secondary schools.

The Communes on the fringes of Brussels¹⁸⁴ or on the linguistic frontier¹⁸⁵, instruction could be given in a different language from the official one if at least 16 resident parents

182. In the Fourons Communes a Dutch-German patois was spoken, but most of the inhabitants used French, there being economic and social links with Liege.

183. Perin, *op.cit.*, p.52.

184. Article 6 loi 30 juillet 1963.

185. Article 7 § 3 loi 2 fev. 1963.

requested it, and the language was the child's usual or maternal language, and such a school did not exist within 4 kilometers of the child's home. Second language learning is compulsory and more intensive in primary schools in these areas, and in the German language region.⁽¹⁸⁶⁾ It is especially intensive in schools that are created in these circumstances. Indeed this was one of the issues raised by the application to the European Commission on Human Rights by the applicants in the *Fourons* case. In the unilingual regions Dutch and French language learning can take place from the fifth year onwards, in French and Dutch respectively.⁽¹⁸⁷⁾

Before the constitutional reforms of 1968-1971 the constitutionality of this law was questioned.⁽¹⁸⁸⁾ It was also the subject of bitter passions, that were, in major part, the reason for these reforms. The father had lost his right to choose the language

186. In this area the second language must be in the French language for German schools, and *vice versa*. Art. 9 Law of 30 July 1963.

187. The French language region recently announced that English would have parity. *Décret 21 février 1980 Moniteur 14 mai 1980*.

188. See Wigny *op.cit.*, p.104, also Wigny, *Cours de droit Constitutionnel*, p.158. See below p. ___.

of the education of his children.⁽¹²⁷⁾ Article 88 of the Law of 26 July 1971 restored this to him.

The feelings ran so strong that six groups of parents applied to the European Commission of Human Rights, claiming that their rights under the European Convention of Human Rights and its first Protocol had been violated by the Belgian law.⁽¹²⁸⁾ This case has been considered in great detail above.⁽¹²⁹⁾ The Belgian Government in fact undertook to change its laws in respect to the violation found by the Court.⁽¹³⁰⁾

The violation related to the rules appertaining in the six peripheral Communes of Brussels which were accorded a special status by the 1963 legislation. Only French-speaking residents had the right of access to the French classes. In these Communes the Dutch-speaking had access to the schools regardless of residence. Thus there was discrimination contrary to articles 2P and 14 of the Convention. The court found no violation as regards the lack of subsidies for schools teaching in the non-regional language, nor in the fact that schools teaching in the non-regional language received

189. In fact since the law of 19 May 1914 the language chosen had been subject to varying degrees of verification, none so strong as that contained in the 1963 law.

190. Articles 8, 9, 10 and 14 of the ECHR and Articles 2 of the First Protocol.

191. See above chapter seven.

192. Debate in Chamber of Deputies, 23 Oct. 1968.

no homologation for their certificates.

The Constitutional Reforms of 1968-1971

In effect the inclusion of Articles 3bis and 59bis Para.3 constitutionalised the linguistic regime of 1963. The Fourons problem was dealt with by the *arrêté royal* of 10 May 1973 which allowed the executive to waive the strict rules (concerning the number of parents and distances schools had to be from homes before education in French-Dutch was permissible)⁽¹⁷³⁾, for certain named Communes on the linguistic frontier. The inhabitants can choose the language regime they wish for their school. This decree was considered by the *Conseil d'Etat* decision of 9th August 1976.

This regime is not applicable to independent schools. Such schools receive no state subsidies, nor are their 'certificates' recognised by the State. This is not an unsurpassable barrier, fees can be charged in such schools, and they can present their students to the Jury Central for examination, and thus gain certification. However naturally there are few such schools, and they are usable only by richer segments of society. Such though is the nature of freedom. The Belgian linguistic cases were concerned with these matters, and have been dealt with above.⁽¹⁷⁴⁾

Conclusions

193. Conditions set out in *Arrêté Royal* of 14 mars 1960.

194. See above chapter seven.

The freedom remaining in regards to the language that children should be educated in, was sparse enough to nourish enormous passions, especially in Brussels and the Fourons Communes, indeed the forces that arose had to be the subject of political compromises during the reform of the Constitution, and it was thus that the Brussels parents regained, unchecked, their right to choose the language of their children's education. (173)

It seems trite to observe that the language of education is fundamental. In GB the Swann Committee made it clear that poor performance by certain minorities was at least partially caused by language disability. The European Court of Human Rights found in the Belgian linguistic cases that choice of language in education was not protected by the European Convention on Human Rights. However the jurisprudence has moved on considerably from this opening position. (174) In Belgium the major tensions caused by the linguistic and community divide have to some extent abated with the Constitutional reforms already mentioned, though the activities of Mr Happart, Mayor of Fourons, have recently been in the headlines. His refusal to acknowledge his competence in the Dutch language caused

195. The law of 26 July 1971, Article 88 declares:

Dans l'arrondissement de Bruxelles; Capitale, la langue de l'enseignement est le français ou le néerlandaise selon le choix du chef du famille, lorsque celui-ci réside dans l'arrondissement.

196. See Campbell & Cosans below p.610.

the fall of the coalition headed by Mr Martens. The new Parliament will be empowered to carry out further constitutional reforms, including devolution of more educational matters to the regions.

SUMMARY

RELIGION

As elsewhere, the Belgian school law debates have to a large extent centered around the role of religion in schools. The major clashes here have also diminished. In the state provided (official) schools religion or ethics is a compulsory component, though parents can opt their children out. The state subsidised schools are mainly in the hands of the Catholic Church.

PRIVATE SCHOOLS

State support for private education is thus totally ensconced in Belgium today. The school leaving certificates of the state supported schools are fully recognised and those of the non-subsidised private schools can be recognised if certain requirements are met.

CONCLUSIONS

The debate over the updating of individual rights in the Constitution made it clear that Belgium fully recognises the modern European conception of rights in education. The Linguistic cases showed though, that, as elsewhere the balance between the rights and liberties of the individual is a delicate one.

THE REPUBLIC OF IRELAND

SECTION ONE

THE EDUCATIONAL SYSTEM

HISTORICAL PERSPECTIVE

Introduction

As with the other sections introducing the national educational systems this section sets out to provide a backdrop and a perspective on how the system evolved. It thus helps establish the framework within which the rules of law operate. It is not designed to give a full account of all the factors that necessarily went into the build-up of the educational system in what is now the Republic of Ireland.⁽¹⁾

In the description and analysis that follow I very briefly gloss the early origins of the Irish educational organisation, and then detail more closely how the system evolved from the eighteenth to twentieth century. The main points of interest relate to how an intended non-denominational system became emphatically denominational. This has interesting repercussions when one looks at how the legal system reacted to this,⁽²⁾ and especially when one puts the Irish system up to scrutiny in the light of the international

1. Some trends and events, which though of vital significance to Ireland and the Irish nation, are not mentioned let alone analysed as they have no effect on educational organisation. Thus no mention is made beyond this to the Great Famine nor to the continuing diaspora of the Irish. I have drawn on numerous works of the experts in setting out the following chapter.
2. See below section 3.

legal norms in this field.³ Also noteworthy have been the official attempts to revive the Irish language. This important symbol of Irish nationalism has become a compulsory subject for the whole school population. Whilst the majority of the population are clearly in favour in the abstract, on leaving school it seems the language withers. The attempt to revive the language of a minority as a first official language is an interesting inversion of the usual case whereby the language of the majority is foisted on the minority. This raises both educational and legal questions that are analysed (the latter more fully) in the Education and the Law section. The following pages outline the main points in the development of the Irish educational system. There is also a quick reference glossary, and a table showing the current structure of the system.

Early days and England's influence

Ireland's educational system, like those of other European nations, was strongly influenced by religious groups. A unique influence was that of England and English policies.

After the sixth century monasteries became the centers of learning⁴; Latin and later Irish were the languages of instruction.

3. See below p.998.

4. See T.G.O. Muirghis, "Education in Ireland", in *Encyclopedia of Ireland*, (Allen Figgis, Dublin, 1968) and Dowling P.J., *A History of Irish Education*, (Mercier Press, Cork, 1971) Ch.2

There also flourished a system of Bardic schools, whose main supporters were the chiefs. They specialized in the study of Gaelic literature. They largely disappeared after the chiefs fled from the sixteenth century tudor military interventions.⁵ The ravages of the norsemen had ended the great days of the monasteries, and they were finally to disappear by dissolution in 1539. In 1537 the Irish Parliament passed an act⁶ designed to create a system of parish schools, and to try and assimilate and remove

. . . diversite in tongue, language, order and habite
. . . [of] . . . his Grace's subjects of this part of
this land of Ireland, that is called the English Pale
. . .

The act was not a success, as the clergy, on whom the duty to create

By the sixteenth century Ireland's schools had become famous in Western Europe.

As Atkinson observed in his book, *Irish Education*:

There were, in all, more than eighteen Irish foundations in Germany and Switzerland, over thirty in Gaul, and many others in Italy and the Netherlands.

Atkinson, N., *Irish Education: A History of Educational Institutions*, (Allen Figgis, Dublin 1969), at p.11.

5. See P.J., Dowling *op.cit.*

6. 1537 28 H.VIII c.15 (Ir), An Act for the English order, habite, and Language.

the schools fell, had few resources to spare for such activity. Also there was strong opposition from the Catholic clergy and schoolmasters.⁽⁷⁾ The act had to be shored up by later statutes.⁽⁸⁾ Atkinson states that

[P]arish schools finally began to appear in the early years of the eighteenth century . . . [but] at best

7. Atkinson, *op.cit.*

8. For example the Act of 1695 7 Will.III, c.4, Section which read:

And to the intent that no pretence may be made, and that there are not sufficient numbers of schools in this realm to instruct and inform the youth thereof in the English language . . . and an Act for the English order, habit, and language . . . and an Act for the erection of free-schools, . . . which have generally been maintained and kept, but have not had the desired effect, by reason of such Irish Popish schools being too much connived at, . . . shall from henceforth be strictly observed and put into execution . . .

8 Geo. 1 c.12 An Act for the encouragement of Protestant schools within the Kingdom of Ireland.

they were pitifully few . . . '7)

In 1570 the Irish Parliament passed *An Act for the Erection of Free-Schools*^{'10'} which provided that there shall be from

henceforth a free schoole in every diocese in the realm of Ireland, and that the scholemaster shall be an Englishman or of the English birth of this realm.

This Act too was largely a dead letter.^{'11'} The lack of success can at least partially be accounted for by the fact that the clergy were supposed to provide cash for the salary of the schoolmaster from their own pockets.^{'12'} Several Royal Schools were established in the seventeenth century endowed, in the main, from confiscated lands.^{'13'} Private benefactors also established schools,^{'14'} notably those founded by Erasmus Smith.

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9. Akenson D.H., *The Irish Educational Experiment*, (R.K.P., London, 1970) p.24. See also Dowling *op.cit.* p.42. In 1809 there were 549 parish schools with 23,000 children in attendance.
 10. 12 Eliz.I, c.1.
 11. Milne, K., 'Irish Charter Schools' in (1974) *Irish Journal of Education*, pp.3-29, at p.7.
 12. Atkinson *op.cit.* p.29
 13. e.g. the five Royal Schools in Ulster created at James 1st's instigation. See Dowling *op.cit.* p.46. Very few Catholics attended these schools.
 14. See Dowling *op.cit.* pp.47-51. See Atkinson *op.cit.* pp.2-21.

The Eighteenth Century: Onward Christian Soldiers

In the late seventeenth century a series of laws (to be called the Penal Code) began to positively discriminate against Catholics, and forbid them, inter alia, from setting up or teaching at schools.⁽¹⁵⁾

From the time of William III for nearly a hundred years, merely to be a Catholic was almost equivalent to being an outlaw. . . there was every obstacle to Catholic education in Ireland.⁽¹⁶⁾

The Irish Charity School movement, incorporated in 1733,⁽¹⁷⁾ also provided schools, and in 1739 received a grant of one thousand pounds from the King. In 1747 the proceeds of a duty revenue (average income approximately £1,100/annum) was given to it by the Irish Parliament. In 1751 it received its first direct grant. The main function of these charter schools was to proselytise

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15. 7 Will.III c.4, An Act to Restrain Foreign Education. This gave half the property of the school to the informer and half to the government. 2 Anne, c.6, An Act to Prevent the Further Growth of Popery.
 16. Dowling, *op.cit.* p.73.
 17. Incorporated Society in Dublin for the Promoting of English Protestant schools in Ireland. This was explicitly copied from the Scottish model. See Milne, K., "Irish Charter Schools", (1974) 8 *Ir.J.Educ.*, p.3 for the background to this organisation.

Catholics.⁽¹⁸⁾ Considerable emphasis was placed on manual labour, and boarding schools was established to enable children to be transplanted out of reach 'of popish parents or relatives'. Conditions within the schools were miserable.⁽¹⁹⁾ The Royal Commission in 1815 reported

We are convinced that if a thousand children, educated in charter schools, were to be compared with an equal number who had remained in the apparently wretched cabins inherited by their parents, but who had attended orderly and well-regulated day schools, it would be found, not only that the latter had passed their years of instruction far more happily to themselves, but that, when arrived at the age of manhood, they would upon a general average, be in every respect more valuable and better member of society.⁽²⁰⁾

Almost nothing is known about Catholic schools from the dissolution of the monasteries until the seventeenth century when many colleges were established on the Continent. The double jeopardy of state-supported proselytising schools and the Penal Code, led the

18. Dowling *op.cit.* p.41.
19. Atkinson *op.cit.* considered them a failure.
20. Atkinson *op.cit.* p.27.

Catholic peasants' children to be educated in 'hedge-schools'.⁽²¹⁾ The hedge schoolmaster was not without honour in the country. He taught the children who came to his schools; he was their parents' letter-writer, lawyer, and general advisor. He was often clerk of the parish and entrusted with the religious education of his scholars. The hedge-schools steadily increased in number as the Penal Code became less severely enforced towards the end of the eighteenth century. In 1778, 1782 and final 1793 the Penal Code was removed and Catholic emancipation established.⁽²²⁾

All these incidents of state aid and provision of schooling appeared much earlier than elsewhere in the British Isles,⁽²³⁾ and were largely directed towards supporting Protestants and converting catholics. Education was seen as a method of social control.

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21. There were 7,600 hedge-schools in 1824. Dowling *op.cit.* estimates 9,000, p.99. Their name derives from their clandestine nature, which caused them to meet in the shelter of the hedge-rows sometimes.
 22. 18 & 18 Geo. III, c.49 (Ir.) ; 21 & 22 Geo. III, c.62 (Ir.), 33 Geo. III, c.21 (Ir.).
 23. The first Parliamentary grants on the mainland of Great Britain were in 1833. The Scottish parliament had legislated in 1696 imposing a duty (oft ignored) on land owners to provide a school-house and teacher's salary.

Nineteenth century: religious accommodation

In the course of the nineteenth century these schools abandoned their attempt at proselytising Catholics and became successful Protestant schools. (24)

Early in the nineteenth century several charitable organisations were set up to promote Christianity through schooling. (25) Yet there was one set of schools that seemed, for a while, to be genuinely charitable and non-denominational, the Kildare Place Society Schools. (26) However in the 1820's the Kildare Society began to support other proselytising societies, and increasingly lost the support of the Catholics, who were thus pushed towards the concept of state schooling as a neutral alternative. (27) The

24. Dowling *op.cit.* p.54.

25. The Association Incorporated for Discountenancing Vice and Promoting the Christian Religion received its first Parliamentary grant in 1801. The London Hibernian Society was established in 1806. The Baptist Society was established to promote the gospel in Ireland in 1814.

26. The Society for Promoting the Education of the poor in Ireland was founded in 1811, and received its first Parliamentary grant in 1816.

27. . . . and the Roman Catholic clergy began to exert themselves with energy and success against a system to which they were in principle opposed, and which they feared might lead in its

Catholic Education Society founded in 1828 attempted to provide free education in Dublin. But it had little money and could only afford to run two schools. The main Catholic educational effort was made through the religious orders such as the Presentation Sisters started by Nano Nagle⁽²⁸⁾ in 1795 and being recognised as a religious order by Pope Pius VII in April 1805. Catherine McAuley started the Sisters of Mercy in September 1828.⁽²⁹⁾

The failure of the Charter schools to reach the majority of the population, coupled with a genuine desire for schooling on the part of the Irish peasants⁽³⁰⁾, a fear of revolutionary ideas and a tradition of legislative interference in educational affairs,⁽³¹⁾ led to the adoption of the Irish national school system, still the basis of the present day Irish education.

The national system started in 1831, after a series of

results to proselytism . . .

from Lord Stanley's letter of instruction to the Duke of Leinster. Quoted in Atkinson *op.cit.*

28. She had previously introduced the Ursulines to Ireland. Coolahan, J., *Irish Education; its History and Structure*, (I.P.A., Dublin, 1981), p.58.
29. There were 3,000 by 1850, 8,000 by 1890, and 23,000 by 1950. The Loretto nun were established in Ireland in 1822.
30. See Atkinson, *op.cit.*, pp.46-47.
31. Including the first parliamentary grants to education in the British Isles.

commissions and committees on Irish education had reported. Instead of grants to the Kildare Place Society and other societies the education vote (£30,000) was to be entrusted to the Lord-Lieutenant. Lord Stanley, the Chief Secretary for Ireland, wrote the instructions⁽³²⁾ that were to become the "written constitution of the national system".⁽³³⁾

A board, the Commissioners of National Education, was set up. It included important representatives from the main denominations, and would have control over the Lord Lieutenant's education fund, subject to certain conditions.⁽³⁴⁾ The funds were to be applied for the following purposes:

1st, granting aid for the erection of schools, . . . :

32. Quoted in the appendix of Atkinson, *op.cit.* As there are two versions of this letter, both of which are in the above-mentioned appendix, I have always quoted from Version A. The instructions were largely based on Wyse's Bill of the year before.

33. Atkinson, *id.* p.120.

34. viz. They will refuse all applications in which the following objects are not provided for--- . . . a fund sufficient for the annual repairs of the schoolhouse and furniture . . . at least one-third of the estimated expense (for a schoolhouse) be subscribed, . . . that the schoolhouse when finished, be vested in trustees, . . . and other like conditions. Lord Stanley's letter *id.*

- 2nd, paying inspectors for visiting and reporting on schools;⁽³⁵⁾
- 3rd, gratuities to teachers for schools conducted under the rules laid down . . . ;
- 4th, establishing and maintaining a model school in Dublin and training teachers for country schools;
- 5th, editing and printing such books of moral and literary education as may be approved of for the use of the schools, and supplying them and school necessities at not lower than half price;
- 6th, defraying all necessary contingent expenses of the board.⁽³⁶⁾

One of the main features of the system was to be the uniting of children of different creeds in the common school. To this end religious and literary education were to be distinguished. Also there can be hardly any doubt that the national schools in their early days were responsible for discouraging the use of the Irish language.⁽³⁷⁾ Joint (Catholic and Protestant) applications for aid were to be expedited and, if the application was from a single denomination, an inquiry was to be made. The system was designed to secure a non-denominational school system. In fact

[during the first 50 or 60 years of the board's operation, a

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35. What centralised control there was, was assured through the use of an inspectorate. By 1849 there were forty inspectors. Coolahan, *op.cit.*, p.22.
36. Lord Stanley's letter *id.*
37. Dowling *op.cit.* p.93.

number of schools, mostly but not exclusively in areas where Protestants were in the majority were built by the local landlords.³⁸

And yet by the mid-nineteenth century there existed a *de facto* denominational system. The Commissioners had not insisted on joint applications. The Presbyterians, Anglicans³⁹ and Irish Christian Brotherhood all, at one time or another, had boycotted the system, setting up their own schools instead.⁴⁰ Especially in the

38. O'Connell, T.J., *The History of INTO*, (Dublin, 1969) p.36.

39. The Established Church (united with the Church of England by the Union (1801)) subsequently referred to as the Church of Ireland, separated from the Church of England and disestablished in 1869.

40. The Established Church (of Anglican tradition) set up the Church Education Society in 1839, by 1843 its schools continued well over 100,000 pupils. In 1854 it took over the Kildare Place Society School. Atkinson, *op.cit.* p.96. The Presbyterians (especially those in the Orange Order) were violently opposed to the national system to start with. Their education was dominated by religion and nationalism. The Irish Christian Brothers, after a brief trial period, rejected the national system. In 1891 the battle to include them had started, and was successful after the turn of the century. The Christian Brothers returned to the national

South this left only Roman Catholics to join the schools.⁽⁴¹⁾

In 1840 the Presbyterian schools joined the national system after wringing major concessions from the Commissioners. The Commissioners decided that non-vested schools (that is schools built without the Commission's aid) were only bound by the rules stated in their application for aid; basically they had more freedom and less duties in the religious field.⁽⁴²⁾ The Anglicans' separate school system, and the threat of Catholic withdrawal from the system,⁽⁴³⁾ forced the Commissioners to give in to the demands of the Presbyterians. As the Anglican Church grew poorer, and especially after its disestablishment in Ireland in 1869, their schools increasingly opted to join the national system. In 1859, 138 national schools were under the management of the Anglican clergy.

The election of Pius IX in 1846 had stiffened Catholic opposition to the national system and Archbishop Paul Cullen refused a seat on the national board. The Catholic hierarchy slowly gained

system in 1925-6.

41. See Osborough, W, N., 'Education in Irish Law and Constitution', (1978) XIII *Ir.Jur.* 145 at p.150 for an account of the fate of Reverend O'Keefe who opposed the establishment of a Christian Brothers school in Callan.
42. Administrative chaos was prevented by the Commissioners' discretion
43. viz. Archbishop McHale's attacks on the system. But the majority of Irish bishops supported Archbishop Murray who was Commissioner. Dowling *op.cit.* p.120.

concessions from the National Commissioners. In 1853 school textbooks that were objectionable to Catholics were withdrawn. In 1860 half of the Commissioners were Catholics.⁽⁴⁴⁾

In 1870 the Powis Commission⁽⁴⁵⁾ recommended many changes in the system, most of which would weaken the power of the Commissioners and increase the denominational aspects of the national system. Most of its recommendations had been implemented by the end of the century.⁽⁴⁶⁾

Amongst other things the Powis Commission rejected compulsory education as being impractical in a rural society and advocated instead a "results system". Fees were to be paid to the teachers based on the results of their pupils in annual examinations. The system had been in use in England since 1861. However, in Ireland there were several modifications to the system as operated in

44. Miller, D.W., *Church, State and Nation in Ireland 1898-1921*, (Gill and Macmillan, 1973) pp.4-5,

the church achieved, . . ., the conversion of the primary education system from its original non-denominational design to an effectively segregated operation - an arrangement which was formalized in a non-statutory convention in 1860 to the effect that the seats on the National Education Board would be divided evenly between Catholics and Protestants.

45. Half of whom were Catholic.

46. See generally Coolahan *op.cit.*, p.24 et seq..

England. The fees were paid to teachers, not to the authorities, and also did not entirely substitute the teachers salary, but were in addition to their basic salary. However, poor attendance still continued, and in 1892 an act made attendance compulsory between the ages of six and fourteen. Education was not compulsory in rural areas until applied by county councils.⁴⁷ By 1908 ten county councils had still not applied the Act.

Intermediate Education

So clear had it become by 1878 that non-sectarianism had failed in the national system, that the Intermediate Education Act of that year made no attempt to repeat the experiment in secondary schools.⁴⁸

The Act established an Intermediate Education Board for Ireland with a duty to provide secular secondary education by instituting and carrying on public examinations, giving prizes, exhibitions and certificates to successful students, and by paying fees to school

47. There were many exceptions written into the Act. Even if the Act had been universally and energetically administered, which was far from being the case, it could effect little because of the numerous exemptions towards securing a satisfactory attendance at school. O'Connell *op.cit.* p.387.

48. Miller *op.cit.* p.30.

managers on the basis of examination results.⁴⁷ There was no direct control over the curriculum. Among its defects the "system" led to cramming for exam passes.⁵⁰ As there were higher rewards for the non-science subjects this took its toll in terms of the number of Irish pupils studying science.

The secondary sector suffered from state neglect.

No regulations existed concerning teacher qualifications, no formal training was available or demanded of teachers, no inspection system was operated, no net salary scales existed and there was no security of tenure or pension rights.⁵¹

The Census Report of 1871 remarked:

By some means or other the higher intellect of the country is plainly being dwarfed; nor is there, we venture to submit, a moment to be lost before those on whom the care lies should apply their faculties to the infusion of blood and spirit into the dry

49. It was funded from the interest on £1,000,000 the left-over revenue from the disestablished Church surplus fund. Titley, E. B., *Church, State, and the Control of Schooling in Ireland 1900-1944*, (McGill-Queen's U.P., Montreal, 1983), p.7.
50. A fact noted by both the Commission on Intermediate Education of 1898, (see Coolahan, *op.cit.*, p.65), and the Dale Report, (see Titley, *op.cit.*, p.23).
51. Coolahan, *op.cit.*, p.54. On secondary education generally see *id.* pp.61 et seq..

bones of public instruction in Ireland.⁽⁵²⁾

In the early twentieth century a partial capitation grant was made available.⁽⁵³⁾

Technical Education⁽⁵⁴⁾

The Royal Dublin Society (established in 1731) had established a natural history museum and supported a course of public lectures. In 1847 a School of Science⁽⁵⁵⁾ was established. In 1889, the Technical Instruction Act⁽⁵⁶⁾ enabled local authorities to strike a rate to pay for technical and manual instruction to their districts provided that the schools were open to the public, had suitable premises, qualified teachers and a curriculum approved by the Department of Science and Art. From 1892 onwards the department contributed an amount equal to that raised locally. The absence of local authorities on the English model made the Act of little effect in Ireland until 1898 when local government was reorganised.⁽⁵⁷⁾ In 1899 the Department of Agriculture and Technical Education was

52. Quoted in Coolahan, *op.cit.*, p.61.

53. See below p.897.

54. See generally Coolahan, *op.cit.*, chapter three.

55. This was later called the Museum of Irish Industry. In 1854 a course of lectures was firmly established. In 1887 it became the Hibernian College of Science. See Clune, M., 'Technical Instruction in Ireland, 1900', (1982) 25 *Oideas* 14.

56. Technical Instruction Act 1889, 52 & 53 Vic. c.7.

57. Clune, M., *op.cit.* p.16.

created.⁵⁸ This department gave grants to national and secondary schools to encourage the teaching of science, from an endowment of £15,000 per annum. It also established state-subsidised schemes for technical instruction, organised and run by local committees. It was highly successful.⁵⁹ and lay-controlled.

Teacher-Training

In 1884 denominational teacher-training colleges were funded for the first time. The Catholic opposition to the district model schools having stalled adequate state provision of teacher training. The Marlborough Street, Dublin Training School of the National Board still continued.⁶⁰ There are currently five colleges of education,

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58. Agricultural and Technical Instruction (Ireland) Act 1899, 62 & 63 Vic. c.50.
59. See Atkinson *op.cit.* p.15 *et seq.* Before this the Royal Dublin Society had carried the flag in this field, See generally Clune, M., *op.cit.* who reaches the opposite conclusion as to the success of the involvement of the Department of Arts and Science in promoting technical instruction in Ireland. *id.* p.20.
60. This had been set up in 1838. Coolahan, *op.cit.*, p.23, pp.32 *et seq.*

all privately owned, though state-funded.⁶¹

The Twentieth Century

By 1900 Dr. Starkie, the Resident Commissioner, announced the replacement of the "results system"⁶² in primary education by a new revised programme. The revised programme increased the curriculum and made the teaching of English and arithmetic obligatory.

"Standards" were introduced as primary school divisions. However, often the teachers were incapable of teaching some of the new subject options. Another difficulty identified by Dale⁶³ was the large number of very small schools and relatively low school attendance (70%).⁶⁴ In 1902 Dr Starkie had proposed local financing for primary and secondary education. Dale also wished to establish the

61. Additionally Thomond College of Education trains specialists in physical education, metal and wood-work, rural science and commerce.
62. The system had increased the rate of basic literacy at the cost of an examination-led mechanistic education. Coolahan, *op.cit.*, pp.29-30.
63. F.H. Dale was appointed to investigate the Irish National school system in 1904. Miller *op.cit.* p.118 et seq. Titley, *op.cit.*, p.20 et seq..
64. Akenson *op.cit.* pp.10-11. Dale found that the efficiency of instruction was impaired by a wasteful proliferation of schools. Miller *op.cit.* p.118.

principle of local financing⁽⁶⁵⁾ and a Department of Education. This he considered would remedy the poor state of many of Ireland's primary schools. The Church's reaction to the Dale Report was to make peace with INTO⁽⁶⁶⁾, to denounce any idea of a government Department of Education, and to express horror at any attempt, howsoever small, to secularise education.

The Liberals' Education Bill of 1906 and the Irish Council Bill of 1907 both failed. The Irish Council Bill would have left ultimate responsibility for education in Irish hands. Revenue would

65. Miller *op.cit.* p.276

As has been frequently pointed out, church men regarded clerical control of education as dependant on the continued exclusion of local authorities from the finance of primary and secondary education.

66. INTO is the Irish National Teachers Organisation. See generally O'Connell, T., *The History of INTO*, (Dublin, 1969). The hierarchy had been in dispute with INTO over the question of tenure of teachers. The Church control over schools also caused problems for promotion of lay members of INTO. These came to a head in the six year long Ballina dispute in the late 1950's. See O'Connell *op.cit.* p.93 et seq.. Also Whyte *op.cit.*, and the Report of the Central Executive Committee to the Easter Congress, Killarney, 1957, *I.N.T.O. and the Ballina case*, (An originally confidential report).

have been provided from Imperial funds.⁶⁷ In 1913 the Intermediate Education (Ireland) Act was passed allowing the Intermediate Board of Education to create permanent inspectors.⁶⁸ Up to 1/25th of the Board's revenue could be made dependant on inspector's reports and disbursed accordingly. This widened state control over secondary education.

The Vice-Regal Committee of Inquiry into Primary Education in Ireland⁶⁹ set up in August 1918, and known as the Killanin Committee, made valuable recommendations for the changing of the national system of education. It recognised that

... the provision of instruction ... is a national trust and obligation. The State representing the Community as a whole, should provide at least for the elementary education of all its future citizens...⁷⁰

Thus teachers' pay must be in national hands. However, one of its central proposals, that of increasing local financing⁷¹ for school

67. Titley, *op.cit.*, p.38.

68. There had been temporary inspectors since 1900. Intermediate Education (Ireland) Act 1913, 3 & 4 7Geo. c.5.

69. British Sessional Papers H.C. Vol.XXI p.748.

70. 563 *id.*.

71. Cardinal Logue (whose diocese was in what is now Northern Ireland), in his Lenten Pastoral, denounced the proposed rate aid as a plot to secularise the schools. Titley, *op.cit.*, p.56.

maintenance was especially opposed by the Catholic hierarchy.¹⁷² The

72. § 68: ... While we hold that the work of teaching in Primary Schools in Iceland is national service, and that the assistance heretofore given from state grants towards the original capital expenditure on the erection of school houses should be continued, there are in our opinion directions in which localities may well be called upon to evince their interest in the success of the State Service, by contributing by a local rate towards the expense of Primary Education.

§ 69:

We therefore propose that it be obligatory on the County Councils and County Boroughs in conjunction with the Board of National Education to appoint School Committees on the same lines as School Attendance Committees are at present constituted. Their duties and powers to be as follows --

(1) The enforcement of school attendance enactments throughout Ireland.

(2) The maintenance, repairs, heating, cleaning and equipment of National Schools unless adequate provision has been otherwise made.

Before expending money in the maintenance, repairs and equipment of non-vested schools the owners of the buildings should enter into agreements with the School Committee as

Committee also strongly attacked the poor attendance record in particular because

[t]he number of adults in this country who are illiterate, or who

regards the use of the buildings during certain hours and for a certain number of years for Primary Education purposes, so as to warrant the Committee in incurring such expenditures. It should be optional for such local committees to undertake the following charges --

(1) The payment of moiety required from the locality in order to secure the provision of meals in necessitous cases. Also, the payment of the local moiety towards discharging the annuity on the residence for the principal teacher.

(2) The provision of school books and requisites in necessitous cases.

(3) The provision, where necessary, of plots of land for the purposes of horticultural instruction, and also the provision of sites free of cost to enable managers to erect teachers' residences where not already provided.

The expenses incurred in exercising these powers and fulfilling these duties to be met by a County-at-Large or Borough rate. In cases of dispute in the distribution of the local rate for any of these purposes the matter should be referred to the Commissioners of National Education for their decision.

See also O'Connell *op.cit.*, p.289.

barely escape this designation, is very regrettable. It constitutes a public danger and is reproach to a land that has been famous for its love of learning. The loss of education is not only an individual hardship, but it affects the welfare and advancement of society as a whole, and wherever the democratic principle prevails there is a strong determination that all the units of society are to be educated, and well educated, not-alone out of sympathy with each child, but in order that the commonwealth may be saved from the evil consequences of ignorance and illiteracy.

They recommended that 'a drastic effort' should be made to improve attendance. It was to this end, recognising that children should not be forced into schools which are ill-kept, badly heated, insanitary, uncomfortable or over-crowded. If the general equipment of the schools were better, parents would be more anxious that their children should attend them, and the children themselves would be less inclined to stay away.⁽⁷³⁾

It was for these reasons that the Committee wanted to see more local financing and control.⁽⁷⁴⁾

The Molony Vice-Regal Committee of Inquiry into Intermediate Education was appointed at the same time.⁽⁷⁵⁾ Most of their

73. §18 *id.*

74. See §21 *id.*

75. British Sessional Papers, H.C., Vol.XXI p.645 (1919).

recommendations⁷⁶ were joined in an Education (Ireland) Bill which had its first reading on November 24th, 1919. It would have set up an Education Department uniting control of the three branches of education, primary, intermediate and technical and would have had to supervise religious instruction.⁷⁷ More importantly, the Bill would have freed the finance of Irish education from Treasury hands by allocating a fixed proportion of educational finance to Ireland. It provided for local finance to support and maintain the schools. I.N.T.O. welcomed the Bill. The Catholic hierarchy, however, issued a long "nationalist" statement to the press condemning the Bill. It

76. Which included, *inter alia*, the abolition of payments by results, the creation of the Intermediate and Leaving Certificate examinations, and an increase in local school control over the curriculum.

77. Clause 3 of the Bill declared:

In the execution of their powers and duties the department shall ensure that the principles and practice which at the time of the passing of this Act govern religious instruction in national schools in receipt of grants from the Commissioner of National Education in Ireland, are adhered to after the passing of this Act, in national schools in receipt of grants from the department.

Education (Ireland) Bill 9 & 10 Geo,5 (1919).

means Irish education "in foreign fetters".⁷⁸ The Education Bill was talked out; condemned as an attempt to "denationalise" and unchristianise Irishmen.⁷⁹ Though it had the clear support of the Irish teachers⁸⁰, the catholic hierarchy successfully mobilised public opinion against it.⁸¹

From 1922

The war and partitioning of Ireland pushed educational reform out of the limelight except as regards the attempts to revive the

78. O'Connell, *op.cit.* p.298. The hierarchy threatened a boycott by pupils. Titley, *op.cit.*, p.66.

79. Miller *op.cit.* p.442. Also Wall, P.J., 'The Bishops and Education' (1982) 25 *Oideas* 5, the Bishops made it their special purpose to safeguard the established position of denominational and clerically controlled schools.

Id. at p.8.

80. At least partly since it proposed pay rises for them.

81. See generally Titley *op.cit.*, chapter three, for a detailed account. The First Dáil had met in January 1919 and issued a Declaration of Independence. The nationalist tone was much stronger than it had been a few years before.

Irish language.⁽⁸²⁾ The Bishops knew what they wanted from the new government:

We feel confident that an Irish government established by the people, ..., will always recognise and respect the principles which must regulate and govern Catholic education, ... we wish to assert the great fundamental principle that the only satisfactory system of education for Catholics is one wherein Catholic children are taught in Catholic schools by Catholic teachers, under Catholic control.⁽⁸³⁾

They had reason to fear that once the Irish tax-payer directly supported education they would demand more say in how the system ran, moreover Nationalist politicians were seeking to persuade the Liberals that home rule was not necessarily Rome rule, and finally the socialists were advocating secularist schools.⁽⁸⁴⁾ The 1922 Irish Free State Constitution stated that all citizens had a right to free elementary education.⁽⁸⁵⁾ In the South the Commissioners (both

B2. See Akenson, D.H., *A Mirror to Kathleen's face*, (McGill-Queen's U.P., Montreal, 1975), Ch. 3. Below p.907.

B3. Quoted in Wall *op.cit.* p.8, and Titley *op.cit.*, p.84.

B4. Miller *op.cit.* p.271.

B5. Article 10. Article 8 provided:

Freedom of Conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be

national and intermediate) were discharged. In 1924 the Ministers and Secretaries Act created a Department of Education⁽⁸⁶⁾. This united control of the previously separate primary (national), secondary (intermediate) and technical education systems in the hands of a cabinet minister.⁽⁸⁷⁾ But as Akenson⁽⁸⁸⁾ observed

made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.

86. Ministers and Secretaries Act 1924, No.16 of 1924, S.1(v).

87. The system inherited by the Department of Education . . . was essentially one devoted to indirect subsidisation of local or private educational initiatives . . .

By no stretch of the imagination was a unified nationwide system of education created.

The state's first Minister for Education Eoin MacNeill⁸⁷ felt that Ireland was lucky to have no school-wars and went to great lengths to appease the catholic church.⁸⁸

The "results" system of payment in intermediate education was replaced by a capitation system⁸⁹ which required the school to teach an approved course of study leading to either the Intermediate Certificate or the Leaving Certificate.⁹⁰ Science was not favoured. In 1962-63 only 30% of boys (14% of girls) wrote science papers in their leaving certificates.⁹¹ The fact that secondary schools were private fee-paying schools lead to social discrimination

Hogan, J., 'Education in the Republic of Ireland', in Bell, R., Fowler, G., and Little, K. (eds.), *Education in Great Britain and Ireland*, (1973, RKP) p.35.

88. Akenson, *A Mirror ...*, *op.cit.* p.33.

89. Himself a devout catholic, Titley *op.cit.*, p.91. See generally Martin and Byrne (eds.), *The Scholar Revolutionary: Eoin MacNeill*, (Harper & Row, New York, 1973).

90. See generally Titley, *op.cit.*, Chapter Six.

91. Intermediate Education (Amendment) Act 1924, No.47 of 1924.

92. Both exams set and marked by the Department of Education. Their institution had been recommended by the Molony Committee.

93. Akenson, *A mirror ...*, *op.cit.* p.76.

and less social and economic mobility than otherwise might have been the case.^{'74'} There was a very insufficient scholarship scheme. Teachers were paid a minimum wage by the school and this was supplemented by the state. The Christian Brothers returned to the National system in 1925.^{'75'} Their teachers though were not paid their salaries directly by the state. The schools received a capitation grant. This meant that the lay teachers in their schools received no pensions.

The Irish Free State dealt with the question of compulsory school attendance by the School Attendance Act of May 1926 that came into force in November 1926.^{'76'}

For four or five years the act operated fairly satisfactorily and average attendance in schools showed a welcome increase.^{'77'}

But the Garda Siochana, who were largely responsible for the enforcement of the Act (bar in the large urban areas) were reduced in strength in order to affect an economy, and were thus increasingly unable to police the Act. The government extended the time limit of the exemptions in Articles 4(3) and (4)^{'78'} to 1940, thus allowing children aged 12 and over to be absent for "light agricultural work

94. Titley *op.cit.*, p.166 *passim*.

95. They had abandoned the system in the nineteenth century as it disallowed them from placing religious emblems in their schools.

96. School Attendance Act 1926, No.17 of 1926.

97. O'Connell *op.cit.* p.388.

98. These articles allowed 20 days absence from school per year.

for their parents". Children were made to attend school only if an acceptably religious school were available.^{'77'} In 1934 the government started to help to transport children to school.

The McQuaid Report (1951) recommended raising the school-leaving age to 16. However, the Council of Education was not keen as this went against parental rights. The state could only make compulsory a "minimum" education.^{'100'} Also only primary education was free at that time.

The 1930 Vocational Education Act established a complete network of vocational education authorities^{'101'} and required them to set a rate and maintain a suitable system of vocational and continuing education.^{'102'} The state contributed two-thirds of the

99. Section 4(2)c *id.*. The school had to be within 2 miles (3 miles) of the child's home if he was under ten (over ten), S.4(5)(a). *id.* unless school transport was provided.
100. See below section 3, p.978.
101. Vocational Education Act 1930, No.29 of 1930. The committees were composed of 14 members between 5-8 of whom had to be representatives of the local rating authority. The rest comprised representatives from amongst employers, trade unions and others with an interest in education.
102. Department for Education, *Vocational Education and Training in Ireland*, (Dublin, 1976).

costs and the local rate the remainder.⁽¹⁰³⁾ By 1936 42 new schools had been built. As with other educational institutions in Ireland the system was dominated by the clergy,⁽¹⁰⁴⁾ though this was not a necessary outcome. As Akenson points out, in the mid-1950's 22 of 27 Vocational Education Committees were chaired by priests.⁽¹⁰⁵⁾ Catholic ire was not raised against these schools because of their limited and useful curriculum. They did not deal out general education. Moreover the state paid the salaries of vocational school chaplains.⁽¹⁰⁶⁾

From 1937

The Fianna Fáil party led by de Valera was as pro-catholic as the Cosgrave government. This was clearly attested by the adoption of a new Constitution in 1937 that heralded a new era for education in

103. Cannon, P, F, G., 'Denominational Schools in the Republic of Ireland', [1966] *World Yearbook of Education* p.330 et seq..

104. ... whatever the letter of the law might say, clerical leadership was in practice accepted here as in other educational fields.

Whyte et al. *op.cit.* pp.37-38.

There were roughly 78,000 pupils in vocational schools in 1981.

105. *Op.cit.* p.106.

106. Mescal, J., *Religion in the Irish system of education*, (Clonmore and Reynolds, Dublin, 1957), p.129.

Ireland legally-speaking and accorded religion a strong place.⁽¹⁰⁷⁾ The Constitution goes into great detail in its section on family and educational rights, much more than in other comparable Western Constitutions. These aspects of the Constitution are fully considered in Chapter 2.

In 1942, five years after the adoption of the new Irish Constitution, a new Education Bill to enforce compulsory attendance was introduced by Mr. Derrig. It was the subject of vivid debate. Some considered that parts of it were unconstitutional.⁽¹⁰⁸⁾ The main controversy was over Clause 4 which provided that a certificate from the Ministry was necessary to show that a child who had not attended a national, other suitable school or recognised school had received the "suitable education". The Minister might also refuse a certificate if the child had gone to an inappropriate school. The bill passed both houses of the Oireachtas. Clearly it could be used against the Protestant minority with their English cultural heritage, and also against catholics who sent their children to school in England. The potentially devastating effects of the Act on parental rights was somewhat ironic given the recently espoused Constitution that consecrated them.

The President referred the Bill to the Supreme Court to assess its propriety under the Constitution. The Supreme Court found

107. See below, p.933 et seq.

108. These aspects are dealt with more fully below p.977 in section 3 of the chapter.

it repugnant to the Constitution and thus the President refused to sign it. The Protestants, though they "won" the battle here, were given a clear signal that cultural pluralism was not a major goal of the Irish government. The Irish Constitution has a very strong catholic element in its make-up^{'107'} which although some aspects of it have been amended^{'110'} is still felt to be threatening to the minority.^{'111'} and especially to the potential minority in Northern Ireland. The pervasiveness of the catholic aura, especially in the schooling system as it exists will be more fully analysed below.^{'112'}

109. Further details p.933, and p.945 *et seq.*

110. See below pp.962-963.

111. The protestant minority found itself in a weak position. Their number have declined, partially at least as a result of mixed marriages combined with the pressure on catholics, exerted by the Church, to bring up their children in the catholic faith.

112. See p.962, and p.998. In 1944 Dr McQuaid, Arch-Bishop of Dublin, added the following to the Diocesan regulation issued at Lent:

...Only the Church is competent to declare what is a fully Catholic upbringing ... those schools alone which the Church approves are capable of providing a fully Catholic education.

Therefore the Church forbids parents and guardians

In 1971 a more child-centred curriculum was introduced in the National schools.¹¹³ In a document describing the new curriculum religion is still considered

to send a child to any non-catholic school, whether primary or secondary or continuation or University. Deliberately to disobey this law is a mortal sin, and they who persist in disobedience are unworthy to receive the Sacraments...

Whyte *op.cit.*, p.306.

113. For a critical analysis and a defence of the current curriculum see Murphy, D., 'The dilemmas of primary curriculum reform', (1986) 29 *Oideas* 7 and Hogan, P., ' "Progressivism" and the primary school curriculum', (1986) 29 *Oideas* 25. For post-primary education in history, music and modern languages see, Murphy, M. W. (ed.), *Education in Ireland II*, (Mercier Press, Cork, 1971). See generally, Curriculum & Examinations Board, *Discussion Paper, In our Schools: a framework for curriculum and assessment*, (Curriculum & Examinations Board, 1986). The Curriculum and Examinations Board was established by Gemma Hussey T.D., Minister of Education in 1984.

the most important aspect of the programme.⁽¹¹⁴⁾

However the early 1980's saw the emergence of some multi-denominational schools.⁽¹¹⁵⁾

In 1963 Dr Hillery (Minister of Education) announced plans for comprehensive schools.⁽¹¹⁶⁾ However as Atkinson points out⁽¹¹⁷⁾

Irish comprehensive schools were not designed to illustrate egalitarian principles, but simply to extend the availability of secondary education in areas where facilities were still extremely limited.

There was a great increase in the numbers of pupils attending secondary education.

The first grants of capital to the secondary sector occurred in 1964. The state pays teachers salaries in full and control over the schools is shared between the state, local authorities and the clergy via a Board of Management. In 1967, following the devastating

114. *Our Children, Home and School* p.20.

We in Ireland accept that religion should inform and permeate the life of the school and it can and should be integrated with other aspects of the school programme.

115. Coolahan, *op.cit.*, p.137.

116. By 1981 there were approximately 9,000 pupils in comprehensive schools.

117. *Op.cit.* p.171.

report, *Investment in Education*,⁽¹¹⁸⁾ fees were abolished in the vocational sector. Secondary schools were provided a supplementary grant of £25 per pupil if they abolished fees. The protestant schools were less able to give up fees under this scheme, partially at least since they lacked the labour force of religious orders that the Catholic religion could rely on.⁽¹¹⁷⁾ The report also spurred on the development of Regional Technical Colleges, the first of which was established in 1969.

From 1972 onwards Community schools were created by mergers between secondary and vocational schools.⁽¹²⁰⁾ Their facilities are open to the public during non-school hours.⁽¹²¹⁾ These schools Board of Management were dominating by the catholic clergy who, it was originally planned would appoint four of a six member Board.⁽¹²²⁾ The ensuing outcry caused this plan to be revised. The Board's six-members are made up from two representatives of the original

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118. *Investment in Education*, (Dublin, Stationery Office, 1966) (P.8311/P.8527). This report symbolised a change in attitudes to education from a consumer service to an investment for the future.
119. Atkinson *op.cit.* p.176.
120. No new comprehensive schools have been opened since 1975. Brown *op.cit.* p.253. Some Community schools were created *de novo* in expanding urban areas.
121. In 1981 there were roughly 17,000 students in Community schools.
122. Akenson, *A mirror ...*, *op.cit.*, p.151.

secondary school, two from the vocational school and two elected parents. Dissatisfaction with this arrangement has led to a new composition for Boards of Management comprising 11 members. Three of these are from the religious body; three are the nominees of the Vocational Education Committee; two are elected parents; and two permanent teachers are also elected. The Principal of the school is a non-voting *ex officio* member. (123)

It was not altogether surprising, in the light of the increasing availability and comprehensivisation of secondary education, to find that in the late 1960's the curriculum of the Vocational Schools was extended to cover Intermediate and Leaving Certificate courses, the latter in particular, being a gateway to higher education and the professions. This is an important recognition for social and educational mobility. The *de facto* denominational control over the system meant that the hierarchy was not fearful of secular education creeping in through these schools and could thus afford to allow them to extend their curriculum. By 1976 a significant number of candidates for these examinations were coming from Vocational schools. (124) The Vocational Education Committees have recently also established Community Colleges, run by

123. Coolahan, *op.cit.*, p.219.

124. Over 13,500 candidates, compared to no candidates in 1963.
Department for Education, *Vocational Education and Training in Ireland*.

Boards that exclude ecclesiastical influence⁽¹²⁵⁾ and which give them a continuing role in providing schooling.

No schools have formal syllabi for sex education.⁽¹²⁶⁾ Ruarc Gahan's survey found that some schools did in fact provide it but he recommended an official syllabus be established.⁽¹²⁷⁾

Language aspects of the Irish Educational system

The Irish language was spoken by roughly 40% of the population in 1851.⁽¹²⁸⁾ By 1891 the figure was 14.5%.⁽¹²⁹⁾ In 1971

125. Coolahan, *op.cit.*, p.196.

126. Though pupils studying biology would learn about reproduction in mammals. *Rules and Programme for secondary schools 1986/1987 op.cit.*, p.120 et seq. (Intermediate certificate programme) and humans *id.*, p.276 (Leaving Certificate programme). The Intermediate level programme in its civics (compulsory) component deals with question of personal and food hygiene, including such matters as food poisoning. It also covers "common communicable diseases". Venereal disease "has not been considered a serious problem in Ireland". Gahan, R., 'Sex education in Dublin', (1979) 21 *Oideas* 43. This emphasis is sure to change to take account of the current "aids" scare.

127. Gahan, *op.cit.*.

128. Atkinson, N., *op.cit.* p.153.

the figure was 789,429 or 26.6% from a population of just under 3 million people. However it is estimated that under 1% of the population actually use the language fully.⁽¹³⁰⁾

The Society for the Preservation of Irish had been founded in 1876, and by 1879 Irish had been accepted as a subject in the curriculum of national schools that could be taught after hours. In 1892 Mr Hyde had delivered his famous 'De-anglicising Ireland' speech before the National Literary Society in Dublin. The following year the Gaelic League had been founded to preserve Irish and develop Irish literature.⁽¹³¹⁾ Patrick Pearse was the editor of its journal. In 1904 the first bilingual programmes were established in schools in Irish areas. In 1920 the Gaelic League demanded that education

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129. Akenson, *op.cit.* gives the figure for 1861 (for the Irish Free State) as 24.5% and 1891 as 19.2%.
130. Huallacháin, C.L., 'Languages of Instruction in Ireland', (1978) 24 *Int.Rev.Ed.* 501. This article notes the decline in the use of the Irish language in schools.
131. Atkinson *id.* The two leading Irish scholars of the mid-nineteenth century O'Donovan and O'Curry communicated together in English, and brought their children up to speak English. Commission of the European Communities, *Linguistic Minorities in countries belonging to the European Community*, (Luxembourg, 1986), p.200.

should be through the medium of Irish. (132)

In February 1922 the Free State Government ordered the teaching of Irish for one hour a day wherever the school had a competent teacher from 17th March onwards. (133) In 1926 this became a minimum with full Irish teaching to be the norm. As Coolahan observed (134)

Mastery of the Irish language was the primary goal of education policy.

132. Akenson, *A mirror ...*, *op.cit.* p.41.

133. I.N.T.O had suggested this at a conference in 1921 subject to parental consent. Atkinson, *op.cit.* p.158. See generally O'Connell *op.cit.* p.351 et seq. See generally on the language issue from 1922-1932 Brown, T., *Ireland: A Social and Cultural History 1922-1979*, (Fontana, 1981) Ch.2. MacNeill the first Minister for education of the Free State had little time for his ministry. ...[He] was criticised for his absence even from debates on the educational estimate. His legacy was largely limited to finding a place for Irish in the school curriculum.

Farrell, B., 'MacNeill in Politics', in Martin and Byrne (eds.), *The Scholar Revolutionary: Eoin MacNeill*, (Mercer, Cork, 1973) p.193. cf. O Cu , B., 'Macneill and the Irish Language', Martin and Byrne (eds.), *The Scholar Revolutionary: Eoin MacNeill*, (Mercer, Cork, 1973).

134. *Op.cit.*, p.43.

The government progressively made it more difficult for teachers not be proficient in Irish. Between 1922-1925 all teachers under 45 (in 1922) had to go on intensive summer training courses in the Irish language. In 1931 the inspectors were instructed to take account of teacher proficiency and keenness on Irish when rating teachers. Those leaving teacher-training colleges had to be proficient in Irish before receiving a final diploma. By 1935 pay increments were withheld from those teachers not possessing a bilingual certificate.⁽¹³⁵⁾

The Constitution provided in Article 4

The national language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this article shall prevent special provision being made by the Parliament of the Irish Free State . . . for districts or areas in which only one language is in general use.

The government tried to ban English from the infant school, but the lack of competent teachers and parental

135. This attested their competence to teach through the medium of Irish. Akenson, *A Mirror . . .*, *op.cit.* p.52. The Department could not withhold increments from teachers who had joined the system before 1930 (i.e. they could not apply the new rules retrospectively). *McEaney v Minister for Education* [1941] I.R. 430.

resistance⁽¹³⁶⁾ caused them to slow the pace. In 1934 English was banned in infant classes, and other curriculum requirements were reduced to make way for more Irish teaching.⁽¹³⁷⁾ The primary leaving certificate that had been introduced in 1928, was made compulsory in 1943 for Irish, English and Mathematics. An increasing amount of time was spent on language learning in schools. Grants were introduced for children who were fluent in Irish.⁽¹³⁸⁾

In the 1928 and 1934 Irish was made a compulsory component of the Intermediate and Leaving Certificates respectively. Failure in Irish meant failure in the entire exam.⁽¹³⁹⁾ Moreover, those writing the exam in Irish were favoured by the system of marking adopted.⁽¹⁴⁰⁾ The *Rules and Programme for Secondary schools* provide

136. O'Connell *op.cit.* p.365.

137. Akenson *op.cit.* p.48.

138. Akenson *op.cit.* pp.49-50.

139. This requirement was lifted in 1973. European Commission *op.cit.* p.206 But the recognised school must still maintain Irish as part of its curriculum to ensure state grants. Rule 20 of the, Department of Education, *Rules and Programme for Secondary Schools 1986/1987*, (Dublin, 1986).

140. Rule 29 of the *Rules and Programme for Secondary Schools 1986/7 op.cit.* provides:

... Bonus marks at the rate of 10% will be given to a candidate who obtains less than 75% of the total marks

that only schools may enter children for the Intermediate and Leaving Examinations.⁽¹⁴¹⁾ Rules 45 and 46, by providing an exception for the children of political refugees and those educated outside the Republic, imply that all candidates must have received an approved curriculum.⁽¹⁴²⁾

From 1927 secondary schools were required to teach Irish if they wished to receive a capitation grant. By 1939 it was required

...

In some subjects the bonus is 5%. For certain subjects no bonus is possible. The bonus is less for those scoring over 75%. Rule 33 provides for grading; a mark of 85% or greater is required for an "A". Marks between 70 and 85% produce a "B" and so on. Clearly the bonus for writing in Irish is a strong incentive.

Rule 39 provides that the Minister may award up to four medals for Irish composition. Also Akenson *op.cit.* p.53.

141. *Id.* Rule 40.

142. Laid out in Rule 21 such curricula must include Irish. Rule 47(a) allows for admission to the Leaving certificate examination by those aged over 17 who have not followed an approved course.

that all pupils take Irish. Schools^{'143'} teaching through the medium of Irish received bonuses.^{'144'}

I.N.T.O. was not keen on the language revival because of the pressure applied to its members and the educational effects of the programme. A research questionnaire found that the bulk of teachers felt that the exclusive use of Irish in the infant school was detrimental to educational achievement of the children where the home language was not Irish.^{'145'}

The Protestant population, culturally attuned to English, found compulsory Irish repellent. Many sent their children to be educated outside the state (in Northern Ireland) or in independent

143. Schools were divided into Grades A,B and C. Grade A schools taught everything except English through the medium of Irish. Grade B schools taught some subjects through the Irish medium and Grade C schools taught Irish courses through the medium only. In 1978/79 there were 15 Grade A schools and 7 grade B schools. Coolahan, *op.cit.*, p.216. In 1981 by redefining what amounted to an A school (to include some of what were previously classified as B schools) there were 19 A schools. But truly this amounts to 14 schools under the old definition. Commission of the European Communities, *op.cit.*, p.207.

144. Akenson, *A mirror ...*, *op.cit.* p.54.

145. Akenson, *A mirror ...*, *op.cit.* p.57. O'Connell *id.*, p.370.

schools. In 1934 a test case⁽¹⁴⁶⁾ was brought against some parents who educated their children at a private school where Irish was not taught. The case was based on the 1926 Compulsory Attendance Act which required attendance at a "national or other suitable school". The Minister for Education, Mr. Derrig, did not consider the school suitable as it taught no Irish. The prosecution won in the first instance on the grounds that as Irish was the national language a school could not be suitable unless Irish was taught. On appeal Judge Devitt found for the defendants. The Irish Free State Constitution Article 4 explicitly recognised English as an official language. The battle was reenacted with the rules modified in 1942, when Mr. Derrig unsuccessfully introduced the School Attendance Bill in 1942.⁽¹⁴⁷⁾ This attack on parental wishes is in direct contrast to what is written in the 1937 Constitution. It is also the exact opposite to the kid-glove treatment meted out to church-run schools. Several teachers in the Gaeltacht areas did not have bilingual certificates. The government refused to act as the matter was "beyond their control".⁽¹⁴⁸⁾

In the 1960's there was a backlash against the Irish language

146. *Carberry v Yates* (1935) 69 I.L.T.R. 86. Akenson, *A Mirror* ..., *op.cit.* p.128. See below p.977 *et seq.*
147. See below section three, p.983 for details.
148. Titley *op.cit.*, p.139.

revival with the establishment of the Language Freedom Movement.⁽¹⁴⁹⁾ MacNamara's book, Bilingualism and Primary Education⁽¹⁵⁰⁾ showed that Irish children were behind in their knowledge of maths and English when compared to their British counterparts. The Irish language it seems was, in the main, learned as a second language in school after which it declined in usage by those who have learned it.⁽¹⁵¹⁾ The conclusions of Andrews and Henshaw was that despite its institutional protection⁽¹⁵²⁾ use of the Irish language was more vulnerable than

149. Atkinson *id.*

150. Macnamara, J., *Bilingualism and Primary Education*, (Edinburgh U.P., 1966). This study has been criticised by Cummins J., 'Immersion programs: The Irish Experience'. (1978) XXIV Int. Rev. Educ. 273.

151. See figures in Andrews, J.A., and Henshaw L.G., 'The Irish and Welsh languages in the Courts: A comparative study', (1983) 18 *Ir. Jur.* 1, at pp.2-3 which show this trend. Also E.C. Commission *op.cit.* p.203.

152. Including higher capitation grants for Irish schools. See Department of Education, *Rules for the Payment of grants to Secondary Schools*, (Stationery Office, Dublin, 1957) p.6 et seq. (Kindly sent by the Department of Education in June 1986). See also D Buachalla, S., "Educational Policy and the role of the Irish language from 1831 to 1981", (1981) 19 *Eur.J.Ed.* 75.

Welsh.⁽¹⁵³⁾ In 1973 its institutional protection suffered a blow when it was no longer necessary to pass in Irish to gain a Leaving Certificate, and it was abandoned as a necessary qualification for entry into the civil service. Its decline as a language of every day use is due to several factors including the general economic decline in the Gaeltacht areas,⁽¹⁵⁴⁾ and the wide use of English in commercial life and in the mass media. One the two channels of RTE a survey by Conradh na Gaelige of a week in 1983 found only 1.9% of transmission was in Irish.⁽¹⁵⁵⁾ The poor performance by RTE is also criticised by the Curriculum and Examinations Board⁽¹⁵⁶⁾ This Board in its Report⁽¹⁵⁷⁾ noted the lack of success of Irish teaching. It emphasised that 25% of parents supported Irish teaching⁽¹⁵⁸⁾. It also considered that the syllabus should be overhauled to suit pupil

153. *Id.* p.21.

154. The consequent emigration also partially explains the decline of use of the language.

155. Comparing very unfavourably with approximately 22hrs per week of transmission in the Welsh language on Sianel Pedwar Cymru. See generally E.C. Commission, *Linguistic Minorities in countries belonging to the European Community*, (Luxembourg, 1986).

156. Curriculum and Examinations Board, *Language in the Curriculum*, (Curriculum and Examinations Board, 1985) p.28 (para 5.2.4.).

157. *Id.*

158. *Id.*, p.28.

abilities and be made more relevant. New teaching materials were needed.⁽¹⁵⁷⁾ The overall tone of the Paper is not supportive of Irish and the Board clearly differentiated between Irish and foreign languages not just on the basis of the fact that Irish was the constitutionally endorsed first national language, but also on the basis of the ultimate needs of pupils. Mastery of the passive language skills was considered necessary for Irish, whereas for foreign language there existed more powerful motivating forces.⁽¹⁵⁸⁾ The legal aspects of the Irish language policy are discussed in the chapter Education and the Law.⁽¹⁵⁹⁾

Parental role

The introduction of Boards of Management in the Irish National School system is potentially⁽¹⁶⁰⁾ one of the major events in recent Irish primary educational history. The reforms were announced

159. *Id.* chapter four for fuller details of the "communication" method of language learning.
160. E.g. Trading interests (overseas sales), labour mobility in the European Communities, support of domestic tourism.
161. Below p.1006 *et seq.*
162. Actual important changes include the contraction of the system of rural schools (between 1966 and 1977 over 1,700 small schools were either closed or amalgamated) and the new 1971 curriculum (which should be noted as an important educational advance).

by the then Minister for Education, Mr Burke in 1974. The Boards for National Schools vary in size according to the size of the school. However the patron⁽¹⁶³⁾ of the school in a six-teacher school, would have three representatives on the Board. The parents of pupils attending the school elect one mother and one father of pupils of the school. The Principal Teacher of the school is also on the board.⁽¹⁶⁴⁾ As the Patron has chosen the Head Teacher it is clear that the Board system itself does not greatly advance the parental role in education. It is noteworthy that the state has no direct representative at all on the Boards of Management of National Schools, in contrast to the position of the state on the Boards of Management in secondary education.⁽¹⁶⁵⁾ However some representation is welcome as a first step towards allowing some input to the system from those designating in the Constitution of the State as being the

163. The Patron of a school is a person or body of persons recognised by the Minister for Education who may personally manage the school or appoint a suitable manager or body of persons to act as a manager. Department of Education, *Boards of Management of National Schools, Constitution of Boards and Rules of Procedure*, (Stationery Office, Dublin, 1986), 2.
164. Under the original scheme the patron had four representatives. Pressure from INTO (by withdrawal) resulted in the present figures.
165. See above p.906.

'primary and natural educators of the child'.⁽¹⁶⁶⁾ As Akenson⁽¹⁶⁷⁾ stresses parents in Ireland are relatively excluded from influencing the education of their children.⁽¹⁶⁸⁾ This was largely in the interests of the Catholic hierarchy who could thus maintain strict control over the system.⁽¹⁶⁹⁾ The Minister for Education sets the curriculum⁽¹⁷⁰⁾ and so the influence of Boards of Management cannot be that vital. They are mainly concerned with the maintenance of the school and raising the necessary local funds. Moreover there are under a duty to keep everything discussed at meetings of the Board confidential.⁽¹⁷¹⁾ The Chairperson of the Board is appointed such by the Patron. The Board controls the discharge of funds by the School and has a say in the selection of teachers, subject to the approval of the Patron and the Minister for Education. The parental role is

166. Article 42. See below note 214. Parents have formed a Council of Parents' Elected Representatives to act as a pressure group for parental interests. See Coolahan, *op.cit.*, p.176.
167. Akenson, D.H., *A Mirror ... op.cit.*, p.4.
168. Coolahan. *op.cit.*, p.6 also notes this.
169. See further Miller *op.cit.* p.122 et seq..
170. And even has a list of sanctioned books. No other books may be used in the schools. See Rule 66, *Rules for National Schools, id..*
171. *Board of Management op.cit.* Para 7 (p.72). Any member of the Board found to violate this rule is to be removed from the Board by the Patron and is to be ineligible for further nominatio

more fully considered below.⁽¹⁷²⁾

Financing

In the early 50's I.N.T.O. campaigned for the state to pay for all the building and maintenance of primary schools.⁽¹⁷³⁾ The Catholic hierarchy opposed this on the grounds that it might lead to state control. Primary education is free (no fees) to all children but they must to pay for books, etc., although there are small bursaries to help the needy.⁽¹⁷⁴⁾ The local community must provide up to 25% of the operating expenses of the school.⁽¹⁷⁵⁾ Operating expenses do not include the salaries of teachers which are borne directly by the Minister for Education. To receive any grants⁽¹⁷⁶⁾ from the Minister for Education the Minister must be satisfied that the school is necessary, that enrolment will amount to at least

172. See p.971 *et seq.*

173. The site had to be provided by those wanting the capital grant for building the school.

174. See *Rules for National Schools*, Schedule VI.

175. *Boards of Management id.* 22 (p.79).

176. There are also various grants for library books and educational equipment.

twenty-four pupils¹⁷⁷, that the school is 'suitable, in good repair, adequately furnished and provided with satisfactory sanitary accommodation'.¹⁷⁸ The Minister will usually provide up to two-thirds of the capital costs of building a new school.¹⁷⁹ The site must be provided by the trustees. A lease is then taken out which provides that the premises will be used for at least sixty-one years¹⁸⁰ as a national school.

Since 1924 secondary schools have received a capitation grant, and if not charging fees, since 1967 have received a

177. Except under rules 35 and 36 that allow an enrolment of 12 in the case of schools provided for children where 'appropriate religious instruction' is not available. The number of children at such a school must fall below eight for two consecutive years before state aid will be removed. Even then, in the case of protestant children, if there are at least five and the expense is reasonable the state will provide free transportation under scheme C. See *Boards of Management op.cit.*, p.100 (Appendix H).
178. Additional requirements include things such as: fireguards for open fires, and that no near relative of the Manager is appointed to the school staff. For all details see Rule 29.
179. Rule 42 *id.*
180. Rule 41 *id.*

supplemental capitation grant.⁽¹⁸¹⁾ For non-catholic schools⁽¹⁸²⁾ the inter-church Secondary Education Committee distributes centrally provided funds. Since 1984 the capitation grant and supplemental "tuition fees" grant have been combined.⁽¹⁸³⁾

For school buildings in the secondary sector the total cost used to be privately borne. In 1964 a scheme whereby the state could pay 70% of the costs and loan the remaining 30% was introduced. Currently 80% of capital costs are payable by the state. The capital costs of vocational schools were borne by the state as well as teachers' salaries. Vocational schools were also funded by a locally struck rate. The recent expansion of secondary education has primarily been funded by the state. Thus the comprehensive schools were entirely funded by the state (both capital and running costs being fully met) and Community schools must provide 10% of the capital costs their running costs being borne by the state.⁽¹⁸⁴⁾

CONCLUSIONS

From this overview of the Irish educational system several

181. This amounted to £77 in the 1980-1981 year and £131 in 1984-1985.
182. The Jewish School also has special arrangements.
183. Department of Education, Doc. M.47/84. There are also 'special grants' to cover certain teaching expenses. See Department of Education, Doc. M.49/85.
184. Coolahan, *op.cit.*, p.196, 219.

features stand out and merit comment. Firstly there is a long tradition of central control in educational affairs. This commenced with the institution of the National Commissioners and, after the establishment of the Irish Free State, their replacement by a centralised bureaucracy.⁽¹⁰⁰⁾ This control has been extended not only through control of the curriculum, but also by the increasing centralised funding of, in particular, the secondary sector of education. State aid to the educational system arrived in Ireland before it did in England. As we have noted the system expanded in the 1960's with several new types of secondary school emerging (i.e. the comprehensives, community schools, and Regional Technical Colleges). Any local control is firmly in the grip of the Patron and Board of Management that must provide for some of the running costs of the school (e.g. maintenance) and not local inhabitants or politicians representing them.

A second notable influence on education has been religion.⁽¹⁰⁰⁾ The legal aspects of this are noted in more depth in

185. This move incidentally wiped out any Protestant influence on the system the tone and inspiration of government being effectively exclusively catholic.
186. A fact celebrated by some, for example Mescal, J., *Religion in the Irish System of Education*, (Clonmore and Reynolds, Dublin, 1957) who considers the system a bulwark against statist communism, and deplored by other for example Clarke,

section Three on Education and the Law.⁽¹⁸⁷⁾ It is generally accepted that religion permeates the schools. Whilst the state controls the overall curriculum and regulates (via grants) the creation of new schools within the system, it is the managers and Boards of Management that attend to the daily running of the schools. These are dominated by the denominations, mostly by catholics. The vast bulk of the schools are owned by private trustees, normally by religious denominations. They control the appointment and retention of teachers.⁽¹⁸⁸⁾ The survival of catholicism is thus assured.⁽¹⁸⁹⁾ As Titley observed⁽¹⁹⁰⁾

The school system was ... the very key to the Church's inordinate influence in Irish society.

A third noteworthy point is that though the Constitution elevates the role of parents in regard to the schooling or otherwise of their children, the situation in fact is that parents have a minute amount of leverage in the system as it operates.

The legal implications of this distribution of educational influence and resource will be analysed in the following chapter. There follows a series of tables and charts and a glossary of

D.M., *Church and State*, (Cork U.P., 1984) who considers it a system of theological totalitarianism.

187. Below p.962.

188. See the *Flynn* case below p.971.

189. See generally Titley, *op.cit.*, Chapter eight, p.158.

190. *Id.*

commonly used terms that summarise the current system of educational organisation in the Republic of Ireland.

TABLES AND CHARTS

<u>TYPE OF INSTITUTION/EDUCATION</u>	<u>AGE</u>	<u>ENTRANCE REQUIREMENTS</u>	<u>CLASS NO./CYCLE</u>
	2.5		
1. <u>Pre-Primary</u>	3		
a) National Schools	4	From 4 years on.	
b) Non-aided Schools	5	From 3 years on.	
2. <u>Primary</u>	6		The six years of Primary School are divided into 'Standards.'
a) National Schools	7	(Can start at 4 yrs.)	
b) Non-aided Schools	8		3rd Standard
	9		4th Standard
	10		5th Standard
	11		6th Standard
3. <u>Secondary</u>	12	To have completed Primary school.	Junior cycle
a) Secondary schools	13	For Vocational Schools	
b) Secondary Tops		pupils must be at	
c) Comprehensive Schools	14	least 12 yrs. old.	
d) Community Schools	15		End Junior Cycle
e) Vocational Schools	16	Intermediate Course	Senior Cycle
	17		
	18		End Senior Cycle
	19		

CERTIFICATES	CURRICULUM	AGE
	Montessori/Froebel. There have been proposals to create a national network of all Irish Nursery Schools. (1974 Comhairle na Gaeilge).	2.5
		3
		4
		5
	The Department of Education controls curriculum. In 1971 a new curriculum was devised to give greater individual freedom to teachers in the methods to be used. Two-language learning is state policy.	6
		7
	<u>Non-aided Schools</u> : Curriculum standards are only indirectly enforced by regulations requiring an examination pre entry into secondary school	8
		9
		10
		11
		12
		13
Day Vocational Certificate. Group Certificate.		14
Intermediate Certificate (General examination, passes in at least 5 subjects)		15
		16
Leaving Certificate (General examination, passes in at least 5 subjects)		17
		18
Advanced Leaving Certificate. (3 subjects, Receive Cert. if gain a 'D' in one.)		19

STATISTICS (Extracted from: An Roinn Oideachais; Turarascáil staitistiúil.)

1. <u>Pre-Primary Pupils:</u>			
2. <u>Primary school pupils</u>	1972/73	1973/4	1985-86
a) In National School	514,631	521,168	566,289
b) In Non-aided Primary Schools	24,122	23,260	10,557
3. <u>Secondary School pupils</u>			
<u>JUNIOR CYCLE</u>			
a) In Secondary Schools	111,999	114,916	134,677
b) In Secondary Tops	1,921	1,930	230
c) In Comprehensive Schools	3,368	4,322	5,639
d) In Community Schools	672	3,154	19,554
e) In Vocational Schools	<u>48,222</u>	<u>48,927</u>	<u>50,677</u>
<u>Total in Junior Cycle</u>	<u>166,182</u>	<u>173,249</u>	<u>210,827</u>
<u>SENIOR CYCLE</u>			
a) In Secondary Schools	49,553	51,680	77,665
b) In Secondary Tops	408	325	104
c) In Comprehensive Schools	1,091	1,374	3,148
d) In Community Schools	105	956	8,570
e) In Vocational Schools (Incl. Regional Technical Colleges)	9,918	10,649	29,685
f) In Non-aided Schools (Commercial, Religious, Radio.)	2,085	2,030	1,012

Provisional figures supplied by Dept. of Educ.

QUICK REFERENCE GLOSSARY

1. National School: The basic form of Primary School in Ireland. Still basically organised on lines laid down before Eire became independent. Some National schools have Pre-primary sections, others have 'Secondary Tops' (see below). (See Present distribution of administrative and financial responsibility regarding National Schools, p. ___).
2. Non-aided School: In Ireland, ownership is not a criterion that can be used to distinguish between publicly run schools and others. Most National schools are privately owned. Thus the distinction to be made is between state-aided schools, and those schools that receive no state aid. The O.E.C.D., (Classification of Educational Systems, Paris, 1973), uses this terminology.
3. Secondary Schools: Privately managed, normally they are controlled by religious groups. Under the 'free post-primary education scheme' introduced in 1967, all schools that don't charge fees, receive an extra capitation grant.
4. Secondary Tops: These are simply National schools that have a secondary section, usually because there was no other provision of secondary education in the area.
5. Comprehensive Schools: Usually established where there was inadequate provision of secondary education, also mergers between vocational and secondary schools. They are entirely paid for by the State. They are run by Boards of Management. They adopt the Comprehensive principle, (no streaming, etc.).
6. Community Schools: Usually the result of mergers between secondary and vocational schools. Emphasis on community involvement and use of schools facilities. They are run by Boards of Management. They merge secondary and vocational curriculums.
7. Vocational Schools: The first set of schools that had genuine local participation in their running. Originally with a strong (exclusive) technical curriculum they now also offer academic courses, but are decreasing in number as they merge with secondary schools into Community schools.
8. Regional Technical Colleges: First created in 1969, these colleges provide a commercially-oriented education. There are now considered to be in the tertiary sector and have the power to award National Certificates, diplomas and some degrees.

PRESENT DISTRIBUTION OF ADMINISTRATIVE AND FINANCIAL RESPONSIBILITY
REGARDING NATIONAL SCHOOLS

DEPARTMENT OF EDUCATION

1. Sets the educational programme (curriculum).
2. Prescribes and enforces teaching standards and qualifications through its inspectorate.
3. Prescribes textbooks.
4. Creates Rules for National Schools.
5. Pays the bulk of building costs, (local contributions average 10%), ('71)
6. Through a capitation grant (since 1975), pays for heating, cleaning, painting, and the provision of materials, with a local contribution.
7. Pays Teachers salaries in full.

Secondary Education

8. Sets and corrects public examinations.
9. Recognises schools and teachers.
10. Pays the bulk of teacher's salaries. ('72)
11. Has a representative on the Management Committees of comprehensive schools.

Boards of Management ('73)

1. Appoint teachers (subject to the Patron's and Department of Education's approval).
2. Ensures that the Department of Education's rules are enforced.
3. Raises the local contribution to running costs.

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1. R. Bell, G. Fowler, K. Little, (eds.), *Education in Great Britain and Ireland*, (R.K.P. London, 1973). The site of the building has to be provided by the local Management Board.
 2. The schools pay a nominal £400 base salary from their capitation funds.
 3. The transition from Managers to Boards of Managers started in 1973.

The
Republic of Ireland

SECTION TWO

THE LEGAL SYSTEM

1. Introduction

In this chapter the Irish legal system is examined. First the basic structure of the legal order is briefly explored, there follows an analysis of the role of the judiciary in the protection of rights, and finally the chapter looks at how the Irish system receives international law. It will be remembered from the Introductory chapter that Ireland was chosen as a country to study for two main reasons. Firstly it is a common law country that has consciously adopted a written Constitution that allows judicial review of legislation. This alone is a fascinating spectacle to any British lawyer with an ear to the perennial Bill of Rights debate in the United Kingdom. Secondly the Constitution adopted expressly devotes much effort to defining rights in relation to education and the role of the family. Indeed the Bill of Rights may even seem unbalanced so heavily are these aspects emphasised. Another reason for looking to Ireland will be apparent to those who have perused its education history and examined its current balancing of the interests of the state, parents and family as regards education. The strong religious influence and the complications of reviving the Irish language almost exclusively through the medium of the schools invite analysis to see whether the individual rights guaranteed by International Law are suitably protected. This analysis forms part of Section Three.

2. JUDICIAL PROTECTION OF RIGHTS: A creative role

The Irish legal order is based on the 1937 Constitution¹⁹⁴ having its legitimacy confirmed by plebiscite and God. Having an openly "natural law" bias has allowed clearly affected the way in which laws are interpreted¹⁹⁵. In the Republic of Ireland, apart from the constitutional protection of Human Rights outlined below, there are continued in force, unless repealed or restricted by statute or the Constitution, all the common law rights that had previously existed there. Many of the common law remedies are also still available. In addition, especially in regard to socio-economic rights, there are many statutes that implement the ideals laid down

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194. An earlier (rejected) draft for the 1922 Constitution by O'Rahilly (and Murnaghan) was apparently at least potentially a part of the inspiration behind the 1937 Constitution. Particularly in its religious aspects, including especially on family and educational rights. See generally Farrell, B., 'The drafting of the Irish Free State Constitution', (1971) 6 *Ir.Jur.* 111 *et seq.*. See Farrell *id.* (1970) 5 *Ir.Jur.* pp.353-354 for texts of the relevant articles that provided *inter alia* for a parental duty to provide education up to 14 years of age and compulsory religious instruction unless parental dissent was expressed. Also reproduced at (1971) 6 *Ir.Jur.* 133.
195. See note 215 and accompanying text.

in Article 45 of the Constitution. (172)

The Irish Constitution of 1937 is of the rigid variety (173) and the question of its validity is beyond the scrutiny of the judiciary. Article 15(4)1 provides that:

The Oireachtas shall not enact any law which is in any respect repugnant to the Constitution or any provision thereof.

Article 15(4)2 specifies that any law so enacted, should, to the extent of the repugnancy, be invalid. Articles 34(3)2 and Article 34(4)3 and 4 give the High Court and the Supreme Court the jurisdiction to 'police' the Constitution. The 'Fundamental Rights' articles of the Constitution (Articles 40-44) thus, can be properly called 'fundamental law'. (174)

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196. Cooke, J. D., *The Protection of fundamental rights in Ireland*, FIDE VII (Brussels, 1975), II/8. Heuston, R.F.V.. "Personal Rights under the Irish Constitution", (1976) 11 *Ir. Jur.* 205.
197. Kelly, J., *The Irish Constitution*, 2nd ed. (Dublin, 1984) and same author, *Fundamental Rights in the Irish Law and Constitution*, 2nd ed., (Dublin, 1967), Ch.1.
198. In contrast to the fundamental rights provisions of the 1922 Constitution which were amenable to ordinary legislative alteration by the terms of article 50. This article allowed the Constitution to be altered by the legislature for a period of eight years. In 1931 the clause was amended to read

Any provision of the Constitution may be amended by following the procedure laid out in Article 46. In addition to various drafting limitations, any Bill that is an Act to amend the Constitution must be submitted by Referendum to the decision of the people. A majority in favour of the Bill will ensure its enactment. (177)

Article 26 allows a Bill to be referred to the Supreme Court by the President, after consultation with the Council of State, for a decision as to its constitutionality. (200) If the Bill is declared repugnant to the Constitution 'the President shall decline to sign

"sixteen years". In 1931 the government added a new Article 2A setting up a special Military Tribunal with power to impose the death penalty. Included in the revisions was a clause ensuring the articles supremacy vis a vis the fundamental rights provisions of the 1922 Constitution. See Crowe, M. B., 'Human Rights, The Irish Constitution and the Courts', (1971) 47 *Notre Dame Lawyer* 281, at 285.

199. Articles 46.2, 46.5. and 47.1. See also Chubb, B., *The Constitution and Constitutional Change in Ireland*, (Dublin, 1978), Ch.7. Recent examples of referendums include those on abortion (successful 1983) and divorce (unsuccessful 1986).
200. With the exception of Money Bills, Bills expressed to be for the purpose of amending the Constitution, and Bills whose time limits have been abridged under Article 24.

such a Bill'. This procedure has not been extensively used,⁽²⁰¹⁾ and only three times has a Bill been held to be repugnant to the Constitution.⁽²⁰²⁾ Nonetheless this device is a stabilizing, thought-provoking safety valve, that allows delay.⁽²⁰³⁾

201. Gallagher suggests that this Presidential power has been grossly under-used. See Gallagher, M., 'The Presidency of the Republic of Ireland: Implications of the Donegan affair', (1977) XXX *Parliamentary Affairs* 373 at p.376.
202. *In re Article 26 of the Constitution and the School Attendance Bill* 1942 [1943] I.R. 334; *In re Article 26 of the Constitution and the Housing (Private Rented Dwellings) Bill*, 1981, [1983] I.R. 181, [1983] I.L.R.M. 246.; *In re Article 26 of the Constitution and the Electoral (Amendment) Bill* 1983, [1984] I.R. 268, [1984] I.L.R.M. 539.
203. Chubb, *op.cit.*, p.39. In its judgment in the *Housing (Private Rented Dwellings) Bill*, *id.* the Supreme Court detailed two disadvantages to the article 26 procedure. Firstly the whole Bill would be struck down if any part of it were repugnant to the Constitution. Legislators could not be sure that all the rest of the Bill was constitutional, and secondly the court commented that it had to decide the constitutionality of a Bill in the abstract which Bill would thereafter be immune from constitutional challenge. Whether the constitutionality of legislation was "better determined" in this way or by

De Valera, used to a weak and easily amended Constitution, had considered the fundamental rights articles to be mere 'headings' rather than binding law. Gavan Duffy J. in his judgment in *The State (Burke) v. Lennon*⁽²⁰⁴⁾ disillusioned the government and struck down Part VI of the Offences against the State Act, 1939, as being unconstitutional. This 'spectacular' judgment, 'a milestone in Irish legal history',⁽²⁰⁵⁾ opened the door to judicial review of legislation, although the effect of the judgment was almost immediately overturned by the government, using the Article 26 procedure (see above), to clear an amended offences against the State Act, and Article 28(3)3, to get an amendment to the Emergency Powers Act passed.

Article 28(3)3 is the weak link in the chainmail of the Constitution,⁽²⁰⁶⁾ it now reads:

Nothing in this Constitution shall be invoked to invalidate any

specific challenge relating to concrete facts at a later stage was "a question on which we refrain from expressing an opinion". [1983] I.L.R.M. 247-8.

204. *The State (Burke) v. Lennon*, [1940] I.R. 136.
205. Kelly, J.M., 'Grafting Judicial Review on to a system founded on Parliamentary sovereignty: The Irish Experience', (European University Institute 174/78 (col. 36)) Colloquium.
206. Clarke, D.M., "Emergency legislation, fundamental rights and Article 28.3.3. of the Irish Constitution", (1977) 12 *Ir.Jur.* 217.

law enacted by the Dineachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this subsection "time of war" is pursuance of any such law. In this subsection "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Dineachtas shall have resolved that, arising out of such armed conflict, a national emergency exists effecting the vital interests of the State and "time of war or armed rebellion" includes such time after the termination of any such armed conflict as aforesaid, or of any armed rebellion, as may elapse until each of the Houses of the Dineachtas shall have resolved that the national emergency occasioned by war, armed conflict, or armed rebellion, has ceased to exist.

The Resolutions of 1, September 1976 declared that such a national emergency does exist. Thus the government by affixing the appropriate wording at the Head of a Statute can avoid judicial control, and infringe human rights that are otherwise

entrenched.⁽²⁰⁷⁾ In the *Emergency Powers Bill* case, the President referred a Bill to the Supreme Court for a decision as to its constitutionality. The Bill had the appropriate Article 28(3)3 formula in its title. The Supreme Court decided that the Bill was protected by Article 28(3)3 from being repugnant to the Constitution because:

the test of its repugnancy or invalidity is what its force and effect will be if and when it becomes law (thus), ipso facto because of the exemption granted be incapable of being struck down on the grounds of repugnancy to the Constitution.⁽²⁰⁸⁾

Apart from the general function of policing the Constitution, alluded to above, the Courts can, by their general interpretation of the Constitution, limit or extend the protection that it offers.

207. The case of *The State v. Lennon and Others* [1942] I.R. 112, shows clearly the judicial acceptance of this ousting of their jurisdiction. In *re Article 26 of the Constitution and the Emergency Powers Bill 1976*, [1977] I.R. 159, at 173, the Supreme Court declared that despite the impossibility of declaring a Law protected by Article 28.3.3 to be invalid, the Constitution could be used to 'construe' and 'interpret' a law so protected.

208. *In re Article 26 and the Emergency Powers Bill 1976* [1977] I.R. at p.174.

After *Byrne v. Ireland*⁽²⁰⁷⁾ it was clear that the State's failure to fulfill its duties towards citizens could be the subject of a claim for damages by the victim if their constitutional rights were infringed.⁽²¹⁰⁾ The rights enshrined in the Irish Constitution are subject to limitation. Even where there is no written limitation the judges may take a restrictive attitude.⁽²¹¹⁾ Thus in Article 43(2),

209. *Byrne v. Ireland* [1972] I.R. 241. In this case Walsh J used the example of the declared "right to free elementary education" under article 10 of the 1922 Constitution to illustrate that unmet Constitutional obligations required a remedy. at p.280.

210. See *Crowley v. Ireland* [1980] IR 102. ~~at p. 97.~~

211. Below p.987 for comment on the case of *Crowley v. Ireland*, [1980] I.R. 102, at 115. See also *Marie Murray and Noel Murray v The Attorney General and Ireland* [1985] I.L.R.M. 542 where *inter alia* it was held:

It is now well established that the Constitution does not confer on citizens of the State fundamental human rights but recognises their existence as being antecedent and superior to positive law and protects them accordingly (see *McGee v Attorney General* [1974] I.R. 284), but the rights so recognised are not only those limited few which are so expressly described in the Constitution. Similarly, the power of the State to

it is recognised that the right to private ownership of external goods

. . ought, in civil society, to be regulated by the principles of social justice.

2) The State, accordingly, may delimit by law the exercise of the said rights with a view to reconciling their exercise with

delimit the exercise of constitutionally protected rights is expressly given in some Articles and not referred to all in others, but this cannot mean that where absent the power does not exist. For example, no reference is made in Article 41 to any restrictive power but it is clear that the exercise by the Family of its imprescriptible and inalienable right to integrity as a unit group can be severely and validly restricted by the State when, for example, its laws permit a father to be banned from a family home or allows for the imprisonment of both parents of young children. As I suggested in *Attorney General v Paperlink Ltd* [1984] I.L.R.M. 373. at p.385, in construing the Constitution the courts should bear in mind that the document is a political one as well as a legal one and, whilst not ignoring the express text of the Constitution, a purposive approach to interpretation which would look at the whole text of the Constitution and identify its purpose and objectives in protecting human rights is frequently a desirable one.

the exigencies of the common good.

Similarly Article 40 is filled with exceptions and limitations. For example Article 40(6) provides:

The state guarantees liberty for the exercise of the following rights, subject to public order and morality.

This type of limitation is to be found in all Constitutions, and it leaves the judges to decide the balance between the public interest and the rights of individuals (the margin of appreciation).⁽²¹²⁾

In this respect Articles 41 and 42 of the Constitution are original and unusual. They afford

a freer field for judicial interpretation in that the principles contained in them are, for the most part, not qualified so as to make them powerless against legislative discretion, but there is equally no doubt that their effectiveness owes something also to the christian educational background and the instinctively

212. This test was endorsed in the *Morris* case (see below p.948) by the dissenting judges (Henchy and McCarthy JJ) who felt that the Attorney-General had not shown that consideration of public morality or order justified restraining the plaintiffs privacy rights. Henchy J regretted the emphasis on Christianity in the majority judgments.

christian disposition of the judges. (213)

The rights protected by these Articles are family rights, and in particular rights in relation to education. (214) Their wording

213. Kelly, *Fundamental Rights, op.cit.*, p.58. For instance, in the case of *In re Art. 26 of the Constitution and the School Attendance Bill 1942*, [1943] I.R. 334 at 346, Article 42.3.2 was interpreted very narrowly, and in favour of the widest possible right. Article 42.3.2 reads:

The state shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual, and social.

See Kenny, J., in *Ryan v A-G*, [1963] I.R. 294.

214. Dealt with more fully below. Article 42 provides:

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.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

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.

5. In exceptional cases, where the parents for

suggests a natural law basis and in fact the judges have assumed this in their interpretation of the Constitution.⁽²¹⁵⁾ Thus Walsh J. declared in *McGee v Attorney General*.⁽²¹⁶⁾

They (Articles 41, 42, 43 of the Constitution) indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law, but that the Constitution confirms their existence and gives them protection.

This natural law origin gives the judges clear scope to override positive law with interpretations based on a higher level law. Thus

physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

215. Grogan, V. "The Constitution and Natural Law", (1954) 8 *Christus Rex*, 201. See Kelly, J., *The Irish Constitution*, *op.cit.*, pp.328-336. Walsh J., 'The existence and meaning of fundamental rights in Ireland', (1980) 1 *H.R.L.J.* 171. See Clarke, D.M., 'The role of Natural Law in Irish Constitutional Law', (1982) 17 *Ir.Jur.* 187.
216. , *McGee v. A.-G.* [1974] I.R. 284, at p.310. A case involving the right to purchase contraceptives as part of the concept of marital privacy.

Walsh J. in *McGee v A-G*⁽²¹⁷⁾ continues:

Both in its Preamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority. The natural or human rights . . . are part of what is generally called natural law. . . . (I)t is sufficient for the Court to examine and to search for the rights which may be discoverable in the particular case before the Court in which these rights are invoked. In this way the judges can extend the protection offered by the Constitution.

In *McGee v A-G*, the personal right to privacy was discovered. The other judges in this case used the more 'traditional' method of extending the rights contained in the Constitution; they followed Kenny J's judgment in *Ryan v Attorney General*.⁽²¹⁸⁾ This judgment had established that the personal rights of Article 40, rights resulting from 'the Christian and Democratic nature of the State',⁽²¹⁹⁾ were not all explicitly enumerated, and could thus be

217. *Id.* pp.317-318.

218. *Ryan v. A.-G.* [1965] I.R. 294, applied in *Murtagh Properties v. Cleary* [1972] I.R. 330, esp. pp.335-6. See also Kenny J., 'The advantages of a written Constitution Incorporating in Bill of Rights', (1979) 30 *N.I.L.Q.* 789 esp. pp.197 et seq..

219. Kenny J. in *Ryan v. A-G id.*, p.313. Itself a highly subjective criteria for determination of constitutional rights. Kenny J., noted that a Papal Encyclical (Peace on

formed by the Courts.⁽²²⁰⁾

Professor Kelly, in his book, *Fundamental Rights in the Irish Law and Constitution*⁽²²¹⁾ strongly condemned the principle established in *Ryan v A-G*. He thought that the 'uncertainty' induced by the application of this reasoning, to say nothing of the possible flouting of Article 29(6).⁽²²²⁾ outweighed any advantages afforded by the possibility of extra protection of human rights that might be given by this 'third house of the Legislature'. He feared judges intervening in policy decisions. Thus, taking a very positivistic approach to natural law, which he admits may well underpin the Irish Constitution, he declared that it was strictly the State's function to implement the principles according to socio-economic needs. In other words, the Court could overturn policy where it ran against the specific provisions of the Constitution, but could not deduce new rights from 'the law of God promulgated by reason'. That the Court

Earth) supported the existence of the personal right.

220. Kelly, *Fundamental Rights*, *op.cit.*, p.37.

Ryan v. A-G. imported into our law the principle that there exists an undefined residue of personal rights guaranteed by the Constitution though not specifically enumerated in it.

See also *O'Brien V. Keogh* [1972] I.R. 144 and Kenny J. *op.cit.*, pp.196-7.

221. See note 197 above.

222. Below p.955.

has done so, and seems likely to continue to 'discover' new rights, gives cause for alarm that its powers may be limited by some future legislator.⁽²²³⁾ The inclusion of the natural law wording in the Constitution has allowed different judges to place their own conflicting views in the Constitution⁽²²⁴⁾. As Clarke notes:

The promised determinacy and objectivity of natural law is an unintended camouflage for judicial indiscretion, poor judgment, unreasonable and unreasoned decisions, and at least in principle, the subversion of democratically enacted laws in deference to the subjective views of members of the judiciary.⁽²²⁵⁾

The more recent case of *Norris v A.G.*⁽²²⁶⁾ confirms the role that religious considerations play in the interpretations of Irish constitutional rights. In this case an unmarried homosexual, David Norris, challenged the legality of criminal provisions that made

223. See, Hand, G., 'Ireland: Historical Sources of Human rights, European University Institute, Human Rights Seminar, Point 1, p.5.

224. For example see the judgments of O'Higgins C.J. and Walsh J. in *G. v An Bord Uchtála* [1980] I.R. 32. Clarke *op.cit.*, at pp.204 *et seq.*.

225. *Id.*, p.219.

226. *Norris v A.G.* [1984] I.R. 36.

certain homosexual acts criminal offences.⁽²²⁷⁾ O'Higgins giving judgment for the majority took into account religious and moral concerns when considering whether Norris's privacy rights were invaded.

... From the earliest days, organised religion regarded homosexual conduct, such as sodomy and associated acts, with a deep revulsion as being contrary to the order of nature, a perversion of the biological functions of the sexual organs and an affront both to society and to God. With the advent of Christianity this view found clear expression in the teachings of St. Paul, and has been repeated over the centuries by the doctors and leaders of the Church in every land in which the Gospel of Christ has been preached. Today, as appears from the evidence given in this case, this strict view is beginning to be questioned by individual Christian theologians but, nevertheless, as the learned trial judge said in his judgment, it remains the teaching of all Christian Churches that homosexual acts are wrong. ...

.... What I have said can be summarised as follows.

[1] Homosexuality has always been condemned in Christian teaching as being morally wrong. It has equally been regarded by society for many centuries as an offence against nature and a very serious crime.

[2] Exclusive homosexuality, whether the condition be congenital

227. No similar prohibition exists in relation to such practices and conduct between females.

or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide.

[3] The homosexually orientated can be importuned into a homosexual lifestyle which can become habitual.

[4] Male homosexual conduct has resulted, in other countries, in the spread of all forms of venereal disease and this has now become a significant public health problem in England.

[5] Homosexual conduct can be inimical to marriage and is per se harmful to it as an institution.

...

The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to "our Divine Lord, Jesus Christ." It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two

thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult of acceptance.

This is strong language indeed and the constant references to Christian tradition⁽²²⁸⁾ and the adoption of that tradition by the

228. Regretted by the dissenting Judges Henchy

...The learned judge [who dealt with this difficult case with commendable thoroughness], in substituting his own conclusions on the personal and societal effects of the questioned provisions, seems to have laid undue stress on the fact that the prohibited acts, especially sodomy, are contrary to the standards of morality advocated by the Christian Churches in this State. With respect, I do not think that should be treated as a guiding consideration. What are known as the seven deadly sins are anathematised as immoral by all the Christian Churches, and it would have to be conceded that they are capable, in different degrees and in certain contexts, of undermining vital aspects of the common good. Yet it would be neither constitutionally permissible nor otherwise desirable to seek by criminal sanctions to legislate their commission out of existence in all possible circumstances. To do so would upset the

necessary balance which the Constitution posits between the common good and the dignity and freedom of the individual. What is deemed necessary to his dignity and freedom by one man may be abhorred by another as an exercise in immorality. The pluralism necessary for the preservation of constitutional requirements in the Christian, democratic State envisaged by the Constitution means that the sanctions of the criminal law may be attached to immoral acts only when the common good requires their proscription as crimes.

and Griffin J

... the Chief Justice has stated that "the preamble proudly asserts the existence of God in the Most Holy Trinity and recites the people of Ireland as humbly acknowledging their obligation to Our Divine Lord Jesus Christ. It cannot be doubted that a people so asserting and acknowledging their obligations to Our Divine Lord Jesus Christ were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. ...

In so far as the judgment of Kenny J. in McGee's Case, in referring to the Christian and democratic nature of

Irish Constitution must be viewed, at least in part, as an attempt to distinguish the Irish position from that of Northern Ireland, where in the *Dudgeon* case before the European Court of Human Rights,

the State, is a relevant identification of source ...I would respectfully dissent from such a proposition if it were to mean that, apart from the democratic nature of the State, the source of personal rights, unenumerated in the Constitution, is to be related to Christian theology, the subject of many diverse views and practices, rather than Christianity itself, the example of Christ and the great doctrine of charity which He preached. ...

I would uphold the view that the unenumerated rights derive from the human personality and that the actions of the State in respect of such rights must be informed by the proud objective of the people as declared in the preamble "seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations." The dignity and freedom of the individual occupy a prominent place in these objectives and are not declared to be subject to any particular exigencies but as forming part of the promotion of the common good.

identical legislation had been held to violate Article 8 of the ECHR.⁽²²⁷⁾ It is also evidence of the strong

christian educational background and the instinctively christian disposition of the judges.⁽²³⁰⁾

Clearly the Irish Courts, in interpreting Irish constitutional rights, have a distinctive and possible unique emphasis on religious aspects of life and a strong religious awareness. This has affected how they have dealt with educational questions.⁽²³¹⁾

3. INTERNATIONAL LAW

Article 29 of the Constitution deals with Ireland's international relations and acceptance of International Law. Article 29(6) declares:

229. Henchy J felt that the law was bound to be overcome by the ECHR.

One way or the other, the impugned provisions seem doomed to extinction. Whether they be struck down by this Court for being unconstitutional or whether they be deemed invalid elsewhere in accordance with the decision in *Dudgeon v. United Kingdom* [for being in contravention of the European Convention for the Protection of Human Rights and Fundamental Freedoms] they will require to be replaced with appropriate statutory provisions.

230. Kelly, *Fundamental Rights, op.cit.*, p.58.

231. See below Section Three.

No international agreement shall be part of the domestic law of the State save as may be determined by the Dineachtas.

This clearly establishes a dualistic outlook as regards to treaties. The acceptance of this by the Courts was shown in the judgment of the High Court read by Davitt P. *In re O Laighléis*.²³²

It is quite clear that the Convention, though the State be a Party to it, cannot of itself in any way qualify or effect our domestic legislation.

Maguire C.J. giving the judgment of the Supreme Court on the same issue stated:²³³

No argument can prevail against the express command of Section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law.

It is clear that Ireland could incorporate the European Convention on Human Rights into the domestic law of the State but to

232. *In re O Laighléis* [1960] I.R. 93 at p. 103. Confirmed recently in *Idé O Domhnaill v Maura Merrick* [1985] I.L.R.M. 40.

233. *Id.*, at p.125. *In re O Laighléis* was applied in *The State (Summers Jennings) v. Furlong* [1966] I.R. 183 where Article 29(3) was given a very limited scope. See below p.956.

do so would not stop the Constitution prevailing.⁽²³⁴⁾

By Article 29(3):

Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.

The scope and effect of this section of Article 29 have been disputed. Can this section of Article 29 allow the direct incorporation of generally recognised principles of the International law into the domestic law of Ireland, thence to be relied upon by litigants?⁽²³⁵⁾ A principle of international law recognised in a treaty, but not yet internalised by enabling legislation, could, if the answer is yes, be thus incorporated by the backdoor, and this

234. See Kenny, J., notes 218 and 219 above.

235. See Symmons, C.R., 'The Law Enforcement Commission Report and Article 29 of the Irish Constitution' (1973) 8 *Ir. Jur.* 33. This expression is taken to include all non-treaty sources of international law including at least custom and general principles of law recognised by civilised nations. In *Saorstát and Continental Steamships Co. v de las Morenas* [1945] I.R. 291 at 298 O'Byrne J. indicated

The immunity of sovereign States and their rulers from the jurisdiction of the Courts of other states has long been recognised as a principle of international law and must now be accepted as part of our municipal law by reason of Article 29, paragraph 3, of our constitution ...

would not necessarily be contrary to Article 29(6).

The argument for Article 29(3) internalisation of generally recognised principles of international law runs as follows. Firstly Article 29(6) refers to international agreements, and generally recognised principles of international law are not reliant on international agreements for their existence (although such agreements may be adduced to prove their existence), thus, a *contrario*, generally recognised principles of international law may be part of the domestic law of the State.⁽²³⁶⁾ Secondly,

The courts, as guardians of the Constitution can intervene to set aside any executive or legislative act which contravenes this (Article 29(3)), or any other constitutional provision.⁽²³⁷⁾

Thus, a law, passed by the Dáil, that was contrary to the generally recognised principles of international law, would be

236. Per Davitt., in *re O Lúighléis*, at p.103,

Apart from any provision of the Constitution . . . the rules of international law are not part of the domestic law, except in to far as they have been made so, by legislation, judicial decision or established usage. (My emphasis).

237. *The Law Enforcement Commission Report to the Minister of Justice of Ireland and the Secretary of State for Northern Ireland*, P.3832 (1974), pp.39-40, as quoted by Symmons, C., *op.cit.* p.43.

contrary to the Constitution, and, as such, could be set aside by the High Court or Supreme Court.

Thirdly, a generally recognised principle of international law, *a priori*, that States should obey such laws. Thus the failure of Ireland to conduct its relations with other States in accordance with the generally recognised principles of international law, by, for instance, inflicting penalties upon its citizens contrary to such recognised principles, or by refusing to fully implement a judgment of the European Court of Human Rights, would be unconstitutional, and thus subject to rectification by the High Court or Supreme Court. Thus the Constitution, by Article 29(3) could recognise generally recognised principles of international law as law of a higher value than those made by the *Direachtas*.

This line of argument seemingly has several weak points. Firstly it relies on a very wide interpretation of the second clause of Article 29(3) " ... as its rule of conduct in its relations with other States ...", interpreting this in such a way that internal legislation or executive action is part of Ireland's conduct in its relations with other States, is a somewhat dubious interpretation, as the Supreme Court itself has held.²³⁸ The effect of Article 29(3) limits itself to the State's role of conduct in its relations with

238. *In re O L'áighléis* [1960] I.R. 93 at p. 124

... Clauses 1 and 3 of Article 29 of the Constitution clearly refer only to relations between States and confer no rights on individuals.

other States. Thus legislation which contravened generally recognised principles of international law could only be struck down if it caused the State to conduct its relations with other States against these principles. In other words it would seem at first glance that within the 'domestic forum' ('matters which are essentially within the domestic jurisdiction of any State' Article 2(7) UN Charter), Article 29(3) can have no effect. However to the extent that Ireland has permitted the individual a role in the international arena there would be hope for the individual to have a suitable standing to raise this issue. Thus for example in the case of an attempt by an individual to rely on a decision of the European Court of Human Rights the reasoning could be that Ireland has undertaken an obligation in its relations with other Western European States to 'abide by the decisions of the Court in any cases to which they are parties' (239) which decision they have further agreed will have its execution supervised by the Committee of Ministers (240). An individual, in these circumstances, should be able to rely on the principle enshrined in article 29(3) to have his interest protected. If Ireland was not correctly implementing such a decision then it would be violating a general principle of international law in its relations with other states, and an individual would have standing to raise the issue as his individual rights would be affected.

The question can also be raised of the acceptability of

239. Article 53 ECHR.

240. Article 54 ECHR.

incorporating human rights principles, which are generally recognised principles of international law, into the national legal system, bypassing the *Direachtas*. The combined effect of Articles 15(2)1 and 29(6) would seem to the present writer to overpower such a teleological interpretation of the effect of Article 29(3).⁽²⁴¹⁾ However the more limited argument that individuals can rely on Ireland's obligations undertaken in its adhesion to the ECHR seems more likely to be accepted by Irish judges.

Professor Kelly, who was concerned that the provisions of Article 29(6) would be avoided by the use of the principles established in *Ryan v A-G*,⁽²⁴²⁾ would be equally concerned at this possible usurpation of the legislative function by the judges. However it must be noted, as Symmons points out in his Article, that the Irish members of the Law Enforcement Commission⁽²⁴³⁾, argued that the effect of Article 29(3) was to incorporate generally recognised principles of international law into domestic law. The Courts could

241. Irish judges have not wished to decide policy issues any more than the English judges do, though they have more scope to do so. If at all possible they leave to the legislature (and people) that job. See for example O'Higgins' judgment in the *Norris* case. See below p.950.

242. *Ryan v. A-G* [1965] I.R. 294. See p.947 above.

243. Amongst whom were Walsh and Henchy JJ. and Doyle S.C.. Doyle later became a judge.

police the Constitution including Article 29(3). This has important repercussions when we consider Irish legal protection of educational rights, the topic of the next Section.

The
Republic of Ireland
SECTION THREE
EDUCATION AND THE LAW

Introduction

This chapter considers the following issues: how the Constitution treats religion in general; state aid to private educational endeavour; the nature of compulsory education in Ireland; the rights of children to education; and finally an analysis of whether Ireland is conforming with its international obligations in its treatment of citizens in relation to education. The role of parents and family in educational decisions is not treated separately but as part of the above sections.

a. Religion

The Constitution itself does not directly provide a role for the Church in relation to education. As we have seen²⁴⁴ the entire system of education is permeated by religion. The primary, secondary and vocational schools are largely run by various religious denominations and are also largely owned by religious groups. Furthermore the 1937 Constitution recognised its allegiance to religious principles in the Preamble and in article 44(1) declares:

The State acknowledges that the homage of public worship is due

244. Above Section One.

to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

Before 1972⁽²⁴⁵⁾ the Constitution formally

recognise[d] the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.⁽²⁴⁶⁾

Other congregations and religious denominations were also recognised.⁽²⁴⁷⁾ Although these provisions no longer form part of the constitution it is clear that natural law and the religious nature of

245. This clause was repealed by referendum in 1972 in the fifth amendment of the Constitution.
246. Article 44(1)(2) now repealed.
247. Article 44(1)(3) also now repealed. See Hogan, G. W., 'Law and religion: Church-state relations in Ireland from Independence to the present day', (1987) 35 *A.J.C.L.* 47 at 55 where he indicates that the inclusion of these declarations followed "negotiations" between De Valera and the Episcopate and were thus a compromise and to be considered as being better than exclusive recognition of the Catholic Church. The release of De Valera's private papers (on 1 July 1987) indicates that De Valera in fact directly sought papal approval of the text of the Constitution before submitting it to the Dail. *The Irish Times*, 2 July 1987, p.11.

society in Ireland⁽²⁴⁸⁾ strongly influence the way rights are interpreted.⁽²⁴⁷⁾ The removal of these articles and the fact that article 44 further provides for the freedom of conscience, free profession and practice of religion⁽²⁵⁰⁾ and guarantees that the State will not "endow any religion" should ensure that the State does not give special legal pre-eminence to the Catholic Church.⁽²⁵¹⁾

248. Above p.947 *Ryan v A.-G., and Norris*, p.949 et seq.

249. This especially so in the area of family law which is heavily constitutionalised when compared to other Constitutions (e.g. U.S.) and the result clearly shows in custody cases. For example *In re J.H.* [1985] I.R. 375, where natural parents (i.e. with a biological link to their offspring) could gain custody of their child even though successful adopting parents had "bonded with the child" for over two years and the trial judge had found a real danger of severe harm to the child should she be returned to the natural parents.
Above p.988.

250. Article 44(2)1 declares that:

Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

251. The principle of state neutrality and non-endowment derive from the Constitution of the Irish Free State (1922) Article 8. See above note 85 for the text.

b. State aid to schools

Article 44(2)2 guaranteeing that the state will not endow any religion has not been interpreted in such a way as to prevent state support for private 'religious' schools. The issue has not been directly raised in any litigation and such support is generally not considered to be endowment. Common sense dictates this result for else the entire system of education would be destroyed and the framers can hardly have intended that result.⁽²⁵²⁾ Moreover Article 42(4) legitimates state support for private and corporate educational initiative. 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.⁽²⁵³⁾

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252. Though see Clarke D., 'Freedom of thought in schools: a Comparative study', (1986) 35 *I.C.L.Q.* 271 at 297 where in considering Flynn (see below) he expresses the view that financing catholic schools does amount to "endowment".
253. The formation of the article on education was influenced by Dr J.C. McQuaid, President of Blackrock, and subsequently Archbishop of Dublin. See e.g. *de Valera Papers 1078/4*, pp.2-

Article 44(2)4 of the Constitution provides:

Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

These two provisions combine to allow the State to aid religious schools (despite article 44(2)2 forbidding endowment of religion), but with the proviso that the parent's rights (in the matter of religious and moral formation) and children's rights (to attend a school receiving public money without attending religious instruction at that school) are not to be thus thwarted.

The State in providing aid to education does not discriminate between religious groups. In fact Protestant primary schools (approximately 5% of the population are protestants) are generously treated⁽²⁵⁴⁾. The Department of Education "recognises" any school with an average attendance of 20. Such recognition makes a school

3 where an early draft of the article is annotated by both de Valera and McQuaid. Some of wording suggested by McQuaid eventually was adopted.

254. Peck, B. T., 'Protestant schools in the Republic of Ireland', (1967) 13 *Int. Rev. Educ.*, 212 et seq.. See generally Akenson, *A mirror, op.cit.*, Ch.8.

eligible for grants.²⁵⁵ In 1967 protestant schools made up almost 50% of small rural schools with less than 25 participants. Many had average attendance of less than 20, but yet continued to be "recognised" and thus financially supported by the state.²⁵⁶ There are also a number of private [preparatory] schools not in receipt of any state subvention being unrecognised by the State.

Rule 3 of the *Rules for National Schools* provides State aid for the establishment of a new national school may be granted on the application by the representatives of a religious denomination where the number of pupils of that denomination in a particular area is sufficient to warrant the establishment and continuance of such school.

This clearly implies what is expected in the Irish state, though naturally the rules cannot prevail against the provisions of the

255. See above section 1.

256. Peck, *op.cit.*, p.213. The school roll would have to fall below 8 for two consecutive years before recognition would be removed. *Rules for National Schools*, Rule 36. Rule 35 provides that where religious instruction is not available to children of a particular denomination then the Minister might recognise a school whose average daily enrollment is twelve pupils, or at least help to transport them to a school where religious instruction was available.

Constitution.⁽²⁵⁷⁾ There is nothing in the Constitution to prevent the state from supporting secular private schools indeed article 44(2)(3) could be interpreted to compel the state to provide equal grants as it prevents the state from

impos[ing] any disabilities or mak[ing] any discrimination on the grounds of religious profession, beliefs or status.

In secondary education 49.6% of the Protestant minority receive such education as against 33.5% of the population as a whole.⁽²⁵⁸⁾ The state supports private secondary schools by capitation grants and by paying the bulk of teacher's salaries.⁽²⁵⁹⁾

The need for modernisation and expansion has threatened this system and there have been an increasing number of calls for capital grants for building especially by lay groups without access to religious funds.⁽²⁶⁰⁾ The call was answered by the state from 1964 onwards.⁽²⁶¹⁾ The closure of secondary schools is at will except when the state has provided building capital in which cases the premises

257. See *Crowley op.cit.*, p.987 below.
258. *Investment in Education op.cit.* p.166. Figures for 1962/63.
259. Approximately 65% of post-secondary schools are privately owned. 1978 Debates *Dáil Éireann* Col.783.
260. Comments of Mr A. Marsh, appended to O Raifartaigh, T., 'Changes and Trends in our educational system since 1922', (1958-59) 20 *Statistical and Social Inquiry Society of Ireland Journal*, 22.
261. See section 1 p.904.

are vested in trustees by a lease which normally requires that a school be maintained for 99 years.⁽²⁶²⁾ The *Crowley* case dealt with below also covers this issue.

However the existence of independent ownership in the secondary sector does have important repercussions. Thus when two laicised members of the teaching staff of a Catholic Seminary were dismissed, they were unable to sustain a constitutional case against their employers since the discrimination complained of was not discrimination by the state, despite the state funding⁽²⁶³⁾ the seminary received.⁽²⁶⁴⁾ The case was brought, *inter alia*, under Article 44(2)3 of the constitution that forbids state action that discriminates on grounds of "religious profession, belief or

262. Col.779 *Dáil Éireann*.

263. *Mcgrath and O Ruairc v. Trustees of Maynooth* S.C. 1/11/79 (Unreported). £802,500 in 1977. See judgment of Kenny J. *Id.* p.10. The funding is applied to the "secular" education the College provides for all its students.

264. The legality of the state provision of funds to a Seminary was not in issue before the Court, Since 1967 Maynooth had accepted non-seminarian students. At the time of the action they represented two-thirds of the students. Henchy J., *id.*, p.31.

status". (205) O'Higgins, C.J., found that article 44(2)5 also saved the Seminary from the effects of article 44(2)3. (206)

Another repercussion arises from the fact that the Minister for Education in fact is the Patron of only 14 national schools (207). The vast majority of the children will have only a denominational school available to them. This has serious repercussions on the question of parental choice of "religious upbringing". This is exacerbated by the nature of the schools, a matter dealt with in the next section on religious instruction.

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265. In *Mulloy v Minister for Education* [1975] I.R. 88 a ministerial order that discriminated in favour of "lay teachers" (by granting them salary increments in relation to overseas service) was held to be contrary to this constitutional provision.
266. Henchy J., supported this maintaining that the true purpose of article 44(2)3 was to
- give vitality, independence and freedom to religion. To construe the provision literally, without due regard to its underlying objective, would lead to a sapping and debilitation of the freedom and independence given by the Constitution to the doctrinal and organisational requirements and proscriptions which are inherent in all organised religions. p.3.
267. Dáil Éireann Debates Cols.76-78 (11th October 1978).

c. Religious instruction

The parent's rights are seemingly very strongly entrenched in Irish law as regards the "religious character" of the education that their children will receive. For example in *Burke and O'Reilly v Burke and Quail* a provision in a will dictating that the trust money could only be disbursed if the minor (to whom the testatrix was not related) was brought up a catholic was excised as being in violation of the parental rights under article 42 of the Constitution.⁽²⁰⁸⁾ But what if parents seeks a secular instructional atmosphere for the

268. *Burke and O'Reilly v Burke and Quail* [1951] I.R. 216. *In re Blake* [1955] I.R. 69. a grandfather's will conditioning a legacy on the religious faith of the grandchildren was equally unable to prevail against article 42 and the clause was void being opposed to public policy. It is though clear that the common law rule that the religious upbringing of children is accordance with the wish of the father has been modified to the extent that if the parents agree (typically in an ante-nuptial agreement) to a particular religious upbringing then one parent alone (typically the father) may not later reverse that decision. This follows from the use of the plural "parents" in article 42. *In re Tilson, infants* [1951] I.R. 1. *In re May, Minors* [1959] I.R. 74 confirms the above and established that formal agreement of the parents was not necessary, their practice over a number of years was sufficient. See also *In re J.H. op.cit.*, below.

education of their children?

The case of *Eileen Flynn v Sister Mary Anna Power and the Sisters of the Holy Faith*⁽²⁶⁹⁾ the plaintiff was dismissed from her teaching job at a catholic secondary school because her behaviour outside the school

openly rejected the norms of behaviour and the ideals which the school existed to promote.

She was living by a code of conduct which was different in important respects from that which the school has been established to foster and instil in its pupils.⁽²⁷⁰⁾ Costello J. pointed out that:

... the appellant was employed in a religious, not a lay, school and the evidence establishes that such a school has long established and well known aims and objectives as well as

269. *Eileen Flynn v Sister Mary Anna Power and the Sisters of the Holy Faith* [1985] I.L.R.M. 336; [1985] I.R. 648.

270. In the words of Costello J.:

[She] carried on openly and publicly in a country town of quite a small population; that within a short period of time it would have been common knowledge in the town (a) that the appellant was associating on a regular basis with a member of the town's business community whose wife had recently left him, (b) later, that she had commenced to live with him as man and wife, and (c) that she had a child by him.

Id. p.656.

requirements for its lay staff which are different to those of a secular institution. Secondly, the evidence establishes that the dismissal occurred not as a punishment for breach of a code of conduct taught in the school, but arising from an assessment made of the effect on the school and its pupils of a continued breach of that code by the appellant.

...[T]he respondents were entitled to conclude that ... the pupils in the school ... would regard her conduct as a rejection of the norms of behaviour and the ideals which the school was endeavouring to instil in and set for them. I do not think that the respondents over emphasised the power of example on the lives of the pupils in the school and they were entitled to conclude that the appellant's conduct was capable of damaging their efforts to foster in their pupils norms of behaviour and religious tenets which the school had been established to promote.

Thus he found that the school had "substantial grounds for dismissing her". Even though there was no contractual provision to this effect the appellant knew from her own upbringing and previous experience as a teacher the sort of school in which she sought employment, and should have been well aware of the obligations she would undertake by joining its staff. Even if the contract of employment was silent on the point (a) she must have known that objection could be taken that her conduct violated her obligations to the school and (b) she was in any event given an opportunity to alter it.

In national schools teachers are typically expected to teach the religious instruction courses. Refusal to do so raises interesting legal questions. Being selected by the Boards of Management and employed by them, refusal to teach such a course would undoubtedly jeopardise chances of securing employment at an interview. (271)

This case shows beyond all doubt that a parental right to withdraw a child from religious instruction is clearly insufficient to ensure a "neutral" education. (272) Such a right of withdrawal is

271. Coolahan, *op.cit.*, p.152.

272. Rule 68 of the *Rules of National Schools op.cit.* makes it clear that the judge here is reflecting national policy. It states:

Of all the parts of a school curriculum Religious Instruction is by far the most important, as its subject-matter, God's honour and service, includes the proper use of all man's faculties, and affords the most powerful inducements to their proper use. Religious Instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school. The teacher should constantly inculcate the practice of charity, justice, truth, purity, patience, temperance, obedience to lawful authority, and all the other moral virtues. In this way he will fulfill the primary duty of an educator, the

constitutionally necessary as 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.

By Article 44(2)4 of the Constitution provides:

Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

These two provisions combine to allow the State to aid religious schools (despite article 44(2)2 forbidding endowment of religion) and guarantee a right of withdrawal from religious instruction.

moulding to perfect form of his pupil's character,
habituating them to observe, in their relations with God
and with their neighbour, the laws which God, both
directly through the dictates of natural reason and
through revelation, and indirectly through the
absorption of lawful authority, imposes on mankind.

(My emphasis) at p.38. For the legal status of the rules see note 332 below.

Whilst a child may be withdrawn from religious instruction, as the *Flynn* case implies, withdrawal from religious instruction⁽²⁷³⁾ may not amount to much given the strong religious atmosphere permeating the school which is supported and recognised by the state in that dismissal of a teacher for non-school activities is considered reasonable if the activities detract from the religious message of the school. The recognition that such schools have a strong religious ethos which "norms of behaviour and .. ideals ... [it] endeavour[ed] to instil in [the pupils]" is clearly damning as regards the standard set by article 2P of the ECHR for parents not wishing their children to have a religious upbringing.⁽²⁷⁴⁾ Clarke has called the system "theological totalitarianism".⁽²⁷⁵⁾ He castigates the Irish system as it disallows the child's liberty interests,⁽²⁷⁶⁾ and contrasts it with the American jurisprudence in this field. He draws the conclusion that the state should not finance

273. As allowed by rule 2 of the *Rules for National Schools under the Department of Education*, Dublin. p.9 which provides: These rules do not discriminate between schools under the management of different religious denominations nor may they be construed so as to affect prejudicially the right of any child to attend a national school without attending religious instruction at that school.

274. See below p.998. A right granted by article 42(1) and (4).

275. Clarke, D.M., *Church and State* (Cork U.P., 1984) p.217.

276. *Id.* p.219.

any religious schools, and that it should be neutral.²⁷⁷ As we have noted above there is a strong trend in Irish jurisprudence to look at United States judgments. This is partly, possibly mainly, due to its desirability as a role model, having as it does a written Bill of Rights, and partly because it is not Great Britain. However the Constitutional provisions in Ireland are different from those in the U.S.A.. In particular the U.S. Constitution has in its 1st Amendment a specific injunction against the establishment of religion by Congress. If the American rules were followed in Ireland no direct support of any Church school would be possible. A better comparison is to regard the Irish rules in the light of the International human rights law provisions in this area. Not only were they generated closer to home, and with Irish participation, but also Ireland is bound by them in International law. This evaluation is carried out below in section (f).

d. Compulsory Education⁽²⁷⁸⁾

Whilst the school system is integrally linked with private religious groups, and parents are granted independent choice as to the religious and moral upbringing of their children (however limited that choice may be in reality), Ireland still requires compulsory education. Gone are the days of the Powis Commission when compulsory

277. I come to a different conclusion, see below p.998 *et seq.*

278. See section 1 above p.901.

education was considered an impractical option.²⁷⁷ The Constitution provides in Article 42(3)1 that:

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.

This strong statement does not mean that the state may not require compulsory education. The following section of Article 42 requires:

The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.²⁸⁰

The law on compulsory education is contained in the School Attendance Acts 1926-67. These require, with many exemptions, school attendance at a suitable school from ages 6-15. The Act, if vigorously enforced, could be considered unconstitutional for all

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279. See above p.882. The more modern spirit is evident in the Killanin Report which recommended 'drastic efforts' to implement compulsory education.
280. Article 42(3)2. Not that the state cannot, even when parent's fail in their obligations, lay down minimum standards in religious or physical education. Walsh, B., "Education and basic rights in Ireland", (1981) 2 *H.R.L.J.* 319.

that the state may require is "a certain minimum education, moral intellectual and social". It could be argued by parents that this requirement amounted to a basic literacy requirement. Of course it depends on exactly how "education" is defined under the Constitution. This question has not been considered in many cases.

Very few cases have fully considered what is meant by "education". The most important to do so was probably *Ryan v A-G* (2011) a case concerning the fluoridation of the water supply. One of Ryan's arguments was that fluoridation of the water supply by the state interfered with the parental rights under article 42 to control the education of their children. In the High Court Kenny J gave education a narrow meaning considering that it meant scholastic education (as opposed to education in general). In the Supreme Court O Dálaigh considered that it meant fulfillment of the child's capacities and "developing his resources". He stated:

...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...

In the *Landers v Attorney-General* (2002) case the parents of a musically talented child were prosecuted under the Prevention of Cruelty to Children Act of 1904 which effectively prevented their son from singing in certain places (licensed premises, public streets) at certain times. They claimed, *inter alia*, that this law frustrated his

281. [1965] I.R. 294.

282. *Landers v Attorney-General* (1975) 109 I.L.T.R. 1.

educational singing career and was thus contrary to article 42 of the Constitution. Finlay, J., found that the definition of education under article 42 did not include a public singing career for children under the age of ten. He considered that the definitions offered in the *Ryan case*⁽²⁸³⁾ were compatible with this interpretation. In particular he noted that the laws preventing his public performances in no way inhibited the training or practice of Michael Landers in his musical accomplishment.⁽²⁸⁴⁾

Given these interpretations of education it is unclear what amounts to a minimum education. It may well require more than a basic literacy and numeracy and extend to a development of a particular child's skills. Eoin MacNeill,⁽²⁸⁵⁾ the Minister for Education from 1922-1925 and a most devout catholic,⁽²⁸⁶⁾ considered that the only role of the state in education should be to support the parents. He was even against the state dictating the educational programme (curriculum).⁽²⁸⁷⁾ Clearly the fact that the state in Ireland makes

283. See above p.946.

284. *Op.cit.* p.5.

285. See generally Titley, *op.cit.*, p.91 *et seq.*

286. Dowling *op.cit.*, p.135.

287. MacNeill, E., 'Guidelines for an Irish Educational Policy', (1979) 14 *Ir.Jur.* 378 at p.384 where he writes;

Educational freedom must largely depend on freedom of programme. ...

schooling compulsory is in itself recognition of the importance of education to the state, but it seems there is no developed doctrine of *parens patriae* in the Irish Constitution for making education compulsory against parental wishes. The case of *Doyle v Minister for Education*⁽²⁸⁸⁾ makes this quite clear. A father sought to 'reclaim' his daughter from the clutches of an Industrial School whence he had placed her earlier. The Minister refused to discharge the girl. The Supreme Court held, *inter alia*,

Article 42 (2) (3) appears to us expressly [together with article 42(1)] to secure to parents the right to choose the nature of the education to be given to their children and the schools at which such education shall be provided and this right must be a continuing right. Parents must be entitled to change and to substitute schools as in their judgment they think proper and to hold that a choice once made is binding for the period of a child's education would be to deny any such right.⁽²⁸⁷⁾

The Minister was unable to rely on article 42 (5) against a parents

The fixing of programmes by State authority has for its inevitable concomitant a general abdication of parental interest and responsibility.

288. *Doyle v Minister for Education* (Supreme Court, Unreported 21/12/1955),, but reproduced in full in O'Reilly, J., and Redmond, M., *Cases and Materials on the Irish Constitution*, (ICSI, 1980), at p.632 *et seq.*.

289. *Id.* p.634.

constitutional right where the parent could fulfill the duty to provide education. (270)

Whilst the state's role in education has thus been considered as a secondary back-up and support for parents, the state has in Ireland as elsewhere, attempted to use the schools for social engineering. The compulsion to learn and use Irish in the schools is a reflection of State policy. Almost the entire burden for reviving Irish has been placed on the schools. It is a policy that has not succeeded. As MacNeill has written;

mere capacity to speak Irish fluently is no guarantee that it will be spoken. (271)

This use of the schools may be open to challenge in under the European Convention on Human Rights. (272) It has certainly been challenged in the domestic courts of Ireland. There are examples of parental resistance to state directed educational compulsion. The Irish government attempted in the late 1930's and early 1940's to give the Minister of Education a discretionary power over whether a child's education was suitable or not. This meant determining the necessary content of education before it would be deemed suitable. The attempt gave rise to several interesting cases.

290. A precedent relied on in *In re J, an infant*, [1966] I.R. 295.

291. *Op.cit.*.

292. A matter considered below p.998.

In *Carberry v Yates* (273) the Minister of Education considered that a private school not teaching any 'Irish' was "unsuitable" under the terms of the School Attendance Act. (274) In the first instance the Minister won, the court considering that Irish as "the national language" it was not an unreasonable requirement that Irish be taught. On appeal to the Circuit Court, Judge Devitt considered that as English was also recognised as an official language by the Constitution, and as the Minister had no clear authority under the School Attendance Act, and as the evidence showed that the child, Hazel Yates, was attending a school

which seemed to be perfect in every way in regard to education (275) but did not teach Irish...

the case should be dismissed. (276)

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293. *Carberry v Yates* (1935) 69 I.L.T.R. 86.
294. The clear intent of the legislation was to avoid parents being able to side-step the Irish element in their children's education.
295. The education provided included, English, Reading, Writing, History, Geography, Arithmetic, needle-work. The school had 7 pupils aged between 7 $\frac{1}{2}$ and 10.
296. See Akenson, *op.cit.*, p.128ff. and Osborough *op.cit.* p.175ff. Judge Devitt considered the power arrogated by the Minister in the absence of clear legislative authority to be despotic:
It would be the greatest despotism if the Minister could

Mr Derrig, the Minister of Education, did not give up however and several years later the government introduced a Bill that would empower the Minister to test children who had not gone to a school considered "suitable". He was also empowered to refuse the necessary certificate if the child had gone to an inappropriate school. On a reference by the President, Douglas Hyde, under Article 26 of the Constitution the Bill was referred to the Supreme Court to have its constitutionality assessed. It was found to be repugnant to the Constitution as it would have allowed the Minister to apply a 'variable' standard as to what was "suitable". Moreover the Minister might apply a standard higher than the constitutionally required "certain minimum education". The Court held that "certain minimum education" meant "a minimum standard of elementary education of general application". The Court considered that the lapse of time between a child first going to school and the Minister certifying the education as suitable, meant that parents could be potentially liable to penalties ex post facto. Also the mode of receiving education should be of no concern to the Minister.

So long as parents supply this general standard of education [certain minimum standard] we are of the opinion that the manner in which it is being given and received is entirely a matter for the parents and is not a matter in respect of which the State under the Constitution is entitled to interfere.

rule out every single Primary School in the country unless Irish were taught. *op.cit.* at p.88.

Only the Dineachtas could lay down such a minimum standard. The Irish state thus, can only require a minimum basic education and the law requiring education until the age of 15 might be unenforceable against a parent bent on home instruction according to his own ideas of life.

Osborough⁽²⁷⁷⁾ speculated that

it [was] ... by no means clear the Bill, had it been brought forward today, would have had the same unpoitable fate.

He holds this view largely because of the *East Donegal Cooperative v A.-G.*⁽²⁷⁸⁾ case where the Supreme Court ruled that if it was possible to construe a statutory provision favourably then it should not be declared invalid. However he entirely, in the present writer's view misses the point. The School Attendance legislation in question in the 1942 case was being challenged *in abstracto*⁽²⁷⁹⁾ under the

297. *Op.cit.* at p.174.

298. *East Donegal Cooperative v. A.-G.* [1970] I.R. 317 at 341.

299. This is entirely permissible in the normal course of litigation under Constitutional jurisprudence. Locus standi is not predicated on there being an actual victim. In the *Norris* case *op.cit.* it was made quite clear that the mere fact that Norris had not been prosecuted did not prevent him from pursuing his claim as

long as the legislation stands and continues to proclaim as criminal the conduct which the plaintiff asserts he

Article 26 procedure⁽³⁰⁰⁾. A Bill that is declared in conformity with the Constitution under this procedure is immune from further constitutional challenge. Thus, had the present day Court been confronted with this case it is likely that they would have decided the issue in the same way, for if it was declared in conformity it could be argued that no challenge would have been possible against Ministerial excesses.

The Irish constitutional subjugation of the state's direct role in education for the benefit largely of parents (nominally) but religious interests in fact had dire consequences in the *Crowley* case for the right of children to receive an education.

e. The right to education

Unlike the Constitution of the Irish Free State the 1937 Constitution does not declare that all citizens have a right to elementary education. As we have seen⁽³⁰¹⁾ the 1922 Constitution had rejected any expansion of fundamental rights in religious directions. In the *Dail* attempts to expand the categories of rights in a

has a right to engage in, such right, if it exists, is threatened and the plaintiff has standing to seek the protection of the Court.

300. See above p.935.

301. See above p.933.

socialist direction were equally rejected. Thus O'Connell's amendments were rejected, including the suggestion that all schools should be under the control of the state.³⁰² Article 42.4 of the Constitution dictates that the state "provide for free primary education". In *Crowley v Ireland*³⁰³ this was narrowly construed by the Supreme Court. As the case is recent and the only one to fully consider a parental claim for education on behalf of their children the opinion will be considered in some depth here. It is important, for although the state may not be able to force parents to send their children to school, perhaps the child himself may have a right to receive minimum education. Certainly article 42(5) talks of the natural and imprescriptible rights of the child. This is only trumped by the parents "inalienable" right to provide for the education of their children found in article 42(1).

In *G v An Bord Uchtála*³⁰⁴ an adoption case, an illegitimate child was considered to have a personal right (Art 40.3) and natural right to have its welfare safeguarded. Henchy J. stated:

Since Article 42 recognises the children of a marriage as having a natural and imprescriptible right (as the correlative of their parents' duty) to make provision for their of religious and moral, intellectual, physical and social education, a like personal right should be held to be impliedly

302. Titley, *op.cit.*, p.86.

303. *Crowley v Ireland* [1980] I.R. 102, 115.

304. *G v An Bord Uchtála* [1980] I.R. 32.

accorded to the illegitimate child by Article 40.3.

O'Higgins C.J. stated:

. . .the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and realising his or her full personality and dignity as a human being.

Article 42(5) of the Constitution⁽³⁰⁵⁾ makes it clear that if parents fail to fulfill their children's rights the State itself must fulfill them. Clearly the right of the child is against his parents, so *Crowley*⁽³⁰⁶⁾ is explainable in those terms. But where parents fail, the state should provide because of article 42.5 of the Constitution. A case illustrating the strength of article 42 is *In re J.H.*⁽³⁰⁷⁾. This case revolved around a custody/adoption battle between natural parents and adopting parents. The child had lived with the adopting parents since December 1982. In February 1984 the natural parents wanted their child back (having since married) and sought court orders to that effect. Lynch J., found that there was an appreciable risk of longterm psychological harm to the child by such a transfer. The evidence did not, however, indicate whether it is more or less probable that such longterm harm may occur, but it did establish to my satisfaction that the risk of such harm is sufficiently proximate that considerable weight must be given to

305. See note 214 above.

306. See below p.989.

307. *In re J.H.* [1985] I.R. 375, 397.

that risk in deciding these claims and counterclaims for custody of the child.

The conclusion was that the best interests of the child⁽³⁰⁸⁾ would be served by the child remaining with the adopting parents though they had no legal rights in relation to the child. On appeal the Supreme Court over-ruled this on the constitutional grounds that the parents had 'inalienable rights' as regards the education of their children under article 42(1) and that the state could not act unless there was an exceptional case in the terms of article 42(5).⁽³⁰⁹⁾ On remand Lynch applied the new constitutional test and the natural parents were awarded custody.

The *Crowley* case arose when all the teachers (except one) of three national schools⁽³¹⁰⁾ in the parish of Drimoleague went on strike⁽³¹¹⁾ on 1st April 1976 because the manager⁽³¹²⁾ of the School, Fr. Crowley, attempted to thwart the Department of Education's regulations by appointing Mr McCarthy to the post of principal even

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308. The standard set by Section 3 of the Guardianship of Infants Act, 1964, provides that in deciding any question relating to the custody of the child regard must be had to the welfare of the child as the first and paramount consideration.
309. Finlay C.J., Griffin, Hederman, McCarthy and O'Hanlon JJ concur in
310. Having a combined pupil population of 198, with eight teachers in all (including Mr McCarthy).
311. Originally the teachers in seven schools went on strike.
312. Replaced by a Board of Management in the course of this dispute.

though he had only four years experience when the regulations stipulated a minimum of five years service prior to appointment in such a position. He was appointed temporary principal and was finally confirmed as principal in July 1976 by which time his five years service had been completed. During the school year when he was acting principal the Board of Management refused to advertise the post despite the strike pressure by INTO⁽³¹³⁾. In August, 1976, the teachers' trade union instructed the teachers in schools in neighbouring parishes not to enroll in their schools pupils from Drimoleague parish.⁽³¹⁴⁾

Mr McCarthy continued to teach three classes, and parents helped out teaching, and some unqualified girls paid from locally raised funds attempted to keep

a form of rudimentary schooling ... from April, 1976, to the end of [1977].⁽³¹⁵⁾

The plaintiffs (also called Crowley) sought a mandatory injunction directing the Minister for Education to provide for them free primary education pending the trial of their action. They claimed that the state had violated their constitutional right to

313. Irish National Teacher's Organisation, a registered trade union representing the vast majority of national teachers in Ireland.

314. This instruction was withdrawn in June, 1977 after the commencement of legal proceedings by parents.

315. [1980] I.R. at 119

education and that INTO had conspired to infringe their constitutional rights. Mr Justice McWilliam, in the High Court made an interim order directing that transport be provided to bring the children to neighbouring schools.⁽³¹⁶⁾ This order was appealed and cross-appealed but it was effective in that from January 1978 the children of Drimoleague received an education in the neighbouring parishes. Mr Justice McWilliam felt that as the state had a duty under Article 42(3)2 to provide a minimum education this compelled him to the conclusion that the state had a duty to see that children receive this minimum education "in view of the actual conditions".

The High Court was directly confronted with the question of whether the children of Drimoleague had been deprived of their right to education by a teacher's strike. McMahon J. in the High Court⁽³¹⁷⁾ decided that the children's constitutional rights had been infringed. He felt that whilst a temporary breakdown in arrangements for education might be tolerated this situation was not temporary.⁽³¹⁸⁾ However the period from March 1976 until December 1977 was not in

316. McWilliam J., unreported, 1 December 1977.

317. [1980] I.R. 102. See Osborough, W. N. 'Education in the Irish Law and Constitution', (1978) 13 *Ir. Jur.* 145 at p.161 *et seq.*

318. *Id.*, at p.112.

question before the Court⁽³¹⁷⁾ as the children's claim was that the state provision of busing to neighbouring schools was insufficient fulfillment of its constitutional duty. They claimed *inter alia* that it would be possible for the State to pay the salaries of teachers directly employed by parents, or that it could have established a model school and that it should have adopted such measures as busing to neighbouring schools was not sufficient in law. The children had to put up with long bus rides, less teacher-attention (because of the larger class size) and they had received no remedial education to make up for the loss of schooling that they had suffered. McMahon held that

so long as that education is made reasonably accessible⁽³²⁰⁾

and that although

he [thought] it very probable that there has been a falling off in the quality of education received by the children ...⁽³²¹⁾

319. Though in its final disposition the Court declared that the Minister of Education was in default for this period as the presumption was that as there had been no education provided during that period the Minister had failed (by not presenting evidence) to rebut the *prima-facie* case. *id.* at p.115 and p.129.

320. *Id.*, at p.113.

321. *Id.*, at p.114. Again counsel inexplicably gave no notice to the Minister of these complaints and thus McMahon found that the Minister had been unable to test whether these complaints

the Minister had discharged his constitutional duty.⁽³²²⁾

Osborough⁽³²³⁾ considers the outcome of the case at this stage as the court approving "a minimum tolerable response" and explains this outcome on the grounds that the wider solution sought by parents would have been politically impossible for a Minister to make, let alone the judiciary who were not yet activist enough to "draw up the measured and detailed contingency plan" that would be necessary. Whilst it is true that the judiciary in Ireland is still marked by some "common law traditional restraint" as regards remedies their role in constitutional adjudication surely requires a more positive

were well-founded or not. This second gaffe by the plaintiffs' counsel seems inexcusable and prevented the Court directly ruling on the question of standards of education required by the Constitution.

322. He also found the children's case against INTO well-founded. INTO, if indeed it had the constitutional right to refuse to enrol Drimoleague children, had in this instance, abused that right, thus the Drimoleague plaintiff would be entitled to damages if they could show that they had been refused such enrolment. Oddly the plaintiff's lawyers presented no evidence on this point: [1980] I.R. at 110. The judgment also had the side-effect of rendering challenges to rural school closures less likely to succeed.

323. *Op.cit.*, at p.166.

attitude.³²⁴ Moreover some of the blame for the timidity of this decision is surely to be placed at the plaintiff's lawyers door for failing to give sufficient evidence concerning the refusal of enrolment (which seems not to have directly effected the ruling against the Minister) and by not giving sufficient notice to the Minister on their other claims (to a sufficient education) which made the trial Court unable to make absolute findings on this important claim. Without this finding on the facts the Supreme Court was more easily led to a narrow ruling.

In the Supreme Court a very limited constitutional interpretation was applied by the majority.³²⁵ Kenny J found that the Constitution had to be interpreted in the light of history. His

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324. Clearly it is not always lacking as in the contraceptives case *McGee*. See p.945.
325. Comprised of Kenny, Henchy and Griffin JJ. The only question before the Court was whether Ireland, the Minister or the Attorney-General had violated the children's constitutional rights. INTO did not appeal the ruling against them and Kenny J approved that ruling. *id.* at p.128. The plaintiffs' claims as to the location of their education and its quality was likewise not appealed. *id.* at p.129.

analysis showed that the Irish state had never⁽³²⁶⁾ directly provided education. He thus found significant the wording of Article 42(4) which states that

[t]he state shall provide for free primary education...⁽³²⁷⁾

They found that no rights had in fact been infringed or the State had only to make provision for schooling and

the totality of evidence... fail[s] to establish that there has been a breach of the Constitutional duty imposed on the State.⁽³²⁸⁾

In his judgment Kenny J in to places points to the dire threat of a national INTO strike should the Minister have taken the actions suggested by the plaintiffs.

Chief Justice O'Higgins (Parke J. concurring) dissented. He found that the wording of article 42(4) was designed to avoid the State having a "mandatory" obligation to provide education directly.

326. He found that "almost all schools" were under the control of a manager. The state was thus deprived of "the enormous power of education". *id.* at pp.126-7.

327. This thus affirmed the Irish text which he translated as meaning:

The state must make arrangements to have basic education available free.

, *id.* at p.126.

328. *id.* at p.130. He easily dismissed arguments based on article 40.

and was thus in deference to the historical religious compromise that enabled the state to avoid being bound to set up state schools except when

assistance to the Church schools is not possible. (329)

He stated:

What was involved was the denial of a constitutional guarantee given to the children attending the affected schools and the breakdown of arrangements which the minister had made for the honouring of this guarantee. The duty imposed on the State under Article 42.4 is a continuing one. If what has been provided proves ineffective or unworkable due to a change in circumstances, it seems to me that this does not relieve the state or the Minister from seeking alternative or other means or methods to provide what is guaranteed to children by the Constitution. (330)

O'Higgins had found the children's right flowing from the State's duty. (331) The Minister he felt had the obligation to investigate and remedy, where possible, the breach of such an obligation. In the instant case he considered that it was incumbent on the Minister to have helped defray the parental expenses incurred in trying to provide an alternative education. In some cases, he made clear, there may be no possible effective remedy in which case the

329. *Id.* at p.123.

330. O'Higgins C.J., [1980] I.R. p.124.

331. *Id.* at p.122.

Courts would find him not in breach of his constitutional duty. Moreover the fact that the Minister had no statutory power (or administrative machinery)³³² to pay uncertified teachers was no argument to a Minister faced with a breach of a constitutional duty.³³³ It is clear from this decision that the open nature of these articles also allows restrictive interpretations.³³⁴

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332. O'Higgins seems to accept this in his judgment. The status of the *Rules for National Schools* is uncertain. There is no statutory authority for them. It seems clear that the Minister is in fact at liberty to alter them. Rule 165 of the *Rules for National Schools* clearly says so. See generally Osborough, W.N., 'Irish Law and the Rights of the National Schoolteacher', (1979) 14 *Ir. Jur.* 33 and 304 at pp.320 et.seq..
333. *Id.* at pp.124-125.
334. Though apparently in *Hayes v Ireland* (Unreported, High Court (Carroll J), 6 October 1986, a pupil affected by the Drimoleague strike was awarded £4,000 as compensation for the unlawful interference with his constitutional rights. See Kelly, J. M., (with Hogan and Whyte) Supplement to the 2nd Edition, 1987, of *The Irish Constitution, op.cit.*, at p.189.

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f. Compatibility with The European Convention on Human Rights
(ECHR) ⁽³³⁶⁾

The ECHR was at issue in the *In re O L'áighléis*⁽³³⁶⁾ case where it was not considered relevant to constitutional interpretation. This has now been confirmed by the case of *Norris v Attorney General*⁽³³⁷⁾ which also affirms in the clearest possible way judicial reluctance to enforce the case-law of the European Court of Human rights in Irish law. It does this because identical legislation had been held to violate article 8 of the ECHR in the *Dudgeon*

335. We have analysed above in Chapter two how Ireland receives International law into the domestic legal system. The relationship between Irish law and Community law is clearly delineated in the third amendment of the Constitution Article 29(4)3 which states:

. . .No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the obligation of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities or Institutions thereof, from having the force of law in the State.

This formula clearly gives primacy to Community Law.

336. See above p.955.

337. See above p.948.

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case.⁽³³⁸⁾ In this case Mrs. Robinson for Mr Norris argued

that this decision [Dudgeon] by the European Court of Human Rights

338. *Dudgeon case* Ser.A Vol.45. Though in strict law the *Dudgeon* case would not bind Ireland as only parties to the case are bound (Article 53 of the ECHR) and Ireland was not such a party. It was clear that the case, involving as it did the same legislation, made explicit the requirements of article 8 as regards the state's treatment of homosexuality. Although the Court's jurisprudence allows a margin of appreciation to states (thus allowing national authorities to make the initial assessment of "pressing social need" that is necessary before a state can justify its legislation under the terms of article 8(2) (See *op.cit.* Para 52 p.21)) in the *Dudgeon* case this was strictly construed by the Court as the case concerned "a most intimate aspect of private life". So even recognising the Christian nature of the Irish state may not save Ireland from the case currently being pursued at the European level. See chapter seven, section III(5) above p.495. However it may be noted that in Para 56 of the judgment the European Court of Human Rights notes that where

there are disparate cultural communities .. it may well be that different requirements, both moral and social will face the governing authorities. (at p.22)

It is also noteworthy that Walsh J dissented.

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should be regarded by this Court as something more than a persuasive precedent and should be followed. She contends that, since Ireland confirmed and ratified the Convention, there arises a presumption that the Constitution is compatible with the Convention and that, in considering a question as to inconsistency under Article 50 of the Constitution, regard should be had to whether the laws being considered are consistent with the Convention itself. (337)

O'Higgins rejected this argument as it would

accord to the Government the power, by an executive act, to change both the Constitution and the law.

Citing *In re O'Laighléis*, Article 29(6) was held to prevail over such an interpretation. (340) Apparently the article 29(3) arguments were not used by counsel. (341) Norris has taken the case to the European Commission of Human Rights where it has been held admissible. (342)

The *Norris* judgment does not say that Irish judges do not

339. *Id.*

340. *In the Goods of William Walker, deceased, O'Brien v Stoutt, In re O'Laighléis* was also applied to reject the application of the ECHR's jurisprudence in dealing with illegitimacy (the *Marckx* case) [1982] I.L.R.M. 327. [1984] I.R. 316.

341. The only reported case where the article 29(3) arguments have been put seems to be *Shannon v Ireland* [1984] I.R. 548 where it was neither accepted nor rejected.

342. [1986] 8 E.H.R.R. 75

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recognise the validity and force of ECHR law, it is merely not available within the system.⁽³⁴³⁾ It is available as an guide to construction and interpretation of the law.⁽³⁴⁴⁾ Irish family law as well as the religious provisions in the Constitution are likely to encounter set backs within the European system as they are not suitably pluralistic.⁽³⁴⁵⁾ *The case of Johnston and Others*, confirms this finding as it held that the Irish treatment of illegitimacy

343. For example after the famous *Airey* case before the European Court of human Rights the Irish government introduced a civil legal aid scheme though some contended that this did not go far enough. See Whyte G. F., 'The application of the European Convention on Human Rights before the Irish Courts' (1982) 31 *I.C.L.Q.* 856.

344. See *Ide O'Donnaiil v Maura Merrick* [1985] I.L.R.M. 40.

345. A standard required when a state limits the rights and freedoms granted according to safeguard clauses allowing limitation when "necessary in a democratic society". The standard has also been applied in relation to article 2 of the First Protocol to the ECHR ((Article 2P) the education article) despite the absence of such a safeguard clause. See Chapter seven above and in particular the analysis of the *Kjeldsen* case at p.590 *et seq.*

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violated Article 8 of the ECHR.⁽³⁴⁶⁾ The unavailability of divorce was not found to be a violation of either article 8 or article 12.

It has been suggested above that Article 29(3) of the Irish Constitution may be an avenue for successful individual actions claiming rights guaranteed under the ECHR.⁽³⁴⁷⁾ However it is likely that this success would arise only after the Strasbourg institutions have ruled in favour of an applicant. Before that event the government could argue that there was no violation of the ECHR, and hence no violation of Article 29(3). An Irish court is not likely to review the substantive scope and application of the ECHR in these circumstances, as the Convention is not part of Irish law, which alone they uphold. The violation would first have to be established. Moreover it would be extremely difficult, if not impossible, to show that general international law protected a right to education.⁽³⁴⁸⁾ However once it was established a plaintiff would, it seems, have the possibility of enforcing a remedy. We must now assess whether aspects of the Irish system are in fact amenable to being struck down by application of the norms established by the ECHR.

There have been, as yet, no cases from Irish petitioners

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346. *The case of Johnston and Others*, (19 December 1986), ECHR Vol.112 Ser.A.; [1987] 9 E.H.R.R. 203 confirms this finding as it held that the Irish treatment of illegitimacy violated Article 8 of the ECHR.
347. See p.956 *et seq.*
348. *cf. Shannon v Ireland, op.cit.*

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complaining under Article 2P of the ECHR about the state's failure to ensure that parental religious and philosophical convictions be respected. Nor any cases under the first sentence of article 2P claiming a denial of education. Since the *Campbell and Cosans* case it has been clear that the state adopts a "function in relation to education" if it finances schools and is responsible for general policy in schools.⁽³⁴⁹⁾ The Irish government does substantially finance such schools and sets out general policy.⁽³⁵⁰⁾ It therefore seems clear that the Irish government in tolerating the current situation of religious permeation of school education is not showing the "respect" necessary under the Convention to both parents with differing religious or philosophical convictions and to the children of such parents.

However a word of caution is necessary for in the *Johnston* case the applicants *inter alia* sought to rely on article 8 which guarantees the right to respect for family and private life. In its earlier case-law the Court considered that the respect required was found to include positive obligations as well as the traditional negative obligation to restrain from interfering with the freedom of

349. See *Campbell and Cosans*, in ECHR section.

350. The Minister has clearly established general policy in the *Rules for National Schools under the Department of Education*, Dublin and the *Rules and Programme for Secondary Schools 1986/1987*

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the individual.³⁵¹ However in *Johnston* the Court made it clear that the respect that had to be shown would "vary considerably from case to case". It was an area where states enjoyed

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.

They refused to find in article 8 what had been explicitly rejected for inclusion in article 12 (on the right to marry). This case does not necessarily mean that the level of respect necessary in Ireland will be less, but coupled with the cautions expressed in the *Dudgeon* case³⁵² as to the variability of the application of the Convention's provisions to take account of "disparate cultural communities" it is not necessarily crystal clear that the whole Irish system would be found unlawful. The Court would be more likely to find a limited violation on the particular fact-based situation presented.

The traditional case-law interpretation of the ECHR³⁵³ is that the State is not obligated to provide directly any school system. Ireland has not done so. However under the second sentence of Article 2P Ireland must respect parental (religious or philosophical)

351. *Airey* Ser.A No.; *Marckx* Ser.A No. 31 p.14 (531); *Abdulaziz, Cabales and Balkandali*, Ser.A No.94 pp.33-34 (567).

352. See above note 338.

353. See chapter seven section VI(B).

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convictions in any functions it undertakes. This the *Flynn* case⁽³⁵⁴⁾ shows, it has potentially⁽³⁵⁵⁾ failed to do. Moreover the requirement of the *Kjeldsen* case seems not to have been met. The permeation of religion throughout the school's curriculum might well be regarded as providing information and knowledge in a subjective, non-critical indoctrinating fashion.⁽³⁵⁶⁾

Furthermore, although the first sentence of Article 2P was early on interpreted as not imposing any positive obligations on the state to provide a schooling system, the interpretation suggested by the present writer, in the light of the recent cases, shows however that Ireland may well have an obligation to provide a "neutral" (i.e. secular) education system. This duty flows from the following considerations. The ECHR must be interpreted in the light of its objectives.⁽³⁵⁷⁾ The rights guaranteed by the ECHR include the rights of all to freedom of conscience, religion and thought.⁽³⁵⁸⁾ The child has a right under the ECHR not to be denied education. Conditions of access to the system that themselves violate the child's or parental

354. Also see rule 68 of the Rules for National Schools, set out above in note 272.

355. The ECHR requires, *inter alia*, that there be a genuine claimant (victim) as a general criterion of admissibility.

356. See ECHR section p.659 *et seq.*

357. Vienna Convention on the Law of Treaties 1969, Article 31.
Also *Case of Johnston and Others* Ser.A vol.112 52.

358. Article 9.

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rights amount to such a denial.⁽³⁵⁷⁾ In the case of children desirous of a secular education or their parents wishing for such an education the Irish system would almost certainly be unable to provide it as religion permeates throughout the school education. The obligation, would probably only relate to elementary education.⁽³⁶⁰⁾

The Irish educational system is also potentially open to challenge under the ECHR on grounds of its Irish language provisions.⁽³⁶¹⁾ It is more doubtful whether such a general challenge would succeed. As we have seen the state regulates the curriculum and requires Irish as a compulsory component of such education in the early education programme.⁽³⁶²⁾ What if a parent demanded instruction through the medium of Irish in an area where the schools taught predominantly in English, or vice versa?

From the *Belgian Linguistics cases*⁽³⁶³⁾ it would appear that they would have no rights in this matter. Ireland is seemingly complying with article 2P even when combined with article 14 since it has a rational basis for its allocation of linguistic schooling. The *Campbell and Cosans case* made it clear that unwarranted conditions of

359. *Campbell and Cosans*, above. p.610.

360. See ECHR chapter seven p.642 *et seq.*

361. Dealt with below. See above pp.907-917.

362. It will be remembered that it is no longer compulsory to take Irish as a component of examinations later.

363. See chapter seven, p.535.

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access violate the first sentence of article 2P.⁽³⁶⁴⁾ Ireland here could argue that as both languages are officially recognised it has legitimate objectives and its means of achieving its ends are reasonable and proportional. To a parental claim that their philosophical convictions were not being respected by the state, the Strasbourg organs may hide behind the precedent of the *Belgian Linguistic* cases to avoid ruling adversely to the Irish government. The *Belgian Linguistics* cases found that there had been no intention to protect the right to a particular language in schooling, and the *Jater Johnston* case suggests that it may not follow the wider ruling of *Campbell and Cosans* which extended the definition of philosophical convictions to an extent whereby it could include the matter of language preference. It will be recalled that in the *Johnston* case the Court followed the reasoning of the Commission in holding that an evolutionary interpretation of the rights in the Convention could not extend the rights in the Convention in directions that had been specifically rejected by the drafters. The *travaux préparatoires* show that the drafters had considered but not included a right for minorities to choose the language of instruction.⁽³⁶⁵⁾

One aspect of the use of schools to revive the language that may well be considered as contrary to the ECHR is the practice of granting bonus marks for those who write their exams in the Irish

364. See chapter seven p.610 *et seq.*

365. Danish proposal, See chapter seven, section IV(B).

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language.³⁶⁶ The *Belgian Linguistics* cases found that children had a right to draw benefit from the education they received. The Irish litigant it is true would not be denied the benefit of an Intermediate or Leaving certificate, but, if he were discriminated against for using the English language in his answer that surely would be contrary to the provisions of the ECHR, namely article 2P when combined with Article 14 that prevents any discrimination on *inter alia* grounds of language. Here the territorial "objective" justification of use of language in schools would not be available as a defence to Ireland. It seems that there have been no challenges to the regulations allowing such discrimination. Article 40 of the Irish constitution provides:

All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

A citizen armed with a European right to draw benefit from his studies, in accordance with the laws of the state (including article 40(1)), should be able to mount a successful attack on this injustice within the Irish Courts. The right to equal treatment in this circumstance would seem paramount and any argument regarding revival of the language would be unlikely to be considered reasonable in the light of the importance and value of the certificate to the student.

366. See above p.911.

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The fact that results in the exam are in major part determinative of future life opportunities, being a passport to higher education³⁶⁷ and professional life, and embody the true essence of the idea of a right to education,³⁶⁸ as recognised by the European Court in the *Belgian Linguistics cases*, would override any reasonableness argument of the Irish government. As we have seen in the international human rights treaties education has been considered as a prime socialising agent that is designed to allow recipients to fully develop their talents and abilities. It would seem that a system that discriminates against an individual on the grounds of language and thus diminishes his chances of using his abilities runs directly contrary to the

367. Higher education grants are also easier to obtain if one has taken an Irish Leaving Certificate. One requires four grade D's or higher with Irish as against five required without Irish. Department of Education, Information Leaflet, *Higher Education Grants Scheme*.

368. In the sense that education can be seen as a right, the examination certificate is almost the equivalent of a property right, showing title to the goods described. This clearly does not mean that all have a right to such a certificate. See discussion in chapter one as regards the arguments that educational certificates may be considered a property interest below p.45 et seq.

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correct interpretation of these provisions.⁽³⁶⁹⁾

Another interesting question revolves around whether the *Crowley* plaintiffs could have had successful recourse to the ECHR? Obviously no Western European state is immune from strike action causing the closure of schools.⁽³⁷⁰⁾ In such a case it seems clear that the children will have been denied education. It would seem that the margin of appreciation as to how a government might react to such a situation would not lead to success at Strasbourg in this type of situation. Even the national courts were reluctant to intervene for fear of hampering the executive (wrongly in the present writer's opinion), the reluctance to override national decisions in such circumstances is quite well established in the jurisprudence of the Strasbourg institutions. Here the Irish Courts themselves could have been more adventurous.

Teachers may not be forced to violate their conscience by compulsion to teach religious instruction contrary to their beliefs. However in the circumstances prevailing it would seem that there is no element of state compulsion. As they are not employed by the state it seems that their beliefs are unprotected even when the "expression" takes place outside of the classroom. The ECHR in article nine protects *inter alia* the

right to manifest his religion or belief in worship, teaching, practice and observance, ...

369. Including the Convention against Discrimination in Education.

370. E.g. *Meade v Haringey L.B.C.* [1979] 2 All ER 1016.

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Nothing that has been done here prevent Flynn's of the world from practising their beliefs. The state is not involved in repressing religious belief.⁽³⁷¹⁾ Moreover a teacher must teach what is assigned.⁽³⁷²⁾ and may not rely on his rights under article 9 or 10 as limitation of his freedom of religion or expression is permissible in a school setting for the protection of the rights of others, especially the rights of the parents to have their philosophical and religious convictions respected as regards the education of their children. This justified limitation is especially pronounced in non-denominational schools. In the case of *Ahmad v I.L.E.A.*⁽³⁷³⁾ which went before the European Commission on Human Rights as *X v U.K.*⁽³⁷⁴⁾ the Commission found that a muslim teacher had no right to demand an altered time-table to accomodate his religious belief. However the Commission was careful to point out that this ruling was arrived at in the light of the applicant's previous acceptance of a time-table

371. Applicant 7374/76 (1976) 5 DR 157. 7805/77 (1979) 22 Ybk.

244. Here a Danish clergyman was asked to desist from a certain method of christening objected on grounds of religious freedom. The Commission found that the freedom was not repressed, in fact the clergyman could exercise it and leave the ministry.

372. 8177/77 (1979) 16 DR 101. (Teacher dismissal for refusal to stop expressing religious beliefs in school.)

373. *Ahmad v I.L.E.A.* [1978] 1 All ER 574.

374. *X v U.K.* (1981) 22 DR 27.

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that disallowed his attendance at a mosque on Friday afternoons. The "respect" to be shown by the state was primarily a negative obligation on the state, but may include positive obligations⁽³⁷⁵⁾. The Commission found that the requirements of Islam as to attendance had not been proved⁽³⁷⁶⁾ and that even if they had been proved the applicant had never raised the question before with his employer. Thus the situations represented by the cases of *Flynn* and *McGrath* are unlikely to achieve redress through the ECHR as in both cases the teachers were employed by denominational institutions.

We have seen then that there are several areas in which the Irish system is open to challenge for failure to comply with international obligations undertaken by Ireland. We have also seen that direct challenges based on the Convention have been rebuffed basically because Ireland adopts a dualist outlook to Treaties. The *Rice & Boyle* case⁽³⁷⁷⁾ currently before the European Court may well force Ireland and other dualist countries that have not incorporated the ECHR to provide a remedy in accordance with article 13 of the Convention.⁽³⁷⁸⁾ In the meantime should a litigant, as is more than

375. *Id.* 33.

376. *Id.* p.35.

377. See Chapter seven, note 86.

378. See in this sense Golsonq, H., 'Implementation of the International Protection of Human rights', (1963) 110 *Rec. des Cours* 1, at p.138. See generally for a summary of views

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likely, not get full satisfaction from the Irish Courts, then recourse to the Convention organs themselves is possible. Whether, and how quickly, the Irish government would respond positively to an adverse ruling from the Strasbourg institutions in the sensitive area of education and religious influence is something that one cannot predict with certainty. It may well be that the grip of the Catholic hierarchy on the Irish political system is very strong⁽³⁷⁷⁾ but some of the judges have shown some independence in this respect⁽³⁸⁰⁾. They could if a suitable case arose apply the Convention via Article 29(3) of the Constitution as suggested above.⁽³⁸¹⁾ This would enable the government to pass off the politically unpleasant burden to Strasbourg. Similarly the objections of the hierarchy could be met by referral to the international obligations undertaken. In this way the international human rights obligations do affect internal resource allocation of the states adhering to them. They do clearly provide a higher "constitutional" law. Ireland has adhered to the Convention and other international instruments and thus is bound to allow a pluralist democratic society.

of different authors, Drzemczewski, A., *European Human Rights Convention in Domestic law: A comparative study*, (Clarendon Press, Oxford, 1983) Ch.2.

379. Generally Whyte and Hogan *op.cit.*.

380. Evidenced by the *McGee* case allowing contraception.

381. See p.956.

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I. INTRODUCTORY

There are numerous themes running through ~~this work~~. This conclusion will attempt to draw together the major themes. They can initially be seen, stated briefly, in the schematic "table of contents" reproduced above.

It is clear that the right to education beyond the elementary level certainly does not form part of customary international law. Even at the elementary level treaty law recognises it as being a programmatic right. Even though many states recognise the right in their national constitutions¹ the *opinio juris* element, in addition to state practice, would seem to be insufficient. However it could be argued that the defaulting states are knowingly in breach of the norm, and thus in fact, the contrary state practice confirms the rule. The ICJ in the *Nicaragua v U.S.A.* case confirmed that:

It is not to be expected that in the practice of states the application of the rules in question should have been perfect, in the sense the states should have refrained, with complete consistency, from the use of force or from intervention in each others internal affairs. The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute conformity with the rules. In order to deduce

1. This was so even in 1947, See U.N.Doc. E/CN.4/AC.1/3 (4 June 1947) for a compilation of relevant constitutional articles by the U.N. Division of Human Rights.

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the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself then whether or not the state's conduct is in fact justifiable on that basis the significance of that attitude is to confirm rather than to weaken the rule.⁽²⁾

So though the right to a basic education might form part of general customary international law, the thesis is more concerned with an analysis of international law applicable within Western Europe. Here there is certainly a "regional custom" in regard to the right to an elementary education, but the developments beyond that educational level, which I have analysed, derive from treaty regimes and depend on them for their legal basis. So the question of the customary nature of the rights is for the present purpose irrelevant. Instead the conclusions seek to analyse the implications of the developments of the treaty norms.

2. *Nicaragua v. United States of America, op.cit. para. 186.*

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II. EDUCATION AS A RIGHT

A. Intrinsic and domestic complicating factors

In the Introduction to this thesis the importance and difficulty of expressing educational rights was outlined. The difficulty of expression arose for several reasons. The multifaceted concept of education itself was one difficulty. The important and expensive role it plays in national life, and therefore its political import was another. Its importance to the individual was explored and the concept of equal educational opportunity examined. The role of the parent in the upbringing of children and the lack of capacity of minor children were further complicating factors in any attempt to establish educational rights for individuals.

As Part Three of the thesis has shown, at least for three Western countries, education is an intensely controversial political factor at the national level. The countries whose educational systems were examined had all formally recognised the parental role in education, as well as the role of a non-state educational sector. Although education was considered especially important in its role of ensuring cultural and national solidarity, all three states recognised the value of pluralism in education.

B. Relationship to international difficulties

1. The complicating factors alluded to above were reflected in the creation of the international human rights declarations and treaties dealt with in part two of the thesis, and will be examined

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below.

2. The three western nations examined are more securely self-confident in their sense of nationhood than is the case for the bulk of the developing world for whom education is still an important nation-building factor.³² They are correspondingly relatively more open to international standards and ideas penetrating through to their educational systems than the mass of states.

III. THE ROLE OF INTERNATIONAL LAW

A. Theoretical considerations

1. Subject/Object problems

This matter was substantially covered in chapter two, the Introduction to Part Two. Clearly it is now untenable, and is not maintained by the states in question, that international law does not grant individuals' rights. Whether they are directly available (cf. the principle direct effect in European Community law) in the national legal order is a separate question.

2. Domestic Jurisdiction

We have seen that the concept of domestic jurisdiction is somewhat circular, matters not covered by applicable international law falling into this category. This was made very clear by two early twentieth

3. Viz. Latin American rejection of full minority educational rights for fear of impeding cultural assimilation of immigrants. Above chapter four.

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century cases, the *Nationality Decrees in Morocco* case⁴ and the *Lotus* case.⁵ The relativity of the concept essentially means that if one can show that the matter is dealt with by applicable international law then *ipso facto* it does not fall under the domestic jurisdiction of states and thus is amenable to international regulation or rule-making and intervention.

As to general international law, both the U.N. and UNESCO have fairly strong domestic jurisdiction reservations written into their basic documents.⁶ This limits the capacity of these bodies to directly intervene in any matter where jurisdiction has not been specifically attributed. However, as we have seen,⁷ their constitutional documents, notwithstanding these general reservations, and though subject to them, do attribute some jurisdiction in the matter of human rights and education. In interpretative declarations and resolutions (of the basic treaties) the attributed competence can

4. *Nationality Decrees in Tunis and Morocco*, PCIJ Ser. B No.4 (1923).

5. *Lotus*, PCIJ Ser.A, No.10 (1927).

6. See above chapter six.

7. See above chapters four to six.

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be extended, (7) though if a state should vote against such an "interpretative" declaration or resolution it is doubtful whether, in law, it would block the evolution of the norm. The state voting against such resolutions would be able to argue that the norm was not opposable to it on the grounds that it has been a "persistent objector". (7)

The UDHR is now commonly seen as being an essential "interpretative" document to the Charter's human rights provisions. It was moreover voted for by all the states dealt with in this study. Though at the time of so voting they did not realise its significance as removing the domestic jurisdiction bar in the matter of the rights therein enshrined, their later endorsement in Teheran (1968) and at Helsinki (1975) make it quite clear that they accept it now.

Further doubt concerning the legitimacy of the intervention of international law is, of course, completely removed by the acceptance of a treaty on the subject. The states under study have all ratified the ECHR and its first protocol. France and Belgium have

8. The prime importance given to such resolutions and declarations by the ICJ in the *Nicaragua v U.S.* case (1986) 25 I.L.M. 1023 must bolster this conclusion though it seems that the Court greatly overplayed the significance of such instruments as a factor in creating customary international law. For UNESCO recommendations are, by its constitution to be implemented. See above chapter six.

9. *Anglo-Norwegian Fisheries*, [1951] ICJ Rep. 116.

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also accepted both the International Covenants that make up the international Bill of Rights.¹⁰ France and Ireland have also ratified the UNESCO Convention against Discrimination in Education¹¹ and the European Social Charter. All three states voted for the Declaration on the Rights of the Child and all three are involved in drafting the Convention on that subject. Thus one can say in relation to these three countries at least, that the general domestic jurisdiction reservation is no bar to international intervention in the areas covered by the treaties adopted.

B. Problems in defining the rights

1. Overview

It is clear from the examination carried out in part two of the thesis that there was a serious divergence of views between states as to the philosophical underpinnings of human rights. This was mainly reflected in the debate whether to have a single covenant

10. France has also accepted the Optional Protocol to the

International Covenant on Civil and Political Rights that allows individual complaints to be received by the Human Rights Committee.

11. Belgium adheres to the Recommendation against Discrimination in Education, on account of the partial regionalisation of competence in the matter of education.

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or two covenants and the concomitant discussion on the appropriate methods of implementation for human rights.¹² The fact that the Bill of Rights is in three documents was generally considered a victory for the Western powers¹³ as economic, social and cultural rights were considered by them to be: (a) different in nature from civil and political rights because they required extensive expenditure to be implemented; and (b) they were not directly legally enforceable as a result of this different nature, thus requiring a different type of enforcement mechanism from civil and political rights.

The Western powers, especially the United States, were wary of anything that might compel social welfare statism. The economic, social and cultural rights seemed, for a while at least, to epitomise communist ideology, and were thus not accepted as "rights" at all, but at best noble aims. The Western front was not solid on this

12. See above chapter four.

13. Hevener, N. K., 'Drafting the human rights covenants; an exploration of the relationship between U.S. participation and non-ratification', (1986) 148 *World Affairs* 233 at p.237; Johnson M. G., 'The contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights', (1987) 9 *H.R.Q.* 19, at p.35.

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matter. Several Western states^{'14'} espoused the economic, social and cultural rights. However these states considered the rights to be of a different character and requiring separate enforcement.

Another difference of perception is accounted for by the mass illiteracy then prevalent throughout most of the world. At the universal level this was clearly a major concern.^{'15'} Hence one finds article 14 in the International Covenant on Economic, Social and Cultural Rights. The U.K. report on implementation makes it clear that this provision was irrelevant for the U.K.. Article 14 was not relevant as there was an existant educational system. Given the development differences between the negotiating states one might have expected that, at the European regional level (where the differences were relatively small), the state parties, unhampered by such differences, would ensconce a stronger right.

2. Classification of rights^{'16'}

This section deals with the classification of rights in the light of the experience of the International Bill of Rights. This analysis, which centres on the alleged differences between types of rights, is

14. E.g. France, Australia.

15. Reflected today in article 15(3) of the Draft Convention on the Rights of the Child. See above chapter five.

16. The arguments of the drafters of the International treaties covered so far are mainly discussed here. For a more theoretical treatment see chapter one.

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put into a European public law perspective and seeks to establish how the right to education might be classified.

As we have seen, at the time that the ECHR was being drafted, the states concerned were fighting off demands that social and economic rights be included in the International Bill of Rights. The classification of rights into various categories is a time-honoured tradition in the field of international human rights. As we saw above¹⁷ during the drafting of the International Bill of Rights much energy was expended on this question. It is only a useful exercise if it tells us something about the nature of the right.

The debate in the (U.N.) as to whether economic, social and cultural rights should be protected by international law can, at the risk of over-simplification of nearly two decades of negotiations and drafting, largely be classified as a debate between the appropriate role for governments in dealing with the issues covered by the rights in question. Some Western states objected to any government role in the sphere of economic, social and cultural rights, viewing such matters from a classic liberal tradition, and fearing that rights in such areas may involve the government in direct provision of services in these areas, whereas the true governmental role lay in simply allowing private actors to be free of governmental restraints. The underlying uneasiness concerning the legalisation of economic, social and cultural rights relates also to the adherence to the classical conception of the role of public international law as being law

17. See chapter four.

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between states.¹⁸ Other Western states recognised the value of recognising certain economic, social and cultural rights but felt that their inclusion in such Covenants was misplaced, some for procedural reasons,¹⁹ others because the enshrinement of such rights would require implementation and facilities that would be beyond the means of the majority of states in the world. Thus they considered that they were not yet ripe for legal definition and implementation.

The most significant perceived difference between economic, social, and cultural rights and civil and political rights, was that the former required major resources to be allocated before they could be achieved, whilst the latter would be readily achieved by simple legislative fiat. This notion has been strongly challenged as untrue in relation to the third world where the necessary institutional framework was not in place to make civil and political rights

18. See above chapter two.

19. It would delay the adoption of the Covenant.

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immediately available.⁽²⁰⁾

The Eastern view was that such rights were absolutely essential and they had to be fulfilled in order to recognise the dignity of man and allow him to enjoy the full civil and political rights. During the drafting process the West, by and large, came round to this view, though they were careful in the International Covenant on Economic, Social and Cultural Rights to ensure that the legal obligations were defined as being programmatic. In this the East willingly enough concurred, being in any event absolutely opposed to any formal machinery for international implementation as being a violation of state sovereignty. The U.N. debate then was largely of a political nature as to the appropriateness of certain categories of rights and the modalities necessary for their enforcement. Whilst there was a general "cold-war" style debating battle in the United Nations during the drafting of the International Bill of Rights, as was made apparent during the drafting of the Bill of Rights and the UNESCO Convention against Discrimination in Education, there was a steady consensus on the concept of equal

20. See Jhablava, F., 'On human rights and the socio-economic context', (1984) 31 *N.I.L.R.* 149. It is also clear that so-called "negative rights" also involve the state in extensive expenditures (on the legal system for example). See Okin, S. M., 'Liberty and Welfare: Some issues in human rights theory', in Pennock, R. J., and Chapman, J. W., (eds), *Human Rights*, (Nomos XXIII), (N.Y.U.P., 1981) 230, at pp.240 et seq.

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educational opportunity and the aims that education should pursue. The problems lay in how this concept should be implemented.

The U.N. debate was echoed on smaller (and briefer scale) in Western Europe. The outcome was not dissimilar in that the traditional negative liberties were enshrined in the European Convention of Human Rights coupled with its enforcement machinery, whereas the economic, social and cultural rights were placed on the European Social Charter (ESC).⁽²¹⁾

The right to education has been classified in various ways. It could be classified as a cultural right⁽²²⁾ the role that education plays in cultural transmission would certainly justify this. It could also be considered a social right⁽²³⁾ in particular because as we have noted its extent and content will vary according

21. See below chapter seven.

22. Dinstein, Y., 'Human Rights: The quest for concretisation', (1971) 1 *Israel Ybk H.R* 13 at pp.17, 24, 25.

23. See chapter seven above. Wilhaber, L., *Report at the Fourth International Colloquy about the ECHR*, (Council of Europe, Rome, 1975), 141, at pp.149 et seq.

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to the society in which it takes place.⁽²⁴⁾ Arguably it could be considered an economic right from the point of view of its role as a major distributor of 'life chances' and economic potential amongst individuals.

+ civil r. =

+ freedom r.

Aspects of the American draft Protocol will allow an expansive and evolutive interpretation to the right to education as the level of educational development in the Americas progresses. The Protocol as currently drafted seems to support the present writer's contention that the right to education has been emerging from its civil-political rights classification shell.

Previously it had never been considered as a civil or political right.⁽²⁵⁾ Thus at first impression it seems odd that the ECHR should include amongst the rights that it protects the right to education. The Western states in the United Nations resisted the inclusion of social, cultural and economic rights in the

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24. Recognised by the European Court of Human Rights in the *Belgian Linguistics* case, see above chapter seven. Waltzer, M., 'Justice here and now' in Lucash, *op.cit.*, p.136 at pp.140-141.
25. Thus appearing for example in the Covenant on Economic Social and Cultural Rights, Article 13. U.K.T.S. 6 (1977).

CONCLUSIONS:

International Bill of Rights.⁽²⁶⁾ However we have shown in the chapter one that the right to education requires a balance between the interests of the state and parents and children. Civil and political rights are consistently concerned with this matter, thus the parental role (elaborated in the second sentence of article 2P and in article 18 of the International Covenant on Civil and Political Rights) might initially justify its inclusion in the ECHR, (the child's rights being protected by the first sentence of article 2P).

It is recognised that initially the right to education was included mainly to protect the liberty interests of parents not to have their children totally under the subjugation of state directed education. From this beginning the rights of the child have increasingly become recognised. The trend in the European jurisprudence has been to recognise the child's separate interest in education. The formulas in the proposed draft additional Protocol to the A.C.H.R. confirm this trend. The trend was undoubtedly started in the U.N. forum where the aims of education were so explicitly stated, and where now there is forming a draft Convention on the Rights of the Child.

26. , Though they were not averse to seeing the right to education included in the 'non-binding' Universal Declaration of Human Rights.

CONCLUSIONS:

C. As worked out in practice

1. Upper Silesia

We see that the scope of international law has extended enormously in the field of human rights. The first signs of inter-governmental or supranational supervision of a state's performance in the area of protection of the right to education came with the Minority treaties and were especially evident under the Upper Silesian regime.

The prime educational provisions related to the guarantee of public schooling. In the general minority regimes this meant that where there was a "considerable proportion" of a minority in a given area, then the state schools had to provide primary teaching in the native tongue of the minority though it could also impose the learning of the national tongue.²⁷ Any public funds used to support private schooling had to be shared "equitably" with the minority group. The right to establish private schools was not directly granted, but in the *Minority Schools in Albania* case²⁸ the P.C.I.J. found that such a right was in fact guaranteed. The majority of the Court assessed that the equality required under the Albanian minority regime was one of outcomes. The minority required differential treatment to ensure its continued survival. The Court here recognised

27. Above chapter three.

28. Above chapter three.

CONCLUSIONS:

the importance of schools as cultural transmitters. This was one of many reasons why the burdened states disliked the minority system, it forbade using the schools as "nation-builders", it stopped the "socialisation" process and prevented the implantation of national culture. This was particularly serious for reconstituted nations. It possibly explains for reason for the low profile given to minority rights in the U.N. system. Nation states were unwilling to disallow themselves from "assimilating" minorities.⁽²⁷⁾

The Upper Silesian regime was far more complete than the general minority treaties. Public "minority schools" and minority classes in non-minority schools were available on demand⁽³⁰⁾ and special language and religious courses were also to be made available on parental demand. The schools and their staff were to be treated equally financially with state schools and their staff. The School Committees that ran the school were to be dominated by parents of pupils. The teachers were to be of the minority group and special training facilities were to be provided to supply "minority" teachers. Private schooling was guaranteed subject to minimum standards.

Beyond these guarantees the states also undertook not to use teaching materials that were offensive to the minority group and not to "deprecate the national or intellectual qualities" of the other

29. See above chapter four.

30. See above chapter three.

CONCLUSIONS:

Party to the Treaty in their school lessons. Clearly these were rules designed to limit the state's power to socialise its citizens. One can conclude that a pluralistic society was considered very important by the treaty drafters, though it is recognised that power politics played a major role in establishing these Treaty regimes. It can be seen that international regulation of state educational provision is readily overseenable at an international level. The machinery established had flaws but also offers valuable lessons from a procedural point of view.⁽³¹⁾

2. U.N.

Amongst the Western states taking part in the debates that led to the adoption of the treaties in question, the question of state intervention in the provision of educational facilities was a political battle of yesteryear, even if the state involvement only amounted to providing financial support for the private sector⁽³²⁾ rather than direct educational provision by the state itself (which was more usual). The political and economic factors leading to the creation of national educational systems have been analysed in part three of the thesis as regards the ideological and religious factors. Social and economic factors were clearly also important. Given the existence of extensive state-supported educational facilities, and

31. See below p.1037.

32. As in Ireland.

CONCLUSIONS:

the acceptance of the state's role in the matter of education by Western states. it is not altogether surprising that the question of enshrining a right to education did not meet firm Western resistance on the grounds of liberal rejection of a state's role in this matter. Opposition to direct enforceability of the right was mainly directed to the problems that developing nations would encounter if such a right was to be made "legally enforceable".

Though the West did not, in the end, oppose educational rights on ideological grounds they did have particular concern to ensure that the state should not have a monopoly in educational provision, and that education should be pluralistic and not monolithic. In particular the systems should reflect societies where civil and political freedom reigned. The parental right to control the upbringing of a child, particularly as regards religious and moral education, had been, on occasion, a hard-fought battle in the development of national educational systems. it lay moreover at the root of a liberal and pluralistic society, and was uppermost in many minds during the early stages of the drafting of the Bill of Rights as a result of the recent fascist excesses. This parental right was considered to be a typical "negative liberty" in the liberal mould. The state should not be allowed to interfere in its exercise, but should not be required to make it a reality (by for example the provision of funds to allow wide parental choice). However as regards

CONCLUSIONS:

religious and moral upbringing the state could allow exemptions³³ with no cost or necessary involvement itself in the provision of such education. Thus this aspect of educational rights could be considered by the West a typical civil and political right; hence its inclusion in the International Covenant on Civil and Political Rights, and the First Protocol to the ECHR is no surprise.

Does the International Covenant on Economic, Social and Cultural Rights demand positive state action in the realm of education? The treaty clearly attempts to realise the aims espoused by the Universal Declaration. As article 22 of the Universal Declaration of Human Rights observed

Everyone as a member of society, ... is entitled to realization, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic and cultural rights indispensable for his dignity and the free development of his personality.

The relevant chapters of part two indicate what types of education should be subsidised and considered available as "of right". The extent of state action required under the Covenant (and UNESCO Convention Against Discrimination in Education) is clearly set out therein. It has been argued in chapter five that the draft Convention on the Rights of the Child seems to a step back from these wide requirements.

33. The UNESCO CDE wording on religious upbringing was the result of a US proposal.

CONCLUSIONS:

The guarantee of parental rights is also enshrined in the universal treaties on human rights.

3. E.C.H.R.

The classification of rights is a useful notion when it comes to analysing the content of the right as enshrined in the European Convention on Human Rights. If the right to education is classified as a socio-economic and cultural right then it would seem to imply that the European states agreed to subsidise education. This poses questions such as, does the ECHR demand positive state action of the realm of education? The ECHR was an attempt to realise the aims espoused by the Universal Declaration. Chapter seven, of part two, indicates what types of education should be subsidised and considered available as "of right" In summary the author has argued that the ECHR (and ESC) demand some positive state action. The extent of the action required under the European treaties, it has been argued above, depends on the individual's requirements and intentions. This accords with the principles of equal opportunities and pluralist outcome analysis. The child is to be free to choose his (vocation) opportunity and role in life. As the Draft Convention on the Rights of the Child expresses it (in articles 15 & 16):

Article 15(1) The States Parties to the present Convention recognize the right of the child to education and, with a view to achieving the full realization of this right on the basis of equal opportunity, ...

CONCLUSIONS:

Article 16(1). The States Parties to the present Convention agree that the education of the child shall be directed to:

- (a) The promotion of the development of the child's personality, talents and mental and physical abilities to their fullest potential and the fostering of respect for all human rights and fundamental freedoms.
- (b) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance and friendship among all peoples, ethnic and religious groups.

...

Other "Western style" educational rights that one might expect to find, especially in a purely Western human rights instrument, would be the guarantee of the *liberté de l'enseignement*. As chapter seven of Part two has shown this is fully ensured under the European system of guarantees.

D. Implementation problems

1. International Level

a. Upper Silesia

The local fact-finding and initial dispute resolution procedures were very effective in stopping the state from blandly denying the existence of a problem. The procedure enabled the facts to be soundly established *in situ*. It also afforded a hearing and investigation into complaints by members of the Minority, undoubtedly

CONCLUSIONS:

a great psychological help.³⁴ It also helped to dissipate inter-state tensions aroused by "mis-treatment" of minorities in neighbouring states. Although it was not seen that way by the League secretariat the lack of internal legal remedies (despite article 1 of the Treaty) was a weakness in the system. The President only issued advice, which was not legally enforceable, and was sometimes ignored. This would not have been a grave problem had the petition system set up worked. But here it became quite evident there was an institutional mismatch. The central enforcement agency was the Council of the League of Nations. This quickly tired of the embarrassments of dealing with petitions and effectively tried to silence the petition procedure. The Council was more concerned with the great issues of war and peace. The closure of a minority school was seemingly a question beneath its dignity, and certainly a question over which it wished to devote as little time as possible. What profit was there for members of the Council to adjudicate such delicate "internal issues"? Here lack of a specialised dispute resolution body was a critical factor in the failure of the system. The Council of the League was simply overwhelmed by the "petty" squabbles. The lessons from this seem to have been learnt to the extent that the post 1945 treaties dealing with human rights all established specialised institutions to deal with "petitions" (to the extent that they were allowed at all). There was however a benefit to

34. It was clearly hard work for the President of the Mixed Commission. See above chapter three.

CONCLUSIONS:

having a high profile exposure of minority problems in the Council of the League. The simple pressure of potential exposure in the Council was enough, in many cases, to cause a settlement. Publicity is currently the major "sanction" under the U.N. International Bill of Rights. The International Bill of Rights does not allow any "petition" or report on human rights to come anywhere near the Security Council, unless peace and security are threatened.

The advent of the United Nations brought a fresh approach to the question of educational rights in International law.

b. U.N.

The U.N. Covenants have established, to that extent that international oversight was at all welcome, that some form of special body should oversee the implementation by states of the human rights norms. The Civil and Political Rights Covenant has a special Human Rights Committee, and the Economic and Social and Cultural rights are 'policed' by the new Committee on Economic, Social and Cultural Rights. Both bodies are made up of independent experts. But neither can issue a legally binding ruling. Thus they have the benefit, missing from the League system, of a specialised forum of experts, but lack what the League had, the right to bind states. ✎

This reversal is accounted for by the fact that the League Treaties were forced on unwilling states, whereas the U.N. Covenants are entirely a voluntary matter for each state. Better a gradual acceptance and development of the norms through a weak, but expert,

CONCLUSIONS:

system, than no form of international control whatsoever. Already one can see progress in the establishment of the international control mechanisms.⁽³⁵⁾ Thus the body dealing with Economic, Social and Cultural rights has evolved into a body of independent experts, instead of the original sessional working group of government representatives. The Human Rights Committee has established far-reaching rules on admissibility, and advanced the interpretation of the Civil and Political Covenant by issuing its general comments. Moreover it has a growing body of case-law under the Optional Protocol.

The universal treaties rely to a great extent on state self-reporting. This is exclusively so in the field of the economic, social and cultural rights. The draft Convention on the Rights of the Child also seems to be heading in this direction. There have proved to be weaknesses in adopting this approach, designed to lead to consensual development and application of the norms. Many states have failed to report. Whilst the experience of UNESCO under the CDE suggests that it is mainly the third world states who have failed to fulfil this (not too onerous) duty, it is not exclusively so. Thus for example Belgium has yet to report under the ESC Covenant, as well as under the Recommendation against Discrimination in Education. Additionally many of the reports received are inadequate. They are comprised of bland statements, or, even when quite detailed, they

35. This work leaves aside the important general control established by Resolution 1503.

CONCLUSIONS:

fail to give the necessary statistics to enable proper evaluation of the state's performance. This weakness is exacerbated by the lack of independent fact-finding ability. To counter this weakness the practice has developed of asking states for further and better information, which when received, is added to the record. Also the NGO's play a vital role in 'priming' the independent experts, as well as elucidating factual information in well-received independent Reports. It is a pity that no NGO has yet seen fit to co-operate in the UNESCO procedures where a useful role could be performed. The Summary Records of the Independent Experts (e.g. Human Rights Committee) are vital for assessing the performance by states of their human rights obligations.

CONCLUSIONS:

c. W.Europe

The European Advantage

(a) Existence of extensive educational infrastructure.

As we saw in part Three (for three not untypical West European states) there are extensive national educational systems. These are not necessarily all state-run or controlled, but the mere existence of the massive educational investment in buildings, teachers and administrators, from whatever source the investment may come, means that individual rights in education emanating from external fora (though agreed by the states concerned) are more likely to be respected and achieved. The educational focus is not so much on basic education (to achieve literacy and numeracy) as to foster individual success.

(b) Existence of legal infrastructure

It is quite apparent that at the European level there is a wider acceptance of "regional" international legal intervention in "essentially domestic affairs". This is most evidenced by state acceptance of the normative supremacy of Community law. Domestic courts have, in the main, been successfully wooed by the jurisprudence of the ECJ. Though it is less clearly accepted in practice and in legal theory, the impressive case-law, and history of compliance with, the jurisprudence of the ECHR is also evidence of state willingness to compromise to the interest of regional norms. This background of regional solidarity, supported by direct legal

CONCLUSIONS:

access to domestically enforceable remedies (in the case of Community law) is not as sophisticated anywhere else in the world. The network of overlapping legal systems and increasing habit of reliance in domestic forum of extra-national legal norms bodes well for the legal enforcement of pan-European or even wider legal norms detailing educational rights. The reliance of an individual on external legal norms will be received more openly in Western Europe than elsewhere in the world, this bodes well for implementation of international educational rights.

The post war impetus to integration also strengthens the possibility of internationally enforceable rights in education being concretised.

(c) The ECHR mechanisms

These are too well-known to bear much further exposition here. Suffice it to say, that not only are individual complaints receivable, and reviewable by specialised bodies, but also there is the facility for independent fact-finding. Whilst this seems a great advance on what is available at the universal level, it is to be remembered with humility that it is not as sound a system as that established by the League under the Minority treaties. There is no permanent, local fact-finding and adjudicative body. The current *Rice & Boyle* case is critically important here. If the European Court rules that articles 1 and 13 of the ECHR mean that a state must incorporate the Convention into its own legal system then the European human rights system will surpass the League model. the

CONCLUSIONS:

national courts and legal procedures will act as local overseers.⁽³⁶⁾

2. National Level

a. Giving and Taking Ideas

Many of the ideas now codified in international human rights law began life in Western Europe. France was particularly prominent in publicising some of these principles. Thus we see the idea of universal indispensable education emerging during the French revolutionary period, where it was legally enshrined.⁽³⁷⁾ The idea of state "neutrality" in educational provision also arose from the same source. The application of the principle of equality in education is also present there.⁽³⁸⁾ Deschooling too was mooted.

State provision of mass educational resources, which mainly occurred during the nineteenth century, (the democratisation, or spread of mass secondary education being a late twentieth century development) as regards primary education was, in fact, not dispensed with such high motives as the Irish experience in particular shows.

36. Much as has been achieved by the European Community legal order, though perhaps without its "supremacy" aspects.

37. See above p.698.

38. The idea of the *maisons d'égalités*.

CONCLUSIONS:

Schools were blatantly used to further governmental interests.⁽³⁷⁾ This clearly included socialisation of the population and nation-building. (Hence the emphasis of language domination by English and French for example).

On the eve of the development of the international legal regulation of this sphere of national life the states under study had already established the necessary educational provision. Only Ireland, recently (re)established as a state in its own right, of the three studied, still was in the process of nation-building. Thus it is not altogether surprising to find some of its educational regulations fall foul of the European and international⁽⁴⁰⁾ standards (language provision, neutrality).

For the mass of states in the world some of the principles

39. The thesis, in part three, explaining the evolution of the educational systems makes this clear. It does not deal, except marginally, with the sub-strata socialisation aspects of educational provision, that of class reproduction. Also Cherkaoui, M., 'Socialisation et conflit: les systèmes éducatif et leur histoire selon Durkheim', (1972) XVII *Rev. fr. de sociologie* 197; Ballion, R., 'Enseignement privé enseignement refuge?', (1974) 29 *Rev. fr. de Pedagogie* 39. Also famous works such as Tawney, *Equality*.
40. It is perhaps not surprising, in this light, that Ireland has yet to ratify the international Covenants.

CONCLUSIONS:

established now in the international legal order are a great deal to swallow for this reason.

In western Europe the gradual dismantlement of nation states, that has been taking place since the end of World war two, makes it easier for states to accept the loss of control implicit in the internationalisation of educational norms. In their security they can more easily tolerate pluralism,⁴¹ the promotion of equal opportunity, and the protection of human rights. Indeed it almost seems that the self-propelled motion of integration compels loss of sovereignty in this sphere. A loss that favours mainly the individual recipients of education, not the Euro-institutions as such.⁴²

b. Role of International law

The reception of public international law by the three European states studied shows a fairly generous and expanded post-World War acceptance of international legal norms. A monist culture is now available in both France and Belgium. This means that individuals can directly rely on "directly applicable" norms. The Conseil d'Etat in France has not yet fully adapted to this new position. In Belgium the ruling of the European Court of Human Rights

41. Cf. FRG ban on communist party case. Application 250/57 v FRG, 1 Ybk.E.C.H.R. 222.

42. Note though the creeping EEC involvement in educational matters. See chapter 7, note 116.

CONCLUSIONS:

international norms preventing such a violation of the child's rights occurring.⁴⁵ Equally no state party to the ECHR (and arguably the other international treaties protecting this right) can lawfully now decide to do away with private education, or the right of parents (within limits) to educate their children as they choose.

Furthermore the first tentative steps have been taken by international law in dictating what must be taught in state schools. This development is at its most advanced within Western Europe but even there is still in its infancy. This issue is examined in the next section.

IV. THE POTENTIAL OF INTERNATIONAL LAW: (Western Europe)

A. The Decline of nationalism and rise of integration

It is possible, and the present writer has noted above, that the nationalistic socialisation encouraged in state systems of education is beginning to be challenged at the international level. The minority regimes, as we have seen forbade denigration of the minority and promoted pluralism. The work of UNESCO in this field has

45. This may seem an abhorrent violation of free speech from the other side of the Atlantic where the Federal government has studiously avoided international constraints by the simple expedient of not becoming a party to the main human rights treaties.

CONCLUSIONS:

in the *Belgian Linguistics* case affected a very sensitive domestic position as regards the language to be taught in schools.⁽⁴³⁾ In Ireland the acceptance of the international human rights norms by the government, and probably by the domestic courts, is shortly to be tested by the *Norris* case. The way the European Court of Human Rights rules will give an important indication of the flexibility of the Convention rules, and if the case goes against Ireland the reception accorded to the judgment there will be interesting to observe.⁽⁴⁴⁾

One can predict an increase in litigation in all three states as the norms of the Convention become more well-known and available in domestic courts. As the norms evolve increasingly the states will find their room for internal political movement on the question of educational (and other) rights constrained. Increasingly the new international institutions will, by their development of the norms themselves, set the political agenda. Already the internal educational debate within Europe is constrained. For example no longer is a parent free to impose totalitarian or other anti-democratic ideals on his children. The debate is constrained by the

43. As well as numerous cases decided by the Commission of Human Rights.

44. In this connection one can recall the charges of "foreign meddling" that greeted the *Campbell & Cosans* case in the U.K. See chapter seven above for reception of the *Ireland v U.K.* judgment.

CONCLUSIONS:

only started to scratch the surface, but is in the same direction⁽⁴⁶⁾. The draft Convention on the Rights of the Child expresses its concern in article 16(1)(d) whereby states agree that the child's education must be directed to:

The development of respect for the child's own cultural identity and values, for the national values of the country in which the child is living, for civilisations different from his own, and for human rights and fundamental freedoms.

In the European dimension, the social values to be transmitted by education are not yet legally imposed at the regional level. In contrast to the universal instruments on human rights the aims of education are not spelled out in the ECHR, though the principle of equal opportunity is present in the ESC. However there is increasing pressure in this direction. The Teachers handbook on Human Rights, promoted by the Council of Europe, is an example. The increasing integrationist pressures from the drive to mutual recognition of diplomas and certificates, at both the E.C. and Council of Europe levels are further indicators of this trend. The European system does prevent certain matters being taught in schools in a particular way. The tolerant and pluralistical method of teaching knowledge is now part of the case-law of the European Court of Human Rights (and of the Human Rights Committee). This trend to legalisation of the right and increasing integration is likely to accelerate.

46. See chapter two, section C.

CONCLUSIONS:

V. THE INDIVIDUAL TRIUMPHANT?

The right to education is clearly a social-cultural right, and it requires that the state recognise the interest of the child in its own development.⁴⁷ At the international level there is obviously no agreement on the question of ultimate outcomes and distribution of social goods, but there is for the recognition of the individuality of each human, and his right to develop his personality according to such innate ability, talent and desire as he may possess. This especially evidenced in the current drafting of the Convention on the Rights of the Child.

The state is permitted a socialising role, but pluralism is guaranteed. This is most strongly stated at the regional levels, though it was selectively present in the early twentieth century minority rights provisions.

The right to education is increasingly being recognised as imposing burdens on states, moving to a position where positive implementation is required. In the European system this *de facto* has occurred at least as regards elementary education, but with no formal recognition that this is so. The present writer has argued that the right to be logically consistent, and with a touch of literalism in

47. At the national level the child's interest is also increasingly recognised. E.g. *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 W.L.R. 830.

CONCLUSIONS:

interpreting the right, should permit an individual the right to a well-rounded education. Thus a state would not be permitted to leave out any important "area of knowledge" in its educational provision. X

As, and if, resources increase the right could expand to allow recipients to fully develop their talents. This interpretation is fully in accord with the International Covenant on Economic Social and Cultural Rights and CDE.

Ranged against the vision and principle of a personally-tailored post-primary education, outlined above, lies the sanctified principle of equality. Though it is not present as such in the ECHR⁴⁸ it is heavily present in the universal instruments protecting human rights.⁴⁹ Clearly state provision that is keyed to personal aptitudes and talents will not be an equally distributed social good in either the sense of equal inputs or equal outcomes. The principle of equal opportunity though, seems to necessarily result in unequal distribution of educational resources. In a free society perhaps the treatment of each according to his (educational) needs is a sound principle.

****THE END****

48. See *Belgian Linguistics Case*.

49. Generally see McKean *op.cit.*.

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PERIODICAL ABBREVIATIONS USED

A.F.D.I.	Annuaire française de droit international
A.J.C.L.	American Journal of Comparative Law
A.J.D.A.	Actualité juridique de droit administratif
A.J.I.L.	American Journal of International Law
A.J.S.	American Journal of Sociology
A.R.S.P.	Archiv fur Rechts- und Sozialphilosophie
B.T.R.	British Tax Review
B.Y.I.L.	British Yearbook of International Law
Brooklyn J.Intl.L	Brooklyn Journal of International Law
C.D.E.	Cahiers de droit européenne
C.H.R.L.R.	Columbia Human Rights Law Review
C.I.L.J.	Cornell International Law Journal
C.J.T.L.	Columbia Journal of Transnational Law
C.L.J.	Cambridge Law Journal
C.L.P.	Current Legal Problems
C.M.L.Rev.	Common Market Law Review
Case W.R.I.L.J.	Case Western Reserve International Law Journal
Col.L.R.	Columbia Law Review
Comp.Ed.	Comparative Education
Comp.Ed.Rev.	Comparative Education Review
D. Chr.	Dalloz Chronique
D. Jur	Dalloz Jurisprudence
E.L.Rev.	European Law Review
Eur.J.Ed.	European Journal of Education
H.E.R.	Harvard Education Review
H.I.L.J.	Harvard Journal of International Law
H.R.L.J.	Human Right Law Journal
H.R.Q.	Human Rights Quarterly
H.R.R.	Human Rights Review
I.C.L.Q.	Interntional and Comparative Law Quartely
I.J.I.L.	Indian Journal of International Law
Int. Lab.Rev.	International Labour Review
Int. Rev. Educ.	International Review of Education
Int.Org.	International Organisation
Int.Soc.Sc.Bull.	International Social Sciences Bulletin
Ir. Jur.	Irish Jurist
Is.Ybk.H.R.	Israel Yearbook of Human Rights

LIST OF PERIODICALS

J.B.I.I.A.	Journal of the British Institute of International Affairs
J.L. & Educ.	Journal of Law and Education
J.T.	Journal des Tribunaux
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
N.I.L.Q.	Netherlands International Law Quarterly
N.I.L.R.	Netherlands International Law Review
N.Y.U.I.L.R.	New York University International Law Review
Ohio S.L.J.	Ohio State Law Journal
Ox.J.L.S.	Oxford Journal of Legal Studies
P.L.	Public Law
Pol.Ybk.Int.L.	Polish Yearbook of International Law
R.B.D.I.	Revue Belge de droit international
R.C.J.B.	Revue critique de jurisprudence belge
R.D.H/H.R.J.	Revue du droits de l'homme
R.D.P.	Revue du Droit Public et de Science Politique en France et à l'étranger
R.G.D.I.P.	Revue generale de droit international public
R.I.D.C.	Revue International de droit comparé
R.Ins.Soc.	
R.T.D.E.	Revue trimestrielle de droit europeenne
Rec. des Cours	Recueils des Cours
T.I.L.J.	Texas International Law Journal
Univ.Penn.L.R.	University of Pennsylvania Law Review
Vand.L.R.	Vanderbilt Law Review
Y.L.J.	Yale Law Journal
Ybk.E.L.	Yearbook of European Law
Ybk.ECHR	Yearbook of the European Convention on Human Rights

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