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Foreword

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The Human Rights Centre at Queen's University Belfast celebrated its 25th anniversary during 2015–2016. Throughout its history the Centre has sought to enhance the quality of debate around human rights issues, whether local, national or international. It has organised innumerable conferences, seminars and guest talks. It has facilitated various research projects and training initiatives. And it has been centrally involved in the delivery of Masters programmes – first the LLM in Human Rights Law and then the LLM in Human Rights and Criminal Justice. The Centre is proud of the role it has played in attracting top-notch staff and graduate students to the university and has plans to develop that role still further in the coming years.

As an additional vehicle for publicising the work of the Centre, an agreement was reached with the Editorial Board of the *Northern Ireland Legal Quarterly* for the production of a Special Issue of the journal focusing on a particular human right. We were privileged to be appointed as joint editors of the Special Issue and decided to choose the right to education as the focal point for discussion. We felt it would allow for a mixture of articles highlighting the importance of the right internationally as well as its salience within Northern Ireland. After a call for papers, we were pleased to select the four articles that follow, which we have supplemented with our own piece advocating a much broader approach to the protection of children's right to be educated in a manner which empowers them to think and act as global citizens – their right to education for humanity.

Foluke Ifejola Adebisi argues passionately for a reframing of the right to education within the continent of Africa. She trenchantly critiques the ways in which the colonisation of Africa has detrimentally impacted on children's education there and she points to steps that can be taken to revive the indigeneity of learning processes. Elizabeth Craig's article provides a fascinating insight into how the right to education is being protected as far as minorities in Bosnia-Herzegovina (BiH) and the Former Yugoslav Republic of Macedonia (FYROM) are concerned. She shows how implementation of the right has been variable but maintains that the approach being advocated by the Organization for Security and Co-operation in Europe's High Commissioner for National Minorities has the required flexibility to strike an appropriate balance between accommodationist, assimilationist and integrationist tendencies, though much more successfully in FYROM than in BiH.

The remaining two articles take a detailed look at specific issues affecting the right to education in Northern Ireland. Orla Drummond examines whether new legislation on children with special educational needs will make a real difference to the realisation of their rights. She is forced to conclude that expectations may be disappointed unless and until further improvements are made to the mechanisms in place for allowing children's views to be taken fully into account. Patricia O'Lynn's article considers the provision made in Northern Ireland for 'education other than at school'. She finds that thousands of children are being failed by the current arrangements and that fresh thinking and greater resources are required if such children are to be given better life chances.

We are very grateful to our contributors for their diligent co-operation in the production of this Special Issue. We hope the collection will help to promote reforms that will benefit future generations not just in Northern Ireland but further afield too. The Human Rights Centre at Queen's University Belfast will maintain a keen interest in the area and is open to receiving suggestions for further collaborative research.

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The right to education for humanity

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Abstract

This article begins by briefly surveying relevant international human rights law concerning the right to education and critiques its failure to guarantee children an education which is free from parental and/or religious domination. It then makes a positive case for guaranteeing children the right to 'education for humanity', meaning an education which equips them to be citizens of the world rather than captives of a particular creed, view of history or community tradition. It argues that conflicts could be reduced if schools were to focus on conveying an understanding of a wide range of beliefs and cultures. The piece then tests this position by considering the current education system in Northern Ireland, looking at six dimensions to the ongoing influence of religion on that system. It makes some suggestions for reform and ends with a more general proposal for a guaranteed right to education for humanity worldwide.

INTRODUCTION

International human rights law (IHRL) protects the right to education, but in a rather half-hearted fashion. To date the relevant legal standards have focused on giving everyone, especially children, the right of equal access to educational opportunities. They say much less about the type of education that should be provided. There is an expanding literature on the desirability of enforcing a right to education *about* human rights, but this too has a rather narrow focus, seeking only to broaden awareness of the actual and potential role of human rights in the world.[1] Part of the reason for this stunted evolution of the right to education is, we would submit, an undue deference to the diktat of parents in relation to how their children should be educated. This article argues that if IHRL is to keep pace with progressive thinking it needs to develop a right to 'education for humanity', where the goal of education is the development of 'citizens of the world', people who can play a full and active role in any society, regardless of the family or community setting into which they happen to be born. To be able to play this role, everyone will need to be equipped not just with communication skills, information technology awareness and mathematical and scientific knowledge, but also with an adequate understanding of the significance of

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1 See e.g. Gudmudur Alfredsson, 'The Right to Human Rights Education' in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* 2nd rev edn (Martinus Nijhoff 2001) 273–88.

different beliefs, cultures and histories. Having made a general case in favour of a right to education for humanity by outlining the way in which the right to education is currently protected by IHRL and considering the appropriate role of religion in education, the article seeks to examine what such a right would entail in the specific context of Northern Ireland, a society emerging from a long period of conflict yet where the vast majority of children are still educated differently depending on the religious beliefs of their parents.

The right to education in international human rights law

In proclaiming the Universal Declaration of Human Rights (UDHR) in 1948 the General Assembly of the UN stated that its goal was 'that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms'.[2] This is a ringing endorsement of the idea that unless all people are made aware of the importance of respecting rights and freedoms, the foundations of justice and peace in the world will be at risk. The UDHR goes on, in Article 26(1), to confer on everyone the right to free 'elementary and fundamental education'. Article 26(2) requires education to 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.

The UDHR was not the first occasion on which an attempt had been made to require states to protect the right to education, but earlier attempts were confined to protecting the right to education of minorities. They focused on allowing those minorities to set up their own schools and to be educated in their own languages.[3] The UDHR's provision was pre-empted a few months earlier by Article 12 of the American Declaration of the Rights and Duties of Man (ADHR) which asserted that every person has the right to an education, that it should be based on the principles of liberty, morality and human solidarity and that it should prepare the person to attain a decent life, raise his or her standard of living, and be a useful member of society.

So far so good. Unfortunately, the further development of the right to education was jeopardised by two developments. One was the tendency of standard-setting bodies to concentrate on a narrow definition of education, restricting it in effect to instruction provided by schools or colleges.[4] This side-lined the wider definition of education adverted to in Article 26(2) of the UDHR. The other was the enhanced focus which was given to Article 26(3) of the UDHR which states that '[p]arents have a prior right to choose the kind of education that shall be given to their children'. The prioritisation of parental rights over children's rights was the result of a concession to certain states which did not want their 'national' approach to education to be undermined by a model imposed by an external authority. In this paper we submit that IHRL took a wrong turn at this juncture. It followed a path which effectively suppressed the right of children to be educated in a way which would best fit them for a free, tolerant and peaceful world. Instead, IHRL allowed the religious prejudices of parents to be dominant in their children's education.

2 The proclamation uses the word 'end' rather than 'goal'; we have used the latter term for the sake of clarity.

3 See generally Klaus Dieter Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff 2006) 431–5.

4 Beiter explains that the right to education as protected by international instruments 'refers primarily to education in its narrower sense': ibid 19.

The UDHR's provisions on education were first given binding legal force when they were largely transposed into UNESCO's Convention against Discrimination in Education in 1960.[5] Article 5(1) of that convention provides that states parties agree that:

> It is essential to respect the liberty of parents and, where applicable, of legal guardians . . . 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.

Perhaps contrary to an average reader's initial expectations, the word 'own' in the fourth line of this provision is a reference to the parents' convictions, not their children's. Further force was given to the UDHR's approach by the two international covenants which were agreed in 1966. The first of these, the International Covenant on Civil and Political Rights (ICCPR), mentioned education only when repeating, in Article 18(4), the duty on states to respect the liberty (not the right) of parents and legal guardians 'to ensure the religious and moral education of their children in conformity with their own convictions'. Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) contained a similar provision,[6] again confirming and expanding upon the content of UDHR Articles 26(1) and (2).[7]

Today the emphasis given to parental rights as regards their children's education should be seen as incompatible with the extensive international law on children's rights, a category of rights which the UDHR and the two Covenants barely recognised,[8] but which has since attracted much attention. The UN Convention on the Rights of the Child (CRC), agreed in 1989, makes no direct mention of a parent's right to control his or her child's education.[9] In fact, at least two of the CRC's provisions can be read as requiring children to be protected against such control. Article 2(1) requires states to ensure that rights in the CRC are granted to each child within their jurisdiction without discrimination of any kind, irrespective of his or her parent's or legal guardian's religion (or any other status). Article 29(1)(c) requires states to ensure that the education of a child is directed

5 This is binding on 101 states, including the UK but not Ireland, though no state has ratified it since 2013. Under Article 7 states parties must, in their periodic reports submitted to UNESCO's General Conference, provide information on the legislative and administrative provisions which they have adopted and other action which they have taken to comply with the Convention. These reports are considered by a Committee on Conventions and Recommendations, which produces one overall analytical summary report every six years, the most recent being in 2013. See UNESCO's *Right to Education: Comparative Analysis* (2006): <http://unesdoc.unesco.org/images/0014/001459/145922e.pdf>.

6 Article 13(3). This too refers to the parents' *liberty*, not *right*.

7 E.g. Article 13(2) introduces the concept of secondary education and says it must be made 'generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education'; it also refers to 'fundamental education' and says it must be 'encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education'. For an exhaustive analysis of Article 13 see Beiter (n 3) 459–569.

8 The only other reference to a child in the UDHR is in Article 25(2), which guarantees special care, assistance and social protection to all children. The ICCPR briefly mentions the rights of children to be protected, in Articles 14(1), 23(4) and 24; Article 12 of the ICESCR simply mirrors Article 25(2) of the UDHR. For a good overview of the relevant IHRL, see Manfred Nowak, 'The Right to Education' in Eide et al (n 1) 245–71.

9 Nor does the World Declaration on Education for All, issued in Jontiem, Thailand, in 1990 and subsequently endorsed by UNESCO: <http://unesdoc.unesco.org/images/0012/001275/127583e.pdf>. In the words of Eva Brems, 'Between 1966 (the ICCPR) and 1989 (the CRC), parents have lost the right to determine the religious education of their children. They are left with an accessory right to support the child in the exercise of his or her own right.': 'Inclusive Universality and the Child–Caretaker Dynamic' in Karl Hanson and Olga Nieuwenhuys (eds), *Reconceptualizing Children's Rights in International Development* (CUP 2013) 199–224, 209.

to the development of respect for the child's parents but also insists that it must be directed to the development of the child's own cultural identity, language and values and to respect for civilizations different from his or her own. A denial of these latter aspects of education constitutes a clear violation of the CRC, but this would be a breach of a duty rather than of a positive right. Nowak is correct when he stresses that:

> *Only the children themselves seem to have no right to choose their own education* under present international law . . . [F]rom the point of view of modern educational theories considering the liberation (and non-indoctrination) of the child as the major aim of education, it is doubtful whether present international law affords sufficient protection to children to choose their kind of education by themselves.[10]

We do not argue, of course, that parents should not be allowed to have some influence over the religious beliefs of their children. We do assert that this influence should not be allowed to extend to the kind of school the children attend (if publicly funded) and nor should it be exercisable when the child is of a maturity to express his or her own informed choice as to what religious beliefs to hold.

Regrettably, and unnecessarily, a similar model was adopted when the Council of Europe drafted the European Convention on Human Rights (ECHR) in 1950. Delegates could not agree on the inclusion of social or economic rights in the ECHR and instead waited a further 17 months before including some of them in what is now known as the First Protocol to the ECHR. More particularly, the drafters were keen to ensure that the kind of indoctrination of children which had been practised by the Nazis should never again be repeated,[11] but on account of their controversial nature the rights in the First Protocol were framed in less categorical terms than most of the rights in the ECHR itself. Article 2 of the First Protocol (A2P1) stipulates, rather weakly, that:

> 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.

To date 45 of the 47 member states of the Council of Europe have ratified the First Protocol, but many of them have entered reservations or declarations relating to Article 2.[12] Macedonia's reservation states that 'the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions cannot be realised through primary private education', while Ireland's declaration states that A2P1 is 'not sufficiently explicit in ensuring to parents the right to provide education for their children in their homes or in schools of the parents' own choice'. The Netherlands has gone as far as declaring that 'the State should not only respect the rights of parents in the matter of education but, if need be, ensure the possibility of exercising those rights by appropriate financial measures'. By way of contrast, Germany, Moldova and Romania have all declared that A2P1 precludes additional financial obligations for the state in respect of philosophically or religiously oriented schools. The UK has accepted the principle in the second sentence of A2P1 'only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'. Malta's declaration is similar but adds 'having regard to the fact that the population of Malta is overwhelmingly Roman Catholic'.

10 Nowak (n 8) 262 (emphasis in the original).

11 For an account of the relevant drafting process, see Ed Bates, *The Evolution of the European Convention on Human Rights* (OUP 2010) 62–63 and 67–68.

12 For a full list and all details, see <www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009/declarations?p_auth=Bkj5Nt4P>.

Faced with the unhelpful wording of A2P1, first the European Commission (ECmHR) and later the European Court of Human Rights (ECtHR) felt textually constrained in the way they could interpret the right to education.[13] It cannot be claimed that the ECtHR has extended its much vaunted 'dynamic or evolutive approach'[14] to the interpretation of A2P1. Van Bueren notes that '[t]he jurisprudence of the European Court has so far indicated that the negative phraseology has inherently limited any duty involving significant resource expenditure . . . The European Court's approach under Article 2 of Protocol No 1 is [one] of quiet toleration rather than positive support'.[15] She adds that the ECtHR 'appears reluctant to enter into any substantive analysis of the best interests of the child in relation to their educational entitlements'.[16] The ECHR, like the UDHR, does not protect children's rights as such, so there is no internal inconsistency in the ECtHR's reasoning in this regard, but, rather than run with the spirit of Articles 26(1) and (2) of the UDHR, the European enforcement bodies have preferred a narrow, content-neutral approach. Moreover, the inclusion of the right to education in the First Protocol to the ECHR acted as a deterrent to the drafters of the European Social Charter against including the right to education in the original version of that document in 1961.[17] The Revised Social Charter of 1996 is more fulsome but still says that the state's duty to ensure that children have the education they need must take account of the rights of the children's parents.[18]

The jurisprudence on A2P1 remains impoverished. The ECtHR has published a Factsheet concerning its case law on children's rights[19] and another on parental rights,[20] but none on the right to education. When it has interpreted the phrase 'philosophical convictions' in A2P1 it has merely required them to denote:

> . . . such convictions as are worthy of respect in a 'democratic society'[21] . . . and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education, the whole of Article 2 of Protocol 1 being dominated by its first sentence.[22]

But in *X v UK*, where the ECmHR was asked to protect a conviction that integrated education was appropriate for pupils in Northern Ireland, whether they came from the Catholic or the Protestant community, it held that this did not qualify as a philosophical conviction for the purposes of Article 2.[23]

In our view the ECtHR has abdicated its responsibility to subject the parental right to have children educated in conformity with parental religious and philosophical convictions

13 For detailed analyses of the relevant jurisprudence, see Beiter (n 3) 158–72; D J Harris, M O'Boyle, E P Bates and C M Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* 3rd edn (OUP 2014) 906–19; B Rainey, E Wicks and C Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* 6th edn (OUP 2014) 520–36.

14 See e.g. Harris et al (n 13) 8–10; Rainey et al (n 13) 73–9.

15 Geraldine Van Bueren, *Child Rights in Europe* (Council of Europe Publishing 2007) 152–3.

16 Ibid 156; see too Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 1999) 68. See too the position under the OSCE's standards, referred to by Craig, in this issue of the NILQ, p 460 (n 60).

17 The Charter, in Article 10, refers only to the right to vocational education.

18 Article 17(1)(a).

19 Last updated in April 2016: <www.echr.coe.int/Documents/FS_Childrens_ENG.pdf>.

20 Last updated in February 2016: <www.echr.coe.int/Documents/FS_Parental_ENG.pdf>.

21 Citing *Young, James and Webster v UK* (1981) 4 EHRR 38, para 63.

22 Citing *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979–80) 1 EHRR 711, para 52.

23 *X v UK* App No 7782/77, 14 DR 179 (1978). In the *Kjeldsen* case (n 22), the ECtHR found that a parental conviction that children should not be given compulsory sex education at school was also unworthy of protection.

to limitations based on the need to ensure that children are educated in accordance with their own religious and philosophical convictions or with the tenets of humanitarianism. The rationale for prioritising parental convictions is that the state must not be allowed to indoctrinate children with particular ideologies, but it does not follow that parental convictions should be allowed to contradict their children's own convictions, assuming the children are mature enough to make an informed decision on the issue,[24] or that a parental conviction that their children should be educated in a way which promotes principles of humanitarianism and human rights should not be respected. We agree with the 'three-step model' devised by Eva Brems to help deal with conflicting rights, in particular, conflicts between a child's right to religious freedom and a child's parents' right to provide direction to their child in the exercise of his or her religious freedom.[25] In such situations it is appropriate to allow core rights to prevail over peripheral rights, which in this context means giving priority (if the child is mature enough) to the child's right, since his or her autonomy as a human being is at stake. But we go further in submitting that, contrary to what is required from states by the UDHR and the ICESCR, the ECtHR has failed to insist that states must promote 'the full development of the human personality', 'the strengthening of respect for human rights and fundamental freedoms' and the promotion of 'understanding, tolerance and friendship among all nations, racial or religious groups'. The promotion of those values can only enhance the autonomy of a child. We sum up this failure as a violation of the right to education for humanity.[26] We strongly endorse the view of Abbott, who maintains that in this increasingly globalised world it is more important than ever that education should champion humanitarian values.[27]

Our championing of the concept of education for humanity is based on our opinion, consonant with Article 26(2) of the UDHR, that educating children about all nations, races and religions, and promoting the values of tolerance and friendship among all people, is a way of helping to maintain global peace. An approach which emphasises religious pluralism will expose children to the doctrines, practices and achievements of many different groups and will help convey an understanding of the benefits which can flow from groups respecting one another's belief systems. Just as ignorance breeds distrust, so understanding breeds trust. Add to this the civilising influence of education in humanitarian principles such as 'give help where you can'[28] and in philosophical tenets

24 A point made by Mr Kellberg in his separate concurring opinion when the *Kjeldsen* case was at the ECmHR, and also by Van Bueren (n 15) 163–4, citing Article 5 of the CRC, which obliges states to respect the rights of parents and guardians to provide appropriate direction and guidance in the exercise by the child of the rights recognised in the CRC 'in a manner consistent with the evolving capacities of the child'. See too Laura Lundy, 'Family Values in the Classroom, Recording Parental Wishes and Children's Rights in State Schools' (2005) 19 International Journal of Law, Policy and the Family 346.

25 Brems (n 9) 201–12.

26 By education for humanity we mean more than just education for every human being, which appears to be what Trevors and Saier are stressing at <www.ncbi.nlm.nih.gov/pmc/articles/PMC3252885/> and what the NGO Education for Humanity is aiming for at <www.eforhusa.org>. Also, we are not suggesting as radically different an approach to the acquisition of knowledge as that suggested by Will Stanton in *Education Revolution* (Will Stanton 2015).

27 Anita Abbott, 'Education for Humanity: A Challenge within Globalization' (2007) 5 International Journal of the Humanities 223. See too Mike Seymour et al, *Educating for Humanity: Rethinking the Purposes of Education* (Routledge 2016), especially the 'Introduction'.

28 The UN Office for the Coordination of Humanitarian Affairs lists the four main humanitarian principles as: (1) addressing human suffering wherever it is found; (2) remaining neutral in conflicts; (3) being impartial when protecting life, health and respect; and (4) maintaining independence from political, economic, military or other objectives. See <https://docs.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf>.

such as 'treat others as an end, not as a means to an end'[29] and the result is likely to be a cohort of young people who can keep their personal beliefs in perspective while becoming denizens not just of their birthplace but of the globe. We accept, of course, that the globe is radically diverse, and that there is often profound disagreement on what is 'fundamental', but we maintain that, like human rights, the values of tolerance and respect should be considered to have universal application. No child should be denied an education in the worth of those values or obstructed in his or her opportunity to become an autonomous individual who can, if so wishing, shake off the trappings of a domestic heritage and live freely as a citizen of the world. IHRL needs to wake up to the obligation on states to empower their inhabitants, especially their children, in this vogue. As already noted, this positive obligation, or something very like it, already exists under Article 13(1) of the ICESCR, but it has not been adequately promoted by the Committee which monitors compliance with that Covenant.[30] A step-change is needed in this regard.

The role of religion in education

A religious belief is a very important part of many people's lives and IHRL is fully justified in protecting people's freedom to hold and to practise their own religious beliefs. The ECtHR sees the manifestation of religious belief as part of the *forum internum*, with which no state should interfere except when the interference is for a legitimate aim, necessary in a democratic society and proportionate. Parents have ample opportunity within the home to impress upon their children the religious beliefs which they want them to adopt,[31] but when it comes to education provided by schools, especially if those schools are funded by the state, parental rights over the religious beliefs of their children should hold no sway. Nowak reminds us that ever since the nineteenth century liberalism has advocated state intervention in the education of children 'for the purpose of reducing the dominance of the Church and of protecting the rights of children against their own parents'.[32] Given the historical importance of religion in the world, and its contemporary salience in the context of Islamic fanaticism, we support the idea that all children at state-funded schools should be *taught about* religious beliefs, but we hold that in no such school should children be *instructed to adopt* any particular religious beliefs. Such *confessional* teaching should be restricted to the home, to the community and to the churches.

The Constitution of the USA famously provides, in the first words of its First Amendment, ratified in 1791, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. In the course of the last 225 years these words have been interpreted in a way which severely restricts the provision of religious education within publicly funded schools. In *Illinois v Board of Education* (1948) the US Supreme Court found a breach of the First Amendment when a school district allowed ministers of religion to enter school premises to give religious instruction to children.[33] This practice was denounced, with one dissenting voice, as a clear example of impermissible public aid to religion. Shortly afterwards, in *Zorach v*

29 This is what Immanuel Kant calls a 'categorical imperative'; see e.g. Alan Montefiore, 'Kant and the Categorical Imperative' (2009) 2(5) Think 75–82.

30 The Committee's General Comment No 13 (1999) devotes just two of its 60 paragraphs to Article 13(1) and adds little to its normative force: <www.refworld.org/docid/4538838c22.html> accessed 6 July 2016.

31 See Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 165–82. Nowak (n 8) 262.

32 Nowak (n 8) 247–8, citing John Stuart Mill, the Constitution of the German Empire of 1849 (not 1949 as in Nowak's text) and the Soviet Constitution of 1936.

33 333 US 203.

Clauson (1952) the same court held that it was not a breach of the Constitution to release students to attend out-of-school religious instruction,[34] but subsequent decisions have widened even further the ban on religious conduct anywhere within a school. Even the conservative Rehnquist court held, in *Lee v Weisman* (1992), that a school is not permitted to invite a minister of religion to deliver a prayer at a graduation ceremony.[35] The underlying principle in these cases is that the First Amendment precludes any state *endorsement* of religious belief. While this does not extend to prohibiting students from organising their own religious meetings on school premises,[36] or from receiving financial support for their society's activities in the same way as other societies would do,[37] it does mean that education in publicly funded schools has to be entirely secular. Attempts to brand such secularism as itself a form of religious belief have been rejected by the Supreme Court.[38] There is not yet any authoritative judicial decision on whether it is a breach of the First Amendment that since 1954 the 'Pledge of Allegiance', which is often formally recited within school classrooms, has included the phrase 'one Nation *under God*'. But the Supreme Court has made it clear that no school child can be compelled to recite any part of this pledge if he or she does not wish to do so.[39] The right not to be compelled to speak certain words is protected by another clause in the same First Amendment: 'Congress shall make no law . . . abridging the freedom of speech.' This is taken to include the negative right *not* to speak.

The American approach to religion in schools does not, of course, preclude the teaching in schools of the role of religion in societies past and present. It would be hard to study the Reformation, for example, without being aware of the different theological beliefs of the protagonists involved. It would be equally impossible to understand the conflicts in the Middle East without being aware of the different religious views of Jews, Christians, Shias, Sunnis, Yazidis etc. Nevertheless, a secular approach does mean that a 'separate but equal' approach is not acceptable. As Habashi has put it, such an approach 'accommodates students' cultures but does not necessarily support the goals of harmony and tolerance detailed in Article 29 of the UNCRC'.[40] Rather than providing an opportunity for students to learn about other religions, it 'restricts their freedom to acquire knowledge and thereby reduce social prejudice'.[41] Habashi argues convincingly for a pluralistic approach to religious education which would treat it as a social science. In so far as the CRC and ECHR can be read as contradicting such an approach, by allowing parents the right to insist that their children must receive publicly funded instruction in how to adhere to one particular religion, those treaties need to be revisited.[42]

34 343 US 306 (6 v 3).

35 505 US 577 (5 v 4).

36 *Westside School District v Mergens* 496 US 226 (1990) (8 v 1).

37 *Good News Club v Milford Central School* 533 US 98 (2001) (6 v 3).

38 *Abington School District v Schempp* 374 US 203 (1963) (8 v 1).

39 *West Virginia State Board of Education v Barnette* 319 US 624 (1943) (6 v 3). This was a case taken by Jehovah's Witnesses.

40 Janette Habashi, 'Intersections of Education and Freedom of Religion Rights in the UNCRC and in Practice' in Beth Blue Swadener et al (eds), *Children's Rights and Education: International Perspectives* (Peter Lang 2013) 236–46, 239–40. For Article 29 see Beiter (n 3) 119–20.

41 Ibid 240, citing U Kilkelly, 'The Child's Right to Religious Freedom in International Law: The Search for Meaning' in M A Fineman and K Worthington (eds), W*hat is Right for Children? The Competing Paradigms of Religion and Human Rights* (Ashgate 2009) 243–67.

42 Ibid 244.

Carolyn Evans has also called for a more enlightened attitude within IHRL in this context.[43] She too speaks of the need for 'plural religious education' and urges states to follow the Toledo Guiding Principles if they really want to adopt a rights-consistent approach to the matter. These Principles, on teaching about religions and beliefs in public schools, were drafted in 2007 by an Advisory Council of Experts within the Organization for Security and Co-operation in Europe's (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw.[44] Written at a high level of abstraction, they *imply* support for a pluralistic approach. Evans describes them as sophisticated and possibly more useful for states than the pronouncements of the UN Human Rights Committee and the ECtHR.[45] The principles are focused on teaching *about* religions and beliefs and do not attempt to address the many other issues involving religion and education. Key values promoted by the principles are inclusivity, historical awareness and 'multi-perspectivity'. Particularly helpful is the list of learning outcomes which the principles suggest should be associated with teaching about religions. These include, as top priorities, 'attitudes of tolerance and respect for the right of individuals to adhere to a particular religion' and 'an ability to connect issues relating to religions and beliefs to wider human rights issues . . . and the promotion of peace'.

To date IHRL has permitted states to compel students to attend classes about religion provided the information in question is conveyed neutrally and objectively. That much was asserted by the Grand Chamber of the ECtHR in *Folgerø v Norway* in 2007.[46] On the facts of that case, however, the court found that the instruction was not being delivered in an adequately neutral fashion, as it was dominated by a Christian perspective, and nor were there adequate opt-out provisions. In the course of its judgment the Grand Chamber repeated that:

> . . . the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.[47]

At the same time:

> . . . the second sentence of Article 2 of Protocol No 1 does not embody any right for parents that their child be kept ignorant about religion and philosophy in their education.[48]

It follows from these statements that, if states can provide education about religion which is neutral and objective, they should be allowed to deny parents (or children) the right to be exempted from such education. An exemption from such education should be no more permissible than it would be from education about elementary mathematics or language. Unless they are exposed to at least a basic grounding in what religions are and

43 Carolyn Evans, 'Religious Education in Public Schools: An International Human Rights Perspective' (2008) 8 HRLR 449.

44 They are available at <www.osce.org/odihr/29154?download=true>. COSE has 56 member states, including most European States, Canada, the US and some former Soviet Republics. The Advisory Council comprises 12 experts drawn from 12 different member states.

45 See Evans (n 43) 472. Appendix III (pp 91–108) of the published principles contains details of two relevant complaints lodged against Norway at the UN Human Rights Committee and one decision of the ECtHR in *Zengin v Turkey* App No 1448/04, 9 October 2007.

46 App No 15472/02, judgment of 29 June 2007. The UN Human Rights Committee came to essentially the same conclusion in a separate complaint relating to the same educational programme: *Leirvåg v Norway* (UN Human Rights Committee, CCPR/C/82/D/1155/2003, 23 November 2004) 385–99: <www.ohchr.org/Documents/Publications/SDecisionsVol8en.pdf>.

47 Ibid para 84(h).

48 Ibid para 89.

how they vary, children will be able to claim, justifiably, that they are being deprived of a crucial aspect of education, which itself is a violation of the first sentence of A2P1 to the ECHR as well as of a variety of UN human rights treaties. Needless to say, if parents, families and communities wish to supplement the state's provision of basic religious education with more specialised instruction in one particular religion, this should be permissible, at least during the period when the child is not mature enough to decide for him- or herself whether he or she wishes to be subjected to such specialised instruction. A more general form of religious education should be designed to enable children to take their place as citizens of the world rather than of any particular locality. In that sense it is appropriate to designate this 'education for humanity'. We think the time has come for the courts and committees which enforce IHRL to declare clearly that education for humanity is a basic entitlement of every person.

Education in Northern Ireland

We now turn to the benefits which adopting a right to education for humanity could bring to a jurisdiction such as Northern Ireland, wracked as it is by sectarian differences and the legacy of a conflict between 1969 and 1998 which cost more than 3600 lives. The conflict was not primarily a religious one, more an ethno-political one between groups who fervently believed Northern Ireland should be part of a united Ireland and others who believed it should remain part of the UK. The former tended to be Catholic Christians while the latter tended to be Protestant Christians. Under the law of Northern Ireland, religious organisations are still guaranteed a strong influence over the education system in a variety of ways. We now examine six dimensions to that influence.

(a) The role of religions in the governance and management of schools

Northern Ireland school categories are not labelled in a way that makes the involvement of religious organisations in their governance and management particularly clear. While the total list of categories is long and malleable,[49] three of them dominate the educational landscape. They are controlled schools, voluntary schools and integrated schools.[50]

Controlled schools are supposed to provide a non-denominational state education, but there is a clear tendency towards Protestantism. This is explicable by the predominant role of the main Protestant churches[51] in their governance and management. Until 1 April 2015, controlled schools were owned, funded and managed by five regional Education and Library Boards[52] through Boards of Governors (school Boards).[53] Education and Library Boards were dissolved on that date[54] and substituted by the

49 As well as those examined in our text, the Department of Education uses the categories of Irish Medium school (a type of maintained school), special needs schools and independent schools. See 'Annual Enrolments at Grant-Aided Schools in Northern Ireland 2015/16: Basic Provisional Statistics' *Department of Education Statistical Bulletin* 8/2015 (10 December 2015) 11–12. Others have adopted a different seven-stranded taxonomy, e.g. Laura Lundy, Gráinne McKeever and Viviane Treacy, 'Education Rights' in Brice Dickson and Brian Gormally (eds), *Human Rights in Northern Ireland: The CAJ Handbook* (Hart 2015) 484–6.

50 The dominance of these sectors is such that 39 per cent of pupils in Northern Ireland attend controlled schools, 51 per cent attend voluntary schools and 5 per cent attend integrated schools, according to Caroline Perry, 'Education System in Northern Ireland' (NI Assembly Research and Information Service, 8 August 2016): <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016–2021/2016/education/4416.pdf>.

51 Namely, the Church of Ireland (Anglican), the Presbyterian Church in Ireland and the Methodist Church in Ireland.

52 Education and Libraries (NI) Order 1986, article 3 (repealed).

53 Ibid article 10.

54 Education Act (NI) 2014, s 3(1).

Education Authority (the Authority), which is now the overarching management body for controlled schools.[55] It is the Authority which makes provision for the management of each controlled school by a school Board.[56] It is also the duty of the Authority to contribute towards 'the spiritual, moral, cultural, intellectual and physical development of the community by securing that efficient primary education and secondary education are available to meet the needs of the community'.[57]

At Authority level, four of the 12 members appointed by the Department of Education (the Department) must appear to represent the interests of transferors of controlled schools.[58] Transferors are the trustees or other persons by whom a school has been transferred to a former or current state education authority, including their representatives or successors.[59] Transferors are typically representatives of the main Protestant churches who during the early twentieth century transferred schools to controlled status in exchange for public funding and managerial positions.[60] In addition, one of the 12 members appointed to the Authority by the Department must appear to represent the interests of controlled *grammar* schools.[61] There is stronger, sectionally majoritarian, transferor representation required by law on the school Boards of controlled schools. Where there are nine voting members appointed to the Board of a controlled primary or secondary school, four of those members must be nominated by transferors or their representatives.[62] This is significant because the powers enjoyed by school Boards are wide ranging.

Voluntary schools are publicly funded but privately owned. They may have a denominational ethos, which amounts to running all school business consistently with a particular set of religious beliefs. The management structures for these schools continue to be sectionally dominated by their trustees, who are normally religiously affiliated, albeit there is now a greater role for Departmental influence than there was in the past. Voluntary *maintained* schools are under the ownership and management of the Catholic Church through the Council for Catholic Maintained Schools (CCMS), but they can avail of public funding for their running costs from the Authority and for capital building works from the Department.[63] Four of the 12 members of the Authority appointed by the Department must appear to represent the interests of trustees of maintained schools.[64] Their school Boards are also sectionally dominated by the influence of the Catholic Church, though since 1993 they have been allowed to receive public funding if the school Boards agree to reduce this dominance.[65] However, given that Departmental and Authority nominees are appointed only after consultation with existing governors, the influence of the Catholic Church in most voluntary schools has been 'largely unaffected'

55 Ibid s 1(1).

56 Education and Libraries (NI) Order 1986, article 10, as amended by the Education Act (NI) 2014, Sch 3, para 1(1).

57 Ibid article 5(2), as amended by the Education Act (NI) 2014, Sch 3, para 1(1).

58 Education Act (NI) 2014, Sch 1, para 2(1)(c)(i). In addition to these 12 Departmental appointments, the Authority consists of a chair and eight political members.

59 Education and Libraries (NI) Order 1986, article 2, as amended by the Education Act (NI) 2014, Sch 3, para 1(1).

60 Laura Lundy, *Education: Law, Policy and Practice in Northern Ireland* (SLS 2000) 66.

61 Education Act (NI) 2014, Sch 1, para 2(1)(c)(v).

62 Education and Libraries (NI) Order 1986, Sch 4, paras 2(2)(a) and 3(2)(a).

63 Education Reform (NI) Order 1989, articles 141–6 and Sch 8; Education and Libraries (NI) Order 2003.

64 Education Act (NI) 2014, Sch 1, para 2(1)(c)(ii).

65 Education and Libraries (NI) Order 1986, article 11, as amended by the Education and Libraries (NI) Order 1993, article 28. Under Sch 5 to the 1993 Order the representation of the Catholic Church typically reduces from 6 out of 10 to 4 out of 9.

by that trade-off.[66] Voluntary *grammar* schools are also funded by the Department,[67] but are self-governing and select their pupils based on perceptions of their academic ability. At Authority level, only one of the 12 members of the Authority appointed by the Department must appear to represent the interests of voluntary grammar schools.[68] This means that the selection process could be contentious because a significant proportion of these schools adopt a Protestant ethos. Most of their school Boards are sectionally dominated by their nominating trustees or denominational authorities to a greater or lesser extent, depending on whether they receive full capital funding from the state,[69] but the schools' trustees remain sectionally dominant either way.

Integrated schools aim to facilitate the education together of Protestant and Catholic pupils.[70] At Authority level, like voluntary grammar schools, only one of the 12 members of the Authority appointed by the Department must appear to represent the interests of integrated schools.[71] The school Boards of *controlled* integrated schools are not dominated by guaranteed religious influences, but there is still some influence. Two-sevenths of their school Boards are normally reserved for religious representatives: one-seventh nominated by the transferors and superseded managers of controlled schools in the locality served by the school[72] and one-seventh nominated by the nominating trustees of voluntary maintained schools in the Roman Catholic diocese in which the school is situated.[73] In practice, the Catholic Church refuses to make these appointments[74] and, instead, the Authority appoints persons appearing to be committed to the continuing viability of the school as a controlled integrated school.[75] It seems to us that a commitment to the continuing viability of the school as a controlled integrated school is a more sensible criterion for appointment than any particular religious affiliation. We think it could operate sensibly as one of the requirements for all appointments to the school Boards of controlled integrated schools. In contrast, the school Boards of *grant-maintained* integrated schools do not have any guaranteed positions for religiously appointed representatives reserved by law. Instead, positions are reserved for so-called 'foundation governors',[76] that is, persons by whom the initial proposal to acquire grant-maintained integrated school status was submitted,[77] or persons appointed to the role by the school's instrument of government.[78] These school Boards must use their best endeavours to ensure that 'the

66 Lundy (n 60) 70.

67 Education Reform (NI) Order 1989, articles 60–1, as amended by the Education and Libraries (NI) Order 2003.

68 Education Act (NI) 2014, Sch 1, para 2(1)(c)(iv).

69 Education and Libraries (NI) Order 1986, Schs 6–7. Nominating trustees are provided for in a bespoke scheme of management which must be approved by the Department: see articles 9A–D of the 1986 Order, inserted by the Education Reform (NI) Order 1989, article 123.

70 Education Reform (NI) Order 1989, article 64(1).

71 Education Act (NI) 2014, Sch 1, para 2(1)(c)(iii). The last of the 12 Departmental appointments to the Authority must appear to represent the interests of Irish Medium schools.

72 Education and Libraries (NI) Order 1986, Sch 4, para 5(1)(c), as amended by the Education Reform (NI) Order 1989, article 89.

73 Ibid, Sch 4, para 5(1)(d), as amended by the Education Reform (NI) Order 1989, article 89.

74 Lundy (n 60) 283–4.

75 Education and Libraries (NI) Order 1986, Sch 4, para 6, as amended by the Education Reform (NI) Order 1989, article 89, and the Education Act (NI) 2014, Sch 3, para 1(1).

76 Education Reform (NI) Order 1989, article 66 and Sch 5, para 2(1). Other members of the Board consist of Departmental nominees, parents of registered pupils and teachers.

77 Ibid article 66 and Sch 5, para 2(2)(a).

78 Ibid article 66 and Sch 5, para 2(2)(b).

management, control and ethos of the school are such as are likely to attract to the school reasonable numbers of both Protestant and Roman Catholic pupils'.[79]

This overview illustrates the startlingly irregular nature of religious involvement in the governance of schools in Northern Ireland. All of the structures, except those relating to grant-maintained integrated schools, feature guaranteed avenues of influence for religious organisations. That influence is very often sectionally majoritarian in nature. From the perspective of a state-led right to education for humanity, the most problematic aspect of these models is that sectional religious influence over educational establishments persists regardless of the level of public funding they are provided with and, in some instances, regardless of the fact that legal ownership now lies with the state. It has been suggested that the stakeholder model in use at present is likely to require reconfiguration 'if schools begin to share more',[80] pursuant to the governmental initiatives explored later in this paper. It seems to us that the basic requirements of a right to education for humanity dovetail with the recommendations of Smith and Hansson regarding reform in this area. They have suggested that there is a case for greater diversity in the governance of all schools 'through revised arrangements for membership based on individual merit rather than representative rights of sectoral interests'.[81] We would prefer a situation where no religious organisation is entitled to nominate any individuals as governors of a school Board and where no members of the Education Authority are appointed because of their support for either Catholicism or Protestantism.

(b) The role of religions in determining the religious education curriculum in schools

The legal foundations of Northern Ireland's state school system originally adopted a secular model which prohibited religious education but provided for 'moral' education.[82] The current model, whereby both religious education and collective worship are required by law in all grant-aided schools,[83] resulted from a series of agitations which took place over a number of decades between the state and Northern Ireland's Christian religious organisations.[84] Consequently, the current legal framework provides, in particular, that controlled schools must provide religious education 'based upon the Holy Scriptures according to some authoritative version or versions thereof but excluding education as to any tenet distinctive of any particular religious denomination' and likewise as regards collective worship.[85] Non-controlled integrated schools are under the same obligation, while controlled integrated schools are permitted to provide separate denominational

79 Ibid article 66(2).

80 Caroline Perry, 'School Governors' (Northern Ireland Assembly Research and Information Service, August 2011) 16: <www.niassembly.gov.uk/globalassets/Documents/RaISe/Publications/2011/Education/8611.pdf>.

81 Alan Smith and Ulf Hansson, 'A Review of Policy Areas Affecting Integration of the Education System in Northern Ireland' (UNESCO Centre Ulster University, September 2015) 47: <www.ief.org.uk/wp-content/uploads/2011/08/Integrated-Education-Scoping-Paper.pdf>.

82 Education Act (NI) 1923, ss 26–8. Prior to the partition of Ireland in 1921, a similar attempt by the state to establish a non-denominational education system failed in 1831 as a result of opposition from the Protestant and Catholic churches. See John Darby and Seamus Dunn, 'Segregated Schools: The Research Evidence' in R D Osborne, R J Cormack and R L Millers (eds), *Education and Policy in Northern Ireland* (Policy Research Institute 1987) 85.

83 Education and Libraries (NI) Order 1986, article 21(1); Education (NI) Order 2006, article 5(1)(a).

84 'Introduction: Ministry/Department of Education Archive' (Public Record Office of Northern Ireland, November 2007) 12–17: <www.nidirect.gov.uk/sites/default/files/publications/education-archive.pdf>.

85 Education and Libraries (NI) Order 1986, article 21(2).

religious education and collective worship as a means of ensuring pupils from both Protestant and Catholic backgrounds can be accommodated.[86]

Fortunately, legislation also stipulates that all religious education and collective worship required by law must be arranged so that 'the school shall be open to pupils of all religious denominations for education other than religious education'[87] and that 'no pupil shall be excluded directly or indirectly from the other advantages which the school affords'.[88] It further provides the option for parents to have their children wholly or partly excused from all religious education and collective worship.[89] Although pupils are denied any guaranteed opportunity to express their views in this regard,[90] existing research has not revealed any conflict between young people and parents in relation to opt-out decisions.[91] These protections are significant because the current core syllabus for religious education in all grant-aided schools was prepared by a drafting group composed of the four main Churches in Northern Ireland,[92] who satisfied the insubstantial requirement of 'having an interest in the teaching of religious education in grant-aided schools'.[93] The non-involvement of other faith communities has served to convince many people that religious education is treated as 'a confessional subject',[94] a view reinforced by the fact that all other subjects in the Northern Ireland curriculum are developed and reviewed by government-appointed working parties.[95]

Unsurprisingly, based on the composition of its drafting group, the current religious education curriculum specified by the Department of Education[96] is dominated by Christian learning objectives, bar one 'Key Stage 3' objective about 'world religions' that is commendably designed to introduce school pupils aged 11–14 to two religions other than Christianity 'in order to develop knowledge of and sensitivity towards the religious beliefs, practices and lifestyles of people from other religions in Northern Ireland'.[97] Schools are permitted to build upon the revised core syllabus 'in a way that suits their pupils and the ethos of the school', which provides scope for additional material on world religions 'or any other [religious education] related subject matter'.[98] Richardson suggests, however, that the reality for many teachers is that 'they feel that there is too much already in the syllabus and that any suggestion of teaching additional material is out of the question'.[99]

86 Education Reform (NI) Order 1989, article 13(1)(b); Education (NI) Order 2006, article 11(1)(b).

87 Education and Libraries (NI) Order 1986, article 21(4)(a).

88 Ibid article 21(4)(b).

89 Ibid article 21(5).

90 It has been suggested that this gives rise to a conflict with the UNCRC, Article 12, which requires adults to take account of the views of children in all matters affecting them. See, e.g. Lundy (n 60) 153.

91 Alison Mawhinney et al, 'Opting Out of Religious Education: The Views of Young People from Minority Belief Backgrounds' (Queen's University Belfast 2010) 62: <www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,485911,en.pdf>.

92 Namely, the Catholic Church in Ireland, the Church of Ireland (Anglican), the Presbyterian Church in Ireland and the Methodist Church in Ireland.

93 Education (NI) Order 2006, article 11(2)(a).

94 Norman Richardson, *Sharing Religious Education: A Brief Introduction to the Possibility of an Inclusive Approach to Religious Education in Northern Ireland* (Christian Education Publications 2014) 3.

95 Ibid.

96 Education (Core Syllabus for Religious Education) Order (NI) 2007.

97 'Core Syllabus for Religious Education' (Department of Education 2007) 29–30: <www.deni.gov.uk/publications/religious-education-core-syllabus>.

98 'Statutory Curriculum' (Department of Education): <www.education-ni.gov.uk/articles/statutory-curriculum#toc-0>.

99 Richardson (n 94) 25–6.

All in all, the Christian focus of the religious education curriculum in state-funded schools resulting from the dominant influence of a relatively small band of religious organisations suggests that a 'narrow and incomplete'[100] approach to religion remains the norm in the Northern Ireland education system. There have been calls to reconsider and redraft the current core syllabus for religious education by a more representative drafting group so that awareness, mutual respect and critical thought about 'world religions and non-religious life stances' can be explored at all 'key stages' of educational attainment[101] in a more 'balanced and comprehensive'[102] fashion. We agree that to do so would enhance the right to freedom of thought, conscience and religion of minority belief pupils,[103] and we submit that it would also further enhance the right to education for humanity as we define that term.

(c) The exemption of teacher recruitment from fair employment legislation

There is an exemption from the prohibition against discrimination on the basis of religion contained in the Fair Employment and Treatment (Northern Ireland) Order 1998.[104] It allows the employing authority for a particular school, namely the Authority, the school Board or the CCMS, depending on the type of school, to discriminate on the basis of an applicant's religion for the purposes of teacher employment and recruitment.[105] The Court of Appeal in Northern Ireland has interpreted the term recruitment to include promotion in this context.[106] However, the Fair Employment Tribunal has made it clear that, where teachers are being selected for redundancy purposes, employing authorities are not entitled to rely on the exemption.[107] These decisions appear to be doctrinally consistent in so far as they interpret the exemption to apply only in relation to the administration of vacant teacher posts but not in respect of decisions relating to the retention of posts already held, but they underline the practical difficulties in operationalising an exemption of this kind.

National law in this area is supported at European Union level (for the time being) by an exemption for Northern Ireland from the Council Directive on Equal Treatment in Employment and Occupation.[108] That exemption reads:

> In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.[109]

It has been suggested that the two arguments presented in the text of the Directive in favour of the exemption are 'at odds with the realities of the Northern Ireland school

100 Ibid 26.

101 Mawhinney et al (n 91) 67–8.

102 Richardson (n 94) 37.

103 Ibid.

104 Fair Employment and Treatment (NI) Order 1998, article 71, as amended by the Fair Employment and Treatment (Amendment) Regulations (NI) 2003, reg 30.

105 Ibid article 71(1), as amended by the Fair Employment and Treatment (Amendment) Regulations (NI) 2003, reg 30.

106 *Flynn and Debast v Malcolmson* [2007] NICA 56.

107 *Brudell v Board of Governors, Ballykelly Primary School* [2010] 161/09FET [9].

108 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16, Article 15(2).

109 Ibid.

system'.[110] It has also been suggested that a more convincing justification is 'that advanced by the Catholic Church regarding the need to maintain a Catholic ethos' in its schools.[111] Regardless, research published in 2002 found 'little evidence of any support' for change at any school level regarding the exemption, except for some of the teacher trade unions.[112] Most other 'educational interests' consulted during the research viewed the status quo as an 'inevitable consequence of an educational system that permits separate denominational schools', except for Catholic authorities who expressed support for the exception 'as a positive endorsement of diversity in education'.[113]

More recently, an attempt to repeal the exemption was made by two Members of the Legislative Assembly (MLAs) by way of a proposed amendment to the Employment Bill at Further Consideration Stage.[114] Their intervention was prompted by perceived 'prevarication' over the issue between the Department and the Office of the First Minister and deputy First Minister (OFMdFM).[115] Justifications advanced by MLAs in support of the amendment included the fact that there are already 'reasonable numbers of Protestant teachers in Catholic schools', even at headmaster level; that the exception may be linked to the annual oversupply of teachers from Northern Ireland's teacher training colleges;[116] and that there was evidence of cross-party agreement with regard to the proposal to abolish the exemption, buttressed by support from representatives of the CCMS as well as representatives from the controlled sector.[117] The alleged support of the CCMS suggests a change in its position since the 2002 research cited above. In addition, it was suggested during a debate on the amendment that the exemption is not used by any sector in practice.[118] However, those MLAs who opposed the amendment referred to a lack of public consultation on the issue, as well as insufficiently neutral debate.[119] It was also suggested that because OFMdFM had responsibility for equality legislation it would be more appropriate for that Office to introduce any proposed changes.[120] In the end, the arguments debated were rendered otiose because the amendment was halted by virtue of a petition of concern requiring cross-community support that was validly tabled against it.[121] This has been lamented by those in favour of the amendment, who have

110 Tony Gallagher and Laura Lundy, 'Religion, Education and the Law in Northern Ireland' in José Luis Martínez López-Muñiz et al (eds), *Religious Education in Public Schools: Study of Comparative Law* (Springer 2006) 181. The first few words of the provision suggest that the provision is necessary so as to prevent religious discrimination, yet its effect is actually to entrench that phenomenon.

111 Ibid.

112 Seamus Dunn and Tony Gallagher, 'The Teacher Exception Provision and Equality in Employment in Northern Ireland' (Equality Commission for Northern Ireland 2002) 29.

113 Ibid.

114 Employment Bill (2011–2016) [Notice of Amendments tabled on 17 February 2016 for Further Consideration Stage], cl 26(1A). Both of the MLAs were members of the Ulster Unionist Party.

115 Official Report (Hansard) 22 February 2016, vol 112, no 8, 67. OFMdFM has been renamed 'the Executive Office' by the Departments Act (NI) 2016, s 1(1), but we have used the former term to reflect its use during debates about the Employment Bill (2011–2016).

116 Namely, St Mary's University College Belfast (traditionally the Catholic option) and Stranmillis University College (traditionally the Protestant option).

117 Official Report (Hansard) 22 February 2016, vol 112, no 8, 66–8.

118 Ibid 66–7.

119 Ibid 69–71.

120 Ibid. Responsibility for equality matters has since been transferred to a Department for Communities established under the Departments Act (NI) 2016, s 1(7). See the Departments (Transfer of Functions) Order (NI) 2016, article 3(1)(b) and Sch 1, Pt 2.

121 Official Report (Hansard) 23 February 2016. The petition of concern was tabled by MLAs from Sinn Féin and the Social Democratic and Labour Party.

suggested that the Shared Education Act (NI) 2016 – discussed further below – is destined to fail for as long as the exemption continues to segregate the teaching workforce in Northern Ireland.[122] Like others,[123] we believe that the abolition of the exemption is long overdue. The parochialism it permits conflicts with the appreciation of diversity inherent in our conception of a right to education for humanity.

(d) The inadequate provision of 'integrated' education

It was noted above that integrated education is defined in legislation as the education together of Protestant and Catholic pupils[124] and that the school Boards of integrated schools are required to use their best endeavours to ensure that 'the management, control and ethos of the school are such as are likely to attract to the school reasonable numbers of both Protestant and Roman Catholic pupils'.[125] Our focus now turns to the Department's duty 'to encourage and facilitate the development of integrated education'.[126] After setting that statutory obligation in its political context, we explore the implications of recent court cases challenging the Department's fulfilment of its duty.

Commitments to the furtherance of integrated education in Northern Ireland have formed part of several important political agreements. The Belfast (Good Friday) Agreement of 1998 recognised that an 'essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of society, including initiatives to facilitate and encourage integrated education and mixed housing'. The parties pledged 'their continuing support' for initiatives of this kind and undertook to 'positively examine the case for enhanced financial assistance' for the work of organisations involved.[127] More recently, the Stormont House Agreement of 2014 included a commitment by the UK government to make a large capital investment in integrated and shared education.[128] More recently still, the Fresh Start Agreement of 2015 provided that the £500m capital investment agreed in 2014 could also be used to support 'shared housing projects'.[129] It appears that, while integrated education continues to be recognised as an important aspect of intergovernmental policy, over time its prominence has been diluted, with strategic commitments towards it having been divided between additional policy goals such as shared education and mixed housing.

122 Sandra Overend MLA, 'Ulster Unionist Attempt to End Lawful Discrimination in Teacher Recruitment Blocked by Nationalists' (23 February 2016): <http://sandraoverend.co.uk/ulster-unionist-attempt-to-end-lawful-discrimination-in-teacher-recruitment-blocked-by-nationalists>.

123 'A Single Equality Bill for Northern Ireland' (Northern Ireland Human Rights Commission, September 2004) para 54: <www.nihrc.org/documents/advice-to-government/2004/single-equality-bill-for-northern-ireland-september-2004.pdf>; 'Teachers Exception' (Equality Commission for Northern Ireland): <www.equalityni.org/Delivering-Equality/Addressing-inequality/Law-reform/Related-links/Teachers-exception-%281%29>.

124 Education Reform (NI) Order 1989, article 64(1).

125 Ibid article 66(2).

126 Ibid article 64(1).

127 'The Belfast Agreement' (Northern Ireland Office, 10 April 1998): <www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf>, Pt VI, para 13.

128 'The Stormont House Agreement' (Northern Ireland Office, 23 December 2014): <www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf>.

129 'A Fresh Start: The Stormont Agreement and Implementation Plan' (Northern Ireland Office, 17 November 2015): <www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf>.

This perception is supported by litigation challenging the ostensibly lacklustre approach of the Department of Education towards integrated education proposals. In an application for judicial review by Drumragh Integrated College, where the college claimed that the Department had failed to fulfil its duty to encourage and facilitate the development of integrated education after it refused a development proposal submitted by the college to increase pupil enrolment figures over a five-year period, and also in relation to the Department's own development planning policy, the court reached a decision in the college's favour on both grounds.[130] Contrary to the Department's claim that its duty was not only directed towards formally recognised integrated schools, nor indeed any 'particular sector',[131] Treacy J held that integrated education is 'a standalone concept' that 'plainly envisages education together at the same school'[132] and 'not education that is delivered by a partisan board'.[133] The learned judge also said that the Department's area-based planning policy, which was focused on 'need', created an additional difficulty for the integrated education sector, thereby accepting the applicant's argument that the effect of the Department's policy was to disadvantage the college by requiring growth in the integrated sector, which the college fell within, 'accompanied by an equivalent contraction in the maintained and controlled sectors'.[134] Significantly, in the context of a case pursued in the public interest (as the Minister had in fact agreed to retake his impugned decision and make certain concessions),[135] the court found that the Department needed to be alive to its duty to encourage and facilitate the development of integrated education 'at all levels, including the strategic level'.[136] Nonetheless, subsequent to the court's judgment, the Minister again rejected the development proposal made by Drumragh Integrated College.[137] The decision stated that 'due regard' had been given to the Department's duty as interpreted by the court, 'in the context of other duties',[138] but an application for leave to challenge the Minister's latest decision is currently before the High Court.[139]

In another recent application for judicial review by Maighread Cunningham, a primary school pupil, the court at first instance quashed ministerial decisions to refuse to permit the applicant's school to transform from a Catholic maintained school into an integrated school and to approve a proposal by the CCMS to close her school.[140] Treacy J held that 'the Minister clearly and mistakenly made both impugned decisions on the basis that the school was under financial stress'[141] and that he had therefore misdirected himself.[142] Perhaps the most noteworthy aspect of this case is that it concerned the first ever proposal to transform a Catholic school into an integrated school since it became possible

130 *Drumragh Integrated College's Application* [2014] NIQB 69.

131 Ibid [36].

132 Ibid [50].

133 Ibid [53].

134 Ibid [22].

135 Ibid [10].

136 Ibid [60].

137 'Development Proposal No 226 – To Increase Approved Enrolment at Drumragh Integrated College from 580 to 750 Pupils' (Department of Education, 17 September 2014): <www.deni.gov.uk/publications/dp-226-drumragh-integrated-college-omagh>.

138 Ibid.

139 'Integrated Education' *The PILS Project Newsletter* (29 February 2016): <http://us1.campaign-archive2.com/?u=c2f47bb0612afef59454494f0&id=b7338cac3f&e=82afc608b3>.

140 *Cunningham's (Maighread) (A Minor) Application* [2015] NIQB 25.

141 Ibid [12].

142 Ibid [17].

to do so in 1989.[143] It had been considered an unlikely prospect, 'given the traditions and ethos of the Catholic church in regard to education'.[144] Treacy J acknowledged that if approval for the transformation proposal had been given, 'its galvanising effect could have had potentially very significant positive implications' for the integrated education sector,[145] constituting 'a potentially ground-breaking development boost'.[146]

The Department appealed Treacy J's decision, arguing that documents which informed the Minister's decisions included accurate statements of the school's relatively stable financial position which rebutted allegations of any mistaken factual basis for them.[147] Significantly, counsel for the Department also submitted that while 'the judge appeared to be attracted by the school offering itself as a pioneering example of transformation from Catholic status to integrated status', the Minister's rejection of the proposal was supported by a low level of interest expressed by children designated as Protestant recorded for the prospective school years 2016 to 2018.[148] It was further submitted that only three expressions of interest were in fact recorded which, while meeting the initial 10 per cent minimum threshold, 'would fall well below the 30% threshold needed for integrated enrolment in the long term'.[149] We would have thought this unsurprising and, indeed, in line with the rationale for having a lower initial threshold, namely that other pupils could be encouraged to come forward over time, but this does not appear to have been raised in argument. The Court of Appeal was persuaded to remit the case to the judge at first instance, principally because his judgment did not engage with those submissions containing accurate records of the school's budgetary position which weighed 'significantly in favour of the Minister's decision'.[150] A new decision has not yet been handed down.

The Department's response to the *Drumragh Integrated College* case has been to commission an independent review of the 'planning, growth and development of integrated education' as it was defined by Treacy J.[151] There is obvious tension between that definition, which emphasises that integrated education is 'a standalone concept',[152] and the Department's stated interest in considering 'how to develop a more integrated education system in its widest sense',[153] the latter being akin to its judicially rejected argument in favour of a non-formally recognised and non-sectoral interpretation of the concept.[154] It is also remarkable that the terms of reference for the review pay no regard to Maighread Cunningham's case, despite the decision at first instance having been handed down many months prior to the launch of the review. Indeed, the terms of reference state that, 'to date', the process of transforming existing schools to integrated status 'has only been utilised by controlled schools',[155] without making any reference to Cunningham's

143 Education Reform (NI) Order 1989, Pt VI.

144 *Re Daly and Others* (NIQB, 5 October 1990) (MacDermott LJ), unreported.

145 *Cunningham's (Maighread) (A Minor) Application* [2015] NIQB 25 [8].

146 Ibid [10].

147 *Department of Education v Maighread Cunningham* [2016] NICA 12.

148 Ibid [58].

149 Ibid.

150 Ibid [92].

151 'Terms of Reference – Review of Integrated Education' (Department of Education, 27 January 2016): <www.deni.gov.uk/sites/default/files/publications/de/terms-of-reference-review-of-the-planning-growth-and-development-of-integrated-education.pdf> paras 1–2.

152 *Drumragh Integrated College's Application* [2014] NIQB 69 [50].

153 'Terms of Reference' (n 151) para 2.

154 *Drumragh Integrated College's Application* [2014] NIQB 69 [36].

155 Terms of Reference' (n 151) para 10.

application and the mould-breaking circumstances it involved. Moreover, the terms of reference include a review of 'the effectiveness of the processes for statutory transformation and the establishment of new integrated schools'.[156] The terms of the review dovetail with the Department's general orientation towards supporting 'naturally integrated' or 'super mixed' schools and shared education policies.[157] This strengthens the view that the review panel's objective to 'develop longer-term proposals to ensure [that] the nature and structure of integrated education remain fit for purpose in light of the significant societal changes in the twenty-five years since the 1989 Order'[158] indicates a drop in support for integrated education by governmental actors, despite the existence of a continuing legal duty to encourage and facilitate it. Tellingly, 'the vast majority of responses (87%)' to the review's call for evidence 'felt that government has not been sufficiently pro-active in supporting development of integrated education'.[159] This confirms our view that it is vital for governmental actors to revisit the foundational arguments in favour of planned integrated education over any other form.[160] The expected introduction of a Private Members' Bill in the Assembly aimed at furthering integrated education provision should be treated as an opportunity to revitalise governmental enthusiasm towards its potential.[161]

(e) The plan to provide for 'shared' education

A Ministerial Advisory Group (the Group) was appointed in 2012 by the Minister of Education 'to explore and bring forward recommendations on how to advance shared education' in Northern Ireland.[162] The Group agreed to adopt a definition of shared education as education involving:

> . . . two or more schools or other educational institutions from different sectors working in collaboration with the aim of delivering educational benefits to all learners, promoting the efficient and effective use of resources, and promoting equality of opportunity, good relations, equality of identity, respect for diversity and community cohesion.[163]

The Group reported in 2013, prefacing its recommendations with the view that integrated schools should not be seen as the 'preferred option' in relation to plans to advance shared education.[164] Instead, the Group saw integrated schools 'as a sector, rather than a model'

156 Ibid para 21(b)(iii).

157 Ibid paras 15–17.

158 Ibid para 21(g).

159 'A Summary Analysis of Responses to the Independent Review of Integrated Education Call for Evidence' (Department of Education, 28 June 2016) 5: <www.education-ni.gov.uk/publications/summary-analysis-responses-independent-review-integrated-education-call-evidence>. The independent review group, comprising Mr Colm Cavanagh and Professor Margaret Topping, delivered its report to the Minister of Education in September 2016, but as yet it has not published.

160 A E C W Spencer, 'Arguments for an Integrated School System' in Osborne et al (n 82) 99.

161 'Alliance Members Table Private Members' Bills for Consideration' (Alliance Party, 12 May 2016): <http://allianceparty.org/article/2016/0010335/alliance-members-table-private-members-bills-for-consideration>.

162 'Ministerial Advisory Group on Advancing Shared Education: Terms of Reference' (Department of Education, 19 July 2012): <www.deni.gov.uk/sites/default/files/publications/de/shared-education-advisory-group-terms-of-reference.pdf>.

163 Paul Connolly, Dawn Purvis and P J O'Grady, 'Advancing Shared Education' (Ministerial Advisory Group Report, March 2013) 103–4: <http://pure.qub.ac.uk/portal/files/14596498/Filetoupload_382123_en.pdf>. The language used in this definition now reflects 'the purpose of shared education' as defined by the Shared Education Act (NI) 2016, s 1(2).

164 Connolly et al (n 163) 107.

of shared education and advocated against 'actively promoting one sector over other sectors'.[165] While expressing its implicit disapproval of the Department's statutory duty to encourage and facilitate integrated education,[166] the Group did not overtly recommend its repeal or amendment. Instead, the Group's recommendations proposed the advancement of shared education by various initiatives without engaging substantively with the relationship between those policies and the Department's existing statutory duty. This relationship was not then clarified before the subsequent passage of a duty on the Authority to encourage, facilitate and promote shared education.[167] The potential for legal confusion which this creates is regrettable.

In September 2015 the Department published a policy document setting out its vision of 'the way forward' for shared education, openly based on the Group's report.[168] The document bluntly asserted that the Department's duty to facilitate and encourage integrated education would 'not be impacted' by the policy proposals[169] and envisaged 'that a proportion of schools may move along the continuum to a more integrated model'.[170] The Department has started the implementation of its policy through the Shared Education Act (NI) 2016, which defines the concept of shared education,[171] confers a power on certain education bodies to encourage and facilitate shared education,[172] and commences the above-mentioned duty on the Authority to encourage, facilitate and promote shared education.[173] The Act places the Department under an identical duty to encourage, facilitate and promote shared education (which differs from the initial proposal to confer upon it a discretionary power to do so).[174] Furthermore, the Act imposes a duty on education bodies to 'consider' shared education when 'developing, adopting, implementing or revising policies, strategies and plans' and when 'designing and delivering public services',[175] and requires the Department to carry out biennial reviews of the Act's operation.[176] These legislative foundations underpin shared education to a far greater extent than is the case for integrated education. This shift in focus is a matter of considerable regret to advocates of integration, who believe that the sharing of classes, facilities, teachers and buildings merely marks an acceptance that Northern Ireland schools are destined to remain separated along religious lines.[177] Indeed, some have said that the policy in favour of shared education 'represents a failure to confront society's most glaring needs', calling it 'segregation with a smiley mask on' opted for as a means of

165 Ibid 108.

166 Ibid 107–8.

167 Education Act (NI) 2014, s 7.

168 'Sharing Works: A Policy for Shared Education' (Department of Education, September 2015): <www.deni.gov.uk/sites/default/files/publications/de/shared-education-policy.pdf>.

169 Ibid 12.

170 Ibid 16.

171 Shared Education Act (NI) 2016, s 2(2).

172 Ibid s 4.

173 Ibid s 8; Education Act (NI) 2014, s 7.

174 Shared Education Act (NI) 2016, s 3.

175 Ibid s 6.

176 Ibid s 7.

177 Kathryn Torney, 'The Shift from Integrated to Shared' *The Detail* (6 June 2014): <www.thedetail.tv/articles/the-shift-from-integrated-to-shared>.

avoiding resistance to genuine integration from influential religious interest groups.[178] These concerns should be taken into account by both the independent review of integrated education discussed above[179] and by the Assembly during its consideration of the Private Members' Bill on integrated education expected to come before it this term.[180] We hope that our proposal relating to education for humanity will influence both those processes.

(f) The influence of academic selection in this sphere

Legislation to prohibit the use of academic selection tests for post-primary pupils in Northern Ireland was stalled by the St Andrew's Agreement in 2006 and, until very recently, the relevant Minister had merely refused to condone regulations permitting academic selection or a central transfer procedure.[181] Departmental guidance which education bodies must 'have regard to',[182] meaning that they must give 'active and receptive consideration' to it and, where applicable, record their reasons for departing from it,[183] strongly discouraged the use of criteria based on academic ability,[184] providing a menu of non-academic selection criteria for them to draw upon instead.[185] However, in the absence of political consensus on the merits of academic selection, and the related absence of will among a majority of the Northern Ireland Assembly to prohibit it, academic selection tests continue to be carried out by most grammar schools for applicants at the age of 10 or 11. The current Education Minister has since said that 'academic selection is here to stay', while expressing his willingness to consider ways of improving the system.[186] Acting upon this commitment, and reversing the policy of his predecessors, the current Minister has issued revised guidance which now permits schools 'to use academic selection as the basis for admission of some or all of their pupils'.[187]

178 Patrick McEvoy, 'Response to the Department of Education's Consultation on Shared Education' (Humani 2015): <www.humanistni.org/dynamic_content.php?id=125>. For a more enthusiastic account of shared education, which explores its underpinning theoretical framework and considers a detailed case study, see Gavin Duffy and Tony Gallagher, 'Shared Education in Contested Spaces: How Collaborative Networks Improve Communities and Schools' (2016) Journal of Educational Change 1.

179 See text at n 151ff.

180 See text at n 161ff.

181 Laura Lundy et al, 'Education Reform in Northern Ireland: A Human Rights Review' (Northern Ireland Human Rights Commission, 8 April 2012) 11: <www.nihrc.org/uploads/publications/Education_Reform_in_Northern_Ireland-_A_Human_Rights_Review.pdf>.

182 Education (NI) Order 1997, article 16(B), as amended by the Education (NI) Order 2006, Article 30, and the Education (NI) Act 2014, Sch 3, para 1(1).

183 *JR 56's Application* [2011] NIQB 78, [12].

184 'Post-Primary Transfer Policy from September 2015' (Department of Education, 10 September 2015) para 18: <www.deni.gov.uk/sites/default/files/publications/de/post-primary-transfer-policy-from-september-2015.pdf>.

185 Ibid para 16.

186 'Peter Weir: Academic Selection Safe, and I Want to Improve It' *Belfast Newsletter* (27 May 2016): <www.newsletter.co.uk/news/northern-ireland-news/peter-weir-academic-selection-safe-and-i-want-to-improve-it-1–7403671>.

187 'Guidance to Primary School Principals, Post-Primary Schools' Boards of Governors and Principals, and the Education Authority on the Process of Transfer from Primary to Post-Primary School from September 2016' (Department of Education, 7 September 2016): <www.education-ni.gov.uk/publications/post-primary-transfer-guidance-september-2016>. For further information on the recent history of academic selection policy, see Caroline Perry, 'Academic Selection: A Brief Overview' (Northern Ireland Assembly Research and Information Service, 8 September 2016): <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016–2021/2016/education/4816.pdf>.

While there is a range of research raising concerns about the current 'system',[188] the most significant aspect of the status quo for present purposes is its perpetuation of religious segregation. In the 'policy vacuum' pertaining at the moment,[189] schools have adopted two separate sets of admissions tests devised by two separate organisations. The Association for Quality Education (AQE), comprising mostly grammar schools with a Protestant ethos, runs one set of tests, and Granada Learning (GL) runs another set of tests for the Post-Primary Transfer Consortium (PPTC) which are recognised mainly by schools in the Catholic sector.[190] It has recently emerged that the two assessment providers are being formally encouraged by the Department to devise a common test by 2017 under the leadership of Professor Peter Tymms, but for the time being the tests continue to be run separately. A small number of schools allow children to apply with the results of either test[191] and some integrated schools have recently chosen to introduce milder academic selection criteria than those deployed by the two main assessment providers,[192] but there is widespread 'dismay amongst commentators, parents and teachers who agree that the current system is chaotic'.[193] That dismay was recognised by the Ministerial Advisory Group referred to above,[194] which conceded that their recommendations on advancing shared education were limited by the 'high stakes and currently unregulated' academic selection processes in present use, calling the available routes 'divisive, archaic and not fit for purpose'.[195] It is similarly clear to us that the right to education for humanity is inhibited by the present arrangements for allocating children to schools providing secondary education, which we consider to be inconsistent with our conception of the right's basis in impartiality and equality. We further consider that the Department's warning to schools in relation to the potential for legal challenges to unregulated admissions testing is well founded.[196]

The way forward

The dangers inherent in neglecting to expose children to education for humanity should be clear for all to see, both generally and more particularly in relation to Northern Ireland. We can point to many conflicts around the world where religious differences play a significant part in dividing peoples, often as proxies for other differences based on ethnic origin, tribal background, political allegiance or social class. Differences between Protestants and Catholics in Northern Ireland, between Shias and Sunnis in Iraq, between Jews and Muslims in Palestine and between Hindus and Sikhs in India have all contributed to the prolongation of conflicts that have entailed the loss of countless lives, terrible personal suffering and huge social upheavals. We are not naïve enough to suppose that an

188 See, for example, Tony Gallagher, 'The Impact of Devolution on Education Policy: Two Case Studies' in Caitlin Donnelly, Penny McKeown and Robert Osborne (eds), *Devolution and Pluralism in Northern Ireland* (Manchester UP 2006) 139–48.

189 Derek Birrell and Deirdre Heenan, 'Policy Style and Governing without Consensus: Devolution and Education Policy in Northern Ireland' (2013) 47 Social Policy and Administration 765, 773.

190 Ibid.

191 Lundy et al (n 181).

192 Rebecca Black, 'Four Integrated Schools Opt for Academic Selection in Defiance of Northern Ireland Education Minister O'Dowd' *Belfast Telegraph* (12 February 2016): <www.belfasttelegraph.co.uk/news/northern-ireland/four-integrated-schools-opt-for-academic-selection-in-defiance-of-northern-ireland-education-minister-odowd-34446587.html>.

193 Birrell and Heenan (n 189).

194 See text at n 162ff.

195 Connolly et al (n 163) 111.

196 'Post-Primary Transfer Policy' (n 184) para 19 and Annex 1; 'Guidance to Primary School Principals (n 187) Annex 1.

obligation on states to provide all persons with education for humanity will settle all such conflicts and prevent new ones from emerging, but we do maintain that, by making all people, especially children, more aware of the role played by religious differences in the perpetuation of conflicts, states are more likely to be able to reduce the intensity of the conflicts and promote compromise between opposing views. In particular, parents should not be allowed to restrict their children's access to pluralistic religious education.

As far as the particular case of Northern Ireland is concerned, we share the view of Emerson and Lundy that the public interest in guaranteeing children's rights to education is even more compelling in a society which is making the transition from violence to peace.[197] But while those authors argue primarily for a rights-based approach to education, including the child's right to help determine the nature of the curriculum,[198] we go further in suggesting that the right to education for humanity requires more than just education about human rights. While maintaining that adherence to human rights principles is a *sine qua non* of an approach based on humanity, we claim that the latter entails in addition a commitment to peaceful co-existence, to the celebration of diversity and to the mutual appreciation of alternative points of view. In Northern Ireland, where the influence of religious organisations is still manifest in many dimensions of a school's activities, it is crucial that the narrow-mindedness which such influence can instil in pupils is countered by a requirement to expose all children to their status as citizens of the world. As they are destined to grow up in an ever more globalised environment where they can communicate at the press of a button with countless others, it is vital that they be equipped to better understand all societies, in particular the nature and diversity of religious beliefs and cultural practices. Guaranteeing their right to education for humanity will dispose children to appreciate the value in difference rather than confine them to their own aleatory heritage.

197 Lesley Emerson and Laura Lundy, 'Education Rights in a Society Emerging from Conflict: Curriculum and Student Participation as a Pathway to the Realization of Rights' in Swadener et al (n 40) 19–38, 20.

198 Ibid 21.

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Decolonising education in Africa: implementing the right to education by re-appropriating culture and indigeneity

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Abstract

Education in many African states is comparatively characterised by inadequate availability, accessibility, acceptability and adaptability of education. Nevertheless, evaluations focusing on lack of educational infrastructure and personnel usually ignore the contextual inadequacies of educational provision in the region and the inability of such education to equip its citizens to fit in with and benefit the societies they live in. This educational incompatibility has led to a significant level of unemployment/underemployment, underdevelopment and 'brain-drain', as well as some erosion of languages and cultures.

The colonial experience reduced education to a tool of communication between the coloniser and the colonised. Emphasis on the individual and de-emphasis on community and culture resulted in ideological dissonance. Despite post-independence attempts to reverse this, vestiges of postcoloniality in contemporary education remain and perpetuate a myth of inferiority of indigenous knowledge and methods. This deprives the world of a wider range of ways of knowing, pedagogy and epistemologies. The CESCR envisions education for the full development of the human personality of all people all over the world. Therefore, international initiatives promoting the right to education in Africa should take into account the particular positionality, historicity and needs of populations.

Using theories of deconstructive postcolonialism, this article will examine Africa's education narrative and suggest a critical Freirian approach for decolonising education in Africa. This article contends that un-decolonised education results in epistemic violence/injustice and is thus pedagogically and ethically unsound – violating the right to education.

Introduction

The 1960 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples demonstrated an international anticolonial consensus. The declaration asserted the 'necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations' and proclaimed that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes *a denial of fundamental human rights*, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'.[1]

* Teaching Associate. I wish to thank Professors Rachel Murray and Steven Greer as well as the anonymous reviewer – their input has enriched this article and myself.

1 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc A/RES 1514 (XV), 14 December 1960, para 1 (emphasis added).

This was subsequent to a history of African agitation against colonial rule and its system.[2] This included formal colonial education and economics; both were considered unfair and discriminatory. Agitators for independence believed that self-government would reverse this.[3] At decolonisation, administration of all colonies was placed in the hands of Africans educated in colonial schools.[4] However, colonial education had coloured indigenous African thought, classifying it as pre-logical and pre-critical, disregarding the fact that difference will not always suggest inferiority.[5] Post-independence anticolonial initiatives informed by postcolonial writing on the subject have not sufficiently decolonised the socio-political, socio-cultural and socio-economic structures which were colonial inheritances.[6] In 2016, the 'Rhodes Must Fall' educational decolonisation movement – started in South Africa with the removal of a statute of Cecil Rhodes – extended to Oxford in the UK.[7] In non-African countries, this debate also suggests making curricula more inclusive.

In Africa, the promotion of the right to education, especially by international bodies, has been focused mainly on improving the availability and accessibility of education. African indigenous knowledge rarely features in this process. 'Indigenous knowledge' refers to precolonial African knowledge in and of Africa. It could be argued here that 'the concept of Africa', distinguished from the geographical entity, is both a colonial and postcolonial illusion, however, international engagement with sub-Saharan Africa especially, tends to disregard African state particularity and rather focuses on equal African paucity – supposed or otherwise. This article's treatment of 'Africa' is based in part on this prior engagement. As Nyamnjoh laments: 'Monological, non-reflexive and non-inclusive representations of parts of an arbitrarily mapped-out and confined Africa continue to be the dominant mode of comprehending the continent'.[8] Oelofsen posits that '"Africa" denotes more than a geographical location'. She suggests that acknowledging the concept of Africa is to acknowledge the effect such conceptualisation has on intellectuality.[9] It is this author's aim to simultaneously conceptualise and reconceptualise this form of representation.

Syrotinski's approach[10] and the views of postcolonial African theorists prove very informative to the decolonisation process. Postcolonial deconstruction suggests the possibility and hope of a world of true equality of knowledge, philosophy and thought,

2 Michael Crowder, *West Africa under Colonial Rule* (Northwestern UP 1976) 467.

3 Ibid 469.

4 Ken Post, *The New States of West Africa* (Penguin African Library 1968) 42.

5 Barry Hallen, *A Short History of African Philosophy* (Indiana UP 2009) 38; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 253; Barry Hallen, *The Good, the Bad, and the Beautiful: Discourse about Values in Yoruba Culture* (Indiana UP 2000) 2, 50; Francis B Nyamnjoh, '"Potted Plants in Greenhouses': A Critical Reflection on the Resilience of Colonial Education in Africa' (2012) 47(2) Journal of Asian and African Studies 136; Edward Shizha, 'Reclaiming our Memories: The Education Dilemma in Postcolonial African School Curricula' in Ali A Abdi and Ailie Cleghorn (eds), *Issues in African Education* (Palgrave Macmillan 2005) 67.

6 Peter Mayo, 'Nyerere's Postcolonial Approach to Education' in Ali A Abdi (ed), *Decolonizing Philosophies of Education* (Sense Publishers 2012) 43–47; Shizha (n 5) 75.

7 André Rhoden-Paul, 'Oxford Uni Must Decolonise its Campus and Curriculum, Say Students' *The Guardian* (24 March 2016) <www.theguardian.com/education/2015/jun/18/oxford-uni-must-decolonise-its-campus-and-curriculum-say-students>.

8 Francis B Nyamnjoh, 'Blinded by Sight: Divining the Future of Anthropology in Africa' (2012) 47 Africa Spectrum 68.

9 Rianna Oelofsen, 'Decolonisation of the African Mind and Intellectual Landscape' (2015) 16(2) Phronimon 140.

10 See n 21 and text at n 41 below.

a world where human rights are truly international. Spivak's writings on the subaltern explore the mechanisms of epistemological silencing,[11] while Freire's ideas transform decolonisation possibility into potential.[12] The pivotal role of education as a socialisation, liberation and developmental force indicates that an acceptable 'right to education' should be complemented by 'rights in education'.[13] Rights in education require 'protection of and respect for learners' cultures, needs and languages'.[14]

This article will examine postcolonial theories as well as the historicity of African education and argue for the possibility of decolonising education. For the purposes of the article, education refers to 'organized activities that take place in schools that are intended to transmit skills, knowledge'.[15] There is a danger that African governments continue to use education as a tool of subjugation. Using the framework of international human rights law to effectively decolonise education could prevent this.

Africa and postcolonial deconstruction

Sertima describes the effects of colonialism in Africa thus:

> No human disaster . . . can equal in dimension of destructiveness the cataclysm that shook Africa . . . the threads of cultural and historical continuity were so savagely torn asunder that henceforward one would have to think of two Africas: the one before and the one after the Holocaust.[16]

The consequence of the colonial encounter between Europe and Africa was to establish thereafter the parameters for global power and the gateway of acceptable language, knowledge, jurisprudence and thought.[17] The colonial relationship functioned through acculturation mechanisms such as 'assimilation' and 'association', predicated on presumed African inferiority; these mechanisms were justified by treaties that disempowered and fervent evangelising, as well as arguments that alluded to both imperial profit-making and humanitarian munificence.[18] Mbembé states that colonisation was an enterprise of appropriation, familiarisation and utilisation.[19] The overall result was to effectively silence African history, knowledge and autonomy.[20]

Postcolonial theory analyses the consequences of colonialism on the colonised. Theorists consider the ideas of hierarchical difference in how the image of Africa is

11 Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan Education UK 1988) 271–313.

12 Paulo Freire, *Pedagogy of the Oppressed*, Myra Bergman Ramos (trans) (Continuum 2000).

13 Zehlia Babaci-Wilhite et al, 'Education and Language: A Human Right for Sustainable Development in Africa' (2012) 58(5) International Review of Education 628.

14 Ibid 629.

15 Ali A Abdi and Ailie Cleghorn, 'Sociology of Education: Theoretical and Conceptual Perspectives' in Abdi and Cleghorn (n 5) 5.

16 Ivan van Sertima, *Black Women in Antiquity* (Transaction Books 1984) 8.

17 Anghie (n 5) 66.

18 Ibid 206; Walter Rodney, *How Europe Underdeveloped Africa* (Bogle-L'Ouverture Publications 1972) 247; Dismao A Masolo, 'African Philosophers in the Greco-Roman Era' in Kwasi Wiredu (ed), *A Companion to African Philosophy* (Blackwell 2004) 51; Edward Shizha, 'Rethinking and Reconstituting Indigenous Knowledge and Voices in the Academy in Zimbabwe: A Decolonization Process' in Dip Kapoor and Edward Shizha (eds), *Indigenous Knowledge and Learning in Asia/Pacific and Africa: Perspectives on Development, Education, and Culture* (Palgrave Macmillan 2010) 118; Nyamnjoh (n 5) 132.

19 Achille Mbembé, *On the Postcolony* (University of California Press 2001) 237.

20 Olivia Rutazibwa, 'Studying Agaciro: Moving beyond Wilsonian Interventionist Knowledge Production on Rwanda' (2014) 8(4) Journal of Intervention and Statebuilding 294; Shizha (n 5) 69.

reproduced or represented in literature as well as new and old media.[21] The idea or invention of Africa cannot be divorced from the ideology that drove colonisation – the distinction between the civilised and the uncivilised.[22] That ideology pervades Africa's current relation with the rest of the world – power structures, politics, language and knowledge. Chinua Achebe, commenting on Joseph Conrad's *Heart of Darkness* (1899), states that the book's thesis is based on a presumption of African savagery, barbarism and intellectual inferiority.[23] Edward Said's critique of Conrad notes that, despite Conrad's disgust for colonial horrors, a world where Europe did not exercise mastery over Africa was beyond Conrad's imagination.[24] Postcolonial theory recognises that the incompetence and dependence of Africa's contemporary political and intellectual elite on external approval and assistance result from hybridity of supposed African authenticity and the attempted replication of colonial character, all carried out within an inherited colonial structure.[25]

Postcolonialism is concerned with:

> . . . the purely methodological question of knowing whether it is possible to offer an intelligible reading of contemporary Africa solely through conceptual structures and fictional representations used precisely to deny African societies any historical depth and to define them as radically other, as all that the West is not.[26]

In other words, postcolonial theory seeks to find the truth about Africa.

Ahluwalia states that even though postcolonial theory seems to have been mainly concerned with literary examination, it is helpful in 'suggesting that a polity be examined in totality from the rupturing moment of colonisation'.[27] It can potentially become more than a special branch of cultural studies. Postcolonial theory recognises that 'whilst retaining its linkages to its European past . . . through the process of hybridisation and transculturation, the African state has been and continues to be inflected locally'.[28] However, a suitably developed theory 'offers a way to break down the tyranny of the structures of power',[29] both for the individual and the state.

One of the major structures of power concerns the control of knowledge. Mudimbe and Nyamnjoh suggest that knowledge of Africa is based on three major systems – anthropological science, colonial politics and the 'civilising mission'.[30] The underlying idea of difference driving these knowledge systems imbued their interactions with

21 Michael Syrotinski, *Deconstruction and the Postcolonial: At the Limits of Theory* (Liverpool UP 2007) 67, 83; Okwach Abagi, 'The Role of the School in Africa in the Twenty-First Century: Coping with Forces of Change' in Abdi and Cleghorn (n 5) 301; Valentin Y Mudimbe, *The Invention of Africa: Prognosis, Philosophy and the Order of Knowledge* (Indiana UP 1988); Valentin Yves Mudimbe, *The Idea of Africa* (Indiana UP 1994); Makau W Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201–45; Frantz Fanon and Constance Farrington, *The Wretched of the Earth* (Penguin Books 1963); Ngugi Wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature* (East African Publishers 1994).

22 Syrotinski (n 21) 98; Anghie (n 5) 65.

23 Chinua Achebe, 'An Image of Africa' (1978) 9(1) Research in African Literatures 3.

24 Edward Said, *Culture and Imperialism* (Vintage 1994) 22–31.

25 Syrotinski (n 21) 69, 70, 72, 76, 99; Christopher Clapham, *Africa and the International System: The Politics of State Survival* (CUP 1996) 32; Nyamnjoh (n 5) 134.

26 Mbembé (n 19) 11.

27 Pal Ahluwalia, *Politics and Post-Colonial Theory: African Inflections* (Routledge 2012) 14.

28 Ibid 66.

29 Ibid 72.

30 Mudimbe, *Invention of Africa* (n 21) 14–36; Nyamnjoh (n 5) 130.

practices of acculturation.[31] The systems are supported by what Mudimbe calls the 'colonial library' – the epistemology of supposed knowledge of Africa – a system of thought so ingrained in our consciousness that we argue against its theories by referencing its precepts.[32] Mudimbe's arguments are reminiscent of Foucault, though Mudimbe is aware of his own self-contradictions.[33] Syrotinski translates a metaphor of an African researcher from Mudimbe's 'L'autre Face du Royaume', 'who rides up and down a lift believing that he or she is in control of its movement, all the while unaware that Western technicians in fact possess the knowledge of its operation and thus ultimately determine the limits of its freedom'.[34] Harrow says of Mudimbe's arguments, that the retreat from colonialism 'must transcend the limits imposed on the situation by the refusal of its givens altogether,'[35] questioning the possibility of transcending international life. Mudimbe ultimately realises that we cannot speak of decolonisation without understanding the psychology of colonisation; yet decolonisation cannot achieve a return to precolonial Africa because acculturation is also a fact of history not particular to Africa.[36] Therefore, formal education cannot be wholly replaced by indigenous knowledge, decolonisation should point forwards, not backwards. Deconstructive reading of postcolonial theory aids this possibility.

Deconstruction has as one of its main authors Jacques Derrida. Derrida sought to question assumptions within Western thought by challenging the premises of stasis and rationality upon which Western philosophy is based.[37] Deconstruction explores accepted assertions to find other meanings than the one constructed: the idea of truth suggests the possibility of fiction, the idea of justice suggests the possibility of injustice.[38] Language, and consequently the world, is shown to be figurative; objectivity can be questioned as it is constructed through unreliable language. Deconstruction asks us to look beyond the text or the 'representation' and question the normalisation of the construction of Africa, enabling us to rewrite/reinvent Africa, to de-victimise Africa, to iterate Africa in the context of a possible equal future.[39] Deconstruction is of particular relevance to epistemic violence, which is concerned with dominant knowledge that silences other forms of knowledge; it is the cognitive inability to engage with the truth of another group's social experience.[40]

'Deconstructive post-colonialism' as theorised by Syrotinski is a scholarly process that can potentially reduce the perceived political inefficacy of deconstruction and grant postcolonialism political force.[41] Syrotinski contends that 'deconstruction as a highly

31 Mudimbe, *Invention of Africa* (n 21) 33; Anghie (n 5) 65.

32 Mudimbe, *Invention of Africa* (n 21) 179–94; Hallen, *African Philosophy* (n 5) 44.

33 Mudimbe, *Invention of Africa* (n 21) 56.

34 Syrotinski (n 21) 85.

35 Kenneth Harrow, 'Mudimbe and the Power of the Word' in Stephen Arnold (ed), *African Literature Studies: The Present State* (Cornell UP 1985) 97.

36 Mudimbe, *Invention of Africa* (n 21) 167, 168, 209; Bryan Mukandi, 'Chester Himes, Jacques Derrida and Inescapable Colonialism: Reflections on African Philosophy from the Diaspora' (2015) 34(4) South African Journal of Philosophy 535.

37 Jacques Derrida, *Writing and Difference* (University of Chicago Press 1978) especially 41; Barry Stocker, *Routledge Philosophy Guidebook to Derrida on Deconstruction* (Routledge 2006) 107, 115–16, 188–9.

38 Michael Syrotinski, 'Monstrous Fictions: Testifying to the Rwandan Genocide in Tierno Monénembo's L'aîné des Orphelins' (2009) 45(4) Forum for Modern Language Studies 437; Jack M Balin, 'Deconstructive Practice and Legal Theory' (1987) 96(4) Yale Law Journal 743-86.

39 Syrotinski (n 21) 74, 109, 111–13, 115.

40 Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (OUP 2007) 152–69.

41 Syrotinski (n 21) 23, 118.

vigilant reading practice, can inform our critical understanding of specific post-colonial contexts'.[42] He argues for a closer theoretical relationship between postcolonial theory and deconstruction. Syrotinski maintains that Mbembé's thesis of 'writing Africa' engages 'in a deconstructive mode of reading that responds to the imperative of a "writing of the disaster"'.[43] He goes on to state that deconstruction teaches us that the historical instances of African trauma 'are the very condition of the possibility of writing and reading narratives . . . and the post-colonial'.[44] Or, as Mbembé himself suggests, 'each death or defeat leads to a new appearance, is perceived as confirmation, gage, and relaunch of an ongoing promise, a "not yet," a "what is coming," which – always – separates hope from utopia'.[45] Postcolonialism points forward, not with an unshakeable narrative of fatality, but with a narrative of equal freedom and opportunity. Syrotinski states that 'the work of remembering and mourning is an ongoing collective responsibility, and not simply a civic duty we perform so as to then forget'.[46] Deconstructing the postcolonial speaks of what can be, despite the trauma of colonialism and the incapacity of the postcolonial state.

Africa, the right to education and Freire's pedagogy

In Africa, the right to education is protected by a collection of international, regional and national legislation, but most specifically by Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Protections within regional laws merely reiterate the ICESCR. According to the Committee on Economic, Social and Cultural Rights (CESCR), education is a means of attainment of all other rights.[47] The UN Committee on the Rights of the Child states that education should reflect a balance between promoting the physical, mental, spiritual and emotional aspects and the intellectual, social and practical dimensions of education.[48] The right to education has been described as an empowerment right or a gateway right.[49] Consequently, the right should enable the educated to take control of her life and contribute to the development of her state.[50]

In its General Comment No 13, the CESCR provides that primary education should be free and quality education should be available, accessible, acceptable and adaptable.[51] Coupled with quantitative data, such as the ratio of a state's youth in education and the portion of state resources allocated to education, the foregoing features provide a standard assessment of education.[52] Process and outcome indicators are used to

42 Ibid 59.

43 Ibid 118.

44 Ibid 123.

45 Mbembé (n 19) 206.

46 Syrotinski (n 38) 12.

47 CESCR General Comment No 13: The Right to Education (Article 13), 8 December 1999, E/C12/1999/10; Fons Coomans, 'Clarifying the Core Elements of the Right to Education' (1988) 10 Framework 215.

48 UN Committee on the Rights of the Child, General Comment No 1 (2001), Article 29(1): The Aims of Education, CRC/GC/2001/1, para 12.

49 Klaus D Beiter, *The Protection of the Right to Education by International Law* (Brill 2005) 56.

50 Coomans (n 47) 214.

51 CESCR (n 47); Sital Kalantry, Jocelyn E Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32(2) Human Rights Quarterly 278.

52 Katrien Beeckman, 'Measuring the Implementation of the Right to Education: Educational versus Human Rights Indicators' (2004) 12(1) International Journal of Children's Rights 72, 73, 77.

determine the suitability of laws and policies and, consequently, the resulting effect of these laws and policies.[53]

According to UNESCO, sub-Saharan African states are comparatively behind other regions in the provision of education.[54] In 2012 sub-Saharan Africa had the lowest regional gross enrolment ratio – 20 per cent. North America and Western Europe's ratio stood at 89 per cent and Central Asia's at 33 per cent. Provision of early childcare in sub-Saharan Africa stood at 20 per cent – unfavourably compared to Latin America at 74 per cent. Sub-Saharan Africa also had the highest regional numbers of students not in school – at nearly 30,000, almost three times Asian regional numbers. Attainment of literacy skills also suffers as education systems exhibit infrastructural failures in access and learning.[55] The inadequacies of the education system are played out against a background of high child-marriage rates, parent illiteracy, poverty and political unrest.[56]

While some regional legal instruments attempted to include 'African values' within their standards,[57] these have failed to be effective as they are attached to legal norms that seem to be in direct contradiction to those propositions. Nevertheless, scholars like Mutua and An-Na'im argue that, without the inclusion of the African perspective in international human rights law (IHRL), the human rights mosaic is incomplete and undemocratic.[58] IHRL is naturally suspicious of tradition, but if our desire to improve human rights and education is predicated on the inherent value of all human experience, we cannot justly disregard a significant part of that experience in doing so. To achieve universality (and not uniformity) of human rights, a more multifaceted conception of how human rights norms are assimilated by different cultures needs to be attained. Culture could in essence be appropriated as a functional tool to help in the promotion and entrenchment of human rights.[59] Indigenisation of education measures in Canada, Australia and the Philippines was followed by an increase in student representation from

53 Kalantry et al (n 51) 282.

54 UNESCO, 'Education for All 2000–2015: Achievements and Challenges' (UNESCO 2015) <http://unesdoc.unesco.org/images/0023/002322/232205e.pdf>.

55 Kevin Watkins, 'Too Little Access, not Enough Learning: Africa's Twin Deficit in Education' in *This is Africa Special Report, Access+: Towards a post-MDG Development Agenda on Education* (2013) <www.brookings.edu/research/opinions/2013/01/16-africa-learning-watkins>; Amina Mama, 'Is It Ethical to Study Africa? Preliminary Thoughts on Scholarship and Freedom' (2007) 50(1) African Studies Review 22; Africa-America Institute, *State of Education in Africa Report 2015: Overview of the State of Education in Africa – Early Childhood, Primary and Secondary Education, Vocational and Technical Training, and Higher Education* (2015) 6–11: <www.aaionline.org/wp-content/uploads/2015/09/AAI-SOE-report-2015-final.pdf>; Justin W Van Fleet, K Watkins and L Greubel, 'Africa Learning Barometer' (2012) 1–14: <www.brookings.edu/~/media/events/2012/9/17-africa-learning/africa-learning-barometerfinal.pdf>; Brendalyn P Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (Greenwood Publishing Group 1995) 67; Abagi (n 21) 301; Birgit Brock-Utne and Malcolm Mercer, 'Languages of Instruction and the Question of Education Quality in Africa: A Post-2015 Challenge and the Work of CASAS' (2014) 44(4) Compare: A Journal of Comparative and International Education 677.

56 Watkins (n 55); Nyamnjoh (n 5) 139; Abagi (n 21) 302–5.

57 African Charter on Human and People's Rights (ACHPR), Articles 27–29.

58 Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1994) 35 Virginia Journal of International Law 344; Abdullahi A An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in Abdullahi A An-Na'im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990) 339; Charles R Beitz, 'Human Rights as a Common Concern' (2001) 95 American Political Science Association 270.

59 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell UP 2013) 112; Manfred O Hinz, 'Human Rights between Universalism and Cultural Relativism? The Need for Anthropological Jurisprudence in the Globalising World' in Anton Bösl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (Konrad Adenauer Foundation 2009) 3, 12.

marginal groups, a new understanding of citizenship and a more robust curriculum.[60] Freire's ideas about 'situationality' therefore have proven merit.[61]

Paulo Freire was a Brazilian educator whose ideas on pedagogy are encapsulated succinctly in his book *The Pedagogy of the Oppressed* (1968). Freire argued that education was usually structured as a system of knowledge 'banking' – collection and regurgitation – that dehumanises the subject.[62] This is reflected in ethnographies conducted in Kenya which showed that, despite code-mixing, the use of English as the primary language of instruction resulted in ritualistic use of language and limited epistemological access.[63] Furthermore, studies in post-apartheid South Africa have suggested that memorisation takes precedence over inquiry.[64] Freire contended that knowledge is formed and reformed through persistent human inquiry about the world.[65] He asserted that education should transcend understanding the world to encompass changing the world; education should transform and empower participants, not make them conform to prototypical representation.[66] He was a firm believer that education should reflect the lived experiences of participants in education – their 'situationality'.[67] To achieve these aims, Freire argued that the 'oppressed' have to 'unveil the world of oppression' themselves. This can be done through an equal relationship of dialogue so that education 'expresses the consciousness' of the teachers and students.[68] He recognised that anticolonial leaders may step into the shoes of the colonisers and use education to silence, in a similar fashion to their predecessors.[69] Silence and freedom, he stressed, are a contradiction.[70] Freire understood that education had revolutionary capacities and could be used to change the course of history;[71] in this he mirrors postcolonial deconstruction's thesis of possibility through education.

His work has had particular significance for pedagogical reform in the African countries of Guinea-Bissau, Egypt and Kenya;[72] his pedagogy is especially relevant for rural Africa where illiteracy is high.[73] While it has been argued that his language is impenetrable, his theories appear to resonate more deeply with people who are subject to

60 Mishack T Gumbo, 'A Model for Indigenising the University Curriculum: A Quest for Educational Relevance' in Vuyisile Msila and Mishack T Gumbo (eds), *Africanising the Curriculum: Indigenous Perspectives and Theories* (Sun Media Metro 2016) 39, 46–8.

61 Freire (n 12) 109.

62 Ibid 72.

63 Grace Bunyi, 'Language Classroom Practices in Kenya' in Angel Lin and Peter W Martin (eds), *Decolonisation, Globalisation: Language-in-Education Policy and Practice* (Multilingual Matters 2005) 132–50.

64 Meshach B Ogunniyi, 'Cultural Perspectives on Science and Technology Education' in Abdi and Cleghorn (n 5) 127.

65 Freire (n 12) 72.

66 Ibid 25, 34, 45, 47.

67 Ibid 54, 95, 109.

68 Ibid 54, 68–9, 88, 95.

69 Ibid 68, 89.

70 Ibid 89.

71 Ibid 84

72 Karl Botchway, 'Paradox of Empowerment: Reflections on a Case Study from Northern Ghana' (2001) 29(1) World Development 135–53; Osman A Ahmed et al, 'A Reflection on the Works of Paulo Freire and its Relevance to Classroom Teaching' (2014) 13 Middle Eastern and African Journal of Educational Research 21; Heba Sharobeem, 'The Impact of the Arab Spring at an Egyptian University: A Personal Experience' (2015) 4 Middle East-Topics and Arguments 110–21.

73 Juma E Nyirenda, 'The Relevance of Paulo Freire's Contributions to Education and Development in Present Day Africa' (1996) 10(1) Africa Media Review 19.

hierarchical structures of knowledge.[74] Nevertheless, any adoption of a Freirian approach needs to be adaptable to the needs of any population in the twenty-first century. Knowledge is fluid. As Nyamnjoh states, to transcend epistemological blindness, 'we must not define and confine Africa *a priori*, racially, geographically or otherwise'.[75]

Conceptual limitations to researching the right to education in Africa

In researching the implementation of the right to education, the individual right-holder should be the focus of attention. However, postcolonial deconstruction posits that the incomplete ideological construction of Africa is a result of filling the cracks of the unknown with the known.[76] Because Africa was unknown, African 'things' had to be signs of a prior stage of evolution resulting in a denial of previous undocumented historicity.[77] All theorising about Africa extends from our 'knowledge' of Africa as not existing before colonialism, an Africa without political or social structures, without history, literature or philosophy, without art or science, an Africa without education.[78] Our discussions of Africa are ultimately and persistently concerned with social engineering.[79] Freire engages with this by predicating his ideas on trust and humanism. He says:

> No pedagogy which is truly liberating can remain distant from the oppressed by treating them as unfortunates and by presenting for their emulation models from among the oppressors. The oppressed must be their own example in the struggle for their redemption.[80]

Current epistemology is derived in an unbroken line of pedagogy from the precolonial to the postcolonial and used to explain all current African phenomena.[81] Therefore, current implementation of the right to education ignores the fact that mimicry of cultural ideology will never become mastery, notwithstanding sincerity of the mimic or the master.[82] As Shizha states: 'Mental or psychological colonization was conducted through, among other mechanisms, Western education, texts, and literature'.[83] Defetishising, deconstructing and reconstructing our view of Africa moves us beyond the idea of an immutable dialectic sequence of African instability[84] and averts our gaze from the trauma to individuals. Without acknowledging the wounds of colonialism, healing is impossible[85] and our gaze is incomplete.[86] Our understanding of African crises is reflexively attributed to our construction of Africa as an 'absolute other'; our gaze of Africa is seen through its representations rather than its substantiation or any engagement with African humanity or the subjects' lived experiences; these representations confine our collective

74 Freire (n 12) 23.

75 Nyamnjoh (n 8) 82.

76 Syrotinski (n 21) 68; Samuel O Imbo, 'Okot p'Bitek's Critique of Western Scholarship on African Religion' in K Wiredu (ed), *A Companion to African Philosophy* (Wiley 2008) 371.

77 Syrotinski (n 21) 68, 77; Hallen, *African Philosophy* (n 5) 102.

78 Pierre Englebert, 'Feature Review – The Contemporary African State: Neither African nor State' (1997) 18(4) Third World Quarterly 767.

79 Mbembé (n 19) 7.

80 Freire (n 12) 84.

81 Mbembé (n 19) 3; Syrotinski (n 21) 79, 83.

82 Mbembé (n 19) 25; Syrotinski (n 21) 78; Hallen, *African Philosophy* (n 5) 38; Fanon and Farrington (n 21) 312.

83 Shizha (n 18) 119.

84 Syrotinski (n 21) 122.

85 Ibid 69.

86 Chimamanda N Adichie, 'The Dangers of a Single Story' (Tedtalks 2009) <www.ted.com/talks/chimamanda_adichie_ the_danger_of_a_single_story.htm>.

memory to one of absolute night, forgetting the existence or possibility of sunrise.[87] Thus academic research ignores the African subject in favour of the 'African project'.[88] This is evidenced by research collection in Africa by non-African academics which is imbued with preconceived representations of Africa and thus focuses on aims congruent with the research agenda but incongruent with the needs of the researched.[89]

While the idea of IHRL, and thus the right to education, is underpinned by the equality of the human subject, its implementation is powered by the hierarchical nature of otherness and consequently knowledge. Anghie makes a powerful argument for the colonial origins of international law, predicated on the disempowering nature of the idea of difference.[90] Otherness, in this sense, differs from particularity – otherness implies difference centred on inferiority; particularity acknowledges individuality and the human dignity of the subject.

The African is torn between a past lost in the mists of time and the fear of losing herself in a modern future constructed on an exogenous template.[91] This creates a dilemma from which there is apparently no possible escape: the African cannot be known without the tools of education, yet this education dilutes the authenticity of past experience and makes the knowing superficial. Lorde says: 'the master's tools will never dismantle the master's house'.[92] So modernity cannot be obtained without the African giving away part of her soul; Kingsley suggested that the philanthropist killed the African's soul to save the African's life.[93] Reconceptualising Africa envisions the possibility of implementing the right to education in Africa without killing the African soul; 'situationality' takes up indigenous tools to decolonise education, preventing reproduction of colonial ideas.[94] By understanding that our knowledge of Africa is subjective and continually open to contestation, we can explore the performances within languages, international law, history and legal arguments.[95] Acknowledging epistemic injustice recognises the ethical and unethical purposes of education in Africa's history.

The history of education in Africa

Assessment of educational attainment is focused on standards set by the international community and is concerned with postcolonial structures of formal schooling.[96] These assessments do not consider decolonisation, or the suitability of the existing education structure for the region, reducing education's effectiveness as a tool for social development.[97] History was removed from Nigeria's core syllabus in the 1970s, producing

87 Mbembé (n 19) 6, 241–2; Syrotinski (n 21) 99; Syrotinski (n 38) 4, 8.

88 Mbembé (n 19) 7–8.

89 Richard A Shweder, '"What about 'Female Genital Mutilation"? And Why Understanding Culture Matters in the First Place' (2000) 129 Daedalus 209, 213.

90 Anghie (n 5) 312.

91 Mbembé (n 19) 12; Abagi (n 21) 311.

92 Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press 2012) 110–13.

93 Quoted in Joseph Ephraim Casely Hayford, *The Truth about the West African Land Question* (Psychology Press 1971) 6.

94 Anghie (n 5) 313.

95 Ibid 320; Mudimbe, *Invention of Africa* (n 21) 193.

96 Report of the Special Rapporteur on the Right to Education, Kishore Singh: Assessment of the Educational Attainment of Students and the Implementation of the Right to Education A/HRC/26/27.

97 Ambrose (n 55) xvii; Nyamnjoh (n 5) 138; Abdullahi An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child' (1994) 8(1) International Journal of Law, Policy and the Family 74.

a generation ignorant of its own history.[98] In most African states education is conducted in a colonial language.[99] According to Namukasa, the school structure and taught content in Uganda has changed little since independence from Britain in 1962.[100]

The quality of colonial education was intentionally poor.[101] Spending on education was low and European powers spent considerably more on education in their own states.[102] In 1935 in Nigeria, only 3.4 per cent of colonial tax was spent on education.[103] The distribution of schools reflected the areas exploited for agricultural produce – the more agricultural produce extracted in an area by the colonial powers, the more likely it would be to find schools; access was restricted for Africans.[104] The content of education will reflect the purposes of education; the purpose of colonial education was to stifle resistance, provide local support staff who could communicate in the required European language and elevate a select few.[105] This created incongruity of content, as Rodney notes:

> On a hot afternoon in some tropical African school, a class of black shining faces would listen to their geography lesson on the seasons of the year – spring, summer, autumn, and winter. They would learn about the Alps and the river Rhine but nothing about the Atlas Mountains of North Africa or the river Zambezi. If those students were in a British colony, they would dutifully write that 'we defeated the Spanish Armada in 1588' . . . If they were in a French colony, they would learn that 'the Gauls, our ancestors, had blue eyes,' and they would be convinced that 'Napoleon was our greatest general . . .'[106]

This was in contrast to precolonial communities that thrived on oral traditions, telling generational legends in the humid moonlight, helping to preserve a sense of community, connectivity and continuity.[107] Such communities had a heavy cultural dependence on musical (and mostly legislative) proverbs and lyrical poetry.[108] The colonial education system introduced non-lyrical European languages and the written text; these are more detached, causing a socio-cultural rift in the communicative space. Consequently, many Africans write fluently only in a European language, but speak one or more African languages fluently. This greatly impedes the learning process.[109] The learner is simultaneously struggling with language and text leading to false and slow translations

98 Odunyemi O Agbelusi, 'Archaeological Education in Nigeria: Concepts, Methods, Challenges, and Recommendations' (2015) 11(2) Archaeologies 223.

99 Ali A Abdi, 'Clash of Dominant Discourses and African Philosophies and Epistemologies of Education' in Abdi (n 6) 137.

100 Immaculate K Namukasa et al, 'Critical Curriculum Renewal in Africa' in Abdi (n 6) 179, 182.

101 Rodney (n 18) 246; Roland Oliver and Anthony Atmore, *Africa since 1800* 5th edn (CUP 2005) 146–7.

102 Ambrose (n 55) xvii.

103 Rodney (n 18) 241–2; Ewout H P Frankema, 'The Origins of Formal Education in Sub-Saharan Africa: Was British Rule more Benign?' (2012) 16(4) European Review of Economic History 353.

104 Rodney (n 18) 243–44.

105 Nyamnjoh (n 5) 135; Shizha (n 5) 70.

106 Rodney (n 18) 247.

107 Ali A Abdi, 'Clash of Oralities and Textualities: The Colonization of the Communicative Space in Sub-Saharan Africa' in Kapoor and Shizha (n 18) 149; Lantana M Usman, 'The Indigenous Knowledge System of Female Pastoral Fulani of Northern Nigeria' in Kapoor and Shizha (n 18) 223.

108 Abdi (n 107) 151–2; Usman (n 107) 217; Coleman Agyeyomah et al, '"To Die is Honey, and to Live is Salt": Indigenous Epistemologies of Wellness in Northern Ghana and the Threat of Institutionalized Containment' in Kapoor and Shizha (n 18) 254–8.

109 Babaci-Wilhite et al (n 13) 628.

from thought to writing and back to thought.[110] African literature students will learn more Shakespeare than Soyinka, more Wallace than Wa Thiong'o.

Pierre Forcin, a French colonial administrator, believed that to ensure the continual loyalty of the colonies it was essential that they 'remain French in language, thought and spirit'.[111] Consequently, there has been focus on English, French and Portuguese as languages of instruction and national communication and also the disappearance of African languages and customs – languages that sustain a people's worldview.[112] Students were also encouraged to adopt European names.[113] These practices became a useful tool of colonial domination;[114] the ability to speak a colonial language influenced the measure of success attainable for Africans.[115]

These practices have had severe consequences for African education and society. It is suggested that 20 per cent of Africans have a European language as their first language.[116] Adegbija notes: 'Over 90% of African languages . . . exist as if they don't really exist; they live without being really alive. Living functional blood is being sucked out of them . . .'[117] The linguistic dichotomy that occurs in Africa is exacerbated by the fact that perfect translations from indigenous languages are presumed.[118] Yet all intra-African governmental meetings are carried out using a European language, irrespective of fluency.[119] The language-in-education debate has economic and political implications, yet retention of colonial languages may sacrifice learning outcomes[120] and may be predicated on a colonial myth of an insurmountable mass of languages.[121] Though South Africa constitutionalised the equity of its multitude of languages, in practice, African languages exist at the bottom of the hierarchical communicative space.[122] Therefore, while education may be physically available and accessible, the learner suffers a deficit in epistemological access and availability, resulting in pedagogically unsound learning at a high psychological cost.[123] Spivak argues that colonialism is the clearest example of epistemic violence[124] – the stripping of African learners of voice and language.

110 Shizha (n 5) 79.

111 Rodney (n 18) 259.

112 Abdi (n 99) 137.

113 Rodney (n 18) 247; Shizha (n 5) 69.

114 Abdi (n 107) 160; Rodney (n 18) 256; Babaci-Wilhite et al (n 13) 623, 628; Mbembé (n 19) 31.

115 Clapham (n 25) 32, 78; Abagi (n 21) 298.

116 Abdi (n 107) 159.

117 Efurosibina Adegbija, 'Saving Threatened Languages in Africa: A Case Study of Oko' in Joshua A Fishman (ed), *Can Threatened Languages Be Saved?* (Multilingual Matters 2001) 284; Herman Batibo, *Language Decline and Death in Africa: Causes, Consequences, and Challenges* (Multilingual Matters 2005) 26–27.

118 Hallen, *The Good, the Bad* (n 5) 35; A G A Bello, 'Some Methodological Controversies in African Philosophy' in K Wiredu (ed), *A Companion to African Philosophy* (Wiley 2008) 269–270.

119 Nyamnjoh (n 5) 140–1.

120 Ailie Cleghorn, 'Language Issues in African School Settings: Problems and Prospects in Attaining Education for All' in Abdi and Cleghorn (n 5) 103–5, 107, 113.

121 Birgit Brock-Utne, 'Language-in-Education Policies and Practices in Africa with a Special Focus on Tanzania and South Africa – Insights from Research in Progress' in Angel Lin and Peter W Martin (eds), *Decolonisation, Globalisation: Language-in-Education Policy and Practice* (Multilingual Matters 2005) 176.

122 Nkonko M Kamwangamalu, 'A New Language Policy, Old Language Practices: Status Planning for African Languages in a Multilingual South Africa' (2000) 20(1) South African Journal of African Languages 55.

123 Vitallis Chikoko, 'Issues in Africanising Higher Education Curricula' in Msila and Gumbo (n 60) 72–3; Brock-Utne (n 121) 180.

124 Spivak (n 11) 280–1.

Currently, speaking indigenous languages is banned in most African schools.[125] Many textbooks are imported or written in a European language; in Eritrea, education was in English and about the world outside Africa.[126] Knowledge in textbooks is considered paramount and unquestionable.[127] Tests that assess students' literacy do not consider problems arising from secondary fluency, as these are done in European languages.[128] Someone who is perfectly able to count in her own language would be assessed as having poor numeracy skills in a language she is very unfamiliar with. In many African societies, the language of instruction is rarely used at home and may be inadequately understood by the teacher.[129] Quality education suggests that education should be done in a language that is understood by both the learner and the teacher;[130] alternatively, code-switching and code-mixing should be adopted.[131] Nelson Mandela said: 'If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language . . . that goes to his heart'.[132] For education to be a useful tool of individual and national development, it has to do more than go to the mind. It has to be transformative.[133]

Indigenous knowledge about agriculture, healing and dietary herbs, medicinal practices, societal values, as well as farming systems and artisan communities was swept away by colonial education.[134] Skills considered to be of great significance to an indigenous community, e.g. the language of the drums, bone-setting and knowledge of medicinal herbs, have been lost.[135] Prior to colonisation, there had been different ways of acquiring knowledge in and of Africa, but these were replaced and forgotten.[136] Indigenous knowledge has the potential for increasing global knowledge of agriculture, ecology, politics, sociology and the arts, among others.[137] Implementing the rights to democracy, environment and development may depend on including indigenous knowledge in the framework of global thought. Research tools and methods can be improved by investigating indigenous knowledge.[138]

Therefore postcolonial education ideologically dislocates individuals from their society and, due to limited literacy and numeracy, does not equip them for any other.[139]

125 Nyamnjoh (n 5) 140; Shizha (n 5) 79.

126 Robert G David, 'Eritrean Voices: Indigenous Views on the Development of the Curriculum Ten Years after Independence' 24(4) International Journal of Educational Development 440–1.

127 Karen L Biraimah, 'Moving beyond a Destructive Past to a Decolonised and Inclusive Future: The Role of Ubuntu-style Education in Providing Culturally Relevant Pedagogy for Namibia' (2016) 62(1) International Review of Education 55.

128 Brock-Utne and Mercer (n 55) 677.

129 Ibid.

130 Ibid 679.

131 Cleghorn (n 120) 109–12.

132 BBC Learning English – Moving Words: 'Nelson Mandela': <www.bbc.co.uk/worldservice/learningenglish/movingwords/shortlist/mandela.shtml>.

133 Nyamnjoh (n 5) 133–4.

134 Shizha (n 18) 118; Shizha (n 5) 68; Usman (n 107) 218–23; Njoki N Wane, 'Traditional Healing Practices: Conversations with Herbalists in Kenya' in Kapoor and Shizha (n 18) 231, 233; Agyeyomah et al (n 108) 245–59.

135 Adebisi Arewa, 'The Humanist Basis of African Communitarianism as Viable Third Alternative Theory of Developmentalism' in Oche Onazi (ed), *African Legal Theory and Contemporary Problems* (Springer Netherlands 2014) 250; Hallen, *The Good, the Bad* (n 5) 6.

136 Shizha (n 18) 119; Shizha (n 5) 67.

137 Nkosinathi Mkosi, 'Surveying Indigenous Knowledge, the Curriculum and Development in Africa: A Critical African Viewpoint' in Abdi and Cleghorn (n 5) 92.

138 Ibid 93.

139 Rodney (n 18) 246, 249; Shizha (n 18) 119; Babaci-Wilhite et al (n 13) 630; Shizha (n 5) 67, 74; Nyamnjoh (n 5) 133, 141.

The prestige of education becomes the end of education and its only purpose.[140] Indigenous knowledge is based on a cultural worldview and forms a core of an individual's identity and connection to her community.[141] Colonised education results in a citizenry with low civil affinity to the state and little technological knowhow, depriving African states of the right to democracy and development.[142] The effect of ideological dissonance is such that the physical is preserved but identity is destroyed; existence replaces living, existence is dehumanised.[143]

Postcolonial African curriculum reforms

Due to the foregoing limitations of colonial education, there have been several postcolonial curriculum reforms. These attempted to reflect the thoughts of local communities and respond to continental issues.[144] In Tanzania, Nyerere introduced a Freire-inspired farm-school system.[145] In 1995, South Africa included indigenous knowledge in its redesign of the curriculum.[146] UNESCO also backed a programme which seeks to provide inclusive education across Africa.[147] However, reforms have found it difficult to balance internationalisation with Africanisation;[148] it has also proved difficult to combat resistance based on the belief that indigenisation is 'dumbing-down'.[149] Due to the nature of anticolonial struggles, postcolonial initiatives immediately following independence were characterised by an uncomfortably close relationship between the political and the intellectual.[150] Consequently, African governments have been known to stifle research aimed at redesign for politically selfish reasons.[151] While in countries like South Africa, Malawi, Nigeria and Rwanda intellectuals helped to prop up dictatorial regimes,[152] at other times intellectuals were at the forefront of dissent.[153] Inadequate personnel and research impede continental efforts to reform curricula,[154] while international efforts are uninformed, sporadic and isolated.[155] The Structural Adjustment Programmes introduced to Africa by international financial institutions in the

140 Mbembé (n 19) 130.

141 Shizha (n 5) 70; Usman (n 107) 215; Agyeyomah et al (n 108) 253.

142 Ambrose (n 55) xvii; Babaci-Wilhite (n 13) 630; Shizha (n 5) 65.

143 Syrotinski (n 21) 103; Nyamnjoh (n 5) 133, 141; Mbembé (n 19) 239; Shizha (n 5) 67, 72.

144 Phillip Higgs, 'The African Renaissance and the Decolonisation of the Curriculum' in Msila and Gumbo (n 60) 8; Gregory H Kamwendo, 'Unpacking Africanisation of Higher Education Curricula: Towards a Framework' in Msila and Gumbo (n 60) 18; C T Viljoen and J L Van der Walt, 'Being and Becoming: Negotiations on Educational Identity in (South) Africa' (2003) 23(1) South African Journal Of Education 14.

145 Mayo (n 6) 47.

146 Higgs (n 144) 11.

147 Biraimah (n 127) 51.

148 Kamwendo (n 144), 21; Viljoen and Van der Walt (n 144) 15.

149 Vuyisile Msila, 'Africanisation of Education and the Search for Relevance and Context' in Msila and Gumbo (n 60) 65; Jonathan Mswazie and Tapiwa Mudyahoto, 'Africanizing the Curriculum: An Adaptive Framework for Reforming African Education Systems' (2013) 4(1) Journal of Emerging Trends in Educational Research and Policy Studies 173; Shizha (n 5) 75.

150 Mama (n 55) 9–10; Ogunniyi (n 64) 128.

151 Gumbo (n 60) 38.

152 Mama (n 55) 10.

153 Ibid 11.

154 Msila (n 149) 64.

155 Namukasa et al (n 100) 187.

1980s and 1990s meant that governmental spending on education was greatly reduced.[156] African attempts to collaborate with the West in this regard are further encumbered by comparatively higher costs of travel, difficulties in obtaining visas or visiting fellowships.[157]

Evidently, for educational reform to be effective it needs to be part of an equal international policy. Education on the continent has to respond to the particular issues of the continent. The power behind the universality of IHRL and the right to education can achieve this, if the 'situationality' of the educated is taken into account.

'Situationality' and the purposes of education

The accepted functions of education in all societies include developing the intellect, instilling societal norms, developing the economy, and job acquisition based on the foregoing.[158] Therefore, education serves three paramount purposes – to make literate, to conform, to develop/liberate.

According to Nyamnjoh: 'Education is the inculcation of facts as knowledge and also a set of values used in turn to appraise the knowledge in question'.[159] However, Africa has had no power to determine what rightly amounts to knowledge.[160] Knowledge received in informal schooling structures lacks legitimacy. The worldview in formal education is so vastly dissimilar to the domestic worldview that Cleghorn describes going to school as 'crossing a cultural border'.[161]

Therefore, Wa Thiong'o suggests that 'a sound educational policy is one which enables students to study the culture and environment of their own society first, then in relation to the culture and environment of other societies'.[162]

Indigenous African knowledge has been suggested as a replacement for colonial education. Wiredu argues that conceptual decolonisation must have indigenous knowledge as its focus and not its fall-back position.[163] This is utilitarian knowledge produced in response to lived experiences; it is typically idiographic knowledge transmitted orally and based on learning by 'seeing, hearing and doing' in real-life contexts.[164] Indigenous knowledge is highly dependent on the specific human condition of the society in which it develops and reflective of the African worldview, thought or philosophy.[165] Hallen marshals arguments which highlight the fact that resistance to the possibility of African thought shows that our paradigmatic conception of knowledge is impervious to contestation and does not take into account the prospect of plurality of thought.[166] The core of education in precolonial Africa was the spiritual and intellectual

156 Yvonne Hérbert and Ali A Abdi, 'Critical Perspectives on International Education: Redefinitions, Knowledge-making, Mobilities and Changing the World' in Ali A Abdi and Yvonne Hérbert (eds), *Critical Perspectives on International Education* (Sense Publishers 2013) 33.

157 Nyamnjoh (n 8) 77.

158 Watkins (n 55); Abdi and Cleghorn (n 5) 5–7.

159 Nyamnjoh (n 5) 129.

160 Syrotinski (n 21) 85.

161 Cleghorn (n 120) 106–9, 114.

162 Wa Thiong'o (n 21) 97.

163 Kwasi Wiredu, 'Introduction: African Philosophy in our Time' in K Wiredu (ed), *A Companion to African Philosophy* (Wiley 2008) 15.

164 Usman (n 107) 217, 223.

165 Ibid 223; Agyeyomah et al (n 108) 249–58; Wane (n 134) 242.

166 Hallen, *African Philosophy* (n 5) 69; Shizha (n 5) 69.

development of the individual as part of a community and was based on the African worldview.[167]

However, due to the plurality and diversity of African culture, it is not strictly true to say that there is a single African worldview. Therefore, the African worldview is predicated on the fact that it is not singular but diverse.[168] Despite this diversity there are points of convergence that suggest shared particularities between the various African worldviews. As Higgs states, accepting diverse worldviews 'acknowledges lived experience and challenges the hegemony of Western Eurocentric forms of universal knowledge'.[169]

The African ideology of *ubuntu* (mostly southern African) means humanness.[170] *Ubuntu* is usually illustrated by the phrase '*umuntu ngumuntu ngabantu*', which means 'a human being is a human being because of other human beings'.[171] *Ujamaa* was popularised by Tanzania's Nyerere and is the idea of the 'familyhood' of African society predicated on the ideals of equality, freedom and unity.[172] *Umunna bu ike* (Igbo/West African), 'brotherhood is power', suggests social solidarity, emphasises unity and abhors social division.[173] The idea of *Ọmọlúàbí* (Yoruba/West African) is that of a person defined by her good character, knowledge, humility, respect, hard work and wisdom who engages in a cyclical relationship with her community.[174] The inference from the foregoing is that the African worldview is based on the cyclic concepts of 'being' and 'belonging', where 'belonging' is paramount, but to 'be' is to 'belong'. Not 'belonging' in a manner understood by indigenous thought questions the purpose of 'being'.

The acceptance of the African worldview necessarily allows us to change our image of Africa to something transformable.[175] Nevertheless, proponents of the African worldview should realise that having a worldview does not preclude the possibility of contestation or change.[176] This resistance to contestation has led to a tenacious and blind application of cultural values sometimes detrimental to human rights. Due to the stagnation of culture that occurred as a response to the colonial encounter and its perceived dilution of culture, anachronistic traditional views still exist.[177] Therefore parts of indigenous knowledge may be incorrect, outdated and impractical to institute.[178] Lack of regulation renders it unsafe to practise in isolation.[179] It should be noted that the

167 Rodney (n 18) 239; Usman (n 107) 215.

168 Hallen, *African Philosophy* (n 5) 14.

169 Philip Higgs, 'African Philosophy and the Decolonisation of Education in Africa: Some Critical Reflections' (2012) 44(2) Educational Philosophy and Theory 51.

170 Ibid 46–7.

171 Moeketsi Letseka, 'In Defence of Ubuntu' (2012) 31(1) Studies in Philosophy and Education 48.

172 Bonny Ibhawoh and J I Dibua, 'Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Quest for Social and Economic Development in Africa' (2003) 8(1) African Journal of Political Science 62; Mayo (n 6) 44, 46.

173 Kingsley N Okoro, 'African Traditional Education: A Viable Alternative for Peace Building Process in Modern Africa' (2010) 2(1) Journal of Alternative Perspectives in the Social Sciences 147; Innocent Chiluwa, 'Online Negotiation of Ethnic Identity' (Covenant University): <http://covenantuniversity.edu.ng/content/download/34947/240636/file/online%20negotiation%20of%20identity.pdf>.

174 K A Fayemi, 'Human Personality and the Yoruba Worldview: An Ethico-Sociological Interpretation' (2009) 9(2) Journal of Pan African Studies 167–9; O A Oyeshile, 'Traditional Yoruba Social-Ethical Values and Governance in Modern Africa' (2003) 6(2) Philosophia Africana 84; O Olufayo and L I Jegede, 'Redressing Security and Crime in Nigeria through Traditional Yoruba Social Values and Cultural Practices' (2014) 4(4) Developing Country Studies 53.

175 Higgs (n 169) 48.

176 Ibid.

177 An-Na'im (n 97) 75.

178 Mkosi (n 137) 89.

179 Wane (n 134) 231; Agyeyomah et al (n 108) 251.

openness to debate and discourse that Freire advocates is a cornerstone of quality education, be it in the turfed turrets of Timbuktu, the consecrated corridors of Cambridge or the hallowed halls of Harvard. Because education is a socialisation tool,[180] contestation within academia will enable the worldview to evolve in line with the thinking of society, rather than setting up an exogenous worldview in eternal opposition to the endogenous one. Decolonising education cannot rely solely on indigenous knowledge.

Mudimbe's lift metaphor and Lorde's litany, both cited earlier, illustrate the lack of autonomy that prevents African thought from possessing its own intellectual force. Imbo suggests that most African academics address their intellectual arguments to the African elite or Western scholars, thus 'smuggling' Western thought into African philosophy.[181] Also the collection, documentation and preservation of indigenous knowledge renders it open to further dilution.[182] While opening it up to commercialisation may aid its preservation, the survival of African thought as a unique product of Africa's lived experiences may be jeopardised.[183] However, that is the advantage of decolonising thought. Indigenous thought serves no utilitarian purpose when preserved for the purpose of originality alone – it merely serves as an intellectual 'other'. Decolonising education suggests that all forms of knowledge equally complete our understanding of the world.

Decolonising education: IHRL, Spivak, Freire and the value of educational research

According to Smith, decolonisation is 'a social and political process aimed at *undoing* the multifaceted impacts of the colonial project and *re-establishing* strong contemporary indigenous nations and institutions based on traditional values, philosophies and knowledge'.[184] Hallen proposes that to decolonise knowledge 'involves *reassessing* academic philosophy's supposedly universal paradigms as Western paradigms. It involves *arguing* that any non-Western system of cognition deserves an equal hearing'.[185] Decolonising education involves deconstruction, reconstruction, re-evaluation and recontestation of knowledge in Africa and the world. Our knowledge of Africa and knowledge in Africa should be completed by the history of Africa.

Colonialism was a geographically and psychologically veiled attack on the heterogeneity of human autonomy, knowledge and thought,[186] from which humanity has not completely retreated. According to Spivak's discourse, colonialism operated as epistemic violence that silenced its subjects. She states that the voice of the precolonial was subjugated to 'a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity'.[187] According to Fricker, epistemic/hermeneutical injustice and marginalisation results when a group's social condition is obscured from collective understanding.[188] Spivak argues that epistemic

180 Abagi (n 21) 306.

181 Imbo (n 76) 370.

182 Mkosi (n 137) 90.

183 Ibid.

184 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books 1999) 19 (emphasis added).

185 Hallen, *The Good, the Bad* (n 5) 34 (emphasis added).

186 Nyamnjoh (n 5) 132.

187 Spivak (n 11) 281.

188 Fricker (n 40) 152–69.

violence can only be defused when the intellectual represents the silenced.[189] However, the African intellectual lacks the structural capacity to represent; the Western intellectual lacks testimonial competence.

Consequently, decolonisation of education has to be focused on research-intensive, interdisciplinary, cross-cultural, egalitarian, overt, persistent, capacity-sharing and competence-building.[190] As Maggio states: 'The academy is both part of the problem and part of the solution'.[191] African states rely heavily on international governmental organisations for financial assistance; this assistance is often predicated on internal acquiescence with international norms that may have origins in colonial thought.[192] Consequently, internal decolonisation of education is fettered by the international community. Surprisingly, communicative incompetence occurs within Africa as most of the issues explored in the preceding sections are not described in IHRL terms.[193] International human rights groups do not engage with the daily social injustice struggles of populations, which leads to a disconnect between the aims of IHRL and domestic civil society[194] because the language of human rights has become a language of privilege.[195] Taking a Freirian approach acknowledges the 'situationality' of African knowledge – indigenous knowledge is static, but African knowledge is fluid and may (or may not) encompass indigenous knowledge. Indigenous knowledge that is anachronistic or irrelevant can be preserved as such – knowledge that *was*. As Hallen argues, knowledge should be democratised, and not defined by reference to a particular cultural worldview.[196] Promoting a dominant worldview silences the non-dominant views.[197] Knowledge that *is* anywhere should be knowledge everywhere.

Research is the heart of knowledge and education; research into education and the right to education should be aware of the vestiges of colonial knowledge in education.[198] Taking a Freirian approach means that equal and collaborative research should be the main focus of external engagement with Africa.[199] African researchers' originality and 'situationality' run the risk of being rejected for challenging accepted knowledge; thus the most strident academic African voices are diasporic.[200] Intensive African input into collaborative research will ensure that African thought is not silenced and recolonised.[201] Therefore, IHRL should continue to maintain the vanguard of the anticolonial movement.

Decolonising education in Africa should have as one of its focuses the liberating purpose of education.[202] By focusing on humanism as a facet of the African worldview,

189 Ibid 285.

190 Higgs (n 169) 45; Wane (n 134) 239.

191 Joe Maggio, '"Can the Subaltern Be Heard?" Political Theory, Translation, Representation, and Gayatri Chakravorty Spivak' (2007) 32(4) Alternatives: Global, Local, Political 420.

192 Ali A Abdi, 'Intensive Globalizations of African Education' in Abdi and Hérbert (n 156) 356–9.

193 Chidi Anselm Odinkalu, 'Why More Africans Don't Use Human Rights Language' (2000) 2(1) Human Rights Dialogue 3.

194 Ibid.

195 Ibid.

196 Hallen, *African Philosophy* (n 5) 88.

197 Rutazibwa (n 20) 292; Shizha (n 5) 68.

198 Rutazibwa (n 20) 299; Shizha (n 18) 120.

199 Mama (n 55) 22; Nyamnjoh (n 5) 144–5, 148; Wane (n 134) 239, 242.

200 Nyamnjoh (n 5) 145, 148.

201 Rutazibwa (n 20) 294; Agyeyomah et al (n 108) 249.

202 Higgs (n 169) 50; Nyamnjoh (n 5) 145.

equal attention would be given to all forms of knowledge:[203] African identity would focus on 'looking out' rather than 'measuring up'; identity would be self-constructed, capable of dynamism, rather than exogenously constructed and static.[204] National development requires citizens who can self-actualise and self-construct the desired future. Implementation of human rights in Africa should focus on the African mind as well as the African body, thus preserving human dignity.[205] Accounting for the African worldview in African education allows for greater communal responsibility in socio-political national development because the African worldview emphasises individual responsibility to community. Civic education will demonstrate to participants in education that the fortunes of their nation rest on their actions.

Therefore, the main emphasis in decolonising education in Africa should involve a process of continuous and persistent critical engagement with, and selective incorporation of, African knowledge (precolonial or postcolonial), while simultaneously resisting the lure of the instinctive ascription of inferiority to different systems of knowledge.[206] This would give voice to the voiceless African, ensure the socio-political development of her society, and increase the forms of knowing available globally. Quality, acceptable and adaptable education in Africa could ensure the implementation of the rights to development and good governance.[207] Global implementation of the right to education should incorporate the best educational ideas and practices into our understanding of knowledge.[208]

Conclusion

I have argued that un-decolonised education which results in epistemic violence is pedagogically unsound and violates the right to education. Limitations to reversing this in Africa include misconceptions about African knowledge systems and African structural inadequacies. Decolonising education can only be done internationally and within the framework of IHRL. As an African, who was schooled in Africa, I was taught that Mungo Park discovered the River Niger, which was never lost. As a member of the school debating club, I was often called upon to support the motion that colonialism was a good thing, without which we would have been living in trees, lacking government or politics. I was taught that we did not exist as identifiable peoples before colonialisation – we were called out of darkness and made from silence into organised states. Decolonisation of education, knowledge and thought recognises that there are several ways of knowing and being known. Decolonisation of education, knowledge and thought does not ask us to rewrite history, but should allow us Africans the academic freedom to finally write ours, as equal intellectual members of the human race.

203 Higgs (n 169) 50–51.

204 Hallen, *African Philosophy* (n 5) 102.

205 Babaci-Wilhite et al (n 13) 623.

206 Handel Kashope Wright et al, 'Guest Editorial: Rethinking the Place of African Worldviews and Ways of Knowing in Education' (2007) 1(4) Diaspora Indigenous and Minority Education 243–4; Babaci-Wilhite et al (n 13) 629.

207 Rutazibwa (n 20) 294.

208 Shizha (n 5) 73.

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Minority rights, integration and education in the Western Balkans

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Abstract

Using the lenses of minority rights and developments in education in the Western Balkans, this article analyses the adaptability of the European minority protection framework and identifies ongoing challenges in relation to its implementation. It focuses in particular on the balance between the accommodation of minority education rights and integration, arguing that there is an inherent flexibility within the European minority protection framework that has been used to good effect. It claims that a shift towards a more integrated approach to education in the Western Balkans was a necessity and one that strengthens rather than weakens the European minority protection framework. The argument is developed through consideration of the case studies of Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia, where ongoing challenges remain.

Introduction

It has been over a quarter of a century since the re-emergence of minority rights as a response to the resurgence of nationalism and ethnic conflict in Europe. This culminated in the adoption of the Council of Europe's Framework Convention for the Protection of National Minorities (FCPNM).[2] However, minority rights now appear to be in decline with a period of rapid evolution in the 1990s followed by a period of stabilisation and consolidation and, more recently, 'overall fatigue'.[3] Using the lenses of minority rights and developments in education in the Western Balkans, the article analyses the adaptability of the minority protection framework and identifies ongoing challenges in relation to its implementation. It focuses in particular on the balance between the accommodation of minority education rights and integration, arguing that there is an inherent flexibility within the European minority protection framework that can be used to particular effect where there remains a risk of conflict between groups. The phenomenon of 'parallel societies' is

1 With particular thanks to Dr Stephanie Berry and Dr Charlotte Skeet and an anonymous reviewer for their helpful feedback on earlier drafts of this article. All errors are of course my own.

2 Council of Europe Treaty No 157, 1 February 1995.

3 Francesco Palermo, 'Addressing Contemporary Stalemate in the Advancement of Minority Rights: Commentary on Language Rights of Persons belonging to National Minorities' in Tove H Malloy and Ugo Caruso (eds), *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities: Essays in Honour of Rainer Hofmann* (Martinus Nijhoff 2013) 124.

well known and is a particular danger in societies emerging from conflict.[4] It has also been argued that there is often greater resistance to minority rights in contexts where ethnic relations are 'securitised', as in the Western Balkans.[5] The drafters of the FCPNM were particularly mindful of developments in the former Yugoslavia, with events in Central and Eastern Europe after 1989 very much in the forefront of discussions on the 'new' Europe.[6] Its application in that context therefore provides a particularly useful focus for discussion of its continued relevance and adaptability. Meanwhile education is considered a crucial lens through which to explore these issues not just because of the prominence of education in the FCPNM itself, but also because of the unique role education plays both as 'an important means for socialization within the state but also a primary instrument for a minority's cultural reproduction'.[7] Education matters because of the key role that it plays in shaping the future and, as a result, can itself often become the source of political and cultural contestation in post-conflict societies.[8] However, it can also play a useful role in contributing to the development of a new 'symbolic landscape', which challenges the divisions and narratives of the past.[9]

The first section of the article highlights the prominent role given to education in the FCPNM, and analyses the extent to which the European minority protection framework is sufficiently flexible to serve both accommodationist and integrationist ends. It considers how approaches to integration have evolved over time, arguing that there has been a notable shift towards integration in education in relation to societies where there remains a risk of conflict and simmering tensions between groups. Using Bosnia and Herzegovina (BiH) and the Former Yugoslav Republic of Macedonia (FYROM) as case studies,[10] the article then evaluates the practical implications of this evolution in approach. These case studies have been chosen as they provide classic examples of 'deeply divided societies', where ethno-cultural and national differences 'are persistent markers of political identity and bases for political mobilisation'[11] and where there remains at least a threat of violent conflict.[12] This was exactly the type of situation that the European minority rights regime was intended to address and these case studies are

4 Will Kymlicka, 'Multiculturalism and Minority Rights: West and East' (2002) 4 Journal on Ethnopolitics and Minority Issues in Europe 1, 12.

5 Ibid.

6 Peter Cumper and Steven Wheatley (eds), *Minority Rights in the 'New' Europe* (Martinus Nijhoff 1999).

7 Walter A Kemp, *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (Martinus Nijhoff 2001) 123–4.

8 For an overview of how this can play out in relation to education in a post-conflict society, see Laura Lundy, 'Mainstreaming Children's Rights in, to and through Education in a Society Emerging from Conflict' (2006) 14 International Journal of Children's Rights 339. One prominent example in the Western Balkans was the controversy over the establishment of the private University of Tetovo by ethnic Albanians in the FYROM in the 1990s discussed by Steven R Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 New York University Journal of International Law and Politics 591.

9 Joanne McEvoy, 'Managing Culture in Post-conflict Societies' (2011) 6 Contemporary Social Science 55; Marc Howard Ross (ed), *Culture and Belonging in Divided Societies: Contestation and Symbolic Landscapes* (University of Pennsylvania Press 2009).

10 Although there are similar issues around integration in education in Kosovo, it has a different status under the FCPNM – see Agreement related to the Framework Convention for the Protection of National Minorities in Kosovo concluded between the Council of Europe and the UN Interim Administration Mission in Kosovo on 23 August 2004.

11 This is the definition of a divided society used in Sujit Choudhry, 'Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 5.

12 The term 'deeply divided society' where there is a risk of violent conflict is used by Adrian Guelke, *Politics in Deeply Divided Societies* (Polity Press 2012) 9.

used to illustrate the flexibility of the minority protection framework in practice. However, they also highlight ongoing obstacles in relation to implementation. The case studies therefore provide important insights into both the continued relevance of European minority rights standards, as well as ongoing challenges to their realisation. The article adds to the expanding literature on integration and minority rights,[13] using the example of education in the Western Balkans to defend its use and application in post-conflict situations. Whilst Xanthaki has argued the concept of integration is often used to dilute human and minority rights protection,[14] the argument here is that the shift to greater emphasis on the need for integration in the Western Balkans was a necessity and one that strengthens rather than weakens the European minority protection framework.

The approach to diversity in education under the FCPNM

> Seeking to accommodate minority claims implies searching for a balance between unity and separation, cohesion and respect for diversity. If one opts solely for unity, the risk is assimilation and the disappearance of a minority as a distinct group; if one chooses exclusively diversity, the result can be the cultural 'ghettoization' of a minority group with consequent separation and marginalisation from society.[15]

There has been a strong emphasis in the literature on the advantages of approaches that emphasise accommodation over integration in addressing differences in divided societies and in relation to conflict regulation.[16] According to McGarry et al, 'accommodation promotes both the public and private maintenance of cultural difference', whereas with integrationist approaches the focus is on the development of 'a common public space'.[17] Their view is that 'integration' needs to be distinguished from 'assimilation', which aims also at the 'erosion' of differences in the private sphere.[18] The view of many working in the field of minority rights is that approaches that tolerate differences only in the private sphere are also assimilationist and therefore unacceptable.[19] Indeed, Hadden's conceptualisation of the term 'integration' is rather different and he argues that the term covers 'structures and policies aimed at securing full recognition of the identity and culture of members of minority communities and their full participation as such in national or regional society or government'.[20] As alluded to in the quote above, the key for minority rights lawyers is the balance between accommodationist goals, which tend to promote separation and respect for diversity, and a more integrationist approach, which tends to promote unity and social cohesion. For the purposes of this article, a key feature of integration is working towards the goal of developing common public spaces and a shared identity (and not one that reflects only the majority culture or imposed by the

13 E.g. Kristin Henrard, 'Tracing Visions on Integration and/of Minorities: An Analysis of the Supervisory Practice of the FCNM' (2011) 13 International Community Law Review 333; Roberta Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion* (Bolzano/Bozen, European Academy 2009); Tom Hadden, 'Integration and Separation: Legal and Political Choices in Implementing Minority Rights' in Nazila Ghanea and Alexandra Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Brill 2005).

14 Alexandra Xanthaki, 'Against Integration, for Human Rights' (2016) 20 International Journal of Human Rights 815.

15 Medda-Windischer (n 13) 14.

16 Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008). See also McEvoy (n 9).

17 John McGarry, Brendan O'Leary and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' in Choudhry (n 16) 42.

18 Ibid 42–4.

19 Medda-Windischer (n 13) 19.

20 Hadden (n 13) 176.

state) and a key feature of accommodation is recognition of a range of group identities in the public sphere through separate facilities and institutions.

According to Hadden, an assimilationist approach in the sphere of education might involve the creation of common schools with a prescribed national curriculum. In comparison a more integrationist approach would involve genuinely integrated schools with multicultural curricula either in addition to, or instead of, separate schools (which reflect more of an accommodationist approach).[21] Writing in 2005, he argues that there is genuine choice *for governments* under international law[22] and concludes that a 'mix of objectives and measures may be best' with how decisions are made being key[23] in managing 'swings of the pendulum between assimilation, integration and separation'.[24] The aim of this section is to show how the FCPNM allows for a shifting in the goals and priorities over time and in different contexts, with a clear steer emerging from the international community towards a more integrated approach in societies emerging from conflict. The European Court of Human Rights has been strongly criticised for favouring assimilation over a more robust approach to minority language rights,[25] and in highlighting the instrumental function of language rather than its role in constituting identities.[26] The FCPNM was supposed to herald a new approach, with its emphasis on the protection and promotion of minority cultures and identities. It has, however, been criticised for not being sufficiently accommodationist because it does not include rights to autonomy or self-government, with unfavourable comparisons being made with the approach of the international human rights community to the rights of indigenous peoples.[27] Meanwhile closer examination of the education provisions of the FCPNM also reveals a more nuanced picture, with the vagueness of relevant provisions allowing for considerable flexibility in approach. Education features particularly prominently in the FCPNM, which has three provisions focused on this area and a specific mention also in Article 6.[28]

It is undoubtedly the case that integration is increasingly being discussed by the Advisory Committee on the Framework Convention (ACFC), which was established to assist in evaluating the measures taken by states,[29] in a range of different contexts and not just in relation to new minorities and immigrants.[30] A key provision of the FCPNM is Article 5(1), which requires states 'to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural

21 Ibid 188.

22 Ibid.

23 See e.g. the requirements in Article 15 FCPNM on effective participation.

24 Hadden (n 13) 190–1.

25 See, in particular, *The Belgian Linguistic Case (No 2)* (1979-80) 1 EHRR 252, judgment of 23 July 1968.

26 Moria Paz, 'The Tower of Babel: Human Rights and the Paradox of Language' (2014) 25 European Journal of International Law 473.

27 Will Kymlicka, 'The Internationalization of Minority Rights' 6 International Journal of Constitutional Law 1, 3. See also Will Kymlicka, 'The Internationalization of Minority Rights' in Choudhry (n 16).

28 Articles 12–14 are discussed further below. Meanwhile Article 6 provides that: 'The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media'.

29 Article 26.

30 Merja Pentikeinen, 'Social Integration of Old and New Minorities in Europe in Views of International Expert Bodies Relying on Human Rights: Contextual Balancing and Tailoring' (2015) 14 Journal on Ethnopolitics and Minority Issues in Europe 26, 32–3.

heritage'. However, Article 5(2) makes it clear that states are to refrain from assimilation of persons belonging to minorities 'against their will' and to protect them 'from any action aimed at such assimilation', stipulating this is '[w]ithout prejudice to measures taken in pursuance of their general integration policy'. Xanthaki has observed that the initiative for discussion of integration often comes from states and can be used as an excuse for assimilation.[31] It is furthermore also often seen as a one-way process[32] and as a way of denying equality between groups.[33] Whilst Xanthaki's focus is primarily on discussions over the integration of migrants, Palermo has observed a similar tendency where there has been a shift from a focus on minority rights towards greater emphasis on social cohesion in post-conflict societies.[34] He too notes that this is sometimes done in a way that restricts minority rights, for example, through additional requirements being placed on minorities to show loyalty and knowledge of the official language.[35] Significantly, he links this trend towards using social cohesion and integration to restrict minority rights to the perception of groups as homogeneous and identities as fixed, not just amongst states but also within the minority rights framework itself.[36] His analysis therefore suggests the need for greater recognition of the complexity of identities and of multiple and evolving affiliations – an approach we are increasingly seeing in the monitoring work under the FCPNM.[37] However, as shall be demonstrated, it is also the case that the international community itself has been pushing for greater integration in a range of different contexts.

If it is accepted that approaches which relegate cultural differences to the private sphere are essentially assimilationist, then the extent of the state's duties in relation to the protection and promotion of minority education within the public sphere acquires particular significance. It is generally assumed that human and minority rights instruments promote separate educational facilities over a more integrated approach in the sphere of education.[38] However, the requirements in relation to the provision of minority language education under Article 14(2) of the FCPNM are not particularly onerous on states,[39] with no requirement to fund private minority schools[40] or specific obligations in relation to higher education.[41] Furthermore the recognition in Article 14(1) of the right of 'every person belonging to a national minority . . . to learn his or her minority language' is qualified in the Explanatory Report with the statement that this 'does not entail any

31 Xanthaki (n 14) 821.

32 Ibid 823.

33 Ibid 827–9.

34 Palermo (n 3) 132.

35 Ibid 132.

36 Ibid.

37 Palermo focuses in particular on the ACFC, Commentary No 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention, 24 May 2012. However, see also ACFC, Commentary No 4: The Scope of Application of the Framework Convention for the Protection of National Minorities (27 May 2016). This evolving approach is also evident in relation to the principle of self-identification – see Elizabeth Craig, 'Who Are the Minorities? The Role of the Right to Self-Identify within the European Minority Rights Framework' (2016) 15(2) Journal on Ethnopolitics and Minority Issues in Europe 6–30.

38 Hadden (n 13) 175.

39 Article 14(2): 'In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.'

40 Article 13(2).

41 See Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (OUP 2007) 215.

financial obligation for the Party concerned'.[42] However, as shall be seen, this has not prevented the ACFC[43] from requiring the development of systems of minority language education provided for and funded by the state.[44]

Meanwhile there are a number of provisions which address wider issues that affect all individuals and groups within society, and not just those belonging to a minority group, and relate to the promotion of unity and social cohesion.[45] At a very basic level there is first of all the stipulation that states' undertakings in relation to minority language education in Article 14(2) should not thereby prejudice 'the learning of the official language or the teaching in this language'.[46] The idea that minority and majority identities can co-exist in the public sphere is further reinforced by Article 12, which promotes intercultural as well as multicultural education. Whilst Article 12(3) of the FCPNM deals with the issue of equal opportunities for educational access, Article 12(1) requires states to '*where appropriate*, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority' (emphasis added). Article 12(2) then addresses the need for 'adequate opportunities' for teacher training and access to textbooks and calls upon states to facilitate contacts amongst those from minority and majority groups. According to the ACFC, Article 12 (along with Article 6) supports 'the core ethos of the Framework Convention as one of intercultural dialogue, integration of minorities in the wider society and social cohesion'.[47] Its position has consistently been that 'all aspects and elements of education should ensure a climate of tolerance and dialogue'.[48] Although the undertakings in Article 12 again do not appear particularly onerous, this has not prevented the ACFC from adopting a fairly robust approach, as will be evidenced in later sections of this article. It is also significant that the provisions on education do not stand alone. There are, for example, undertakings in Articles 4–6 on effective equality and non-discrimination, as well as positive obligations in relation to the maintenance and development of minority cultures and to the promotion of mutual understanding and tolerance. These are considered to form 'a continuum of core obligations' that have informed the ACFC's approach in making recommendations to states.[49] The balancing of the three aspects is key to the ACFC's work and to its success.

Some of the early criticisms of the FCPNM focused on the lack of definition of the term 'national minority', the vagueness of many of the provisions and the potential for political influence on the monitoring process through the role of the Committee of Ministers.[50] It is argued here that the flexibility inherent in the FCPNM means that these aspects should now be seen as potential strengths. This will be evidenced through consideration of how the ACFC has approached the balancing of minority rights and integration in the context of BiH and the FYROM in a way that strengthens rather than

42 Council of Europe, *Explanatory Report to the Framework Convention for the Protection of National Minorities* (1995) para 73.

43 Article 26.

44 See also ACFC, Commentary No 1: Commentary on Education under the Framework Convention for the Protection of National Minorities (2 March 2006).

45 E.g. Article 6(1).

46 Article 14(3), cf Article 5(2).

47 ACFC, Commentary No 1 (n 44) 10–11.

48 Ibid 15.

49 Ibid 9.

50 E.g. Gudmunder Alfredsson, 'A Frame for an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures' (2000) 7 International Journal on Minority and Group Rights 291.

undermines minority rights, demonstrating considerable flexibility in its approach. It is argued that the key here is the balancing of unity in diversity, and the shifting of priorities in response to changing circumstances and contexts. In developing its approach, the ACFC has notably been able to draw upon the experiences of the Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM),[51] whose mandate is focused on conflict-prevention and who has therefore paid considerable attention to the balancing of unity and diversity in a range of deeply divided and post-conflict societies.[52] Indeed, it is the HCNM which has taken the lead in developing an approach to integration which is aimed at strengthening rather than undermining minority rights.[53] Its approach is therefore the focus of the next section.

Unity in diversity: the approach of the HCNM

To what extent is the promotion of integration seen as necessary to protect against segregation in societies at risk of conflict? And is there a way of promoting integration that does not undermine or restrict minority rights? As will be seen, the ACFC has been increasingly addressing these questions in the context of the Western Balkans and has explicitly stated in its Commentary on Education that 'in countries that have experienced conflict or are experiencing interethnic tension or aggressive nationalism, the need to ensure contact, dialogue and integration is a compelling priority'.[54] Like the ACFC, the HCNM has produced a range of thematic guidelines promoting good practice and based on the relevant European and international standards. Given the conflict-prevention aspect of the HCNM's mandate, these thematic guidelines are more tailored to the situations considered within this article and demonstrate a notable shift over the years away from separation and towards more integrated approaches.

The Hague Recommendations Regarding the Education Rights of National Minorities were the first to be adopted[55] and emphasised the importance of acquiring proper knowledge of both the mother tongue and the state language. They included extensive provisions in relation to minority language education at primary and second level, as well as teacher training, vocational training and higher education. It was noted, for example, that educational research indicated that education at the lower levels should 'ideally' be in the minority language, with a substantial part of the curriculum taught through the minority language at secondary level.[56] The need for intercultural as well as multicultural education was meanwhile particularly emphasised in relation to the compulsory curriculum, which was to include 'the teaching of the histories, cultures and traditions of their respective national minorities'.[57]

Over time, and in light of the HCNM's experiences, greater emphasis has been placed on the dangers of separation and the advantages of integration.[58] This is illustrated particularly in the Ljubljana Guidelines on Integration adopted in 2012, which recognise that:

51 E.g. ACFC, Commentary No 1 (n 44); ACFC, Commentary No 2: The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, 27 February 2008, and ACFC, Commentary No 3 (n 37).

52 The Office of HCNM was established by the CSCE Helsinki Document 1993: The Challenges of Change II.

53 Pentikeinen (n 30) 39.

54 ACFC, Commentary No 1 (n 44) 17.

55 October 1996.

56 Hague Recommendations nos 11–14.

57 Ibid no 19.

58 E.g. The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations and Explanatory Note, June 2008, 15.

> Integration is a dynamic, multi-actor process of mutual engagement that facilitates effective participation by all members of a diverse society in the economic, political, social and cultural life, and fosters a shared and inclusive sense of belonging at national and local levels. To support the integration process, States should adopt policies that aim to create a society in which diversity is respected and everyone, including all members of ethnic, linguistic, cultural or religious groups, contributes to building and maintaining a common and inclusive civic identity . . .[59]

Significantly, this approach is based on the recognition both that distinct identities can co-exist in the public sphere[60] and that identities can be 'multiple, multilayered, contextual and dynamic'.[61] It has also been noted that it marks a shift from balancing integration and minority rights to a greater focus on the rights and responsibilities of all members of society.[62] According to the Guidelines, the process of integration 'can lead to changes in majority and minority cultures', with the HCNM tending to speak 'about the integration of multi-ethnic societies rather than integration of a minority group into a particular society'.[63] This avoids the danger of the concept of integration actually being used as a cover for assimilationist policies. It is also recognised that the right balance will vary according to the situation and that it will change over time.[64] The tension between minority rights and social cohesion is meanwhile explicitly recognised in principle 7, which states that 'isolation or excessive separation may weaken cross-community links and undermine the cohesiveness of society'.

In relation to education, the Guidelines recognise the need to complement minority language education:

> . . . by developing integrated and multilingual education systems at all levels designed to provide equal access, opportunities and educational opportunities, regardless of their majority or minority background. Such integrated education should also include teaching all pupils about the diversity in their society.[65]

Segregation meanwhile, even if 'self-induced by minority communities' is to be avoided.[66] There is therefore a strong steer away from separation in these latest guidelines. For example, they recommend that:

> *Where appropriate, and based on demonstrated evidence*, authorities should intervene to counter excessive separation and risks of segregation; for example, by establishing integrated school curricula . . . Such policies should not unduly interfere with the respect for identity-related traditions and life styles, as provided for in minority rights. (emphasis added)[67]

59 The Ljubljana Guidelines on Integration of Diverse Societies, November 2012, 3–4.

60 Ibid principle 8.

61 Ibid principle 5.

62 Pentikeinen (n 30) 30.

63 Ljubljana Guidelines (n 59) 4. Similarly, the ACFC has made it clear that integration is distinct from assimilation and understood to involve both minority and majority contributions in a two-way process, which is 'a process of social cohesion that respectfully accommodates diversity while promoting a positive sense of belonging for all members of society' and will often lead to cultural change. ACFC, Commentary No 3 (n 51) para 25.

64 Ljubljana Guidelines (n 59) 17.

65 Ibid principle 45.

66 Ibid 56.

67 Ibid 17.

The important role played by politicians and the private sector is also highlighted.[68] Whilst the right to establish minority schools in accordance with parental wishes is still recognised as being of the utmost importance, it is also clear that when schools are established 'on the basis of culture, language or religion', whether by the state or privately, then the state is required to promote 'arrangements for promoting understanding and regular interaction between students'.[69] The next two sections consider how this works out in practice in the context of the Western Balkans.

Challenging segregation in BiH

The discussion above suggests that minority rights standards are sufficiently flexible to serve both accommodationist and integrationist ends, and that the inherent flexibility in the system can be used to promote integration in situations where there remains a risk of conflict between groups. There is increasing international interest in the development of integrated education in both BiH and the FYROM,[70] understood for the purposes of this section to refer to the 'deliberate coeducation of children who are normally educated apart in conflicted societies'.[71] It is clear that such initiatives have a key role to play in post-conflict societies, where segregation can be a real problem. This is particularly the case in Eastern and central Bosnia, home to many post-war returnees.[72] It is here that we see particular prominence of the 'two schools under one roof' phenomenon, which has been a matter of such concern for the international human rights community.[73]

According to the HCNM, 'when education [is] forgotten in peace agreements, post-conflict countries struggle with new divisions and divisive narratives'.[74] It is therefore significant that education does not feature prominently in the Dayton accords,[75] a fact which has been described by Torsti as 'a historical mistake' by the international community.[76] As a result, decisions on education were made by the Republika Srpska (with a large Serb majority) and by the cantons within the Federation of Bosnia and Herzegovina, resulting in three different systems emerging.[77] The 'two schools under one roof' policy was initially developed in BiH to accommodate returnee children, who constituted a minority in municipalities with a mixed Bosniac/Croat population in the Federation of BiH.[78] With two

68 Ibid principles 27 and 28.

69 Ibid 56.

70 E.g. Biljana Krstevska-Papic and Veton Zekolli, 'Integrated Education in the Republic of Macedonia' in Claire McGlynn, Michalinos Zembylas and Zvi Bekerman (eds), *Integrated Education in Conflicted Societies* (Palgrave Macmillan 2016) 135–46; Ljuljjeta Goranci-Brkic, 'Interethnic Dialogue and Cooperation for Integrated Education in BiH: The Practice and Experience of the Nansen Dialogue Center Sarajevo' in ibid, 59–68.

71 Michalinos Zembylas and Zvi Bekerman, 'General Conclusion: The Future of Integrated Education in Divided Societies' in McGlynn et al (n 70) 266.

72 Goranci-Brkic (n 70) 60–1.

73 E.g. UNCRC, 'Concluding Observations: Bosnia and Herzegovina' CRC/C/15/Add.260 (21 September 2005) paras 56–9; CESCR, 'Concluding Observations: Bosnia and Herzegovina' E/C12/BIH/CO/1 (24 January 2006); Committee on the Elimination of Racial Discrimination (CERD), 'Concluding Observations: Bosnia and Herzegovina' CERD/C/BIH/CO/7–8 (23 September 2010) para 11; CERD, 'Concluding Observations: Bosnia and Herzegovina' CERD/C/BIH/CO/7–8 (23 September 2010) para 11; CERD, 'Concluding Observations: Bosnia and Herzegovina' CERD/C/BIH/CO/9–11 (12 June 2015) para 11.

74 HCNM (@oscehcnm) 20 April 2016, 13:23 #thehague20.

75 The right to education is listed in both Article II of the Constitution in Annex 4 and in Article 1 of Annex 6.

76 Pilvi Torsti, 'Segregated Education and Texts: A Challenge to Peace in Bosnia and Herzegovina' (2009) 26 International Journal on World Peace 65, 70.

77 Ibid 67.

78 'Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed: Mission to Bosnia and Herzegovina' A/HRC/25/49/Add 1 (3 March 2014) paras 38–9.

schools located in one building, children from the two groups are taught separately under different administrations and with different teaching staff and curricula.[79] Although work has been ongoing on the development of integrated education in BiH (initially linked to an OSCE initiative) since 2002,[80] progress has been slow. Reported challenges have included 'fear and passivity of parents' and the lack of support amongst political elites.[81] Meanwhile, the approach of the OSCE to educational initiatives in BiH in the early days has itself been criticised, with problems noted in relation to monitoring and implementation as well as expertise.[82]

The key to the Dayton Peace Accords was the development of power-sharing between the three constituent peoples, or nations, with smaller minority groups unrepresented during most of the negotiations.[83] It is therefore perhaps unsurprising that minority rights are addressed only in passing.[84] However, one commentator has described Dayton as a 'missed opportunity' creatively to apply a multicultural model, balancing rights of individual citizens with rights of the various groups.[85] A key question that emerged fairly early on was the extent to which constituent peoples could also benefit from the protection of European minority rights standards. The ACFC has been extremely flexible in its approach to this issue and considers that Bosniacs and Croats in the Republika Srpska and Serbs in the Federation of BiH should be able to rely on protection under the FCPNM should they wish to do so in relation to issues coming within the jurisdiction of the entities.[86] The key for the ACFC was that the status of constituent peoples applied across the whole territory, regardless of whether the members were in a de facto majority or minority situation.[87] Its view was that ensuring their protection as national minorities under the FCPNM 'would by no means imply a weakening of their status as constituent peoples . . . but merely aim at offering an additional tool to respond to a specific need for protection'.[88] This position was re-affirmed in the second reporting cycle, when it was noted that discussions with relevant representatives suggested members of these groups would not object to having access to this additional protection.[89] This is a classic example of a situation where the flexibility of the FCPNM (in this case the lack of a definition of the term national minority) has been used to good effect by the ACFC and in way that strengthens rather than undermines minority rights.

79 A D Tveit, D L Cameron and V B Kovač, '"Two Schools under one Roof" in Bosnia and Herzegovina: Exploring the Challenges of Group Identity and Deliberative Values among Bosniak and Croat Students' (2014) 66 International Journal of Educational Research 103, 104.

80 Goranci-Brkic (n 70) 61.

81 Ibid 62–3.

82 Torsti (n 76) 73–4.

83 James C O'Brien, 'The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiation' in W I Zartman and V Kremenyuk (eds), *Peace versus Justice: Negotiating Forward- and Backward-Looking Outcomes* (Rowman & Littlefield 2005) 105.

84 The FCPNM is listed as one of 16 human rights treaties to be applied in an Appendix to the Agreement on Human Rights (Annex 6). There is also a reference to the protection of minority populations in Article 1 of the Agreement on the Rights of Refugees and Displaced Persons (Annex 7).

85 Tibor Várady, 'On the Chances of Ethnocultural Justice in East Central Europe' in Will Kymlicka and Magda Opalski (eds), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (OUP 2001) 144–7.

86 ACFC 'Opinion on Bosnia and Herzegovina adopted on 27 May 2004' ACFC/INF/OP/I(2005)003, para 28. Cf UN Human Rights Committee, *Ballantyne, Davidson, McIntyre v Canada*, Communication Nos 359/1989 and 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev1 (1993), para 11.2 in relation to Article 27 of the International Covenant on Civil and Political Rights 1966. See also ACFC, Commentary No 4 (n 37).

87 Ibid para 26.

88 Ibid para 28.

89 ACFC 'Opinion on Bosnia and Herzegovina adopted on 9 October 2008' ACFC/INF/OP/II(2008)005, para 40.

In relation to education, the early view of the ACFC was that the principles enshrined in Article 12(2) were 'of central importance' in the context of BiH, describing it as 'crucial to eliminate elements of segregation' in the education system.[90] These included separate entrances within the same buildings,[91] as well as separate classes for Croat and Bosniac pupils.[92] In doing so, the ACFC implicitly rejected the argument from Croat officials that a separate school system was needed to avoid assimilation.[93] It further identified an urgent need for the numerous entities responsible for educational matters to coordinate their efforts.[94] The ACFC also found that measures to foster knowledge and history of national minorities other than the three constituent peoples were insufficient, emphasising the need to educate the people about the 'multicultural character' of BiH.[95] It is clear that this is a particular problem in post-conflict societies, where the focus tends to be on relations between those on different sides of the conflict, with smaller minorities often neglected. Meanwhile, on a more positive note, moves towards the adoption of a common core curriculum to operate alongside a 'national group of subjects',[96] as well as the work of the Textbook Review Commission and the development of guidelines for history and geography textbooks, were also noted.[97]

What was particularly noteworthy from the second monitoring cycle was how little had changed, not just in relation to integration but also in relation to the development of minority language education. This was despite various legislative developments in relation to the rights of smaller national minorities,[98] with the ACFC noting in particular the low visibility of such groups and their cultures and languages.[99] In the educational sphere this was manifest in their almost complete absence from school syllabuses and textbooks[100] and no teaching in the languages of those groups protected under the State Law on National Minorities.[101] Indeed, even the teaching of minority languages at schools was described as 'very rare'.[102] This can be linked to the separate issues of a shortage of appropriate educational material and of a sufficient number of trained teachers.[103] This state of affairs also highlights the gap between the law and implementation, with problems arising despite provision for the inclusion of information about the history and culture of national minorities in the curricula[104] and the provision of resources for the teaching of minority languages and for teacher training envisaged in the State Law on National Minorities, as amended in 2005.[105] Meanwhile, during the third monitoring cycle, the ACFC expressed concern about the failure of the authorities to take a pro-active approach in relation to the further development of minority language education

90 ACFC (2004) (n 86) para 144.
91 Ibid.
92 Ibid para 84.
93 Ibid.
94 Ibid para 86.
95 Ibid paras 144–5.
96 Ibid.
97 Ibid para 90.
98 ACFC (2008) (n 89) paras 10–11.
99 Ibid para 26.
100 Ibid para 37.
101 Ibid para 29.
102 Ibid para 188.
103 Ibid para 30.
104 Ibid para 172.
105 Ibid para 188.

and criticised the continued invisibility of these languages.[106] The state's ratification of the European Charter for Regional or Minority Languages appears to have made little difference in this regard.[107]

It was, however, in relation to the continued segregation of education that the most significant concerns were raised, with a lack of political will to move towards further integration identified as a key obstacle.[108] The state had been asked to provide information on progress towards a more integrated approach, and its response was that problems had arisen because responsibility in the Federation lay with the cantons.[109] Meanwhile the ACFC's concerns focused not just on the 'two schools under one roof' phenomenon, but also on the continued establishment of mono-ethnic schools, often with the support of kin-states, as well as on obstacles to the implementation of the core curriculum.[110] It noted in particular that limited powers of state-level authorities, given the spread of responsibilities at state, entity and cantonal levels, had led to a lack of coordination and oversight.[111] The ACFC therefore urged the authorities 'to take far more determined measures to end segregation . . . and to impose more widespread application of the common core curricula'.[112] This was reinforced by the Committee of Ministers, which stressed the need to 'take resolute steps to counteract the worrying trend towards increased school segregation of pupils along ethnic lines'.[113] This is in step with the general approach of the Committee of Ministers to support and give political back-up to the ACFC's recommendations rather than undermining its attempts, as was originally feared.[114]

During the third cycle, there was again considerable emphasis placed on the need to accelerate progress on abolishing 'two schools under one roof' and to replace it with a more integrated system and again avoiding the further development of mono-ethnic schools in mixed areas.[115] This time the language used by the Committee of Ministers was even stronger, identifying the issue as one for immediate action and calling on the state to 'take as a matter of priority all necessary steps to eliminate segregation in education'.[116] The extension of the common core curriculum to all schools and to subjects such as history, geography and religion was also included in the call for immediate action.[117] Furthermore, the state was asked to consider the impact of support from abroad in relation to segregation in education under Article 17 of the FCPNM, despite its

106 ACFC, 'Third Opinion on Bosnia and Herzegovina adopted on 7 March 2013' ACFC/INF/OP/III(2013)003, paras 142 and 144.

107 Council of Europe Treaty No 148, 5 November 1992. Instrument of ratification deposited 21 September 2010.

108 ACFC (2008) (n 89) para 170.

109 ACFC, 'Second Report Submitted by Bosnia and Herzegovina Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities' (2 August 2007) ACFC/SR/II(2007)005, 34–5.

110 ACFC (2008) (n 89) para 170.

111 Ibid para 171.

112 Ibid para 173.

113 Resolution CM/ResCMN(2009)6 on the implementation of the Framework Convention for the Protection of National Minorities by Bosnia and Herzegovina, adopted by the Committee of Ministers on 9 December 2009.

114 Kyriaki Topidi, 'Articles 24–26' in Marc Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 585–6.

115 ACFC (2013) (n 106) 2.

116 Resolution CM/ResCMN(2015)5 on the implementation of the Framework Convention for the Protection of National Minorities by Bosnia and Herzegovina, adopted by the Committee of Ministers on 12 May 2015.

117 Ibid.

obligation under that provision not to interfere with the rights of minorities 'to establish and maintain free and peaceful contacts across frontiers'.[118] The concern appears to have been that such support was in practice reinforcing divisions and potentially undermining the goal of promoting mutual understanding and tolerance.[119]

It appears therefore that ongoing segregation in education in BiH has been a matter of particular concern, with 'excessive fragmentation and politicization of the education system' presenting a number of challenges both for stakeholders and for the ACFC.[120] According to the UN Special Rapporteur on the Right to Education, who visited BiH in 2007, education is 'widely perceived as a political tool; in practice, the school becomes a sort of "cold war" zone where students become victims of the bitterness and stereotypes projected by adults'.[121] This was manifest in a system whereby the majority within each canton tended to dominate,[122] with school boards being controlled by political parties, despite prohibitions of political party involvement in schools.[123] In 2012 there was a visit by another of the UN's thematic mechanisms, the Independent Expert on Minority Issues. Her conclusion was much the same, that mono-ethnic schools and the 'two schools under one roof' system were preventing integration.[124] She also found that political and other actors were presenting segregation as necessary for the protection of group identities.[125] Her overall verdict in relation to minority rights was that:

> . . . ethnically biased political agendas and a prioritization of party and ethnic interests of all citizens has perpetuated a polarized and adversarial political environment which is not conducive to reform or the full protection and promotion of minority rights in practice.[126]

Meanwhile, the ending of segregation on the basis of ethnicity and the need for the implementation of a common core curriculum were also raised under the UN's Universal Periodic Review process,[127] and by the UN Special Rapporteur in the Field of Cultural Rights, who visited BiH in May 2013.[128]

Like the Independent Expert on Minority Issues, the Special Rapporteur in the Field of Cultural Rights was able to devote considerable attention to the political context, noting a general lack of consensus between the two main entities on the future of the state and between political elites, linked to different narratives of the past.[129] Her analysis adopted more of a sociological approach, arguing that the current framework, 'which over-emphasizes national/ethnic and religious affiliations, has been used by some actors to pursue ethno-nationalistic agendas, to promote the notion of hermetically sealed

118 ACFC (2013) (n 106) para 225.

119 Ibid paras 183–4.

120 Report of the UN Special Rapporteur on the Right to Education: 'Vernor Muñoz: Mission to Bosnia and Herzegovina' A/HRC/8/10/Add 4 (27 May 2008) para 54.

121 Ibid para 72.

122 Ibid para 73.

123 Ibid para 74.

124 Report of the Independent Expert on Minority Issues, 'Rita Izsák: Mission to Bosnia and Herzegovina' A/HRC/22/49/Add 1 (31 December 2012) para 73.

125 Ibid para 98.

126 Ibid para 78.

127 'Report of the Working Group on the Universal Periodic Review: Bosnia and Herzegovina' A/HRC/28/17 (4 December 2014) para 107.140–147.

128 Special Rapporteur (n 78) para 104.

129 Ibid paras 7–8.

communities and to conduct segregation policies'.[130] One of the examples she provided was the emphasis on differences between the Bosnian, Croatian and Serbian languages, which, coupled with rhetoric on the right of each person to learn his or her mother tongue, is used to justify a segregated education system.[131] She described this, perhaps unfairly, as a 'misrepresentation of cultural rights'.[132] She also noted that a call from the Parliament of the Federation for measures to be taken to end the 'two schools under one roof' system, a two-year plan of the Ministry of Education[133] and a ruling of the Mostar Municipal Court that the system as it was currently operating was both illegal and discriminatory, did not result in any significant changes being made.[134] The Supreme Court within the Federation of BiH has subsequently affirmed the finding of the Municipal Court.[135]

These reports provide an indication of the challenges facing the ACFC in pushing for a more integrated approach. Whilst the ACFC has consistently challenged segregation in education in BiH, it is clear that the process of integration remains a long way off the standards set in the Ljubljana Guidelines. The evidence suggests that progress will continue to be slow. For example, more schools are becoming administratively unified as a result of pressure from the international community and initiatives from within the Federation itself.[136] However, having visited the Gymnasium in Mostar where two schools were operating under one roof but as one legal entity with a single administrative structure, the UN Special Rapporteur in the Field of Cultural Rights reported that integration was minimal in practice, with only one class held in common and two different curricula being applied.[137] There have also been some symbolic initiatives such as a joint drawing exhibit and the creation of a joint 'peace garden' in one school.[138] Another initiative has been the development of a manual on national minorities for schools with the support of the OSCE and minority group representatives.[139] However, the Special Rapporteur found that nationalist ideologies continue to dominate 'the symbolic cultural landscape', manifest in the sphere of education in the teaching of history and literature in particular, and in the writing and evaluating of textbooks.[140] Meanwhile over 50 schools still operate under the 'two schools under one roof' policy.[141]

Balancing integration and minority rights: the example of education in the FYROM

Whilst segregation in education is also a problem in the FYROM, the evidence in this section presents a more positive picture of what can be achieved using the European

130 Ibid para 22.

131 Ibid para 23.

132 Ibid para 37.

133 The adoption of a set of Recommendations for the Elimination of Segregation in Education by the coordinating body of Ministers of Education within the Federation had earlier been welcomed by the ACFC: ACFC (2013) (n 106) para 120.

134 Special Rapporteur (n 78) para 40.

135 Denis Dzidic, 'Bosnia Federation Rules against Ethnically-Divided Schools' *Balkan Insight* (4 November 2014) <www.balkaninsight.com/en/article/bosnian-federation-court-rules-against-school-discrimination>.

136 Special Rapporteur (n 78) para 38.

137 Ibid paras 47–8.

138 Ibid para 42.

139 ACFC (2013) (n 106) para 126.

140 Special Rapporteur (n 78) paras 59–69.

141 Rodolfo Toe, 'Bosnia's Segregated Schools Perpetuate Ethnic Divisions' *Balkan Insight* (15 July 2016) <www.balkaninsight.com/en/article/bosnia-s-segregated-schools-perpetuate-ethnic-divisions-07–15–2016>.

minority protection framework. This has not meant that challenges have not arisen, but rather that more discernible progress has been made both in relation to the protection of minority rights in education and in the development of a more integrated approach. It might seem as if the position of the Albanian minority in the FYROM is more of a classical minority–majority situation,[142] with the Albanian minority primarily located in the north-west (where they are the majority in a number of municipalities) and with strong links to a kin-state.[143] However, this would be a controversial interpretation given that some Albanians have argued for recognition as a 'constituent nation' rather than as a 'minority', a term perceived by many Albanians to imply inferiority.[144] Meanwhile education has provided a key battleground for contestations. Indeed, one commentator observed before the outbreak of the conflict in 2001 that the issue of minority education had 'come to symbolize the struggle for all minority rights in the state', with concerns amongst the majority of a link to 'radical Albanian nationalism and Great Albanian expansionist ideology'.[145] It was therefore significant that the Ohrid Framework Agreement referred specifically to the preservation of the 'multi-ethnic character' of society (s 1.3) and included extensive provisions on the provision of instruction in 'community' languages at primary and secondary level (s 6.1), state funding for higher level education in those languages spoken by at least 20 per cent of the population (s 6.2) and positive discrimination in relation to minority enrolment in state universities (s 6.3).[146] This therefore already set the tone for a more positive approach.

A number of challenges to the development of a more integrated approach were identified even during the first monitoring cycle under the FCPNM, with the ACFC expressing its 'deep concern at the attitudes of intolerance' being played out in debates over the future of integrated education.[147] For example, the ACFC noted the tensions that had arisen over the introduction of additional classes in Albanian in Macedonian schools and the functioning of ethnically mixed schools.[148] This had resulted in 'open conflict, polarizing young people along ethnic lines'.[149] Despite condemnation by the authorities, the ACFC considered that the state could do more in explaining objectives and discussing ways to move forward.[150] This appears to be a classic example of the securitisation of ethnic relations and of minority rights being played out in the sphere of education, with the majority at state level perceiving their own rights to be under threat.[151] The ACFC also stressed that more resources were needed to facilitate the development of a more integrated approach to education and expressed concern about a lack of institutional capacity.[152]

142 The Albanian, Turkish, Vlach, Serbian, Roma and Bosniac peoples are protected under the FCPNM according to the Declaration contained in a letter from the Minister of Foreign Affairs of the FYROM, dated 16 April 2004.

143 According to the 2002 census, 64 per cent of the population are Macedonian and 25 per cent ethnic Albanian: Sinisa Jakov Marusic, 'Macedonia Albanians Propose End to Census Logjam' *Balkan Insight* (6 October 2014) <www.balkaninsight.com/en/article/macedonia-albanians-propose-census-change>.

144 Ratner (n 8) 592.

145 Eleanor Pritchard, 'A University of their Own' *Central Europe Review* (19 June 2000) <www.ce-review.org/00/24/pritchard24.html>.

146 OSCE, Ohrid Framework Agreement (13 August 2001) <www.osce.org/skopje/100622>.

147 ACFC, 'Opinion on "the Former Yugoslav Republic of Macedonia" adopted on 27 May 2004' ACFC/INF/OP/I(2005)001, para 74.

148 Ibid.

149 Ibid para 51.

150 Ibid.

151 Ibid.

152 Ibid 75.

On the other hand, there appears to have been considerable progress made in relation to minority language education in the FYROM since the coming into force of the FCPNM. At the end of the first monitoring cycle, it had been suggested that additional measures were required to ensure better accommodation of needs for teaching in minority languages.[153] It is therefore significant that a number of improvements were observed in relation to the promotion and protection of minorities during the next monitoring cycle. For example, the ACFC noted that there had been some positive efforts in relation to the provision of education in minority languages, including with regard to textbooks, teacher training and improvement of facilities.[154] This rather more positive state of affairs resulted in the Committee of Ministers noting the 'commendable measures' taken to improve implementation of the FCPNM and increased opportunities and initiatives taken in relation to the Albanian, Turkish, Serbian and Bosnian languages.[155] There were, however, a number of outstanding issues. These included decentralisation of responsibilities in the sphere of education, which appeared to have caused particular problems for smaller communities.[156] Meanwhile, it was noted that no progress had been made in relation to the anomaly whereby there is no right in the FYROM to establish private primary schools[157] and there were still concerns about opportunities for minority language education for smaller groups.[158] As is often the case in post-conflict societies, there is a tendency to focus on the two (or three) largest, or most high profile, groups (in this case the Macedonian and Albanian communities) within textbooks and the wider curriculum, with the needs of smaller minorities somewhat neglected.[159] The Committee of Ministers at the end of the cycle subsequently recommended the further expansion of opportunities for teaching of or in minority languages for smaller communities 'taking into account their real needs'.[160] During the third monitoring cycle under the FCPNM, there were a number of further signs of improvement.[161] This led to the overall finding of the ACFC in relation to minority language education that 'a well-developed system of minority language teaching' now exists.[162] There was, notably, no change in relation to the right to establish private primary schools, which affects all communities.[163]

As the provision of minority language education has improved, so concerns about intercultural education have increased, particularly in relation to the development of interactions between Albanian and Macedonian children.[164] This is another advantage of

153 Resolution CM/ResCMN(2005)4 on the implementation of the Framework Convention for the Protection of National Minorities by the 'Former Yugoslav Republic of Macedonia', adopted by the Committee of Ministers on 15 June 2005.

154 ACFC, 'Second Opinion on "the former Yugoslav Republic of Macedonia" adopted on 23 February 2007' ACFC/INF/OP/II(2007)002 paras 150–2. See also paras 173 and 180–3.

155 Resolution CM/ResCMN(2008)6 on the implementation of the Framework Convention for the Protection of National Minorities by 'the Former Yugoslav Republic of Macedonia' adopted by the Committee of Ministers on 9 July 2008.

156 ACFC (2007) (n 154) 154 and 157.

157 Ibid paras 174–5.

158 Ibid paras 184–6.

159 Ibid para 144.

160 CM/Res (n 155).

161 ACFC, 'Third Opinion on "the Former Yugoslav Republic of Macedonia" Adopted on 30 March 2011' ACFC/OP/III(2011)001, para 156.

162 Ibid para 154.

163 Ibid paras 149–51.

164 ACFC (2007) (n 154) para 142.

the comprehensive approach of the ACFC and the flexibility that allows for a shifting of priorities over time. It also reflects increasing international concern about this issue, as discussed previously in relation to the Ljubljana Guidelines. The ACFC has, however, noted some positive developments. For example, during the second monitoring cycle, it was acknowledged that relations between the two communities had improved within society as a whole.[165] Specifically, in relation to education, it appeared that tensions around the introduction of Albanian language classes in Macedonian schools had eased, with the role of civil society initiatives specifically highlighted.[166] Meanwhile the numbers of Albanian and Macedonian children interested in studying the language in mixed municipalities had increased.[167]

Despite the progress that had been made, the ACFC found that society remained polarised, with 'sustained efforts' and the 'de-politicisation' of ethnic issues and political debate identified as the best ways forward.[168] Similar to the criticisms of the 'two schools under one proof' policy in BiH discussed above, the ACFC expressed particular concern that children attending the same school were often taught separately and in separate premises.[169] Whilst this can be seen as a way of ensuring that obligations are met in relation to the provision of minority language teaching, it leads to segregation in practice and the ACFC therefore encouraged the state to promote alternatives such as bilingual education.[170] The important role played by civil society in promoting integration and reconciliation was again noted,[171] with the state encouraged to increase its involvement and support.[172] The Committee of Ministers meanwhile stressed that there was still a need for 'resolute efforts . . . to strengthen inter-ethnic dialogue' between children and teachers and in areas where those in the majority were de facto a minority.[173]

Progress in the lead-up to the third monitoring cycle was more disappointing. For example, the ACFC expressed regret that so little had changed in relation to opportunities for interactions between Albanian and Macedonian children and the fact that textbooks remained unbalanced from a minority protection perspective.[174] This was despite significant investment by external actors, including the OSCE, in the development of a strategy on integrated education, with a lack of resources identified as a particular problem.[175] It is therefore fairly unsurprising that the Committee of Ministers at the end of the third reporting cycle identified the continued polarisation of society along ethnic lines and the lack of significant interaction, including in education, as issues that remained of concern. It called furthermore for 'immediate action' in creating 'opportunities for interethnic dialogue in all spheres of life, in particular aiming to involve in joint activities

165 Ibid para 79.

166 Ibid para 152.

167 Ibid para 181.

168 Ibid para 83.

169 Ibid para 142.

170 Ibid para 143.

171 Note in particular the work of the Nansen Dialogue Centre Skopje discussed by Krstevska-Papic and Zekolli (n 70).

172 ACFC (2007) (n 154) para 147.

173 CM/Res (n 155).

174 ACFC (2011) (n 161) para 130.

175 Ibid paras 131–4.

children and young people living in ethnically-mixed areas'.[176] The issue was therefore identified as one to be prioritised and with immediate effect.

It is clear that ethnic relations remain highly politicised in the FYROM more than 15 years after the end of the conflict. This is not helped by the lack of interaction between the two main groups, which has only served to reinforce the development of parallel societies and structures.[177] Meanwhile contestation over education continues to arise, with controversies during the third monitoring cycle over the decision to introduce Macedonian language teaching from the first year of education without adequate consultation with relevant stakeholders. This led to protests and the eventual revoking of the decision.[178] Other challenges noted by researchers on integrated education include gaining the confidence of parents in a context where a decision to send a child to an integrated school could be seen as a betrayal and obtaining the support of political elites.[179]

The importance of looking at what is happening at grassroots level and within domestic social institutions has been recognised as key to the effective implementation of human rights.[180] What is particularly evident in relation to the FYROM is the efforts being made both by the government and by civil society with the support of the wider international community. The HCNM continues to engage in both BiH and the FYROM, visiting the latter twice during the political crisis in 2015 and warning against the crisis being used to inflame ethnic tensions.[181] Unsurprisingly, in light of the discussion above, a key focus in relation to education has been the promotion of the Ljubljana Guidelines and on societal integration, with a particular emphasis on bilingual and multilingual education, integrated education and teaching of state languages.[182] Meanwhile the OSCE Mission to the FYROM has been providing more practical support, as well as facilitating a governmental review of the Ohrid Agreement. It has also been helping to review the implementation of the Law on Communities, which protects minority rights, and supporting implementation of the Government's Strategy towards Integrated Education.[183] The FYROM has been a candidate country for EU membership since 2005.[184] In its latest progress report, the EU Commission picked up on a number of the issues discussed in this article, noting that the 'inter-ethnic situation remains fragile'[185] and that planned reforms had been put on hold because of the public protests in 2015.[186] It also found that measures to promote integration were insufficient and that multiple forms of discrimination were persisting.[187] As evident from the discussion so far, the ACFC does not work in isolation and there is a complementarity in the approach of the

176 Resolution CM/ResCMN(2012)13 on the implementation of the Framework Convention for the Protection of National Minorities by 'the Former Yugoslav Republic of Macedonia' adopted by the Committee of Ministers on 4 July 2012.

177 ACFC (2011) (n 161) para 82.

178 Ibid para 157. The ACFC's Fourth Opinion on the FYROM is due to be made public in late 2016.

179 Krstevska-Papic and Zekolli (n 70) 139–40.

180 Tom Zwart 'Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach' (2012) 34 Human Rights Quarterly 546.

181 OSCE Annual Report (2015) 8.

182 OSCE Annual Report (2014) 50; OSCE Annual Report (2015) 49.

183 OSCE Annual Report (2014) 66–7; OSCE Annual Report (2015) 64–5. See also approach of the Mission in BiH – OSCE Annual Report (2014) 59; OSCE Annual Report (2015) 56.

184 BiH submitted its application to join on 15 February 2016.

185 European Commission, 'The Former Yugoslav Republic of Macedonia Report 2015' SWD(2015)212 (10 November 2015) 4.

186 Ibid 66.

187 Ibid 61.

various bodies involved in monitoring progress and in calling for improvements to be made. The ACFC does nonetheless have a unique role to play as the only human rights treaty-body specifically focused on minority rights and minority protection issues. This enables the adoption of a comprehensive approach, with consideration of progress in realising minority rights alongside the development of more integrated approaches. This is supplemented by more practical support from the OSCE and by stronger political incentives for progress from the EU.

Conclusion

To what extent, then, has the European minority protection framework proved adaptable and able to respond to the challenges posed by continued segregation between groups previously involved in conflict in the Western Balkans? This article has argued that there is an inherent flexibility in the FCPNM, which should be considered as a particular strength of the European minority protection framework. The pragmatic approach adopted by the ACFC has enabled changing priorities over time and with reference to the longer-term impact of developments on the ground. This has led to the development of a strong challenge to the entrenchment of segregation in situations where polarisation between different ethnic groups remains unacceptably high. It is clear that demands for a more integrated approach to education and for integration to be prioritised are a necessity in the contexts of both BiH and the FYROM and serve to strengthen rather than undermine the European minority protection framework. Minority rights remain high on the agenda of the ACFC alongside integration and it is alert to the impact that any change in policy or perceived shift in the balance of power can have on relations between different ethnic groups. The case studies also identified a number of ongoing challenges in relation to implementation linked to the wider political contexts within which minority rights standards are realised. The limits of what European minority rights law can achieve when the future of education remains such a highly contested issue and when inter-ethnic relations remain fragile and highly politicised are all too evident. This does not mean that the minority rights project is doomed, as the case studies also reveal that some progress is being made, and that there are a lot of different factors in play. The work of human rights monitoring bodies is inevitably always a 'work in progress', with progression in one area often accompanied by regression in another. The FCPNM is only one cog in the wheel, although an important one given its uniqueness as the only multilateral treaty focused specifically on the protection of minorities and of minority rights as an integral part of the human rights framework. It therefore needs to work to ensure the continued monitoring of law, policy and practice and to help find a better balance between the claims of different ethnic groups and wider societal cohesion and integration than is currently the case in many post-conflict situations.

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Potential barriers to the new child's right to appeal to Special Educational Needs and Disability tribunals in Northern Ireland

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Abstract

The Special Educational Needs and Disability Act (Northern Ireland) 2016 has changed the legal landscape for those seeking to utilise the Special Educational Needs Tribunal in the event of a dispute regarding special educational provision. The new Act provides children over compulsory school age with the right to request a statutory assessment and the right to appeal to the tribunal against certain decisions of the Education Authority. While these new participative rights are reflective of international obligations emanating from the UNCRC and the UNCRPD, recent research has highlighted a number of procedural and attitudinal barriers which may dilute the effectiveness of the legislation in guaranteeing a child's right to participate at the tribunal. This paper uses new empirical data from key stakeholders in the process to discuss these potential barriers and asserts that implanting a child's right to appeal into a process with pre-existing participative barriers will do little to ensure meaningful child participation at SEN tribunals.

Special Educational Needs and Disability (SEN) tribunals are independent panels which typically arbitrate in disputes between parents of children with special educational needs and education providers.[1] Disputes generally concern the level of special educational provision or type of support the child is receiving at school, although claims of disability discrimination are also heard by the tribunal. These types of administrative tribunals permit citizens to individually and directly challenge decisions of the state that they perceive to be inequitable. Their independence and detachment from the original educational decision-maker injects fairness and objectivity into the decision-making process, generating legitimacy, trust and confidence in the wider democratic governance of the state.[2] Children's right to participate in such judicial and administrative proceedings affecting them is internationally enshrined in Article 12(2) of the UN Convention on the Rights of the Child (UNCRC).[3] This right may be claimed directly by the child, or through a representative or an appropriate body, in a manner consistent with the procedural rules

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1 Previously known as Education and Library Boards.

2 Neville Harris, 'Dispute Resolution in Education: Role Models' in Neville Harris and Sheila Riddell, *Resolving Disputes about Educational Provision: A Comparative Perspective on Special Educational Needs* (Ashgate 2011) 29; Vicki Lens, 'Administrative Justice in Public Welfare Bureaucracies: When Citizens (Don't) Complain' (2007) 39 Administration and Society 382–408, 382.

3 UNCRC (adopted 20 November 1989, entered into force 2 September 1990) Article 12(2).

of national law. Article 12(2) is tied to the more general participative rights guaranteed in Article 12(1) which assures children the right to express their views freely in all matters that affect them, the views of the child being given due weight in accordance with the age and maturity of the child.

Theoretically, the SEN tribunal is a prime example of a forum which should guarantee the rights enshrined in Article 12(2), particularly in light of much newer participative rights generated for children with disabilities by Article 7 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[4] and yet research has highlighted that children are rarely party to proceedings and have little influence on the outcome of tribunal decision-making.[5]

In an attempt to redress the gap in child participation at tribunals in Northern Ireland, the new Special Educational Needs and Disability Act[6] (SEND Act) provides for a new child right of appeal for children of compulsory school age, provided the child is considered to have the capacity to take an appeal forward. This replaces the traditional parental right to appeal and places emphasis on mediation prior to invoking the tribunal. While the rhetoric emanating from the Department of Education of Northern Ireland is welcomingly rights-based, emphasising the necessity to place the child at the centre of the decision-making process and ensuring the provision of necessary information and support to enable participation, the procedural requirements of taking a case to a SEN tribunal and the tribunal environment seem relatively unchanged or impacted upon by the passing of the Act.

This paper will examine new empirical data, gathered from interviews and written submissions from key stakeholders in the tribunal process, in order to conduct a comparative examination of SEN tribunals in Northern Ireland and Wales. The data documents a number of persistent barriers to accessibility and participation at SEN tribunals for current users of this mechanism of legal redress. In essence the paper will suggest that grafting a child's right to appeal on to a process with pre-existing participative barriers may do little to ensure meaningful child participation at SEN tribunals (a process that had little success when piloted in Wales between 2012–2015) and will highlight areas of reform that would be required in order to ensure that participative rights take effect.

Methodology

The data referred to in this article came from a study which examined, from a child rights perspective, the extent to which SEN tribunals are accessible, enabling and participatory for users, concentrating on barriers to accessibility and participation, and exploring issues which might continue to dissuade users from seeking redress through the tribunal system. The research was comparative in nature, examining differing approaches to tribunal participation in both Northern Ireland and Wales. The decision to examine these two distinct regions comparatively stems from their differing approaches to child participation in the SEN tribunal process.

In Wales, the Education (Wales) Measure 2009 gave children the opportunity to make an appeal or claim themselves, supplementing the traditional parental right to take a case to the Special Educational Needs Tribunal Wales (SENTW). The Welsh government stated that the Measure specifically built on the UNCRC, expanding children's entitlement

4 UNCRPD (adopted 13 December 2006, entered into force 3 May 2008) Article 7.

5 Neville Harris, Sheila Riddell and Emily Smith, 'Special Educational Needs (England) and Additional Support Needs (Scotland) Dispute Resolution Project: Working Paper 1: Literature Review' (University of Manchester 2008) 46.

6 Special Educational Needs and Disability Act (NI) 2016.

by providing them with a parity of rights their parents already possessed to make SEN appeals and claims of disability discrimination to the tribunal.[7] In addition the Measure required local authorities to inform children of their appeal rights; placed a new duty on local authorities to make arrangements for, and inform children about, access rights to both partnership and disagreement resolution services; and placed a new duty on local authorities to provide access to independent advocacy services that would listen to and give voice to children's views and concerns. At the time of the study, Northern Ireland retained the traditional parental right to appeal only.

The empirical data was gathered through interviews and written submissions provided by key users, judicial staff, administrative staff and government departments in both Wales and Northern Ireland. These stakeholders included 10 parents from Northern Ireland and nine parents from Wales who had experience of taking a case to tribunal; a child from Northern Ireland who attended tribunal hearings; members of tribunals from both Wales and Northern Ireland; representatives from education authorities; administrative tribunal staff in Wales; interviews with the Department of Education and Skills (Wales); and written submissions from the Northern Ireland Courts and Tribunal Service, the Department of Justice NI and the Department of Education NI.

For the purposes of the research, the term 'child' applies to all persons under the age of 18 as stated in Article 1 of the UNCRC and article 2 of the Children (NI) Order 1995.[8]

New participative rights guaranteed by the SEND Act

Following the development of and consultation on 'Every School a Good School: The Way Forward for Special Educational Needs and Inclusion' the Department of Education NI secured the enactment of the SEND Act 2016, giving legislative effect to the revised policy on special educational needs and inclusion framework.[9] The department asserts that the intention of this new policy direction and legislative structure is to ensure early identification, assessment and provision for SEN children in order that they can achieve their full potential, with the child placed firmly at the centre of that process, bringing into domestic legislation a number of aspects of the UNCRC and the UNCRPD.[10]

In Northern Ireland the definition of 'special educational needs' (SEN) is laid out in article 3(1) of the Education (NI) Order 1996 (the 1996 Order). It states that a child is considered to have special educational needs if the child has learning difficulties which call for special educational provision. A child is considered to have learning difficulties if he or she has a significantly greater difficulty in learning than the majority of their peer group, at the same age, or has a disability which prevents or hinders him or her from making use of educational facilities of a kind generally provided for children of the same age, in mainstream grant-aided schools.[11]

As regards the details of the new SEND Act, the first section is general in nature, placing a duty on the Education Authority to seek and have regard to the views of the child in the decision-making process of their SEN provision. It asserts the importance of the child participating in the decision and being adequately informed and supported as

7 Education (Wales) Measure 2009.

8 Children (NI) Order 1995, article 2(2).

9 Department of Education NI, 'Every School a Good School: The Way Forward for Special Educational Needs and Inclusion' (August 2009).

10 Department of Education NI, 'Special Educational Needs and Disability Bill: Explanatory and Financial Memorandum' (January 2016) 1–3.

11 Education (NI) Order 1996, article 3(2)(a)–(b).

necessary to enable participation.[12] The following section provides that the Education Authority must prepare and publish a plan setting out arrangements to be made in relation to special educational needs, including a description of new resources and advisory and support services that the Authority proposes to make available. Authorities must publish their plans and bring them to the attention of people likely to be affected by their content.[13]

Additionally, the Act amends existing provisions contained within the 1996 Order,[14] with a key element being the expansion of appeal rights for children. Section 11 provides children over compulsory school age with the right to request a statutory assessment and the right to appeal to a tribunal against certain decisions of the Education Authority. It also introduces a new duty on the Department of Education to make regulations to provide for cases where a child over compulsory school age lacks, or may lack, capacity to exercise his or her rights. These include the department making provision to determine whether a child lacks capacity in relation to the exercise of his or her rights, and for the parent of the child to exercise those rights where it is determined that the child lacks the capacity to do so.[15]

The expansion of participative rights provided for in the Act seemingly incorporates elements of Article 12 of the UNCRC and Article 7 of the UNCRPD. The right of children to be actively involved in the process of special education decisions reflects obligations expressed in Article 12(1) of the UNCRC, which explicitly provides that state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child and that those views will be given due weight in accordance with the age and maturity of the child. Furthermore, Article 7 of the UNCRPD expands upon Article 12 in relation to children with disabilities, noting that states parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability- and age-appropriate assistance to realise that right. This obligation seems to be met in the creation of new advice and support mechanisms for children in Northern Ireland to enable them to challenge a decision on the statementing process or to take a case to tribunal under section 11 of the Act. The right of children to take an appeal to the SEN tribunal is deeply rooted in the obligations emanating from Article 12(2) of the UNCRC which states that the child shall be provided the opportunity to be heard in any judicial and administrative proceeding affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

While the above participative rights guaranteed by the SEND Act are reflective of international guidance on children's right to participate in SEN decision making, a number of issues arise regarding SEN tribunals as they currently function which may negatively impact any attempt to involve children in the process. The empirical data gathered for this research highlighted a number of procedural and attitudinal issues which need to be considered as the Act takes legislative effect, to ensure that there is guaranteed fairness and administrative justice for those seeking to utilise this mechanism of legal redress.

12 Department of Education NI (n 10) 4.

13 Ibid; Special Educational Needs and Disability Act (NI) 2016, s 2.

14 Education (NI) Order 1996.

15 Department of Education NI (n 10) 7.

Potential barriers to the child's right to participate at SEN tribunals

Procedural issues: legal capacity and socio-economic factors

Responses from interviewees highlighted significant, general barriers to participation faced by adults in their engagement with the SEN tribunal process. These structural and cultural barriers to adult participation raise a fundamental question: if indeed parents are struggling to access the system, how are we to expect children to fit seamlessly into the existing process?

Tribunal panel members pointed to the fact that the hearing has become more paper-based, focused on an ever increasing bundle of documents, thereby excluding those with lower literacy rates. As one panel member noted:

> *I can't see a child tackling a 300 page bundle in size 10 font. Realistically that's not ever going to happen. So perhaps if you want to encourage people to take part then you need to look at the fundamentals of the system as well.*

Previous research has indicated that the socio-economic background of users impacts significantly on the issue of accessibility to legal process. In particular, that economic barriers and especially poverty lead people to have little or no access to either information or adequate representation.[16] Furthermore it has been advanced that often SEN tribunals are considered a 'weapon of the middle classes', with few appeals being made from people living in socially disadvantaged areas and from ethnic minority families.[17] Previous research in Northern Ireland found that the SEN tribunal was perceived by tribunal members to favour participation by educated parents, leading to the consequence that the process was viewed as being very 'middle class'.[18]

Findings from this research reiterate that sentiment, with tribunal panel members noting that the tribunal, as it currently exists, is too often a mechanism of the middle class, with too many people from poorer backgrounds lacking knowledge or understanding of the system, thereby being rendered unable to take part in the process. This flags a number of serious concerns regarding the SEN tribunal's capacity to be inclusive as, theoretically, it has been identified that truly participative forums are those which are accessible to all societal groups, including the usually excluded and hard-to-reach, and are not dominated by interest groups.[19]

Education, as an empowerment right, can act as the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.[20] In terms of SEN tribunals, these may be viewed as mechanisms to address recognition of an inequality in the provision of education and to subsequently redistribute resources to remove the

16 Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World Wide Access-to-Justice Movement' (1993) 56 Modern Law Review 282, 282.

17 Harris et al (n 5); Neville Harris, *Education, Law and Diversity* (Bloomsbury 2007) 352–3; Shelia Riddell, Sally Brown and Jill Duffield, 'Conflicts of Policies and Models: The Case of Specific Learning Difficulties' in Shelia Riddell and Sally Brown (eds), *Special Educational Needs in the 1990s* (Routledge 1994).

18 Grainne McKeever, 'Supporting Tribunal Users: Access to Pre-Hearing Information, Advice and Support' (Law Centre NI 2011).

19 Nancy Fraser, 'Social Justice in an Age of Identity Politics: Redistribution, Recognition and Participation' (1996 Tanner Lectures on Human Values: Stanford) 30; Cheryl Simrell King, Kathryn M Fetly and Bridget O'Neill Susel, 'The Question of Participation: Towards Authentic Public Participation in Public Administration' (1998) 58 Public Administration Review 317.

20 United Nations Committee on Economic Social and Cultural Rights, 'General Comment 13' (8 December 1999) UN Doc E/C12/1999/10, 1.

inequity. Yet, if the tribunal process is inaccessible to certain members of society, the system exacerbates, rather than dissipates, injustice. If, as demonstrated above, those from an affluent social stratum are the group predominantly accessing the tribunal system, this in turn sees the movement of educational resources to those more affluent groups following successful appeals to tribunal, whilst those from lower socio-economic backgrounds become further entrenched in inequality, unable to access the system and similarly unable to acknowledge or verbalise the maldistribution.[21]

Essentially, administrative tribunals exist to ensure that public servants are applying the law consistently, fairly and equitably, and as intended by policy-makers.[22] They bolster our ideas of democracy in that they permit individual citizens to question administrative decisions of the state. Yet, if the tribunal system is skewed, either through its facilitation, process or procedure, it functions as a defective cog within the democratic mechanism, leading to failings within the overall system.

Alternative dispute resolution

As with other jurisdictions the SEND Act places an increased emphasis on the utilisation of mediation prior to taking a case to tribunal. Section 10 of the Act sets out that a person intending to bring an appeal to tribunal must first seek and be provided with independent information and advice about pursuing mediation. Once they have sought advice, the mediation service provider will issue a mediation certificate, now a prerequisite to enable lodgement of an appeal to the SEN tribunal in Northern Ireland.[23] This section does not apply to certain types of appeal, namely those which relate only to the school or other institution named in a statement maintained under article 16 of the Education (NI) Order 1996; the type of school or other institution named in a statement under that article; or when a statement does not name a school or other institution.[24]

Recent policy has seen a shift towards the use of alternative dispute resolution (ADR) within the field of administrative justice, including both mediation and conciliation approaches.[25] In Northern Ireland, the Dispute Avoidance Resolution Service (DARS) provides mediation in an informal forum and aims to explore differences and points of agreement and disagreement to find a way forward during educational disputes.[26] Yet, research would indicate that knowledge of and access to mediation services may prove difficult for children, particularly without specific advice and support and, additionally, the fairness of the outcomes of such mediation has been questioned in relation to SEN disputes. Therefore, employing mediation for SEN disputes is increasingly considered contentious.[27]

Prior to accessing the tribunal system, ADR services had been utilised at the onset of educational and disability discrimination disputes by a number of respondent families in Northern Ireland. When questioned about their experiences of mediation, those

21 Neville Harris and Emily Smith, 'Resolving Disputes about Special Educational Needs and Provision in England' (2009) 10 Education Law Journal 113; Ellen Wiles, 'Aspirational Principles or Enforceable Right? The Future for Socio-Economic Rights in National Law' (2006) 22 American University International Law Review 35, 56–8; Michael R Anderson, 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs' (Institute of Development Studies 2003).

22 Lens (n 2) 382.

23 Department of Education (n 10) 6–7.

24 Special Educational Needs and Disability Act (NI) 2016, s 10.

25 Anne Ruff, 'Quick, Private and Inexpensive' (2011) (spring) Judicial College Tribunals 14.

26 Department of Education NI, 'Supplement to the Code of Practice in the Identification and Assessment of Special Educational Needs' (September 2005) 27–30.

27 Harris et al (n 5) 29–31.

interviewed were quite dubious in relation to the effectiveness of the service and raised concerns regarding the resoluteness of outcomes reached during the resolution process.[28] As one parent noted: '*I didn't go down the DARS route because there was no point.*'

Another stated:

> *I contacted the Children's Law Centre which is a charity and I contacted DARS as well. And well DARS, there was no point . . . Because I mean, they were putting forward these different things to try and that was fine but whenever [the DARS Representative] went back to the Board, the Board just dismissed [the DARS Representative].*

Another parent from Northern Ireland relayed concerns regarding the advice she had received during mediation, which was to make an appeal to the tribunal in an attempt to force the school to settle. This action had the opposite effect, with the school in question refusing any further communication with the parent and advising the parent to converse directly with the school's solicitors.

Scepticism in relation to ADR reflects other such research which highlighted parental concerns that ADR outcomes are not legally binding and that there is therefore a greater risk that rights will not be safeguarded through this mechanism.[29] As other recent research suggests, in cases of SEN disputes there are doubts regarding the cost-effectiveness of such approaches and about whether they extend the scope for settlement or the resolution of disputes.[30] Harris highlights the statutory duty placed on education authorities through the statementing system and questions if arrangements settled via mediation can guarantee that duty; maintaining such mediation may be intrinsically unsuitable in SEN cases where there is little scope for compromise.[31]

Conceptually, there are also concerns regarding the balance of power between those participating in a citizen-versus-state forum without independent judicial processes. The fact that they are private hearings can be contentious, particularly in terms of transparency and fairness, and concerns have been raised regarding their appropriateness for cases regarding fundamental human rights.[32] There is an elemental unease that ADR may affect the justice of outcomes in a negative way. On this point research suggests that people may settle for less than they are entitled to for convenience, thereby compromising their legal rights.[33]

The use of ADR as a method to resolve educational disputes should be adopted tentatively, particularly as children can now be brought into the mediation process and expected to negotiate on their own behalf in a process where there may be an imbalance of power. It may assist in opening the lines of communication between the parties in dispute, creating an understanding of both sides of the argument and, in conjunction with pre-hearing advice and support, helping to mitigate the need to progress to tribunal. Mediation can be highly effective if the problem relates to interpersonal communication, which may be resolved by reflection on the issues and agreement concerning the way forward.[34] When the dispute concerns resource allocation, mediation can lead to less

28 Orla Drummond, 'When the Law is not Enough: Guaranteeing a Child's Right to Participate at SEN Tribunals' (2016) Education Law (forthcoming).

29 Sheila Riddell, Joan Stead, Elisabet Weedon and Kevin Wright, 'Dispute Resolution and Avoidance in Special and Additional Support Needs in England and Scotland' (University of Edinburgh 2010) 4.

30 Harris (n 2) 35–40.

31 Ibid.

32 Harris et al (n 5) 5.

33 Ibid 29–31.

34 Neville Harris and Emily Smith, 'Resolving Disputes about Special Educational Needs: Cross Border Comparisons and Reflections' in Harris and Riddell (n 2) 198.

assertive and knowledgeable participants achieving a worse settlement than they would have done through more open judicial processes.[35]

Difficulties in accessing support: perceptions, reality and tribunal-based information

Pre-hearing advice and support are necessary prerequisites to enable meaningful participation in the tribunal process. It is essential that those who wish to utilise this mechanism of redress have knowledge of the legal system and legal rights. Research highlights that it is vital that citizens are equipped with knowledge to engage with both formal and informal legal networks, as a pervasive lack of such knowledge can lead to unnecessary levels of helplessness even among the most confident and resourceful.[36]

Findings from the research conducted for this article indicated that parents from Northern Ireland sought support from a number of local organisations including local politicians, Members of Parliament and local charity organisations, such as Autism NI. It is important to note that for the purposes of this study all Northern Irish parents were recruited through the Children's Law Centre and therefore had prior contact with this service, although support from the organisation varied from general advice to legal representation at SEN tribunal hearings. While many praised the Children's Law Centre for its guidance and legal assistance, parents noted difficulty in accessing support services in general. As one parent noted:

> *We kept hitting brick walls every time we asked for help. Nobody would help us. And it all came down to funding and that's what we were up against the entire time . . . There's very little support and it's a scary, scary thing because you're fighting for your child's right to be educated.*

Additionally, parents complained that tribunal-based literature did not prepare them for the process, claiming inconsistencies between the informal hearing they expected and the formal, legal process they experienced on the day. Concerns were raised about the unrealistic amount of paperwork expected to be submitted, the engagement with legal jargon and the restrictions of time limits.[37] These points reinforce the need for access to early and appropriate advice and assistance, so that those engaging with the tribunal have the skills and knowledge to do so, or to effectively mitigate the need to progress to the tribunal at all.[38]

Legalistic, formal and intimidating tribunal environment

Tribunals are often regarded as accessible and informal alternatives to the traditional court-based resolution of legal disputes. These types of redress mechanisms were originally developed as a response to the perceived shortcomings of traditional courts, establishing simplified methods of resolving disputes to improve access to justice for all sections of society.[39] Yet many respondents from this study found the process complicated, time-consuming, legalistic and '*horrendous*' and struggled to access support to deal with problems they encountered. For many parents their anxiety was heightened due to the fact that they were fighting to obtain the desired outcome for their child. As one parent stated:

35 Ibid.

36 Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart 1999) 255.

37 Drummond (n 28).

38 McKeever (n 18) 40.

39 Tom Mullen, 'A Holistic Approach to Administrative Justice?' in Michael Adler, *Administrative Justice in Context* (Hart 2010) 390; Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 Modern Law Review 399, 395–7.

> *I found it intimidating enough myself and I'm reasonably eloquent and I was very sure that I was right . . . but it meant so much to me that I got what I needed for my child that I was very, very nervous on the day.*

Parents expressed the view that the tribunal hearing was daunting and court-like, with many struggling with the complexity of the process. These findings reflect other such research which notes that tribunal hearings often involve highly complex rules and case law and can be, therefore, adversarial and legalistic, meaning that those without legal representation are often unable to sufficiently understand the proceedings so as to participate effectively.[40] As Mullen asserts, during tribunal proceedings participants are required to speak to the legal narrative upon which the tribunals must adjudicate. Those lacking such skills are at a considerable disadvantage.[41]

In relation to child participation in the process, parents were adamant that children should be shielded from this adversarial environment. Based upon their experiences of tribunal hearings, parents noted that it was too volatile a process to involve children. As one parent relayed:

> *So I think it's important for kids to have their voice. I think that someone speaking for them though is better than the child actually having to be put under that pressure . . . because it got heated a few times and I don't think that's appropriate for a child, especially with special needs.*

A representative from an Education Authority noted that the tribunal hearing is often a lengthy, formal, stressful, legalised process which would be inappropriate for a child. This was reaffirmed by a SEN tribunal panel member who stated that the hearings are too judicial and that the child may become nervous and frightened. When asked if children should be permitted to attend SEN tribunal hearings as they currently exist, parents were resoundingly negative. As a parent firmly asserted:

> *Where the tribunal is at the moment, now? Definitely not! Because it's too volatile . . . it's not run well enough and it's not organised enough. It's a free for all . . . it would be detrimental to the child.*

Another noted: '*I still think that something like that would be very traumatic for a child.*'

One child who had attended two SEN tribunal hearings was interviewed as part of the research. The child relayed concerns about the process stating:

> *It was very formal. It's definitely an adult environment not a child environment . . . I didn't expect how I was going to feel . . . completely uncomfortable. I felt like I was being judged the entire time . . . I literally wanted to just get up and run. I was tempted a few times and I started on a couple of occasions as well.*

In addition to parental wishes to shield children from adversarial hearings, there were also protectionist views from all stakeholders that children should not be privy to sensitive personal information which could have a detrimental effect on their psychological well-being.[42] For some parents in Northern Ireland this included safeguarding the child from knowledge of their own special educational need. As one parent asserted: '*My child has never been aware that there is anything wrong with him.*'

40 Genn (n 39) 397–409; Jona Goldschmidt, 'The Pro Se Litigant's Struggle for Access to Justice' (2002) 40 Family Court Review 36; Deborah Rhode, 'Access to Justice: Connecting Principles to Practice' (2004) 17 Georgetown Journal of Legal Ethics 369.

41 Mullen (n 39).

42 Aoife Daly, 'The Right of Children to be heard in Civil Proceedings and the Emerging Law of the European Court of Human Rights' (2011) 15 International Journal of Human Rights 441, 441; Neville Harris, 'Education Law: Excluding the Child' (2000) 12 Education and the Law 31, 35.

In this case the parent was adamant that they would not involve their child under any circumstances, stating:

> *Even if I'd taken it to the court, to the High Court, I would never have had [my child] in court or speaking about it because in [my child's] head and in [my child's] world, he's the smartest child and there's nothing . . . he's perfect. So I would never, ever have went down that route and it was nothing to do with . . . well, part of it is protection for your child.*

The concerns of key stakeholders in relation to the SEN tribunal as it currently exists require careful consideration by the Department of Education and the Department of Justice as the SEND Act takes effect. The Department of Education may find parents extremely reluctant to permit their child to enter a process which they feel will detrimentally impact their health and well-being, given that many have spoken of the effects that taking a case to a tribunal had on their family life, the damaging impact on their mental health, the strain on marital relations and the financial implications of taking a case. As one parent stated:

> *It puts a lot of pressure on your relationship, your marriage, your family. It puts a hell of a lot of pressure. I don't think I can emphasise how much pressure it puts on families going through all this. Because it is very traumatic and it did put a strain on my marriage because I was living, breathing and eating this.*

Another parent simply noted: '*Family life was at breaking point.*'

Inequality of legal arms

One of the key issues identified by respondents as exacerbating the adversarial environment was the inequality of legal arms between the parents and the Education Authority. This raises explicit concerns regarding the fairness of the tribunal hearing in Northern Ireland, with parents feeling overpowered by the legal might of the opposing side. One stated:

> *Well I think it's just totally stacked against you. If they can bring a barrister and a solicitor and you're on your own. That's not an open and fair playing field.*

Another said:

> *I didn't think the tribunal itself was an even playing field. I didn't think any of it was an even playing field at all.*

Apprehensions regarding an inequality of arms and the unfairness of the tribunal environment were reiterated by a member of the SEN tribunal who noted:

> *The biggest change in terms of accessibility, by which I think you probably mean fairness to the tribunal users, would in my view be the availability of experienced representatives. Some parents are extremely able in presenting their case and presenting their child's condition. Others are not and struggle and you would also have very capable and intelligent people who simply don't know the system and how could they be expected to? In my experience the single biggest factor affecting fairness and accessibility is experienced representatives.*

Power imbalances can have a negative impact on the ability to meaningfully participate and one of the fundamental conceptual prerequisites for truly participative processes is the guarantee of equality within the process of engagement.[43] This applies just as much to opposing parties within a legal dispute and is of particular importance when addressing the power imbalance in citizen-versus-state proceedings.

43 Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Institute of Planners 216, 216; Bill Cooke and Uma Kothari, 'The Case for Participation as Tyranny' in Bill Cooke and Uma Kothari, *Participation: The New Tyranny?* (Palgrave Second Impression 2002) 1; Peter Somerville, 'Democracy and Participation' (2011) 39(3) Policy and Politics 417, 418.

Additionally, findings from this research reinforce other empirical studies that have found that the approach and attitude of the panel and legal representatives can have either a positive, enabling effect on participation or a detrimental impact on those taking part.[44] In terms of notions of procedural fairness the quality of interpersonal treatment is essential to a procedure being viewed as fair.[45] It has been found that people value the feeling of being treated with dignity and respect by authorities and that this contributes to their sense of justice.[46] Yet respondent parents from this research claimed that, during the SEN tribunal hearing, they experienced questions concerning their personal abilities or parenting skills from both the panel and opposing side. Some reported feeling belittled, while others felt that their child was insignificant within the process. As a parent from Northern Ireland stated:

> *There's me sitting there and they have a solicitor and a barrister facing me. So like, you don't really stand a lot of a chance. And the [panel member] has been rude to me and criticised the manner of my asking questions or talking, which he hasn't done to anybody else.*

Many parents felt that their role within the process was both secondary and inferior. There was a distinct sense of powerlessness, which contributed to the difficulty of voicing their case. At present parents feel that they are an unequal partner in an already unbalanced domain. Findings from this research indicate that feelings of inequality expressed by parents have been powerfully influential on their perceptions of procedural fairness whether the outcome was successful or not.

In terms of child participation, the inequality of legal arms within the process has triggered further notions of protectionism among parents and panel members. Parents relayed fears regarding the role of legal representation in the process and, while they generally agree that children should have a say in the dispute, parents are hesitant in relation to their own child encountering a tense and adversarial legal hearing and being cross-examined by legal representatives.[47] One SEND tribunal panel member pinpointed the general concerns of balancing child participation within an inherently legal process, noting:

> *What I want is what's best for the child and being best for the child is not being aggressively questioned by an over ambitious young barrister.*

If children are to enter the tribunal environment, as envisaged by the SEND Act, it is essential that concerns about the inequality of legal arms are and addressed. As Lundy makes clear, children require a safe and inclusive space to engage and express their views.[48] The findings from this research evidence that at present SEN tribunals do not create the optimum environment for meaningful participation of children. In order to deal with parental concerns and encourage the participation of children in tribunals, the setting, the legal representation, the adversarial approach and the formality of the process all need to be looked at.

Attitudinal barriers – measuring capacity

As noted earlier, section 11 of the SEND Act amends the 1996 Order for the purpose of conferring on a child over compulsory school age who has, or may have, special educational needs certain rights previously exercisable only by the parent of that child. In

44 Michael Adler, 'Tribunals Ain't What They Used to Be' (2009) (March) *Adjust Newsletter*.

45 Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283, 298–301.

46 Ibid 298–301.

47 Drummond (n 28).

48 Laura Lundy, '"Voice" is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) British Educational Research Journal 927, 931–3.

particular, the child now has the right to challenge decisions on the statementing process and if necessary can appeal to the SEN tribunal. One outstanding caveat is that Department of Education Regulations will determine and make provision for cases where a child over compulsory school age lacks (or may lack) capacity to exercise any such right.[49] If the child is deemed to lack the capacity to take a case to the tribunal then those rights are transferred to the parent. The draft regulations issued for consultation by the department note that if a question is raised concerning the child's capacity, by the child themselves, their parent(s), the Education Authority, an educational or health or social care professional who knows the child, or by the tribunal, the Education Authority must determine the child's capacity. In addition, the Education Authority will discuss the matter with the child in question and, where reasonably practicable, with the parent(s) and others as it deems fit.[50] Capacity, as set out in the draft regulations, is to be measured by the child's ability to understand the information, their understanding of the rights bestowed on them and what is being asked of them, and the child's ability to act in an informed way in order to exercise those rights.[51]

Essentially, the rights of the child to appeal to a tribunal ultimately rest upon this definition of capacity and the department's substantive interpretation of it – a benchmark which is often not as simple to formulate or as easy to apply as might be thought. The Education Authority has the final say in determining the capacity of the child, a position which is less than ideal for the enhancement of meaningful participation. Since the creation of international children's participative rights the notion of capacity has been invoked as a main reason for denying children their rights to influence decisions that affect them. Children's rights are often qualified by our understanding and theorisation of childhood accentuated by notions of emotional and cognitive incompetence, and based on the principle of 'best interest'.[52]

In relation to opinions on age and capacity, respondents for this study claimed that children may not be aware of what is best for their education. As one member of the Education Authority in Northern Ireland noted:

> *A lot of the time it's about wording on a statement that maybe parents are concerned about or certain provisions and the child might not be developmentally at an age appropriate or cognitively tuned into what their best needs are.*

These findings echo Harris's assertion that the underlying basis for the suppression of children's rights to parental authority is that it is generally accepted that the child may lack the competence to make decisions and, therefore, must be protected from damaging their long-term interests through inappropriate choices.[53] This central issue incorporates components of debates concerning the age, capacity, disablement and protection of children participating at SEN tribunals, creating a conceptual stumbling block to the realisation of meaningful participation.[54]

The transference of the right to appeal from the parent to the child enacted in the SEND Act may be considered, by many key stakeholders, as controversial and could possibly be met with substantial parental resistance. In terms of power relations in the

49 Special Educational Needs and Disability Act (NI) 2016, s 11(3).

50 Department of Education NI, Draft Special Educational Needs (SEN) Regulations (22 February 2016) 27–8.

51 Ibid.

52 Elizabeth Such and Robert Walker, 'Young Citizens or Policy Objects? Children in the "Rights and Responsibilities" Debate' (2005) 34 Journal of Social Policy 39, 41–3.

53 Neville Harris, 'Grievances, Disputes and Education Rights' in Harris and Riddell (n 2) 12–13.

54 Drummond (n 28).

private sphere, the formidable value of the parental role was discernible in the findings of this research. The role of the parent as the key decision-maker manifested as an undercurrent throughout interview responses, as did the fact that parents felt it was their role to champion their child's opinion. As one parent noted: '*As his parents it is up to us to understand what [our child's] needs are and find the best fit of school*.'

Another stated:

> *We made [our child] aware of nothing and I think where that's concerned it all depends on the child. And I think you decide what's best for your child.*

These findings link specifically to theoretical considerations of the asymmetrical power relations between children and adults and in particular to Hinton's explanation that traditional theorisations of childhood have conceptualised children as passive recipients of care to be placed in the private sphere.[55] Once placed within the private realm their interests are considered best served through the decisions and voice of their parents and this, in turn, impacts upon the enablement of 'child' citizenship and participation.[56] Indeed, one of the main concerns among interviewees regarding granting children wider participation within the process is the contention that differing opinions between the child and their parent would be difficult to reconcile: in essence, whose voice would take precedence? This conceptual hurdle, particularly the notion that the enhancement of child participation would lead to the corrosion of adult authority, has been a major reason to deny children access to their participatory rights.[57]

In terms of the new SEND Act, the Department of Education may find parents utilising the capacity 'opt-out' as a way of protecting their child from becoming embroiled in the educational dispute. As noted in earlier research, for children with special educational needs, the capacity debate is further complicated by the disparity created by society's perception of disability and disablement. In its findings, parents continually referred to the nature of their child's disability as a reason for exclusion from the legal process. An example of a typical response was:

> *Well because my daughter is so far behind compared to her peers . . . basically it wouldn't have been appropriate, I think, even to question her because basically she can't cope with change.*

When specifically asked why their children had not participated in their SEND tribunal hearing, one of the main reasons provided by respondents, particularly those from Northern Ireland, for not involving the child was their age. As a parent stated: '*No, [our child] is 10. No, he's definitely too young*.'

Another added:

> *No, he's too young. He's only 6. So I kind of felt he was maybe a bit too young. If he had of been older then yes . . . So I just thought no, I'll not because to be honest I didn't really want to upset him either with all the decisions.*

In general, most respondents' views on age were inextricably linked to notions of the child's capacity to be involved. Many expressed the view that younger children should not participate in tribunal hearings because they lacked skills, maturity and aptitude by virtue of their age. As noted by one Northern Irish panel member:

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55 Rachel Hinton, 'Children's Participation and Good Governance: Limitations of the Theoretical Literature' (2008) 16 International Journal of Children's Rights 285, 293.

56 Tom Cockburn, 'Children as Participative Citizens: A Radical Pluralist Case for "Child-Friendly" Public Communication' (2005) 9 Journal of Social Sciences 19, 23–4.

57 Such and Walker (n 52) 43.

> *In principle I think a more active role is fine but it very much depends on the facts of the case, disabilities the child has, what needs to be discussed and the age of the child. So in principle yes, but subject to the individual facts to each case . . . it could be entirely inappropriate in certain cases.*

In essence the Department of Education's move to benchmark the child's ability to participate solely against their perceived capacity may actually diminish any attempts to meaningfully engage with the child. As an Education Authority representative observed:

> *If they're at a certain age and development level where they are able to participate then they should. I think their views should be sought but my experience and I suppose the [Education Authority] experience is that the vast majority of children aren't at the developmental stage to be participating.*

The Department of Education would be wise to follow the guidance from the UN Committee on the Rights of the Child, which specifically states that the every child's right to be heard if he or she is 'capable of forming his or her own views' should not be seen as a limitation, but rather as an obligation for state parties to assess the capability of the child to form an autonomous opinion to the greatest extent possible. Parties cannot begin with the assumption that the child is incapable of expressing his or her own views, but should instead presume that the child has the capacity and has the right to express them.[58] It should also be noted that Article 7 of the UNCRPD, assuring children with disabilities the right to express their views freely on all matters affecting them, is not restricted by capability and it places an obligation on the state to provide children with disability- and age-appropriate assistance in order to realise the right. Additionally, Article 12 of the UNCRPD provides that state parties must recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. It also obliges states to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The capacity of judicial staff to engage with children

Since the discussion surrounding children's participation is often centred on the capability of the child, panel members and tribunal staff were asked if they felt they had the personal capacity to engage with children within the tribunal setting. As Walker states, competency as a witness in court involves measuring the capacity to understand the questions and the ability to make intelligent answers, yet there is no reciprocal test that questioners must meet which measures their aptitude to ask intelligent, easily understood questions.[59] This concern was raised in research by Donnelly, referring to the case of *Re H and C*[60] when Mr Justice McLaughlin stated that he did not have the professional skills for interviewing young children.[61] In relation to the findings of this research, in Northern Ireland two panel members stated that they felt they had the capacity to engage with children within the tribunal setting, while one did not and questions were raised regarding other panel members' ability to converse with children.

58 UN Committee on the Rights of the Child, General Comment 12 (20 July 2009) CRC/C/GC/12.

59 Anne Graffam Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993) 17 Law and Human Behaviour 59, 59.

60 *Re H and C* [2005] NIFam 1; also see Lesley Emerson et al, 'The Legal Needs of Children and Young People in Northern Ireland: The Views of Young People and Adult Stakeholders' (Centre for Children's Rights, Queen's University Belfast 2014).

61 Cathy Donnelly, 'Reflections of a Guardian Ad Litem on the Participation of Looked-After Children in Public Law Proceedings' (2010) 16 Child Care in Practice 181, 186.

When asked if they had the capacity to interact with children within the legal setting one panel member replied with complete honesty, stating:

> *Well it's an interesting question. I really don't know and I suspect not . . . I mean as an individual and a personality I have no difficulty getting on with children but in terms of a judicial setting I would welcome additional training because really I don't know.*

Another noted how the language of the tribunal may need to be adjusted for child participants, noting:

> *I mean I have no difficulty in that area but if I'm honest I know of other members of the tribunal who would have no experience in dealing with children . . . and there'd probably have to be training because how you ask a question of a child is very different to how you ask it of an adult.*

The exploration of judicial capacity to engage with children is extremely important when considering participation at tribunals and is an area which requires further research. As Walker notes, poorly worded questions may simply be a nuisance when addressed to an adult, but for a child they may be a serious source of miscommunication.[62]

All of the panel members interviewed noted the need for additional training on communicating with children within the legal setting and welcomed specialist advice on the matter. When asked if they felt in need of additional training and support one stated: '*I believe that, absolutely yes.*'

Another added:

> *Oh absolutely, but it wouldn't be just the panel staff. I mean, for example, barristers and lawyers brought in would need specialist training. Some of the barristers can be actually quite aggressive.*

This need for specialist legal education reiterates findings from recent research which highlighted the inappropriate treatment of children and young people by judges in legal settings in Northern Ireland and emphasised the need for child-focused selection procedures, monitoring and appraisal of judiciary working with children.[63]

Judicial attitudes to child participation at SEN tribunals

A further barrier to the introduction of child rights initiatives in legal process could be the attitude of judicial staff on the implementation of such approaches. The findings from this research highlighted a significant geographical disparity in the opinions of judicial staff to the introduction of a child's right to appeal. Panel members' responses in Northern Ireland, when asked if children should have a more active role in the process, were tentative and reflected traditional views on exposure to sensitive personal information and parental protectionism. As one panel member stated when asked if children should be party to SEN tribunal hearings:

> *I couldn't give you a yes or no because I think there have been occasions when I thought I wish I had the child here to ask the child the truth about . . . where for example the parent says something isn't happening in the school and the school says it is happening. On the other hand I don't know if I would want, just say this was my own child, I don't want my own child taking part in proceedings where their mental ability might be discussed. Would you want a boy of 14 to be told that his IQ was 65? It's a difficult area.*

When asked about the possible implementation of a child's right to appeal in Northern Ireland, another panel member observed:

62 Walker (n 59) 59.

63 Emerson et al (n 60) 63.

> *Well it's an absurd notion. A five year old wouldn't know what an appeal was . . . I think that's something that could be used because a child could be manipulated into appealing. I'm not really sure about that because there's no age limit laid down I'm thinking if you're over fourteen certainly. When you're cognisant of it all you should have the right to appeal. If you're five well it's not you appealing at all it's your mummy or your granny. I'm not sure that I would agree with that in that present form.*

Additionally, when asked if the enhancement of child participation at a SEN tribunal would require a proactive campaign with children and families, a panel member replied no, that it would require a more pro-active campaign with the judiciary. Fundamentally, SEN tribunal members' responses to questioning on the expansion of children's participatory rights were based on traditional conservative theorisations of childhood.[64] This conservative approach reflected general conceptualisations of childhood, placing parental deference at the nucleus of the process. Traditional notions of age, capacity and protectionism were upheld as reasons for excluding children from the process, instead of being recognised as barriers to be dismantled.

Conclusion

While the SEND Act 2016 is a welcome attempt to incorporate the obligations emanating from Article 12(2) by providing a new child right to appeal to the SEN tribunal, there remain a number of persistent barriers for current users that may negatively impact on the new initiative. As evidenced above, there are concerns that the process presently excludes those from lower socio-economic backgrounds, those with lower literacy rates and those with low confidence and legal capacity. This research suggests that participants should not be excluded from the process because of low skills, lack of confidence about appearing before a panel, or their disability or age.[65] As Mullen and Genn assert, citizens can vary in personal characteristics such as intellectual capacity, educational attainment, oral and/or written communication skills and psychological and emotional attributes such as confidence and emotional fortitude.[66] It is therefore essential to adapt processes and procedures to meet those needs and enable participation.

All participants require flexibility within the process to enable participation tailored to their individual needs. This would require, for example, developing the communicative capability of panel members and tribunal staff; utilising appropriate local settings for hearings; providing greater discretion to expand time limits; reviewing the requirement of paperwork; the development of informal, child-friendly procedures and literature; the use of informal, child friendly settings; and developing accessible tribunal-based information.[67] Fundamentally, involving citizens in participatory processes requires careful planning, thoughtful preparation and flexibility to change procedures to meet the requirements of the affected constituencies.[68]

Findings from this research have also uncovered substantial difficulties for parents seeking advice and support following the onset of educational disputes. In order to enable meaningful participation at SEN tribunals participants require knowledge and advice about rights, obligations, remedies and procedures to ensure they have an adequate

64 Eithne McLaughlin, 'Governance and Social Policy in Northern Ireland (1999–2002)' in Martin Powell, Linda Bauld and Karen Clarke (eds), *The Devolution Years and Postscript*, Social Policy Review 17 (Policy Press 2005) 116.

65 Drummond (n 28).

66 Mullen (n 39) ii.

67 Drummond (n 28).

68 Ortwin Renn et al, 'Public Participation in Decision Making: A Three Step Procedure' (1993) 26 Policy Sciences 189, 209.

understanding of the issues at stake and the possible outcomes of differing decisions.[69] Additionally, ADR services were viewed sceptically by respondents, with concerns raised regarding the clarity of outcomes and the fear that rights would not be safeguarded through this mechanism. This is an issue which will become even more controversial when children are expected to negotiate a resolution within a mediation setting.

SEN tribunals have been described as formal, legalistic, and excessively adversarial, sparking protectionist views that children should be shielded from this process instead of being actively included. The eradication of the inequality of legal arms is urgently required to rebalance the inherent fairness of the tribunal and ensure administrative justice.[70] One of the protectionist reasons for refusing children access to their right was the fear that they would encounter cross-examination by an over-zealous barrister and this is something which needs to be addressed to relieve parental concerns thereby enhancing their receptivity to involving their children in the process.

There is a need to ensure that participants do not feel belittled within the dispute resolution process and are shielded from unnecessary censure. It is essential, if children are to attend tribunals, that they can express their opinion in a safe environment without fear of rebuke or reprisal.[71] Attitudinal barriers to involving children in the process remain culturally entrenched, with age and capacity continually cited as reasons for reducing children's right to participate, an approach which the SEND Act entrenches further. What is required is a conceptual shift, moving away from the need to shape the child to fit within the tribunal process, expecting them to reach the potentially unobtainable 'capacity' benchmark required for legal participation. Instead, participation should be a fluid concept, armed with evolutionary properties so, when faced with the challenges of specific needs, it can procedurally transform so as to hear children's voices as they express them, instead of expecting children to conform to some rigid standard of competence. Crucially, the findings from this research highlight that, in order to meaningfully hear the voice of the child within the process, particularly a child considered to have a disability, there is a requirement to be adaptive to their needs.

Granting children the full right to appeal should be considered only one step in a multifaceted approach to enable meaningful participation. Children have differences. Some have substantial, complex needs which may mean it is unrealistic to assume that they can physically attend the tribunal or present their own case. Yet this is not to suggest that those with complex needs cannot influence the decision-making process or have their voice heard within the proceeding.

The Welsh experience is one from which lessons can be learnt. Following the enactment of a child's right to appeal to a SEN tribunal, an evaluation of the legislative pilot found that systems and processes of informing children and young people of their rights were well established and generally regarded as working well. In reality, only one child had made a claim of disability discrimination during the pilot and no children had made appeals to SENTW.[72] In addition, no children or young people availed of the advocacy or dispute resolution services established as part of the pilots.[73] This research would suggest that the underlying procedural and attitudinal issues discussed above in

69 Thomas Webler and Seth Tuler, 'Fairness and Competence in Citizen Participation: Theoretical Reflections from a Case Study' (2000) 32 Administration and Society 566–95, 568; Genn (n 36) 255.

70 Drummond (n 28) above.

71 Lundy (n 48) 931–3.

72 Welsh Government, *Evaluation of a Pilot of Young People's Right to Appeal and Claim to the Special Educational Needs Tribunal Wales: Final Report* (2014).

73 Ibid.

essence created an overwhelming barrier to child participation at SEND tribunals. Barriers were so culturally entrenched that they overwhelmed innovative legislative attempts to ensure children their right to participate. In relation to the notion of the child's capacity to participate, the Welsh government assessment acknowledged that a limited number of right-bearers would be able to understand and exercise their rights, an issue which this research has demonstrated is a pervasive barrier to participation not only for children but also adult users of tribunals.[74]

There is, therefore, a need to move away from conceptualising the meaningful participation of children at SEN tribunals as the total immersion of the child in the dispute resolution process. Fundamentally, what is being advocated as a result of this research is the development of processes, techniques and procedures to guarantee that children's voices are heard within the decision-making process, thereby ensuring that they can give their opinion on the nucleus of the disagreement and that their opinion is given weight within the process. If a child has complex needs, it is about tailoring the methods of extracting the child's opinion to suit the individual needs of that child, utilising approaches that reflect their method of communication.

The need for training to build the capacity and communication skills required to engage with children was highlighted by all but one of the tribunal members in Northern Ireland. This is obviously an area which requires immediate attention as the SEND Act takes effect, particularly if we are to effectively expand the inquisitorial role of the panel in an attempt to challenge the adversarial environment experienced by current users. It is about changing our perceptions of communication within formal settings and developing the skills of those involved in the tribunal process to enable that. This would include training, not only for tribunal staff and judiciary, but for the legal community in general.[75]

There is an urgent need to address the attitudinal concerns of parents involved in the processes and a need to educate them concerning children's rights. Findings from this research found that the traditional conceptualisation of children as being in need of protection from the process, knowledge of their disability and/or knowledge of the dispute, in order to protect their best interests, needs to be challenged. Reassuring parents that their children will not be exposed to an excessively adversarial environment or unnecessarily exposed to sensitive information may go some way to alleviate their concerns and may convince them to permit and encourage their children to participate.

The SEND Act has taken effect in Northern Ireland, expanding children's participatory rights into an environment rife with pre-existing procedural and attitudinal barriers. Historically, parents have struggled to take a case, find support, engage at the tribunal hearing and deal with the reality of their everyday lives. If this remains unchanged it is impossible to see how children with special educational needs can enter this domain and meaningfully participate. The Act is progressive, but perhaps what is required is a review of the existing SEN tribunal process, with a view to making the tribunal accessible for all.

74 Ibid.

75 Emerson et al (n 60) 8–9.