The focus of this article is children’s rights in school and my proposition is that ‘children’s rights’ is a dynamic concept capable of review to reflect new social norms and increasing cultural pluralism within society. Beginning with an historical perspective of the children’s rights movement, the article explores the concept of ‘the child’ and childhood, and specific rights pertaining to children at school. Reference is made throughout the discussion to litigation taken to the European Court of Human Rights in Strasbourg where there has been a tradition of promoting children’s rights, particularly evident in the issue of corporal punishment in the 1980s. Recent cases concerning school dress based on religious and philosophical convictions are explored, and the limits to accommodation based on religious identity. Discussion concludes with consideration of the potential for ‘rights in conflict’ caused by competing claims between schools and pupils with a proposal that an ‘integrative’ approach be developed, incorporating rights for everyone within an educational institution.

I INTRODUCTION

If it is possible to talk about ‘animal rights’ without ridicule, it should be possible to raise the issue of children’s rights. Yet historically, children have been the last group to whom rights have been extended. This paper explores this issue with discussion of: (i) the historical background to the growth of the children’s rights movement; (ii) the concept of the ‘child’ and ‘childhood’; (iii) the notion of ‘rights’; (iv) and specific rights advocated for children and petitioning at the European Court of Human Rights in Strasbourg. Finally, (v) recent issues in Europe concerning school dress or uniform, particularly based on Islamic traditions, are explored through litigation in Strasbourg demonstrating the range and limit to children’s rights. As such, ‘children’s rights and wrongs’ form the basis of discussion in the final sections and highlights the potential for (vi) ‘rights in conflict’ between the child and the school.

II HISTORICAL PERSPECTIVE ON THE CONCEPT OF CHILDREN’S RIGHTS

Children may be smaller than we are, but their rights must weigh as heavily as our own.

Should children’s rights weigh as heavily as those of adults? What effect do such claims have on other members of society; and what should be the extent of children’s rights in school? An underlying theme of cases taken to the European Court of Human Rights in Strasbourg is that of ‘children’s rights’. The Court’s jurisprudence has been important for what it implies of children’s...
The children’s rights movement is an international feature of the 20th century but its roots can be traced to earlier times. The Children’s Petitions of 1669 were, in a sense, an attempt to single out children as a special need category and specifically to call for restriction of corporal punishment by teachers. Although early attempts to challenge physical chastisement failed, the issue did not disappear and concern over children’s welfare continued. Pioneers of the 19th century such as Lord Shaftesbury and writers such as Kingsley and Dickens aimed to awaken the public conscience by highlighting the plight of children. Whilst these developments were more in the name of children’s best interests rather than their ‘rights’, they laid the foundation of a movement which was to modify the traditional status of children vis-à-vis adults.

Early writings on children’s rights demonstrate interest in the cause. More had anticipated the movement towards the recognition of ‘the rights of youth, children and babies’, as a natural progression of entitlement. Siogvolk asked the question: ‘The “rights of man” and the “rights of woman” have been discussed “ad nauseam”; but who vindicates the rights of children?’ In Children’s Rights, Wiggin argued that ‘a multitude of privileges, or rather indulgences, can exist with a total disregard of the child’s right’ and concluded that ‘the child has a right to a place of his own, to things of his own, to surroundings which have some relation to his size, his desires and his capabilities’. Throughout the 20th century there has been increased concern over children’s rights but not until the 1960s did the movement gain momentum and fresh impetus was provided by pupil and student militancy. Freeman notes that ‘the real impetus to children’s rights is contemporaneous with the liberation and student movements of the late 1960s’. Pupil militancy was supported by the development of underground literature used to publicise the issue of children’s rights. Another publication was The Little Red School Book, translated from the Dutch, which advised children about how they could influence their own lives. With particular regard to school punishment the authors suggested that pupils ‘demand your rights but be polite’.

To see the thrust for children’s rights simply as a ‘downward seepage’ of unrest at university level is to underestimate the cause, for a number of factors were present. Wringe suggests firstly the importance of writers such as A S Neill, who advocated the notion of school democracy. Similarly Firestone made clear the connection between the liberation of women and that of children, their oppressions being mutually reinforcing and entwined. Secondly, the early 1970s was important for the beginning of the ‘de-schooling’ debate in which writers addressed the nature of institutionalised education. American author Jonathan Kozol captured the essence of the mood in his book Death at an Early Age. The National Council for Civil Liberties in the United Kingdom (UK) issued a series of discussion papers in 1971 entitled ‘Children Have Rights’. This organisation also passed an executive resolution in 1972 calling for active campaigning on specific rights for school children including the abolition of corporal punishment and the right of children to determine their personal appearance in school, two issues which are explored later in the article.

Margolin notes that in America, the children’s rights movement has been largely concerned with the notion of ‘due process’, school desegregation, school discipline and freedom of expression. The cases of Re Gault, Tinker, Re Winship, and Ingraham v Wright, address some of these issues, and in a piecemeal manner human rights were gradually extended to American children.
International recognition of children’s rights has been expressed in the form of charters and declarations throughout the 20th Century. Chanlett and Morier state that: ‘the concept that a child has rights is of relatively recent vintage’, for until 1914 the focus had been on ‘the duties of children to parents and society, but never any question of rights they might be entitled to’. In the aftermath of the First World War, organisations were formed to help with relief, one of which was Eglantyne Jebb’s Save the Children dealing with the problems of minors. This was followed by the Save the Children International Union in Geneva 1920 and four years later Jebb presented to this organisation a charter specifically concerned with children’s rights. This ‘Declaration of the Rights of Geneva’ was adopted September 24 1924 by the fifth Assembly of the League of Nations. It embodied in the broadest sense the ‘basic principles of child welfare, leaving appropriate action to each country, within its needs and resources’. In 1934 the League of Nations confirmed the principles of the Declaration, one of which pertained specifically to education. The Universal Declaration of Human Rights was silent about children’s rights and it was not until 1959 that the situation was rectified. The preamble to The United Nations Declaration of the Rights of the Child states that ‘by reason of his physical and mental immaturity’ the child requires special safeguards and care, including appropriate legal protection before as well as after birth. As a general principle the document stipulates ‘mankind owes to the child the best it has to give’. Ten principles are proclaimed within the document, number seven of which specifies that ‘the child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages’.

Whilst the 1959 Declaration of children’s rights highlighted ‘rights and freedoms’, it only expressed ‘principles’. Freeman describes these as deliberately vague as to what rights children should have, and as to who should bear the correlative duties. In fact, the 1924, 1948 and 1959 declarations of children’s rights are noteworthy ‘by their simplicity of language’ and inadequate enforcement. Similarly, Bel Geddes states that for the most part principles concerning the rights tend not to be legal documents, they rarely have enforcement; the European Convention is a notable exception. Instead they provide an ideal situation in which they may say ‘too little about means and a lot about ends’. Freeman describes many of the documents of children’s rights as containing ‘blueprints rather than reasoned arguments’.

The drafting of the United Nations Convention on the Rights of the Child started in 1978 and was completed in 1989, containing many principles expressed in earlier documents and representing what was ‘world consensus on the status of the child’. The importance of education is recognised in Article 15(1) which calls for: ‘the right of the child to education … with a view to achieving the full realisation of this right on the basis of equal opportunity’. Of particular relevance here is the second subsection of this article which adds:

States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner reflective of the child’s dignity.

The article clearly echoes the language of the European Court of Human Rights in the corporal punishment cases of Campbell and Cosan, and Tyrer. Further, Article 10 of the Convention provides for

the right of the child to freedom of thought, conscience and religion … [and] the liberty of the child and his parents … to ensure the religious and moral education of the child in conformity with convictions of their choice.

The issue of religious convictions manifested in school dress is explored later in the article through cases litigated in Strasbourg, demonstrating the dynamic nature of human rights.
There is a range of European charters, such as *The European Convention on Human Rights*,\(^{43}\) which have particular relevance to minors. However the Children’s Legal Centre contends that the Convention ‘provides unique protection for the fundamental rights and freedoms of children and young people’.\(^{44}\) This is evidenced by the cases discussed here but it is noteworthy that invariably the litigation is instigated at the behest of the parent.\(^{45}\) A variety of European declarations concerning children’s welfare have been established and in 1979 a *European Charter on the Rights of the Child*\(^{46}\) was enacted, containing as its first principle:

[children must no longer be considered as parents’ property, but must be recognised as individuals with their own rights and needs.\(^{47}\)]

Today the notion of children’s rights is no longer unusual, yet there is still some ambivalence about the legality of such claims. International and European documents relating to children’s rights abound, although enforcement has been far less rigorously defined. However, support for the ‘liberation’ of children has been an ongoing feature of the last three decades of the 20\(^{th}\) Century. In 1975 Godfrey stated that:

[t]his is no more a ‘lunatic fringe’ phenomenon. Increasingly, commentators and reformers are calling for the coalition of children’s rights in some legal form or another.\(^{48}\)

Similarly, Fortin argues:

[d]espite the jokes and even the hostility, it seems clear that the concept that children have rights is here to stay.\(^{49}\)

Furthermore, there has been a shift in terminology from children’s ‘needs’ to ‘rights’, and a change in focus away from broad educational issues to a specific concern such as ‘child abuse’, which at times has been associated with corporal punishment and institutional abuse.\(^{50}\) (Litigation in Strasbourg concerning corporal punishment in schools is discussed later.) However, the children’s rights movement provides a plethora of issues, each group within it often defining one particular concern. No one policy emerges from the movement in Europe and USA; rather it appears as a collection of deeply committed advocates recommending complementary proposals to enhance the welfare of the child.

As discussion so far has demonstrated, series of charters and treaties have been drafted providing rights for children but there is often confusion as to who is a child, and when does the period of childhood end. This forms the focus of discussion in the next section.

### III THE CONCEPT OF THE ‘CHILD’ AND ‘CHILDHOOD’

What is a ‘child’ and who decides? What do we mean by ‘childhood’ and how long should it last before adulthood begins? These two related concepts affect the acquisition of rights and privileges, and the length of dependency on adult caretakers.

Definition of ‘the child’ concerns the acknowledgment of a young person’s ability to act independently of adults. Goldstein et al state that

[i]n the eyes of the law, to be a child is to be at risk, dependent and without capacity or authority to decide, free of parental control, what is ‘best’ for oneself.\(^{51}\)

This contrasts with the status of an adult who is ‘presumed by law to have the capacity, authority and responsibility to determine, and to do, what is “good” for one’s children’.\(^{52}\) The
vulnerability of the child was described by Bentham thus: ‘the feebleness of infancy demands a continual protection’.53

That protection is normally provided by the parent or an adult carer. Margolin adds that ‘notions of childhood as a period of helplessness and protected growth are entrenched’, 54 and have provided justification for treating young people differently from adults. Fionda adds:

… over the centuries we can trace society’s notions of childhood through, inter alia, the way that children are educated; the way they are dressed; the age at which they are expected to work and fend for themselves; and through common notions of the responsibilities of parents and the state towards them.55

The age at which a child ceases to require adult supervision is claimed by many to be arbitrary in determination. Freeman, for example, maintains that:

[c]hildren are by definition not adults, even if the dividing line between the two is relatively arbitrary, a historical and shifting social construction.56

Likewise Wiggin states that the age of ‘discretion’ or majority is ‘that highly uncertain period which arises very late in life with some persons and not at all with others’. 57 However, Foster and Freed suggest that whilst the specific age of majority is ‘a carry over from feudal times, and perhaps anachronistic’, there is the need for an ‘age line’ to be delineated.58 ‘Legislatures and courts are not unreasonable in taking an average age as regards a particular function, as long as the age set is not completely out of kilter with custom and mores’.59

The lack of clear definition between the age of minority and majority in previous centuries concerned the changing notion of childhood. Holt describes age categorisation as ‘the curve of life’ which has been divided into two parts: one called childhood and the other adulthood or maturity.60 Freeman argues that it is a ‘social construct’ and that understanding of it ‘is not a constant in space or time’. 61 However, there has been advocacy of ‘rights’ for children as distinct from those for adults.

So far the discussion has focussed on the historical movement to justify rights for children, and to delineate between the age at which childhood ends and adulthood begins. Next the focus is on defining more clearly the concept of ‘rights’.

### IV Defining the Concept of ‘Rights’

It is useful to examine the notion of ‘rights’ *per se* and to see the ambiguity which surrounds the concept in a philosophical context. Further, particular reference is made to schools and how the child’s right may place limits on the rights of the teacher.

Hilary Clinton, writing under her maiden name Rodham describes children’s rights as ‘a slogan in search of a definition’.62 Six years later she observed that ‘although that search is still continuing, there has been significant progress in our efforts to define and achieve children’s rights’.63 Freeman suggests that discussion of children’s rights is ‘essentially ambiguous’, embracing ‘a number of disparate notions’.64 Accordingly, it is important to attempt definition of the term ‘rights’ and separate it from other terminology before considering what rights should be afforded to children in school.

The term ‘rights’ is suffuse with connotations of moral and legal rights, liberties and freedom, positive and negative claims and entitlements. It is used by campaigners lobbying for a host of
different causes within society. The application of the term ‘rights’ to the category of children, causes further confusion. This is because, as stated by Gross and Gross:

\[\text{the rights of children are an, abstract, general, legalistic concept. It is an idea, an ideal, at best an affirmation of principle. It does not help children until it is put into practice.}\]

For Rodham the phrase refers to a series of relations: the family, society and juvenile-orientated institutions, such as schools, against which claims can be made. Freeman adds that children’s rights is ‘a phrase that continues to be used imprecisely’ as it tends to be ‘something of a catch-all idea embracing different notions’. Furthermore, when the different rights are reviewed ‘it becomes apparent they are conceptually sub-divided into categories and that they are urged against different persons and have different enforcement problems’, as discussed later. Rodham points out that:

\[\text{when we talk of children’s rights we are often not talking of legal or institutional rights at all. We are referring most often to moral … rights, usually in the sense of ideal rights, against those who make society’s rules, usually that is the legislature, to convert their moral right into a positive legal one.}\]

So it is arguable that the abolition of corporal punishment in British schools, for example, was a moral right for pupils, converted into a legal right by virtue of the pressure to implement the *Campbell and Cosans* ruling adjudicated by the European Court of Human Rights in Strasbourg. Further, states Freeman, ‘many references to children’s rights turn out on inspection to be aspirations for the accomplishment of particular social or moral goals’. This is applicable to the desire to abolish corporal punishment in the home, which is strongly advocated in Scandinavian countries. Twenty European countries, including Spain, Germany and the Netherlands prohibit corporal punishment in the home, or within juvenile institutions in Ireland, and for many this ‘right’ constitutes a ‘social or moral goal’. This moral goal may, however, conflict with parents’ moral/religious convictions that moderate corporal punishment is appropriate and indeed ordained by Biblical texts as demonstrated in *Williamson v Secretary of State for Education*.

A definition of the term ‘human rights’, states Hunter, can be broad in scope, in order ‘to throw a mantle of respectability around whatever private interest is being espoused at the moment’, or narrow, ‘focusing on what might more accurately be called anti-discrimination legislation’. There is an important distinction to be made between ‘rights, liberties and freedoms’. A ‘liberty’ tends to be very broad in nature, and enables a person to do anything which is not specifically prohibited by law. The words ‘freedom’ and ‘liberty’ are often used interchangeably. Fundamental freedoms which are stated in a Bill of Rights normally include freedom of religion and freedom of assembly, explored with reference to personal appearance in a later section of the article. A ‘right’ is more narrowly defined, and is something granted to a person who requires positive action on the part of the government to ensure it — such as the ‘right to education’ or the right to physical integrity. Further, the word ‘rights’ is an umbrella which incorporates political, legal and egalitarian rights, which were noted previously with respect to the justification of children’s rights. Finally, Wasserstrom states that human rights are not absolute, in that ‘there are no conditions under which they can properly be overridden’. A case in point is the right to wear particular clothing in school as a manifestation of faith, which is explored below also. This contrasts with the right not to be subjected to torture or inhuman or degrading treatment which arguably is or ought to be absolute.
Discussion of ‘rights’ also brings into question the correlative with ‘duties’. Feinberg delineates ten kinds of duties: including duties of respect, status and obedience. Of particular relevance to this discussion is his argument that:

[a] duty, whatever else it is, is something required of one. That is to say first of all that a duty, like an obligation, is something that obliges. It is something we conceive of as imposed upon our inclinations, something we must do whether we want to or not.

In most European states and elsewhere in the world teachers now have a duty to refrain from corporally punishing their pupils whether they ‘want to or not’. Unless, that is, they are prepared to accept the consequences, or what Feinberg calls the ‘liability’. Similarly, the notion of ‘duty’ has application for ‘the right to education’. This right, as discussed later, often implies obligations and duties on the part of the state and schools to provide education for children of a certain age and importantly, also imposes duties on the child to adhere to school regulations. Contradictory and confusing ideas may be expressed in education policy regarding duties. Government may espouse the notion of children’s and parents’ rights but say very little as to their responsibilities. For the purpose of this discussion, therefore, we can summarise that a ‘right’ may be defined as a claim or entitlement to an action or service which may be legally enforceable and may place obligations on others to uphold.

Having discussed the concepts of human rights and responsibilities, the focus now shifts to exploration of a number of ‘rights’ advocated for children which are directly related to what happens in schools.

V \textbf{SPECIFIC RIGHTS ADVOCATED FOR CHILDREN}

Advocates of the children’s rights movement maintain that there are several important rights which children are entitled to claim. These range from the child’s right to be treated as a person of equal status to that of an adult, to the right to be treated differently, in some cases deferentially with certain immunities. What the movement has brought to public attention is the belief that children do possess rights. Wringe suggests further that: ‘not only are children held to have rights, but certain established practices are held to infringe these rights and to justify protest’. He argues that many of the rights advocated belong clearly to a liberal tradition of long standing. The only new characteristic in the situation is their applicability to children. Freeman identifies four categories of rights under the general heading of children’s rights: welfare rights; protection rights; rights of social justice; and rights of autonomy. All of these have application to schools.

‘If one assertion seems particularly fundamental to the children’s rights movement it is that \textit{children should be seen as persons in their own right}'. This contrasts with the traditional assumption that children are in fact the property of their parents, a theme highlighted earlier in the article. It would appear to be the most basic of rights, for the UK National Council for Civil Liberties has made the point that ‘children are the property of someone — if not of parents then the state’.

However, Wringe argues that:

in spite of their lack of legal status, it is suggested pupils in school have a moral right to the same consideration as anyone else and the same amount of respect from their teachers as the clients of any other professional body.

There are a variety of rights specifically related to pupils in schools. The following figure (Figure 1) highlights some of the main ones drawn from international treaties and children’s
rights advocates.\textsuperscript{37} Further, as the majority of children between the ages of five to sixteen are at school, and as their attendance is compulsory, unless alternative arrangements have been made, discussion of children’s rights in many instances is actually that of ‘pupils’ rights’.

- The right to be seen as persons in their own right
- The right to education
- The right to direct and manage one’s own education
- The right not to attend school
- The right to work for money
- The right to freedom in personal appearance
- The right to religious freedom
- The right to educational democracy
- The right to participate in school governance
- The right to appeal, representation and redress
- The right of access to knowledge
- The right to freedom of thought and expression
- The right to be free of corporal punishment
- The right to be free of degrading or humiliating treatment or punishment
- The right to sexual freedom
- The right to live away from home
- The right to effective education about sex and health (sexually transmitted diseases and HIV/AIDS etc.)

Figure 1: Children’s Rights Concerning Schools

For the purpose of this discussion a sample of three rights identified in this table are highlighted to illustrate the scope of entitlement for children. Further, ‘the right to freedom in personal appearance’ based on religious freedom is explored below.

A The Right Not to Attend School

‘The right not to attend school’ is an interesting claim, given that so much is argued for ‘the right to education’, a service which is normally provided in some form of educational institution. Wringe states that advocates of this right see compulsory schooling in terms of the infringement of personal autonomy and schooling is perceived in terms of ‘imprisonment’.\textsuperscript{88} Jeffs provides a very robust defence of the right not to attend school.

Until we begin to reassess the place of compulsion within school it is difficult to see how real progress can be made with respect to extending children’s rights in the context of schools … the bottom line being that they, unlike adults, have no option but ‘to put up and shut up’ about the way in which they are treated.\textsuperscript{89}
He sees compulsory school attendance as causing teachers to keep children contained against their will which contradicts their primary role as educators. Concern over the compulsory nature of schooling raises the point that some teachers may be serving the role of social controller rather than that of educator. This leads to the imposition of rules and management styles which ‘undermine the rights, freedoms and dignity of the majority of young people’.90

Wringe argues that ‘except [for] the right to life itself’, no human right is more fundamental than the educational right, since it concerns freedom of thought and expression.91 He cautions, however, that:

the requirement that a child go to school, for about six hours a day, 180 days a year, for about ten years, whether or not he learns anything there, whether or not he already knows it or could learn it faster or better somewhere else, is such a gross violation of civil liberties that few adults would stand for it.92

Moreover he contends that presently there is not in fact ‘the right of children to go to school’ but really ‘the right of the State to compel them to go whether they want it or not’.93

B The Right of Free Access to Knowledge

‘The right of free access to knowledge’ has also been advocated by children’s rights campaigners and this entitlement is interesting because it may be opposed by schools in the choice of curriculum, or parents who hold strong religious convictions.94 In the British case of Gillick v West Norfolk and Wisbech Area Health Authority,95 for example, the parent objected to contraceptive information being given to her 15-year-old child. In cases where there is clearly a situation of ‘rights in conflict’, whose should take primacy? In Gillick, the courts were persuaded that provided the child has sufficient maturity, her rights should be recognised, and that in fact parents’ rights dwindled according to the age and maturity of the child.

Recent cases in Canada have been testing out the extent of parental rights to object to or provide ‘access to knowledge’. On the one hand Alberta is about to become the first province to enshrine ‘parents’ rights in the classroom’, and allow them to withdraw their children from classes dealing with religion and sexuality.96 Conversely, the Manitoba Child and Family Services removed a seven-year-old child from a mother who exposed her daughter to white supremacist ideology and drew racist markings on her body.97 The argument being put forward is that parents do not have a constitutional right to teach their children to hate and that the state’s duty to protect the child takes primacy over the parents’ right to indoctrinate. The Danish sex education case Kjeldsen v Denmark98 is a case in point. Here there was a challenge by parents to compulsory sex education in Danish state primary schools on the basis of such teaching being contrary to the state’s obligation to respect parents’ religious and philosophical convictions (Article 2 of Protocol 1).99 The question of what amounted to indoctrination was key in this dispute and the Court held:

examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour.100

Similarly, in Williamson v Secretary of State for Education,101 parents with ‘fundamentalist’ religious convictions argued unsuccessfully that the abolition of corporal punishment conflicted with their rights under Article 9.102
C The Right to be Free of Corporal Punishment

Finally in this section, the right to be free of corporal punishment is a particularly important claim because it was successfully petitioned in Strasbourg in the 1980s and ultimately led to abolition in the UK. Starting with *Tyrer v UK*, a series of cases were taken to Strasbourg to challenge the use of physical punishment in schools. In these cases, Article 3 of the European Convention was invoked which states ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

Jeffs argues that ‘disrespect for young people is nowhere more evident than in the continued use of physical punishment in some private schools’. As the European Convention is applicable to everyone within a European country’s jurisdiction, it was successfully argued that this right should be extended to *all* pupils in *all* educational establishments, regardless of the nature of their school, that is inclusive of education taking place in mosques, temples, synagogues or churches, and this was achieved at the turn of the century in the UK. In Europe, the issue of corporal punishment in schools no longer features as a major issue of concern. For example physical chastisement was abolished across most of Western Europe by 1980, and belatedly abolition occurred in the Britain in 1998 after humiliating defeat in Strasbourg. However, this is not universal and remains an issue in the USA, for example, where the use of corporal punishment still exists in just under half of the States. The significance of the corporal punishment cases is that Strasbourg has upheld children’s rights recognising the dignity and physical integrity of pupils free from humiliating or degrading treatment or punishment, and this jurisprudence provides important signals about how children should be treated in schools.

Given the success of cases taken to Strasbourg in the 1980s, this judicial forum continues to be a place where children’s rights are invoked, more recently concerning the right of freedom of personal appearance based on religious convictions. These cases demonstrate the dynamic nature of children’s rights. It is unlikely that the founding fathers of the European Convention of Human Rights in the 1940s conceived of the charter being used to promote children’s rights at school either in terms of corporal punishment or freedom in personal appearance, but litigation has demonstrated the scope for interpretation of the European Convention in light of emerging social norms.

VI The Right of ‘Freedom in Personal Appearance’

The right of ‘freedom in personal appearance’ has direct relevance to schools and the majority of educational institutions at primary and secondary level in the UK and other parts of Europe stipulate requirements on school dress, hair styles, and the wearing of jewellery. Prohibition on the wearing of a head covering or ‘hijab’ by students at university level is also prohibited in some countries (see, eg, the case of *Sahin*).

The UK National Council for Civil Liberties has stated that when parents are requested to sign an undertaking ensuring that ‘their children will wear school uniform’, this constitutes a ‘mild form of blackmail on parents’ and is possibly invalid since pupils ‘have not signed nor necessarily been consulted about signing the undertakings in question’.

Interestingly a case was taken to Strasbourg in which a mother complained that the rules governing school uniform in her children’s school violated their rights under Article 8 of the Convention. This states that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. Whilst *Stevens v UK* ultimately failed at the admissibility stage, the Commission did imply that school rules which prevented children from expressing an
opinion or idea by means of their clothing might be a breach of the Convention’s guarantee of freedom of expression under Article 10. This was also found in the American case of Tinker v Des Moines, in which it was held that a student has the right to freedom of political expression through school dress. A recent case in Ireland concerning the length of hair worn by a male pupil could also fall into this category of freedom of expression and choice of appearance based on ‘philosophical convictions’.

Schools’ prohibition on school dress in the form of the ‘hijab’ or head covering worn by Muslim girls has generated a number of cases in Strasbourg during last 15 years. This issue is signalled out here for particular discussion because the wearing of the ‘hijab’ has been, and continues to be, a controversial issue across Europe. As highlighted earlier, there are specific claims concerning ‘the right to freedom in personal appearance’ and ‘the right to religious freedom’. ‘Manifestation of faith’ or belief can cover a broad range of religious activities, symbols and behaviours, and such customs as ‘the wearing of distinctive clothing or head-coverings’. As such, the claim to wear the ‘hijab’ by Muslim girls in school can be seen as part of the State’s obligation within Article 1, First Protocol of the European Convention on Human Rights:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (emphasis added).

A number of reasons are suggested to explain this increase in demand for wearing the ‘hijab’ during school time: ‘an intensifying of engagement with religion among Muslim communities’; political events in the Middle East, 9/11 and the Bali and Madrid bombings; and a perceived ‘targeting’ of Muslims in the host society. Added to this is the issue of female education and how gender is constructed based on religious ideology. In the desire of ‘diaspora’ in Europe, as in Australia, to preserve religious and cultural values, girls particularly are the bearers of tradition and maintaining the family honour or ‘izzat’. Young people of Muslim background in Europe are constructing new hybrid identities, and there is a highlighting of religious identity with growing use of religious symbols and dress codes such as the ‘hijab’.

Controversy over the wearing of the ‘hijab’ by young Muslim women in a number of states such as the UK, Holland and France has caused challenges for school managers. There is a distinction in law between the right to have religious belief, an unconditional right, and the freedom to manifest those beliefs which is relative and can be subject to curtailment. Some rights are not absolute but dependent on time, place and circumstance, and it would be considered acceptable for a school to request that school dress be worn in such a way as to ensure health and safety. Schools have revised policy in light of increasing cultural pluralism among the student body, and most educational institutions in the UK, for example, do permit the wearing of ‘the hijab’ underpinned by government guidance. In the Republic of Ireland, the Minister of Education and Science has stipulated that ‘schools decide their uniform policy at a local level’, but they should not exclude students ‘of a particular religious background’ from having access to schools.

Schools in the UK have received requests from Muslim families for their daughters to wear both the ‘hijab’ and the ‘niqab’ or veil as part of school uniform [Denbigh High School v UK]. There is a clear distinction to be made between the ‘hijab’ and the ‘niqab’ as they raise significantly different considerations for school authorities and arguably justify a very different approach in terms of response. In Ireland, for example, the Equal Status Acts seek to implement
the European Union Race Directive that requires schools to respect cultural diversity.\textsuperscript{127} In terms of veiling however, the Department of Education and Science has stated, that it does not recommend the wearing of clothing in the classroom which obscures a facial view and creates an artificial barrier between pupil and teacher.\textsuperscript{128}

This would be consistent with policy on school dress in the UK where the wearing of the ‘hijab’ in educational institutions has been accommodated, but the wearing of the ‘niqab’ or veil within state-funded schools is not common. Ireland and the UK have a tradition of church involvement in education and the manifestation of religious belief such as through the wearing of a crucifix. In France, however, the manifestation of faith in the form of the wearing of a crucifix, skull cap or ‘hijab’ has tended to be opposed.\textsuperscript{129}

The controversial ban on the wearing of head scarves by female pupils and students in France has been an on-going issue since 1989, and the prohibition on any religious sign or garment that manifests religious affiliation by the wearer in state primary and secondary schools has been reaffirmed.\textsuperscript{130} This country particularly has been struggling to balance an ideology of secularism with the right to religious freedom, and a controversial law was passed in 2004 forbidding conspicuous religious symbols from state schools, such as the wearing of veils. More recently the French government has moved to ban the ‘burqa’, a long gown with head covering and veil, in public places and other Islamic clothing which are perceived as degrading to women.\textsuperscript{131}

Failure to remove the ‘hijab’ in educational institutions has led to the denial of ‘the right to education’ and there have been a number of cases taken to Strasbourg in which Muslim girls and women have challenged school policy and practice.\textsuperscript{132} This took place in the case of \textit{Sahin},\textsuperscript{133} a medical student in the University of Istanbul who brought a case against Turkey claiming that the university prohibited her from taking exams or attending lectures while wearing a headscarf. She cited Article 9 of the European Convention which provides for the right to manifest religious belief. In this case, Strasbourg found for the State as it did in the similar case of \textit{Karaduman v Turkey.}\textsuperscript{134} In \textit{Dahlab v Switzerland},\textsuperscript{135} a teacher who had converted to Islam was similarly banned from wearing a headscarf whilst in the employment of her primary school. The Court’s view was

\[\text{[i]t cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by the precept which is laid down in the Koran … which is hard to square with the principle of gender equality.}\textsuperscript{136}\]

Hoopes comments on these findings that limitations which prevent Muslims from peacefully expressing their religious beliefs constitute a violation of human rights and that ‘there has yet to be seen any evidence of public disruption over the wearing of a headscarf, or a cross, or any other passive manifestation of one’s religious beliefs’\textsuperscript{137}

What the cases of \textit{Sahin}, \textit{Karaduman} and \textit{Dahlab} demonstrate is the limitation to the right to manifest religious belief by Muslim girls and young women in educational establishments, and that principles such as gender equality, public order and the preservation of the secular character of the institutions can take primacy. Similar litigation elsewhere, for example, \textit{Hasan v Bulgaria, Sharon v Makerere University, Uganda, and Begum v Denbigh High School v UK} concerning the wearing of the ‘niqab’ or veil, also demonstrate the limitations placed on the right to wear dress based on Islamic traditions.\textsuperscript{138} Ssenyonjo is useful here when she states

\[\text{despite the existence of human rights arguments in favour of freedom of religion or beliefs, the freedom to manifest one’s religion or beliefs is not absolute and may be subject to limitations … in a democratic society where there are several conflicting religious}\]
beliefs, ‘it may not always be possible for schools and universities to accommodate every religious manifestation at any given time. In any case, courts may defer to the experience, background and detailed knowledge of the educational institutions.139
(emphasis added)

Hadden concurs that ‘it is increasingly difficult in a period of mass immigration and settlement to prescribe policies let alone to enforce legal rights’.140

The wearing of the ‘hijab’ (head covering) or ‘niqab’ (veil) in schools for religious reasons is likely to continue to be litigated in Strasbourg, but given recent jurisprudence this issue may not be judged sympathetically. Case law on this issue is telling in terms of the extent of children’s rights: the failure of cases concerning the wearing of dress based on Islamic tradition and the limits to children’s rights based on religious identity within educational establishments. However, despite signals from Strasbourg which do not support these claims, most schools across the UK, for example, have policy and practice that permits the wearing of the ‘hijab’, as long as tied in a manner that does not compromise health and safety. Importantly, such accommodation has not generally been extended to include the wearing of the veil in school.

The exclusion of boys due to the length of their hair alluded to earlier in this discussion could also be invoked under the European Convention on Human Rights.141 It could be argued that the choice of hair length constitutes a pupil’s ‘right to freedom in personal appearance’, and that this issue falls within the principle of respect for parents’ ‘philosophical convictions’. Here the argument centred on the school denying a boy access to education due to the length of his hair.142 The ‘principle of proportionality’ requires that exclusion is one of the ‘last resort’ sanctions, and it is especially not recommended if it deprives a pupil of the opportunity to take examinations which was raised in Sahin, and Campbell and Cosans.143 In addition, sex discrimination legislation has relevance to both gender and does not countenance treating boys less favourably in such matters. If accommodation can be made for girls in this instance, then arguably the same arrangements can extend to boys. Unless a school prospectus or brochure clearly expresses regulations on appearance and the parents or carers have signed or indicated that they accept this rule, schools which exclude boys because of the length of their hair are vulnerable to accusations of denying pupils ‘the right to education’ which is a breach of the European Convention on Human Rights. Further, even if the parent or carer has signed such a contract on behalf of the child, older boys may not necessarily concur with the policy and Gillick144 could be useful citation for recognising the maturity of older pupils.

There is no consensus across Europe about pupil attire whilst in school. In Scandinavian countries school dress and the length of boys’ hair is not generally governed by regulations whilst in the UK and Ireland, for example, the opposite is true. Schools which do require school uniform need to be mindful that implementing unreasonable rules on school dress, especially in the context of ‘the right to education’ and respect for ‘religious and philosophical convictions’, is unlikely to go unchallenged.

Smith adds that in enhancing children’s rights,

there is a sense in which practice in any era is circumscribed by structural arrangements and ideological forces (‘hegemony’), which sets limits to what is believed to be ‘possible’. Despite this, the case continues to be made for articulating and seeking to achieve change in the interests of children.145
VII ‘Rights in Conflict’?

The discussion so far has demonstrated that there have been a number of cases where parents have been prepared to litigate in Strasbourg challenging school policy and asserting their rights and those of their children. Rulings in this forum in the 1980s upheld children’s rights, for example, in the area of physical chastisement (Tyrer, Ms. X, Campbell and Cosans, Mrs X and Ms X). What the discussion also demonstrates is that a new wave of claims has been litigated (Karaduman v Turkey, Dahlab v Switzerland), reflecting increased cultural pluralism across Europe, and the assertion of rights concerning religious identity within educational institutions.

With reference to Strasbourg, Fortin states that the work of the Council of Europe in establishing the European Convention on Human Rights ‘has had considerable impact’ in producing ‘a practical rights-oriented consciousness amongst those dealing with legal problems affecting children on a day to day basis’. She argues, ‘it is becoming increasingly common for domestic courts in Europe to justify their decisions on matters affecting children by reference to children’s rights’. Drawing on the European Convention of Human Rights to substantiate such an approach, Fortin continues

practitioners and the judiciary are not only far more open to arguments based on children’s rights, but also more willing to consider international instruments as an important source of guidance over the standards to be reached by domestic law.

Legal principles in the European Convention on Human Rights have been alluded to which have direct relevance to school, such as access to knowledge, the right not be subjected to corporal punishment, and the right to freedom of choice in personal appearance based on religious and philosophical convictions. The Convention was established in 1947 by the Council of Europe within the framework of a regional treaty with its enforcement agency, the European Court. Working collectively, member states seek to improve the standard of human rights within their territories and the recognition of the right of individual petition. The Convention has legal authority within Europe but can be cited as moral authority elsewhere. This document has been particularly useful in promoting children’s rights.

Discussion so far has demonstrated the potential for ‘rights in conflict’ as both the school and pupils seek to have their legal entitlements upheld in a judicial forum. However, rather than seeing schools and children pitted against each other, Melton suggests relationships are strengthened by recognising ‘the legitimacy of rights’. As highlighted earlier in this paper, there was a long movement to legitimise claims for children and today the acceptance of children’s rights has been recognised as ‘a social phenomenon’.

In categorising human rights Bobbio states that the first generation of rights was established as a challenge to the totalitarian state, whilst the second, social rights, was as a result of political and social change in society. Englund et al argue that ‘for children it is the other way round’: the pronouncement of the child’s right to protection and welfare was made well before claims for individual freedom and self-determination.

The cases cited in this discussion demonstrate a desire for pupils to have individual freedom and self-determination in matters of personal appearance. School policy should, therefore, reflect rules which are equitable and based on gender, cultural and religious considerations.

The potential for tension between the child and the school can generate a situation of ‘rights in conflict’ with the perception that there is a need to resolve competing claims. As such, discussions of rights have often been framed, states Melton, in terms of ‘balancing’, that is, the need to balance
between possessors of rights (parents and child), types of rights (autonomy vs protection), and types of obligations (rights vs responsibilities). However he maintains that there is a position ‘beyond balancing’ whereby ‘respect for children implies no diminution of respect for the adults who care for them’, and that rather than seeing disputes as ‘rights in conflict’, with the ‘balancing’ of entitlements, he suggests an alternative approach whereby ‘autonomy and protection rights are integrated, not balanced, in the effort to protect children’s dignity’. Thus,

[w]hen children…are treated as members of the community, everyone’s sense of worth increases. The expression of dignity multiplies amid the recognition and exercise of rights; there are no losers.

This he maintains will allow a child to develop and express her or his unique personality. In moving to such an approach, schools can be the place where human rights are respected rather than legally contested, and policy can be devised with rules which are reflective of all members in the school community.

VIII CONCLUSION

Historically, the children’s rights movement has raised the issue of children being deserving of human rights. A number of entitlements have been identified which seek to cover the age range of birth through childhood to adulthood and these rights have been ratified through declarations such as the European Convention on Human Rights. Jurisprudence from the European Court of Rights in Strasbourg provides important indication that pupils’ rights in the classroom should be taken seriously. Strasbourg has been a forum for successful review of children’s rights evidenced in the series of corporal punishment cases in the 1980s. Also in cases involving parental indoctrination there has been support for the rights of the child in terms of access to knowledge. Equally important is the need to acknowledge that there is a limit to ‘rights’ for example in the expression of personal appearance and the manifestation of faith in educational institutions. Jurisprudence from the European Court to date suggests that schools are not obliged to accommodate all religious beliefs. Such pronouncements help provide guidance to all countries about developing social and legal norms, and the extent of human rights in the classroom. Further, despite what may be seen as a set-back for children’s rights in the area of personal appearance, schools can still regularly review policy and consider what adaptations can be made for children who wish to express their religious and philosophical convictions.

Finally, a key point in this discussion has been the difficulty in striking a balance between conflicting rights that arise — between the rights of the child and the school. However, rather than seeing human rights as ‘in conflict’, or needing to be ‘balanced’, they can be integrated into the school ethos and curriculum in a framework of good practice so that the dignity of everyone in the community can be recognised.

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Keywords: children; rights; Strasbourg; school; identity; dress.
ENDNOTES

8 Ibid 2.
12 Ibid 71.
16 *Times Educational Supplement* (London), 5 May 1972, 9, 14.
23 Ibid.
25 Ibid 5.
28 Ibid pr 6.
29 Ibid.
30 Ibid pr 7.
31 Freeman, above n 9.
32 Chanlett and Morier, above n 22.
37 M D A Freeman, ‘Taking Children’s Rights More Seriously’ in P Alston, S Parker, and J Seymour (eds), (1992) *Children’s Rights and the Law* 52, 70. It should be noted that the USA and Somalia have not yet ratified the UN Convention on the Rights of the Child.
40 *Campbell and Cosans v UK* (1982) 48, 60 Eur Court HR (Ser A).
41 *Tyrer v UK* (1978) 26 Eur Court HR (Ser A).

Neilson v Denmark (1986) 1092 Eur Comm HR 84 is a notable exception.


Ibid 4.


Ibid.


Freeman, above n 9.

K D Wiggin, above n 7.


Ibid.


Freeman, above n 9, 183.

Rodham, above n 5.


Freeman, above n 9, 72.


Freeman, above n 9, 32.

Ibid.

Rodham, above n 63, 35.

*Campbell and Cosans v UK* (1982) 48, 60 Eur Court HR (Ser A);

Freeman, above n 9, 37.


Fortin, above n 49.

*Williamson v Secretary for Education* (2005) UKHL 15.

I Hunter, ‘The Origin, Development and Interpretation of Human Rights Legislation’ in R St J MacDonald and J P Humphreys (eds), *Practice of Freedom* (1979) 77, 78.


Ibid 140, (emphasis added).

Wringe, above n 10, 1.
Freeman, above n 9.
84 Wringe, above n 10, 11 (emphasis added).
85 National Council For Civil Liberties (1972) Bills of Rights for Children.
88 Wringe, above n 10.
90 Ibid.
91 Wringe, above n 10, 183.
92 Ibid 184.
93 Ibid 185.
98 Kjeldsen v Denmark (1976) 1 EHRR 711.
100 Kjeldsen v Denmark (1976) 1 EHRR 711, 23.
101 Williamson v Secretary for Education (2005) UKHL 15.
103 Tyrer v UK (1978) 26 Eur Court HR (Ser A)
105 Jeffs, above n 89, 25.
106 Parker-Jenkins, above n 87.
107 Ibid.
110 National Council for Civil Liberties, above n 85.
112 Stevens v UK (1986) 11674 Eur Court HR (Ser A) 85.
124 Weller, above 79.
125 Travis, above n 76.
128 Department of Education and Science (Ireland), above n 125, 1.
132 *Campbell and Cosans v UK* (1982) 48, 60 Eur Court HR (Ser A); *Tyrer v UK* (1978) 26 Eur Court HR (Ser A).
133 Leyla Sahin v Turkey (2005) 447 ECHR 74, 98.
134 Karaduman v Turkey (1993) 74 DR 93.
136 Ibid.
143 *Sahin, Leyla v Turkey* (2005) 447 ECHR 74,98; *Campbell and Cosans v UK* (1982) 48, 60 Eur Court HR (Ser A).
146 *Tyrer v UK* (1978) 26 Eur Court HR (Ser A); *Campbell and Cosans v UK* (1982) 48, 60 Eur Court HR (Ser A).
147 *Karaduman v Turkey* (1993) 74 DR 93.
149 Fortin, above n 49, 58.
150 Ibid.
151 Ibid 59.
152 Freeman, above n 1.
158 Melton, above n 154, 906-907.
159 Ibid 912-913.
160 Ibid 913.