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What is a right to education?

***Abstract:** This article will examine the nature and scope of a right to education and will compare and contrast international and domestic education rights provisions and will make a comparative analysis of the application and utility of such rights in the UK, Ireland, US, UAE and developing countries. It will argue that a right to education is a fundamental human right upon which the sustainability of any society depends. Finally it will argue that education rights provisions alone will not of themselves be sufficient to achieve educational, social and economic sustainability and advancement without the necessary political, judicial, societal and financial support to enable such rights, in whatever form they are set down, to foster, support and direct educational provision, participation and attainment.*

Keywords: right to education; sustainability; fundamental human right; enshrined rights; international education rights provisions; domestic education rights provisions; Article 42; *Plessy v Ferguson*; *Brown v Board of Education*; *Grutter v Bollinger*; UAE Education; developing countries' education; education provision.

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1 Introduction

“Our progress as a nation can be no swifter than our progress in education.” John F. Kennedy

The sustainability of any society depends upon many factors, political, legal, geographical, socio-economic, etc. However, a common thread running through the optimal utilisation of any of these facets of a society is the level of education of the populace. This paper will argue that there is a chain of factors determining the level of education within a society commencing with education rights but subject to many other influences.

A right to education is widely espoused throughout the world but takes many forms. This paper will examine the scope of a right to education. It will start from broad international provisions and narrow down to state specific provisions. It will argue that justiciable education rights are necessary to encourage, enforce and sustain the provision of sufficient resources allocated towards suitable and accessible education. It will further argue that whilst education rights are a driving factor in paving the way towards accessible education that the accessibility of education is multifactorial.

It will make a comparative analysis of how and to what extent various states’ judiciaries have taken education rights, be they enshrined or otherwise embedded in their legal systems, and notwithstanding their different natures, given practical application to these concepts. It will use such comparison to discuss to what extent the form of such rights provisions influences their efficacy and sustainability.

Finally, it will consider how this panoply of rights has been interpreted and enforced and whether they are sufficient to foster an educational environment that will stimulate greater opportunities for personal, national and international advances in the mobility of knowledge, ideas, people and goods such as will foster advances in societal wellbeing in a range of areas of sustainable socio-economic, political and legal activity.

2 The Scope and Nature of a Right to Education?

Whilst a right to education must necessarily be framed within the socio-economic, political and legal contexts referred to above as it impacts upon all of them, it cannot be completely subject to any of them. To consider it in isolation would be to fail to understand the core thrust of this paper which is that for all the discussion of its nature and scope a right to education is a

fundamental human right. As such it encompasses all elements of one's humanity and cannot be considered solely within the framework of legal instruments but from an overall societal viewpoint and must be upheld and given force to the greatest degree possible.

Education may be defined in an infinite number of ways but for the purposes of this paper which is focusing on education in an academic form it may be defined as: "The process of receiving or giving systematic instruction, especially at a school or university." (Lexico <https://www.lexico.com/en/definition/education>). This paper will make a comparative analysis of state educational rights and provisions but, as states are subject to both national and supranational jurisdiction, before focusing on individual state provisions, it is first necessary to take a broad overview of international education rights provisions.

3 International Education Rights Provisions

3.1 United Nations

The Universal Declaration of Human Rights which was proclaimed by the United Nations General Assembly in 1948 states in Article 26:

"(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children." [The Universal Declaration of Human Rights].

The International Covenant on Economic, Social and Cultural Rights which was adopted by the UN General Assembly in 1966 and came into force in 1976 provides:

13.1: The States Parties to the present Covenant recognize the right of everyone to education...

This applies to Secondary education which according to General Comment 11 "...includes the elements of availability, accessibility, acceptability and adaptability which are common to

education in all its forms and at all levels”. (UN CESCR, http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CESR_General_Comment_13_en.pdf).

The Covenant continues:

“13.3: The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.” (ICESCR Article 13, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>)

These two articles represent a very wide interpretation of what constitutes a right to education which rather than being broadly aspirational must be achieved ‘within a reasonable number of years’ as set out in the subsequent article:

“Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.” (ICESCR Article 14, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>).

3.1.1 Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) was adopted by the United Nations General Assembly in 1989 and came into force the following year. A child is defined as “a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger. The Committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18.” (Unicef, <https://www.unicef.org/montenegro/media/1891/file/MNE-media-MNEpublication12.pdf>)

Articles 28 and 29 relate to the education rights of children:

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The meaning, scope and effect of Article 29 may be elucidated by reference to the United Nations General Comment No.1 (2001). [UNCRC, 2001]. It says that education in the context of Article 29 “goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society”. [UNCRC, (2001), p.2]. It later states that “the article attaches importance to the process by which the right to education is to be promoted. Thus, efforts to promote the enjoyment of other rights must not be undermined, and should be reinforced, by the values imparted in the educational process”. [UNCRC, (2001) p.3]. Paragraph 10 of the General Comment states: “Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities”. [UNCRC, (2001), p.4]. Finally with regard to implementation “the school environment itself must thus reflect the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin called for in article 29 (1) (b) and (d)...” [UNCRC, (2001), p.6].

3.2 European Union Law

From its origins as an economics focused body the EU has evolved and expanded its outlook to a point where it is now “seeks to advance in the wider world, in particular democracy, the rule of law and the universality and indivisibility of human rights”. (Egan and Pech, 2015). In this context the right to education is a human right indivisible from other human rights and therefore something it should seek to promote through external action. Before deciding upon the nature and range of education rights to promote it would be useful to analyse the nature and range of education rights to be found within the EU’s own borders. As the right to education has not traditionally been part of its competence, legally enshrined education rights within the EU are predominantly found within member states’ domestic legislative and constitutional frameworks as well as within their application of relevant ECHR jurisprudence. That said, elements of EU law such as the ‘Race Directive’ (Council Directive 2000/43/EC of 29th June 2000) which implements the principle of equal treatment between persons irrespective of racial or ethnic origin, impinge on education. The Lisbon Treaty gives legal effect to the Charter of Fundamental Rights of the European Union which includes:

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

A right to education as an EU sourced right is therefore at an evolutionary stage and member state citizens would currently be more likely to use other sources to invoke such a right.

4 Domestic Education Rights Provisions

4.1 The UK

In 1951 the United Kingdom was one of the first members of the Council of Europe to ratify the European Convention on Human Rights, however due to its dualist legal system international law such as the Convention does not form part of its domestic law so it was incorporated into UK law, with certain provisions to protect UK parliamentary sovereignty, by the Human Rights Act 1998. The right to education is set out in the First Protocol, Article 2 of the European Convention on Human Rights

(https://www.echr.coe.int/Documents/Convention_ENG.pdf):

“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.”

This in turn is included in SCHEDULE 1 of the Human Rights Act 1998. The UK does not have a written, or more accurately a codified constitution but “...it is often said that the UK has an unwritten constitution made up of important statutes, common law precedents, and unwritten conventions.[2] The Human Rights Act 1998, which incorporates most of the substantive provisions of the European Convention on Human Rights into the domestic law of the UK, provides an informal codification of many of the rights typically contained in written constitutions. [3]”.

(The Law Library of Congress, <https://www.loc.gov/law/help/constitutional-right-to-an-education/englandandwales.php#Right>)

Whilst the Convention does not take precedence over UK legislation all such legislation must be interpreted in line with the Convention “[s]o far as it is possible to do so...”. [Human Rights Act 1998 S3 (1)]. Furthermore UK courts “...must take into account...” [Human Rights Act 1998 S2 (1)] the significant body of the European Court of Human Rights’ education related (as well as all other) jurisprudence.

This is, however, an addition to rather than the origin of a UK right to education. To the extent that the UK has a constitution it is submitted that there is a constitutional right to education. The UK has had state provided statutory based free education dating back to the 19th century. A system of state education that is so long established and widely accepted and required by the population is arguably as entrenched as any legally entrenched source of education rights.

4.2 Ireland

There are various provisions in the Irish Constitution relating to education such as Article 42.1: “The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”

Ireland, also a dualist state, has incorporated the European Convention on Human Rights into Irish law, albeit at a sub-constitutional level, in the European Convention on Human Rights Act 2003 including the First Protocol, Article 2 referred to under “UK” above. Similar to the UK position, in Ireland “[j]udicial notice shall be taken of...” [ECHRA (2003) S4] the Strasbourg jurisprudence.

Where Ireland diverges from the UK position in relation to education rights is in the significant body of case law built up in the field of education rights which is largely based on teasing out the nature and scope of education rights enshrined in the Irish Constitution. The nature of this article is not such as to permit a detailed discussion of the evolution of such rights; suffice to say the Irish courts commenced in the 1960s to follow the somewhat activist nature of their US Supreme Court counterpart in discovering the range and depth of enumerated (specifically stated) and unenumerated (implicit) rights in the Irish Constitution.

In its early scoping of the right to education in the Constitution the Irish High Court referred to its “scholastic nature”. [*Ryan v A.G.*, p.310]. When the same case reached the Supreme Court this was refined to the “...teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral”. [*Ryan v A.G.*, p.350]. More recently in a challenge to the state’s duties under Article 42 the High Court said that the test was not whether the educational facility desired by the parents of an autistic child was best for the child but whether the alternative offered by the state was “appropriate”. (*O’Carolan v Minister for Education*, 2005). It is argued that recent decades have seen the Irish judiciary if not row back on, at least halt the rate of discovery of enshrined educational rights.

4.3 The USA

All children living in the United States regardless of their citizenship or immigration status are entitled to free public education. There is no right to education *per se* in the United States Constitution. However other rights, for example those emanating from the equal protection clause of the 14th Amendment, may indirectly create education rights perhaps to an equal or greater extent than if specific education rights had been enshrined (as in, for example, the Irish Constitution) in the first place.

Whilst argued on other bases, education rights have featured prominently in the jurisprudence of the United States Supreme Court. *Plessy v Ferguson* (1896) [*Plessy*] upheld the doctrine of “separate but equal” in relation to the Separate Car Act 1890-which was a Louisiana statute requiring blacks and whites to travel in “equal, but separate” train carriages. The majority opinion said,

“(w)e consider the underlying fallacy of the plaintiff’s...argument to consist in the assumption that the enforced separation of the two races stamped the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but *solely because the colored race chooses to put that construction on it*”. [Abraham and Perry (2003), p.12].

It was the ‘separate but equal’ principle that was at issue in the seminal case dealing with segregated education, *Brown v Board of Education* (1954) [*Brown*]. This case overruled *Plessy v Ferguson* and found that racial segregation denied equal protection of the laws to those who are segregated and restricts their liberty so arbitrarily as to deny due process.

The outcome of the case was that *de jure* school segregation was prohibited but *de facto* school segregation resulting from neighbourhood segregation [Lively *et al* (1996)], p.480] continued and is a broader social issue, relevant to a greater or lesser degree in many other countries also. *Brown* established that the very fact of having separate public schools for black and white students was inherently unequal.

The full effects of *Brown* took a long time to be felt and ripples from the judgment are still erupting and expanding to this day. It is such a significant case that, “(o)nly a generation after it was handed down, *Brown* seems like an elemental force in American constitutional law, something so essential that the Constitution was unfinished before 1954”. [Wiecek, (1998), p.158]. It is worth considering in a study such as this which is examining education rights, enshrined and otherwise constituted, how other rights, for example those emanating from the equal protection clause of the 14th Amendment, may indirectly create education rights perhaps to an equal or greater extent than if specific education rights had been enshrined (in for example, the USA Constitution).

In order to uphold the principles set out in *Brown* the US Supreme Court subsequently upheld laws providing for the forced busing of black children and white children to schools outside their local area in order to achieve a more racially mixed cohort of students in state schools. However this policy lost force over time as the Court in effect, excluded suburbs in general from being included in busing programmes with the eventual outcome that busing to desegregate declined to a point where it no longer has any significance.

Subsequent US Supreme Court education related jurisprudence has focused on education admissions policies to universities. Whilst the Court has held that affirmative action to achieve a more racially diverse student body may be constitutionally permissible it has been prepared to strike down provisions designed to achieve this where it felt they were not sufficiently flexible to consider the merits of particular students. Quotas may not be used but public universities and other public institutions of higher education may use race as a plus factor. In *Grutter v Bollinger* (2003, pp.336-337) Justice O’Connor in delivering the opinion of the Court stated:

“When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining

feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount....”

However, the Court has struck down many policies to promote more racially diverse school populations. Pitre (2009, p.544) has asserted that current education policy in the United States places excellence over equity. He says:

“[E]ducation is firmly steeped in politics...parents who have the assurances of power within the realm of educational politics will leverage that power to secure five things for their children: the best education possible at the public expense, the ability to determine who their child sits next to in class, high status programs and curriculum, the best teachers, and admission to a prestigious college”. [Pitrie, (2009), pp.558-559].

Education continues to be a topical and contentious issue in US social and political debate; however, rather than being analysed in isolation it is frequently conjoined with issues of race, religion, social and economic status and political ideology.

4.4 United Arab Emirates

Along with virtually every other facet of life in the United Arab Emirates education has undergone rapid and fundamental development in the last fifty years. According to Article 17 of the Constitution of the United Arab Emirates:

“Education shall be a primary means of social development. It shall be compulsory in its primary stage and free at all stages within the Union. The law shall prescribe the necessary plans for the propagation and spread of education at various levels and for the eradication of illiteracy.”

“Education is free for UAE citizens at government institutes up to the university level. Non-UAE nationals may attend government schools as fee-paying students”. (The United Arab Emirates’ Government Portal, <https://www.government.ae/en/information-and-services/education/school-education-k-12-education/joining-k-12-education/school-fees>)

Kamal and Trines (2018) state:

“It was not before the discovery of oil and independence from Britain in 1971 that the Emirates started to build a modern, mass-scale education system. Newly found petrol wealth enabled the UAE to create a public education system akin to Western systems within just a few decades—essentially at warp speed. Today, the structure of the education system closely resembles that of the U.S.: It features a K-12* school system, two-year associate degrees, four-year bachelor’s degrees, two-year master’s degrees, and doctoral degrees.”

*“K-12, a term used in education and educational technology in the United States, Canada, and possibly other countries, is a short form for the publicly-supported school grades prior to college. These grades are kindergarten (K) and the 1st through the 12th grade (1-12). (If the term were used, “13th grade” would be the first year of college.)” (WhatIs.com, <https://whatis.techtarget.com/definition/K-12>)

The UAE is a prime example of educational provision and attainment evolving in tandem with economic advancement. The correlation is indisputable whereas the cause and effect merit further study. As a state which has undergone rapid economic development the concomitant educational advancement should act if not as a model then at least as a yardstick by which developing countries might assess their own educational advances.

4.5 Developing Countries

If and where developing countries have a right to education and even if there is free provision of education it still may not be accessible to all.

“In most developing countries, few children graduate from secondary school and many don’t even finish primary school... There are numerous reasons, including the difficulty of getting to school and the cost of schooling. Even when tuition is free, there are often expenses for lunch, uniforms, and examination fees. And because the quality of education is often poor, parents are forced to pay for additional tutoring to enable their children to pass tests. Opportunity costs may be even larger—while they are in school, children forgo opportunities to produce income working on the family farm or selling in the marketplace.” (Epstein & Yuthas, 2012)

Allowing for a right to free provision of education and even assuming the quality of educational provision may be good there are many reasons students may not stay on in school. The curriculum may not be relevant to their needs or educational attainment may not result in improved employment prospects due to a lack of opportunities in the region. (Epstein & Yuthas, 2012). It is submitted that where students’ life prospects are not sufficiently improved by education this reflects on the type of education provided rather than a lack of value of education *per se*. Education is a broad concept and goes beyond traditional academic endeavours.

Even when learning outcomes are adequate, very few students continue on to secondary school. Job prospects for most people in the developing world are poor, and staying in school past grade 5, or even through grade 10, does not improve them significantly. In impoverished

regions, the vast majority will not secure formal employment and will be supported primarily through subsistence level agriculture and trading.

The need for further and better education particularly in the developing world is beyond doubt. UNESCO estimates that: “If all adults completed secondary education, 420 million could be lifted out of poverty, reducing the total number of poor people by more than half globally and by almost two-thirds in sub-Saharan Africa and South Asia...” [Sustainable Developmental Goals, <https://www.un.org/sustainabledevelopment/blog/2017/06/millions-could-escape-poverty-by-finishing-secondary-education-says-un-cultural-agency/>]. However, it is quite apparent that education rights in and of themselves are not sufficient in developing countries. They must be accompanied by other social and economic advancements such as to facilitate, make use of and reward educational provision and achievement. Where the fruits of education can be harnessed this can lead to a virtuous circle whereby further and better provision of education can provide the resources for even further and better provision of education.

5 Comparative Analysis

There is much to be learned from engaging in a comparative analysis of a right to education in different jurisdictions and international rights documents. Education rights cover a spectrum, from being more aspirational in nature in international provisions such as those of the United Nations to having more concrete and enforceable characteristics, as is to be expected, in national provisions.

This paper has considered the form and nature of education rights from an international and domestic perspective. It has briefly considered developing countries generally and has reviewed education rights provisions in their respective legal contexts in a small selection of countries; the UK, Ireland, the USA and UAE. They provide a useful sample of countries as the UAE has a civil law based legal system whilst the other three mentioned states have a purely common law legal system. Their legal structure is however quite different with the UK having no codified constitution, Ireland having one with explicit education rights and the US Constitution containing no education rights *per se* but nonetheless its Supreme Court has been very active in ruling on education matters through other non-education provisions in the Constitution.

The closest the UK comes to having enshrined rights to education is through its adherence to international rights provisions. Whilst the UK parliament is the sovereign lawmaker in the country it has largely been supportive of international agreements to which the state has aligned itself. The Human Rights Act 1998, in particular, in light of the UK's dualist legal system all but incorporates the provisions of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights into UK law.

Ireland has specific education provisions in its Constitution that take precedence over any statutory measures. Whilst the USA and Irish Constitutions are enforceable in similar ways within their respective jurisdictions there are no specific US constitutional education rights. At least that is to say there is no direct reference to education in the US Constitution, however, as some of the abovementioned case law would indicate that has proven to be no barrier to the US Supreme Court ruling on education rights, albeit indirectly, through such means as the equal protection clause of the 14th Amendment to the US Constitution. Perhaps reflecting its much more recent origins the UAE Constitution clearly outlines the right and obligation of children to receive free and compulsory education.

To enunciate a right without making it accessible is mere bluster which is sometimes the experience in developing countries. Even where educational opportunities may be availed of, they may not present an attractive option where there are other demands on children and families that are considered more pressing.

Each of the states considered in this article has upheld education rights in different ways and to varying degrees at different periods. The comparison indicates that the form of rights provision is less significant than other factors such as political and legal will. These in turn are influenced by many other variables such as social norms and financial wherewithal. There is no utopian society that has identified what is, much less given effect to, an all-encompassing right to education. However, considering the scope of such rights as have been discussed in this paper presents an opportunity to consider their best elements which could perhaps be adapted and adopted more generally. That said, whilst well-structured education rights can potentially support good educational provision there are so many factors at play in the interaction of educational rights, educational provision and educational attainment as to blur the lines between them. All that can be said with any degree of certainty is that it is imperative to strive to improve all three.

6 Conclusions

This article has examined what are considered to be education rights from an international and national perspective. They take many forms – customary, statutory and constitutional. Although frequently placed in an academic context there is usually a broader notion such as the UN’s “...full development of the human personality”. (Article 26 Universal Declaration of Human Rights). Most institutions and states adopt lofty ideals but unfortunately such notions do not always accord with the lived experience. Education rights need to be supported with state funding, judicial enforcement and societal buy-in. Where they are so supported, they can contribute to economic, socio-economic, political and legal sustainability.

From the Irish constitutional perspective this analysis has focused on Article 42 of the Constitution. There has been an evolution in the courts’ defining and refining of the constitutional right to education. In terms of advancing education rights, it is argued that the evolution has not always been on an upwards trajectory.

In US constitutional jurisprudence *Brown* and the strand of cases which emanated from it established that the very fact of having separate public schools for black and white students was inherently unequal. The full effects of these cases have reached into other areas of educational inequality and these effects are still being discerned. It is worth considering in a discussion such as this looking at comparative education rights, how non-education rights, for example those emanating from the equal protection clause of the 14th Amendment, may indirectly enunciate education rights perhaps to an equal or greater extent than if specific education rights had been enshrined in the USA Constitution.

It is submitted that both the Irish higher courts and the US Supreme Court have, in the last three decades, been less activist than was previously the case in enunciating the range and scope of education rights in their constitutions by not discovering new rights or expanding existing rights or even by rowing back on previously recognised elements of education rights.

Enshrined rights are by their nature insulated from the democratic political sphere. This might be welcomed from the viewpoint of proponents of greater education rights when courts are actively discovering or upholding such rights, however, when courts become more conservative in such matters this conservatism has the effect not just of a missed opportunity

to advance such rights but can even stifle progressive measures that legislators might wish to adopt. This leads back to the issue of the nature of education rights. The UK is subject to international rights provisions but, notwithstanding the Human Rights Act 1998, its parliament is sovereign and therefore not subject to judicial review, so its lawmakers can effectively overrule judicial activism or conservatism. The UAE uniquely amongst the states compared here does not have a precedent based common law legal system.

Former United Nations Secretary-General Ban Ki-moon said:

“Education is a fundamental right and the basis for progress in every country. Parents need information about health and nutrition if they are to give their children the start in life they deserve. Prosperous countries depend on skilled and educated workers. The challenges of conquering poverty, combatting climate change and achieving truly sustainable development in the coming decades compel us to work together. With partnership, leadership and wise investments in education, we can transform individual lives, national economies and our world.” [UNESCO, <https://en.unesco.org/news/unesco-sustainable-development-begins-education>]

This paper asks what is a right to education. As has been indicated there is much similarity between national and international provisions indicating that it is both a right to academic study and personal development. This paper argues that while laying down rights to education, in whatever form, is to be welcomed, no amount of rights protections can be adequate unless supported by political, judicial and societal goodwill and the necessary financial support to enable education rights to morph into adequate educational provision, participation and attainment.

Educational achievement and advancement involve so many moving and changing parts as to require ever continuing and adapting research. A further complexity is that the basis for such research is itself constantly moving. The ability to avail of and benefit from, education is influenced by a myriad of factors such as the state of both the global and local economy, technological changes, climate change and natural disasters to name a few. Two years ago, who could have foreseen that children and adults would have to physically distance themselves from formal organised learning in order to protect themselves from the COVID-19 virus? Undoubtedly there will be future studies on how this has disproportionately affected certain groups with some able to adapt well to new forms of learning whilst others will be stymied in their efforts by a lack of access to technology and other resources.

Notwithstanding the obvious weakness of education rights alone to force forward an education agenda without adequate means of enforcement, their significance cannot be minimised as they are essential if not to set then at least to inform such an agenda. It would be difficult to surpass the conclusion of Abraham Lincoln: “Upon the subject of education, not presuming to dictate any plan or system respecting it, I can only say that I view it as the most important subject which we as a people can be engaged in.” [Hirsch and Van Haften (2010, 2015), p.44]. As outlined in this paper there may not be a unique way of dictating a plan or system to advance education rights and all that can flow from them. However, nations must find appropriate ways of doing so within their own legal, political and socio-economic frameworks, as such rights are the cornerstone of educational development which itself is foundational to the sustainability and development of every society.

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