

**The Edmund Burke Lecture 2019**

**Trinity College Dublin**

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**Address by Mary McAleese**

*The future of Ireland*

*Human rights and children's rights*

Ireland's future sets before us a series of evolving and inchoate questions about next generation constitutional structures and about Church-State relationships. The provision in the Good Friday agreement for a future border poll is the outline constitutional context and mention by An Taoiseach during Pope's Francis' visit to Ireland of a new Church State covenant is the outline context of future Church State relationships. These two issues are not disconnected for in the warp and weft of debates on constitutional matters, religion and religious sensibilities are rarely far from centre stage whether the axis of debate is foursquare within the Republic of Ireland, or within Northern Ireland or involves the entire island of Ireland.

The constitutional issue is gathering a gradual momentum thanks in part to the changing demographics as between Nationalist and Unionist voters in Northern Ireland but also in part due to the cross-community majority in favour of remaining in the European Union which post-Brexit will have the option of

seamless reentry to the European Union if there is majority consent to a united Ireland.

This is an important juncture to be navigated with great care for the identities on which these issues tread are strong and emotions around them are fragile. Repeating old narratives about righting past wrongs or rehearsing reformation and counter-reformation divisions are not good building blocks for a new future. Somehow we have to move beyond them to a new magnanimity capable of carefully developing the constitutional question without disturbing the peace. Sometime in the years ahead we face the creative challenge of constructing in draft form a detailed plan for a reconciled Ireland. If it is to be at all persuasive or attractive it will have to derive from a broad and all-inclusive consensus underpinned by parity of esteem, generosity and a genuine sensitivity around deeply held identities strong enough to bridge deep fractures. It will have to do that against a weakening background where we will have lost the cohesion, solidarity, everyday communication and mutuality of shared membership of the European Union. For almost fifty years the depth, density and regularity of our engagement with the UK as a European partner has helped develop the healthier relationships we now enjoy. It was an essential part of the alchemy that significantly reduced intercommunal tensions, ended paramilitarism and delivered a peace process supported right across the divided communities. The GFA never contemplated much less provided for a situation in which the UK would withdraw from the EU. After all it was our common membership of the European Union which helped recast the character of NI from a place of two terminally estranged communities by offering a common and transcendent parallel European identity to both Unionist and Nationalist communities. It helped recast Ireland, Northern Ireland and Great Britain as more than estranged

neighbours but as partners in probably the noblest enterprise ever ventured upon by Europeans in the history of Europe. Brexit has interrupted that process dramatically and the convulsive effect it has had on UK politics is not something we would wish imported into our own present or future debates. Rather we need to insist that post Brexit the possibility of a future border poll must lead to a much more cerebral and less emotional debate about the future relationship between both parts of this island.

Brexit has been an object lesson in how NOT to go about radical constitutional change. Long long before any future border poll goes live we need to do what Brexit has abjectly failed to do and that is to delve deeply, objectively and in a considered way into the complex of issues it raises. The goal has to be to construct a new political configuration capable of comfortably accommodating all identities including those historically uncomfortable with one another; Brexit has produced an enraged rather than an engaged civic society and we will have to do a lot better than that.

Civic society in Ireland has shown itself to be moving comprehensively and confidently in the direction of becoming a modern egalitarian secular state. Northern Ireland has been somewhat more tentative but that should not obscure the reality that it too is a changed and changing society. The benefits of peace and the GFA have been evident in the growing normalization of North South and East West relationships impacting many sectors. There are strong undercurrents in both jurisdictions on this island pulling them in directions more compatible with each other than in the past. Religious conservatives on both sides of the border are finding common cause around certain socio-moral issues while those pursuing the same issues from a liberal perspective have also found common cause cross border. Majorities on both sides of the border are

pro EU and regardless of attitude to Brexit or political allegiance everyone agrees there can be no return to a hard border. In a lot of respects the communities both sides of the border if not on precisely the same page are on similar pages.

A recurring issue in both jurisdictions concerns education and expanding the range of choice of school systems. I want to come at those debates in a different way from the usual arguments about integrated education, or reduction of Catholic school patronage, or how to provide opt outs or options for those who wish to withdraw from religious education or who want alternatives to faith based schools. Instead I want to look closely at an overlooked issue which should be on the agenda of any discussion about Church State relations. It has important implications for Ireland's future. It concerns how children's human rights to freedom of religion, including freedom to change religion, freedom of thought and freedom of conscience as set out in Article 14 of the 1989 United Nations Convention on the Rights of the Child are being experienced by children here. While I am going to look the major service provider of education services to children which in this jurisdiction is the Latin Catholic Church what I have to say has transferable implications for other denominations, faith systems and services providers generally in our educational systems. All need to be asked the same question and held to account for their responsibilities in fully respecting the rights of the child. I hope we can prise open a debate we need to have between parents, adolescent children, the State, civic society, and the education providers including Churches, a debate which has been gestating semi-incoherently in recent years without finding clarity in its voice.

The Latin Catholic Church is the biggest service provider of educational services to children in our country. Some ninety percent of all primary schools

are Catholic controlled and faith based schools which are predominantly Catholic account for some sixty percent of second level schools. This very dominance has provoked considerable debate prompted by a growing multicultural demographic and diminishing religious homogeneity. However a lot of discussion has been about exceptionalism, about providing opt-outs or options for the non-normative. I want to look more broadly at how the Article 14 human rights of Catholic children who are the majority norm in our schools are being protected and respected by our major service provider.

Our understanding of children's rights has developed considerably since Article 42 of the 1937 Irish Constitution was drafted. It guaranteed to respect the inalienable right and duty of parents to provide for the religious, moral education of their children. The State's role was largely functional in support of and subordinate to parents. Children's rights were not mentioned. Instead they were subsumed into family and parental rights. In practical terms the right and obligation of Catholic parents and Catholic schools was to hand on the faith and the duty of children was to grasp the baton handed to them thus sustaining an unbroken continuum of generational denominational adherence. That model made no provision for a child's right to make his or her own choices when sufficiently mature to do so. It can no longer do so. Times, attitudes and laws have changed.

In 1989 after a lengthy debate championed by Catholic priest Canon Joseph Moerman the United Nations agreed a radical Convention on the Rights of the Child as a result of which the child is presented as a holder of autonomous rights including the right to freedom of religion, thought and conscience. Parental rights were explained in more nuanced and less absolute terms than previously presumed. Yes they had the right to baptize, raise and educate their children

according to their own faith, convictions and rituals but now they had an obligation to do so in a manner which respected and facilitated the child's right to form its own independent and different views when capable of doing so. Parents do not have to raise their children in a neutral environment. They have the right to guide and direct their child's religious formation but they have no right to impose. for their children are and must be free to choose for themselves when capable of doing so. Children must know they have that freedom.

The Convention on the Rights of the Child rapidly became the most ratified treaty in the history of the United Nations with all UN member states now State parties with the exception of the United States. The Holy See which has Permanent Representative status at the United Nations and which governs the universal Catholic Church was one of the very first State Parties to sign up to the Convention. Since it was involved in drafting the Convention's travaux préparatoires the Holy See can have been in no doubt as to the Convention's content and intent. Every State Party voluntarily undertakes the same treaty obligations to respect and ensure the Convention's rights «to each child within their jurisdiction»<sup>1</sup> and to «undertake all appropriate legislative, administrative, and other measures for the implementation of the rights»<sup>2</sup>. Each State Party is obliged to make regular progress reports on how it is implementing the Convention within its jurisdiction to a monitoring body of experts known as the Committee on the Rights of the Child which often makes recommendations for better protection of children's rights. State Parties are expected to bring their laws into line with the Convention.

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<sup>1</sup> UNCRC, Art. 2.1.

<sup>2</sup> UNCRC, Art. 4.

Here in Ireland for example we changed our laws on the corporal punishment of children by parents to conform to the Convention's recognition of the child's right to bodily integrity. In 2015 we added a new constitutional provision (article 42a) by which the State recognized and affirmed the natural and imprescriptible rights of all children and undertook as far as practicable to protect and vindicate those rights. This gave firm constitutional recognition to the child as an autonomous rights holder. It did not elaborate a list of children's autonomous rights but since Ireland is a State Party to the Convention on the Rights of the Child it is an appropriate place to look to for guidance. The principles it sets out are broadly scoped rather than detailed but this is a rapidly developing field in both national and international law.

The Catholic Church is the biggest ngo in the world providing over 200000 schools for over 60 million children in five continents. It has a unique reach and experience which is why alone of all faith systems the Holy See which governs it enjoys a special status at the United Nations. It became a State Party to the UNCRC in 1990 and there is now an extensive body of correspondence between it and the Committee on the Rights of the Child which monitors compliance with the treaty by State Parties. It operates a system of law called canon law set out in the Code of Canon Law 1983 which applies to all 1.2 billion members of the Church worldwide including children.

In 2014 the Committee on the Rights of the Child asked the Holy See to «undertake a comprehensive review of its normative framework, in particular Canon Law, with a view to ensuring its full compliance with the Convention». The Holy See has refused to do so arguing that discussion of its canon law lies outside the remit of the Committee. The Committee denies that this is the case. It says the Holy See's State Party obligations are the same as all other State

Parties. In other words the Holy See has an obligation to ensure its system of canon law, of teachings and practices which apply to over three hundred million children across the universal Church must conform to the Convention's principles. There is currently a stand-off between the Holy See and the CRC on this issue. It is worth noting however that the Holy See had itself freely raised and discussed issues, including controversial issues, arising out of canon law with the CRC and other UN treaty monitoring bodies for decades without once raising any hesitation about the CRC's jurisdiction. It had been a State Party to the Convention on the Rights of the Child for twenty-four years when it challenged the CRC's jurisdiction for the first time. That time coincided with the first time the clerical child sex abuse scandals became a matter of discussion with the CRC. The Holy See's State Party status allows it to look as if it subscribes to all the children's rights set out in the Convention including freedom of religion, thought and conscience. Its current insistence that canon law is immune from the impact of the Convention contradicts the logic of its State Party undertakings and raises a flag of concern given the Holy See's relationship with the single biggest provider of education services to children in Ireland. The extent of its influence on and access to children makes State scrutiny and accountability essential to ensure children's rights are being fully respected. So are they? To answer that we have to go deeper than merely looking at how school curricula provide for diversity or information about other religions and perspectives. We have to look at what it is in Canon law the Catholic Church is so determined to protect from scrutiny and what we will find there are adamant Church claims to have rights over children which at best limit and at worst eliminate their fundamental rights to freedom of religion, thought and conscience. Let me explain.

In Catholic canon law Catholic parents are obliged to baptize their children as soon as possible after birth<sup>3</sup> consequently the vast majority of children are baptized as infants. It is not possible to be born a Catholic. One becomes a Catholic by Baptism.

Baptism in the Catholic Church has two quite distinct sets of consequences, one theological the other juridic. The theological/spiritual are seen as divinely ordained, as a gratuitous gift from God and as indelible-unchangeable. The juridic are man-made and therefore changeable. The theological/spiritual include that a child is freed from all sins including original sin and so has the prospect of salvation, he or she is born again as a child of God, made like to Christ by an indelible character, incorporated into the *Cristifideles* and given the ongoing grace of the sacrament (cf. can. 849). Just to be absolutely clear I take no issue with this aspect of infant Baptism which is perfectly consistent with parental rights to baptize their children and give them the benefit of the free God given gift of the grace of the sacrament.

But the juridic consequences which are bolted on to Baptism by man-made canon law are a different matter and some of these are not consistent with the child's right to freedom of conscience, thought and religion including the right to change religion. These rights are understood today in ways very different from our past understanding of children's rights. That changed understanding has yet to be reflected in canon law.

The juridic or canon law consequences of Baptism include the imposition of life long Church membership which can never be rescinded, becoming subject to Church laws from the age of seven on reaching the use of reason, and being

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<sup>3</sup> Cf. can. 867 §1

deemed by Baptism to have made personal promises to fulfill the many onerous obligations canon law imposes on Church members. These promises were made by adults on the child's behalf and in circumstances where the child could not have been aware of the promises or their import<sup>4</sup>. That is the nub of the problem for the idea that the child made promises is a fiction.

The Catholic child will enter a web of relationships and structures set out in canon law and designed to secure his or her formation as a Church member. The web involves parents, godparents, Catholic schools, teachers, pastor, parish, diocese, Catholic community, local episcopal conference and Church authorities, including the legislative authority of the Pope and the College of Bishops. All of these work to a model which insists that the child by Baptism has embraced the Catholic faith and is now obliged to profess it by honouring the promises it made to do so. When the Second Vatican Council's document on religious freedom *Dignitatis Humanae* says no-one can be forced to embrace the faith, it is important to note that it is talking exclusively about those who are not baptized Catholics. It does not apply to those already baptized. The baptized child is deemed to have already embraced the faith voluntarily and neither *Dignitatis Humanae* nor its logic applies to him or her. Consequently the catechesis the Catholic child experiences is a catechesis of obligation. It tells the child this is what you must accept and believe and practice. It is not a catechesis of invitation or of optional choice such as an unbaptised catechumene experiences who is considering joining the Church. The Catholic child is not told "This is what the Church teaches We invite you to consider and evaluate and decide for yourself"..

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<sup>4</sup> Cf. cann. 1; 11; 96; 111 §1-§2

It is one thing to acknowledge the right of parents to bring their children up in their faith and to introduce them to the rites and rituals of their faith as national and international law do but it is quite another to impose significant obligations on those children which trammel on their freedom of religion, thought and conscience as canon law does. The Holy See has never considered the ethical, legal and moral implications of imposing lifelong membership of the Church and a body of obligations on a baby who is not in a position to weigh the implications. Yet the Church is well aware that there is a dilemma here for its own Theological Commission has said that in the case of those baptized as infants there is a «lack of free-will and responsible choice on the part of infants»<sup>5</sup>. The logic of that statement has never been faced by the Catholic Church. If we look to the civil law of contract in many common law jurisdictions including here in Ireland certain onerous contractual obligations imposed on children by adults acting on their behalf may be rendered void or voidable at the initiative of the child when he or she later becomes capable of making a *sui compos* choice, that is with full knowledge and consent<sup>6</sup> which usually means on reaching adulthood. The Church offers no such option to either children or adults.

Church members have rights which are set out in canon law but the fullness of the rights acknowledged in the secular world to freedom of religion, conscience and thought as well as freedom to change religion or give it up entirely, are not recognized in canon law. All such freedoms are subordinated to the demands of compulsory obedience to the Church's teaching

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<sup>5</sup> INTERNATIONAL THEOLOGICAL COMMISSION, *The hope of salvation for infants*, 93.

<sup>6</sup> Cf. UNITED KINGDOM, *Infant Relief Act 1874*. For a discussion of the civil law of contracts by minors see LAW REFORM COMMISSION (Ireland), *Report on minors' contracts*.

(magisterium), the obligation to maintain communion with the Church and the Church's insistence that – once a Catholic, always a Catholic. Canon law has a penal system with tribunals, trials, judgments and penalties and there are canonical penalties for Church delicts which can include serious dissent from certain Church teachings or for schism, heresy and apostasy. Children between the age of sixteen and eighteen can have mitigated penalties imposed upon them. That would be a rare occurrence but the provisions are extensive. Remarkably for such a sophisticated system, the Murphy tribunal wrote that it did not encounter one single instance of clerical child sexual abuse where canon law was of any use to a victim.

From the age of seven which the Church deems the age of discretion, a child is seen as capable of grave sin and must confess all grave sins at least once a year in the sacrament of Penance which Pope John Paul has described as a judicial process. In the sacrament of confirmation the child is asked to “renew” his or her baptismal promises as if they had actually personally made such promises in the first place. Confirmation imposes an enhanced set of obligations on the child including to profess Christ publicly and if necessary to be willing to die for the faith (*Dignitatis Humanae* 11; *Lumen Gentium* 33; 42). There is no clarity as to whether Confirmation is at the child's choice. In fact Confirmation has been described as a sacrament in search of a theology/

The logic of *Dignitatis humanae* (cf. art.2) and the Holy See's State Party support for the child's right to freedom of religion, conscience and belief as set out in the UNCRC (cf. art. 14) have introduced fresh considerations to the question of children's rights and fundamental freedoms which the Church has yet to explore, clarify and reconcile. The role and rights of the Catholic Church are meshed and melded here with parental rights and obligations in ways that

historically did not conduce to disaggregation but are today interrupted and challenged by the changing understanding of individual human rights and children's rights in particular. As the child grows into adolescence and becomes capable of exercising freedom of thought, conscience and religion, agency shifts from parent to child. The child's right to decide becomes exercisable but importantly the previous years of education and upbringing are supposed have helped prepare him or her to freely exercise his or her autonomy. Service providers of education have to honour that.

Canon law today is a repository of largely uncritiqued, unsystematised rights and obligations directly and indirectly applicable to Catholic children. They have such canonical rights and obligations by virtue of their Baptism says the Church. They also have inalienable human rights to freedom of conscience, religion and thought which the Church claims a right in canon law to control and limit. Where the Church says its members are bound to the Church for life by Baptism, human rights law says they can freely leave. Exactly when is debateable but some jurisdictions have begun to set the ages below adulthood of fourteen, fifteen or sixteen as the age when an adolescent child can choose to leave the denomination of upbringing. Those State Party provisions are made in order to vindicate the adolescent child's Article 14 rights while at the same time balancing the rights of family and parents and Church during the years of infancy and early adolescence when the guidance and direction of parents is important. We have yet to have that debate.

When canon law says an infant can be held to the fiction of promises it did not make and never had an opportunity to evaluate, validate or repudiate when capable of doing so, human rights law says no it cannot. The current extensive

catechesis of obligation whether at home or school or church is problematic as a result..

What is surprising is that as a global advocate on behalf of all the world's children for the principles of the UNCRC, as a major service provider to children worldwide and as an organisation with a huge child membership the Holy See has never conducted a comprehensive internal review of the rights and obligations of its own child members within its own legal system. Nowhere in any official Church document can one find a methodical, explanatory and thoroughgoing account of the rights and obligations of child members of the Catholic Church much less a critique of them in the light of international law on children's rights. This is the debate the CRC has asked the Church to have.

The Church and its members are entitled to the full protection afforded by their right to religious freedom but as a former Irish Attorney General has observed Catholic Church canon law does not confer a right on the Church to ignore State laws or international law<sup>7</sup>. That goes also for the internal laws of any denomination or faith or ideological system. We need a clear acknowledgment from the Catholic Church that the canon laws which constrict children's rights have now been overtaken by the Convention and our Constitution.

The Catholic Church's contribution to Ireland's past and present is enormous. Its contribution to education is exceptional. Few countries have been impacted as profoundly as Ireland has been by the Church's assumption of responsibility for education, health care, welfare and charitable outreach. It is as we have had to acknowledge a story of both dark and light but it is a strong continuing story

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<sup>7</sup> Extract from radio interview on The Pat Kenny Show, RTE Radio 1, 23 Oct. 2002. Cf. F. BLACK, «Canon law has same status as golf club rules».

with a remarkable degree of mutual dependence and likely to remain so. Any covenant between Church and State must be about the future of children. Any debate about Ireland's future is about the future of children, children whose voices we should hear. Are we currently realizing their rights to freedom of conscience, thought and religion or do those rights remain in the paralysed abstract for as Edmund Burke would have it "Abstract liberty like other mere abstractions is not to be found".

In Abu Dhabi on the 4<sup>th</sup> of February of this year Pope Francis and the Grand Imnam of Al-Azhar, Ahmed el-Tayeb co-signed a document entitled "Document on Human Fraternity for World Peace and Living Together".

The Declaration attests that "freedom is a right of every person: each individual enjoys the freedom of belief, thought, expression and action". Canon law flatly contradicts that and in ways that particularly impact children. The stable future we yearn for will be lived by children raised in all denominations, faiths and none. We are still in the throes of shifting from an ages old embedded culture of presumption that children should be seen and not heard to a culture where they have autonomous rights to freedom of thought, conscience and religion. We should be in no doubt that this marks a catharsis for religious identities have historically been formidably strong and formidably important. They have not always facilitated living together in peace. Yet peace is our hearts desire and ambition. To get to that new Ireland we now have to learn new ways of guiding and directing our children so that when the mantle of personal responsibility shifts from our shoulders to theirs as their capacity evolves towards adulthood, they will be prepared and able to exercise their freedoms well. Any covenant between Church and State should start with children's rights. So should any talk of Ireland's future. It is a good place to begin.

