

Why You Must Vote “No” on Ireland’s Children’s Rights Referendum on November 10th

Introduction

On November 10th, the people of Ireland will decide whether or not to adopt the Children’s Rights Referendum. Although many understand a “Yes” vote on the Referendum to effectively implement the Convention on the Rights of the Child in Irish law, the fact is that while the Convention on the Rights of the Child protects parental rights, the Children’s Rights Referendum undermines parental rights through ambiguous language that is easily manipulated. The problem with the Referendum is not that it implements the Convention on the Rights of the Child in Irish law; the problem with the Children’s Rights Referendum is that it violates the Convention on the Rights of the Child. Ireland is legally obligated to comply with the Convention on the Rights of the Child, and the Children’s Rights Referendum will place Ireland out of step with the most widely ratified human rights treaty in the world, the Convention on the Rights of the Child. If, therefore, progress is what the people of Ireland seek, progress in implementing international laws and norms with respect to children’s rights, it is imperative that the people of Ireland vote “No” on the Children’s Rights Referendum.

I. The Protection of Parental Rights in the Convention on the Rights of the Child

The Convention on the Rights of the Child explicitly and implicitly protects parental rights. The Preamble of the Convention is a vital means of interpreting the language used.¹ The Preamble provides in pertinent part, “*Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding . . .*” Consequently, in interpreting the Convention on the Rights of the Child, we must remember that the family is recognized as the “*natural environment for the growth and well-being*” of children, and that the family “*should be afforded the necessary protection and assistance*” so that it can fulfill its responsibilities. Moreover, we must remember that children “*should grow up in a family environment,*” as such an environment contributes to the “*full and harmonious development*” of their personality. With such principles as these, it is difficult to imagine how they could be applied such that the State would usurp parental rights.²

¹ *Vienna Convention on the Law of Treaties* Article 31(2), 1155 U.N.T.S. 331, 23 May 1969 (entered into force 27 Jan. 1980).

² To be sure, the Committee on the Rights of the Child has so contorted the express language used in the Convention that it has effectively interpreted the Convention as a means for the State to usurp parental rights. Cf. Committee on the Rights of the Child Recommendations, Day of General Discussion on the Right of the Child to be Heard. But the Committee on the Rights of the Child has no legislative authority to create new law, no executive authority to enforce the Convention, and no judicial authority to interpret the Convention. Its mandate is strictly limited by the text of the Convention itself. Convention on the Rights of the Child, Articles 43-45.

One of the fundamental principles of the Convention is set forth in Article 3(1), which provides, “*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*” But “*the best interests of the child*” is not left vague and undefined. It is given content by the same Article (Article 3) which sets forth the best interests of the child standard. Article 3(2) provides, “*States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*” Thus, the “*appropriate legislative and administrative measures*” taken by Ireland or any other State are oriented toward the well being of the child, which necessarily includes the protection of parental rights. Therefore, the best interests of the child standard in Article 3(1) of the Convention on the Rights of the Child is intrinsically connected with the protection of parental rights in Article 3(2). That is clearly why Article 3(2) immediately follows Article 3(1). Lest States are tempted to think that they are the primary guarantors of the “*best interests of the child,*” Article 3(2) makes clear that the best interests of the child standard necessarily involves the protection of parental rights. Remembering the Preamble to the Convention on the Rights of the Child, in particular, that the family is the “*natural environment for the growth and well being*” of children and that children “*should grow up in family environment*” for the “*full and harmonious development*” of their personality, it is, of course, not surprising that parental rights are a fundamental component of the best interests of the child standard.

Furthermore, even if Article 3(2) is dismissed, Article 5 reinforces the Convention on the Rights of the Child’s protection of parental rights from State interference. Furthermore, Article 5 sets forth the definitive principle that parental rights are not limited to only certain rights of children, such as the right to education, but they apply across the board to all rights of children. Article 5 affirms, “*States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*” In other words, the only reason parental rights are not expressly mentioned in every Article of the Convention on the Rights of the Child is because parental rights are secured with respect to all rights of children by Article 5. Implicit in every child’s right, to education, to healthcare, to clothing and shelter, etc, is the right of children to exercise such rights within their family, that is, within the context of parental rights and duties. There are no children’s rights which of their nature exclude parental rights because all the rights of a child should be exercised, if possible, within their respective families. Therefore, parental rights are part of the very structure of protecting children’s rights set forth in the Convention on the Rights of the Child, and the mere failure to mention them with every mention of a child’s right does nothing to negate their existence.

There are, of course, exceptional cases when parental rights are used to harm children, i.e., through physical or sexual abuse. In such cases, the State is legally obligated pursuant to the Convention on the Rights of the Child to remove a child from his or her parents. As set forth in Article 9(1) of the Convention, “*States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary*

in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."³ There are, however, two things that need to be noted about this language. Firstly, the State is not permitted to make a unilateral determination that it is in the "*best interests*" of a particular child to remove that child from his or her parents. Instead, that determination of the State must be subject to judicial review wherein a hopefully independent court will have the authority to overrule the State and return a child to his or her parents if that is in the "*best interests*" of the child. Thus, the Convention on the Rights of the Child does not give the State authority to interfere with parental rights *carte blanche*,⁴ even in circumstances where there is a clear showing of an abuse of parental rights. Secondly, the separation of a child from his or her parents against their will must be "*necessary*," not expedient or preferable in the eyes of the State. This effectively means that the Convention on the Rights of the Child Article 9(1) creates a rebuttable presumption that it is in the "*best interests*" of children to remain with their parents. In other words, the State has the burden to prove that it is "*necessary*" to separate a child from his or her parents. Absent such a showing, the State may not take a child from his or her parents without their consent. Therefore, the cases when the State needs to take a child from his or her parents to satisfy the best interests of the child standard are the exception and not the rule. The mere existence of such exceptional cases does not undermine or in any way detract from the parental rights safeguarded by the Convention on the Rights of the Child. Such exceptional cases merely illustrate that parental rights are not absolute.

While parental rights are not absolute, they are primary. Convention on the Rights of the Child Article 18(1) affirms, "*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the **primary** responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*" Thus, the "*primary*" safeguard for the "*best interests of the child*" is the presence of parents, that is, the exercise of parental rights and duties, not the State. Otherwise stated, the Convention on the Rights of the Child presumes that parents act in the "*best interests*" of their children.⁵ The role of the State with respect to "*the best interests of the child*" is clearly discerned in Article 18(2), which states, "*For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.*" The role of the State is clear: assist parents in safeguarding the "*best interests*" of their children. The role of the State with respect to protecting children's rights is, therefore, secondary to that of parents or legal guardians, which is why the Preamble to the Convention affirms that the family "*should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.*" Consequently, when Article 9(1) is read in conjunction with Article 18(1) and (2), it becomes clear that State is, in principle, the secondary protector of the "*best interests of the child*," and only the primary protector when the parents have manifestly failed to safeguard the best interests of their child

³ Cf. also Convention on the Rights of the Child, Articles 19 and 20.

⁴ That is, the state does not have unrestricted power to act as it wishes with respect to the protection of children's rights.

⁵ Consequently, since parents are presumed to act in the "*best interests*" of their children, the State's duty to respect the "*appropriate direction and guidance*" parents exercise over their children in accordance with Article 5 does not give the State license to interpret "*appropriate direction and guidance*" in accordance with its own rationale. On the contrary, "*appropriate direction and guidance*" can only mean direction and guidance which does not amount to a manifest violation of the "*bests interests of the child*" through parental abuse or neglect.

through abuse or neglect. Therefore, the ordinary structure for protecting children's rights as set forth in the Convention on the Rights of the Child provides that the State is a safeguard for parental rights, and parental rights are, in turn, a safeguard for the best interests of the child. Ordinarily, the State's interaction with children is mediated through parental rights and duties.

This structure for protecting children's rights, as set forth in the Convention on the Rights of the Child, is reaffirmed in two particular contexts. Firstly, it is reaffirmed in the context of a child's right to freedom of thought, conscience and religion. Article 14(1) provides, "*States Parties shall respect the right of the child to freedom of thought, conscience and religion.*" How then practically speaking does the State protect this right? Article 14(2) provides, "*States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*"⁶ So to translate the structure of this Article, the State protects the right of the child to freedom of thought, conscience and religion by respecting the rights and duties of parents to direct and guide their children in the exercise of this right. Parents are the primary safeguard for the exercise of the child's right, and the State is a secondary safeguard.

Secondly, this structure is reaffirmed in the context of a child's right to an adequate standard of living. Article 27(1) provides, "*States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*" But who primarily is responsible for providing the child with such a standard of living? Article 27(2) expressly provides, "*The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.*" What then is the role of the State? Article 27(3) relates, "*States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*" As usual, the State recognizes the right of a child to an adequate standard of living by assisting parents. So to translate the structure of Article 27, the State protects the right of the child to an adequate standard of living by assisting parents in providing an adequate standard of living to their children. Yet again, parents are the primary safeguard for the exercise of the child's right, and the State is a secondary safeguard. The State's interaction with children is mediated through parental rights and duties.

All this emphasis on parental rights is present in the Convention on the Rights of the Child. As if this were not enough to lay to rest any remaining allegations that the Convention on the Rights of the Child is anti-parental rights, the following 3 point proposal forms part of the legislative history of the Convention and speaks eloquently about the Convention's regard for parental rights:

⁶ Once again, the presumption that parents act in the "*best interests*" of their children is dispositive in interpreting the phrase "*in a manner consistent with the evolving capacities of the child.*" If it is the State who determines whether parental direction or guidance to a child is "*consistent with the evolving capacities of the child,*" then the presumption that parents act in the "*best interests*" of their children is devoid of meaning. So it is the parents who determine whether parental direction or guidance to a child is "*consistent with the evolving capacities of the child,*" subject, of course, to the condition that such direction or guidance must not amount to the manifest abuse or neglect of a child.

1. The protection of the child's interests cannot be dissociated from the protection of the child's natural family.
2. The responsibility of parents is to do everything in their power to ensure their children's well-being and harmonious development. Parents shall participate in all decision-making and orientation with regard to their children's education and future.
3. The States Parties to the present Convention undertake to recognize, support and protect the family unit in every way to enable it to carry out its function as provider of the most suitable environment for the child's emotional, physical, moral and social development.⁷

II. Children Have the Right to Benefit from Parental Rights

Convention on the Rights of the Child Article 16(1) relates in pertinent part, "*No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence.*" So when a State takes a child from his or her parents without their consent based upon the State's rationale of how children should be raised, the State is, in fact, interfering with that child's family. Furthermore, such State interference is arbitrary and unlawful. It is arbitrary because there is no objective reason why the State's opinion as to how children should be raised is any more valid than a parent's opinion. Given the close proximity of the parent to the child and the presumption that parents act in accord with the "*best interests*" of their children, it is, in fact, far more likely that the parent's opinion is in the "*best interests*" of the child. Such state interference is also unlawful because it violates Convention on the Rights of the Child Article 5, wherein States are required by law to respect the direction and guidance parents give their children. When the State removes a child from his or her parents against their will, the parent's ability to provide direction and guidance to their child is negated or, at the very least, severely compromised. Therefore, a violation of parental rights by a State Party to the Convention on the Rights of the Child, such as Ireland, is, in accordance with Article 16(1), a violation of a child's right not to have their family interfered with by the State. Consequently, a violation of parental rights is a violation of children's rights. It is children, after all, who most stand to benefit from the protection of parental rights from State interference.

⁷ E/CN.4/1985/WG.1/WP.1, page 17.

III. Why the Children's Rights Referendum Fails to Implement the Convention on the Rights of the Child and Threatens Irish Children?

The text of the Irish Children's Rights Referendum is as follows:

1. *The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*
2. *1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child. 2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*
3. *Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.*
4. *1° Provision shall be made by law that in the resolution of all proceedings-
i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.
2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.*

The Referendum begins, "*The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*" So far so good, insofar as the State recognizes the natural and imprescriptible rights of all children and protects them. The word "*vindicate*" does seem to suggest that the State will play an active role in furthering the rights of children. But even with this word, No. 1 of the Referendum can be interpreted in accordance with the Convention on the Rights of the Child, provided that "*vindicate*" refers to situations where parents manifestly abuse or neglect their children. As will become apparent, however, the Children's Rights Referendum sets forth a very different structure for the protection of children's rights than the Convention on the Rights of the Child.

So how according to the Referendum does the State "*recognise and affirm the natural and imprescriptible rights of all children,*" as well as "*protect and vindicate those rights?*" Here begins the real problem with the Children's Rights Referendum. Unlike the Convention on the Rights of the Child, the Children's Rights Referendum contemplates State action that is not mediated through the protection of parental rights and duties. The child is viewed as an isolated individual rather than as a part of the family. As a result, the child becomes a creature of the State of Ireland. Ironically, by claiming the authority of Ireland to safeguard the best interests of the child independent of parental rights, Ireland would thus violate the right of children not to have their families interfered with through the dismissal of parental rights in violation of Convention on the Rights of the Child Article 16.

The first indication of this new, problematic structure for the protection of children's

rights appears in No. 2. 1° of the Children's Rights Referendum, which relates, "*In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*" The Referendum here speaks of the "duty" of parents towards their children, but it is unclear what specifically is meant by this term. In the context of the Convention on the Rights of the Child, the duty of parents is, as already mentioned, to promote the "*best interests*" of their children, which is why the State must recognize parental rights. Here, however, in the Children's Rights Referendum, there is no mention of parental rights. How parents can possibly perform their duty towards their children without exercising parental rights is conveniently unstated.

Corresponding to this absence of parental rights in the text of the Referendum, the State of Ireland reserves to itself the judgment as to when parents fail in their duty towards their children to such an extent that "*the safety or welfare of any of their children is likely to be prejudicially affected.*" The State is thus referred to as the "*guardian of the common good*" and shall "*endeavour to supply the place of the parents,*" that is, the State of Ireland will usurp parental rights. These same parental rights need not be considered by the State in determining whether parents have failed in their duty towards their children. To hide the fact that the State of Ireland would be usurping parental rights, the Referendum uses the general phrase "*the place of the parents,*" so as not to draw attention to the existence of parental rights. Furthermore, whereas the Convention on the Rights of the Child Article 3(2) provides that the State's protection of the "*best interests of the child*" must respect parental rights, the Children's Rights Referendum provides that the State's protection of the safety or welfare of the child must have due regard, not for parental rights, but for the "*natural and imprescriptible rights of the child.*" Given this formulation, it is unclear, in accordance with the Children's Rights Referendum, whether the "*natural and imprescriptible rights of the child*" include the right of children to receive the guidance and direction of their parents as well as to remain in the custody of their parents absent manifest parental abuse or neglect. If the Referendum does intend to protect parental rights, it should say so explicitly and not leave such a foundational right of children to be implied.

Even worse, the State of Ireland must make projections about the future welfare of Children in determining whether it will "*endeavour to supply the place of parents.*" The State is not required to conclude that the safety or welfare of children has already been compromised, but only that it is "*likely to be prejudicially affected.*" There are no detailed criteria set forth for this hocus-pocus determination of predicting the future, nor does it seem probable that such forecasting of the future will be based on objective criteria rather than the subjective opinions of those who work for the State of Ireland. Whether, for example, a child's safety or welfare is "*likely to be prejudicially affected*" may very well depend upon the religion or culture of that child's parents, or rather, the perception which an agent of the State has about that religion or culture.

The second indication of this new, problematic structure for protecting children's rights is the most frightening of all. No. 2 2° of the Children's Rights Referendum relates, "*Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*" This language allows for the compulsory adoption of children without their parent's consent, and unlike the Convention on the Rights of the Child Article 9(1), which only permits the compulsory adoption of children without their parent's consent

when it is absolutely necessary, such as cases of manifest abuse or neglect, the Referendum provides the State of Ireland with broad discretion in determining when to adopt children without their parents' consent. There are three primary reasons for this broad discretion. Firstly, as previously established, the "duty" of parents is undefined, which in practice means that the "duty" of parents means whatever the State of Ireland wants it to mean. Secondly, since the "best interests of the child" is determined without regard to parental rights, it is the State which unilaterally determines the "best interests of the child." Thirdly, the period of time that parents must fail in their duty towards their child to have their child taken away from them without their consent is unspecified, and could theoretically be a very short period of time. Therefore, Ireland determines what the "duty of parents" is, Ireland determines what the "best interests of the child" means in a particular situation, and Ireland sets the time frame after which parents may have their children taken from them without their consent. The Children's Rights Referendum gives Ireland absolute control over children in Ireland, who are subjected to the fancies of the State and can be deprived of loving and caring parents without a clear showing of parental neglect or abuse. If this Referendum passes, Irish children will belong to the State, and parents will be powerless to protect their own children from the State.

The compulsory adoption of children is further alluded to in No. 3 of the Children's Rights Referendum, which requires that the law provide for two different situations: "the voluntary placement for adoption and the adoption of any child." The "adoption of any child" must mean something different from the "voluntary placement for adoption." Clearly, the implication is that the "adoption of any child" is code language for the forced or compulsory adoption of any child. Presumably, the word "forced" or "compulsory" would frighten the Irish people, so the drafters of the Children's Rights Referendum have aptly provided for "forced" or "compulsory" adoption while avoiding either word. The obviously deceiving language in the Children's Rights Referendum is a very negative indication of what will happen to Irish society, and especially Irish children, if the Children's Rights Referendum passes.

The third indication of this new, problematic structure for the protection of children's rights in the Children's Rights Referendum is that unlike in the Convention on the Rights of the Child, the State of Ireland is not expressly required to make judicial review available to parents who have their children taken from them without their consent. The complete absence of any reference to judicial review renders the power of the State of Ireland with respect to the protection of children's rights unchecked by any independent authority outside of itself.

The fourth indication of this new, problematic structure for the protection of children's rights appears in 4. 1°, which provides,

Provision shall be made by law that in the resolution of all proceedings-
i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

As hard as it is to believe, this language gives even more power to the State of Ireland with respect to the protection of children's rights. It does so by rejecting the international standard set forth in Article 3(1) of the Convention on the Rights of the Child: that in all actions concerning children, "the best interests of the child shall be a primary consideration." In contrast to this language, the Children's Rights Referendum provides that in all actions brought by the State of Ireland to prevent the "safety and welfare of any child from being prejudicially affected" and in other proceedings involving child custody, adoption (including compulsory

adoption), the guardianship of any child, or access to any child, the “*best interests of the child*” shall be, not “*a primary consideration*,” but “*the paramount consideration*.” If Ireland recognized the “*best interests of the child*” as “*a primary consideration*,” in accordance with the Convention on the Rights of the Child Article 3(1), it would be obliged to balance the “*best interests of the child*” as defined by the State of Ireland with other considerations, such as the parental rights recognized in Convention on the Rights of the Child Article 3(2) and Article 5. Wishing to avoid this limitation on the authority of the State of Ireland over children, the Children’s Rights Referendum simply converts the “*best interests of the child*” as defined by the State of Ireland into the sole consideration that need be considered, thus referring to it as “*the paramount consideration*.” Such linguistic deception again underscores the very real and present danger to children posed by the Children’s Rights Referendum.

Conclusion

Given the very real and present danger posed to Irish children by the Children’s Rights Referendum, it is impossible to overstate how important it is for the Irish people to vote “No” on the Children’s Rights Referendum on November 10th. Ireland once told the Committee on the Rights of the Child, “*A person who is a child's guardian has duties and rights in relation to all matters concerning the child's physical, intellectual, religious, social and moral welfare. Parents who are married to each other automatically hold equal rights as guardians until a child reaches the age of 18 years.*”⁸ May this continue to be true in Ireland; vote “No” on the Children’s Rights Referendum.

⁸ CRC/C/11/Add.12, 17 June 1996.