
Legal Issues for Faith Schools in England and Wales

PHILIP PETCHHEY

Barrister

Deputy Chancellor, Diocese of Southwark

Faith schools¹ are controversial. There is nothing new about this. State funding for the schools of the established church was historically objectionable to those who dissented from that establishment. Funding for any religious school has always been objectionable to secularists, who have increased in number and influence as society has become increasingly secular. More recently, the Muslim, Hindu and other faiths of the ethnic minorities of England and Wales have begun to utilise provisions that came into being with the Christian churches in mind. This had led to objections from those who are critical of the multicultural approach which has evolved since the Second World War as a response to extensive immigration from the New Commonwealth. This paper examines whether any of the political criticism of faith schools might give rise to legal challenges, now that rights under the European Convention on Human Rights are directly enforceable. In order fully to appreciate the legal arguments, it is necessary to have some understanding of the background. Accordingly, this paper begins by summarising the history of the matter before outlining the current position. An examination of the main criticisms of faith schools follows, and the paper concludes with consideration of a variety of legal arguments.

HISTORICAL BACKGROUND

In 1281, Archbishop Peckham laid down a programme of basic religious instruction that every parish priest was required to expound to his flock.² However, the need for any general provision of education did not exist then nor for centuries thereafter. Memorably, the programme of basic religious education contained in the Catechism provides for a confirmation candidate to identify as his duty to his neighbours ‘to do my duty in that state of life, unto which it shall please God to call me’.

In the static society envisaged by the Catechism, there was no need to read or write. Even after the French Revolution – and in some cases because of the

- 1 The *Oxford English Dictionary* (online) first records use of the term *faith school* in 1990. In this paper, faith school is used to refer to a maintained school (ie, maintained by the state) of a religious character. Although there have long been a small number of Jewish schools, before 1990 generic reference to maintained schools of a religious character would have been to church schools. The change in usage, which is controversial in some church circles, reflects the increasing number of schools of a religious character where that character is not Christian.
- 2 See J Lawson, *Mediaeval Education and the Reformation* (London, 1967), cited in the *Report of the Commission on Religious Education in Schools* (London, 1970).

French Revolution – there would still have been found those who, like Elizabeth Gaskell's Lady Ludlow, thought that the teaching of reading, writing and arithmetic was 'levelling and revolutionary'.³ However, early in the nineteenth century attitudes changed rapidly. In 1811, the National Society was founded – to give it its full name, The National Society for the Education of the Poor in the Principles of the Established Church.

Starting in 1812 with a school near Gray's Inn for 600 boys and 400 girls, the Society undertook an impressive programme for the provision of church schools.⁴ By 1856 it was educating 988,276 children.⁵ This is likely to have been the peak in terms of the proportion of the nation's children being educated. By 1870, the figure of nearly 900,000 children being educated in Church of England schools represented 70 per cent of the school population. In terms of numbers, the peak was in about 1890, when there were 11,922 Church of England Schools educating about 1.5 million children. But, by that time, this represented only 45 per cent of the school population.⁶

The reason for the failure to educate all the nation's children was twofold. First of all, the cost of such extensive provision could not be sustained. Second, protestant dissenters and Roman Catholics did not want their children to be educated according to the principles of the established church and accordingly made their own provision.⁷ But many children went without education altogether.

When, in 1870, the state decided to make elementary education compulsory, this was achieved by the provision by the state itself of a large number of additional schools. The state did not however 'nationalise' the pre-existing schools provided by the Church of England and the other churches. Rather, it continued to subsidise them.⁸ Thus, from 1870 onwards, compulsory education was provided by means of a dual system of what we would now call faith schools and community schools. Note that the duality as it was conceived was not between Christian schools on the one hand and secular schools on the other. In 1870, hardly anyone was in favour of secular education.⁹ The non-church-sponsored

3 See E Gaskell, *My Lady Ludlow* (London, 1859), Chapter 1.

4 See E Churton, *Memoir of Joshua Watson* (Oxford and London, 1861), p 114.

5 *Ibid*, p 122.

6 The figures are in M Cruickshank, *Church and State in English Education* (London, 1964), p 190.

7 The British and Foreign School Society, which provided schools for dissenters, had been established in 1808 and the Catholic Poor School Committee was formed in 1847: see Cruickshank, *Church and State in English Education*, pp 2, 8. Note that the Methodist Church provided schools separately from the British and Foreign School Society.

8 The first state grant for education (of £20,000) had been made in 1833, to the two school societies. By 1857, the state was spending £500,000 per year on educational grants in this way: see Cruickshank, *Church and State in English Education*, pp 3, 10.

9 There were some. Among the principles of the radical Education League was that the teaching of religion should be left to Sunday schools: see S Gwynn, *The Life of the Rt Hon Sir Charles Dilke* (London, 1917), p 95.

schools were required to give a Christian education but it was to be related to a Christianity not distinctive of any particular denomination.¹⁰

The complicated history of the involvement of the churches with education in the period after 1870 can be found elsewhere¹¹ and the detail of it need not concern this article. There was a surge of new school building by the churches after 1870.¹² However the strain could not be borne and by the beginning of the Second World War the number was in decline. The present settlement dates from 1944 and the Education Act of that year, in which the churches surrendered some control of their schools in return for increased funding. Putting the matter broadly, the Church of England and Roman Catholic Church have continued to maintain church schools, although the position now is that the majority of the costs are met by the state.¹³

FAITH SCHOOLS TODAY

In January 2007, there were 17,361 primary schools in England maintained by the state. Of these, 4,441 (25 per cent) were Church of England schools and 1,696 (10 per cent) were Roman Catholic schools. There were 26 Methodist schools and 58 schools sponsored by other Christian denominations. There were 28 Jewish schools, 4 Muslim schools and 1 Sikh school. In total, primary school population was 4.1 million. Of this population, 767,000 (19 per cent) were being educated in Church of England schools and 404,360 (10 per cent) in Roman Catholic schools.

In the same month, there were 3,343 secondary schools in England maintained by the state. Of these, 201 (6 per cent) were Church of England schools and 342 (10 per cent) were Roman Catholic schools. There were 30 schools sponsored by other Christian denominations. There were 9 Jewish schools, 3 Muslim schools and 1 Sikh school. The total secondary school population was 3.2 million. Of this population, 172,110 (5 per cent) were being educated in Church of England schools and 317,890 (10 per cent) in Roman Catholic schools.

Of the Church of England primary schools, it should be noted that 2,446 were voluntary controlled schools and 1,956 were voluntary aided schools. Of the Church of England secondary schools, 53 were voluntary controlled.¹⁴

10 See the Elementary Education Act 1870 (33 & 34 Vict, c 75), s 14(2).

11 Eg in Cruickshank, *Church and State in English Education*.

12 The number rose from 6,382 in 1870 to 11,416 in 1880.

13 An interesting twist to the history relates to the schools of the protestant dissenters. These were mainly provided by the British and Foreign School Society and from the start they provided non-denominational religious education. When the state itself undertook to provide such religious education, their *raison d'être* disappeared, and in due course they withered away. Schools maintained by the Methodist Church (which at their peak in 1880 numbered 569) have also now largely disappeared.

14 See Department for Children, Families and Schools, *Schools and Pupils in England: January 2007 (Final) (Tables 8a and 8)*, available at <<http://www.dfes.gov.uk/rsgateway/DB/SFR/s000744/index.shtml>>.

The worship in a faith school will be that of the sponsoring faith.¹⁵ Subject to what is said below about voluntary controlled schools, faith schools teach the faith, that is, the religious education will be in accordance with that of the sponsoring faith.¹⁶ As regards admissions, a faith school may adopt an admissions policy applicable in the event of oversubscription that gives a higher priority to pupils who are members of or who practise the faith or denomination.¹⁷ As regards staffing, subject to what is said below about voluntary controlled schools, preference may be given to teachers who profess or practise the faith.¹⁸

Voluntary controlled schools do not enjoy as much freedom as voluntary aided schools. Because the local education authority will be responsible for the admissions policy of these schools, they are unlikely to give preference to members of the Church of England,¹⁹ while the religious education provided is likely to be non-denominational. They have only limited power to make teaching appointments with reference to the religious beliefs of applicants.

The lesser degree of autonomy enjoyed by voluntary controlled schools reflects their funding arrangements. Although the site of a voluntary controlled school will be owned by the Church of England, its funding will be entirely provided by the local education authority. In contrast, the faith sponsor will have to provide 10 per cent of the cost of external repairs to a voluntary aided school and 10 per cent of the costs of new buildings.²⁰

accessed 12 February 2008. As regards geographical spread, figures produced by the Church of England and Roman Catholic Church show that church schools are particularly strong in London and Lancashire. Comparable data for Wales is not available. In 1998–1989, there were 1,404 primary schools in Wales maintained by the state. Of these, 173 (12 per cent) were Church in Wales schools and 78 (5 per cent) were Roman Catholic schools. Of a primary school population of 291,712, church schools educated 36,808 (13 per cent). There were 229 secondary schools maintained by the state, of which 5 were Church in Wales schools and 16 Roman Catholic schools. Of a secondary school population of 204,158, church schools educated 16,294 (8 per cent). The statistics are in Welsh Assembly Government, *Schools in Wales: General Statistics 2007 (Tables 3.5 and 4.6)*, pp 28, 38 (available at <<http://new.wales.gov.uk/topics/statistics/publications/swgs2007/?lang=en>>, accessed 12 February 2008). In the account of faith schools in this section, the complication that some faith schools are foundation schools is ignored. Note that not all foundation schools are faith schools.

15 Every school pupil is required each day to take part in an act of collective worship: see the School Standards and Framework Act 1998 (c 31), s 70. In the case of a non-faith school, this must be of a broadly Christian character: see Sch 20, para 3(2). In the absence of this requirement in respect of a faith school, worship in a faith school obviously reflects the tradition of the sponsoring faith and/or denomination.

16 *Ibid*, Sch 19, para 4.

17 Faith schools are exempted by the Equality Act 2006 (c 3), s 50, from most of the provisions of s 49. However, a faith school cannot keep a place empty if there is not a faith candidate available: this is the effect of the School Standards and Framework Act 2006, s 86(2).

18 See the School Standards and Framework Act 1998, s 60(5).

19 The LEA control as regards admissions is by virtue of *ibid*, s 88(1). No statistics are available and the number of voluntary controlled schools giving such preference is thought to be tiny.

20 The position is complicated, and what is said above is a simplification. By virtue of the School Standards and Framework Act 1998, Sch 3, para 3, the governing body has a liability for all capital expenditure. However, the majority of this is recoverable from the state by way of grant. In Wales, the faith sponsor must provide 15 per cent of relevant expenditure.

Non-faith schools are required to teach RE²¹ and to have a daily act of collective worship of a broadly Christian character.²² However, in secondary schools at least, these requirements are attenuated in practice.²³ Accordingly, whereas historically the contrast would have been between (Christian) denominational schools and schools providing non-denominational Christian education, today the contrast is between faith schools (in the number of which those sponsored by faiths that are not Christian are beginning to feature) and schools that are essentially secular in ethos.

Of the two main providers of faith schools, the approaches of the Church of England and the Roman Catholic Church to admissions are different. Seeking to ensure social inclusiveness, the Church of England considers that, where one of its schools is oversubscribed, some places should be reserved for children of other faiths and of no faith.²⁴ As regards new schools, it will give priority in respect of 25 per cent of the places with no requirement that the children should be from practising Anglican families.²⁵ The Roman Catholic Church's primary concern is to provide schools to meet the needs of Roman Catholic parents.²⁶ The other faiths have not articulated policies in this regard.

The most recent statement of the Government's position as regards faith schools is one of unqualified support:

The Government continues to support the benefits to society that [the dual system of voluntary schools supported by faith organisations and schools without a religious character] brings for parental choice and diversity and with the changes in society, it is only fair that pupils of all faiths and none have the opportunity to be educated in accordance with the wishes of their parents.²⁷

21 Ibid, Sch 19, para 2.

22 See note 15 above.

23 Apparently, 76 per cent of secondary schools do not observe the requirements of the law as regards collective worship: see speech by David Bell, Chief Inspector of Schools, 21 April 2004, available for download at <www.sociology.org.uk/as4e4b.doc>, accessed 12 February 2008. The school roll of Denbigh High School, Luton (see note 56) was 79 per cent Muslim. Accordingly, the school was exempt from the requirement for a daily act of collective worship. This was by virtue of dispensation issued under the Education Act 1996 (c 56), s 394.

24 *The Way Ahead*, namely the *Report of the Schools Review Group appointed by the Archbishop's Council* (London, 2001, also available at <http://www.natsoc.org.uk/schools/the_way_ahead/wa-whole.pdf>, accessed 12 February 2008) (often called the *Dearing Report* after its chairman, Lord Dearing), para 4.44.

25 See Department for Children, Schools and Families, *Faith in the System: the role of schools with a religious character in English education and society* (London, 2007, also available at <<http://www.dfes.gov.uk/publications/faithinthetystem/pdfs/FaithInTheSystem.pdf>>, accessed 12 February 2008, p 17. *Faith in the System* is a joint vision statement (so described) of the Department and the providers of faith schools.

26 Ibid.

27 Ibid, p 3.

OBJECTIONS TO FAITH SCHOOLS

Funding of religion by the state

In 1870, and for long thereafter, protestant dissenters were wholly opposed to the state providing any funding to the schools of the established church. They did not object to non-denominational religious teaching, of course, but they strongly objected to such teaching according to the tenets of the Church of England. Their criticism was the more intense in circumstances where a church school was the only one available.²⁸ This objection is now voiced by secularists, who are opposed in principle to any teaching of religion being funded by the state.²⁹ It is a weighty objection and I would suggest that it can only be met by pragmatic arguments. The only entirely coherent justification for special treatment would surely be for that special treatment only to be given to the established church, as reflecting its special relationship to the state: and this is an argument that has not been heard since 1870.

As a matter of history, the justification by the state for its funding of church schools was indeed pragmatic – its provision of community schools was originally only augmenting the substantial pre-existing provision of religious schools. The present justification, as has been seen, is now based essentially on choice. This is only completely satisfactory if sufficient resources are available to satisfy all reasonable parental choices. Moreover, rather obviously, parental choice is generally capable of working contrary to other government objectives such as social and racial inclusiveness. As will be seen below, there are specific issues relating to faith schools in this regard.

Suggested indoctrination and proselytism

Some object to faith schools on the basis that they indoctrinate their students and aim to convert to the faith those students who, when they join the school are not of the faith. ‘Indoctrinate’ is here being used in a sense which is akin to ‘brainwash’.

One can be confident that no supporter of faith schools would do so on the basis that they afford opportunities for indoctrination, a process which is antipathetic to concept of true education.³⁰ However, the providers of faith schools are committed to ensuring that they ‘nurture young people in the faith of their family’.³¹ Faith schools will teach the faith as truth, and clearly a secularist (or a member of a different faith) may object to this.

28 Even though a parent could require his child to be withdrawn from religious instruction: see the Elementary Education Act 1870, s 7(i). Interestingly, by 1887 only 2,200 out of 2,000,000 children had claimed the exemption: O Chadwick, *The Victorian Church* (London, 1970), vol 2, p 189.

29 The free churches are now reconciled to the dual system as it currently operates: the Free Church Federal Council is a signatory to *Faith in the System*.

30 For a sensible discussion, see BG Mitchell, ‘Indoctrination’, appendix B in IT Ramsey (ed.), *The Fourth R: report of the Commission on Religious Education in Schools* (London, 1970), pp 353–358.

31 See *Faith in the System*, p 7.

The process of nurture, applied to a person not of the faith, can be described as proselytism. In *The Way Ahead*, the Church of England expressed the view that church schools should be at the centre of the mission of the church to the nation, that mission being summarised as being ‘to proclaim the gospel . . . to bring others into the faith’.³² The present Archbishop of Canterbury, Rowan Williams, has said, however, that ‘To speak of the religious “mission” of the church school is not to define its task as being recruitment – an easy misunderstanding, but a very serious one’.³³

The Archbishop’s argument rebutting the criticism and in support of faith schools is as follows:

For those who want their children to undertake the experiment of living in a climate of commitment, such a school offers, not a programme of indoctrination but the possibility of a new level of emotional and imaginative literacy through the understanding of how faith shapes common life. And this matters for the lives of individuals, agnostic or even atheist as much as believing; as it matters in a world where not to understand how faith operates leaves you at sea in engaging with the other, the stranger, at home or abroad.³⁴

On this basis it seems that it would be best if all education was in faith schools.³⁵ It also draws no distinction between different faiths.³⁶

Note that proselytism is not a charge that can be levelled directly at Roman Catholic schools. This is because, as has been seen, the Roman Catholic Church primarily aims to provide schools to educate the children of Roman Catholic parents.

Suggested social exclusivity

The general criticism is frequently made that church schools are not socially inclusive; that is, the assertion is that their social composition does not reflect that of the area in which they are placed. This might be, of course, a reflection of the fact that the social composition of the faith community does not reflect

32 See *The Way Ahead*, p 11, para 3.11. But note p 15, para 3.28: ‘Church schools will not actively seek to convert children from the faith of their parents . . .’.

33 See R Williams, *Church Schools: a national vision*, a speech made on 14 March 2006, available at <<http://www.archbishopofcanterbury.org/352>>, accessed 12 February 2008.

34 Ibid.

35 The Archbishop says ‘No-one expects that [a faith basis] will or *should be* the norm for every institution’ (emphasis added), but does not explain why. One guesses that this is because he recognises that his view expressed above is unlikely to commend itself to secularists.

36 It is an interesting comment on the possibility that church schools might indoctrinate their pupils that the present Chief Rabbi’s parents (described by him as ‘reasonably religious Jews’) were happy to send him and his brothers to Church of England schools. This is because they saw the schools’ ethos as ‘profoundly congruent with Jewish values’. See Jonathan Sacks, *The Home We Build Together: recreating society* (London, 2007), p 82.

the social composition of the community at large. However a further specific criticism is often articulated.

Church schools do generally have excellent academic records and this encourages high levels of applications. Parents with high aspirations for their children, who tend to be middle class, want to get their children into church schools. They take steps to meet the selection criteria for the relevant church school. This is undesirable as it produces a school that is selective by class, as well as ‘tempting parents to public hypocrisy about their beliefs’.³⁷ The hypocrisy is probably less a matter of concern than its results.

The evidence is not decisive. A study carried out by Professor David Jesson for the National Society looked at 373 of the 400 secondary schools in London. Of the pupils at these schools, 23 per cent were entitled to free school meals.³⁸ In Church of England schools, the comparable figure was 22 per cent. Writing in the *Church Times*, Professor Jesson remarked that ‘These findings, related to social deprivation, demolish the myth that C of E schools are socially divisive; the data shows clearly that they almost exactly mirror the communities they serve.’³⁹

On the other hand, a study of 3071 secondary schools by the Bedford Group for Lifecare and Statistical Studies at the Institute of Education, University of London, indicated that, of the 480 voluntary aided secondary schools in its sample, 30 per cent were ‘cream skimming’⁴⁰ when eligibility for free school meals was considered.

There are other such studies.⁴¹ It cannot be said that any are decisive. It seems likely that the effect about which concern is expressed does exist. What is more difficult is forming a judgment about how significant the effect is.

Enforcement of ‘mono-culturalism’

A more recent concern is highlighted by the report into the disturbances that occurred in Oldham, Burnley and a number of other places in the spring and early summer of 2001. These resulted in the destruction of property and

37 See R Williams, *Church Schools*. The Archbishop made it clear that he did not accept the criticism and expressed concern about what he called anecdotal evidence. The problem here is that the evidence of hypocrisy (if it exists) is likely to be anecdotal. The charge is widely made: see, eg, Polly Toynbee writing in *The Guardian* on 6 November 2007, available at <<http://www.guardian.co.uk/commentsfree/2007/nov/06/comment.publicservices>>, accessed 12 February 2008.

38 Eligibility for free school meals is widely used as a proxy for social deprivation.

39 *Church Times*, 29 September 2006, available at <<http://www.churchtimes.co.uk/content.asp?id=17356>>, accessed 12 February 2008.

40 This is its phrase. It means admitting pupils with the effect that the proportion of those admitted with reference to the identified criteria does not reflect the proportion of those with reference to those criteria who would otherwise have been admitted on the basis of geographical proximity. It becomes apparent that the point at issue is not one capable of simple analysis.

41 One of the more interesting is by the Pastoral Research Centre Trust, which showed (in relation to the Roman Catholic Church) a significant increase in the proportion of ‘late’ baptisms between 1958 and 2005 (‘late’ baptisms being those of children between the ages of 1 and 13). The suggestion was that this reflected the desire of the children’s parents to qualify their children for entry into Roman Catholic schools. The Director of the Catholic Education Service accepted that this was a factor in the increase.

attacks on the police. They had the common feature that they involved large numbers of people from different cultural backgrounds. One response was that the Home Office established a Community Cohesion Review Team to consider the position and make recommendations.

The team concluded that:

In terms of community cohesion, however, a significant problem is posed by existing and future mono-cultural schools, which can add significantly to the separation of communities described above. The development of more faith based schools may, in some cases, lead to an increase in mono-cultural schools but this problem is not in any way confined to them. We believe that all schools owe a responsibility to their pupils to promote, expand and enrich their experience, by developing contacts with other cultures (also set out below), or by ensuring that, as far as possible, they are represented within the school intake.⁴²

This conclusion led to a general proposal:

We would therefore, propose that all schools – whether faith or non-faith based – should seek to limit their intake from one culture or ethnicity. They should offer, at least 25%, of places to reflect the other cultures or ethnicities within the local area. We recognise that it is difficult to discriminate on the grounds of culture or ethnicity (the latter would be subject to legal challenge) and, in any event, the school may be less attractive to parents and children from other cultures. Indeed, the local culture or ethnicity may be the same as that of the predominant culture of the school. Nevertheless, schools can and must make themselves attractive to other cultures and ethnicities from a wider area (many parents are prepared for travel of some distances at present to schools of their choice) over a period of time. This will be difficult at first but the offer of places on a more inclusive basis is the first step and a positive action programme will be necessary to underpin it.⁴³

Against this background should be seen the team's specific proposals in respect of faith schools:

Faith schools should adopt exactly the same positive approach as that set out above for all schools. However, they have some special arrangements

42 *The Cante Report* (2001) (so-called after the commission's chairman, Ted Cante, an Associate Director of the Improvement and Development Agency for Local Government), available at <<http://image.guardian.co.uk/sys-files/Guardian/documents/2001/12/11/communitycohesionreport.pdf>>, accessed 12 February 2008, p 33.

43 *Ibid*, pp 33–34.

which allow them to address the matter in different ways. Some faith schools presently attract students from different cultures or ethnicities either because that faith community is presently inclusive of them, or by limiting the school to a maximum from that faith (ie accepting a predominant, rather than single faith basis for the school). We believe that either, or both, of these approaches should now be adopted by all existing and proposed faith schools. Indeed, they have the means to achieve this directly, as whilst it is not possible in practical terms, to define ‘culture’ and nor is it possible to discriminate on the grounds of ethnicity under present legislation, it is possible to determine intake by reference to faith, or denomination. This is the gift of the church and faith leaders, who could advise both independent and state sector schools to open a proportion of their places, say a minimum of 25%, to other, or non faith, students. This would be entirely consistent with their stated desire to promote religious tolerance and understanding.⁴⁴

The political response to criticism of faith schools

If, as is the case, faith schools have been positively encouraged by the Labour governments that have been in power in Britain since 1998 as well as being supported by spokesmen of the Conservative Party, it is to be expected that faith schools will continue to receive political support. However, in the debates in Parliament on what became the Education and Inspections Act 2006, Lord Baker of Dorking proposed that a 25 per cent quota of non-faith pupils should be mandatory for new faith schools. This proposal was apparently principally aimed at new Muslim schools:

I say to the leaders of the Muslim community: is it really wise to promote the proliferation of exclusively Muslim schools in Muslim communities? Let us suppose that four primary schools are set up quite quickly in a Muslim community, to be followed by two or three secondary schools. Supported by their mosques that community will become very closed and inward looking. Children from outside will not be welcomed or, if they are welcome, will not want to go in. That strongly reinforces separateness in our society.⁴⁵

The resistance to this proposal shows the resilience of the existing system. Lord Baker’s proposal raised a storm of protest from the Roman Catholic Church, and the government, which had begun by accepting the principle of the amendment,

⁴⁴ Ibid, pp 34–35.

⁴⁵ See Hansard (HL) 17 October 2006, col 704.

changed its mind about it. Instead, there is now a duty on all schools to promote community cohesion.⁴⁶

The matter is evidently a hugely sensitive one. It is not reasonable to criticise the non-Christian faiths for wanting to utilise the advantageous provisions that exist for the establishment of new faith schools. But Lord Baker and others may properly be concerned that the re-enforcement of faith through the educational system is potentially divisive.⁴⁷ It will be instructive to see how faith schools in mono-cultural areas will promote community cohesion in practice.

LEGAL ARGUMENTS AFFECTING FAITH SCHOOLS

If, accordingly, the dual system looks safe from political challenge, is there any basis on which it might be at risk from legal challenge?

In his consideration of whether faith schools indoctrinate, the Archbishop of Canterbury posed the question ‘Do they infringe the rights of our children by inducting them into damagingly false and irrational habits of mind, habits which no normal adult would freely adopt?’⁴⁸ As we have seen, the Archbishop answered this question in the negative, although not everybody will have been convinced by his argument. However, whatever view is taken of what actually goes on in faith schools, the question evidently proceeds from two prior assumptions, namely that indoctrination as he defined it would be wrong and that it would infringe the rights of the child. Does a child indeed have a right not to be indoctrinated?

Article 26 of the Universal Declaration of Human Rights begins ‘Everyone has the right to education’. Article 2 of the First Protocol of the European Convention on Human Rights begins ‘No person shall be denied the right to education’. Although negative in form, the Article has the heading ‘Right to Education’ and it has been held that it does confer a positive right.⁴⁹ Further, Article 14(1) of the United Nations Convention on the Rights of the Child provides that ‘States Parties shall respect the right of the child to freedom of thought, conscience and religion’.⁵⁰ Putting these rights together, one can begin to articulate a legal argument against indoctrination.

46 See the Education Act 2002 (c 32), s 21(5), inserted by the Education and Inspections Act 2006 c(40), s 38(1). As will be apparent, the 25 per cent quota proposal reflects the approach of the Church of England to the matter. However, speaking in the debates, the Bishop of Peterborough made it clear that the Church of England opposed mandatory quotas (see Hansard (HL) 30 October 2006, col 117).

47 An argument often made with reference to the provision of schools in Northern Ireland.

48 See Williams, *Church Schools*.

49 See *Belgian Linguistic Case* (1968) 1 EHRR 252: ‘In spite of its negative formulation, this provision uses the term “right” and speaks of a “right to education”. Likewise, the preamble to the Protocol specifies that the object of the Protocol lies in the collective enforcement of “rights and freedoms”. There is therefore no doubt that Article 2 does enshrine a right’ (para 3).

50 Note also that the Treaty of Lisbon will require the EU to promote the protection of the rights of the child: see the Treaty on European Union, Article 2, as amended by the Treaty of Lisbon (December 2007) Cm 7294, Article 2.

In Canada, indeed, the Supreme Court of Ontario has held that the RE curriculum of a Board of Education did amount to indoctrination (as the court defined it).⁵¹ The teaching thus infringed the freedom of conscience and religious provisions of the Canadian Charter of Rights and Freedoms.⁵²

This was a case where the parents of a child objected to religious teaching. However, it is difficult to articulate rights of the child in opposition to the rights of his or her parents. Thus Article 2 of the First Protocol of the Convention on Human Rights set out above continues: 'In the exercise of the functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' Article 14(2) of the UNCRC provides:

State parties shall respect the rights and duties of parents and, where 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.

Historically, courts have been hostile to the assertion of the rights of a child in opposition to his or her parents,⁵³ and, although in *Gillick v West Norfolk and Wisbech Area Health Authority* Lord Scarman held that the true principle was that 'parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his mind on the matter requiring decision',⁵⁴ this begs the question as to the point at which a child reaches a sufficient understanding so as to be allowed to make his or her own decisions.

In *Re R (A Minor)*⁵⁵ a 10 year old wished to live with his grandparents, members of the Plymouth Brethren,⁵⁶ rather than his father, who had been excluded from that body. His wishes were a factor to be taken into account but were not, surely correctly, viewed as overriding.

Moreover, even if the views of the child and of his parents coincide, this does not mean that the child's rights, properly considered, are being respected. Thus, in the *Denbigh High School* case,⁵⁷ a school pupil made a claim under Article 9 of

51 Ie, 'teaching students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour [which] amounts to religious coercion in the classroom'.

52 See *Canadian Civil Liberties Association v Ontario (Minister of Education)* (1990) 65 DLR (4th) 1. The quotation is from the judgment of the court at p 24. The right of parents to exempt their children from the lessons did not rectify the situation since they would still be under pressure to conform.

53 See, eg, *Re Agar-Ellis* (1883) 24 Ch D 317 (protestant father entitled to prevent his child seeing her Roman Catholic mother, from whom he was separated).

54 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL, p 186.

55 [1993] 2 FLR 163, CA.

56 Purchas LJ described the conditions of the fellowship of the Brethren as 'stifling' (p 173).

57 Ie, *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [2006] 2 All ER 487, HL.

the European Convention on Human Rights, alleging infringement of her right to manifest her religious belief by wearing a jilbab.⁵⁸ The claim was rejected. Among the complex considerations that Baroness Hale said needed to be examined was the fact that 'A mandatory policy that rejects veiling in state institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families.'⁵⁹

Thus there may be cases where the child's assertion of her rights in conformity with the views of her guardians may be contradicted by the state.⁶⁰ So, in an appropriate case, what may appear to be the rights of the child may be trumped by his parents or by the state asserting that they or it knows best. The rights of the child are ensured by not allowing him to make his own decisions. It is submitted that rights analysis in this area is particularly difficult and probably unhelpful.

In the *Denbigh High School* case, Lord Scott considered one particular situation that could arise:

Take the case of a faith school that required its pupils each day to participate in a form of collective religious worship. It may be assumed that each pupil on entry to the school would be content to participate in the daily religious service. If a pupil, having become a convinced atheist, decided that he or she could no longer in conscience take part in an act of worship that was inconsistent with the new beliefs that he or she had recently acquired and asked to be excused from attending the daily religious service, Strasbourg jurisprudence would not permit the school's refusal to accept this request to be represented as infringing the pupil's Article 9 rights unless, perhaps, the institution offered an essential service not obtainable elsewhere.⁶¹

His analysis seems correct⁶² and, of course, he was considering a situation absent of a potential complication, namely that the atheist child's parents, not having shared his conversion, might wish him to continue at the faith school.

It is submitted, however, that, without a right (of a pupil's parents at least) of withdrawal from collective worship and faith-based RE, there would be human rights concerns about faith schools. However, a right of withdrawal does exist,

⁵⁸ A jilbab is a long, shapeless, black gown.

⁵⁹ See para 98 of her speech, endorsing the views of Professor Frances Raday in 'Culture, religion and gender', (2003) 1 *International Journal of Constitutional Law* 663, 701.

⁶⁰ Lord Scott in the *Denbigh High School* case was troubled that the approach to the matter of the claimant's guardian did not reflect that which would have been done by the pupil herself: see *R (SB) v Governors of Denbigh High School*, para 80.

⁶¹ *Ibid*, para 88.

⁶² Lord Scott cited *Kalac v Turkey* (1997) 27 EHRR 522, *Ahmad v United Kingdom* (1982) 4 EHRR 126 and *Karaduman v Turkey* (1993) 74 DR 93.

and the concerns articulated in the *Canadian Civil Liberties Association* case would be unlikely at the moment to impress an English or European Court.

Thus, even setting aside disagreements about what indoctrination is,⁶³ it does not look at the moment as if the rights of the child not to be indoctrinated could be articulated in a way so as to pose any threat to the existing arrangements for faith schools.

The funding arrangements for faith schools are at least potentially vulnerable to human rights attacks. In this context, it is necessary to consider *Bishop of Roman Catholic Diocese of Port Louis v Suttyhudeo Tengur*,⁶⁴ an appeal from the Supreme Court of Mauritius to the Privy Council.

The case concerned the admissions policy of 12 Roman Catholic secondary schools in Mauritius. All the schools were funded by the state, so that it could be said that the state bore responsibility for the admissions system, which indeed it had agreed with the Roman Catholic authorities. The effect of this was that the human rights provisions in the Constitution of Mauritius applied to the admissions system operated by the Roman Catholic authorities (the provisions of the constitution in respect of the actions of public bodies mirror those in respect of public authorities in the Human Rights Act 1998, and the Roman Catholic authorities were held to be a public body).

The admissions policy was that half the intake each year was of Roman Catholic children and half of non-Roman Catholic. All children competed for half the places on merit, and some would obviously go to Roman Catholic children. These latter would have first call on the Roman Catholic places, which would then be made up to half by the selection of those who had either failed or not taken part in the competition. The other half would be selected on merit. The details are not entirely clear, but it is possible to see that that a potential pupil had a better chance of getting in if he or she was a Roman Catholic.

This was differentiation based on creed. As Lord Bingham pointed out:

The giving of preference to one group of applicants necessarily works to the disadvantage of any group of applicants to whom preference is not given. In relation to reserved places, the appellants' avowed intention is to maintain the religious and moral character and ethos of the Catholic colleges by recruiting enough Roman Catholic pupils to leaven the whole loaf. Understandable and even admirable as this intention may be, it involves differentiating between one pupil and another.⁶⁵

63 See pp 179–180 above.

64 [2004] MR 197; [2004] UKPC 9. This case is also reported in (2004) 7 Ecc LJ 498.

65 *Bishop of Roman Catholic Diocese of Port Louis v Tengur*, para 16. Lord Bingham seems to have assumed without stating it that the claimant's right to education for his child was a fundamental freedom conferred by the constitution.

But this is not necessarily enough to sustain a complaint of unlawful discrimination. As Lord Bingham explained, the discrimination may be justified as having a legitimate aim and having a reasonable relationship of proportionality between the means employed and the aim sought to be realised. As the authorities cited by him demonstrated, this is the position both under Mauritian law applying the Mauritian constitution and English law applying the European Convention.⁶⁶

In the Mauritian courts the argument had been about whether the arrangements described above did in fact exist, and no attempt had been made to justify them. Accordingly there was no material before the Privy Council on which it could find the discrimination justified.

As has been seen, there is a right to education under Article 2 of the First Protocol to the European Convention on Human Rights just as there is under the Mauritian constitution. Article 14 of the Convention provides:

The enjoyment of the rights and freedoms set forth in the Constitution shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Consider now a non-faith parent of a child who lives close to a faith school with an excellent academic record. His child is not admitted to the faith school. He may say ‘I care nothing for the ethos of this school, although I have no objection to my son attending acts of religious worship and classes of religious instruction. I do however want my son to attend the best local school’. It may be possible to demonstrate that, had his son met the faith-based requirements of the faith school, he would have been admitted to it. As it is, his son attends a school with a markedly poorer academic record than the faith school. Additional matters could be added to the hypothetical facts. Analysis might show, for example, that the proportion of those entitled to free school meals is markedly less than would be the case if it drew its pupils from those eligible living nearest to it; and that those potential pupils who would be entitled to free school meals tend to be from an ethnic minority of a particular faith. This might support the argument on religious discrimination, and add to it the possibility of discrimination on the grounds of race.⁶⁷ Against this it would be argued that, if the situation were properly analysed, no discrimination would be found; and, further, that any discrimination that there might be would be justified.

As a matter of principle, it can indeed be said that the facilitation of choice by the provision of both faith schools and non-faith schools does not involve

66 See, eg, *Police v Rose* [1976] MR 79 and *R (Carson) v Secretary of State for Work and Pensions* [2003] 3 All ER 577, CA (see now also [2006] 1 AC 173).

67 If there were racial discrimination it might be objectively justifiable: see *Mandla v Dowell Lee* [1983] 2 AC 548, at 566C–567C (per Lord Fraser of Tullybelton), [1983] 1 All ER 1062, HL.

discrimination. Why is it unlawful discrimination to exclude a child not of the faith from a school provided for those who are of the faith? In the *Denbigh High School* case (not a case argued on the basis of discrimination), the House of Lords held, by a majority, that there was no interference with the claimant's right to manifest her religion, because she could readily go to another school that would allow her to wear the jilbab. It would no doubt be strongly argued, even on the facts postulated, that the child could readily be educated elsewhere. Nonetheless, on the basis of those facts, the argument that there is no discrimination does not seem altogether convincing.⁶⁸ Nor, on those facts, can it be said that the discrimination is justified by the ability of the child to go to an equally good school elsewhere.

As regards justification, some assistance is provided by *X v United Kingdom*.⁶⁹ In that case, parents in Northern Ireland wanted to set up a non-denominational school. To do so they would have been required to provide part of the funding. They claimed that the existing state schools in Northern Ireland (which were entirely funded by the state) were essentially Protestant in character and that the failure of the state to provide all the funding for a non-denominational school was contrary to Article 2 of the First Protocol. They did not argue a case based on Article 14. However, the Commission considered the point and held as follows:

In its determination whether there is discrimination within the meaning of Article 14 in the present case, the Commission considers that it is legitimate for the State to exercise substantial control in the ownership and management of schools for which it provides a full 100% subsidy. Conversely, the Commission is of the opinion that it is reasonable for the State, in relation to bodies that seek ownership and decisive control over management policy in voluntary schools, to require some degree of financial contribution. The Commission does not consider that the requirement of a 15% contribution capital costs [sic] is an unreasonable or disproportionate requirement, taking into consideration that ownership of the school would be vested in trustees representative of the body concerned and the exercise of two thirds control in the governing body.

Accordingly, the complaint was declared inadmissible.

68 Even though the courts are plainly reluctant to accept arguments of this kind, as the *Denbigh High School* case showed. In this regard, *Copsey v WWB Devon Clays Ltd* [2005] ICR 1789, CA, is instructive. Mummery LJ held (following Commission rulings) that a change in working hours so that a Christian employee was required to work on Sunday did not involve interference with his rights of religious freedom, because the employee was free to resign (para 37). In the absence of authority he would have held otherwise (para 36). He went on to say that he thought that the question raised required a political solution, and that 'neither judges nor lawyers had relevant knowledge or experience' to decide it (para 39).

69 (1978) 14 DR 179, E Comm HR.

The assumed facts and reasoning are not altogether clear, but the point seems to be that the state can justify a system whereby the amount of funding is related to degree of control exercised by the state. Applying this to the dual system in England and Wales, the state does not provide all the funding in respect of faith schools, and the *quid pro quo* for that is a lesser degree of control by the state.⁷⁰

The school that was the subject of challenge in the hypothetical case postulated above would no doubt emphasise its duty of promoting community cohesion, and seek to argue that any discrimination is an indirect and unintended consequence of a reasonable selection policy. One may predict that it would win, but it cannot be said that the outcome is self-evident. As with many human rights cases, even ones raising important points of principle, the outcome would be heavily fact reliant.

CONCLUSION

Criticism of faith schools, which has been shown to be long-standing, is not going to go away. Accordingly, legal challenges are to be expected. This is an interesting area because it gives rise to profound questions as to the proper scope of education in a liberal society as well as to difficult questions of social justice. In the political arena, these questions are answered by arguments based on pragmatism. Accordingly, it may be said that they are not very well suited to adjudication with reference to legal rights. The proper scope of human rights law lies beyond the scope of this paper, although it is hoped that it will help to inform the discussion of that issue.

70 The case provides a legal answer to the secularist who objects in principle to the state funding of faith schools. The state is not unfairly subsidising faith schools (at least, not in terms of Convention rights) but granting a degree of autonomy to faith schools in return for funding from the faiths. The history of the current arrangements (see pp 174–176 above) supports this analysis.