

# OBSTACLES TO TACKLING ILLEGAL RELIGIOUS SCHOOLS IN THE CONSTITUTIONAL CULTURE OF ENGLAND

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**Abstract:** A significant number of children in England are attending religious schools operating outside of the law. The institutions are not registered or inspected, meaning that there are no checks on the quality of the education, appropriateness of the physical environment or adequate safeguards against abuse. The current legal framework on home-schooling enables this situation to continue, and despite a number of scandals, there has so far been no attempt at radical reform to address the situation. This article examines the elements of English constitutional and juridical culture which have incubated this problem, and which present obstacles to an holistic and effective response being implemented.

**Keywords:** religion. Home-schooling. Illegal schools. England. Parents. State schools. Private schools.

**Resumen:** Un número considerable de niños en Inglaterra asisten a escuelas religiosas que operan al margen de la ley. Nos encontramos frente a instituciones que no están registradas o sujetas a inspección, lo cual lleva a que en la práctica no haya controles respecto a la calidad de la educación, la naturaleza del entorno físico o mecanismos de protección contra el abuso. El sistema legal actual sobre *home-schooling* favorece la continuidad de esta realidad, y a pesar de los numerosos escándalos que han acontecido, no se ha producido un verdadero intento por llevar a cabo una reforma sustantiva de esta situación. Este

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artículo examina los elementos de la cultura constitucional y jurídica inglesa que han propiciado este problema, y que constituyen un obstáculo a la consecución de una respuesta integral y efectiva al mismo.

**Palabras claves:** religión. *Home-schooling*. Escuelas ilegales. Inglaterra. Padres. Escuelas estatales. Escuelas privadas.

SUMMARY: 1. Introduction. 2. Accommodation of Parental Choice in Respect of Religion and Ideology. 2.1 Schools with a designated religious character. 2.2 Schools with no designated religious character. 2.3 Independent Schools. 2.4 Home-schooling. 2.5 What is unavailable within the legal education framework, and potentially perceived to be available from unregistered schools? 3. What lacunas in the present framework permit unregistered schooling to continue, and why have moves to close them hitherto failed? 4. Constitutional Culture and Obstacles to Closing the Lacuna that Facilitates Illegal Schools. 4.1 Prioritisation of Individual Liberty Above Collective Concerns. 4.2 Support for Religious and Ideological Freedom. 4.3 Parental choice and the care and upbringing of children. 5. Conclusions-closing the loophole.

## 1. INTRODUCTION

Government statistics estimate that around six thousand children of compulsory fulltime educational age are at present attending «illegal schools».<sup>2</sup> These institutions operate as private academies, but are not registered, as required by legislation<sup>3</sup>. This means that their existence is not communicated to the authorities, and there is no mechanism to ensure that the standards demanded by law of independent schools are met with regard to the quality of the education provided, the moral, cultural and spiritual development of pupils, the

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<sup>2</sup> UK GOVERNMENT «New data shows illegal schools are a huge nationwide problem» 12<sup>th</sup> April 2020 «<https://www.gov.uk/government/news/new-data-shows-illegal-schools-are-a-huge-nationwide-problem>» Date of consultation 4<sup>th</sup> November 2022.

<sup>3</sup> Education and Skills Act 2008, Part IV, Chapter 1.

health, safety and welfare of learners, the suitability of staff, the leadership team or the condition of premises<sup>4</sup>.

It is self-evident that this state of affairs is extremely concerning. The current position jeopardises the rights of the children and young people involved, as guaranteed by international legal instruments. The European Convention on Human Rights Article 2 Protocol 1 declares that no person may be denied the right to education. Not only has the Strasbourg Court been vigilant in protecting this fundamental freedom, it has also repeatedly emphasised that the operation of Article 14 demands that it must be upheld by States without discrimination.<sup>5</sup> A large proportion of the litigation in respect of Article 14 in conjunction with Article 2 Protocol 1 has concerned children living with some form of mental or physical disability, but the underlying principle applies to any characteristic.<sup>6</sup> Public authorities are not required to ensure that all children receive education in the same format or venue, but adequate and equal provision cannot be denied in a discriminatory manner. In short, young people cannot have their right to education less effectively safeguarded as a result of their religious or philosophical identity or background.

It is true that Article 2 Protocol 1 also explicitly recognises that:

*«In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.»*

Meaning that the religious and philosophical stance of parents must be respected, especially when the State is either in charge of the education system or setting parameters within which private parties may deliver it. This is a key sentence, designed to ward off the malevolent spectre of state indoctrination, and banish it where it does arise. Nonetheless, this clause is not intended to subjugate the rights of children to education to competing parental freedoms in relation to liberty of belief, or the autonomy of the family unit.

This was made clear in *R (Williamson) v Secretary of State for Education and Employment*<sup>7</sup>, in which headteachers, parents and children from a number

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<sup>4</sup> Education and Skills Act 2008, s94 and the Education (Independent School Standards) Regulations 2014 (as amended).

<sup>5</sup> See, for example: *GL v Italy* 59751/15 (2020); *Dupin v France* 2282/17 (2018); and *Salisoy v Turkey* 77023/12 (2016).

<sup>6</sup> *McIntyre v United Kingdom* 29046/95 (1998).

<sup>7</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.

of private Christian schools argued that a statutory ban<sup>8</sup> on corporal punishment infringed their rights as set out in Article 2 Protocol 1 and Article 9, because their interpretation of the Bible expected parents (and by extension those in loco parentis) to physically discipline children<sup>9</sup>. The Judicial Committee of the House of Lords (the predecessor body of the United Kingdom Supreme Court) found that there had been no unlawful interference with the Article 9 of the parties, nor the Article 2 Protocol 1 rights in the case of parent claimants. The State was justified in limiting the manifestation of protected beliefs, as it was a proportionate means of protecting children from pain, distress and other damaging effects of physical violence<sup>10</sup>.

There can be no doubt that in permitting children to spend their days in purported schools with no monitored and enforced standards of educational quality is a serious breach of their Article 2 Protocol 1 right to education. When evidence of the dangerous and squalid conditions in many such institutions operate is taken into account<sup>11</sup>, alongside widespread assault and abuse (unlawful corporal punishment is as much as criminal assault as physically attacking an adult), it is apparent that the Article 3 and 8 interests of students are also being infringed in the most egregious manner<sup>12</sup>.

In light of all of the above, it is unquestionable that in failing to effectively crack down on illegal schools, the United Kingdom is in dereliction of its duties pursuant to the European Convention of Human Rights. This treaty enjoys special status, because although the jurisdiction adopts a dualist constitutional model, the ECHR has been incorporated into domestic law by virtue of the Human Rights Act 1998, and in contrast, the United Nations Conventions on the Rights of the Child («UNCRC») has not been implemented in a way which permits direct enforcement through British courts. Despite the significant distinction in the domestic sphere, the UNCRC was ratified by the United Kingdom in 1991, and therefore imposes international obligations and has relevance

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<sup>8</sup> Education Act 1996 s548.

<sup>9</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15 per Lord Nicholls para 10. The claimants cited Proverbs 13:24 «*He who spares the rod hates his son, but he who loves him is diligent to discipline him*».

<sup>10</sup> *Ibid.*, per Lord Nicholls para 49; and per Lord Walker para 86.

<sup>11</sup> «Ofsted raises alarm over “squalid” illegal schools», *The Guardian*, 10<sup>th</sup> November 2015 «<https://www.theguardian.com/education/2015/nov/10/ofsted-raises-alarm-over-squalid-illegal-schools>» Date of consultation 6<sup>th</sup> November 2022,

<sup>12</sup> «Fears for thousands of children stuck in unregistered, illegal schools» *The Sunday Times* 28<sup>th</sup> December 2021 «<https://www.thetimes.co.uk/article/fears-for-thousands-of-children-stuck-in-unregistered-illegal-schools-76nb2fd77>» Date of consultation 6<sup>th</sup> November 2022.

for the construction of national legal questions.<sup>13</sup> As a result, alongside the incompatibility with the ECHR, the continued failure to adequately address illegal schools undermines Articles 2, 3, 6, 19, 28 and 29 of the UNCRC.

The truth is that unregistered schools are incompatible with the core rights of children, safeguarded by both national and international levels, and they continue to place vulnerable young individuals at risk long-term harm, as well as immediate ill effects. This article explores how and why the English legal framework has inadvertently enabled such institutions to exist and function, and why efforts to take decisive action to eradicate them has proved challenging. We shall begin by examining the provisions which allow families to keep their children out of the system of educational oversight furnished by the State. We shall start our analysis by briefly considering how the State seeks to accommodate parental choice in respect of religion, ideology and educational environment, and ask what might be incentivising families to achieve something beyond these structures. In other words, what can parents not attain via registered schooling, that they may be aiming to get elsewhere? Then having considered the question of *why* such choices might be made, we shall address the issue of *how* they have slipped through the cracks in regulation, given that they are inimical to children's rights and wellbeing. Finally, having identified the gaps in the legal barriers to such abuse, we shall ask what has so far prevented Parliament from taking effective steps to fill them in, and consequently, what might be done to remedy this.

## 2. ACCOMMODATION OF PARENTAL CHOICE IN RESPECT OF RELIGION AND IDEOLOGY

The means by which the legal framework incorporates parental choice into arrangements on educational provision varies according to the context at hand. As might be anticipated, both the applicable law and the practical considerations change according to the factual backdrop. Therefore, we shall divide our assessment up into four subsections: 1) State maintained schools with a designated religious character; 2) State maintained schools without a designated religious character; 3) Independent schools; 4) Home-schooling.

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<sup>13</sup> «United Nations Convention on the Rights of the Child» *Together: Scottish Alliance for Children's Rights* <<https://www.togetherscotland.org.uk/about-childrens-rights/un-convention-on-the-rights-of-the-child/#:~:text=The%20UNCRC%20was%20drafted%20in,on%2016th%20December%201991>> Date of consultation 6<sup>th</sup> November 2022.

## 2.1 Schools with a designated religious character

For our current purposes, an important division must be made between educational establishments with a designated religious character, and those without. Institutions with a defined faith alignment are commonly referred to as «faith schools», and even governmental authorities sometimes use this label.<sup>14</sup> This is unfortunate because, as we shall discuss below, it gives the erroneous impression that other schools have a secular, or least religiously neutral, nature. This is untrue for all publicly funded schools, and indeed for many private establishments as well. The key difference between schools with a designated religious character (herein after referred to a «DRC Schools») and others (which I shall label «Non-DRC Schools») is, as Vickers outlines, whether or not they enjoy them special dispensation from Equality Law.<sup>15</sup>

Crucially, this distinction has nothing to do with whether or not they are supported in whole or in part from public funds. In fact, schools maintained from public funds may or may not be DRC schools, as may schools providing private education. There are a variety of different governance arrangements within the publicly funded sector, but the detail of these does not directly concern this investigation.<sup>16</sup> We are interested, primarily, in the implications of DRC status for the education content and environment, and what this may mean for parents with strong religiously motivated desires for their child's upbringing and experience.

DRC schools are permitted to carry out what would otherwise be unlawful discrimination of religious grounds when it comes to student admission, and give places preferentially to pupils from the specified faith community.<sup>17</sup> It should be noted that this privilege is subject to limitation, and may only be exercised if the school in question is oversubscribed.<sup>18</sup> This caveat has undeniable practical significance, but is also revealing about the justification underpinning the policy, as the intention is to allow families actively practising the religion in question to access an educational backdrop in line with their convictions, or at least to maximise their chances of doing so. It is not geared towards permitting schools to provide a monochrome religious and cultural environ-

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<sup>14</sup> UK Government, «Types of School: Faith Schools» «<https://www.gov.uk/types-of-school/faith-schools>» Date of Consultation 9<sup>th</sup> November 2022.

<sup>15</sup> VICKERS, L., «Religious Discrimination in Schools: The Employment of Teachers and the Public Sector Duty», in Hunter-Henin, M., (ed), *Law, Religion and Freedoms in Europe: Education in Europe* ASHGATE, S., 2011 at 87-106.

<sup>16</sup> UK Government, «Types of School: Overview» «<https://www.gov.uk/types-of-school/>» Date of Consultation 9<sup>th</sup> November 2022.

<sup>17</sup> Equality Act 2010, Schedule 11.

<sup>18</sup> Schools Admission Code for 2007, paras 2.41–3.

ment, whilst enabling parents to shield their children from the influence of peers from homes with different values.

It should also be noted that the law *permits* DRC schools to discriminate in this fashion, but it does not require them to do so. Some institutions, for example, a significant number run by the Church of England, have chosen to eschew this approach, seeking to maintain their chosen ethos in the ambience that they facilitate, but welcoming all perspective students on an equal basis.<sup>19</sup> However, many schools do decide to exercise their option to discriminate in relation to admissions, and are able to do so, because over subscription is extremely common. One reason for this is that many publicly funded DRC schools have a reputation for academic excellence and an alluring range of extra-curricular activities, causing them to be coveted by parents intending to maximise their children's opportunities.<sup>20</sup> As Johnes and Andrews argue, the reasons behind the academic success of these institutions are multifaceted, but are undoubtedly related too strongly to social factors.<sup>21</sup> Pupils are drawn from educationally and economically advantaged families, and are therefore, statistically more likely to perform well in examinations, meaning that the school achieves highly in publicly available data, attracting other parents with the resources to proactively nurture their child's academic development, thus creating a self-perpetuating phenomenon.

As the research quoted above illustrates, it is well established that debates around DRC schools relate as much to socio-economic inequality as they do to clashes over religion and worldview. It is undeniable that Humanist and Secularist organisations put forth excoriating statements about the continued existence of such institutions, but the majority of social criticism relates to differential access to educational opportunities based on class.<sup>22</sup> Admittedly, there is ire on both sides of the fence about parents attending churches for a few critical years with the cynical aim of securing the desired school place. It is unsurprising that many such families do not always enjoy the pantomime of arranging

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<sup>19</sup> ROMAIN, J., «Faith Schools Cannot Continue Their Immoral Policy of Discrimination» *The Guardian* 2<sup>nd</sup> November 2013 <<https://www.theguardian.com/commentisfree/belief/2013/sep/02/faith-schools-immoral-discrimination-london-oratory>> Date of consultation 10<sup>th</sup> September 2022.

<sup>20</sup> GODFREY, R. and MORRIS, A., «Explaining High Attainment in Faith Schools: the impact of Religious Education and other examinations on pupils' GCSE point scores», *British Journal of Religious Education* 30 (3), pp. 211-222.

<sup>21</sup> JOHNES, R. and ANDREWS, J., «Faith Schools do Better Chiefly Because of Their Pupils Backgrounds» *London School of Economics* 11<sup>th</sup> January 2017 <<https://blogs.lse.ac.uk/religionglobalsociety/2017/01/faith-schools-do-better-chiefly-because-of-their-pupils-backgrounds/>> Date of consultation 10<sup>th</sup> November 2022.

<sup>22</sup> Humanists UK, «Faith Schools Why Not?» <<https://humanists.uk/campaigns/schools-and-education/faith-schools/faith-schools-why-not/>> Date of consultation 10<sup>th</sup> November 2022.

flowers, baking cupcakes or attending worship for worldly, rather than spiritual motives,<sup>23</sup> nor that religious communities are not exactly thrilled about being thus invaded and instrumentalised<sup>24</sup>.

At the same time, it must be acknowledged that religion is not a political-ly affiliated cause in England, in a manner similar to that of Spain, the contemporary United States of America or many other contexts, at least in the sense that there is no necessary association between the left and secularism or the right and faith. Religion is not *per se* divisive or tribal, and it is common for social circles to have a wide range of faith perspectives. Both Labour and Conservative Governments have, at least in recent decades, supported the existence of DRC schools as part of the state system. The Labour Party has historical associations with Non-Conformist political radicals, as much as it does to atheist traditions,<sup>25</sup> and there is a Conservative Humanist organisation.<sup>26</sup> The simmering discontent about outward religious conformity in order to secure school places exists precisely because a broad range of affluent and educated parents are anxious to manoeuvre their way into the best non-fee paying schools that they can access. Even those antagonistic towards organised religion frequently consider the spiritual character of the school a price worth paying, while many other families are religiously neutral, and do not see their ideology or identity as being on the line if their children are educated in a faith related context.

It would be hard to construe the current situation as desirable, much less optimal, but the most grave concern has to be the difference in academic standards across the public sector provision. A thorough investigation into this reality is obviously beyond the scope of our present investigation, the relevant point for our purposes is that faith schools in England are available and supported from the public purse. Parents send their children to these institutions for a wide variety of reasons, and in many cases, the pupils attending will be drawn from extremely diverse backgrounds. In fairness, the majority of state-maintained faith schools will not offer a homogenous cultural environ-

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<sup>23</sup> PENMAN, A., «I faked religion to find a school», *The Independent*, 30<sup>th</sup> September 2010, <<https://www.independent.co.uk/news/education/schools/i-faked-religion-to-find-a-school-2093403.html>> Date of consultation 10<sup>th</sup> November 2022.

<sup>24</sup> «Faking Faith to Get Children a Heysham School Place», *Lancaster Guardian*, 8<sup>th</sup> November 2016, <<https://www.lancasterguardian.co.uk/news/faking-faith-to-get-children-a-heysham-school-place-658130>> Date of consultation 10<sup>th</sup> November 2022.

<sup>25</sup> TURNER, J., *The Labour Church: Religion and Politics in Britain: 1890-1914*, Bloomsbury, London, 2019.

<sup>26</sup> Conservative Humanists <<https://conservativehumanists.org.uk/>> Date of consultation 10<sup>th</sup> November 2022.

ment, and indeed many would not strive to do so. Parents who only wish their children to mix exclusively with coreligionists, or at least peers with adjacent value-systems, will not find this widely available within the state system.

However, it should be highlighted that there are a few local contexts where, for good or ill, this may occur: for example, in a litigation around children spending time with a transgender parent, courts recognised the factual concern that the minors involved would be subject to discriminatory behaviour in their state funded school if the relationship was maintained.<sup>27</sup>

It ought also to be recognized that provision of DRC schools is dependent upon the socio-economic make-up of communities, both present and historically. Not all areas offer provision for all faith groups, as by definition, the establishment of DRC schools is dependent on the input of religious organisations, and there must be a critical mass of believers in the district for this to be viable. It might also be asked whether there was a link between the socio-economic factors at play, and the inability of some families to access the desired form of religious schooling from within state provision. Nevertheless, given that the reported illegal schools have all been Jewish or Islamic, and that most of the DRC schools with fierce competition for entry are of an Anglican or Roman Catholic character, it does not seem sustainable to argue that failure to achieve entry there might be driving families towards unregistered schooling. Indeed, focus on boosting academic attainment and high quality facilities could not contrast more sharply with the conditions within unregistered establishments, which do not prepare pupils accredited qualifications, nor even ensure adequate safety and cleanliness. It, therefore, seems reasonable to conclude that parents sending their children to such institutions are placing religious environment very high on their list of priorities.

Moreover, without doubt, the values and knowledge of teaching staff form an important part of any school context. With regard to teacher recruitment, DRC schools are granted special leeway in the ambit of Equality Law,<sup>28</sup> whilst the nature of this latitude depends upon the precise governance arrangements in place. For instance, voluntary controlled and foundation schools may take faith into account during the appointment process for a head-teacher,<sup>29</sup> and also have the option of allocation up to one fifth of appointments as «*reserved teachers*». This enables applicants during the recruitment process to be filtered ac-

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<sup>27</sup> *Re M* [2017] EWCA Civ 2164.

<sup>28</sup> GARCÍA OLIVA, J. and GINN, D., «The Religious and Ideological Freedom of Teachers within the English Legal Framework: Is the balance between collective and individual rights correct?», *Oxford Journal of Law and Religion*, 2018, 7(2), pp. 185-205.

<sup>29</sup> *School Standards and Framework Act 1998*, c 31, s 60 (as amended).

ording to their «*fitness and competence*» to deliver religious education in harmony with the faith-based character of the employing institution<sup>30</sup>.

On top of which, it is possible to argue that more than mere knowledge of dogma is required. Under certain circumstances, staff at DRC schools undermining religious instruction by behaving in way that was incompatible with doctrine could legitimately face disciplinary action, and in the case of head-teachers and reserved teachers, even dismissal, if their actions were grave enough to undermine their «*fitness and competence*» to perform the role they have been appointed for.

DRC which are voluntary aided enjoy even greater discretion: faith related considerations may be considered when appointing *all* teaching staff and are a possible ground for disciplinary action and dismissal.<sup>31</sup> From the perspective of parents concerned about the influences to which their children are subject, this degree of control might be seen as advantageous. Obviously, however, it comes at a significant price for the freedoms of the staff members in question.

The impact of this concession to collective religious liberty is that individuals may face warnings and sanctions for activities or decisions taken outside of the school sphere (for example, engaging in extra-marital, homosexual or inter-faith relationships). Furthermore, as Vickers highlights, unlike the provisions of the Equality Act 2010, the School Standards and Framework Act 1998 does not apply any test of proportionality, nor require a demonstration that the religious criteria are «*genuine occupational requirements*»; that is, that the religious criterion is of practical relevance to fulfilling a legitimate aim of the school.<sup>32</sup> Vickers questions whether the statutory arrangements can be squared with Human Rights Law in a European context, when it is recognized that they specifically enable discrimination against individuals with no test for proportionality: in reality, providing that the schools act within the boundary of the legislation, they have *carte-blanche* to act as they see fit. This perspective is shared by other authors who also note with dismay the gaping hole blasted into Equality Law to permit such a wide, blanket exemption<sup>33</sup>.

Not all DRC schools enjoy quite such flexibility, because academies and free schools designated as religious are able to apply religious criteria to teacher-recruitment and discipline, but lack the shield of the School Standards and

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<sup>30</sup> *Ibid.* at s 58.

<sup>31</sup> *Ibid.* at s 60.

<sup>32</sup> VICKERS, L. «Religious Discrimination in Schools: The Employment of Teachers and the Public Sector Duty», in Myriam Hunter-Henin (ed), *Law, Religion and Freedoms in Europe: Education in Europe*, Ashgate, Surrey, 2011 pp. 87-106.

<sup>33</sup> THOMPSON, R. «Religion, Belief, Education and Discrimination», *Equal Rights Review*, 2015 (14), pp. 71-106.

Framework Act 1998.<sup>34</sup> As a result, in practice, they must operate within the Equality Act 2010, unless the school can demonstrate that the religious criteria form a «*genuine occupational requirement*». <sup>35</sup>

In pragmatic terms, it is unlikely that an average teacher will be familiar with the intricacies of these provisions, much less a typical parent looking for a suitable school. The key concern for the present is that DRC schools, even within the public sphere, make generous allowance for collective religious liberty, and faith communities associated with such institutions can be assured that teaching staff will be required to keep academic and pastoral conversations in conformity with the approved doctrine. In addition, activities or behaviours outside of school hours which may have an impact on the appointed role of teaching staff can also be addressed via contractual means, with less supervening regulation from Equality Law than is the case in most other contexts. The desirability of this is open to question from a variety of angles, but for our present investigation into parental choice and schooling, at a school and community level, it can be seen that the law robustly upholds collective religious freedoms, perhaps to an overzealous degree.

As might be expected from the picture so far, there is also a wider degree of flexibility given to DRC schools in relation to the nature and content of teaching. Religious education falls outside of the national curriculum, and as might be anticipated, DRC institutions deliver a program which aligns to their chosen ethos.<sup>36</sup> The freedom that institutions have to determine the structure for the teaching of other subjects varies according to the form of governance arrangements in place, but all are subject to inspect by the Office for Standards in Education, Children's Services and Skills: «Ofsted».<sup>37</sup> This means that while schools have considerable latitude arranging their curriculum in accordance with their values, there are limits should this reach the stage of undermining the effectiveness and quality of the education which is offered.

A flashpoint has been the topic of evolution and creationism, although public authorities have generally not been criticised for making insufficient allowance for religious perspectives, rather some critics have voiced that responses needed to be more robust to the presentation of narratives not compatible with mainstream scientific understanding being delivered within science

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<sup>34</sup> *Ibid.* at 76.

<sup>35</sup> SHRIBMAN, N. «A Victory for Common Sense», *New Law Journal*, 2011, (161) at 1248-1250.

<sup>36</sup> UK Government, «Types of Schools» «[https://www.gov.uk/types-of-school/faith-schools#:~: text=Faith%20schools%20have%20to%20follow, can%20apply%20for%20a%20 place](https://www.gov.uk/types-of-school/faith-schools#:~:text=Faith%20schools%20have%20to%20follow,can%20apply%20for%20a%20place)» Date of consultation 10<sup>th</sup> November 2022.

<sup>37</sup> Education Act 2005, s5 and Education and Inspectors Act 2006.

lessons.<sup>38</sup> Nevertheless, despite a culture of respecting religious diversity and striving to work with schools where possible, the shadow of the state inspectorate means that there are limits upon the nature of the material which can be conveyed. DRC schools which fail to demonstrate appropriate respect for British democratic values, or are unable to meet minimum standards, will face regulatory consequences which could ultimately lead to their closure.

In summary, in relation to publicly funded DRC schools, a wide degree of flexibility is accorded to operate within statutory parameters. Direct discrimination is possible in relation to the admission of pupils and recruitment of staff, teaching professionals can be required to present material and behave in conformity with the school ethos, and the curriculum and mode of delivery can be tailored to suit the needs of the religious context. If an Evangelical Christian primary school wishes to exclude *The Worst Witch* or *Harry Potter* from its library or pool of books for English lessons, it is free to do so. Similarly, a secondary school for Orthodox Jewish girls is at liberty to ensure that any singing recitals or dance performances given by pupils as part of drama or music assessments are attended exclusively by female audience members. However, if either institution is promoting ideas which undermine individual liberty, the rule of law or democratic principles,<sup>39</sup> or are simply failing to meet required standards of academic rigor, the wheels of the state inspectorate will grind into gear<sup>40</sup>.

Thus, although publicly funded DRC schools enjoy considerable room for manoeuvre, the consequences of stepping outside of the designated boundaries are serious. It should also, of course, be noted that, as we shall discuss further below, we have been focusing on the collective liberty of the school governing authority and the faith community that it aims to serve. Another set of questions arise when we drill down to the level of individual families, if parents find that the arrangements of the school in question do not sit comfortably with their interpretation of religious doctrine or ideas of best practice.

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<sup>38</sup> TURNER, B., *The New Blackwell Companion to the Sociology of Religion*, Wiley, New Jersey, 2016, 299.

<sup>39</sup> Department for Education «Promoting Fundamental British Values as part of SMSC in Schools: Departmental Advice for Maintained Schools» 2014.

<sup>40</sup> Ofsted «School Inspection Handbook», 11<sup>th</sup> July 2022, «<https://www.gov.uk/government/publications/school-inspection-handbook-eif/school-inspection-handbook>» Date of consultation 10<sup>th</sup> November 2022.

## 2.2 Schools with no designated religious character

It is frequently a surprise to people not familiar with the English paradigm to learn that all state schools are, in some sense, faith schools.<sup>41</sup> As Rivers explains, this a practical consequence of the structures of an established religion.<sup>42</sup> It is striking that Non-DRC schools are required by statute to hold a daily act of worship,<sup>43</sup> which is «*wholly or mainly of a broadly Christian character*»,<sup>44</sup> a feature of the law which undermines any claim that England might have a secular educational framework. It also reveals that the history of establishment in this jurisdiction has been complex and slowly evolving, as the centuries have seen a gradual transmutation of an oppressive, exclusionary Early Modern State Church, into a regime which embodies an enabling stance towards the belief and conscience of citizens and residents.<sup>45</sup> It is no accident that the reference is to «Christian», rather than Anglican worship, reflects XIX century jostling between the Church of England and Non-Conformist interests.<sup>46</sup> Ironically, the requirement for an act of worship of a broadly Christian character stems from early efforts at inclusivity, or at least harmonious cooperation.

Needless to say, this does not mean that such an inherited aspect of the legal framework is necessarily appropriate, much less desirable in the XXI century, but the clause does need to be understood in context. It cannot be over-emphasised that this is a setting in which the law must be read in light of the prevailing Constitutional Culture. This has been defined by us previously as the set of norms, values and expectations which govern the collective life within the State.<sup>47</sup> These systems contain both intra-legal and extra-legal elements, and even the legal elements can only be rendered intelligible in relation to the prevailing social expectations. Therefore, it is vital to comprehend that the mandatory act of daily worship is interpreted in an extremely loose manner. Most schools have some form of morning gathering which is partly administrative in nature, with reminders about rules about acceptable uses of footballs or the contents of lunchboxes. The «worship» element often takes the form of a short

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<sup>41</sup> SANDBERG, R., *Law and Religion* CUP, Cambridge, 2012, 152.

<sup>42</sup> RIVERS, J., *The Law of Organized Religions* OUP, Oxford, 2010 at 234.

<sup>43</sup> *Education Act 1996*, c 56, s 390.

<sup>44</sup> *Ibid.* at Sch 20.

<sup>45</sup> GARCÍA OLIVA, J., and HALL, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain*, Routledge: Abingdon, 2017.

<sup>46</sup> The currently arrangements are descended from the famous «Cowper Temple Clause»-See the *Education Act 1870*, s14.

<sup>47</sup> GARCÍA OLIVA, J., and HALL, H., «Peoples and Sovereignty: Constitutional Law Lessons from Greenland and Denmark», *Public Law* 2020, pp. 331-349.

moral or philosophical reflection given by a teacher, and the «broadly Christian» character is frequently reflected in appeals to general principles which most people of good will would support, regardless of their spiritual orientation, e.g. showing kindness and consideration of other members of the community.

Scandals and complaints over this element of school life, often referred to as «assembly», do occur, but are comparatively rare, and often relate to matters other than religion. For instance, a school in the north-east of England was accused of using it as a vehicle to intimidate pupils, and establish dominance, rather than motivation and encouragement.<sup>48</sup> Disputes surrounding religion which do arise tend to happen in the orbit of much wider dysfunction and controversy.

For example, scandals surrounding a non DRC school in Birmingham arose over accusations of a broad agenda to introduce a hard line, Islamic culture into the academy, and complaints included assembly being hijacked for proselytising and chanting anti-Christian slogans.<sup>49</sup> Not only was such a conduct clearly stretching even the hyper-pliable statutory clauses to the point of snapping, it was part of a problematic pattern which went well beyond issues connected with the act of daily worship. Indeed, the headteacher responsible for the school at the time was ultimately struck off for professional misconduct by the National College for Teaching and Leadership.<sup>50</sup> Extreme and dramatic cases aside, school assemblies rarely hit the headline, and while there may be a variety of views within society on the appropriateness of the current law, it is not a hot topic at election time, nor high on the agenda of any political party.

There are opt out provisions which enable parents to withdraw their children from the act of collective worship, and for young people themselves to decline to participate after the age of 16.<sup>51</sup> As a result, when the position is considered in the round, taking into account the expansive and sensitive interpretation adopted by most schools in relation to the law, and the mechanism allowing for families uncomfortable with arrangements to remove pupils from

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<sup>48</sup> PERRAUDIN, F., «Academy trust accused of using assemblies to intimidate students», *The Guardian*, 16<sup>th</sup> March 2019, «<https://www.theguardian.com/education/2019/mar/16/outwood-grange-academy-trust-accused-assemblies-intimidate-students-discipline>» Date of consultation 10<sup>th</sup> November 2022.

<sup>49</sup> DAY, H., «Pupils allegedly chanted "We don't believe in Christmas" at school implicated in Trojan Horse scandal», *The Mirror*, 10<sup>th</sup> November 2015, «<https://www.mirror.co.uk/news/uk-news/pupils-allegedly-chanted-we-dont-6802761>» Date of consultation 10<sup>th</sup> November 2022.

<sup>50</sup> «Trojan Horse Headteacher Receives Lifetime Ban for Professional Misconduct», *The Guardian*, 4<sup>th</sup> January 2016, «<https://www.theguardian.com/education/2016/jan/04/trojan-horse-headteacher-receives-lifetime-ban-for-professional-misconduct>» Date of consultation 10<sup>th</sup> November 2022.

<sup>51</sup> *School Standards and Framework Act 1998 s 71*; and *Education and Inspections Act 2006 s 55*.

this aspect of collective activities, it is difficult to construe the legal framework on offer as intolerable to large numbers of people on religious grounds.

Similarly, non-DRC schools are expected to offer religious education, but there is a parental right to withdraw pupils.<sup>52</sup> Once again, the ideological freedoms of children are treated as being coterminous with, or possibly even contained within, parental liberties. This is undesirable, and arguably incompatible, with the Article 8 and 9 rights of the young people in question, incorporated into the domestic framework by virtue of the Human Rights Act 1998.<sup>53</sup> It also violates the United Nations Convention on the Rights of the Child, Articles 12 and 14, as Lundy correctly argues, given that it makes no space for the independent views or beliefs of the pupils themselves<sup>54</sup>.

This exclusively adult-focused stance of the legislation is problematic from a human rights standpoint, but it sheds no real light on why parents might be driven to illegally retreat from the framework of licit education. If participating in religious study, even of an academic rather than devotional nature, is incompatible with the doctrine or worldview held by the family, there is no requirement for the child to join in. The excision of religious studies from the general curriculum means that this decision makes no material difference to the grades received or assessments undertaken, so there is no risk of academic detriment.

Again, in common with collective worship, it is also appropriate to note that the wider context is geared towards inclusion, and special attention is ordinarily paid to faith communities prominently represented within the surrounding area. Every local authority is bound by legislation to establish a Standing Advisory Council on Religious Education (SACRE),<sup>55</sup> in order to regulate the content of religious education in state funded non-DRC schools.<sup>56</sup> Church of England representation is mandatory, but the arrangements specifically allow for the presence from other faith groups and quasi-faith groups (e.g. humanism). Although the non-statutory governmental guidance promoting the incorporation of multiple religious perspectives onto the SACRE technically has the status of «soft law», and is therefore non-binding, in the vast majority

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<sup>52</sup> School Standards and Framework Act 1998 s 71.

<sup>53</sup> The United Kingdom is a dualist State, meaning that international agreements do not automatically form part of the body of national law.

<sup>54</sup> LUNDY, L., «Voice Is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child», *British Educational Research Journal*, 2013, 33, pp. 927-942, p 927.

<sup>55</sup> Education Act 1996, s 390.

<sup>56</sup> Education Act 2002, s 80.

of areas it is accepted and seen as desirable.<sup>57</sup> Working with grassroots faith groups to ensure that children gain a nuanced and accurate understanding of the various beliefs represented in their surrounding district, as well as the wider world, is generally recognized as a positive endeavor by councils.

It must be acknowledged that the playing field is not completely level, in the sense that the Church of England has a seat at the table as a matter of right, whereas other religious and spiritual groups join on the basis of invitation. Although not uncontroversial, however, there are pragmatic reasons behind the current arrangements. The Church of England has a parochial structure that covers every community, while the density of other faith groups varies dramatically from region to region and even between districts in the same urban area.<sup>58</sup>

Moreover, imposing standard requirements throughout England would undermine the aim of giving local communities the autonomy to determine what arrangements and representation would be most appropriate to their unique circumstances. For example, in some communities it would be unjust and irrational not to include Jewish or Muslim members on the SACRE, whereas in others it would be challenging for public authorities to find any delegates willing and able to serve. Furthermore, uniform rules could easily result in faith groups with small numbers nationally, but a very strong presence in some local settings, not keeping a voice in areas where this would be beneficial. It is also important to note that not all faith groups have a single, cohesive hierarchical structure or identity, meaning that a blanket mandate for representation would be unwieldy and potentially divisive. If, for instance, statutory guidance demanded that every SACRE had one Jewish representative, a liberal, Reform appointee might not be deemed suitable by some members of the Charedi community living locally, and indeed vice versa.

We are not suggesting that the current paradigm is perfect, but there is a lot of merit in the degree of local discretion and flexibility afforded. For the purposes of our immediate study, it is relevant that the framework in respect of religious education in DRC schools does not amount to a stark, binary choice between acceptance of a pre-packaged product, or withdrawal from participation. Faith groups on the ground have an option of working within the SACRE to ensure that children learn about their beliefs and practices, helping young people from within their community to understand their own traditions, and giving their peers insight into their worldview.

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<sup>57</sup> HM Government, *Religious Education in English Schools: Non-Statutory Guidance*, 2010. See especially, pp. 19-25.

<sup>58</sup> Church of England, *Research and Statistics*, «<https://www.churchofengland.org/about/research-and-statistics>» Date of consultation 10<sup>th</sup> November 2022.

With regard to the academic curriculum aside from religious education, the degree of autonomy enjoyed by non-DRC schools depends upon their governance arrangements. There is nothing to prevent schools making choices which reflect the particular community from which their pupils are drawn, and many teachers, headteachers and governing bodies would wish to operate on this basis. Schools have a specific duty to consult with parents in devising Relationships Education, although the government has made it clear that there is no right of withdrawal from this aspect of the curriculum<sup>59</sup>.

This is an area in which the right of children to information about healthy and appropriate relationships have been deemed by the executive and legislature<sup>60</sup> to outweigh the importance of respecting parental choice about the ideas and values to which children are exposed.<sup>61</sup> Sex education is not offered to pupils until secondary school, and there is an option for parental withdrawal in respect of this aspect of the program, up until three terms before the young person turns sixteen, at which point the pupil themselves may elect to attend these classes, irrespective of parental wishes.

It should be noted that the duty to provide relationships education during primary years, and sex and relationships education at secondary stage, applies to DRC and non-DRC institutions, as well as the independent sector, so there is no escape from the provisions at an organisational level with the lawful school system. Some anxieties have been expressed over school authorities communicating with parents in an attempt to orchestrate a mass opt out of sex education.<sup>62</sup> It should be noted that part of this criticism have come from Humanists UK, a campaign group which actively promotes a secularist agenda and lobbies for the current legal accommodation of faith schools to be reformed.<sup>63</sup> There is, of course, absolutely nothing wrong with an organisation exercising its democratic liberties in this way, but it is not attempting to offer a neutral perspective. The school in question (Lubavitch Senior Girls School)

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<sup>59</sup> UK Government, «Relationships education, relationships and sex education, (RSE) and health education: Frequently Asked Questions», «[www.gov.uk/government/news/relationships-education-relationships-and-sex-education-rse-and-health-education-faqs](http://www.gov.uk/government/news/relationships-education-relationships-and-sex-education-rse-and-health-education-faqs)» Date of consultation 15<sup>th</sup> November 2022.

<sup>60</sup> Statutory guidance has been issued pursuant to Education Act 2002 s80A and Education Act 1996 s408.

<sup>61</sup> Department for Education, «Relationships Education, Relationships and Sex Education (RSE) and Health Education» 25<sup>th</sup> June 2019, updated 13<sup>th</sup> September 2021.

<sup>62</sup> WOODS, D., «Charity criticises a faith school for encouraging parents to withdraw pupils from sex education lessons», *inews* 24<sup>th</sup> July 2019 «[www.inews.co.uk/news/charity-faith-school-sex-education-lessons-stamford-hill-london-318107](http://www.inews.co.uk/news/charity-faith-school-sex-education-lessons-stamford-hill-london-318107)» Date of consultation 15<sup>th</sup> November 2022.

<sup>63</sup> HUMANISTS UK, «Our Campaigns» «[www.humanists.uk/campaigns/](http://www.humanists.uk/campaigns/)» Date of consultation 15<sup>th</sup> November 2022.

disputed some of the facts asserted, and stressed that whilst it respected the preference of many parents to talk themselves about «*the practical facts of intimacy*» with their daughters privately at home, it also recognised its statutory obligations to sixteen year olds, and made accommodation for small groups to speak with teachers about issues that their parents did not want to discuss. It is also fair to point out that much of the debate around this case from external commentators used gendered language, referring to «girls» and emphasising the school's own terminology in its communication. It should be explained that this was due to the single sex nature of the institution. Segregated education is not particularly unusual in England, and by no means all single sex schools are of DRC, it simply reflects a cultural tradition of elite schooling having historically been arranged in this way. Nevertheless, a casual reader might easily have come away with the impression that the students were being denied sex education because the community in question did not consider it appropriate for females, whereas in reality girls were being discussed because the school in question did not have any boys.

The contrasting perspectives on this particular controversy are significant for our study, given that they illustrate several important dimensions of the present paradigm with regard to sex and relationships education in schools: 1) there is no escaping of the general duty to deliver sex and relationships education; 2) given the overarching legal framework on Equality and Human Rights, some communities worry that their children will be given knowledge and introduced to ideas of which they disapprove; 3) parental opt outs are in place and can be exercised en bloc, especially if school authorities engineer this; and 4) some of the debate can be extremely divisive.

Controversy over sex and relationships education can arise in any school, and is likely to be determined by the demographic of the population that the school serves, rather than whether or not the institution has a DRC. So, for instance, a Church of England school attended by pupils from a broad range of faith backgrounds, for the reasons discussed above in relation to admissions, could conceivably have fewer concerns to deal with than a non-DRC school which served an area with a large Muslim population, or a high concentration of gender critical feminists, given that LGBT+ issues have been a particular flashpoint<sup>64</sup>.

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<sup>64</sup> FERGUSON, D., «We can't give in: The Birmingham school on the frontline of anti-LGBT protests», *The Guardian*, 26<sup>th</sup> May 2019, <<https://www.theguardian.com/uk-news/2019/may/26/birmingham-anderton-park-primary-muslim-protests-lgbt-teaching-rights>> Date of consultation 15<sup>th</sup> November 2022.

It is also critical to notice that school authorities encouraging parents to exercise their right to withdraw children from sex education are accepting their legal duties and attempting to work within the law. Even though there are legitimate concerns about efforts to use the letter of the statute to undermine its spirit, it is significant that the response from the overwhelming majority of schools within the legal framework has been acceptance of their obligations. Whatever interpretation of events is adopted, the Lubavitch Senior Girls School was without doubt committed to working within the law, and this is going to be the case for any institution intent upon remaining licit and passing mandatory state inspections.

So far, we have stated that there is considerable freedom in designing curriculum, both for schools which are DRC and non-DRC within the state maintained sector, but this will not extend to undermining the basic guarantees of Equality Law, ignoring requirements about sex education or presenting material incompatible with contemporary scientific consensus. It is time for us to wonder what the position of private schools is in practice.

### 2.3 Independent Schools

Independent schools are those which are not in receipt of direct state funding, even though they enjoy considerable fiscal advantage and indirect public support through Charity Law, a reality which is politically controversial, as James, Kenway and Boden assert.<sup>65</sup> Many independent schools have a marked religious tradition or character, but this does not tend to cause the same level of controversy as found in the state sector. The combined considerations that such institutions are not reliant on public funding, and that parents are by definition voluntary clients (either paying or choosing take advantage of a bursary scheme) means that the education provided is a matter of parental choice.

These schools are free to determine their curriculum, including in relation to religious studies, but must offer education on relationships and sex. The environment, buildings and quality of teaching must satisfy minimum standards

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<sup>65</sup> JAMES, M., KENWAY, J. and BODEN, R., «The Public Cost of Private Schools: Rising Fees and Luxury Facilities Raise Questions About Charitable Status», *The Conversation*, 27<sup>th</sup> June 2022, «<https://theconversation.com/the-public-cost-of-private-schools-rising-fees-and-luxury-facilities-raise-questions-about-charitable-status-182060>» (Date of consultation 15<sup>th</sup> November 2022).

outlined in law, and this must be monitored by regular mandatory inspections.<sup>66</sup> Independent schools do have some agency in deciding which system of oversight they wish to adopt, and institutions may be inspected by Ofsted, the Independent Schools Inspectorate or the Schools Inspection Service.<sup>67</sup> Regardless of the inspectorate selected, both the quality of education and wellbeing of pupils will be monitored. Private schools do not have *carte blanche* in terms of their curriculum, and must provide teaching which equips young people to function in the XXI century society, without unduly limiting their access to jobs or higher education. Equality Law, liberal democratic values and human dignity must be respected,<sup>68</sup> and an appropriate range of subjects must be taught to an acceptable standard.<sup>69</sup> No legal provision prevents the teaching being carried out through the medium of a specified language, but if pupils did not attain age appropriate fluency in written and spoken English, it is difficult to imagine that the teaching would be deemed to satisfy the statutory requirements.

As might be anticipated, there are also conditions about the suitability of teaching staff,<sup>70</sup> although the specific qualifications demanded of professionals in state maintained schools are not imposed by law in the private sphere.<sup>71</sup> The state of premises and accommodation are also regulated, in order to ensure that the health, safety and wellbeing of students are not placed in jeopardy.

Without doubt, most parents who choose to pay for private schooling are keen to ensure that their children receive the highest quality of education possible, and failing to meet the expectation of paying customers is not a good survival strategy for any business. Even though there is undoubtedly some subjectivity when it comes to determining what constitutes a successful educational experience, by and large, schools which do not maximise the chances of pupils fulfilling their career ambitions or safeguard physical and mental health cannot hope to flourish. Those with the economic resources to do so are willing to pay a high premium to secure their children's future. The Independent

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<sup>66</sup> Education (Independent School Standards) Regulations 2014.

<sup>67</sup> UK Government, «Types of School: Private School», «[www.gov.uk/types-of-school/private-schools](http://www.gov.uk/types-of-school/private-schools)» Date of consultation 15<sup>th</sup> November 2022.

<sup>68</sup> UK Government, «Guidance on Promoting British Values», 27<sup>th</sup> November 2014, «[www.gov.uk/government/news/guidance-on-promoting-british-values-in-schools-published](http://www.gov.uk/government/news/guidance-on-promoting-british-values-in-schools-published)» Date of consultation 15<sup>th</sup> November 2022.

<sup>69</sup> Department for Education, «The Independent School Standards: Guidance for Independent Schools», 1<sup>st</sup> November 2019, pp. 5-17.

<sup>70</sup> *Ibid.*, pp. 34-37.

<sup>71</sup> UK Government, «What is a PGCE Course?», «[getintoteaching.education.gov.uk/what-is-a-pgce](http://getintoteaching.education.gov.uk/what-is-a-pgce)» Date of consultation 15<sup>th</sup> November 2022.

Schools Council Census for 2022<sup>72</sup> found that the average fees for boarding school were approximately £27,000 for primary school age, £36,500 for secondary and £39,000 for sixth formers (sixteen to eighteen year olds). Day schools were around £14,500 for primary level, £16, 500 for secondary and £17,000 for sixth form.<sup>73</sup>

When it is remembered that the median UK salary is £33,280, it is readily apparent that private education is inaccessible to large swathes of the population, particularly for families with several children who are anxious to give all siblings an equal start in life.<sup>74</sup> Furthermore, as well as the economic barriers to accessing education, there are also ideological considerations. Fee paying schools are, at one level, a mode of pooling resources, and a method by which parents can collectively buy education in an environment of their choosing. Nonetheless, in order to achieve this, not only they need to have sufficient money, they also have to find a critical mass of people whose worldview is sufficiently aligned to their own.

Thus, although independent schools offer considerably flexibility in relation to curriculum and religious and philosophical ethos, this is not infinitely elastic. Moreover, as an option they are beyond the reach of the majority of families within England. The fierce competition for high performing state schools described above reflects the desire to middle class parents to obtain an elite academic experience without suffering the exorbitant fees.

## 2.4 Home-schooling

A potentially less expensive option for education outside of the state school sector lies in home education. England operates an extremely libertarian model in this regard. Parents choosing to home-school do not have demonstrate that instruction is delivered by a person with specific qualifications, or even a minimum level of educational attainment. There are no requirements about the curriculum which must be followed, the methods to be adopted, or the skills

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<sup>72</sup> Independent Schools Council, ISC Census 2022, «[www.isc.co.uk/research/annual-census/](http://www.isc.co.uk/research/annual-census/)» Date of consultation 15<sup>th</sup> November 2022.

<sup>73</sup> School Guide, «How Much Does Private School Cost?» «[www.schoolguide.co.uk/blog/how-much-does-private-school-cost](http://www.schoolguide.co.uk/blog/how-much-does-private-school-cost)» Date of consultation 15<sup>th</sup> November 2022.

<sup>74</sup> Office for National Statistics, «Employee Earnings in the UK: 2022», 26<sup>th</sup> October 2022 «[www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2022](http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2022)» Date of consultation 15<sup>th</sup> November 2022.

and competencies that should be at least targets for a young person of a specified age and no additional educational needs.<sup>75</sup>

All that is demanded is that a child of compulsory school age be in receipt of an «efficient» and «full-time» education.<sup>76</sup> Even more alarmingly, there is no obligation on the part of local authorities to proactively, or regularly, monitor the standard of education, unless they have some reason to be concerned for that individual's wellbeing. It is true that the Education Act imposes a duty on public authorities to identify children who are not registered and not receiving an adequate education, but this obligation is vague in nature and hedged with the caveat «in so far as possible.»<sup>77</sup> It does not come close to mandating, or even *enabling*, regular checks to be carried out.

It is telling that not only is there no duty to inspect, the local authority is not legally entitled to enter a dwelling house or insist on seeing a child, solely for the purpose of monitoring their education.<sup>78</sup> Policies at a local level vary enormously, but in the harsh financial climate of a post-pandemic world, local government bodies in England are struggling to meet their mandatory statutory duties, and are, consequently, cutting back on all activities not positively required by law. In a context where provision of child services is shrinking, rather than expanding, the optional monitoring of home-schooling has a vulnerable immediate future, even where it is currently in place. The position is complicated even further by the fact that if parents choose to home school their children from the very beginning of their educational journey, there is no obligation to notify the local authority.<sup>79</sup> Consequently, some children remain off the radar, because they were never incorporated into the system of state school provision. Department of Education guidance encourages parents to voluntarily notify the local authority, and access the help and support that is available, but this is ultimately a matter of choice.

In families where children have begun attending school, parents must write and give notice of their intention to withdraw a child and home-school, so the chances of oversight are greater, but as previously stated, even this does not guarantee any inspection or safeguarding. Within the context of education in this environment, parents are free to teach whatever religious doctrines they wish, engage in prayer or other forms of devotion as part of the school day and control every other aspect of the child's environment and experience.

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<sup>75</sup> Department for Education, «Elective Home Education» 1<sup>st</sup> April 20, pp. 1-12.

<sup>76</sup> Education Act 1996 s 7.

<sup>77</sup> Education Act 1996 s 436A.

<sup>78</sup> Education Act 2002, s 175.

<sup>79</sup> Department for Education, «Elective Home Education», 01/04/20, paras 4.1-5.19.

The guidance issued by the Department of Education explains that parents home schooling their children may quite legitimately use external providers for some purposes, and may meet with other home schooling families and share resources. Furthermore, it explicitly warns in plain language that groups of five or more children being taught communally may require registration, and that operating an unregistered school may amount to a criminal offence. It warns that such illegal institutions may be inspected by Ofsted and closed down, and advises parents unsure about the status of a particular school to contact either their local authority or Ofsted for clarification.<sup>80</sup>

There is also careful and explicit discussion of faith communities:

*«Local authorities should have an understanding of, and be sensitive to, the distinct ethos and needs of children in specific faith communities and be able to take into account the impact that faith has on the home education priorities of parent... However, faith considerations should not in any way stop a child from receiving a suitable full-time education, and that will remain the local authority's main concern. It is likely to be helpful if you are able to explain how faith considerations have affected the content of the home education – if that is the case.»<sup>81</sup>*

The guidance attempts to strike a balance between acknowledging, on the one hand, that spiritual beliefs may shape the way in which parents would wish a child's education to be designed and delivered, but on the other, emphasising that religion cannot justify flouting the legislative requirement to ensure that a young person receives an appropriate education. Given the lack of any rigid prescription about the nature, content and format of education to be delivered, combined with the absence of any need to demonstrate appropriate qualification on the part of instructors, it is difficult to imagine how the option of home-schooling could be inaccessible in terms of the parameters set. For instance, even extremely free form educational approaches, such as the controversial «unschooling» philosophy (in which children's learning activities are self-directed), are permissible within the English framework.<sup>82</sup>

Yet even allowing for this, home-schooling may be problematic, or even unviable for other reasons. It is contingent upon at least one adult being present

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<sup>80</sup> *Ibid.*, paras 6.6 and 6.7.

<sup>81</sup> *Ibid.* para 6.14.

<sup>82</sup> PARKES, A., «Rise of the home “unschoolers” where children learn only what they want to», *The Guardian* 11<sup>th</sup> October 2016 [www.theguardian.com/education/2016/oct/11/unschool-children-monitor-home-schooling-education](http://www.theguardian.com/education/2016/oct/11/unschool-children-monitor-home-schooling-education) Date of consultation 15<sup>th</sup> November 2022.

to supervise and assist the children in their learning, which may be a barrier for single parents, or in households where all adults are engaged in paid employment or childcare for infants. In other cases, even if the statutory framework does not mandate particular qualifications or language skills, parents may consider that they are not equipped to deliver appropriate teaching, and may lack the money to employ a tutor. Desiring a child to be educated within a particular environment for faith-based reasons does not signify an automatic indifference to academic achievement. Some parents may prioritise spiritual training over worldly success, or even consider that preparedness for practical skills in a post-apocalyptic society to be more pressing than textbook based learning, but this is by no means true of all parents with strong religious convictions.

Considering the context holistically, although there are few legal obstacles to home-schooling, there are many practical challenges faced by families considering this as a route to an education which effectively transmits the values of their faith or worldview. As with all of the possible routes to securing an education in harmony with parental religious perspectives, home-schooling offers both advantages and drawbacks. Having identified this reality across the spectrum of possibilities within the current legal framework, we come to one of our core questions: what are some parents unable to achieve within a lawful educational model? What are unregistered schools offering that registered schools or home-schooling options fail to deliver?

## **2.5 What is unavailable within the legal education framework, and potentially perceived to be available from unregistered schools?**

As we have seen, the state funded sector offers DRC schools that facilitate education within the ethos of a specified religious tradition. It is true that not all areas have provisions for all faiths, and even where DRC schools are available, they may be over subscribed, so that not all families wanting to secure a place will be in a position to do so. Furthermore, the popularity of some institutions, combined with their own entrance policies and local demographics, may mean that the pupils attending are drawn from a wide variety of faith and philosophical backgrounds. As we have been at pains to stress, parents who desire a religiously monochrome environment will not find this within the majority of state-maintained schools in contemporary England, whether or not they are DRC.

In addition, even where a DRC institution of the approach umbrella faith is available, it may not match the beliefs of all parents. Families may not regard

the interpretation of Christianity, Judaism, Islam or other faith on offer as being closely enough aligned with their own beliefs to be an acceptable learning environment. In many cases it may be considered too open or liberal, a risk exacerbated by the statutory requirements to teach a curriculum which is balanced, reflects current scientific understanding, includes sex and relationships education and supports liberal democratic values and Equality Law.

All of these issues apply a fortiori to non-DRC state-maintained schools. Pupils will not be forced to attend collective worship or participate in even the academic study of religion, but will necessarily mix with peers growing up in homes with a diversity of viewpoints, study a range of subjects and be exposed to materials and ideas which parents may find objectionable. Schools may choose to respect parental objections to participation in certain lessons or activities, but there is no overarching statutory right of withdrawal on religious grounds, so for example, it is a matter of local policy as to whether a particular school chooses to excuse Muslim pupils from music lessons if their parents view this as problematic.<sup>83</sup>

In theory, registered private schools can create a tailored environment which caters to the preferences of parents, but these are economically inaccessible for many families. Furthermore, there may not be convenient opportunities available, if there are not sufficient funds in the coffers to pay fees. There may not be a desired school within the local area, and parents may prefer not to send their children to board. Equally, the conditions imposed by the appointed inspectorate may render the education undesirable in the eyes of some religiously strict and conservative parents. Exposure to ideas which conflict with the faith perspective of the home (e.g. the theory of evolution, or acceptance of LGBT rights) may be deemed spiritually and morally corrosive.<sup>84</sup>

Home-schooling allows for a religiously controlled environment, and parents have complete discretion over what activities and ideas their children encounter. No direct state oversight is necessary, and unless public authorities have reason to be concerned about the child's circumstances, there is no right to demand to enter a home and interview, or even observe a child, in order to monitor their educational process. However, parents may conclude that they lack the resources for this education model.

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<sup>83</sup> «Muslim pupils taken out of music lessons because Islam forbids playing an instrument», *Evening Standard*, 1<sup>st</sup> July 2010 [www.standard.co.uk/hp/front/muslim-pupils-taken-out-of-music-lessons-because-islam-forbids-playing-an-instrument-6487141.html](http://www.standard.co.uk/hp/front/muslim-pupils-taken-out-of-music-lessons-because-islam-forbids-playing-an-instrument-6487141.html) Date of consultation 15<sup>th</sup> November 2022.

<sup>84</sup> KNAPP, A., «Why some Christians reject evolution», *Forbes* 7<sup>th</sup> May 2012, [www.forbes.com/sites/alexknapp/2012/05/07/why-some-christians-reject-evolution/](http://www.forbes.com/sites/alexknapp/2012/05/07/why-some-christians-reject-evolution/) Date of consultation 15<sup>th</sup> November 2022.

Taking all of the above into account, the aspects of the current legal framework on education which might motivate parents to send their children to unregistered schools are as follows:

- 1) The inability to keep children insulated from ideas or activities which conflict with parental interpretation of religious doctrine.
- 2) The inability to prevent children mixing with peers who have been exposed to other worldviews or possess knowledge which parents deem transgressive or not age appropriate. For instance, it is possible to withdraw children from sex education, but it is not feasible to avoid situations in which their friends relay (accurately or otherwise) the information conveyed in such classes.

Having identified these elements of licit educational provision which some families object so strongly that, in their view, justifies to exit the system via the backdoor and flout the law, we are bound to ask whether the framework is in need of reform. Without doubt, our discussion so far has identified some concerning elements, viz: 1) The inequality of educational opportunity and the varying academic quality of state schools, leading for fierce competition to enter the most desirable public institutions, which are often coincidentally DRC schools; 2) The archaic arrangements in respect of collective worship and complexity around the composition of the SACRE body; and 3) The lack of respect for the independent rights of children and young people in relation to religious studies and sex and relationship education.

Undoubtedly, some of the identified issues above demand an urgent overhaul of arrangements, while others merit investigation and further consideration (for instance, as discussed, there are reasons why, in pragmatic terms, the unique position of the Church of England in relation to the SACRE may be defensible, and even beneficial, for faith communities in general). Nonetheless, none of these matters really relate to the two core legal drivers towards unregistered schools, and on the other hand, despite the fact that there may be other social factors at play (e.g. pressure from fellow community members to conform, or support the enterprise of the people running the unregistered institutions), the focus of this article is on the considerations stemming from the legal arrangements.

Does the fact that the current educational system within England does not permit parents to insulate their children from interaction with people and ideas outside of their narrow religious community demand action? The logical conclusion must surely be no, both in terms of fair distribution of collective resources, and far more importantly, a children's rights perspective.

To deal with the lesser consideration first, there is simply no way that state authorities can furnish *a la carte* education for every family. Either all children would have to be deprived of all conceivable triggers for dogmatic objection to aspects of the curriculum, or resources would have to be in place for extensive and ad hoc parental opt out in all lessons. It would be destructive to strip away all music from schools, on the grounds that some traditions within Islam regard it as problematic, or to deprive all students of the opportunity to read or perform Shakespeare's *The Tempest*, on the basis that certain interpretations of the Christian faith condemn magic and witchcraft. *Macbeth* is probably fairly unobjectionable, given that the witches are depicted as unambiguously evil, but the protagonist of the *Tempest*, Prospero, is essentially a hero magician with his personal pet demon.<sup>85</sup> The point is not a frivolous one, because it illustrates that an attempt to render the teaching of literature religiously unobjectionable would excise some classic works of authors, including Shakespeare, that are part of the cultural patrimony of all pupils growing up in England. This particular play also provides fascinating material for discussions around colonialism, slavery, justice and gender politics, all of which would be lost if it was banished due to the Duke's spirit summoning habits.<sup>86</sup>

This is just a single example, and there are countless others, demonstrating the impossibility of cleansing the school curriculum of potentially controversial material, and the immense cost of doing so in terms of educational opportunity, across the gamut of arts, humanities and sciences. Should all pupils in state maintained schools be deprived from learning about Darwin or geology, because such topics might offend some creationist or Young Earth perspectives?<sup>87</sup>

The possibility of offering alternative lessons for pupils when elements of the teaching offended parental beliefs would become unworkable if it was offered as a universal right. Schools simply would not have the resources to provide supervision, much less alternative classes, if an open-ended right to objection was conferred. There are good reasons why the Article 9 (2) freedom to manifest religious beliefs is a qualified, rather than an absolute, right.

An even more weighty consideration than the logistical unmanageability of allowing parents such a power to veto educational arrangements, is the impact that it would have on the interests of their children as individuals.

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<sup>85</sup> See, for example, *The Tempest* Act I, Scene II, Line 314: «*Hast thou, spirit, performed the tempest that I bade thee?*»

<sup>86</sup> LOOMBA, A., *Shakespeare, Race and Colonialism*, OUP, Oxford, 2002.

<sup>87</sup> «Creationism and Intelligent Design», *The BBC*, 2<sup>nd</sup> June 2009 [www.bbc.co.uk/religion/religions/christianity/beliefs/creationism\\_1.shtml](http://www.bbc.co.uk/religion/religions/christianity/beliefs/creationism_1.shtml). Date of consultation 15<sup>th</sup> November 2022.

Not only do the rights of other pupils to a full and enriching educational experience need to be balanced against the freedom of those from conservative religious backgrounds to receive education in harmony with their identity and heritage, the rights of those young people to an effective education which enables them to form their own beliefs, and ultimately pursue their own life goals, also must be factored into the equation. Children are not property, and parental and child rights are not isomorphic or coterminous for all purposes. Young people enjoy human rights to as great an extent as any other group of citizens or residents within the jurisdictions, and their liberties cannot be subsumed by parental freedoms in respect of family autonomy or religious beliefs.<sup>88</sup>

Not only is this assertion supported by both the ECHR and the UNCRC, it is an uncontested pillar of the Children Act 1989 and well established Common Law principles on the autonomy of minors. In the iconic *Gillick* decision, the House of Lords made it crystal clear that parental responsibility exists for the benefit of children, not parents, and gradually tapers as the young person acquires capacity to make independent choices in relation to discreet issues.<sup>89</sup> Once a minor has sufficient understanding to weigh the consequences of a particular decision, parental authority to make the judgment is extinguished. Furthermore, the entire thrust of this watershed ruling, was that parents are not entitled to control the flow of information of minor children. The mother bringing the action sought reassurance that her daughters would not be given contraceptive advice without her knowledge, but failed to obtain this, and ironically brought legal clarity about the scope of child freedoms.

In short, the rights of children cannot be sacrificed on the altar on parental ideology, and if the legal framework shifted to somehow accommodate the ambition of some parents to more tightly control children's access to people and ideas, this would be antithetical to the best interests and autonomy of the minors concerned. Therefore, the legal framework is correct not to further the ambitions of parents who are choosing to send their children to unregistered schools, but this in turn raises another question: how and why does the law contain gaps wide enough for such practices to be perpetuated?

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<sup>88</sup> BARNETT, H., *Children's Rights and the Law: An Introduction*, Routledge, Abingdon, 2021, 1-43.

<sup>89</sup> *Gillick v West Norfolk and Wisbeach Area Health Authority* [1985] UKHL 7.

### 3. WHAT LACUNAS IN THE PRESENT FRAMEWORK PERMIT UNREGISTERED SCHOOLING TO CONTINUE, AND WHY HAVE MOVES TO CLOSE THEM HITHERTO FAILED?

The answer to the first point has already been substantially outlined. Given that the *laissez-faire* arrangements on home-schooling do not require parents to register their children as home-schooled, as well as not even permitting, much less binding, local authorities to routinely enter homes and check on the education on offer, it is understandable how illegal schools are able to persist within the current arrangements. Unless Ofsted is made aware of their institutional existence, or welfare (as opposed to purely educational) concerns about a particular child triggering the local authority to investigate their circumstances, there is no mechanism for state authorities to readily discover that pupils are attending them.<sup>90</sup> The activities and whereabouts of home-schooled are not monitored, so there is no means of knowing whether they are pursuing appropriate activities behind closed doors in private houses, going on enlightening field trips (nobody would deny that most home-school children can and should attend museums, art galleries, etc) or on the contrary, they are being sent to squalid and dangerous unregistered academies.

Without doubt, that state of affairs presents a gaping hole in the protection of children's rights, and no person familiar with the English system could be oblivious to its existence. Having identified the source of the problem, we are bound to ask, once again, why it has not so far been effectively addressed.

As a 2021 report of the House of Lords attests, there has been a long-running campaign to introduce a system of compulsory registration for home-schooled children, alongside other measures to ensure that these young people are receiving proper care and instruction.<sup>91</sup> Implementing such a register is in fact Government policy, but there has been no progress in moving this forward since a published response to a consultation on the topic in 2019.<sup>92</sup> As anticipated, the findings were overwhelmingly hostile to the introduction of a mandatory register. Unsurprisingly, the people who chose to participate tended to be adults in home-schooling families, and were already of the view that local authorities were inclined to exceed their powers of oversight.<sup>93</sup>

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<sup>90</sup> For provisions in relation to child welfare, see for example Children Act 1989 s 31.

<sup>91</sup> LEWIS, P., «Elective Home Education: Time for a Compulsory Register?», House of Lords Library, UK Parliament, London, 2021, p 1.

<sup>92</sup> Department for Education, «Elective Home Education: Call for Evidence-Government Consultation Response», UK Government, London, 2019.

<sup>93</sup> *Ibid.*, para 3.4.

There have been efforts to bring about reform via Private Members Bills in Parliament, and for example, in 2017, Lord Solely attempted to instigate legislation which would have reformed the Education Act 1996 to introduce mandatory registration, annual home visits from local authorities and a duty on parents to facilitate information in order to enable effective local authority monitoring.<sup>94</sup> The bill successfully passed through all stages of the House of Lords process, but did not achieve a second reading in the House of Commons.

The powerful pro-home-schooling, anti-registration and monitoring lobby, predictably mobilised against Lord Solely's Bill, and all other moves in the direction of greater regulation. It should be emphasised that that particular debate was not about whether or not to permit home-schooling, nor the merits of that approach for some families, but rather in the words of Lord Solely:

*«The issue is not whether some parents can do it well; it is about how we help those who cannot do it well and protect the rights of the child.»<sup>95</sup>*

No judgement is made here about the desirability of allowing parents without qualifications or professional support to take charge of their education, the focus for this article is on the impact of permitting home-schooling without mandatory registration, with the specific problem of illegal educational institutions in mind. There is, unquestionably, an entirely separate discourse about whether, when and how home education should be permitted, but that is not our present concern.

The point, for our purposes, is that a vociferous alliance of people in England are vigilant about any proposed changes to the existing libertarian model (or at least, libertarian if only the freedom and rights of adults are considered), whilst any attempts by the Government or Parliament to change the status quo are met with planned and effective campaigning, even in the face of national tragedies, where children have died from completely preventable causes, in the most horrific circumstances imaginable.<sup>96</sup>

The truth is that legitimate discussion is often elided in destructive ways. Nobody in mainstream debates is contending that abuse is widespread amongst home-schooling families, nor that all parents opting for this pathway do so with

<sup>94</sup> Home Education (Duty of Local Authorities) Bill 2017.

<sup>95</sup> LEWIS, P., «Elective Home Education: Time for a Compulsory Register?», House of Lords Library, UK Parliament, London, 2021, p3.

<sup>96</sup> «Report on boy who died of scurvy raises fears for home-schooled children», *The Guardian* 8<sup>th</sup> July 2017 <https://www.theguardian.com/society/2016/jul/08/report-on-death-of-boy-with-scurvy-raises-fears-for-home-schooled-children> Date of consultation 18<sup>th</sup> November 2022.

the sinister motivation of hiding ill-treatment, exploitation and neglect. As we have been at pains to stress, the question is not whether or not some parents are capable of delivering an effective and positive educational experience outside of the school system, and should be permitted to do so. The point is rather whether the lack of registration creates a situation in which some children can suffer human rights abuses without detection and intervention from public authorities, and there it is manifest evidence that this is indeed the case. The infractions of their rights might be so gross as to deprive them of life itself,<sup>97</sup> or of their personal development and available choices as adults.<sup>98</sup>

The reality is that this highly parent-right centred framework on home-schooling creates an environment in which unregistered schools can acquire pupils without detection. The strength of the anti-regulation lobby in respect of home-schooling cannot be denied, as we have previously stated, and vehement opposition to the introduction of a register remains. Having said which, it must also be stressed that these parents are in a small minority in national terms.<sup>99</sup> Figures have risen sharply in the last three years, and although 115,542 children in England were being home educated in 2020-21, this remains a low number when compared with a population of 12,000,000 minors.

We should also recognise that the resistance to reform to date could not have been so successful, had the vocal minority of home-schooling families not found a significant vein of sympathy within wider society, which leads us on to the critical inquiry of what elements of the English Constitutional Culture hamper an effective response to illegal schools.

#### 4. CONSTITUTIONAL CULTURE AND OBSTACLES TO CLOSING THE LACUNA THAT FACILITATES ILLEGAL SCHOOLS

As discussed above, we have previously defined Constitutional Culture to refer to the set of collective norms and expectations which govern collective life within a jurisdiction. Some of these are intra-legal, and enshrined within provisions of law. Others are extra-legal, and exist in a social, non-judicial

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<sup>97</sup> Lord Lamming, «The Victoria Climbié Inquiry», Presented to UK Parliament by the Secretary of State for Health and the Secretary of State for the Home Department, 2003.

<sup>98</sup> «Unregistered Jewish School Prompt Calls for New Laws», *BBC News* 5<sup>th</sup> January 2018 <https://www.bbc.co.uk/news/education-42580792> Date of consultation 18<sup>th</sup> November 2022.

<sup>99</sup> WEALE, S., «Parents in England who fail to register home schooling could face sanctions» *The Guardian* 3<sup>rd</sup> February 2022, <https://www.theguardian.com/education/2022/feb/03/parents-in-england-who-fail-to-register-home-schooling-could-face-sanctions> Date of consultation 19<sup>th</sup> February 2022.

sphere, but are relevant for legal scholars, because they mould the way in which law is understood and interpreted by jurists, professionals and citizens alike.

We would propose that several identifiable elements of the English Constitutional Culture combine to generate sympathy for voices resisting regulation of home-education, and consequently, impeding efforts to tackle illegal schools, albeit unintentionally. We shall consider each of these in turn, before turning attention to what may be done in response: 1) Strong prioritisation of individual liberty over collective concerns; 2) Support for religious and ideological freedom; and 3) Respect for parental choice in the education and upbringing of children.

#### 4.1 Prioritisation of individual liberty above collective concerns

This is a famous, perhaps even notorious, feature of Common Law thought-patterns, but is nonetheless one of profound importance. It is exemplified in the absence of any proactive duty to rescue, even if a third party is in jeopardy of death and aid could be given without endangering the helper.<sup>100</sup> Individuals who freely choose to intervene will be treated favourably by the courts, and a person acting to save someone in a high pressure situation will usually only be liable in negligence if their actions are reckless or spectacularly foolish. Moreover, it is recognised that the judgement of reasonable people is impaired under stress, and equally, where volunteer rescuers are injured trying to save someone, a defendant who cause the perilous situation will generally get short shrift trying to raise *volenti non fit injuria* as a defence.<sup>101</sup>

This is important because the individualism of the law is not unrestrained, and does not preclude support for citizens who elect to act in an altruistic manner. In considering the conflicting demands of upholding individual autonomy and promoting the collective good, legal systems are seeking to balance competing priorities, rather than categorising one of the vying concerns as insignificant or even undesirable. It is undeniable that Common Law in general, and England specifically, leans towards individual as opposed to collective interests, but this does not mean that societal needs taper away into irrelevance. There is a great deal of nuance about the way in which this broad pattern plays out in concrete legal situations, but the overarching theme is strongly present in a wide variety of contexts suffusing the juridical framework.

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<sup>100</sup> *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4.

<sup>101</sup> *Baker v Hopkins* [1959] 1 WLR 966.

For instance, it is also found in the weight attached to freedom of expression, and reluctance to curtail this simply to protect the sensibilities of third parties. It is significant that England has not witnessed high profile prosecutions for offensive statements made online, a position which contrasts sharply with the Scottish experience (Scotland having always maintained its own system of both Private and Criminal Law, as part of the deal brokered by the Scottish elite for acquiescing to a union of Parliaments).<sup>102</sup> In the northern British nation, a man was prosecuted for a hate crime, for training his girl's friends pet pug to raise its paw in response to Nazi slogans, and posting a video of this on the internet.<sup>103</sup> He argued that this was not intended to demonstrate support for Nazism or the Far Right, and the joke he was trying to make was predicated on the viewer finding Fascism and Anti-Semitism repugnant. He was deliberately pursuing to outrage his girlfriend by associating the innocent little dog that she doted on with something vile. This, however, did not avail him, and he was found guilty of sending material «grossly offensive or of an indecent, obscene or menacing character» via a public electronic communications network».<sup>104</sup>

Then in 2021, Joseph Kelly was prosecuted for an offence tweet directed at a dying elderly soldier, «Captain Tom», who had become a celebrity during the Covid-19 pandemic, raising money for the NHS, despite his age and accompanying infirmity. Kelly was convicted under the same legislative provision that had been applied in the Nazi Pug case.<sup>105</sup> It is telling that both incidents caused an outcry in the English press over freedom of expression, and that the relevant clause is being repealed for England and Wales.<sup>106</sup> We are not suggesting that the decisions in these cases were uncontroversial in Scotland, but it is noticeable that public authorities were willing and determined to prosecute, demonstrating a more collectivist approach to the balance between freedom of expression. and avoiding distress and a more civilian mindset.

Testamentary freedom is another much discussed instance of Common Law individualism, and also a context which tracks through into Family Law.<sup>107</sup>

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<sup>102</sup> Act of Union 1707.

<sup>103</sup> «Supreme Court appeal blocked for man in Pug Nazi salute case», *BBC News* 22<sup>nd</sup> January 2019 <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-46959556> Date of consultation 19<sup>th</sup> November 2022.

<sup>104</sup> Communications Act 2003, s127 (1)

<sup>105</sup> «Offensive Tom Moore tweet author appeals to European Court», *STV News* 1<sup>st</sup> November 2022 <https://news.stv.tv/west-central/glasgow-man-convicted-over-offensive-captain-sir-tom-moore-tweet-appeals-to-european-court> Date of consultation 19<sup>th</sup> November 2022.

<sup>106</sup> «Man who taught girlfriend's pet pug to perform Nazi salutes is fined £800», *The Independent* 23<sup>rd</sup> April 2018 <https://www.independent.co.uk/news/uk/crime/count-dankula-nazi-pug-salutes-mark-meechan-fine-sentenced-a8317751.html> Date of consultation 19<sup>th</sup> November 2022.

<sup>107</sup> BECKERT, J. *Inherited Wealth*, Princeton University Press, Princeton 2018, p 69.

Although some commentators have argued that the difference between the systems can be exaggerated, there is undoubtedly a fundamentally distinct approach to the distribution of assets upon death, the margin of discretion available to testators and the legitimate expectations of family members, in the absence of any relationship of dependence.<sup>108</sup>

These are just a handful of examples of the way in which the English judicial system, both in terms of Common Law and legislation, accords a high value to individual liberty over social policy and collective needs. As noted above, this is self-evidently not a binary choice, but a matter of positioning along a spectrum. In a context where the natural centre of gravity is closer to the individual, libertarian end of the continuum, it is unsurprising that the proposition that parents should have considerable discretion in deciding how and where to educate their children receives considerable sympathy. The expectation is that state regulation and the imposition of legal duties will be kept to a minimum, and that pre-emptive action restricting personal liberties will be used sparingly. On this basis, it is not surprising to encounter reluctance to the establishment of controls on parents in the absence of any specific evidence that the family in question are failing to adequately care for or educate their children.

#### 4.2 Support for Religious and Ideological Freedom

In addition to the overarching support for individual liberty, the English Constitutional Culture also embraces a particular zeal for preserving freedom of religion and conscience. This has very deep roots, and reflects the unique history of the nation.<sup>109</sup> Although this may at first seem counterintuitive, the position in the XXI century can only be properly understood by taking a considerable leap back in time, to appreciate its evolution. In common with most other States in Western Europe, England experienced its fair share of tussles between temporal and spiritual power, and it is no accident that Clause 1 of the Magna Carta states that «The Church of England shall be free», nor that the archbishop of Canterbury Stephen Langton was heavily involved in negotiating and drafting the settlement.<sup>110</sup> Nonetheless, it was to be the nature and circumstances of the Reformation which moulded the Constitutional Culture for all succeeding centuries.

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<sup>108</sup> *Illrot v The Blue Cross* [2017] UKSC 17.

<sup>109</sup> GARCIA OLIVA, J., and HALL, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain*, Routledge: Abingdon, 2017.

<sup>110</sup> JONES, D., *The Magna Carta*, Head of Zeus, London, 2021.

In contrast with Scotland, and other European countries, England did not experience a Reformation as a result of pressure from educated elites, persuaded by the contentions of Luther and others. In stark contrast, the English Reformation was driven primarily by the dynastic ambition of a single ruler, Henry VIII, who would undoubtedly have been content to have remained loyal to Rome, had his wife produced the male heir that he desired and expected.<sup>111</sup> There was no groundswell of opinion, nor one theological faction able to gain a firm hold on hearts and imaginations, a reality reflected by the radically differing religious allegiances of Henry's children, and the tumultuous changes during their successive reigns (not to mention the brief attempt of Lady Jane Grey's supporters to place his Protestant great niece on the throne).

During Henry's lifetime, much of the outward vesture of Catholicism remained, as he was not naturally inclined to the ways or doctrines of the new religious movement. In contrast, his son Edward was devoutly and energetically Protestant, but also short-lived, leaving his sister Mary to succeed (despite the best efforts of some Protestant nobles to install a more religiously acceptable claimant). Mary was married to Philip II of Spain (and of course, the daughter of a Spanish mother, Queen Catherine of Aragon), and attempted to restore England to the Catholic faith, a project cut short by her untimely death without children. She was succeeded by her half-sister Elizabeth, whose reign saw the Church of England begin to forge its own distinct identity, resolutely separate from Rome, but not as thoroughly Protestant as those of that persuasion desired. It is fair to say that this parade of different religious arrangements left many local communities somewhat traumatised and completely bemused.<sup>112</sup>

The upheaval was by no means over, however. When the Tudor dynasty was succeeded by the Stuarts, the latter warmed to the ritual and elegance of Anglican religion, despite their origins in Presbyterian Scotland. James I and VI did not take long to succumb the charms of a Church which treated him as Governor, and upheld as the divine right of kings, as opposed to scolding him that his writ ran only to temporal matters, and that in the Kirk he was a mere member, rather than the head (a position, of course, belonging to Christ).<sup>113</sup> His son Charles I was equally inclined to this way of thinking, and being resistant to any restraint of his personal rule, found himself at loggerheads with Parliament. The fact that he also married a Roman Catholic (on the advice of the Duke of Buck-

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<sup>111</sup> SHIELS, W., *The English Reformation: 1530-1570*, Routledge, London, 2013.

<sup>112</sup> DUFFY, E., *The Stripping of the Altars: Traditional Religion in England 1400-1580*, Yale University Press, London 2005.

<sup>113</sup> LEE, M., «James VI and the Revival of Episcopacy in Scotland», *Church History* 1974, 43(1), pp. 50-64.

ingham) did absolutely nothing to allay Protestant anxieties of quell resentment.<sup>114</sup> Amongst those who desired to finish reforming the Church, Charles' reign and policies were an unmitigated disaster. Some of those wishing to separate themselves from the Church of England, or purify it from the inside, opted to cross the Atlantic to pursue religious freedom in colonial America.<sup>115</sup>

Yet others remained behind, and England, and indeed the British Isles, erupted into civil wars, which gave rise to Charles I being tried and executed for treason.<sup>116</sup> For a number of years England was a Puritan Commonwealth, but this did not mean that radical Protestantism had been successfully embraced by the population as a whole. When Lord Protector Oliver Cromwell died, and his son Richard proved unable to retain control, the monarchy was restored, and with it, the return of the Stuart dynasty, a brand of Anglicanism which was repressive as well as flamboyant. Despite his reputation as «the merry monarch» Charles II took up the throne with a thirst for vengeance, and was in no mood to be conciliatory towards those on the opposing side of religious and political conflicts. Ironically, with the exception of Roman Catholics, the population had enjoyed a unprecedented degree of religious freedom during the period of Puritan rule, and this had come to an abrupt end.<sup>117</sup>

Nonetheless, the Restoration did not usher in a period of religious peace. Charles II died without a legitimate heir, and his younger brother James II took the crown. James had never expected to reign, and was openly Roman Catholic. By this stage Catholicism had long been associated with tyranny and autocratic rule, and James imperious personality did little to pour oil on troubled waters. When his wife unexpectedly produced a male heir, a group of parliamentarians organised a coup, inviting his son-in-law and daughter to stage an armed invasion. The events became known as the «Glorious Revolution» and were pivotal to the development of the current constitutional monarchy, and religious settlement.<sup>118</sup>

In terms of Victorian myth-making, this transition of power, and the accompanying legislation acts, e.g. the Bill of Rights, marked England out as a

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<sup>114</sup> WHITE, M., *Henrietta Maria and the English Civil Wars*, Ashgate, London, 2006, pp. 12-16.

<sup>115</sup> BREMER, F., *The Puritan Experiment: New England Society from Bradford to Edwards*, University of New England Press, London, 1995, pp. 29-72.

<sup>116</sup> ROBERTSON, G., *The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold*, Anchor Books, Germany, 2007.

<sup>117</sup> LAY, P., *Providence Lost: The Rise and Fall of Cromwell's Protectorate*, Head of Zeus, London, 2020.

<sup>118</sup> MILLER, J., *The Glorious Revolution*, Taylor and Francis, London, 2014.

rational, moderate power, which respected individual liberty.<sup>119</sup> In reality, the position was far less rosy. The constitutional settlement enshrined religious oppression and inequality, and was based upon the explicitly articulated idea that the Church of England was superior to all other expressions of Christianity.<sup>120</sup> Acceptance of the Anglican religion was a prerequisite for becoming a member of Parliament, judge or officer in the armed forces, whilst only members of the established Church could attend Oxford and Cambridge, and there were practical obstacles to non-Anglicans attending some of the most prestigious schools, cutting off networking, as well as educational opportunities. Non-Conformists were also at a distinct disadvantage in the marriage market, given all of the disabilities that their situation presented to social climbing, and ambitious parents, or even dynasties anxious to maintain their current standing, would be inclined to steer their children away from a match with a non-Anglican partner.

Taking all of this into account, there was strong external pressure for individuals and families alike to either remain within, or seek to join, the Church of England, even if its doctrines were not a perfect fit, and this meant a degree of ideological chaffing. It is also important to remember that the foregoing history signified that everyone, regardless of theological persuasion had some degree of experience of persecution and being on the losing side in religious conflicts. The Church of England in the eighteenth century was necessarily a broad Church in the literal sense, and it was no uncommon for neighbouring clergy to hold radically divergent theological views. The incentive to retain membership was great enough to encourage a climate of (sometimes grudging) tolerance. Radically Protestant, staunchly High Church, mystical enthusiasts and rationalist clergy who were almost Deist in persuasion, all had a vested interest in coexisting, and protesting too loudly about the antics of other people could draw unwelcome attention to your own devotional and doctrinal quirks.

Precisely because no single faction within the Church of England ever enjoyed hegemonic dominance, everyone lived with the feeling of dwelling in a glass-house, and nobody was too keen to start flinging stones. There was nothing edifying about the situation, but the pragmatic reality was that an established Church with a monopoly on prestigious and lucrative opportunities fostered a climate of tolerance, and an acceptance that it was wise to give other people considerable latitude in their religious opinions.

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<sup>119</sup> SCHWOERER, L., *The Revolution of 1688-89: Changing Perspectives*, CUP, Cambridge, 1992, 5-6.

<sup>120</sup> Thirty-Nine Articles, Art 19.

It goes without saying, given the importance which religion continued to hold at this time, by no means everyone was content with the idea of squeezing their conscience out of shape to remain within the Church of England. Furthermore, the industrial and agrarian revolutions meant that there was money to be made even for those who were denied access to Parliament and the traditional professions.<sup>121</sup> Many Non-Conformists prospered as entrepreneurs in trade and manufacturing, causing them to form a powerful economic lobby by the close of the XVIII century. Furthermore, the intellectual impact of the Enlightenment was also chipping away at the façade of Anglican privilege, and over the course of the XIX century, subjecting some citizens to disadvantage on the basis of their religious convictions became less and less politically and socially tenable.

However, England was not destined to experience a revolution on home soil after the events of 1688, and there never was a 1789 style moment when privilege tumbled, and the power of the Church of England came crashing down. In consequence, the general pattern in seeking to redress the balance of legal inequality was for Anglican privilege to be *shared*, rather than removed. As a result, for instance, the capacity to conduct legally binding marriages was gradually accorded to different groups within society, beginning with the Jewish and Quaker communities.<sup>122</sup>

It had always been axiomatic that the beliefs and practices of the Church of England should be supported by the law, therefore, in order to bring about greater equality, this gradually transformed into support for first all forms of Christianity, and then all religious perspectives.<sup>123</sup> Moreover, this diffusion of benefit did not stop with faith, but spread out to touch all matters of conscience. It was established early on that the religious pacifism of Quakers should be respected, even to the point of exempting them from compulsory military service.<sup>124</sup> There was, consequently, little no doubt that faith-based exemptions would be incorporated into the conscription legislation of the First World War, but by this stage it was clear that there were people with deeply held philosophical objections to fighting which were not spiritual in character, for example, some Marxists considered that killing fellow workers in a war between capitalist masters was immoral. The need for parity of treatment between citizens was by now widely accepted, and it was not deemed reasonable to differentiate

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<sup>121</sup> FREEMAN, C. and SOETE, L., *The Economics of the Industrial Revolution* Pinter, London, 1997, 43.

<sup>122</sup> Marriage Act 1753.

<sup>123</sup> García OLIVA, J., and HALL, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain*, Routledge: Abingdon, 2017, pp. 50-125.

<sup>124</sup> Militia Ballot Act 1757.

between religious and non-religious conscientious objections. If Quaker and other faith groups were to be exempt, then the same accommodation had to apply to other form of conscientious objection, and the terms of the legislation were drafted accordingly.<sup>125</sup>

In short, the respectful and facilitating stance towards Anglicanism, which had been woven into the fabric of the legal system from the Reformation onwards, came to be applied to faith in general, and from faith broadly understood, easily but necessarily leap-frogged to conscience. Consequently, the importance of freedom of belief evolved its way into the English juridical framework, as social and political attitudes shifted over the centuries. This combined with the pragmatic tolerance which developed *within* Anglicanism, and subsequently within English legal and political circles, to generate a culture of accepting individual belief systems and allowing citizens to live by their personal creeds, whether or not these seemed desirable to third party observers.

The result of all of this is an ingrained understanding of freedom of belief as a fundamental, possibly even quasi-sacral value, within the legal system. This is not to suggest that it trumps all other considerations, but it certainly cannot be lightly or easily displaced, and as a result, given that home-schooling is often linked to freedom of belief, ideology being a common motivating factor (whether this is of a religious or philosophical nature, such as might be observed with a movement like «unschooling»), there is a predisposition to protect this liberty.<sup>126</sup>

In addition, the reluctance to interfere with freedom of belief is heightened when it is combined with the reticence to overturn parental choice when it comes to the education and upbringing of children.

#### 4.3 Parental choice and the care and upbringing of children

Respect for the family unit is, of course, an established pillar of contemporary human rights frameworks, as the very wording of Article 8 of the ECHR illustrates, explicitly linking privacy and family life.<sup>127</sup> Nevertheless, the imbalance of power between adult parents and minor children is an inescapable reality,

<sup>125</sup> Military Service Act 1916.

<sup>126</sup> LEWIS, P., «Elective Home Education: Time for a Compulsory Register?» House of Lords Library, UK Parliament, London, 2021, p 1.

<sup>127</sup> ECHR Article 8: «*Everyone has the right to respect for his private and family life, his home and correspondence*», and in the French text: «*Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.*»

and individuals who have not yet reached the age of majority nonetheless enjoy independent human rights. Their freedoms and interests are, by no means, subsumed within the protection afforded to parents.<sup>128</sup> On many occasions, the rights of children and parents are coterminous, but this is not universally applicable.

It goes without saying, this is an analysis from a contemporary perspective. For many centuries, children were treated as quasi-property, and the male head of the household enjoyed wide-ranging powers over their lives, occupation, and movement. William Blackstone famously described legitimate children as being «*under the empire of the father...for a mother, as such, is entitled to no power, but only reverence and respect*».<sup>129</sup>

This facet of the Common Law had support within from prevailing interpretations of Christian Scripture, and ancient cultural roots. Furthermore, an explicitly patriarchal worldview was combined with a background respect for freedom of conscience and religion. Since children (and for that matter, women) were regarded as lacking the capacity for rational thought vested in adult males, it was natural to conclude that respect for freedom of conscience necessitated deference to a man's choices about the spiritual and moral wellbeing of *his* household.<sup>130</sup>

Moreover, in historical times, there was also an acceptance that fathers had an economic interest in their children. Middle and upper class families expected their sons to manage their future estates, and pursue careers which would advance dynastic ambitions, whereas daughters were expected to marry well for the same reason. Keeping close control over the education and activities of children was a necessary facet of maintaining clan prosperity, and equally, in poorer households, children were expected to be economically productive from late toddlerhood onwards, helping with chores in traditional industries, taking in tasks like carding wool prior to spinning.<sup>131</sup> As society transformed in the XVIII and XIX centuries, minors were increasingly employed in factory-work, and whilst many of them were apprentices whose labour directly benefited ill owners and other industrialists, others lived at home and contributed wages to the household income.<sup>132</sup> In a world with no state welfare, children were in part an insurance policy against old age and sickness or disability (the latter being

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<sup>128</sup> FREEMAN, M., «Towards a Sociology of Children's Rights» in Freeman, M. (ed) *Law and Childhood Studies* OUP, Oxford 2012, pp. 29-38.

<sup>129</sup> HASDAY, J., *Family Law Reimagined*, Harvard University Press, Harvard, 2014, p 136.

<sup>130</sup> FLATHER, A., *Gender and Space in Early Modern England*, Boydell and Brewer, Woodbridge, 2007, p 20.

<sup>131</sup> DEANE, P., *The First Industrial Revolution*, CUP, Cambridge, 1979, p 15.

<sup>132</sup> HUMPHRIES, J., *Childhood and Child Labour in the British Industrial Revolution* pp. 32-33.

a common outcome from industrial injuries in an era when legal requirements in respect of health and safety were rudimentary at best).

Preteens and young teenagers were often from working class homes in the unenviable position of being expected to earn their keep, and support younger siblings, without enjoying any of the autonomy of adulthood. In Disraeli's novel *Sybil or the Two Nations*, the author depicts older teenagers opting to live together and keep house, in preference to staying at home. His tone is not unsympathetic to the girls' decisions, although many other Victorian observers were less understanding.<sup>133</sup> Many other voices in the nineteenth century, perhaps with less imagination for the plight of young people wanting to enjoy some autonomy and not be responsible for their sponging relations, were outraged at these kinds of developments. In the prevailing attitudes of the day, young people, and girls especially, belonged under the guidance of their paterfamilias. If this system was breaking down amongst the working classes, then it was imperative to step in and restore order.

This is important for the Constitutional Culture, because both the moral and economic interests of parents, and fathers in particular, were at the forefront of legal developments around education. The introduction of compulsory schooling had a serious impact on the income of poorer families, whilst legal reform came gradually in a series of statutes between 1870 and 1893, and alongside debates over the problems of reducing the capacity of parents to stay afloat financially, there was considerable sectarian rivalry between Anglican and Non-Conformist educators.<sup>134</sup>

A general agreement amongst the governing classes that children from poor families needed schooling in order to be useful and morally upstanding citizens emerged, but squabbling over concerns about rival Churches using this as a vehicle for indoctrination grew up considerably. Moreover, it was accepted that middle and upper class families did not require state supervision in order to raise socially acceptable subjects of the British Empire. Legislation on compulsory school attendance originally aimed at those who could not, or would not make their own arrangements. However, it was assumed that those in a position to educate their children privately, either at home (especially in the case of girls) or in fee paying schools, would naturally choose to do so. In

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<sup>133</sup> Benjamin Disraeli, *Sybil or the Two Nations* 1845, Henry Colburn, London, 1845, 1858 edition, p 78: «I am at Wiggins and Websters» Said the girl «and this is my partner. We keep house together, we have a very nice room in Arbour Court, high up; it's very airy. If you will take a dish of tea with us tomorrow, we expect some friends.» «I take it kindly!» said Mrs Carey «And so you keep house together! All the children keep house these days. Times is changed indeed»

<sup>134</sup> «Synopsis of the Forster Education Act 1870», *British Library* <https://www.bl.uk/collection-items/synopsis-of-the-forster-education-act-1870> Date of consultation 21<sup>st</sup> November 2022.

contrast to some other jurisdictions, there was no political clamour to move schooling out of religious hands altogether, nor to remove parental choice from those deemed able to exercise it responsibly.

As class prejudice receded in the twentieth century, or at least took on different forms, the cultural trope of parental choice and family autonomy within education remained strong. Despite the fact that it became unacceptable to see children as economic assets, the quasi-proprietary attitude towards them have undoubtedly remained. It is telling that some of the protestors objecting to mandatory sex and relationships education in schools felt no embarrassment about waving placards with slogans such as «My Child, My Choice».<sup>135</sup> The use of possessive language, and absence of any recognition of the child as an independent person, makes a powerful statement. Of course, many of these protestors were influenced by cultural and religious values reflecting their south Asian heritage, *as well as* the British society in which they had been raised. For the moment, we are focusing on the general Constitutional Culture around parental freedom to make decisions, and there is without doubt a long history of assuming that parents have the prerogative to determine what is desirable for their household, and that minor children are component cogs in a larger machine.

This is not a perspective which the courts have endorsed in respect of young people who have achieved the cognitive capacity to make independent choices about their lives. The seminal *Gillick* case, discussed above, is the antithesis of this mode of thought,<sup>136</sup> having the reasoning of the House of Lords made abundantly clear that parental responsibility exists exclusively for the benefit of the child, and is not vested in parents for their personal benefit. As a child matures, layers of parental responsibility are sloughed off, like a growing reptile shedding its skin.

Neither is a parent/family centric approach reflected in either the Children Act 1989, the key statute concerning the position of minors in English and Welsh Law. For example, questions arising in relation to children and their upbringing will be decided on the basis of a best interests determination, meaning that the welfare of the child who is the centre of the litigation will be paramount.<sup>137</sup> Yet it is also true that the same statute gives parents wide leeway within which to act. In practical terms, they are free to make whatever decisions

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<sup>135</sup> FERGUSON, D., «We can't give in: The Birmingham school on the frontline of anti-LGBT protests», *The Guardian* 26<sup>th</sup> May 2019 <<https://www.theguardian.com/uk-news/2019/may/26/birmingham-anderton-park-primary-muslim-protests-lgbt-teaching-rights>> Date of consultation 15<sup>th</sup> November 2022.

<sup>136</sup> *Gillick v West Norfolk and Wisbeach Area Health Authority* [1985] UKHL 7.

<sup>137</sup> Children Act 1989 s1(1).

they wish within the scope of parental responsibility, irrespective of whether these are in the child's best interests. The choices will not be restricted unless there is a dispute which comes to court, and only persons with a close connection to the child recognised by statute can intervene as of right, other third parties need to attain leave in order to make an application.<sup>138</sup> The sole exception to this is where the actions of those with parental responsibility are such that the child is suffering or at risk of suffering «significant harm.»<sup>139</sup> As would be expected, the threshold of public authorities to intervene in family life is not easily met, and less than ideal parenting will be permitted, as it is recognised that the State cannot, and should not, involve itself in the private lives of citizens with a strong imperative to do so<sup>140</sup>.

For the purposes of the present discussion, it is also highly significant that while intra-legal Constitutional Culture attempts to strike a delicate balance between the rights of children as individuals and respect for the family unit, extra-legal Constitutional Culture is powerfully influenced by an expectation of deference to parental wishes. This has been demonstrated powerfully in disputes around withdraw of medical treatment from children, involving minors too young and too ill to express any personal wishes, much less to exercise any form of decision-making capacity. A high-profile dispute arose over the infant Charlie Gard, whose parents sought to challenge the decision of the medical team caring for their baby to end interventions to sustain life, and instead desired to take the dying child abroad for experimental therapies<sup>141</sup>.

The battle before the courts centred around the straightforward issue of what was in the baby's best interests, and whether inflicting further painful treatment was justifiable, in light of the lack of demonstrable benefit for the patient. However, the dispute grabbed the imagination of a section of the population, and protesters calling themselves «Charlie's Army» turned up to demonstrate outside London's leading children's hospital<sup>142</sup>. It must be stressed that the behaviour of these people was widely recognised as reprehensible, and on occasion, criminal. Doctors and nurses received threats of violence, and were vociferously accused of murder, while other young patients and their parents attending the Great Ormond Street for treatment had to run the gauntlet of these protestors. It is vital to highlight the distress of other critically ill children at

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<sup>138</sup> *Ibid.*, ss 8 and 10,

<sup>139</sup> *Ibid.*, s 3,

<sup>140</sup> *Re B* [2013] UKSC 33.

<sup>141</sup> *Great Ormond Street Hospital v Yates and Gard* [2017] EWHC 1909.

<sup>142</sup> «Charlie's Army: The People Fighting for Charlie Gard», *The Week* 26<sup>th</sup> February 2017 <<https://www.theweek.co.uk/85153/charlies-army-the-people-fighting-for-charlie-gard>> Date of consultation 21<sup>st</sup> November 2022.

tending hospital, already nervous and in pain, having to hear shouts that the doctors inside were killing people.

We are not suggesting that this type of destructive behaviour would be widely condoned within England. Yet at the same time, the campaign to have the wishes of Charlie's parents respected did gain a great deal of traction, and undeniably stirred up strong emotions. Neither was it an isolated incident. In 2022, parents of Archie Battersbee, managed to garner considerable support in their efforts to resist the cessation of treatment for a twelve year old left brain-stem dead following an accident.<sup>143</sup>

In cases like these, a strong groundswell of popular opinion rises up to champion the idea that parents should be allowed to decide what treatment their child does or does not receive. Without doubt, there are many reasons why in objective terms, doctors rather than next of kin make such decisions in the English legal system, and it would be unethical to inflict further painful treatment on a patient of any age when this has no identifiable benefit. It is entirely understandable that traumatised and grieving parents may be unable or unwilling to appreciate the reality of the situation, but the emotional needs of adults (however acute) cannot trump the welfare of a child. Forcing clinicians to treat would violate the rights of the minor patient, and it would also be grossly unfair on the doctors and nurses faced with the physical task of carrying out invasive procedures which they knew were delivering no benefit.

Nonetheless, despite all of this, campaigns highlighting the parents «right» to choose what is best for their child strike an emotional chord with a sizeable percentage of the population. The reasons for this undoubtedly go beyond the legal realm, and are in large measure beyond the scope of this article. Western culture tends to idealise family life, and elevates parent and child relationships to an almost sacred level.<sup>144</sup> The message that sometimes the human frailty of parents means that they are not best placed to care for their children is for many unpalatable in the extreme. This contemporary narrative further feeds into a narrative of parental decision-making it as preferable to the intervention of state mechanisms.

Furthermore, it can be seen that this aspect of the English Constitutional Culture has the potential to combine with the two other streams which we have already observed, in respect of a pro-libertarian stance and a robust defence of freedom of belief. Both intra-and extra-legal culture support the notion that

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<sup>143</sup> «Archie Battersbee has no prospect of recovery hospital doctors tell court», *LBC*, 11<sup>th</sup> July 2022, «<https://www.lbc.co.uk/news/archie-battersbee-has-no-prospect-of-recovery-court-hears/>» Date of consultation 21<sup>st</sup> November 2022.

<sup>144</sup> DOUGLAS, S. and MICHAEL, M., *The Mommy Myth*, Simon and Schuster, New York, 2005.

individuals should, where possible, be given scope to act as they see fit, and that socially responsible choices should in general be voluntary, rather than the result of the coercive force of law. Added to which, matters of conscience and parental autonomy are treated as necessitating a high degree of respect and accommodation. Taken together, this triad of factors generate a climate in which reforms to limit the scope of parental decision-making in respect of educational choices are likely to be viewed with caution, shading into suspicion, and even hostility, in some quarters. Which returns us to the question of how obstacles to greater regulation of home-schooling, and therefore, the effective eradication of unregistered academies, might be tackled.

## 5. CONCLUSIONS-CLOSING THE LOOPHOLE

Put simply, it remains comparatively easy for children to disappear into illegal schools because there is a reservoir of resistance to imposing regulation on families choosing to educate their children at home. One possible response would be to attempt to move the debate in a more productive direction, emphasising that registration is not an existential threat to home-schooling. This, however, is complicated by two political factors: First, many of the parents actively campaigning against greater controls and monitoring for home-schooling families are ideologically opposed to state oversight and suspicious of local and national governmental authorities.<sup>145</sup>

In some cases, this stems from the frustration that the public sector was unable to accommodate the additional educational needs of their child, or that professional opinion differed from parental perceptions with regard to assessing appropriate provision. In others, this stance is rooted in a range of philosophical convictions, which frequently include distrust or disapproval of the administrative apparatus of modern nation States, and mainstream science.<sup>146</sup> In neither circumstance is the provision of additional information, especially from state sponsored sources, likely to make much of an impact.

Secondly, it is an unfortunate reality that the majority of unregistered, illegal schools are operating within the Ultra-Orthodox Jewish and Muslim com-

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<sup>145</sup> Department for Education, «Elective Home Education: Call for Evidence-Government Consultation Response», UK Government, London, 2019.

<sup>146</sup> See, for example: «Sovereign Citizens are trying to set up own anti-vax schools in the UK», *Vice*, 1<sup>st</sup> October 2021, <<https://www.vice.com/en/article/bvz9n4/sovereign-citizens-are-trying-to-set-up-their-own-anti-vax-schools-in-the-uk>> Date of consultation 21<sup>st</sup> November 2022; WATERHOUSE, D., «Compassionate, Holistic Health Tailored for You: Home Schooling» <<https://www.dawnwaterhouse.co.uk/home-school.html>> Date of Consultation 21<sup>st</sup> November 2022.

munities, and that in common with many other contemporary global contexts, England is experiencing a prolonged upsurge in Anti-Semitism<sup>147</sup> and Islamophobia.<sup>148</sup> There is an entirely justified caution on the part of both the public and voluntary sector about any responses which may either exacerbate the toxic climate of fear and prejudice, or perceptions of outside hostility and distrust towards wider society from within these communities.

Nevertheless, in one sense, the locus of the legal problem actually assists with this second reality. The framework in respect of the running and inspect of private schools, and DRC schools, is not indeed of radical reconstruction in order to close the regulatory gap. There is, therefore, no need to shine any particular light on Jewish or Muslim schools. The area of difficulty is unregistered home-schooling, and this effects a wide range of different demographics within the English society, including a large percentage of white, middle class families not affiliated with any form of organised religion.

Furthermore, targeting reform at the registration of home-schooled pupils, and requiring mandatory checks on progress and welfare, would help children both directly and indirectly, as it would make it more difficult for their parents to be exploited and manipulated. It cannot be emphasised strongly enough that only a fringe minority of the Jewish and Muslim communities with England are involved with unregistered schooling, and that the vast majority of parents within these constituencies share the values and priorities of wider society when it comes to ensuring that their children flourish and have a full range of educational opportunities. Yet importantly, even within the circles where illegal schooling is taking place, there are many parents who sincerely believe that they are acting lawfully and in their children's best interests. Families can be subject to manipulation and community pressure, especially where there are additional vulnerabilities such as language barriers or economic hardship. Moreover, the involvement of external agents may help parents to understand the full context, and also be supported in resisting any duress that they may be experiencing.

Obviously, there will always be some parents who despite having all of the circumstances explained to them, continue to act in ways which are objectively harmful to their children. This is a tragedy which is found in all human societies. The truth is that not all families will respond to information and support by rejecting unregistered schooling, and in these cases appropriate intervention

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<sup>147</sup> «Record rise in Anti-Semitism in UK in 2021», *BBC News*, 10<sup>th</sup> December 2021, «<https://www.youtube.com/watch?v=YxmUiqvnn2Q>» Date of Consultation 21<sup>st</sup> November 2022.

<sup>148</sup> «Islamophobia behind Far Right rise in UK», *BBC News*, 18<sup>th</sup> February 2019, «<https://www.bbc.co.uk/news/uk-47280082>» Date of Consultation 21<sup>st</sup> November 2022.

needs to be put in place to protect the children, and suitable legal sanctions imposed upon culpable adults. Equally, it is already beyond doubt that some individuals running illegal schools have no compunction about flouting the law or putting children at risk.<sup>149</sup>

Greater monitoring of home-schooled children, and a commensurate rise in detection rates, would assist in taking robust measures against wilful wrongdoers. Where parents are concerned, as opposed to adults running schools, this poses complicated problems, as fines or imprisonment for family members on whom minors depend will have negative repercussions for the very children whom the State is seeking to protect. Yet this is a feature of all situations of child abuse and neglect, because navigating such situations demands both nuanced legal instruments and great professional expertise for all public servants involved. The truth is that knowingly sending a child to an unregistered, un-inspected school, compromising their educational development, and even physical safety, is abusive and neglectful parenting. Of course, there may be reasons behind this behaviour, but again, that is very frequently the case where children are suffering, or at risk of suffering, significant harm. Whatever motivation or mitigation factors may apply to parental failings, these do not lessen the impact for the children involved.

Once again, categorising unregistered schooling as a form of educational neglect, an issue which can arise in any social or religious context, shifts the emphasis away from already marginalised groups. Measures to ensure the registration and monitoring of home-schooled children would be designed to safeguard *all* young people in these situations.

As discussed thoroughly above, however, this increase in state vigilance is likely to collide not only with the desires of vocal and organised campaigners for the autonomy of home-schooling families, but also with broad and very deeply rooted tropes within English Constitutional Culture. It does not help matters that the children involved, by definition, lack the capacity to vote and have any voice in democratic processes.

If considered in isolation, targeting home-schooling will not bring dividends at the ballot-box, as the intended beneficiaries of the reforms lack electoral agency, and libertarian factions from both the left and right of the political spectrum will be actively critical of such a policy. In many ways, the plight of children in unregistered schools is heightened by their hyper-marginalised position as a minority within a minority. They labour under all of the systemic

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<sup>149</sup> WEALE, S., «Two people sentenced for running unregistered school in London», *The Guardian*, 11<sup>th</sup> October 2021, «<https://www.theguardian.com/education/2021/oct/11/two-people-sentenced-for-running-unregistered-school-in-london>» Date of consultation 21<sup>st</sup> November 2022.

disadvantages of coming from religious, and often ethnic and linguistic minority group, yet as disempowered within this community. Needless to say, the position is even more acute for female, LGBT+ or disabled children. If the measure of a society can be found in the way in which it treats its most vulnerable members, then a failure to close the lacuna in the law facilitating the operation of unregistered schools would leave England weighed in the balance and found wanting.

One possible way of dealing with the currents of Constitutional Culture pulling away from registration and regulation of home-schooling, would be instigate a wider discussion about the place and importance of children's rights. The United Kingdom as a whole is facing an uncertain future in terms of rights protection. It remains government policy to repeal the Human Rights Act 1998, and replace this with a British Bill of Rights, although legislative process is halting.<sup>150</sup> In addition, the constitutional position of human rights is one of the many points of tension between Edinburgh and London, as the Scottish Government has been impeded in its policy aim of fully incorporating the United Nations Convention on the Rights of the Child into Scots law. Nevertheless, the limitations of current devolutionary arrangements, and the differing approach to children's rights as between Scotland and other component parts of the United Kingdom,<sup>151</sup> are critical.

At a moment in time when at a state wide level, a radical reassessment of Constitutional Culture is taking place in respect of human rights in general, it would be opportune to explore what children's rights mean in the twenty-first century, and how the legal framework can be constructed to facilitate their optimal protection and realisation.

As stated above, the systemic characteristics of the law giving rise to the persistent problem of illegal schools are comparatively easy to identify, and the issue cannot really be said to be a lack of religious or ideological freedom within licit educational provision. The balance between parent and children's rights is, if anything, weighted too greatly in favour of parental preferences. Freedom of belief and conscience receives ample support and accommodation through a variety of mechanisms, including state funded schools with a religious ethos, and parental opts outs in respect of religious and sex education. The limitations in place exist in order to safeguard the educational rights of children, and maintain standards in respect of human rights and equality, as

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<sup>150</sup> UK Parliament, «Human Rights Act Reform», 15<sup>th</sup> November 2022, «<https://commonslibrary.parliament.uk/research-briefings/cbp-9581/>», Date of Consultation 21<sup>st</sup> November 2022.

<sup>151</sup> Scottish Government, «Human Rights: Children's Rights» «<https://www.gov.scot/policies/human-rights/childrens-rights/>» Date of Consultation 21<sup>st</sup> November 2022.

well as securing the future of a liberal democratic Constitution, which as commentators like Nehushtan argue, has a proactive duty of self-preservation in the face of anti-democratic extremism.<sup>152</sup> These considerations, combined with the practical limitations of resources, mean that the State could not go further in making concessions of the type which might allay desires of some parents to move outside of the legally sanctioned system.

The lack of legitimate reasons for families seeking to escape the current framework means that legal reform to alter provision within the educational sphere will not solve the problem. In order to do this, a hole into which unregistered home schooled children fall needs to be resolutely and permanently filled in, and an appropriate system of registration and monitoring must be introduced. The resistance to move within the English Constitutional must be acknowledged, but could be countered if the change took place within a wider discussion around children's rights, and their importance and prioritisation in the XXI century.

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<sup>152</sup> NEHUSTAN, Y., *Intolerant Religion in a Tolerant Liberal Democracy*, Bloomsbury, London, 2016.

