

ENGLISH SCHOOLS WITH A RELIGIOUS ETHOS:
FOR A RE-INTERPRETATION OF RELIGIOUS AUTONOMY

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Abstract:

Rooted in a principle of non-interference in matters of religious beliefs, supported by an ideology of parental school choice, faith state schools in England have enjoyed a large discretion to promote their religious ethos. Recent judicial and legislative interventions into the affairs of religious schools may be criticized as they betray these philosophical roots, without offering an alternative coherent justificatory model for law and religion relationships. By seeking to remove the allegedly socially or racially divisive edge of religious autonomy, these interventions have provoked an unwarranted and inconsistent mingling of the secular and the religious. Moreover, they have imposed a form of state governance which has reinforced religious authorities to the detriment of the autonomy of local stakeholders, parents and schools. It is claimed that a more deliberative and contextual re-interpretation of the principle of religious autonomy in English Law would lead to less confrontational and more acceptable outcomes.

Keywords: religious freedom; autonomy; faith schools; deliberative democracy; spherical justice; equality; discrimination; liberalism

1 Introduction

Debates about religion and education often focus on the alleged tensions between a religious education and liberalism.² While religions may, by definition, claim to hold

¹ I am deeply indebted to Dr Oliver Gerstenberg for his inspiring comments in the weeks which preceded the writing of this article and to Professor Charles Sabel for his observations on a previous draft of this article. Any errors remain mine.

the truth and consequently undermine opposing points of view, liberalism rests on the toleration of conflicting views. For some liberal scholars, state education should therefore steer away from religion. Separatists argue that the State should not meddle with religion and that state schools should remain exempt from any religious influence.³ According to other liberal thinkers, religion could however be compatible with or even reinforce liberal principles. Civic liberalists claim that state education should gradually equip children with the capacity to make informed and autonomous choices, including religious ones.⁴ The presence of religion in state schools would consequently ensure that the religious option remains open and would thus strengthen civic liberal education.

The presence of religion in state education, from a liberal perspective, must however go hand in hand with pluralism and neutrality.⁵ Religion is not valued for its own sake but as a conduit for social harmony, intercommunity understanding and tolerance.⁶ As soon as it becomes divisive, religion should no longer feature in state education.⁷ Moreover, when it is included in state education, religion is to enhance pupils' critical thinking capacity and resist any attempts at converting them into

² Ian Leigh, 'Objective, Critical and Pluralistic? Religious Education and Human Rights in the Public Sphere', in C. Ungereanu and L. Zucca (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge: Cambridge University Press, 2011), p. 192; and more generally, Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2013, 2nd ed.), esp. pp. 243 *et seq.*

³ A separatist approach underlies (but in complex and nuanced ways) the French concept of *laïcité*, see Jean Baubérot, Guy Gauthier, Louis Legrand and Pierre Ognier, *Histoire de la laïcité* (Besançon: CRDP de Franche Comté, 1994).

⁴ See Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), pp. 155-156.

⁵ E.g., Jürgen Habermas, 'Intolerance and Discrimination', 1 *International Journal of Constitutional Law (I•CON)* (2003), p. 2.

⁶ Robert Jackson, 'How School Education in Religion Can Facilitate the Promotion of Tolerance and Non-Discrimination with Regard to Freedom of Religion and Belief', *Report from the Preparatory Seminar on Teaching for Tolerance and Freedom of Religion and Belief*, Oslo, 7-9 December 2002, <folk.uio.no/leirvik/oslocoalition/RobertJackson.htm>, 26 April 2017.

⁷ Meira Levinson, *The Demands of Liberal Education* (Oxford: Oxford University Press, 1999).

believers.⁸ With a different terminology, the European Court of Human Rights has also insisted that religion should be taught at school in a pluralistic, objective and neutral fashion.⁹ Enforced too strictly,¹⁰ such emphasis on pluralism and neutrality will in itself prevent neutrality in education.¹¹ It will inevitably favour secularist positions and will fail to give a true account of what religion means for believers.¹²

Many liberal thinkers will however accept and defend the charge that liberal education is not neutral, as it aims to form good citizens.¹³ According to Stephan Macedo, liberal education should shape students into citizens respectful of fundamental institutions.¹⁴ Neutrality in teaching should thus not be confused with neutrality of the overarching value framework.¹⁵ Neutrality in teaching is precisely sought in order to convey to pupils the importance of tolerance and critical rational thinking. For theorists of difference or multiculturalists, this “transformative civic

⁸ The Organization for Security and Co-operation in Europe (OSCE) 2007 Guidelines recommend against confessional religious education at schools, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*, p. 21, <osce.org/odihr/2721>, 1 April 2017.

⁹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, European Court of Human Rights, Nos. 5095/71; 5920/72; 5926/72.

¹⁰ For an analysis of how the requirement has been enforced in the European Court of Human Rights’ jurisprudence, see Myriam Hunter-Henin, ‘Law, Religion and the School’, in S. Ferrari (ed.), *Handbook on Law and Religion* (Abingdon: Routledge, 2014), p. 259.

¹¹ See the debates on this issue between Amy Gutmann and Michael McConnell: Amy Gutmann, *Democratic Education* (Princeton: Princeton University Press, 1999); Michael McConnell, ‘Educational Disestablishment: Why democracy is ill-served by democratic control of schooling’, in S. Macedo and Y. Tamir (eds.), *NOMOS XLVIII: Moral and Political Education* (New York: New York University Press, 2002), p. 87; Amy Gutmann, ‘Can Publicly Funded Schools Legitimately Teach Values in a Constitutional Democracy? A Reply to McConnell and Eisgruber’, *ibid*, p. 170.

¹² Nomi M. Stolzenberg, ‘“He drew a Circle and Shut me Out”: Assimilation, Indoctrination and the Paradox of a Liberal Education’, 106 *Harvard Law Review* (1993), p. 581.

¹³ See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 199; *adde*, Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 1997).

¹⁴ Stephan Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge MA: Harvard University Press, 2000).

¹⁵ Neutrality in teaching forbids indoctrination but does not require strict impartiality. On the contrary strict impartiality could be harmful to pedagogy, Basil Singh, ‘The Teaching of Controversial Issues: the Problems of the Neutral-chair approach’, in B. Carrington and B. Troyna (eds.), *Children and Controversial Issues* (London, New York, Philadelphia: The Falmer Press, 1988), p. 91. On indoctrination in education, see Eomann Callan and Dylan Arena, ‘Indocrination’, in H. Siegel (ed.), *Oxford Handbook of Philosophy of Education* (Oxford: Oxford University Press, 2009); Rebecca M. Taylor, ‘Indoctrination and Social Context: A System-based approach to identifying the threat of indoctrination and the responsibilities of educators’, 51:1 *Journal of Philosophy of Education* (2017), p. 38; Paul Taylor, *Freedom of Religion: UN and European Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), *esp.* pp. 168-170.

liberalism” can however be criticised for upholding a majority bias in society.¹⁶ For them, religion in education is a welcome counter-majoritarian force; without the reaffirmation of pupils’ respective social and cultural identities, they contend, educational opportunities will structurally favour pupils from socially and culturally dominant backgrounds.

The insertion of religion in education could serve the “curricular justice” which Connell¹⁷ proposes and promote multicultural inclusion in education. More generally, the inclusion of religion in education would reflect a contextual and arguably more realistic approach to justice. In line with this contextual approach to social justice, Feinberg and McDonough attempt to transcend the multiculturalist critique by emphasising the connections between socio-cultural particularities and liberal values.¹⁸ In the same vein, Ackerman has developed a notion of “spherical justice”¹⁹ which could allow religion to feature, but in compliance with the broader liberal framework.²⁰

The presence of religion in state liberal education can therefore rely on two (at times intermingled) lines of justification: its merits in furthering general social harmony and tolerance on the one hand and its positive reflection of minority views and identities on the other. Normatively, the first model is based on a *laissez-faire* attitude which postulates *indifference* (within the bounds of the rule of law) towards

¹⁶ Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995); Bhikhu Parekh, *Rethinking Multiculturalism. Cultural Diversity and Political Theory* (London: McMillan, 2000).

¹⁷ Raewyn W. Connell, *Schools and Social Justice* (Philadelphia: Temple University Press, 1993).

¹⁸ Kevin McDonough, ‘Multinational Civic Education’, in K. McDonough and W. Feinberg (eds.), *Citizenship and Education in Liberal-Democratic Societies*, (New York: Oxford University Press, 2003), p. 351; *adde*, Stephan Macedo, ‘Liberalism and Group identities’, *ibid.*, p. 414.

¹⁹ Building upon Michael Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (New York: Basic Books, 1999). For a critique, David Blacker, ‘Complex Equality and Democratic Education. The Challenge of Walzer’s Spherical Pluralism’, 49:2 *Educational Theory* (1999), p. 181.

²⁰ Bruce Ackerman, *We the People, vol. 3, The Civil Rights Revolution* (Cambridge MA, London, England: Harvard University Press, 2014).

religion while the second model is premised on *democratic inclusion* and hearing-from the-hitherto excluded.

While both allow religion in education, the former will require that instances of religious influence in education are proven to serve broader societal interests whereas the latter will tend to presume the value of religion at school, unless otherwise proven. Religion will thus be welcome as an intrinsically positive good, in the latter perspective, but will only be conferred a subordinate value under the first model. Moreover, in the former perspective, the religious presence in education will often be diffuse whereas the latter approach will be more amenable to an institutional dimension of religion in education.

As will be shown, for the sake of parents' and religious communities' rights to autonomy, English law has traditionally conferred to religion both a positive value and an institutional presence in education. More recent trends have however called the institutional dimension of religion into question. As noted regretfully by Julian Rivers, the importance of religion thus seems to have recently weakened in English law: 'Ensuring the weight of religious claims not only requires an appreciation of their social and moral value; it requires institutional anchoring in the recognition of a quintessentially religious domain— a core field— which is important enough to be immune from state interference'.²¹

Focusing on state religious schools, this article will argue that state religious schools' autonomy should not be preserved at all costs for the mere sake of respecting English legal traditions. Nevertheless, it will be submitted that the current moves away from religious autonomy in English law are often inconsistent with liberal values, however construed, and should, therefore, be resisted. Instead, a re-

²¹ Julian Rivers, 'The Secularization of the British Constitution', 14:3 *Ecc.L.J.* (2012), p. 71, esp. p. 399.

interpretation of the principle of religious autonomy, in line with models of deliberative democracy ought to be sought. It is argued that a deliberative democracy model would be helpful in modernizing the English model, by drawing on exactly what is valuable at the heart of it: its deliberative, negotiating approach²² and the inclusiveness²³ of its discussions on religion.

The first part of this article will outline the extent of and justification for the presence of religion in English state schools. It will be shown that faith state schools in England have traditionally enjoyed a large discretion to promote their religious ethos. Rooted in a principle of non-interference in matters of religious beliefs and supported by an ideology of parental school choice, the presence of religious schools is welcome in English state education as a positive good, which enhances parental autonomy and respects minority groups' identities. In a second part, the article will go on to analyse recent developments. It will thus be argued that recent judicial interventions into religious schools' admission criteria are problematic because they betray these philosophical roots, without offering an alternative coherent justificatory model for law and religion relationships. Contrary to the traditional autonomous sphere granted to faith schools, these interventions have provoked an unwarranted and inconsistent mingling of the secular and the religious. Moreover, contrary to the principle of parental autonomy, they have imposed a form of state governance which has reinforced religious authorities to the detriment of the autonomy of local stakeholders, parents and schools. In a third and final part, solutions for renewed relationships of law and religion in educational settings in England will be sought.

²² On this approach to law and religion in English law, see Myriam Hunter-Henin, 'Believing in Negotiation: Reflection in Law's regulation of Religious Symbols in State Schools', F. Guesnet et al. (eds.), *Negotiating with Religion. Cross-disciplinary Perspectives* (Abingdon: Routledge, 2017).

²³ On the importance of equal and reciprocal membership in deliberative democracy models, see for example, Joshua Cohen, 'Procedure and Substance in Deliberative Democracy', in S. Benhabid (ed.), *Democracy and Difference. Contesting the Boundaries of the Political*, 1996, p. 104.

Having criticised the current inconsistent approach to equality values and the new Fundamental British Value rhetoric, I will argue that a renewed interpretation of autonomy, in light of liberal analyses of spherical justice and notions of deliberative democracy would offer a more convincing justification for the presence of faith schools in England.

2 Religion in English Schools

The English schools' framework rests upon two major distinctions: one between schools with a religious character, commonly known as "faith schools", and schools devoid of such religious character or "non-faith schools", and a distinction between state schools and independent schools.²⁴ The two distinctions do not overlap. There are "faith schools" in the state sector as well as in the independent sector. English law is therefore at the antipodes of a separatist model in which religion is to be relegated to the private realm.

Religion is welcome in English state secular schools, both as an expression of pupils'²⁵ and staff members'²⁶ individual faith. Religion will appear in English state secular schools through the wearing of religious clothing and symbols. It will also

²⁴ While state-funded schools exist in the whole of the UK, different legislation governs schools in other parts of the UK. This article will focus on faith schools in England. For an analysis of the Welsh model, see Russell Sandberg and Anna Buchanan, 'Religion, Regionalism and Education in the United Kingdom: Tales from Wales', in Myriam Hunter-Henin (ed.), *Law, Religious Freedoms and Education in Europe* (Farnham: Ashgate, 2011), p. 107; on Northern Ireland, see Christopher McCrudden, 'Religion and Education in Northern Ireland: Voluntary Segregation. Reflecting Historical Divisions', *ibid.*, p. 133. On Scotland, see Margaret Arnott and Ian Menter, 'The Same but Different? Post-Devolution Regulation and Control in Education in Scotland and England', 6: 3 *European Educational Research Journal* (2007), p. 250.

²⁵ See for example, *Re S Begum v. Governors of Denbigh High School* [2007] 1AC 100, [2006] 2 All ER 487, HL. The student's request to wear a more concealing form of outfit than the one allowed under the school uniform code was however denied.

²⁶ *Azmi v. Kirklees Metropolitan Borough Council* [2007] ICR 1154 (although the teaching assistant's wish to wear a face-covering *niqab* was denied because it conflicted with children's right to receive the best education possible).

feature in the syllabus, through religious education courses (thereafter RE) and collective acts of worship,²⁷ albeit with rights to opt-out.²⁸

More idiosyncratically, English law will moreover welcome religion as an expression of a collective ethos. As a historic residue of the Church's past influence on education,²⁹ later strengthened and extended to minority religions by the multiculturalist agenda of New Labour in the 1990s,³⁰ faith schools are an important part of the school state system in England. Within faith state schools, a traditional distinction is drawn between voluntary-aided, voluntary-controlled and foundation schools.³¹ Voluntary-aided schools are granted more independence: two-thirds of managers/governors and all staff may be appointed or dismissed with reference to their adherence to the faith of the school and religious education can be taught in accordance with the tenets of the chosen religion. By contrast, in foundations and controlled-voluntary schools, only one-third of the managers and governors may be appointed in reference to the foundation's ethos and only "reserved" teachers (up to one-fifth) might be required to adhere to the faith of the foundation. In addition, religious education in voluntary-controlled education is not normally denominational, unless parents request it.³²

Surprisingly, the distinction between voluntary-aided and voluntary-controlled schools does not rely on the degree of religiosity of the school ethos but on their

²⁷ School Standards and Framework Act 1998 s70 and Sched 20.

²⁸ Parents have the right to withdraw their child wholly or in part from religious education and worship, under section 71 of the Schools Standards and Framework Act 1998, or to remove their children from sex education classes, under section 405 of the Education Act 1996. Once they are in Sixth-form, pupils may, under Section 71 (1B) of the Schools Standards and Framework Act 1998, exercise rights to opt-out directly.

²⁹ See George M. Trevelyan, *English Social History: a survey of six centuries: Chaucer to Queen Victoria* (London: Longman, 1946).

³⁰ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010), esp. p. 234.

³¹ RA Butler's Education 1944 Act (s. 15) for controlled- and voluntary-aided schools, to which the 1998 Education reform Act added foundation schools.

³² School Standards and Framework Act 1998 s. 69(2) and Sched. 19; Education Act 1996 s. 375 and Sched. 31.

preferred financial arrangements and the greater state funding afforded to the latter.³³ In the 1990s, faith state schools then came to symbolise and foster new concerns for the accommodation of minority rights, while in the 2000s, they were praised by government as a beacon of parental choice.³⁴

As a result of governmental support for parental autonomy in education, a new type of schools has flourished in the English framework since the 2000s: academies and within academies, free schools.³⁵ Transcending the usual divides, academies are schools which are directly funded by and accountable to central government, subject to the terms of an individually negotiated agreement. Free schools are a form of academy set by parents, businesses, religious organisations or other groups. Academies and free schools have control over their own admissions arrangements and also enjoy increased freedoms in their choice of curriculum and the employment of their teaching staff. Academies are not inherently religious. They may have a religious designation or not. Undoubtedly however, government support for academies has been an opportunity for faith communities to strengthen their role in education.³⁶

English law thus actively promotes faith schools. The English school framework strives to ensure that, subject to practical and financial constraints, children are educated in a way consistent with the wishes and convictions of their

³³ The site of a voluntary-controlled school will be owned by the Church and the governing body will have a liability for capital expenditure. Initially, the Church had to make a 50 per cent capital contribution to the school. The percentage was reduced to 25 per cent in 1959 and is now 10 per cent. Besides, most of the expenditure will be recoverable from the State by way of a grant. School Standards and Framework Act 1998, Sch. 3, para. 3.

³⁴ Department for Education and Employment, *Schools. Achieving Success. A White Paper*, <www.educationengland.org.uk/documents/pdfs/2001-schools-achieving-success.pdf>, 29 March 2017.

³⁵ Rebecca Morris, 'Free Schools and disadvantaged intakes', 41:4 *British Educational Research Journal* (2015), p. 535.

³⁶ Michael Hand, 'A New Dawn for Faith-based Education? Opportunities for Religious Organisations in the UK's New School System', 46:4 *Journal of Philosophy of Education* (2012), p. 546.

parents.³⁷ In that sense, English law has adopted the second of the two models outlined above: one in which religion (including the institutional presence of religion) in state education is presumed to be a positive good, which enhances parental autonomy and respects minority groups' identities. The "English autonomy model", as I will call it, seems however under increasing pressure, both from within, as its core concept of choice often seems fragile, and from outside pressures, which challenge the principle of autonomy itself. Despite the pervasiveness of faith state schools in England, doubts are thus cast on the principle on which they are founded— both the reality and the importance of the principle of autonomy are now regularly contested.

3 How Real Is the Principle of Autonomy?

The presence of faith schools arguably serves educational and social diversity and hereby increases parental autonomy: 'the Government continues to support the benefits to society that the dual system of voluntary schools supported by faith organisations and schools without a religious character brings for parental choice and diversity and with the changes in society, it is only fair that pupils of all faiths and none have the opportunity to be educated in accordance with the wishes of their parents'.³⁸ A greater diversity of schools does not however necessarily indicate a greater diversity of choices for parents. Several conditions are necessary for parental choices to be enhanced: the existence of a secular alternative with comparable

³⁷ Article 2 Protocol 1 of the European Convention on Human Rights grants parents a right to have their children educated in accordance with their convictions but the ECtHR has allowed States a wide margin of appreciation as to how this right is to be reflected in the educational institutional framework.

³⁸ Department for Children, Schools and Families, *Faith in the System: the role of schools with a religious character in English education and society*, <[www.churchofengland.org/media/1118295/faithinthetystem\[1\].pdf](http://www.churchofengland.org/media/1118295/faithinthetystem[1].pdf)>, 29 March 2017, p. 3.

academic achievements;³⁹ a match between the local faith schools' ethos and parental convictions⁴⁰ and a realistic opportunity to access (and exit) either faith or non-faith stream easily.

According to many secularists, the growing presence of faith state schools in England is both a factor of division and a constraint on parental autonomy. First, faith state schools are accused of exclusively benefiting middle-class parents, as illustrated by the allegedly disproportionately advantaged intakes of voluntary-aided faith schools in England.⁴¹ According to the British Humanist Association, the claim that faith schools enhance parental choice would therefore only be true for a fraction of parents.⁴² Moreover the separation of school children on the basis of their religious beliefs is at times in itself perceived as a factor of social tension and a denial of parental autonomy.⁴³

By definition, those who do not conform to the ethos of their local faith school will be excluded. Given the large proportion of Christian faith schools,⁴⁴ the presence

³⁹ Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia', 30 *Adelaide Law Review* (2009), p. 31, *esp.* p. 40.

⁴⁰ For an illustration of a mismatch between parental convictions and the type of local schools available, see *R v. Lancashire County Council ex parte Foster* [1995] ELR 33.

⁴¹ Rebecca Allen and Anne West, 'Why Do Faith Secondary Schools Have Advantaged Intakes? The relative importance of neighbourhood characteristics, social background and religious identification amongst parents', 37:4 *British Educational Research Journal* (2011), p. 691. See also how faith state schools have helped integrate wave of migrants: The Board of Deputies of British Jews, *Response to the Commission for Integration and Cohesion Consultation, 'Your Chance to Tell Us What You Think'*, January 2007 <archive.jpr.org.uk/download?id=2515> , 24 March 2017 and Catholic Education Service of England and Wales, *Catholic Schools, Children of other Faiths and Community Cohesion: Cherishing Education for Human Growth* 2008, www.catholiceducation.org.uk/...schools/, 24 March 2017.

⁴² British Humanist Association, *Religious Schools: the case against* (London: British Humanist Association, 2001).

⁴³ Hannah Lewis and Gary Craig, "'Multiculturalism is never talked about': Community cohesion and local policy contradictions in England", 42(1) *Policy & Politics* (2014), p. 21.

⁴⁴ Approximately 37 per cent of state-funded primary schools and 19 per cent of state-funded secondary schools were faith schools as of January 2017. The great majority of these are associated with Christian traditions (primarily Church of England and Catholicism) but there are also a modest number of state-funded schools of other faiths: 48 Jewish, 27 Muslim, 11 Sikh and 5 Hindu schools at the start of January 2017. A substantial portion of independent schools also have a religious designation. In the case of Muslim schools, there are more in the independent sector than state-funded ones. See Robert Long and Paul Bolton, *Faith Schools: FAQs*, House of Commons Briefing Paper no. 06972, 13 March 2017

of faith state schools would thus in effect only increase the autonomy of Christian (mainly Church of England or Catholic) parents. Pupils from minority religious groups or non-believers would not enjoy a similar benefit. Arguably as public money is diverted to fund a faith state school which they cannot attend, they will even indirectly suffer a disadvantage.

Following the riots in North England in 2001, there has also been growing concerns about the alleged social tensions that segregated-religious schooling creates. The Cantle Report,⁴⁵ commissioned to make recommendations on how to appease such social unrest, suggested that no more than three-quarters of a school's intake should come from any one culture.⁴⁶ The recommendation assumes that mono-religious school admission policies are a factor of social division.⁴⁷ A mono-religious admission policy does not however necessarily imply a mono-cultural curriculum.⁴⁸ Conversely, a mixed-religious intake does not guarantee that the school ethos will preach tolerance.⁴⁹ Faith schools may in effect operate in an open-minded fashion⁵⁰ and develop, for example, links with other faith schools of a different denomination.⁵¹

<researchbriefings.files.parliament.uk/documents/SN06972/SN06972.pdf >, 1 May 2017.

⁴⁵ *Community Cohesion. A Report of the Independent Review Team chaired by Ted Cantle* (London: the Home Office, 2001), pp. 33 *et seq.*

⁴⁶ The recommendation led to a legislative proposal on the same lines by Lord Baker (Hansard (HL) 17 October 2006, col. 704) but the idea of a quota on admission was finally dropped in favour of a more general duty for schools to "promote community cohesion" (Education and Inspections Act 2006 c.(40), s. 38(1)).

⁴⁷ See for an identical assumption, British Humanist Association, *op. cit.*, fn. 42, p. 35.

⁴⁸ Geoffrey Short, 'Faith-Based Schools: A Threat to Social Cohesion?', 36:4 *Journal of Philosophy of Education* (2002), p. 559.

⁴⁹ See Sumi Hollingworth and Katya Williams, 'Multicultural mixing or middle-class reproduction? The white middle-classes in London's comprehensive schools', 14 *Space and Polity* (2010), p. 47, revealing that white middle-class pupils were, through various practices and processes, set apart, which resulted in a reification of social and racial divides.

⁵⁰ Terence McLaughlin, 'The Ethics of Separate Schools', in M. Leicester and M. Taylor (eds.), *Ethics, Ethnicity and Education* (London: Kogan, 1992), p. 115.

⁵¹ See for example the "Shared Futures" initiative by the Board of Deputies of British Jews which paired different faith schools together, Keith Khan-Harris, *Communities in Conversation: Jewish involvement in inter-faith activities in the UK* (London: Board of Deputies of British Jews, 2009).

More deeply, there is no evidence that a mono-cultural education is itself necessarily divisive.⁵² A clear sense of identity might help students relate to others rather than inhibit future interaction. A restrictive admission policy will however certainly curtail the choice of parents who belong to a different faith or have no faith.⁵³ Directly challenging the claim of enhanced parental choice on which state faith schools are based, such objections on autonomy grounds are in that sense more powerful than critiques in social cohesion terms. Both lines of objections however overlap as the alleged restriction on parental autonomy would weigh more heavily on families from religious minorities and hereby exacerbate social and religious divides. Indeed, even if minority faith state schools have been created, their numbers still do not match the proportion of minority religious pupils in England. Parents of minority faiths who do not have a local faith school of their religion will therefore need to find a secular alternative, opt for home schooling⁵⁴ or turn to the independent sector.⁵⁵

They might also have the possibility, in certain circumstances, to send their children to a Christian state faith school. If a faith state school is undersubscribed, it cannot refuse to fill up vacancies in order to preserve its ethos and has to admit children with a different or no faith. Moreover, Church of England state schools have

⁵² Geoffrey Short, *op. cit.*, fn. 48, p. 567.

⁵³ Unless non-religious parents take on religious beliefs in order to gain access to faith schools, a strategy denounced as a distortion of religious autonomy and as another illustration of the bias that faith schools create in favour of socially-advantaged parents, who are more likely to be able to manipulate the system, see Stephen Ball and Carol Vincent, 'Education, Class Factions and the local rules of spatial relations', 44 *Urban Studies* (2007), p. 1175.

⁵⁴ Under section 7 of the Education Act 1996, parents of children of compulsory school age must arrange for them to receive full-time education which is suitable for their age, ability and aptitude, either by regular attendance at school or otherwise.

⁵⁵ As the UK is not under any obligation to set up new schools to cater for all those parents wishing their children to learn in a faith environment, *See X v. United Kingdom* No. 7782/77 (1978) 14 DR 179; *X and Y v. United Kingdom* (App. No. 9461/81 (1982) 31 DR 210.

adopted a welcoming policy towards pupils of other faiths and have proven to be a popular choice for minority faith pupils.⁵⁶

Nevertheless, the argument that faith state schools are inherently divisive has persisted and, in response, Parliament and Courts have come to scrutinise faith state schools' admission criteria. First, alongside a few unsuccessful challenges against decisions to open new faith schools,⁵⁷ English courts have been asked to review admission policies of faith schools by parents whose children had been denied a place. In the *Jewish Free School Case* (thereafter *JFS*),⁵⁸ the disputed policy gave priority to children recognised as Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth, namely children who were Jewish by matrilineal descent or through a conversion recognised by Orthodox authorities.

In holding that these criteria amounted to discrimination on the basis of race, the Supreme Court revealed some unknown tensions between the principles of equality and religious autonomy.⁵⁹ In that case, the applicant, who was born to a Catholic Italian mother who had converted to Judaism under the auspices of the Masorti, did not meet the school's definition of "Jewish pupils". Rather than putting forward a case in religious discrimination terms, the applicant argued that the school had unlawfully discriminated against him on the ground of race. The Supreme Court ruled in favour of the applicant, holding that the school had directly discriminated

⁵⁶ Letter from Bishop of Portsmouth, Rt Reverend Dr Kenneth Stevenson, Chairman, the Church of England Board of Education and National Society, to Alan Johnson, Secretary of State of Education and Skills of 2 October 2006, making the pledge to allow that 25 per cent of places in new Church of England schools would be available with no requirement that children come from Christian practicing families. Quoted in Claire Dwyer and Violetta Parutis, "'Faith in the system?' State-funded faith schools in England and the contested parameters of community cohesion', 38 *Transactions* (2013), p. 267, *esp. fn. 5*.

⁵⁷ See for example, *R (on the application of British Humanist Association) v. Richmond-upon-Thames LBC* Queen's Bench Division (Administrative Court) 14 December 2012 [2012] EWHC 3622 (admin); [2013] 2 All ER 146.

⁵⁸ *R (E) v. Governing Body of JFS* [2010] 2 WLR 153.

⁵⁹ For a detailed and insightful analysis of these new tensions, Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the *JFS* case considered', 9:1 *International Journal of Constitutional Law I•CON* (2011), p. 200.

against him because the test applied by the school hinged on the ethnicity of the applicant's mother.⁶⁰

If the mother had been of the requisite ethnic origins, she would not have been expected to undertake an approved course of Orthodox conversion. Consequently, the conversion route did not absolve the school but only confirmed, according to the majority of the Court, the ethnic nature of the test. Albeit couched in ethnic terms, on the basis of racial discrimination, the reasoning of the Supreme Court directly affects the definition of religion. The court does not intervene to curb some discriminatory side-effects of a school's religious ethos.⁶¹ Its intervention hits at the heart of the definition of religious membership itself and hereby largely contradicts the statutory exemption from religious discrimination which faith schools supposedly enjoy.⁶²

More inconsistently still, the interference will only affect those religions whose membership criteria overlap with ethnic factors.⁶³ The Supreme Court in *JFS* pretends to focus on racial discrimination and set aside the religious dimension of the case. Yet, in drawing sharp lines between "religion" and "ethnicity", the Court frames religion in Protestant terms. Contrary to evidence provided by the Chief Rabbi indicating that one could be Jewish according to Jewish Law and explicitly reject any conscious affiliation with the Jewish religion or faith,⁶⁴ it projects the individual conscience of the believer as being of paramount importance in the definition of religious Jewish affiliation. Paradoxically, minority faith state schools, promoted for the sake of preserving religious minority rights, would then be compelled to adopt a

⁶⁰ Para. 41, per Lord Phillips.

⁶¹ On this issue, *see* below.

⁶² Under DCSF School Admissions Code (2009) para. 2.47.

⁶³ See for example the complex intermingling of race and religious criteria in relation to Sikhs: *R Watkins-Singh v. The Governing Body of Aberdare Girls' High School* [2008] EWHC 165 (admin).

⁶⁴ Christopher McCrudden, *op. cit.*, fn. 59, p. 221.

Christian mould. In the *JFS* decision, religion is neither left to the realm of religious schools, under the traditional English autonomy model nor is its presence restricted to the extent that it serves the greater social good. The *JFS* decision lies in-between the two models: it ensures interaction within the Jewish community, between more liberal and Orthodox branches, but does not foster the inter-religious contact which transformative liberals would support. The rationale for such middle-way is unclear and even appears arbitrary.

Legislative intervention on the issue of faith state schools' admission criteria has to an extent removed the charge of a Christian bias but has further obscured the underlying philosophy for legal intervention. Following the persistent concerns about state faith schools' admission policies, a Department for Education Schools' Admission Code was issued, under the Education and Inspections Act 2006. In 2008, the Government then charged the inspectorate body, Ofsted, to closely monitor the enforcement of the code. To allegedly increase the fairness and transparency of the admission process, faith state schools were moreover required to have their admission criteria approved by their own religious authorities. It is argued that this complex intertwining of religious and state authorities has led to an unjustified intrusion of the secular into religious matters.

In the *London Oratory Catholic School* case, the High Court Judge was asked to ascertain whether the board of governors had failed to have due regard to the Archdiocese Guidance. In doing so, he was drawn into discussing the extent to which participation in Catholic services adds to or merely complements attendance at Mass and whether the requirement of providing baptismal certificates adds to or merely

proves membership to the Catholic faith.⁶⁵ Such detailed analysis led the judge into considerations of scholastic issues for which secular courts lack legitimacy and competence. ‘A secular court will not adjudicate on the truth of disputed tenets of religious belief and faith or on the correctness of religious practices: those questions are non-justiciable, because there are neither questions of law or are they factual issues capable of proof in court by admissible evidence. Judicial method is equipped to deal in hard facts objectively ascertainable, directly or by inference, from probative evidence: it is not equipped to determine the truth, accuracy or sincerity of subjective religious beliefs about doctrine and practice.’⁶⁶

It is argued that discussion of the opportunity of particular religious criteria would best be left to the relevant religious schools.⁶⁷ Such judicial restraint would be more in fitting with the principle of religious autonomy, traditionally embraced in English law. Such judicial restraint would moreover serve civic liberalism under which religion, where it is welcome, should not be welcome on religious grounds but because of the broader societal interests it helps to foster. Accepting religious criteria because of their conformity to definitions of Catholicism set by diocesan authorities therefore betray liberal values, however, construed. This recent intrusion into religious schools’ admission criteria is all the more puzzling that English Courts still favour a hands-off approach in relation to rights of exit.

English Courts do not intervene to ensure that the education which faith state schools dispense enables pupils to easily switch to a non-faith school setting should

⁶⁵ *R (on the application of London Oratory School Governing Body) v. Schools Adjudicator* [2015] EWHC 102 (Admin).

⁶⁶ See *Khaira & Ors v. Shergill & Ors* [2012] EWCA Civ 983 (17 July 2012), per Mummery LJ, para 5.

⁶⁷ See also, Myriam Hunter-Henin, ‘Believing in Negotiation’, *op. cit.*, fn 22.

they later change their minds.⁶⁸ As Spinner-Halev puts it, ‘if the State has a firm commitment to equality, it makes it more likely that citizens (within religious organisations) feel empowered to argue and discuss. It also means that the idea of exit is real – that citizens can leave religious organisations if they so choose’.⁶⁹ The idea of exit underlines the tensions between a collective and individual approach to liberal values. Religious schools may add to the overall diversity of views and thus enhance pluralism and democracy in society but a State respectful of human rights should also ensure that individual freedoms are not compromised as a result.

For James Dwyer, it is thus unacceptable to sacrifice children in the interests of the diffuse public good of pluralism.⁷⁰ Under English law, the rights of parents to educate their children in accordance with their own beliefs will justify parental choice of a secluded up-bringing within closed communities. If the ECtHR has asserted that there is no right for parents to refuse exposure to other cultures and demand exemptions from core teaching in state schools,⁷¹ Member States are free to allow parents to educate their children outside of the state syllabus altogether.⁷² The possibility under English law for parents to remove their children from the state education system or even from school institutions altogether reflects obvious consideration for parental religious convictions but can also be supported from a children’s rights perspective.

⁶⁸ For an illustration, but in relation to an independent faith schools, *R v. Secretary of State for Education and Science ex parte Talmud Torah Machzikhei Haddass School Trust*, *infra* fn 74.

⁶⁹ Jeff Spinner-Halev, ‘Discrimination within Religious Schools’, *Journal of Law, Religion and State* (2012), p. 45, *esp.* p. 56; *adde*, on the importance of the right to exit, same author, ‘Autonomy, Association and Pluralism’, in A. Eisenberg and J. Spinner-Halev (eds.), *Minorities within Minorities: Equality, Diversity and Rights* (Cambridge: Cambridge University Press, 2005).

⁷⁰ James G. Dwyer, *Religious Schools v. Children’s Rights* (Ithaca and London: Cornell University Press, 1998), p. 99 and the review by Rex Adhar, ‘The Child’s Right to a Godly Future’, 10 *The International Journal of Children’s Rights* (2002), p. 89.

⁷¹ The ECtHR has expressly declared that ‘the second sentence of article 2 of Protocol I does not embody any right for parents that their child be kept ignorant about religion and philosophy in their education’, ECtHR *Folgerø and Others v. Norway* 29 June 2007 Grand Chamber, App. no. 15472/02, para. 89.

⁷² See Anthony Bradney, ‘The Inspection of Ultra-Orthodox Jewish Schools: “The Audit Society” and “The Society of Scholars”’, 21 *Child and Family Law Quarterly* (2011), p. 133

Whilst potentially restricting children's future career prospects, education within the child's closed community will preserve the child's links with the community and his family and foster the child's emerging identity.⁷³ Indeed, the argument goes, forcing those children into state secular education might prevent their full acceptance within their communities. As Woold J stated in *R v. Secretary of State for Education and Science, ex p Talmud Torah Machzikhei Haddass School Trust*, 'there is no requirement to educate the child in the way of life of the country as a whole', with the important qualification that the education received 'does not foreclose the child's options in later years to adopt some other form of life if he wishes to'.⁷⁴ The right to participate in one's community of origin is therefore tied to its opposite: the right to choose not to.

When one of the parents wishes to leave the community and remove the children from the corresponding school, I would argue that a rebuttable presumption should therefore be set in favour of the more liberal school chosen by the parent wishing to leave. At present, English Courts tend to support the choice of the primary carer, whether the outcome leads to a move towards a more moderate life-style,⁷⁵ or to maintenance of the *statu-quo* in the reclusive school and community.⁷⁶ Judicial support for the primary carer's choice of the reclusive option will however dwindle if the other parent is systematically vilified or not kept informed of the children's progress.⁷⁷ More forcefully, I would argue that in such instances of parental conflict over school choices, the default position should be in favour of the school which best ensures the child's future integration into the wider society.

⁷³ Anat Scolnicov, 'The Child's Right to Religious Freedom and Formation of Identity', 15 *International Journal of Children Rights* (2007), p. 251.

⁷⁴ *R v. Secretary of State for Education and Science ex parte Talmud Torah Machzikhei Haddass School Trust* (Crown Office List) 3 April 1985.

⁷⁵ *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233; [2012] 3 FCR 524.

⁷⁶ *X (Number 1: Religious Differences: Schools)* [2014] EWFC B230

⁷⁷ *Ibid.*, para. 54.

Such rebuttable presumption would respect both children's autonomy and the State's interests in promoting social cohesion. Indeed the "dynamic aspect of children's self-determinism", that is the requirement that children's autonomy be protected both in actuality and potentiality, renders restrictions of their future possible goals problematic.⁷⁸ If children's future autonomy rights may arguably legitimately be restricted when balanced against the importance of preserving family, cultural and religious ties, the restrictions become hardly defensible in instances of parental conflicts where the child's identity is already torn between different conceptions of life.

The presence of faith state schools in England is thus embedded in the concept of religious freedom, itself rooted in the notion that religious communities and individual believers need to be granted autonomy to conduct their own affairs. This traditional hands-off approach is grounded in a negative definition of liberty as an entitlement to non-interference,⁷⁹ and strengthened by the presumption of the positive value of religion, especially in education. The abovementioned recent judicial and legislative interventions⁸⁰ into the affairs of religious schools may be criticized as they betray these philosophical roots, without offering an alternative coherent justificatory model for law and religion relationships. By seeking to remove the allegedly socially or racially divisive edge of religious autonomy, they have provoked an unwarranted and inconsistent mingling of the secular and the religious and imposed a form of state governance which has reinforced religious authorities to the detriment of the autonomy of local stakeholders, parents and schools. More robustly, subsequent

⁷⁸ John Eekelaar, 'The Interests of the Child and the Child's Wishes: the Role of Dynamic Self-Determinism' 8 *International Journal Law, Policy and the Family* (1994), p. 42.

⁷⁹ John S. Mill, *On Liberty and Other Essays*, with an introduction by John Gray (Oxford: Oxford University Press, 1991), p. 63.

⁸⁰ See *R (on the application of London Oratory School Governing Body) v. Schools Adjudicator* [2015], *op cit* fn 65 and *R (E) v. Governing Body of JFS* [2010], *op cit* fn 58.

legislative interventions have seemed to challenge the principle of religious autonomy itself and suggested an alternative model, based on equality and Fundamental British Values.

4 How Important Is the Principle of Autonomy?

The legislative endorsement of equality rights⁸¹ and of the rhetoric of fundamental British values (thereafter FBV)⁸² has cast doubts on the importance of parental autonomy in the English school framework. Under section 26 of the Counter-Terrorism and Security 2015 Act, schools, universities and nurseries have since September 2015 been subject to a duty to promote Fundamental British Values and to have due regard to the need to prevent people from being drawn into terrorism. By stating that non-violent extremism is conducive to terrorism, the legislation may seem to challenge the existence of faith schools which promote an extreme religious ethos. The legislation however refers to FBV as values that existing schools should be promoting, not as criteria for assessing whether existing schools should remain in existence. The real threat for state faith schools lies in a downgrading of their classification by the body of school's inspectors: Ofsted.⁸³

While the Equality Act 2010 has provided for specific derogations in favour of religious schools in relation to admission of students and appointment of teaching staff,⁸⁴ recent case-law has emphasized the importance of equality values,

⁸¹ Under section 149 of the Equality Act 2010, schools are under a duty to have due regard to the need to eliminate discrimination and promote equality of opportunities.

⁸² For a critical analysis of the discourse of Fundamental British Values, see Myriam Hunter-Henin, 'Vices and Virtues of Fundamental British Values. Education, Religion, Equality and Autonomy', forthcoming.

⁸³ OFSTED, *School Inspection Handbook* August 2015, No. 150066, p. 133 and p. 152.

⁸⁴ Schedule 11, Part 2 of the Equality Act 2010, available at www.legislation.gov.uk/ukpga/2010/15/schedule/11.

often above religious autonomy.⁸⁵ Transposed in a school context, the reasoning for example raises questions as to the legitimacy of gender segregation in certain faith schools. Can gender segregation be defended for the sake of the school's religious ethos or is the practice to be prohibited in the name of gender equality values? The Equality Act allows single-sex schools to refuse to admit pupils of the opposite sex⁸⁶ but does not extend the exemption to gender discrimination within mixed-school settings.

The compatibility of gender segregation with equality provisions was raised in *X School v. Her Majesty's Chief Inspector of Education, Children's services and skills*, in the context of a voluntary-aided mixed school with a Muslim religious character.⁸⁷ Segregation of boys and girls from the age of 9 years old was one of the school's key features. It was widely publicized as an integral part of the school's Muslim ethos and supported by parents at the school. Autonomy of the school to bolster its religious ethos and of parents to choose an education in accordance with their convictions therefore combined to support the practice. However, the court still had to ensure that the practice was also compatible with anti-discrimination provisions, under section 149(1)(a) of the Equality Act 2010. Lord Justice Kay expressly rejected the relevance of autonomy considerations in this assessment: 'the fact that the motive for this segregation is religious belief is irrelevant. Nor is it relevant that the School is clearly taking account of the wishes and preferences of the parents' (para. 101).

⁸⁵ ECtHR 15 January 2013 *Eweida v. United Kingdom*, App. nos. 48420/10, 59842/10, 51671/10 and 36516/10. For an explanation of this implicit hierarchy, see below fn 93.

⁸⁶ Equality Act 2010, Schedule 11, Part 1.

⁸⁷ *X School v. Her Majesty's Chief Inspector of Education, Children's services and skills* 8th November 2016 [2016] EWHC 2813 (Admin).

Aware of the consequences of a ruling of incompatibility for a proportion of other Muslim, some Jewish schools and a number of Christian schools,⁸⁸ Kay LJ construed, however, the conception of discrimination narrowly. He considered that mere segregation, without any inequalities in the education received, did not amount to discrimination. The meaning of segregation is indeed ambivalent. Segregation may in itself constitute a harm in that it will deprive the children from the opportunity to interact with the opposite sex (para. 40), but it could also be viewed as advantageous both in pedagogical and religious terms (para. 95). Under a civic liberal model, under which the onus of proof of liberal compatibility would lie on religious groups, such ambivalence would lead to a rebuttable presumption that segregation for religious reasons is always discriminatory, unless the school proves it is justified by an educational goal. Kay LJ prefers to rule that segregation will be presumed not to be discriminatory, unless the inspector shows inequalities of treatment which are detrimental to one of the gender groups.

While dismissing the pertinence of the principle of autonomy, Kay LJ thus still reasons under its auspices; he allows the school to enforce its religious ethos freely, until evidence of right violations is put forward. Naturally segregation can be compatible with equality. However, in light of schools' public sector duty to 'foster good relations between persons who share a relevant protected characteristic and persons who do not share it'⁸⁹ and of the long pedigree of racial segregation in the US in order to maintain blacks in an inferior detrimental status,⁹⁰ the general presumption that segregation is non-discriminatory may seem unduly generous.

⁸⁸ *Ibid.* para. 11, para. 90.

⁸⁹ Under section 149(1)(c) Equality Act 2010.

⁹⁰ Lord Justice Kay relies on section 13(5) of the Equality Act which states that racial segregation is inherently discriminatory to draw a distinction between racial and gender segregation. Whereas racial segregation has in his view a specific historical resonance and has led to a specific prohibition, gender

The conclusion by Kay LJ that ‘one act/treatment whose nature and character has equivalent consequences for both sexes cannot be said to result in one sex being treated less favourably than the other’ (para. 127) is at odds with a wealth of literature on feminism and racism which has revealed how segregation will inherently carry a stigma for the socially disadvantaged group.⁹¹ The message that the decision might send to pupils as to the value of equality is ignored. Law has a legitimating as well as regulating function. When religious schools are permitted to practice gender segregation, it may convey to a group of impressionable children that equality is of limited value, that it can be ignored if desired.⁹²

Such restrictive interpretation differs from case-law on equality discrimination and convention rights in the employment law context. In analogous employment law cases, English courts have been much more protective of equality, both as a right and a value. Even though same-sex couples would still have had access to the public service, the very suggestion that they should be set aside to ensure that their unions were celebrated by staff members who did not object to homosexuality was held in *Ladele* to be contrary to equality.⁹³ Had Ms Ladele’s request to be exempted from conducting civil partnerships been granted, same-sex couples could not have complained of any concrete infringements to their rights but the value of equality would still have been undermined. In *School X* on the other hand, protection is limited to equality *rights*. The interpretation of equality may not be uniform across all spheres and there may be particular reasons why in education, gender segregation

segregation would not carry the same weight and was not allegedly intended by Parliament to be characterized in itself as amounting to discrimination (see para. 128).

⁹¹ See Douglas S. Massey and Nancy A. Denton, *American Apartheid. Segregation and the Making of the Underclass* (Cambridge, Massachusetts; London, England: Harvard University Press, 1993).

⁹² See Carolyn Evans and Leilani Ujvari, *op. cit.*, fn. 39.

⁹³ *Ladele v. Islington Borough Council* [2009] EWCA 1357.

could be tolerated to a greater (because of the importance of a religious upbringing for religious freedom) or lesser (because of the impressionable age of children) extent.⁹⁴

Assuming that a case for gender segregation could have been made, it should therefore, it is submitted, have been made in light of the particular context of faith schools. Such contextual approach would not however necessarily have led to upholding the segregatory practice. It would still have been possible for courts to argue that gender-segregation in the context of a mixed-school setting, be it a faith school, is more likely to reinforce the subordination of girls than segregation in different single-sex schools. The closeness of both genders makes their separation all the more obvious and suspicious, and the possibility of single-sex school settings makes its justification in terms of a religious ethos less compelling.⁹⁵ Even under a contextual approach to religious freedom therefore, gender-segregation may not have necessarily been held to be a proportionate restriction of equality values. Recognition of the autonomy of state faith schools to promote their ethos would not, in that sense, be the end-solution to differing conceptions of the good but the beginning of a dialogue on these sensitive issues.

My argument here echoes theories of deliberative democracy under which ‘the question of what level of tolerance we, as citizens, legally owe to one another (must be retained) within the realm of liberal constitutional dialogue itself, in which we confront each other *symmetrically* as free and equal –as partners in a shared constitutional project, not *asymmetrically* as “us” and “them” (or the “other-

⁹⁴ See Michael Walzer, above fn. 19 and Bruce Ackerman, above, fn. 20. Also, Seyla Benhabib, *The Claims of Culture, Equality and Diversity in the Global Era* (Princeton and Oxford: Princeton University Press, 2002), arguing that a universal concept of equality at the level of the polity is compatible with legal pluralist interpretations to resolve multiculturalist tensions.

⁹⁵ Parents may be allowed to indicate that their preference for single-sex education is religiously motivated and their religious motivation will add weight to their school preference, *R (K) v. Newham London Borough Council* [2002] EWHC 405.

minded”)⁹⁶. As equality issues are now often perceived as a key element on the “silent war on religion”,⁹⁷ it is claimed that a more deliberative and contextual re-interpretation of the principle of religious autonomy in English Law would lead to less confrontational and more acceptable outcomes.

Signs of a more deliberative approach between stakeholders (schools, inspectors and parents) can already be detected. As shown by Claire Dwyer and Violetta Parubis,⁹⁸ faith-state schools demonstrated such creative strategies when the new duty to promote social cohesion was imposed on them.⁹⁹ The duty, in its implementation, gave faith state schools the opportunity to counter the official narrative and prove their own contribution to social inclusion, notably their role in the integration of migrants in Britain, through an on-going discussion with Ofsted inspectors and courts. In that sense, the legislative duty to promote social cohesion created an incentive for stakeholders to all actively discuss sensitive issues on religion and social cohesion and gradually shape balanced solutions. However, as the duty to promote social cohesion has been complemented by a duty to actively promote FBV and prevent pupils from being drawn into terrorism, the scope for such creative deliberative initiatives has been restricted in many ways.¹⁰⁰

Deliberation at school has been affected by the FBV discourse, as the securitisation of places of learning is likely to restrain rather than encourage debate.¹⁰¹ Moreover and more broadly, free speech has been muffled, as the insistence on shared

⁹⁶ Oliver Gerstenberg, ‘Germany: Freedom of Conscience in public schools’, 94:3 *International Journal of Constitutional Law* (2005), p. 103, *esp.* p. 104.

⁹⁷ Frank Furedi, ‘The British State’s Silent War on Religion’, *Spiked* 9 June 2015, www.spiked-online.com 1st May 2017.

⁹⁸ *See* above fn. 56.

⁹⁹ Since 2006, schools have been expected to promote social cohesion: Education Act 2002, s. 21(5), introduced by the Education and Inspection Act 2006.

¹⁰⁰ For an analysis of the detrimental effects of the FBV discourse, see my article, ‘Vices and Virtues of Fundamental British Values. Education, Religion, Autonomy and Equality’, fn. 80.

¹⁰¹ Liam Gearon, ‘The Counter-Terrorist Classroom: Religion, Education and Security’ 108 *The Official Journal of the Religious Education Association* (2013), p. 129.

British values has had a stigmatising effect on minorities and encouraged a political correctness culture. Following the guidance by Ofsted that inspectors ‘should judge the leadership and management of a state-funded school inadequate if leaders and governors, through their words, actions or influence, undermine the promotion of tolerance of and respect for people of ... sexual orientations and other groups with protected characteristics’,¹⁰² it is possible that schools will welcome the opportunity to both challenge the stigmatising effect of FBV and contribute to debates on shared values,¹⁰³ just as they did on social cohesion.

The task is, however, fraught with difficulties: the overall security objectives of the legislative FBV duty and the government’s adamant desire to keep the upper-hand in the definition of FBV currently impede the more nuanced and complex regulatory framework which would be required for appropriate sites of deliberation.¹⁰⁴

5 Conclusion

‘If we do not protect the space for religious teaching of children, we are not really protecting religious freedom at all.’¹⁰⁵ In line with this generous conception of religious freedom, English law has traditionally allowed religion to feature largely in state education. Intertwined with the principle of autonomy, religious freedom, in English terms, has justified a strong institutional presence of religion in state education, through a large number of state faith schools. Rooted in a principle of non-

¹⁰² OFSTED *School Inspection Handbook*, August 2015, *op. cit.*, fn. 81, p. 138.

¹⁰³ See, in that light, the Guidance issued by the Equality and Human Rights Commission on “Delivering the Prevent Duty in a Proportionate and Fair Way”, *A Guide for Higher Education Providers in England on how to use Equality and Human Rights Law in the Context of Prevent*, <www.equalityhumanrights.com/sites/default/.../delivering-the-prevent-duty.pdf>, 28th April 2017.

¹⁰⁴ On this regulatory dimension, see Gráinne De Búrca, Robert O. Keohane and Charles Sabel, ‘New Modes of Pluralist Global Governance’, 45 *New York University Journal of International Law & Politics*, p. 723.

¹⁰⁵ Stephen Carter, *God’s Name in Vain: The Wrongs and Rights of Religion in Politics* (New York: Basic Books, 2000), p. 181.

interference in matters of religious beliefs, supported by an ideology of parental school choice, faith state schools in England have enjoyed a large discretion to develop and promote their own religious ethos.

As argued in this article, recent legal interventions in the sphere of state faith schools' religious autonomy have often been inconsistent and even arbitrary. English Courts have at times struck down religious admission criteria imposed by state faith schools, and, at times, on the contrary, allowed them unfettered discretion to promote their religious ethos, even at the cost of individual human rights. My aim is not to suggest that greater restrictions upon faith state schools' religious autonomy should never be imposed. However, greater work needs to be done to establish a clear normative framework by which it is legitimate for the State to intervene to curb religious autonomy.¹⁰⁶ The new FBV discourse may have provided a new basis for state intervention into state faith schools but, sadly, its security and counter-terrorism objectives have failed to provide a convincing theoretical justification for doing so.

It is submitted that a renewed interpretation of autonomy, in light of liberal analyses of spherical justice and notions of deliberative democracy would offer a more convincing justification. A justification in those terms would preserve the possibility of a more robust defence of equality values in non-faith settings. It would also guarantee a more attuned and contextual expression of the relationships between these values and religion in school faith settings. It would avoid the creation of debatable distinctions between protected characteristics whereby equality rights on the basis of sexual orientation appear more vigorously protected than women's

¹⁰⁶ See Rachel E. Taylor, 'Responsibility for the Soul of the Child: the Role of the State and Parents in Determining Religious Upbringing and Education', *International Journal of Law Policy and Family* (2015), p. 1, *esp.* p. 18.

equality rights.¹⁰⁷ Conceptually, it would finally offer an interesting avenue for reconciling the current tensions between autonomy and equality principles in English educational law.

¹⁰⁷ For an argument that religious freedom rights are now subordinated to sexual orientation equality rights, see Carl F. Stychin, 'Faith in the Future: sexuality, religion and the public sphere', 29:4 *Oxford Journal of Legal Studies* (2009), p. 729.