Social Mobility, Education, and the European Convention on Human Rights

Abstract

This article argues that the problem of Britain’s social immobility could be challenged under the European Convention on Human Rights. In doing so, it suggests that the most tangible expression of this is Britain’s ‘segregated’ education system of state and private education, which produces wide disparities in outcomes that stand alone by international comparisons. Then it frames the education system in the legal setting of the Right to Education per se, and without discrimination, provided by the European Convention on Human Rights, and informed by the European Social Charter and the UN International Covenant of Social, Economic, and Cultural Rights. For this purpose it explores this state of affairs in relation to current Western values of freedom of choice, plurality in education, a competitive market economy, notions of meritocracy and, of course, social mobility.

The article concludes that the state is obliged to provide education without discrimination, and that the freedoms favouring private education do not outweigh the damage it does to the life chances of the vast majority of Britain’s children, the competitive market economy, and the related goals of social mobility and meritocracy.

INTRODUCTION

Like New Labour before it, the current Coalition Government has made much of the lack of social mobility in Britain. In recent times, for instance, the Government has published ‘Opening Doors’, and ‘Fair Access to Professional Careers.’ More informally, the Minister for Education acknowledged his concern that social mobility was worse than in any comparable country. All these concerns unite around one theme: the private/state education schism, with the education minister declaring that ‘one of the most stratified and segregated education systems of any developed nation’ was England’s ‘dark secret’; thus the private schools’ domination of public life was ‘morally indefensible’.

The oddity here is that this apparent concern for social inequality has never resulted in the enactment of dedicated equality legislation. Equality laws generally are justified by reference to the economic and social disadvantages suffered by protected groups. Women generally earn less, some ethnic minority groups tend to underperform at school, whilst all

5 Equality Act 2010, s.1 provided for a ‘Public sector duty regarding socio-economic inequalities’. But the Coalition Government, who inherited the Act, refused to put s.1 into force.
these groups are underrepresented in the most highly paid and powerful jobs. Yet, they share a common and predictable theme: lower social-economic groups dominate those underrepresented, underperforming, and poorly paid. So much so that:

‘... in contemporary Britain, social stratification along class and education lines has a more enduring force and cuts more deeply in the civic life than ... [attributable] characteristics such as religion or ethnicity’.

Of course, a ‘wealth-gap’ is a necessary consequence of a competitive market economy; this is the accepted trade-off for the more general benefits of wealth creation and individual freedom. However, existing equality law generally seeks to redress unjustified economic inequalities. And on the face of it, this private/state education inequality is unjustified, or, in the words of the education minister, ‘morally indefensible’. Yet this glaring inequality – by social class – remains largely unchallenged by equality law.

This paper explores the relevance to this matter of the European Convention on Human Rights (ECHR). In doing so, it highlights the extent of social immobility in Britain, and how it is tied to education, and then considers a challenge under the Right to Education per se, and without discrimination.

Before proceeding further, some parameters are required. First, as noted above, this paper does not seek to challenge the ‘wealth-gap’, but rather the distribution of life chances (including wealth) by social-economic class through education. Second, its focus is not confined to those socially excluded, or an ‘underclass’. It is broader, arguing that the vast majority of the nation is excluded from its own top echelons. Third, it does not adhere to the various theories of ‘equality in education’, which explore how education may precisely be ‘equal’ in some detail, from pupil to pupil. Nor does this paper explore the disparities within each of the state and private school sectors. It takes the nation as a whole, and so analyses its education system as a whole. The driver of this is the persistent gulf of outcomes between the state and private sectors, the tangible evidence of this, and so the likelihood of a legal solution.

That said, one existing theory of ‘equality in education’ will be honoured. ‘Equality of opportunity’ in education ‘is not a meaningful term’ because outputs cannot be equal due to varying factors such as parental support, whilst equality in inputs could result in all schools


8 See e.g. ‘Hugh Collins, Discrimination, Equality and Social exclusion’ (2003) 66 MLR 16.

being equally bad. A better principle is a ‘reduction in inequality’. Accordingly, this paper does not explore how the Convention could achieve equality in education, but rather, how it might be used to reduce the inequality in education.

SOCIAL-ECONOMIC INEQUALITIES IN BRITAIN

Social mobility is one of most tangible indicators of class inequality. The politicians agree that ‘merit‘ is a highly prized value, and that Britain needs more social mobility. They have reason to be concerned. Research suggests that in Britain social mobility is static, if not in decline. In other words, children are more likely to replicate their parents’ achievements and aspirations, rather than participate fully in civil life and a competitive market economy. Social mobility and inequality in Britain have roots in education and merit.

Education

Social class is not an easy thing to pin down, especially for a legal discourse. Discrimination on the ground of being ‘posh’ or being ‘common’ is an elusive concept. It is easier to witness than reduce to writing, especially in legal terms. Two tangible and closely related starting points are parental income and education, which, in the main, dictate a British person’s social class and financial prosperity. The most tangible and significant connection between parental wealth and a child’s prospects is realised in the education it determines. Statistics on the educational backgrounds of those working in the upper echelons of society suggest there is serious class-related inequality in Britain.

The new coalition cabinet, when formed in May 2010, contained 29 ministers, 18 of whom (62 per cent) were privately educated. A survey last conducted in 2005, reported some

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13 GB Shaw’s Pygmalion (1912) was based on his frustration of the written word’s inability to capture Britain’s class accents.
14 There are no figures available for England alone.
15 Includes Cabinet Ministers and other Ministers attending Cabinet meetings. ‘The Educational Backgrounds of Government Ministers in 2010’, (May 21, 2010), Sutton Trust: <
three-quarters of the senior judiciary,\textsuperscript{16} two-thirds of the leading commercial chambers, and 55 per cent of partners in the ‘magic circle’ solicitors’ firms were privately educated.\textsuperscript{17} Recently, the Sutton Trust found that half of ‘medics’\textsuperscript{18} were privately educated.\textsuperscript{19} Similar findings can be found elsewhere. In 2000, for instance, of those admitted to medical schools in the UK, over 80\% were from social classes 1 or 2 (from 5 social classes).\textsuperscript{20} The Sutton Trust has found that 54 per cent of top journalists and 54 per cent of chief executive officers of FTSE 100 companies\textsuperscript{21} were privately educated. Government research found that for army officer training (at Sandhurst), private schools were over-represented, making up 42.3 per cent of the 2011/2012 graduates.\textsuperscript{22} The journey from school to a top job normally will be via a top university. Private school students are 55 times more likely to win a place at Oxbridge and 22 times more likely to go to a top-ranked university than the poorest students at state schools.\textsuperscript{23}

These figures become arresting once it is realised that private schools account for about seven per cent of the nation’s education.\textsuperscript{24} Coupled with the findings that social mobility has stalled (or is in decline),\textsuperscript{25} if anything, the top jobs are likely to become even less accessible to the vast majority of the British talent pool.

That this is a peculiar state of affairs is highlighted by comparisons with other nations. This peculiarly British problem is recognised by the Coalition, which points out that the influence of parental income on the income of children in Britain is among the strongest in the Organisation for Economic Co-operation and Development (OECD) countries: ‘The impact

\textsuperscript{16} High Court, Court of Appeal, and House of Lords.
\textsuperscript{18} That is medics with positions on the Councils of the medical royal colleges or other national representative bodies. These Councils represent doctors at a national level for particular specialisms or for the profession as a whole. The figures were compiled for 100 Council members in 2007 and 100 Council members in 1987, each concluding that 51 per cent were privately educated.
\textsuperscript{22} Fair Access to Professional Careers (above, n.2), p.61.
\textsuperscript{24} Opening Doors (n.1, above), p.5.
\textsuperscript{25} J. Blanden et al, n.12, above.
of parental income is over one and a half times higher in Great Britain than in Canada, Germany, Sweden or Australia’.  

This echoes in broader educational indicators. Between 2000 and 2009, 15-year-olds in the UK have fallen from 4th to 16th in international rankings in science, from 7th to 25th in literacy and from 8th to 28th in maths. In a global economic context, Britain’s top-heavy allocation of education resources is outstanding. The OECD has found that the UK spends about half per pupil on its state schools in comparison with some 29 other nations, ranging from Hungry, Australia, the United States, Korea, and Mexico. Two further OECD reports illustrate what this means in the classrooms. The first highlights a discrepancy in class sizes, with private school classes about half that of their state counterparts. In a global context, this discrepancy is the widest in the survey. As the chart below vividly demonstrates, the United Kingdom has by far the widest discrepancy of the 28 nations surveyed, and is less egalitarian, for instance, than Turkey, Portugal, Mexico and Chile.

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26 Opening Doors, (above, n.1), para.1.15, citing Blanden, ibid.
The second report, on student/teacher ratios for secondary schools, presents a similar picture. For the state sector, whilst the OECD average was 13.4 (students per teacher), the United
Kingdom could only manage 15.7. By contrast, the UK’s ratio for the private sector was 7.5, bettering by far the OECD private school average of 12.1.30

These figures show that Britain has an exceptional coincidence between wealth and education, a coincidence that persists individual life chances. Overall, it is clear that Britain is labouring under a severe, widespread, and exceptional problem of inequality.

In addition, private school graduates enjoy superior ‘cultural capital’ (such as confidence, accent, manners, dining etiquette, deportment and connections), which will have a residual value beyond the economic worth of qualifications, and feed respective senses of superiority and inferiority. Other factors contribute. First, the cost31 of private education render it practically out of reach to the Non-wealthy, whose situation is – for all practical purposes - immutable. Second, although the law does not mandate the segregation, it does facilitate and support it, most notably by the charitable status afforded to private education.32 These factors can only drive home a deep sense of inferiority, which extends to a person’s ‘citizenship’ and ‘status in the community’. Such people are less likely to take part in civic life, such as sitting as a magistrate, standing for the local council, or voting in elections.33 Indeed, it was these factors that underpinned the outlawing of racially segregated education in the United States, famously, in Brown v Board of Education.34 This suggests that segregation per se contributes to the problem.

THE LEGAL DIMENSION

The starting point is the Council of Europe’s companion treaties, the European Convention on Human Rights and the lesser-known European Social Charter.35 Principally, the

30 Ibid, Table D2.3.
31 This could be deduced from available statistics: On the last survey, average school fees for 2012 were £13,788 per year, whilst the average wage, including bonus, before deductions, was £23,932. Simple maths (deduct e.g. tax, national insurance, pension, rent or mortgage, household bills, transport, etc.) informs us that the average family cannot choose to educate its children privately. See respectively: < Independent Schools Council Census 2012, p.11. < http://www.isc.co.uk/Resources/Independent%20Schools%20Council/Research%20Archive/Annual%20Census/2012/ISC_Census_2012_Final.pdf > and ‘Labour Market Statistics, LMS June 2012’ < http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/june-2012/statistical-bulletin.html#tab-earnings > Both accessed 28 September 2012.
32 e.g. under the Charities Act 2006. It has been held that ‘a charitable organisation which in practice excludes poor people remains a charity’ so long as makes a de minimis provision for the poor: R (Independent Schools Council) v Charity Commission for England and Wales [2012] 2 WLR 100 (TCC), [228].
34 347 US 483 (1954). See further below, text to n.94.
Convention provides civil and political rights, whilst the Charter addresses social and economic matters. It would appear at first sight that the social/economic and ‘soft law’ nature of the Charter would be the more appropriate instrument for such a multi-faceted problem. But there are some practical problems with this route. To understand these, a little history is required.

The Charter was published in 1961 and a year later ratified by the UK. A revised Charter was published in 1996. ‘Enforcement’ was by a ‘Reporting’ system, whereby States would report to the European Committee on Social Rights on a regular basis on matters of compliance. In 1995, a further ‘Collective Complaints’ mechanism was introduced, giving the Committee a quasi-judicial role. The UK has not ratified the 1996 Charter nor the complaints mechanism. Only the 1996 Charter provides a ‘right’ to education. This highlights a number of practical reasons why the Charter is an inappropriate instrument here.

On the other hand, the Convention provides a right to education, a non-discrimination clause, and a more viable enforcement mechanism, all of which the UK has ratified. Further, the European Court of Human Rights (‘the Strasbourg Court’) will take into account international treaties, including the Charter, when deciding matters under the Convention, and more generally, it has asserted ‘there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention.’

The Convention provides, by Article 2 of Protocol No. 1 (P1A2), a right to education and that, by Article 14, Convention rights must be secured without discrimination.

**The Right to Education**

The Convention provides, by P1A2:

‘No person shall be denied the right to education. 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.’

The first thing to note here is that although the Convention is not aimed at private parties, the state cannot absolve responsibility for what happens in private schools. The Strasbourg Court has held that: ‘The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two...’
Further, in the *Belgium Linguistic Case*, the Court noted that despite its negative formulation (‘denied’), P1A2 uses the term 'right' and speaks of a 'right to education', thus indicating some positive obligation on the state and so ‘...by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals’. Thus, a Government cannot be a passive observer of education provision, be it private, public, or a mixture of both. The second point is that education is one of the Convention’s ‘most important’ rights - concerned not just its denial, but its *quality*.

Both the 1996 Charter, and the UN International Covenant of Social, Economic, and Cultural Rights (ICSECR 1955), expand on the right to education. Article 17 of the 1996 Charter provides:

‘With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the *full* development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed... to ensure that children ... have the ... education and the training they need...’

The ICSECR 1955, Article 13(1) is in similar terms:

‘The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the *full* development of the human personality and the sense of its *dignity*, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.’

[Emphasis supplied.]

Stood alone, these indicate that every child is entitled to an education that can exploit their *full* potential, and be enabled to participate *effectively* and with *dignity* in society and civil life. This implies that the quality of the education should not vary greatly. Otherwise, some children will be denied the opportunity to reach their potential, and are less likely to participate in the top jobs and other aspects of civil life. Recently, the Strasbourg Court brought these values up to date:

‘... in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons

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40 (Series A, No. 6) (1979-80) 1 EHRR 252.
41 Ibid, p.281, paras.3 and 5. See also, the European Commission on Social Rights’ statement in *International Centre for the Legal Protection of Human Rights (Interights) v Croatia* Complaint No.45/2007 ECSR (2009) 49 EHRR SE13, [61].
42 *DH v Czech Republic* (2008) 47 EHRR 3, [139]. For the facts, below, text to n.61.
43 Ibid.
44 Part II, Article 17. (Emphasis supplied.)
concerned from adjusting to their environment, and entails far-reaching consequences for their social and economic well-being.\textsuperscript{45}

By comparison to other states, Britain has the widest discrepancy in funding, class sizes, and student/staff ratios, which, predictably, produces sharply contrasting life chances.\textsuperscript{46} And so, it is conceivable that the right to education includes the right to a reasonably fair system, evenly spread amongst the nation’s children. This presents an argument that Britain’s segregated system infringes the right to education, without considering discrimination under Article 14.

The countervailing argument centres on parents’ liberty to do their best for their children. The second sentence of P1A2 (above) lends some support, stating that the state should ‘respect’ the parents’ ‘religious and philosophical convictions’. The Charter of Fundamental Rights of the European Union goes one step further, qualifying its right to education with due respect to parents’ pedagogical rights.\textsuperscript{47} The ICSECR 1955 goes further still and provides the platform for private education per se. Article 13(1) is quoted above. Article 13(4) carries the rider:

‘No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State’.

The drafters of these international instruments envisaged, to varying degrees, a right of parents to educate their children independently of the state, be it for religious, philosophical, pedagogical, or libertarian reasons. Underpinning these rights is a notion of ‘pluralism’ in education, necessary in a democracy,\textsuperscript{48} inter alia to guard against indoctrination.\textsuperscript{49} But such a right cannot be all-conquering. The riders in P1A2 are subject to the ‘right to education’ in the first sentence.\textsuperscript{50} For instance, national laws may prevent parents educating their children at home, especially where that education is inferior, or contrary to democratic principles.\textsuperscript{51} Moreover, it cannot be in the interest of a nation to become too divided, with parallel societies adopting separate social, economic, cultural, or philosophical mores, emerging from segregated educational systems.\textsuperscript{52} It is notable that Paragraph 13(4) of ICSECR 1955 is

\textsuperscript{46} See text et al to n.26.
\textsuperscript{47} Article 14(1) and (3) respectively.
\textsuperscript{48} Konrad v Germany (Application No.35504/03) (2007) 44 EHRR SE8, p.142.
\textsuperscript{49} Folgerø v Norway (Application No.15472/02) (2008) 46 EHRR 47, [84] (b) & (h).
\textsuperscript{50} ‘... the whole of Art.2 of Protocol No.1 being dominated by its first sentence’: Konrad v Germany (Application No.35504/03) (2007) 44 EHRR SE8, p 143, citing Campbell v UK (1982) 4 EHRR 293 at [36].
\textsuperscript{51} See Konrad v Germany (Admissibility) (Application No.35504/03) (2007) 44 EHRR SE8; Kjeldsen v Denmark (Application No. 5095/71; 5920/72; 5926/72) Series A, No. 23, (1979-80) 1 EHRR 711, [50].
\textsuperscript{52} See Konrad v Germany Ibid, p.143, citing mutatis mutandis, Refah Partisi (The Welfare Party) v Turkey (2002) 35 EHRR 3, [70], upholding the dissolution of a political party committed to Sharia law for Muslim citizens, thus creating a pluralist but divided (legally) society. The reasons given were that the state would no longer be the guarantor of
subject always to’ to paragraph 1. Thus, if plurality goes too far, and creates segregation, the ‘dominant’ right to education is violated. 53

This jurisprudence suggests that the parents’ freedom to educate their children according to their own wishes is not absolute where that education would produce a divided society. By accent, language, culture, and life chances, Britain is a divided society, and the education system is the protagonist. But as well as division, Britain’s education system produces inequality. This calls for further consideration, this time under the anti-discrimination principle.

**Discrimination and ECHR, Article 14**

To bring Article 14 into play, a substantive article must be ‘engaged’, but not necessarily breached. 54 Here, the allegation is that the State is providing education, but in discriminatory manner, thus engaging P1A2.

The main questions under Article 14 are establishing a prima facie case of discrimination, and the State’s justification defence.

**The Prima Facie Case**

The first matter is to define the groups for comparison. It is tempting to make a simple and tangible division between ‘state school’ and ‘private school’ children. This would tend to challenge the educational quality and life chances of the respective groups, but not segregation per se (because such a challenge merely would assert that state schools should improve). A group defined by who has access to private education is less tangible, but would produce a more inclusive comparison, challenging not just what happens at school, but who has access. A broad-brush group could be defined on a calculation of average school fees and the income required to afford them. 55 These groups could be labelled Wealthy and Non-wealthy. Going further, defining (legally) ‘posh’ and ‘common’ would be an unbearably fraught exercise, with the obviously posh (say, minor aristocracy upwards) and common (say, children on free school meals) at the extremes, and a huge grey area of debate in the middle. And so, the optimum comparison is likely to be between the Wealthy and Non-wealthy groups.

Of course, such a class of persons must be recognised under Article 14, which covers ‘any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. It may well be that the non-wealthy could be defined by ‘social origin’. Otherwise, the use of the phrases *such as* and *or other status* (a fortiori the French version *toute autre situation*) 56 opens Article 14 to more grounds than those listed. Among other things, this non-exhaustive formula...
allows for changing values, and discrimination that was once acceptable may become unacceptable, a factor that may be relevant here. The Strasbourg Court has entertained Article 14 claims from groups as wide-ranging as owners of non-residential buildings (distinct from residential), owners of pit bull terriers (distinct from other breeds of dog), small landowners (distinct from large landowners), coastal (distinct from open sea) fishermen, foreign residence, and previous employment by the KGB. More conventionally, the Court has recognised sexual orientation, marital status, illegitimacy, trade union status, military rank, and conscientious objection, as falling within this residual category. Thus, if ‘social origin’ were inappropriate, it is inconceivable that the class of Non-wealthy, as defined above, would fail under ‘other status’.

The next question is whether the situation could be characterised as one of direct or indirect discrimination. For direct discrimination, it must be shown that the UK Government presides over a system that overtly discriminates against the Non-wealthy. Given that a few of these children find ways into private education (e.g. through scholarships), that some state school graduates find top jobs and/or elite university places, and that, no doubt, some state schools outperform some private schools, establishing direct discrimination might prove difficult. And as Strasbourg affords both direct and indirect discrimination a justification defence, there is no great advantage in trying to couch this as case of direct discrimination.

For indirect discrimination, the most obvious case for comparison is DH v Czech Republic. Here, primary school children who performed poorly in intelligence tests were placed in a special school for those with mental deficiencies. Statistics showed that in one district a Roma child was 27 times more likely to be placed in a special school. The result of this facially neutral policy was that over half of Roma and just 1.8 per cent of non-Roma children were placed in these special schools. The Court cited a number of authorities including the United States’ seminal case Griggs v Duke Power, and European Community and United Nations materials. Accordingly, the Court reasoned that: ‘to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged


60 See above, ‘Education’, (text to n.13 et al).


The perhaps distinguishing here feature is that there was tangible legislation at the root of the practice. The ‘Non-wealthy’ claim is on much broader scale, affecting the majority of a nation’s schoolchildren. There is no single tangible piece of legislation from which a practice can be identified. There are of course numerous statutes and regulations establishing and/or regulating both state and private schools (perhaps most contentiously is the rule affording charitable status to private schools).\(^ {60}\) Behind the statistics (above) there is the practice, and behind that is a general policy of permitting that practice. In Thlimmenos v Greece\(^ {71} \) the Strasbourg Court said that:

‘The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.’\(^ {72}\)

In combination with DH v Czech Republic, this suggests that a state’s general policy on non-intervention in a discriminatory state of affairs (evidenced by statistics) within the ambit of a substantive Convention Article, could amount to discrimination under Article 14.

The bare statistics show that state-school children are significantly disadvantaged, and that these are overwhelmingly from the Non-wealthy group.\(^ {73}\) There is a Government general
policy acquiescing, at the least, in this state of affairs. Accordingly, there is a prima facie case of indirect discrimination. The next question centres on justification.

**Justification**

In line with indirect discrimination jurisprudence, under Article 14, the State defendant has the burden to ‘objectively and reasonably justify’ the challenged discriminatory measure. This process divides, loosely, into two stages. First, the general policy must pursue a legitimate aim, and second, it must have reasonable relationship of proportionality between the means employed and the aim sought to be realised. Before discussing either, it is necessary to establish the ‘standard of review’, in other words, how strictly the law should scrutinise the discriminatory practice.

(1) The Standard of Review

There is good reason to suppose that the standard of review should vary, depending on the circumstances. Society would expect nowadays a stricter scrutiny of measures based on race or gender, than based on, say, age. There are some embryonic signs of this in the Strasbourg Court. In a few cases, the Court has subjected a defence to ‘intensive’ scrutiny, demanding ‘very weighty reasons’ to justify the otherwise discriminatory measure. One emerging theme is that these cases can be distinguished by the ground of the discrimination. The Court has demanded very weighty reasons in cases of discrimination on grounds of sex, sexual orientation, birth out of wedlock (including different treatment of unmarried parents), marital status, and nationality. But if the Court is developing a hierarchical system of scrutiny, it is in its very early stage, and so there is no certainty as to its approach to the many and varied grounds.

Several possible factors could contribute to the classification. First, the prevailing values at the time. As the Court treats the Convention as a ‘living instrument’, this is not, on the face of it, controversial. But a prevailing value should be distinguished from prevailing mood.

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73 It may be assumed, using EU jurisprudence, that the fees are 'intrinsically liable' to exclude the 'Non-wealthy' group: Case C237/94 *O'Flynn* [1996] ECR I-2617 (ECJ). More detailed analysis may require statistics showing, e.g. the proportion of children from poor backgrounds admitted (say, through scholarships), or those Non-wealthy parents who ordinarily cannot afford the fees, but give up everything to do so. But such exceptions are likely to be marginal.


Anti-Semitism was widespread and acceptable in many quarters in the years leading up to World War II, a practice the Convention was designed to address.\textsuperscript{78} Other factors could relate to redress for past wrongs, the effects of which have tumbled down the generations. These include a history of purposeful discrimination,\textsuperscript{79} which was invidious perhaps bearing no relationship to the group’s abilities,\textsuperscript{80} or degree of immutability; and that the group lacks the political power to obtain redress through political channels.\textsuperscript{81}

Quite clearly, in the 21\textsuperscript{st} century, meritocracy is a highly prized value,\textsuperscript{82} whilst education is one of the Convention’s ‘most important’ rights.\textsuperscript{83} The group (‘Non-wealthy’) is practically immutable.\textsuperscript{84} Before the widespread state education was introduced near the end of World War II,\textsuperscript{85} the non-wealthy suffered an even more considerable disadvantage. And within that group, the poor and socially excluded, characterised as the ‘lower classes’, would have suffered a history of inferior, invidious, characteristically ‘Dickensian’ treatment, and were locked into their class in variety of ways. Further, the inequality here bears little relationship to the group’s innate abilities. The Coalition Government itself has highlighted that a more highly-skilled workforce could add four per cent to Gross National Product.\textsuperscript{86}

On the other hand, a one-person-one-vote democracy suggests that it is harder to argue that the group lacks the political power to obtain redress. After all, the Non-wealthy group comprises the vast majority of voters, and so ought to able to participate in the decision-making of the State, notably education policy and their children’s future. But the evidence suggests otherwise, with the majority of those in political power coming from the minority predominantly wealthy private school sector. This is not a one-off aberration. For a century or so, women have had the vote, and yet remain underrepresented in the top jobs (notably Parliament) and are underpaid generally, despite comprising about half the electorate. Indeed, dedicated anti-discrimination and equal pay legislation has been in place for decades in most Western democracies, and sex discrimination appears to attract strict scrutiny in the

\textsuperscript{79} See, under the United States’ Equal Protection Clause of the 14th or 5th Amendments, e.g.\textit{City of Cleburne, Texas v Cleburne Living Center} 473 US 432, 441 (Sup Ct 1985); \textit{Massachusetts Board of Retirement v Murgia} 427 US 307, 313 (Sup Ct 1976).
\textsuperscript{80} See \textit{City of Cleburne, Texas v Cleburne Living Center} 473 US 432, 441 (Sup Ct 1985) (White J), citing \textit{Mathews v Lucas} 427 US 495, 505 (Sup Ct 1976).
\textsuperscript{81} \textit{High Tech Gays v Defense Indus. Sec. Clearance Office} 895 F 2d 563, at 573-574 (9th Cir 1990), citing \textit{City of Cleburne, Texas v Cleburne Living Center} 473 US 432, at 446 (Sup Ct 1985).
\textsuperscript{82} Expressed by all 3 main British political parties. See n.11, above.
\textsuperscript{83} \textit{DH v Czech Republic} (2008) 47 EHRR 3, [139].
\textsuperscript{84} See above, n.31 and accompanying text.
\textsuperscript{85} Education Act 1944, see now Education Act 1996, s.14.
The right to vote is no guarantee against discrimination, even against the majority.

A connected consideration here is the ‘wide’ margin of appreciation usually afforded to states’ economic or social policy. For education in itself, the Strasbourg Court has indicated that although primary education is the most important, shifts towards “knowledge-based” societies by ever-more nations means that ‘secondary education plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned’. Accordingly, the Court has subjected to ‘ stricter scrutiny’ discrimination in the closely-connected ground of education.

Given this, and the importance of meritocracy and education, the invidious history, practical immutability, the inseparability of wealth and education, and that a majority is not immune from discrimination, a state policy that discriminates against the Non-wealthy in education ought not be afforded a wide margin of appreciation, and should be scrutinised strictly.

(2) Justification - The Legitimate Aim and Proportionality

To evaluate the defence, the severity of the discrimination it is attempting to justify must be appreciated. The statistics cited in this paper, along with the sense of inferiority, demonstrate the scale and severity of the disadvantage. It is against this that the justification argument has to prevail.

The legitimate aim centres on the parents’ liberty to educate their children independently, which is underpinned by the desirability in a democracy for plurality in education. This aim is expressed, to various degrees, in a number of treaties recognised by the Strasbourg Court. As such, for this reason alone, it must be considered a legitimate aim. This leaves a clash of rights, which is normally resolved under the principle of proportionality.

On the face of it, as the statistics show, both domestically and by international comparison, Britain’s private education is out of all proportion to this aim. Only a tiny minority actually enjoy the ‘freedom’ of choice, and so this freedom does not weigh heavily against the considerable inequality. But this does not dismiss the broader principle of pluralism in education.

The response to this is two-fold. First, it does not necessarily follow that an egalitarian system lacks plurality. No one would suggest that the more egalitarian nations in the comparisons (above) lacked plurality in their education systems. Second, imagine the most

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89 Ibid [57]-[58] (a case on nationality discrimination in secondary education).

90 See above, ‘Education’, (text to n.13 et al).

91 See above, n.48, and accompanying text.
obvious, but challenging, solution: integration of the state/private systems. Legislation could dictate common objective entry requirements (or their absence) with the state paying the fees. This restriction on picking and choosing pupils (according to wealth, and perhaps academic entrance requirements) might spread the privilege more evenly amongst Britain’s social classes, but privilege would remain in the system. To go further, the best teachers should be more evenly spread, most obviously achieved with an equalisation of teachers’ minimum qualifications and pay. Either way, individuals would be free to establish new schools, albeit within a tighter top-down framework.

Predictably, as the system becomes more egalitarian, it would be less pluralistic. This is a generalisation, and with detail and subtlety, it may be that many changes could be made without restricting pluralism unnecessarily. And given that pluralism is subordinate to the right to education, and if too entrenched restricts fundamental rights (as it does in Britain), it cannot be treated as all-domineering.

THE ‘REAL’ PROBLEM

For many, this paper may appear logical, but unrealistic. At the root of this scepticism, in legal terms, is the judiciary’s wariness of encroaching into social-economic matters. This problem has been played out in the United States’ Supreme Court.

Famously, in Brown v Board of Education, it held that the ‘separate but equal’ racially segregated education system operated in some States was constitutionally ‘unequal’. In doing so, the Court lauded the intangible values of education per se, as ‘the very foundation of good citizenship’ and the ‘principal instrument in awakening the child to cultural values, in preparing him for later professional training’, without which a child could be expected to succeed in life. The system was unequal because it generated ‘a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.’ In sum, the denoted sense of inferiority includes the economic benefits of education, as well as ‘good citizenship’ and a person’s ‘status in the community’.

Some two decades later, in San Antonio v Rodriguez, the Court refused to extend Brown v Board of Education to wealth discrimination in education. The claim challenged the allocation school funds according to the tax raised in that school’s district, thus affording – on the whole - the poorest children inferior schooling. The rejection was based around three broad reasons. First, education was not a fundamental right: the Constitution did not provide a right to education, explicitly or implicitly. Second, the difference in treatment did not

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92 See the Government-commissioned 1944 Fleming Report, which explored how private schools could be integrated into the state system: David Fleming, Report on the Public Schools and the General Educational System, (1944) London: HMSO.
93 See above, n.50, and accompanying text.
95 Under the equal protection clause of the 14th Amendment.
97 Ibid, 494.
99 Ibid, p.35.
deprive anyone of education.\textsuperscript{100} Third, it was not possible to identify a victim group entitled to ‘intensive’ scrutiny of the system, as some poor resided in wealthy areas and vice versa.\textsuperscript{101}

The reasoning is frail. First, the judgment expressed no basis as to why education was less valuable than 20 years’ before. Second, the fact that Afro-Americans were not deprived of education did not trouble the Brown Court. Only the third of these reasons truly distinguished Brown, and that distinction is a hollow one. There remain the ‘built in headwinds’\textsuperscript{102} to the poor, who have no choice but reside in low tax areas and therefore, on the whole, suffer a parallel sense of inferiority in economic benefits, good citizenship and status in the community. It is, of course, built in headwinds that cause so much inequality for women and racial groups, which is normally characterised by the Court as ‘disparate impact’ (indirect discrimination).\textsuperscript{103} Further, the education in Brown ostensively was equal, whereas in Rodriguez, it was most definitely unequal.

In retrospect, each decision is predictable. But on the face of it, they are not comfortable companions. The real basis of Rodriguez lies beneath the legal reasoning provided. United States culture, perhaps more than most, is centred on a competitive market economy, where there must be (economic) winners and losers. If the Constitution were used to iron out these disparities, then the economic system itself is challenged, which is a matter for the politicians, not the courts.

However, since Rodriguez, the political, social, economic, and legal context has changed. In his re-election address, Barrack Obama proclaimed:

‘For we, the people, understand that our country cannot succeed when a shrinking few do very well and a growing many barely make it.... We are true to our creed when a little girl born into the bleakest poverty knows that she has the same chance to succeed as anybody else, because she is an American; she is free, and she is equal, not just in the eyes of God but also in our own.’\textsuperscript{104}

And as noted above, the Coalition Government has expressed serious concerns over Britain’s lack of social mobility, whilst the Strasbourg Court has developed the notion that the Convention is a ‘living instrument’, adaptable for the prevailing values,\textsuperscript{105} presumably social mobility being one of them.

\textbf{CONCLUSION}

\textsuperscript{100} In the US, some wealth disparities are challengeable, where there is a deprivation of a fundamental right, such a fair trial (\textit{Griffin v Illinois} 351 US 12 (1956, Sup Ct)), or standing for election (\textit{Bullock v Carter} 405 US 134 (1972, Sup Ct)).
\textsuperscript{101} 411 US 1 (1973), p.25.
\textsuperscript{102} \textit{Griggs v Duke Power} 401 US 424, at 432 (Sup Ct 1971).
\textsuperscript{103} Ibid.
\textsuperscript{105} See n.77, above.
This brief examination shows that the most tangible aspect of social class division in Britain is its segregated education system, which is loaded with social, ethical, and economic ills. It stands out as unique in the Western world. The result is that the vast majority of Britain’s children are destined to second-class life chances. It offends current values of merit, competitiveness, and equality, all associated with social mobility.

The Convention’s Right to Education, and more pertinently perhaps, the right to education without discrimination are appropriate vehicles to challenge Britain’s uniquely unequal education system. The Strasbourg Court has acknowledged that education is now central to a nation’s economic and social wellbeing,106 and with its ‘living instrument’ philosophy, it should absorb the prevailing value of social mobility, and thus entertain such a challenge.

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