

### 13. New Issues for Negotiation: Schools and Religious Freedom

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The English education system has always contained large numbers of schools with a religious ethos, providing an important space for negotiation between religion, education, and the secular. The focus here is on the freedom of teachers in English schools, and the ways in which this has been negotiated as part of a system of protection for religious freedom for schools more generally. The various voices in the negotiation of the current settlement, including religious organizations, schools, teachers, unions and teachers themselves are considered. Although the focus is on English schools,<sup>1</sup> the issues are of broader significance; they speak to other legal settlements with relation to religion and education, as well as raising issues of more general concern relating to the accommodation of religion in contemporary secular law. Thus, the particular concerns in context of English schools serve as important illustration of more general concerns regarding the ongoing negotiation of religion in modern society.

Turning to the particular position of state schooling in England, the English state school system has long contained large numbers of schools with a religious ethos, due to the historical involvement of churches in the development of universal education in

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<sup>1</sup> The rules differ from those that operate in Scotland, Wales and Northern Ireland, although the background issues may of course be the same.

the country.<sup>2</sup> Today, over 30 per cent of maintained schools in England have a religious character.<sup>3</sup> Although these are not all Christian in affiliation, the vast majority are. The very existence of what are, in England, usually termed ‘faith schools’ within the maintained sector of education is testament to the history of negotiation and compromise between the Church and state with regards to education. Faith schools can be different kinds of schools but are associated with a particular religion.<sup>4</sup> They are run like other state schools in that they have to follow the national curriculum, except that they are free to teach only about their own religion in religious studies.

As explored by Hunter-Henin elsewhere in this volume, negotiation with religion in schools can be seen at a number of levels. It is seen in the organisation of schools, rules pertaining to property ownership, religious education, school uniforms and processes relating to admissions. It is also seen in the regulation of the employment relationship between teachers and schools. It is this relationship that is the focus of this chapter.

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<sup>2</sup> For a history of religious schooling in the context see Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism* (Oxford, OUP, 2010)

<sup>3</sup> Around 7,000 of the 22,000 maintained schools in the England have a religious character. See <https://www.gov.uk/government/publications/maintained-faith-schools/maintained-faith-schools> [accessed 20 August 2014]

<sup>4</sup> See UK Government definition: <https://www.gov.uk/types-of-school/faith-schools> [accessed 20 August 2014]

In order to set some context to this discussion, the chapter begins by exploring the ways in which the organisational structure of faith schools within the state education sector reflects a broad compromise between religion and education.

### **A Product of Negotiation: Religion and Education in England**

At a time when the relationship between education and religion are open for negotiation, it is important to recognise that existing arrangements are themselves a product of a long history of negotiation. In England, education was historically provided as part of a voluntary system. Many schools had religious foundations and were closely linked to the church. Over time, various negotiations have occurred within religious groups and between them, as well as with secular agencies and non-religious groups, regarding the proper parameters of religious education, and the correct balance between reflecting religious consensus on the one hand and providing non-denominational schooling on the other. The outcome has always been, however, that the Church has remained involved in providing significant levels of public education. When the state introduced public provision of education in 1870, it supplemented that offered by the Church, in effect beginning a process of shared provision of public education between the state and religious bodies. By the turn of the twentieth century and the Education Act 1902, the main elements of the current settlement were in place, with voluntary schools brought within the state system. In relation to church-funded voluntary schools, a compromise was reached to reflect both the interests of the churches that owned the property in which the school was located and the interests of the state in providing universal education without incurring the capital costs of building new schools. The settlement involved bringing

existing church schools within the state system by providing the maintenance costs;<sup>6</sup> and, in return for providing school premises,<sup>7</sup> the churches were allowed to control religious instruction within those maintained schools, as well as retaining some controls over staffing. While a number of structural changes have taken place over the twentieth century, this significant compromise between religion and schools has largely survived.<sup>8</sup>

Structural changes include the distinction introduced by the 1944 Education Act between voluntary aided schools and voluntary controlled schools. Again, the variations in the structure make clear the element of compromise that has been reached. Schools were able to opt to become either ‘voluntary controlled’ (with land and buildings owned by the church, but the local education authority funding the school, employing staff and controlling admissions) or ‘voluntary aided’ (with land and buildings owned by the church, the governing body employing staff and controlling admissions, but the school funded largely by the local education authority). The Education Act 1944 also required all schools, whether or not they retained a religious foundation, to have a daily act of collective worship and to teach

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<sup>6</sup> Faith schools receive grants (of up to 90% of the total cost) towards capital costs of the buildings and 100% of running costs (including teachers’ salaries) from the State:

[www.atl.org.uk/atl\\_en/education/postition\\_statements/faith\\_schools.asp](http://www.atl.org.uk/atl_en/education/postition_statements/faith_schools.asp) [accessed 17 January 2008].

<sup>7</sup>The school site and buildings will be owned by the Church.

<sup>8</sup> See Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism* (Oxford, OUP, 2010); Harte, JCD ‘The Development of the Law of Employment and Education’, in *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002); and Petchey, P. ‘Legal issues for faith schools in England and Wales’ *Ecc. L. J* (2008) 174.

religious education. Under this system, voluntary aided schools enjoy greater independence in terms of admissions and religious education syllabus; in return they provide more financial support as the school governors maintain the school buildings. In voluntary controlled schools the compromise falls differently: in return for greater central government funding for the buildings, the school has less control over its staffing (detailed below).

The twenty-first century legal framework for state funded schools sees the continued existence of faith-based schools. While many of these schools date back to the early days of universal education, the system is now being developed and renewed. First, since 1997, there has been an increase in the creation of faith schools which are not Christian.<sup>9</sup> This development can be viewed as the outcome of negotiation between other faith groups and the state regarding faith schooling. With the increase in religious diversity in England came a pressure to revisit the preferential treatment of Christian denominations in terms of education. In order to address the inequality of treatment, the state was faced with a choice: to scale back the faith element in schools which are maintained by the state, or allow other faith groups to provide state-maintained education. The government chose the latter option, although the numbers of faith schools which are not Christian remain very small.

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<sup>9</sup> For a review of the trend towards greater involvement of religious schools, see Vickers, L. 'Religion and Belief Discrimination and the Employment of Teachers in Faith Schools' *Religion and Human Rights* 4 (2009) 1–20

Second, the more recent creation of ‘free’ schools with a religious character,<sup>10</sup> and the significant level of involvement of faith based organisations in the sponsorship of academy schools,<sup>11</sup> means that numbers of faith schools remain high. Moreover the freedom of free schools from traditional controls over curriculum and local authority regulation has led to a number of schools with a very explicit and strong religious ethos.<sup>12</sup> The existence of faith schools can no longer be viewed merely as the continuation of a historic compromise reached between religion and the state at a time of financial necessity. Nor can it be seen as a relic which is of academic interest only or the outcome of a nominal religious affiliation. The expansion of faith schools in the early part of the twenty-first century means that the negotiation between religious groups and schools is ongoing. Moreover, the compromise reached which allows other faiths to run state-funded schools means that the settlement between religion and education can now be developed further, free from any claims of systemic and legally-entrenched inequality between religions.

A full discussion of the reasons for the increased governmental support for faith schools is beyond the scope of this chapter, but suffice to say that such schools are said to deliver high-quality education, achieve good academic results and are popular

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<sup>10</sup> <http://www.guardian.co.uk/education/2012/jul/13/third-new-free-schools-religious>, 13 July 2012

Accessed 29 July 2013

<sup>11</sup> The Church of England is the biggest sponsor of academy schools under the original academy programme [http://www.churchofengland.org/education/national-society/academies-\(1\).aspx](http://www.churchofengland.org/education/national-society/academies-(1).aspx) (accessed 10 May 2014).

<sup>12</sup> See <https://humanism.org.uk/2012/09/12/news-1111/> (accessed 7 May 2014)

with parents.<sup>13</sup> Of course the reason for the success of faith schools is highly contentious; some would claim that it is the religious ethos itself which is the cause of success. Others, such as the Fair Admissions Campaign, point to the lower percentages of pupils eligible for free school meals in faith schools as evidence that there is a degree of segregation on socio-economic grounds.<sup>14</sup> Moreover, even without such evidence, a causal link between religious ethos *per se* and success would probably be impossible to prove. Nonetheless, the schools remain very popular, with indications that many parents attend church in order to get children into faith schools, even in the absence of any personal faith.<sup>15</sup> Moreover, there is clear evidence that faith groups themselves are keen to continue their formal links with education, as they see this as a key part of their future growth strategy.<sup>16</sup>

The most high-profile and contentious issue relating to the interaction of religion with schools involves the question of parental choice of school and the admission of pupils. Other issues that have received publicity and have generated case law relate to

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<sup>13</sup> See *Building on Success*, (London: DFES, 2001)

<sup>14</sup> See <http://fairadmissions.org.uk/groundbreaking-new-research-maps-the-segregating-impact-of-faith-school-admissions/> (accessed 7 May 2014)

<sup>15</sup> Voas, D. and Watt, L. 'The Church Growth Research Programme Report on Strands 1 and 2 Numerical change in church attendance: National, local and individual factors' (Institute for Social and Economic Research, 2014) [http://www.churchgrowthresearch.org.uk/progress\\_findings\\_reports](http://www.churchgrowthresearch.org.uk/progress_findings_reports) (Accessed 7 May 2014)

<sup>16</sup> Evidence for this can be seen in the Church of England document, *The Way Ahead*, Church House Publishing, London, 2001 and the supplementary strategic document setting out strategy for 2007-11.

the adaptation of school policy in order to accommodate religious dress.<sup>17</sup> The legal framework governing the employment terms of teachers at faith schools is, however, an additional site of negotiation between religion and education, albeit one that has received less public attention. The legal framework is set out below.

### **Legal Framework Governing Teachers in Faith Schools**

As outlined above, the English state school system is made up of schools which have very different governance structures. Apart from community schools, which will not have a religious character, any of the other types of school – voluntary aided, voluntary controlled, foundation schools, free schools or academies – could have a religious character, and so be termed ‘faith schools’. The level of religiosity of faith schools varies hugely, however, with some merely nominally Christian, designated a faith school due to historical funding arrangements, and others infused with a Christian ethos, with an explicitly evangelical agenda. It should be noted, however, that there is no formal link between the legal status of the school and its level of religiosity. A voluntary aided Church of England school or Church-sponsored academy could be very multicultural on the ground with, for example, multicultural assemblies, minority religious dress codes and the accommodation of religious holidays; a voluntary controlled school could have a stronger Christian ethos, with prayers said every day and religious symbols displayed prominently in school. Yet, despite the variation in terms of the strength of religious ethos, the legal regulation of

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<sup>17</sup> *Azmi v. Kirklees Met. Borough Council* [2007] I.C.R. 1154, *R (on the application of Begum) v.*

*Headteacher & Governors of Denbigh High Sch.* [2006] UKHL 15, [2007] 1 A.C. 100



faith schools depends on the legal and governance structure of the school, rather than reflecting the religious character of the school in its day-to-day running.

When it comes to considering the employment rights of staff employed in faith schools, there is a clear tension between the interests of these schools as faith-based entities and the interests of teachers to enjoy employment free from discrimination. Faith schools may well have a desire to uphold their religious ethos by ensuring that staff share the school's religious culture and agree to promote its values. Moreover, it is arguable that faith schools have a right to impose such requirements, given that religious freedom encompasses a right to collective manifestation of religion.<sup>18</sup> Equally, however, teaching staff members have a right to be free from religious discrimination in employment – a right introduced in 2003 under the Employment Equality (Religion and Belief) Regulations and now included in the Equality Act 2010. The legislation covering employment rights for staff in faith schools has long involved a compromise between these two competing interests, even prior to 2003 when religious discrimination was not generally prohibited. A general rule prohibiting discrimination on grounds of religion was introduced for teaching staff in the Education Act 1944,<sup>19</sup> with limited exceptions for religious schools. Thus, the compromise negotiated at the time when Church schools were incorporated into the state sector was to protect staff from discrimination in community schools but allow some discrimination in voluntary aided and voluntary controlled faith schools.

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<sup>18</sup> Article 9(2) ECHR

<sup>19</sup> s [?] 30 Education Act 1944.

This compromise is still reflected in the legislation relating to religious discrimination against teachers in state schools, the School Standards and Framework Act 1998 (SSFA). The SSFA protects teachers in non-faith schools from religious discrimination,<sup>20</sup> a provision now replicated by the general rules of the Equality Act 2010. The SSFA, however, provides more detailed provisions governing faith schools, reflecting a compromise which is much more favourable to faith school employers than is allowed to religious employers outside of education sector.

Under the SSFA, voluntary controlled and foundation faith schools can apply religious requirements on up to a fifth of their teachers, thus allowing schools to ensure that they have sufficient staff members sharing the religious ethos of the school to provide religious education and pastoral care. Voluntary aided faith schools, in contrast, can impose religious requirements on all teaching staff, whatever their duties. The different rules reflect the parties' different positions when the compromise was reached: greater funding offered by the Churches for voluntary aided schools has led to greater autonomy over appointment of staff, including more freedom to require religious adherence. In the case of voluntary controlled schools, where more state funding is provided, the number of staff members who are required to share the faith of the school is more limited. The overall effect is that the finance and governance structures of the school determine the legal treatment of teachers, rather than the practiced religious ethos.

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<sup>20</sup> SSFA, s.59.

Beyond the appointment of staff, the School Standards and Framework Act (SSFA) goes further in the case of voluntary aided schools and some faith-based academies.<sup>21</sup> Schools in this category can not only take account of religion in deciding who to employ but can also consider religious practice in deciding on promotion, remuneration or dismissal and, in other staffing decisions, whether staff attend religious worship and are willing to give religious education at the school. Further, voluntary aided faith schools can take account of any conduct which is ‘incompatible with the precepts, or with the upholding of the tenets, of the religion’ in deciding to terminate employment.<sup>22</sup>

The rules governing the employment practices of state faith schools can be contrasted with provisions governing other employers, including those with a religious ethos. In non-education contexts, religious employers are allowed a degree of freedom to reflect their religious ethos in their employment practices, but not an unfettered freedom. Under the Equality Act 2010, and in accordance with the EU Equality Directive,<sup>23</sup> religious organisations are prohibited from discriminating against staff on grounds of religion unless belonging to a specific faith is an occupational requirement for a role. Thus, for example, a chaplain can be employed by a secular employer such as a prison or hospital and a requirement that he or she be Christian would be justified as a genuine occupational requirement of the job. Where the employer has a religious ethos, a slightly broader exception is allowed, in that the court can take the religious

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<sup>21</sup> These schools are governed by similar rules to those governing voluntary aided faith schools, s 62 Education Act 2011.

<sup>22</sup> S60(5)(b) School Standards and Framework Act 1998

<sup>23</sup> Directive 2000/78

ethos into account in deciding whether the requirement is necessary. How this might work in the schools context can be illustrated by use of the case of *Glasgow City Council v McNab*,<sup>24</sup> in which a faith school imposed a religious requirement on staff. As the case arose in Scotland, the legal position was governed by the standard provisions covering religious discrimination in employment rather than by the SSFA;<sup>25</sup> it therefore serves as a useful example of how teachers might be protected in the absence of the SSFA. The case involved an atheist teacher in a voluntary controlled Catholic school who applied for a post as a pastoral care teacher but was not offered an interview. The legal question essentially was whether the post of pastoral care teacher was covered by the genuine occupational requirement exception to direct discrimination. The Tribunal found that, as the school was voluntary controlled, the employer was the local council, which does not have a religious ethos. It therefore applied the standard genuine occupational requirement provisions, which allow for discrimination on grounds of religion where religion is genuinely needed for the role. The Tribunal found that it was not essential that the holder of the post be Catholic as the responsibilities of the job involved giving advice on a large number of pastoral issues, only a few of which required knowledge of Catholic doctrine; moreover, those that did could be assigned to a different teacher. The case illustrates that, were the employment of school staff to be governed by the general rules in the Equality Act, the extent to which schools can impose religious requirements on staff would be significantly restricted as it might be difficult to convince a tribunal that being of a particular religion or belief is a genuine occupational requirement for

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<sup>24</sup> UKEAT/0037/06.

<sup>25</sup> At the time the Employment Equality (Religion and Belief) Regulations 2003, now covered by the Equality Act 2010 Schedule 9.

teaching, it being rare for religion to be a defining element of the teacher's role, apart from where religious instruction is given.

*McNab* was decided on the basis that the employer (the local council, as the school was voluntary controlled) was not a religious ethos employer. Where the employer has a religious ethos, the rules allow for greater freedom to employers to require religious adherence: the occupational requirement must still be justified, but the religious ethos of organisations can be taken into account in making this judgment. In order to assess whether the requirement is justified, the employer will need to identify a legitimate aim for the religious requirement and the means for achieving that aim will need to be proportionate, taking into account its religious ethos. This will involve an assessment not only of the type of employment but also its religious context, such as the extent to which organisation is permeated by the particular religious ethos. So, for example, in the case of *Muhammed v The Leprosy Mission International*,<sup>26</sup> the Leprosy Mission (a Christian charity) was allowed to refuse applications from non-Christians because Christianity permeated the organisation, with, for example, prayers at the start of each day. Moreover, in assessing the proportionality of a religious requirement, the court balanced the fact that employing a non-Christian would have had a significant impact on the ability of the organisation to maintain its ethos, whereas, in contrast, a finance administrator who was refused a job would have the chance to work elsewhere: his job prospects were not significantly harmed in practice. One might expect that, had the facts been different, a different outcome would have been reached; for example, if the workplace had not been permeated by religion and

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<sup>26</sup> (16 Dec 2009, ET/2303459/09)

the member of staff was going to face difficulty in finding other work, the court may not have been willing to find the religious requirement proportionate.

Applying this approach to the education context, and in the light of the *McNab* decision, one might expect that a court would find the imposition of a religious requirement to be disproportionate in the case of most voluntary controlled schools. Even for voluntary aided schools, if the capacity of the school to reflect its ethos is not under threat or if the member of staff might find it difficult to find other work, religious requirements could be found to be disproportionate. Under the provision of the SSFA, however, such questions are not considered. Instead, the legal regime governing employment in faith schools allows much greater latitude and discretion to the employer as there is no requirement that religious requirements be proportionate. This remains the case whether the employer has a religious ethos (that is, whether the school is voluntary aided or controlled), whether or not the school itself has a very strong religious culture in its day-to-day running and regardless of the impact of the requirement on the job prospects of teachers.

In effect, decisions to impose religious requirements on teaching staff are not fettered by any requirements of proportionality as long as the governance structure and land holdings mean that the school takes the legal form of a religious organisation. The rules governing the employment practices of state faith schools are thus significantly more restrictive to the freedom of religion of teachers than the rules governing employment in religious-ethos charities or other such organisations. Moreover, they apply to a sector that is almost entirely state-funded and covers up to a third of

primary schools and an increasing number of secondary schools. Thus, the negotiation between religion and employment in faith schools has been concluded very differently from that between religion and faith-based employment more generally.

Restrictions on the employment of teaching staff have the capacity to significantly affect the career prospects of large numbers of staff members who are unable to teach across the full range of state schools. Admittedly, although these rules are highly restrictive in legal terms, in practice they pose a lesser threat to the employment prospects of staff because schools often do not use the powers they are given under the legislation. To the extent that many voluntary aided and voluntary controlled schools are in practice extensively multicultural, so many such schools do not require their teaching staff to be Christian. Several reasons for concern remain, however, regarding the outcome of the negotiation between religion and schools in this context. First, the number of faith schools is increasing, making rare cases more common overall. Second, while many schools employ large numbers of non-Christian teachers, the rules can cause particular difficulties when it comes to applying for headships, as faith schools tend to be particularly careful in ensuring their head-teachers share the faith of the school. Third, the assumption that the rules are not often utilised may be incorrect: there is growing evidence that employment prospects of staff are more affected than has been recognised. The Accord Coalition has collated a range of testimonials from teaching staff demonstrating the impact that these rules can have on individual careers.<sup>27</sup> For example, one head-teacher recounts having to resign from a

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<sup>27</sup> <http://accordcoalition.org.uk/wp-content/uploads/2011/12/Personal-testimonies-2011-FINAL1.pdf>

(accessed 29th July 2013)

Catholic school because he wished to remarry, contrary to the teaching of the Catholic Church. Another teacher recounts not being considered for posts in faith schools, despite a willingness to support the ethos of the school.

Furthermore, there is evidence that faith groups are increasingly willing to rely on these restrictions as the role of the Anglican Church in the provision of education continues its shift from one of service to one of mission.<sup>28</sup> Current strategies of the Church of England, the biggest provider of faith schooling, are to use Church schools as a vehicle for outreach to the local communities in which the schools are situated, in order to provide an experience of Christianity and teach the Christian faith in an era when church attendance is falling.<sup>29</sup> This means that many within the church support the current legal position, despite the fact that it has the potential significantly to affect teachers' freedom of religion within the workplace as well as having an impact on career progression.

### **The role of 'negotiation'**

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<sup>28</sup> See Vickers, L. Freedom of Religion and Belief and Employment in Faith Schools *Religion and Human Rights* 4 (2009) 1-20.

<sup>29</sup> See *The Way Ahead*, Church House Publishing, London, 2001; and *The Church School of the Future Review*, March 2012, Church of England Archbishop's Council Education Division and the National Society

([http://www.churchofengland.org/media/1418393/the%20church%20school%20of%20the%20future%20review%20-%20march%202012\[1\].pdf](http://www.churchofengland.org/media/1418393/the%20church%20school%20of%20the%20future%20review%20-%20march%202012[1].pdf) accessed 29<sup>th</sup> July 2013)



It has been argued above that staff members who do not share the religion of faith schools may suffer some disadvantage in their careers. Of course, staff interests are not the only ones involved in the equation. Set against the non-discrimination interests of staff members are a number of other interests, not least those of parents to have choice as regards the education of children, religious freedom by religious bodies to provide education and the legally protected interest of parents to educate their children according to their religious beliefs.<sup>30</sup> It should be noted, however, that these competing rights are not absolute in nature and that the right to educate one's children in one's faith, or to offer faith based education, does not comprise a right that such education be funded by the state nor that it be at the expense of the religious freedom of staff. It would seem then that there are no absolute rights in play when it comes to determining how much protection should be provided to the religious freedom of parents, religious organisations and teachers. Instead, to the extent that they conflict, these interests clearly need to be dealt with via some form of compromise or negotiation.

An element of negotiation regarding the role of religion in public life is reflected in the fact that, in international and European law, the right to religious freedom is a qualified one, which often requires balancing with other rights including the right to freedom from religion. In the context of the ECHR, Article 9 provides an absolute right to freedom of religious belief, but the right to manifest religion is qualified and

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<sup>30</sup> Article 2 Protocol 1 ECHR Right to education: 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 respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

can be restricted when it is justified as proportionate and for a legitimate aim, such as protecting the rights of others. This allows for an element of compromise and negotiation between different, sometimes competing interests at the enforcement level.<sup>31</sup> Similarly, religion and belief is protected at work by the provisions of EU Directive 2000/78, which protects against discrimination on grounds of religion or belief. Although direct discrimination cannot be justified, where, because of the nature of the occupation or the context in which the work is carried out, a religion or belief constitutes a genuine occupational requirement for the job in question and it is proportionate to impose that requirement, any resulting discrimination will be lawful.<sup>32</sup> Indirect discrimination can be justified too where there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary.<sup>33</sup> Again, negotiation occurs at the enforcement level in this context, through the court assessment of the proportionality of any interference with religious equality.

Thus, legal frameworks covering religion and work both involve balancing competing rights to try to achieve a proportionate response. This process might alternatively be termed ‘negotiating’, ‘reaching compromise’, ‘seeking concordance’ or finding ‘equilibrium’, but, in each case, the different factors are reviewed and, as illustrated above in *Muhammed v. Leprosy Mission*, a finely graded assessment can be made as to how to balance competing interests. In effect, negotiation between the interests of religious employers and those of staff members occurs at enforcement level and is

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<sup>31</sup> See Hunter-Henin introduction

<sup>32</sup> Equality Directive 2000/78 Article 4.

<sup>33</sup> Article 2(2)(b)

effected via the application of a proportionality test to any religious requirement imposed on staff.

In contrast, negotiation between the religious employer and the employee in the context of faith schools occurs at the preliminary stage at which the rule has been formulated,<sup>34</sup> leaving no discretion to those enforcing the rules, and thus no space for compromise at enforcement level. Elements of compromise can be seen at the preliminary rule formulation level. For example, under the SSFA, voluntary aided schools, free schools and designated academies can discriminate against all teaching staff, but other schools' freedom to discriminate is limited to a fifth of staff. There is no negotiation at the enforcement stage, however: the rules that have been decided upon are not subject to a proportionality assessment.

Moreover, whilst clearly there has been some compromise at the rule formulation stage, the overall situation seems to be, at best, a very messy compromise, as the reduced discrimination in voluntary controlled schools does not appear to have a clear theoretical justification. It seems instead to be an attempt to lessen the burden on staff by limiting the impact of the rule in some schools. It could be argued that greater religious freedom should be allowed to schools with a stronger religious ethos (leaving aside debates over whether such freedom should be allowed within the state school system as a whole), but different treatment by the SSFA does not depend on the practical religiosity of the school, but instead on finance and governance structures. A better compromise would be to allow some negotiation at the

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<sup>34</sup> See Hunter-Henin, above

enforcement stage, by way of a proportionality test, as is allowed in religious discrimination cases in contexts other than education.

The negotiation of religion in relation to education has been settled in a way that is unfavourable to teaching staff, compared with that reached for staff of other religious ethos employers. In seeking to understand why this is the case, it is worth considering the various voices that have contributed to the debate. It is suggested that the perspectives of all parties have not been adequately included, with the result that the compromise reached is not one of equilibrium or concordance. Instead the balance has been tilted in favour of religious actors who have been accorded access to state-funded education, whether as recipients or providers, that meets their religious requirements. Had teachers' voices been taken into account more clearly, the balance might have been tilted more evenly.

### *Voices in the Negotiation*

As referred to above, Christian churches have long been involved in the provision of education, predating the delivery of education by the state. However, the Anglican Church, the biggest faith school provider and biggest sponsor of academies,<sup>35</sup> has, in recent years, become more explicit in its aim to use education as an opportunity to

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<sup>35</sup>The Church of England claims to be the biggest provider of academies under the old scheme where academies needed to find sponsors. <http://www.churchofengland.org/education/national-society/academies-%281%29.aspx> (accessed 29 May 2012)

reach to a greater number and wider range of individuals with the Christian message. The Church of England's 2001 policy document, *The Way Ahead*,<sup>36</sup> states that thirty years ago, 'the emphasis was on the Church's mission of service to the community, through education,'<sup>37</sup> whereas the new policy notes that schools can provide churches with an opportunity to reach out to parents through the children attending its schools.

Concerning the employment of staff, *The Way Ahead* actively aims to encourage Christians to enter the teaching profession and suggests that ways need to be found to offer 'enhanced opportunities for Christians seeking Qualified Teacher Status', by offering additional qualifications for new entrants to work in Church schools as well as developing training for head-teachers. More recently, in the 2012 *Church School of the Future Review*, there is no mention of teachers' rights in terms of non-discrimination. Indeed the only recommendation relating to staff in this review is to continue work on training and recruiting Christian teachers. The voice of the Anglican Church in questions of faith schooling has thus been firmly in favour of promoting faith schools, with questions of equality for staff of other faiths or no faith not part of the debate.

In contrast, the voice of teachers has been weaker. Unions and NGOs such as Accord have campaigned against religious discrimination against teachers in faith schools. Accord has catalogued examples of discrimination against staff members in faith

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<sup>36</sup> Church House Publishing, London, 2001

<sup>37</sup> *Ibidem*, para 3.15.

schools,<sup>38</sup> but this voice does not seem to be heard as strongly as the concerns of parents regarding admission. Stories of parents attending church to get a place at a church school are commonplace in the media; narratives relating to discrimination against teachers are comparatively rare.

One might expect that the main voices in any negotiation over the role of staff members' religion in faith schools would be those of the school, the relevant religious organisation and the staff. In the context of faith schooling, however, the government also plays a very significant role. The provision of faith schools is supported by all main political parties. In the 2001 Labour Government's Green Paper, the Department for Education and Skills (DFES)<sup>39</sup> extolled the good record of faith schools in delivering high quality education, in achieving good academic results and popularity with parents. It states: 'We therefore wish to welcome more schools provided by the churches and other major faith groups ... where there is a clear local demand from parents and the community'.<sup>40</sup> This approach is carried forward in current government policy, with the introduction of a programme of free schools, and academies, many of which are faith based.

### **Has 'Negotiation with Religion' Reached a Fair Compromise for Staff?**

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<sup>38</sup> <http://accordcoalition.org.uk/wp-content/uploads/2011/12/Personal-testimonies-2011-FINAL1.pdf>

(accessed 29 May 2012)

<sup>39</sup> The Department for Education and Skills, replaced by the Department for Children, Schools and Families in 2007.

<sup>40</sup> *Building on Success in Schools* (London: DFES, 2001) p. 48

In attempting to negotiate a fair balance, there are two obvious interests to address: faith organisations and staff. On the part of faith groups, involvement in state education provides an immense opportunity for outreach and it is unsurprising that some are keen to exploit the opportunities available. Viewed from the perspective of members of the teaching profession, however, such a strategy may be more problematic as it may significantly curtail the freedom of teachers who do not share the faith of the majority of faith schools to develop their careers across the full range of state-funded schools.

The factor that seems to set education apart from other religious settings is the role of the state in negotiations. This seems to have tipped the balance firmly towards the interests of religious actors over those of teaching staff by providing a legal environment that is more favourable to church schools than strictly allowed in EU law, which requires that any religious requirements imposed by religious employers be for a legitimate aim and proportionate. An assessment of the reasons for the approach taken to religious education by the main political parties lies beyond the scope of this chapter, but it is undoubtedly the case that religious education retains cross-party support, with little political debate about the impact that this has on the religious freedom of staff.

What the case of teachers in faith schools shows is that negotiation between rights and interests can be an effective process for reaching a fair compromise, but only if the

relevant parties have an appropriate part in the negotiation. In the context of religious schooling, this means a greater voice for teaching staff and, perhaps, a reduced voice for the state, which arguably should be a neutral broker between different interests. In practical terms, any rebalancing of the settlement between religious schools and their staff would involve ensuring that some negotiation at the enforcement stage be permitted. This would allow the consequences of any solution for the individual to be taken into account.<sup>41</sup> How this might work in the schools context is considered below.

### **How might the Settlement be Renegotiated?**

There is a strong legal basis for arguing that the current settlement regarding legal protection for teachers with respect to their religious freedom at work requires renegotiation. The lack of a proportionality test in the SSFA raises the question of whether its provisions are compatible with the requirements of the Employment Equality Directive 2000/78. The Directive provides a general exception to discrimination where there is a genuine occupational requirement, where it serves a legitimate aim and the discrimination is proportionate to that aim. There are broader exceptions where the employer is a religious organisation, to allow for the maintenance of a religious ethos, permitting employers to demand loyalty from staff to that ethos. Whilst exceptions to the non-discrimination principle can be acceptable within the Directive, therefore, the provisions of the SSFA are so broad that they may well not comply with the requirement in Article 4 that exceptions be legitimate and justified. The failure of the SSFA to include a proviso that any religious

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<sup>41</sup> See Hunter-Henin, above



discrimination in schools must be proportionate may make the protection of the SSFA incompatible with that provided for in the Directive.

If the provisions of the SSFA that allow discrimination against teachers on grounds of religion and belief were to be made subject to a requirement of proportionality, this would not only meet the objection that the current provisions fail to correctly implement the Directive, but also allow for a balance to be struck between the competing interests at stake. The introduction of a proportionality test would permit an assessment to be made at enforcement level as to how an appropriate balance should be maintained between upholding the rights of faith schools to maintain their religious ethos and of teachers to pursue their careers free from religious discrimination. It would enable each case to be considered at a local level, rather than determining, in advance and at the rule formulation stage, that discrimination against the teacher is always acceptable.

In effect, negotiation at the enforcement stage involves a balancing approach, performed by the imposition of a proportionality test. This is a more individualised approach and so it enables more individualised negotiation. The operation of the proportionality approach in the context of religion and schools can be seen in two cases involving religious dress in schools, one on the part of staff, one on the part of a pupil. These cases may serve as an example of how proportionality could apply in the faith school context.

The first case, *Azmi v. Kirklees Metropolitan Borough Council*,<sup>42</sup> involved a Muslim teaching assistant who wanted to wear the *niqab*<sup>43</sup> when in the presence of male colleagues.<sup>44</sup> The school was not prepared to allow her to wear the *niqab* when assisting in class.<sup>45</sup> In her subsequent discrimination claim, the court accepted that there was *prima facie* indirect discrimination,<sup>46</sup> but that the indirect discrimination was justified as the restriction on wearing the *niqab* was proportionate given the need to uphold the interests of the children in having the best possible education, as the face covering was said to limit essential non-verbal communication. In applying the proportionality test at the local level, the court noted<sup>47</sup> that the school had investigated the situation before reaching the conclusion that the restriction was necessary and it was not possible to accommodate her request without harming the interests of the children. The *Azmi* case illustrates that proportionality requires careful review of the facts and circumstances of the case on the ground, rather than the imposition of a rule negotiated above the local level. It is noteworthy that, in *Azmi*, the school – coincidentally a voluntary controlled Church of England school – was prepared for her to wear religious dress such as a headscarf in class and for her to wear the *niqab* in the school. She was only prohibited from wearing the *niqab* when assisting in class. Had the school sought to ban such religious symbols in all parts of the school there is

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<sup>42</sup> *Azmi v. Kirklees Met. Borough Council*, [2007] I.C.R. 1154

<sup>43</sup> A *niqab* is a face-covering for women that veils the face and hair down to the shoulders, with a small opening for the eyes.

<sup>44</sup> *Azmi*, at 1157.

<sup>45</sup> *Azmi* at 1161.

<sup>46</sup> Since the refusal to allow *Azmi* to wear the *niqab* put her at a particular disadvantage when compared with others.

<sup>47</sup> *Azmi* at 1172.

every indication that the court would have found this to be disproportionate. It would certainly have required very clear justifications that were relevant to the precise case before the court.

A similarly detailed approach at local level can be seen in *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School*.<sup>48</sup> The case involved a pupil's refusal to wear the agreed school uniform, requesting instead to wear a *jilbab*.<sup>49</sup> In deciding that the school's decision to enforce the school uniform was proportionate, the court again undertook a careful review of the circumstances of the case. For example, the school had worked hard to promote harmony between the different races, religions and cultures represented in the school and the uniform (which already accommodated common Islamic dress<sup>50</sup>) was viewed as necessary to combat conflict between pupils and the development of sub-groups identified by dress.<sup>51</sup> As with *Azmi*, the court recognized that the school had undertaken detailed discussion, including consultation with local religious leaders, in reaching its decision.<sup>52</sup>

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<sup>48</sup> *R (on the application of Begum) v. Headteacher & Governors of Denbigh High Sch.*, [2006] UKHL

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<sup>49</sup> A loose fitting garment which hides the contours of the body, worn by some Muslim women.

<sup>50</sup> The uniform allowed for a *salwar kameez*, a sleeveless smock-like dress with the loose trousers, to be worn.

<sup>51</sup> *Begum* at [18].

<sup>52</sup> *Begum* at [33].

Of course, when decisions are taken at local level, it will always be arguable that a different court could have reached a different conclusion.<sup>53</sup> However, the courts' use of fact-based decision-making at the enforcement stage in both *Azmi* and *Begum* allowed for a more contextual and sensitive decision, and arguably a fair compromise to be reached.

If a similar proportionality-based assessment were to be undertaken in the context of discrimination against staff, the outcome would be quite different to that arrived at under the current legal settlement. A proportionality approach taken at enforcement level would entail considering the facts and circumstances of the individual case. A number of factors might be relevant. For example, a court could consider whether there were other options available for a teacher to work or look for promotion elsewhere. Where there is only one religious school among several others in a particular location, such as a city, the practical effect of discrimination by an employer may differ from where a faith school is the only maintained school in a locality or where a large proportion of schools in an area are faith schools. The consideration of proportionality might also involve an assessment of an individual school's actual ethos, based on current practice, rather than basing the employment rights of teachers on the constitutional and governance arrangements of the school. It might also mean that, as in the *McNab* case, while a religious requirement on teachers in religious roles could be proportionate, a requirement imposed on all staff would not be.

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<sup>53</sup> See Hunter-Henin, above. See Mancini, S. The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence, *Cardozo L. Rev.* 30 (2009) 2629, 2654 for criticism of the *Begum* decision.

Thus, such a proportionality approach might allow for a settlement to be negotiated that achieves more equilibrium between the competing interests at stake. It might also allow for a more radical renegotiation of the settlement for teachers in faith schools, as the state may not be afforded such a strong voice in the debate. The current position, where negotiation has occurred at the rule formulation stage, has given a significant voice to the state, such that a compromise has been reached between the Church and faith groups at the expense of the employment rights of staff. Given that these schools are almost entirely publicly funded, such a settlement is arguably inappropriate. Allowing a proportionality approach implemented at enforcement level would allow for local voices and local conditions to be taken into account and a better balance to be struck.

### **Re-negotiating religion**

The current settlement for staff in faith schools in England looks set to remain, particularly while government continues to enjoy its current position in the negotiation room, with its policy of promoting the free school and academy programme, which involves increasing the number of faith schools. The European Commission has, however, recently been investigating a complaint against the UK government that the law governing religious discrimination against teachers in faith

schools is in breach of European equality law.<sup>54</sup> The intervention of the European Commission means the entry of a new party to the negotiations. With this new voice as part of the negotiation, it could be that a fairer compromise could be reached in future.

However, beyond this, the position of English faith schools serves as useful illustration of the relationship between the religious and the secular more generally. The current compromise reached between religions and the state in the context of faith schooling have emerged from a long history of negotiation between religion and secularity in both education and more generally. This discussion of the contemporary debate in England in the particular context of education demonstrates that this negotiation is ongoing. It has been suggested that the current settlement is disadvantageous for many, and that this has occurred because the negotiation has taken place with too much weight given to the voice of the state at the preliminary rule formulation stage. A more appropriate settlement would be achieved if the

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<sup>54</sup> British Humanist Association News: “European Commission to investigate whether ‘faith’ schools break European employment laws” <https://humanism.org.uk/2012/07/24/news-1084/> (Accessed 30 July 13).

See also answer by the Parliamentary Under-Secretary of State for Schools (Lord Nash) to a Parliamentary Question from Lord Laird, in which the Government refers to an invitation by the European Commission for it to submit observations on the compatibility of Section 60 of the School Standards and Framework Act 1998 and the European Union Council Directive 2000/78/EC. Hansard 3 Jun 2013 : Column WA144 (<http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/130603w0002.htm> accessed 30 July 2013)

negotiation between different interests could occur at a local enforcement level, with greater participation by a wider range of relevant voices.