

## **CHAPTER NINE**

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# **RAISING CHILDREN IN ACCORDANCE WITH UNORTHODOX RELIGIOUS BELIEFS**

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Nicholas Hatzis' analysis in chapter eight of the ways in which the British and Canadian constitutions regulate the wearing of religious symbols takes us primarily to situations in which a governmental body stands as what the Canadian courts have come to call a 'singular antagonist' relative to an individual (or group) who (or which) contends that that either the government body is invoking a presumptively Charter-compliant statutory provision in a Charter non-complaint fashion or that the statutory provision is per se in breach of Charter rights.<sup>1</sup> Such scenarios have been contrasted (by the Canadian Supreme Court) with circumstances in which the law and/or the government body applying the law is more readily seen as seeking to balance competing private interests: when the law (and the governmental body applying it) stands as a mediator between those interests rather than as a singular antagonist to just one of them.<sup>2</sup> In the Canadian context, the dichotomy is ostensibly significant because the Canadian Supreme Court affords legislatures greater substantive latitude (a notion more readily recognised as 'deference' in the context of British courts' interpretation of the HRA 1998) in 'balancing' scenarios.

As other contributors to this volume have observed, that dichotomy may often have blurred rather than clear edges. Perhaps more importantly, it is a dichotomy that shades in analytical terms into the distinction between 'vertical' and 'horizontal' applications of human rights norms; a distinction which prima facies mandates the resolution of vertical disputes according to the requirements of Charter rights and horizontal disputes in conformity with Charter 'values'. Loveland's critique of the way in which Canadian and British law have lent a demonstrably 'public' (or if one prefers 'vertical' or 'singular antagonist') nature to defamation law which was previously treated as a 'private (or if one prefers 'horizontal' or 'mediating') highlights both the overlap between these dichotomies and the sometimes simplistic way in which they have been formulated and applied by the courts in both jurisdictions.<sup>3</sup> Further, as both Hatzis and Bamforth have suggested in their respective chapters in this volume,<sup>4</sup> the doctrinal clarity of the Canadian Supreme Court's jurisprudence on religious freedom has been

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<sup>1</sup> See the discussion of the point in Loveland's introductory chapter in this volume at pp ----- above.

<sup>2</sup> Thus in one of the earliest cases addressing religious freedom, which concerned provincial laws regulating shop opening on Sundays, the Court was ready to countenance quite substantial interferences with owners' religious beliefs if such interferences were designed to protect employees from potential exportation; *Edwards Books & Art Ltd v R* [1986]2 SCR 713. And see also the free expression cases discussed in Loveland's chapter at pp ---- above.

<sup>3</sup> See in particular pp ----- and pp ----- above.

<sup>4</sup> See especially the passages at pp ---- and pp ---- (Hatzis) and pp ---- and pp ----- (Bamforth) above.

additionally complicated by the authority which Canadian courts have accorded to the judgment in *Anselem*.<sup>5</sup> Strictu sensu, *Anselem* concerns the Quebec Charter, a human rights instrument which has horizontal as well as vertical effect, which was relied upon by the individuals alleging an interference with their religious freedom because the interference came from a private sector rather than governmental body. The Supreme nonetheless conflated the analytical approaches taken to the Quebec Charter and the Canadian Charter, even though on the logic of *Dolphin Delivery*<sup>6</sup> the Canadian Charter could provide only 'values' rather than 'rights' as a guide to resolving the dispute between the parties.

This chapter focuses on questions of religious freedom which have an obviously complex character. The complexity arises because it is not immediately apparent if the governmental role is best characterised as 'singular antagonist' or 'mediator' and if the matter before the court is best characterised as 'vertical' or horizontal' in nature.

In both Canada and Britain, tensions between religious belief and the secular state have been played out in similar disputes concerning the family and children's upbringing and education. The religious upbringing of children sits at the intersection of a number of contentious issues: the acceptable limits of religious practice; the respective roles of parents and the state in children's upbringing; and the extent to which the state may legitimately intrude into the 'private' family sphere. The interests of the children themselves are also complex. No upbringing, whether religious or not, can be neutral as to the values by which life is lived. A religious upbringing can be important not only in the shaping the child's beliefs but also in securing their place within the community and developing relationships within and outside of the family. Religious affiliation, closely tied as it often is to culture and race, may also be significant in the formation of a child's identity even if the child later rejects the beliefs themselves.

For these reasons the freedom of parents to determine their child's religious upbringing is not necessarily inconsistent with the interests of children. It is, however, clear that a narrow upbringing, in which children are brought up with little exposure to alternative ideas will limit their opportunity to develop the capacity to make future rational choices about their own beliefs and to participate fully in a society that requires its citizens to understand and respect diversity of belief and ways of life. There is also a public interest in providing the conditions for a harmonious society, resilient to the tensions that may come from negotiating different ways of life. As both Canada and the UK have become more diverse so attempts have been made to forge collective identity through a shared vision of the foundational values in each country. Within this framework, the beliefs held by children and their families are potentially risky, threatening community cohesion and even creating an environment conducive to extremism. This chapter will consider the way in which the law has responded to these tensions in two areas: parental disputes over religious upbringing; and religious education.<sup>7</sup> In both areas parental freedom has been increasingly circumscribed by the use of collective values but in each of these areas the legitimacy of the derivation of these values has been questioned, along with their ability to draw the boundaries of religious freedom and public interest.

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<sup>5</sup> *Syndicat Northcrest v Anselem* [2004] 2 SCR 299.

<sup>6</sup> See the discussion in Bamforth's chapter and the sources cited therein at pp ----- above.

<sup>7</sup> These areas present a rather more nuanced challenge to the courts than such matters as the respect to be given to parents' religious beliefs which would preclude their children being given certain medical treatments when the children would if untreated suffer serious harm or death; see especially *B (R) v Children's Metropolitan Aid Society of Toronto* [1995] 1 SCR 315; and Draghici's discussion of the point at pp ---- above.

## **I. Historical background(s)** [A heading; 14 bold]

The way in which a country responds to the question of the role of parents and state in children's religious upbringing and education will inevitably reflect the history, constitutional foundations and prevailing social conditions within the state. Whilst there are important differences between the UK and Canada, the two countries have much in common, most importantly: the common law roots of the law on religious upbringing; the role of religious conflict in the formation of the constitution; an increasingly diverse population; and a commitment to broadly similar liberal values and rights.

The language of the law in family disputes is also similar in both jurisdictions,<sup>8</sup> with the resolution of disputes about children's upbringing expressed in tests related to the 'best interests' or 'welfare' of the child and the use of the 'harm' principle. Despite the broad similarities between the jurisdictions, terms such as 'best interests' and 'harm' do not have fixed meanings, instead reflecting the values and norms of the society in which they are determined.

The modern law in both jurisdictions has its roots in the common law right of a father to determine the religious upbringing of his child.<sup>9</sup> The foundations of the modern British constitution were born of the deep religious conflicts of the 16<sup>th</sup> and 17<sup>th</sup> Centuries, which gave rise to draconian state interference in religious belief, including parental religious freedom<sup>10</sup> and children's education.<sup>11</sup> As the Protestant faith became firmly established, these restrictions began to be relaxed such that by the early 19<sup>th</sup> Century children's religious upbringing was largely treated as a private parental freedom.<sup>12</sup> Whilst this right was not absolute and could be

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<sup>8</sup> Many aspects of family law in Canada are governed by provincial law, although the law on marriage and divorce is a matter of federal law (Constitution Act 1867 section 91(26) and is primarily based on the federal Divorce Act (RSC 1985, c3, 2<sup>nd</sup> supp).

<sup>9</sup> Until the Guardianship of Infants Act 1925 this was primarily a paternal right, save where the child was illegitimate in which case the mother possessed such rights. See *Young v Young* [1993] 4 SCR 3, 108 DLR 4<sup>th</sup> 193 at 209-211 and 268-270 for discussion of the common law roots of Canadian law (dispute arising in British Columbia but primarily concerning divorce under federal Divorce Act) on parental responsibility for religious upbringing. The law in Quebec is based on the civil law system rather than the common law but the Supreme Court of Canada has noted that the evolution of the law in Quebec is parallel to that in the common law: *P. (D.) v. S. (C.)*, [1993] 4 SCR 141.

<sup>10</sup> For example, *Shaftsbury v Hannam Finch* 323 (1677); *Preston v Ferrard*, 4 Bro P C. 298 (1720); *Teynham v Lennard*, 4 Bro P C. 302 (1724); 9 Mod 40, 2 Eq Cas abr 486; *Edwards v Wise*, Barnard, ch.x39 (1740).

<sup>11</sup> See, for example, Act of 1699, 11 & 12 Wm. III c4 by which it became a crime punishable by life imprisonment for a Catholic to keep a school or educate youth and which compelled Catholic parents to continue to support their children who converted to Protestantism. See Friedman (1916) 'The parental right to control the religious education of the child' 29 *Harvard LR* 485.

<sup>12</sup> Friedman *ibid*, noting that, *de facto* if not *de jure*, this approach appears to be established in judicial practice by the mid-18<sup>th</sup> century.

forfeited by the father's conduct,<sup>13</sup> the courts were reluctant to intervene in the father's religious discretion, even in cases that arose after the father's death.<sup>14</sup>

Perhaps the best example of this approach is *Agar-Ellis*,<sup>15</sup> in which the Protestant father barred his children from all contact with their mother who had secretly educated them as Roman Catholics. The court refused to interfere with exercise of the father's rights, despite the fact that there had been an agreement at the time of marriage that the children would be brought up as Roman Catholics and that the children's own wishes were that they would continue to be brought up in that faith. In the view of the court, as the father had not forfeited or abandoned his paternal rights, the court 'could not interfere with him in his honest exercise of the jurisdiction which the law had confided to him'.<sup>16</sup>

Cases such as *Agar-Ellis* demonstrate that the prevailing law in both Canada and Britain in the 1860s reflected a primary state response to religious diversity in parenting as one of non-intervention in the private rights of the parent, or, more accurately, the father. This reflected a wider dismantling of religious disabilities and an increase in non-conformist religious observance as religious pluralism became more firmly established.

Julian Rivers, in his survey of religious constitutional change, concludes that by 1870 a new constitutional settlement had been reached, meaning that religious equality and liberty were firmly established with private conscience being given particular protection.<sup>17</sup> 1870 was also the year that saw the introduction of the systematic involvement of the state in education through the creation of board schools. Until this point religious upbringing and education were largely synonymous, with religious groups dominating the provision of education. This together with the introduction of compulsory education in 1880 gave the state a greater interest and role in the provision of education; the most powerful route to state intervention in the otherwise private sphere of religious upbringing.

Given the historic role of the Christian churches in providing education<sup>18</sup> state provision was built around the existing religious provision rather than by creating a new secular, state system. This basic approach to partnership between the state and religious groups in the provision of education has continued to the present day. As British society has become more diverse, the state has responded by increasing the number and variety of 'schools with a religious character' based on a deliberate policy of pluralism<sup>19</sup> and respect for parents' rights to choose a faith-based education.<sup>20</sup> As discussed further below, this policy forms the backdrop to many of the most difficult questions of accommodation of religious upbringing in the modern law.

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<sup>13</sup> Most famously the poet Shelley was deprived of the custody of his children on the grounds that he professed and acted upon irreligious and immoral principles: *Shelley v Westbrook* (1817) Jac 266, although other undesirable aspects of Shelley's parenting may have influenced the court, Todd (2007) *Death and the maidens*. See also: *Wellesley's Case* (1827) 38 ER 236; (1828) 4 ER 1078.

<sup>14</sup> *Hawksworth v Hawksworth* (1871) L R 6 Ch App 539.

<sup>15</sup> *Re Agar-Ellis* (1878-79) L R 10 Ch D 49; (1883) L R 24 Ch D 317.

<sup>16</sup> *Re Agar-Ellis* (1878-79) L R 10 Ch D 49, 75.

<sup>17</sup> Rivers (2010) *The law of organised religions: between establishment and secularism*, ch 1.

<sup>18</sup> *Ibid* ch 8.

<sup>19</sup> Department for Education and Skills (2001) *Schools: achieving success* (Cm 5230) and Department for Education (2016) *Schools that work for everyone*.

<sup>20</sup> See Estelle Morris, Secretary of State for Education, speaking to the General Synod on 14 November 2001: <http://news.bbc.co.uk/1/hi/education/1655994.stm>; <https://www.theguardian.com/politics/2001/nov/14/uk.schools>

The crucible of religious tension was also a formative influence on the emerging Canadian state and again the upbringing and education of children was an important part of the resulting settlement. This origins of this settlement can be traced back to the British acquisition of French Canada, with its largely Catholic population. The resulting Treaty of Paris (1763) and subsequent Quebec Act (1774) granted its Roman Catholic inhabitants freedom of worship and access to public office as yet unavailable to their co-religionists in Britain and its other territories. This relatively early approach of toleration of religious difference found further expression,<sup>21</sup> most importantly, at the creation of Canadian Federation in 1867 specific protection was given to Catholic and Protestant education in those areas in which they were respectively minorities.<sup>22</sup> This was, however, a limited vision of toleration and did not extend to protection for the education rights of other religious minorities.<sup>23</sup> Further, the use of education has a dark side to its history through its use as a tool for assimilation and control, particularly in relation to Canada's indigenous people who suffered great harm through its use.<sup>24</sup> Just as is the case in Britain, this historic approach to education continues to cast a shadow over current debates concerning the reach of the state and the religious upbringing of children.

## **II. Multiculturalism and collective values** [A heading: 14 bold]

Both Canada and the UK have become increasingly diverse in terms of culture, language and religion, including the increasing proportion of the population who have no religious affiliation. These trends can be seen by comparing census data.<sup>25</sup> In both countries<sup>26</sup> the 2011 figures record that a majority of the population reported themselves to belong to a Christian denomination<sup>27</sup> but these numbers represent a steep decline from a decade earlier.<sup>28</sup> In both countries around a quarter of respondents stated that they had no religious affiliation, a

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<sup>21</sup> Notably the recognition of equality for Jewish subjects in Lower Canada: 1 Will. IV, ch. 57 (1831) and protection from restrictions on the free exercise of religion contained in the Freedom of Worship Act (1851): 14 & 15 Vict., ch. 175.

<sup>22</sup> Constitution Act 1867 (British North America Act 1867) s.93.

<sup>23</sup> An omission which survived later challenge in the Supreme Court of Canada: *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] 1 SCR 1148. See also the sources cited in Ian Loveland's chapter relating to the persecution of Jehovah's Witnesses in Quebec in the 1950s.

<sup>24</sup> White and Peters (2009) 'A short history of aboriginal education in Canada', in White, Beavon and Peters (eds) *Aboriginal education: current crisis and future alternatives*.

<sup>25</sup> The Canadian Census of 2011 did not ask for religious affiliation but a subset of households were sent the voluntary National Household Survey and data from 2011 reflects answers to that survey.

<sup>26</sup> The figures given here relate to England and Wales rather than the whole of the UK. The Census for Scotland shows a similar picture. In Northern Ireland the question on religion were closely related to its history of religious tension, a complexity beyond the scope of this chapter.

<sup>27</sup> In Canada in 2011 just over two thirds of people reported themselves to be Christian, in England and Wales the equivalent figure was just under 60%.

<sup>28</sup> In Canada in the 2001 Census over three quarters of the population self-described as Christian. In England and Wales the figure was just over 70%.

considerable rise from 2001.<sup>29</sup> At the same time, whilst other religious groups remained a relatively small proportion of the population, in both countries there was a sharp rise in the numbers affiliating to minority religions.<sup>30</sup> In both countries Islam has the greatest number of adherents after Christianity and in both countries the number of Muslims has shown a considerable increase over the past decade.<sup>31</sup> Whilst there are significant national and regions differences in the stories behind these figures, both countries show a similar picture of declining affiliation to Christianity and a rise in the proportion of people with minority or no religion. In consequence, in both countries, any attempt to achieve a sense of collective identity must look beyond religious tradition and unite those who have very different religious, or non-religious, affiliation.

The primary response to such a dilemma in Canada has been found in the contested concept of multiculturalism. This value is written into s.27 of the Charter: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”. S.27 has been regularly resorted to by the courts since the outset of the Charter era as an important factor both in assessing if Charter rights (or in the horizontal context Charter ‘values’) have been infringed, and in assessing if such infringements can be justified under s.1.<sup>32</sup> However, the meaning of this provision, like multiculturalism itself, has remained somewhat ambiguous. In 2007, in *Bruker v Marcovitz*,<sup>33</sup> Abella J described multiculturalism in terms of respect for difference:

[10 normal] Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected... the right to integrate into Canada’s mainstream based on and notwithstanding these differences has become a defining part of our national character.<sup>34</sup>

For Deschamps J (dissenting) the respect for difference that underlay multiculturalism required the court to adopt a stance of neutrality with regard to religious belief:

[10 normal] Canada’s adoption of multiculturalism and attachment to the fundamental values of freedom of conscience and religion and of the right to equality guarantee to all Canadians that the courts will remain neutral where religious precepts are concerned. This neutrality gives the courts the legitimacy they need to play their role as arbiters in relation to the cohabitation of different religions and enables them to decide how to reconcile conflicting rights. In thus protecting freedom of conscience and religion, the courts perform a task that is difficult

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<sup>29</sup> In 2001 16.2% of Canadians had no religious affiliation in England and Wales the figure was 14.8%.

<sup>30</sup> In Canada minority religions such as Judaism and Buddhism, have remained relatively stable as a proportion of the population between 2001 and 2011, but there has been a 50% rise in the proportion stating themselves to be Sikh, Muslim or Hindu.

<sup>31</sup> In England and Wales the proportion of Muslims rose from 3% of the population in 2001 to 4.8% in 2011. In Canada the equivalent figures show a rise from 2% to 3.2%.

<sup>32</sup> See for example *R v Keegstra* [1990] 3 SCR 697 (in respect of criminalising religiously motivated hate speech); *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 (in relation to the dismissal of public school teachers promoting anti-semitic views: *Edwards Books & Art Ltd v R* [1986] 2 SCR 173 (concerning Sunday closing laws) and the discussion in Hatzis’ chapter at pp ----- and pp -----).

<sup>33</sup> [2007] 3 SCR 607

<sup>34</sup> *Ibid* at [1].



and complex. It would be inappropriate to impose on them an additional burden of sanctioning religious precepts and undertakings.<sup>35</sup>

To the extent that neutrality merely means that no automatic preference is given to one religion over another this is uncontroversial but as Abela J explains in the same case, difficulties arise where that religion's adherents espouse beliefs that are potentially in conflict with fundamental values that the Court is also charged with protecting:

[10 normal] The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.<sup>36</sup>

*Braker* itself is a good example of this problem of the tension between religious freedom and fundamental values or rights. The case concerned a Jewish couple who had obtained a civil divorce and reached agreement on the financial aspects of that divorce. A condition of the agreement was that the husband obtained a *get*, the religious divorce that could only be sought by the husband and without which the wife was not free to remarry under Jewish law. Unable to force compliance through Jewish law, she therefore sought damages in civil law for her husband's failure to comply with the terms of the agreement over a 15-year period. The majority of the Supreme Court found in her favour, considering that the religious nature of the dispute did not render the enforcement of the agreement non-justiciable and that the husband's claim to religious freedom would in any event be outweighed by the harm to the wife and the public interest in fundamental values including equality between the sexes.

The problem that she faced neatly illustrates what Ayelet Shachar has termed the 'paradox of multicultural vulnerability': in seeking to accommodate religious and cultural difference the state may unwittingly reinforce power hierarchies within the group that disadvantage weaker members of the group and conflict with their citizenship rights.<sup>37</sup> This was an animating concern in the decision by Ontario to prohibit binding religious arbitration in family law matters.<sup>38</sup>

In Britain, a similar debate has centred on the role of sharia councils in resolving family disputes and has primarily been framed as a conflict between the right to choose religious values in negotiating intimate disputes and preventing the imposition of principles and practices that may prevent members of those communities, particularly women, from obtaining the protection available in domestic law.<sup>39</sup> Attempts to use private members bills to impose

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<sup>35</sup> Ibid at [102].

<sup>36</sup> Ibid at [2].

<sup>37</sup> Shachar (2000) 'On citizenship and multicultural vulnerability' *Political Theory* 64.

<sup>38</sup> Arbitration Act, 1991, SO 1991, c. 17, as amended by Family Statute Law Amendment Act, SO 2006, c. 19. Discussed by Greckol (2008) 'Religious fundamentalism and freedom: conflict or common cause?' in Brunelle and Molinari (eds) *Reasonable accommodation and the role of the state: a democratic challenge* pp 19-20.

<sup>39</sup> The issue is complicated by the fact that in many cases marriage in question is only recognised in religious law as the parties to the marriage have not attempted to marry according to civil law. In such cases the civil courts will have no jurisdiction over the divorce or the redistribution of the parties' assets.

certain equality principles on such tribunals have so far failed.<sup>40</sup> A controversial report for the government has recommended a new regulatory scheme to protect the civil rights of women and children, although it is not yet clear whether this will be acted upon.<sup>41</sup>

Concerns about the limits of multicultural accommodation are not limited to the protection of the citizenship rights of members of the group in question. In both Canada and the UK attempts have been made to restrict religious expression on the basis that is said to conflict with national values and thereby pose a form of threat to a cohesive society.

In Canada these arguments have had particular resonance in Quebec where a regional identity rooted in its francophone and Catholic heritage has come under pressure from increasing diversity in Canadian society. Most controversially, a proposed *Charter of Values*<sup>42</sup> attempted to strengthen 'secular' values in Quebec, including a prohibition on public officials wearing religious symbols. The stated aims of the draft Charter, proposed by the minority Parti Québécois government, were to reaffirm religious neutrality and state secularism, but it was widely perceived as imposing undue constraints on religious freedom, particularly for adherents of faiths other than the dominant Christian tradition. Whilst the bill did not succeed,<sup>43</sup> the episode is a good example of the ongoing tensions between religious freedom and secular values.

A similar attempt to articulate a sense of 'Britishness' through shared values has gained particular currency as a response to religious extremism and terrorism. A pivotal point in this policy was then Prime Minister David Cameron's 2011 speech to the Munich Security Conference, rejecting 'state multiculturalism' and instead advocating active promotion of a liberal value system:

[10 normal] ...We need a lot less of the passive tolerance of recent years and a much more active, muscular liberalism. A passively tolerant society says to its citizens, as long as you obey the law we will just leave you alone. It stands neutral between different values. But I believe a genuinely liberal country does much more; it believes in certain values and actively promotes them. Freedom of speech, freedom of worship, democracy, the rule of law, equal rights regardless of race, sex or sexuality. It says to its citizens, this is what defines us as a society: to belong here is to believe in these things. Now, each of us in our own countries, I believe, must be unambiguous and hard-nosed about this defence of our liberty.<sup>44</sup>

These 'fundamental British values' have been defined through anti-terrorism policy as 'democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs.'<sup>45</sup> Active opposition to these values is treated as 'extremism' and considered

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<sup>40</sup> The Arbitration and Mediation Services (Equality) Bill sought to prevent the provision of services that discriminated on the grounds of sex including differential treatment of evidence or inheritance. Arguably such restrictions are unnecessary as the Equality Act 2010 would already prohibit such discrimination in the provision of services.

<sup>41</sup> Home Office (2018) *The independent review into the application of sharia law in England and Wales* (Cm 9560).

<sup>42</sup> Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Quebec, 2013.

<sup>43</sup> Discussed by Jukier and Woehrling, (2016) 'Religion and the secular State in Canada' in Martinez-Torron and Cole Durham, (eds.) *Religion and the secular State: national reports* p183. As Hatzis' chapter in this volume suggests, had the bill been enacted it would likely have faced a successful challenge under s.2 of the Charter; see especially pp ---- above.

<sup>44</sup> Cameron (2011) *Prime Minister's speech at Munich security conference*, 5 February 2011; <https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference>

<sup>45</sup> *Prevent strategy* (June 2011) Cm 8092, Annex A.



a key driver of radicalisation and terrorism. Within this framework, the beliefs held by children and their families are potentially risky: signalling potential future violence; creating an environment conducive to extremism; and threatening community cohesion. These ‘British’ values do not impose uniformity but are increasingly used to construct the outer limits of acceptable upbringing for children. Schools and other education and childcare providers have been given extensive obligations to ‘actively promote’ ‘fundamental British values’ to the children within their care.<sup>46</sup> The definitions have also been used by the courts in child protection proceedings, such that parental non-violent but vocal opposition to these values is characterised as harmful to children and a legitimate basis for compulsory care proceedings by the state,<sup>47</sup> so providing an increasingly firm limit on beliefs that can legitimately be transmitted to children. Whether these really represent a collective vision of national values is more controversial, it has so far proved impossible to embody them in primary legislation, which may have granted greater democratic legitimacy.<sup>48</sup> Further, their basis in anti-terrorism policy risks, at the very least, a perception that the government agenda is targeted in a way that discriminates against certain forms of Islamic belief and upbringing.<sup>49</sup>

In both Canada and the UK there is a live issue as to how far multiculturalism can be circumscribed by collective values and how any such values are to be derived. The legal disputes around children’s religious upbringing considered in the remainder of this chapter are connected to a wider thesis that many states are moving towards a post-multiculturalist form of normative secularism that places limits on acceptable religious belief and practice.<sup>50</sup> If this thesis is correct, acceptable religious difference in children’s upbringing may increasingly be bounded by a set of normative values which, whilst in harmony with many religious beliefs, will pose particular difficulties for fundamentalist religious beliefs. This contention will be considered in two contexts in which the state becomes directly involved in children’s religious upbringing: judicial resolution of parental disputes; and regulation of religious teaching in schools.

### **III. Parental disputes and children’s religious upbringing** [A heading: 14 bold]

The question of whether it is best for a child to receive a particular religious upbringing or to be brought up in a secular environment is one that is and has long been deeply contested in

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<sup>46</sup> Taylor (2015) ‘Responsibility for the soul of the child: the role of the State and parents in determining religious upbringing and education’ *International Journal of Law Policy and the Family* 15.

<sup>47</sup> Taylor (2018) ‘Religion as harm? Radicalisation, extremism and child protection’ *Child and Family Law Quarterly* 41.

<sup>48</sup> An attempt to do so in the now abandoned Counter-Extremism and Safeguarding Bill was criticised by a Parliamentary scrutiny committee as the definitions were ‘couched in such general terms that they would be likely to prove unworkable as a legislative definition’: Joint Committee on Human Rights, *Counter-Extremism* (2<sup>nd</sup> Report of Session 2016-17) at p3.

<sup>49</sup> UN Committee on the Rights of the Child, *Concluding observations on the 5<sup>th</sup> periodic report of United Kingdom of Great Britain and Northern Ireland* (12<sup>th</sup> July 2016) CRC/C/GBR/CO/5, [21(b)]. Jivraj (2013) *The religion of law: race, citizenship and children’s belonging* suggests that many of the values presented as neutral or secular find their origin in Christian conceptions of truth.

<sup>50</sup> Discussed by Rivers (2012) ‘The secularisation of the British constitution’ *Ecclesiastical LJ* 371; and McCrudden (2011) ‘Multiculturalism, freedom of religion, equality and the British constitution: the JFS case considered’ *International Journal of Constitutional Law* 200.

both Britain and Canada. It is perhaps inevitable that in a pluralistic state the primary location of decision-making as to a child's religious upbringing, at least whilst they are too young to make their own decision, will remain with their parents who know them best and whose own lives will be intimately connected to the choices made in the upbringing of their children. As Baroness Hale observed in a seminal British case on parents' religious rights: "'[T]he child is not the child of the state' and it is important in a free society that parents should be allowed a large measure of autonomy in the way in which they discharge their parental responsibilities."<sup>51</sup>

Parental responsibility includes a broad freedom, perhaps best described as a Hohfeldian 'privilege' or 'liberty', to bring children up within a particular religion or in none including freedom to determine matters such as a child's diet, clothing, and education in accordance with their ('their' being the parents' not the children's) religious beliefs. This broad freedom is, of course, not unique to the religious context; parents have considerable freedom of choice in caring for their children whether their motivation is from religious principle, personal ethics or simply practical concern. The justification for respect for religious freedom in parenting goes beyond this a general respect for parental autonomy. For devout parents, the proper religious upbringing of their children is often a core religious obligation of the parent themselves and might be claimed as a protected manifestation of the parent's own right to religious freedom. This does not protect parents from all interference with their religiously motivated parenting decisions; as Masson ACJ and Brennan J memorably explained in the High Court of Australia, 'Religious conviction is not a solvent of legal obligation'.<sup>52</sup> Nonetheless, in both Canada and the UK, parents have sought to argue that restrictions on their ability to bring their child up as they wish are an interference with their protected religious freedoms and are only permissible if they meet the relevant domestic tests to justify interference with that right.

### **Central principles** [B heading: 12 bold]

In some disputes arising from parents' wishes to raise their children in accordance with particular religious beliefs, the parents themselves will present the court with a united front, arrayed against a governmental body which is seeking to constrain the parents' exercise of their religious freedoms in order to safeguard what that body perceives to be the best interests of the child. As suggested above, such scenarios are difficult to characterise as singular antagonist (vertical) or mediatory (horizontal) in nature. The difficulty is however compounded in disputes where the parents themselves are divided as to the extent to which religious beliefs should control their children's upbringing.

Both Canada and Britain are parties to a strong international consensus on the principles to be used in children's cases. The United Nations Convention on the Rights of the Child ('UNCRC') has obtained near universal international commitment<sup>53</sup> and includes the guiding principle and right for children to have their best interests treated as a primary consideration in all decisions

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<sup>51</sup> *R (Williamson) v Sec of St for Education* [2005] UKHL 15 at [72]. The case concerned a challenge by fundamentalist Christian parents to the prohibition on the use of corporal punishment in schools. For a similar statement in the Canadian context see *La Forest J in B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 at 372.

<sup>52</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120.

<sup>53</sup> All countries save for the USA have ratified the UNCRC. The USA is a signatory to the Convention but has not ratified it.

concerning them.<sup>54</sup> Although the precise terms vary, this best interests, or welfare,<sup>55</sup> test provides the standard for the resolution of parental disputes concerning children in Canada and the UK. Although the test is firmly established in both international and domestic law, that consensus does not resolve the underlying constitutional debates as to the reach of the state into the sphere of religious upbringing. The best interests test faces three particular difficulties all of which have been pertinent to disputes in Canada and the UK.

The first problem is that of court neutrality. It is clearly the case that any *a priori* assumption that being brought up in a particular religion would be against a child's interests would constitute religious discrimination against the believing parent.<sup>56</sup> The courts have instead tended to consider the secular effects of adhering to a religious belief rather than assessing the belief itself,<sup>57</sup> so, for example, rather than assessing a belief that social interaction with non-believers should be rejected, the court would consider the impact of social isolation on the individual child. This approach does not, however, fully resolve the problem. In religious disputes the parents are often arguing about precisely the question of whether it is better for a child that they are brought up with religious discipline or without those constraints. If the court is to adopt the stand point that all socially acceptable belief systems are of equal worth the best interests test will struggle to resolve such a dispute in the absence of specific evidence of individual impact on the child in question. If, however, the court adopts a value system by which the child's interests should be assessed, that value system risks imposing indirect discrimination of a religious group that is opposed to those values.

The second difficulty in applying the best interests test is whether and how the fundamental rights of parents should be taken into account. If decisions are taken solely on the basis of welfare, without consideration of parental rights, this effectively means that *any* interference with a parent's rights, not matter how serious, can be justified simply by citing the child's welfare, no matter how slight.

The final difficulty is whether the best interests test should include consideration of the child's right to freedom of belief. The UNCRC recognises that children have a right to freedom of thought, conscience and religion but this right of the child is connected to the rights of parents to 'to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'.<sup>58</sup> There is therefore an ambiguity as to whether children have the right to freedom from their parents' religious beliefs<sup>59</sup> and whether this freedom can be asserted in assessing those interests. These three problems of neutrality, parental freedom and children's rights underlie many of the cases on parental religious disputes despite the consensus apparently provided by the welfare principle.

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<sup>54</sup> Article 3 UNCRC.

<sup>55</sup> For the purposes of this chapter the terms 'best interests' and 'welfare' are treated as synonymous.

<sup>56</sup> *Young v Young* [1993] 4 SCR 3; 108 DLR (4th) 193 at 252; and *Hoffman v Austria* (1993) 17 EHRR 293 at 316.

<sup>57</sup> Ahdar and Leigh (2013) *Religious freedom in the Liberal State* ch 7.

<sup>58</sup> Article 14(2) UNCRC.

<sup>59</sup> The initial draft of Article 14 would have recognised the child's right to reject their parents' beliefs but the provision proved so controversial that it threatened to derail the entire Convention. The position in international law is summarised in Taylor (2016) 'The child's right to religion in international law', in Strhan, Parker and Ridgely (eds) *Reader in childhood and religion*.

## **Foundations of the Canadian approach** [B heading; 12 bold]

The Supreme Court of Canada was faced with a number of cases concerning children's religious upbringing at an early stage in its experience with the Canadian Charter of Rights and Freedoms. The foundations of the Court's approach were established in *Young v Young*,<sup>60</sup> which came to the Court at the same time as its sister case, *P(D) v S(C)*.<sup>61</sup>

Both cases concerned separated parents and in both cases the mother, as custodial parent, objected to the father's attempts to involve the children with his Jehovah's Witness faith and to teach the children aspect of that faith. In both cases the trial judge had placed significant constraints on the extent to which the father could involve the children in his religious activities as conditions on his rights of access. In *Young* the father was prevented from discussing his religious beliefs with his children and from involving them in any religious services or meetings without the written consent of the mother,<sup>62</sup> whilst in *P(D)* he was permitted to teach his beliefs to his daughter but not to 'indoctrinate her continually'.

In both cases the fathers considered the conditions to be a serious interference with their Charter rights to religious freedom and their obligation to bring their children up with an understanding of religious teaching. Preventing the father in *Young* from discussing his religious beliefs with his children seemed to be a particularly draconian interference. For many religious parents, religion is not simply an aspect of life but encompasses and informs every part of their life. A prohibition on discussing religious belief would prevent such a parent from discussing any serious matter with their children with any sincerity. In *Young* the British Columbia Court of Appeal removed the restrictions, considering them to be an unjustified interference with the father's Charter right to freedom of religion. In contrast in *P(D)* the Quebec Court of Appeal upheld the restrictions on the basis that the proper test was the best interests of the child. As a result, the Supreme Court was faced with a conflict between what might be termed a 'parental rights approach' and a 'family law approach' to children's religious upbringing.<sup>63</sup>

In an important decision that has set the tone for future parental disputes in Canada, the Supreme Court rejected the argument that direct consideration of Charter rights was required, instead adopting the family law approach based on best interests. Giving the majority opinion on this point, L'Heureux-Dubé J reasoned that if the statutory best interests test itself was consistent with the underlying concerns and values of the Charter then a judge properly exercising discretion according to that standard would also be acting consistently with the Charter, without the need for explicit reference to it.<sup>64</sup>

This was an important decision in largely removing disputes about children's religious upbringing from direct constitutional oversight; but it does not resolve the underlying debate about the respective weight to be given to parental freedom to discuss their religion and

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<sup>60</sup> [1993] 4 SCR 3.

<sup>61</sup> [1993] 4 SCR 141.

<sup>62</sup> The conditions also restricted him from preventing any required blood transfusions for the children and from making adverse remarks as to the religious beliefs of their mother; [1993] 4 SCR 3; 108 D.L.R. (4th) 193 at 206.

<sup>63</sup> See Van Praagh (1997) 'Religion, custody and a child's identities' *Osgoode Hall LJ* 309 for detailed consideration of these approaches.

<sup>64</sup> [1993] 4 SCR 3, 108 D.L.R. (4th) 193, at 236-241. Although L'Heureux-Dubé J was dissenting on the outcome of the case, she was speaking for a majority on this point.

children's interests in being free from that influence. It was this problem that essentially split the court in both *Young* and *P(D)* and resulted in confusing, shifting majority judgments.

For L'Heureux-Dubé J,<sup>65</sup> the only question was the best interests of the child and as the children in *Young* had expressed discomfort at their father's religious discussions, their best interests supported the restrictions imposed on their father at trial, the parents' constitutional freedoms playing no part in that decision. At the other extreme, for Sopinka J the fact that the best interests test was to be applied did not mean that the parents' religious freedom were irrelevant to its application. The breadth of the best interests test and its potential to be applied in a manner that overrode Charter values, meant that it should be interpreted in line with Charter values, in this case protection for religious freedom. On this approach, Sopinka J considered that the best interests test *must* be read down so that it could only be used to restrict parental religious expression where there was proof of risk of substantial harm to the child, as the best interests test itself was insufficient to justify significant restrictions on parental freedom.

Whilst McLachlin J, giving the majority judgment in *Young*, did not go quite this far, she also stressed that *evidence* of risk of harm would be an important aspect, but not an essential requirement, in applying the best interests test to reconcile its application with Charter freedoms. In this case there was no evidence of such harm, merely discomfort, and the children's interests were better served by them coming to know their father as he was rather than in restricting his ability to speak freely to them.

In setting the foundations of the best interests approach to parental disputes, *Young* limits the direct application of constitutional rights to parental disputes but also demonstrates the conflicts that remain hidden beneath the surface of best interests. Fundamentally it demonstrates a split between an approach that views religious upbringing as merely another aspect of parental decision-making and one which views it as a protected manifestation of parental religious freedom. On this latter view, as best interests cannot be isolated from the value system by which they are assessed, courts should only restrict parental religious practice on the basis of solid evidence of actual harm to avoid infringing that freedom. The majority's rejection of this view allows greater discretionary limitation on religious upbringing in the name of children's interests but gives little guidance as to the basis on which those interests are assessed.

### **Constitutional values and best interests in English law** [B heading; 12 bold]

The approach in *Young* means that inter-parental religious disputes about their children's upbringing are rarely *framed* as requiring resolution by explicit reference to Charter *rights*; albeit that this situations arises in large part because judicial inquiry is guided by and *resolved* according to implicit reference to Charter *values*. Similarly, the courts in England have generally maintained the view that the best interests test should be applied without direct consideration of the human rights of parents. That view was first expressed, shortly after the Human Rights Act 1998 came into force, by Thorpe LJ in *Payne v Payne*<sup>66</sup>:

[10 normal] [T]he advent of the Convention within our domestic law does not necessitate a revision of the fundamental approach [to relocation applications] formulated by this court and consistently applied over so many years. The reason that I hold this opinion is that, reduced to its fundamentals, the court's approach is and always has been to apply child welfare as the paramount consideration. The court's focus upon supporting the reasonable proposal of the primary carer is seen as no more than an important factor in the assessment of welfare...".

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<sup>65</sup> In the minority in *Young* but majority in *P(D)*.

<sup>66</sup> [2001] EWCA Civ 166; [2001] 1 FLR 1052 at [38]-[39].

The problems that remain can be demonstrated by considering two recent cases, both of which expose the difficulties that remain behind the best interests test.

The first case, *Re G (Children)*<sup>67</sup> concerned the future education of five children, boys and girls between the ages of three and 11, whose parents had separated following their mother's decision to leave the ultra-orthodox Jewish Chareidi community in which they had all been brought up. The children were to live with their mother but the question remained whether she would be permitted to enrol them in to co-educational Modern Orthodox schools to give them the educational opportunities and future career prospects that were not available in their current Chareidi schools.

Unlike the matter before the Canadian courts in *Young*, this dispute could not be resolved by recognising each parent's freedom to express their beliefs to their children as the question of education clearly required a choice to be made between the parents' propositions. Importantly, those propositions were deeply connected to the parents' respective religious beliefs meaning that it was impossible to fully separate the best interests test from their underlying conception of a valuable life. For the father it was a life based on the culture and practices that generations of the family had followed. It was a life centred on the community and family that the children had always known and the religious beliefs and practices that bound them together. For the mother it was a life where religion played an important role but did not restrict the freedom of educational and economic choice available to the children and their opportunity to forge a future of their own making.

Each of these ways of life are, the court considered, deserving of fundamental respect. To choose between them the court adopted the standpoint of the 'generally accepted standards' of the 'reasonable' parent in the society in modern society. If the hypothetical reasonable parent is the embodiment of the views of the majority, this raises the difficulty of whether minorities can be assessed on the values of the majority without improperly discriminating against those groups. Reliance on 'generally accepted standards' effectively created a bias against same-sex parenting in the 1980s and 90s, by allowing the court to view it as less conducive to the welfare of the child, solely because it deviated from the accepted norm of heterosexual parenting.<sup>68</sup>

The derivation and content of these 'generally acceptable standards' therefore requires careful scrutiny if they are not to impose the tyranny of majority opinion on a minority group. The Court of Appeal in this case stated the values of the hypothetical reasonable parent to be equality of opportunity, aspiration and bringing the child to the cusp of adulthood with the maximum opportunity to pursue their own vision of the good life. Once these values were applied it was clear that the children should move to the schools advocated by their mother. Laudable as many will think these values are, nowhere does the court explain their derivation despite the fact that their use creates a significant disadvantage for those religious minorities, and their individual members, whose value systems are based on ideas and practices which differ fundamentally from mainstream visions of life. In a system without clearly established fundamental constitutional rights that might reasonably form the basis of a normative framework of shared values, there is a risk that such reasoning is merely a veil for the subjective views of the court, however noble those views might appear to be to the majority.

The 'generally accepted standards' idea has obvious parallels with the contentious 'community standards' doctrine developed by the Canadian courts in the context of obscenity law. As Phillipson and Bettie have argued in this volume,<sup>69</sup> the doctrine is readily open to criticism as

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<sup>67</sup> *Re G (Children)* [2012] EWCA Civ 1233; [2012] 3 FCR 524.

<sup>68</sup> Reece (1996) 'The paramountcy principle: consensus or construct?' (1996) 49 *Current Legal Problems* 267.

<sup>69</sup> See pp ----- above.



providing a vehicle which in effect conceals majoritarian – or, more pejoratively, ‘normal’ or ‘mainstream’ – belief systems under a nominally pluralist cloak. The observation has particular resonance in Canada, where the test has been applied to First Nations children in a manner that has presented as neutral and universal but which has been analysed as incorporating racist assumptions and the means by which children have been disproportionately removed from their families and communities.<sup>70</sup>

The second English case which merits close consideration here, *J v B (Ultra-Orthodox Judaism: Transgender)*,<sup>71</sup> also concerned the Chareidi ultra-orthodox community. Like *Young*, it was concerned with the place of fundamental rights of parents in the assessment of best interests and the potential conflict between a ‘family law,’ and ‘parental rights’ approach. But unlike *Young* the case had an additional complexity arising from the issue of the equality rights of one of the parents. In *J v B* the children’s father<sup>72</sup> left the community in order to live as a transgender woman. Both parents agreed that the five children would remain living in the community with their mother, the question for the court was whether they would have direct contact with the trans parent. The mother was strongly opposed to such contact on the basis that it was very likely that the children would be ostracised by the community if contact were to take place.

At first instance, the court adopted a ‘family law’ approach based solely on the welfare principle and reluctantly decided that there should be no direct contact, primarily because the unanimous professional evidence supported this outcome on the basis that the children would experience significant hostility from the community that outweighed their strong interest in maintaining direct contact with their father.<sup>73</sup> The Court of Appeal overturned this judgment, requiring the best interests test to be applied through the lens of equality and human rights. The mechanism for doing so was again the ‘judicially reasonable parent’ who would adopt a broadminded and tolerant attitude consistent with ‘changing social values’. This, together with the court’s obligation to act consistently with the Human Rights Act 1998 and to refuse to take account of any action that would amount to unlawful discrimination, meant that the family court’s decision could not stand and the case was remitted back to the family court for redetermination.

The Court of Appeal’s approach in *J v B* is similar to that adopted by McLachlin and Sopinka JJ in *Young*, infusing the family law tests with the parental rights approach, in contrast to the pure family law approach that was evident in the decision of the family court. It may, however, be preferable for courts to address the rights involved directly rather than through the veil of welfare, not least because invoking rights directly provides a far more secure normative basis than attributing values to the hypothetical reasonable parent. Further, resolving disputes through the language of welfare, rather than explicitly assessing the human rights of all involved, obscures the central conflicts that can arise in such cases. In *J v B* the central problem was that treating the trans parent with equal respect risked very real detriment to the children’s security of upbringing and community. The essence of the decision for the court was how far it would allow itself to be complicit with the intolerant stance of the community in order to

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<sup>70</sup> Kline (1992) ‘Child welfare law, “best interests of the child” ideology, and First Nations’ (1992) 30 *Osgoode Hall LJ* 375.

<sup>71</sup> [2017] EWCA Civ 2164.

<sup>72</sup> Under domestic law a transgender parent retains the legal relationship of ‘mother’ or ‘father’ to their existing children, meaning that the trans parent is referred to as the ‘father’ throughout the judgments.

<sup>73</sup> [2017] EWFC 4.

shield the children's from the potentially devastating consequences of that intolerance. The case is another good example of the way in which these dilemmas are not confronted directly but through the use of judicially observed changing social values to constrain the application of the welfare principle.

## **V. Religious upbringing and education** [A heading; 14 bold]

It is perhaps in the area of education<sup>74</sup> that parental freedom to determine religious upbringing comes under particular pressure, as the private sphere of family life comes into contact with the public interest in training the next generation and instilling civic values of citizenship. Education is one of the primary means by which the community transmits its culture and values to the next generation, so shaping its own future as well as that of the pupils themselves. Both religious communities and wider society have a deep interest in children's education and it is unsurprising that education has been one of the key arenas in which pluralism and the limits of acceptable religious difference have been played out.

The courts in a many jurisdictions, including Canada, the UK and the other signatory States to the ECHR, have been faced with high-profile religious disputes in an education setting on questions such as pupil's clothing,<sup>75</sup> religious symbols and practices in schools<sup>76</sup> and the ability of religious schools to limit access by defining their own admissions policies.<sup>77</sup> Many of those issues have been explored in Hatzis' chapter in this book,<sup>78</sup> and they are not revisited here. In the space available here the focus will be on the conflict that touches most closely on the subject of this chapter: the extent to which parents have the right to object to education that conflicts with their religious and philosophical convictions. This issue has become particularly contentious as policies adopted to promote shared values and respect for diversity have come into conflict with truth claims advanced by parents and religious communities.

The foundational human rights treaties, to which both Canada and the UK are signatories, were drafted in the aftermath of the religious and racial persecution of the Nazi regime. In consequence they emphasise the need to avoid educational institutions being used by states to indoctrinate children in ways that undermine their allegiance to their families and their own culture and religion. In consequence, those treaties emphasise parental rights to choice in education<sup>79</sup> and require the state to 'have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.<sup>80</sup>

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<sup>74</sup> For a detailed analysis of Canadian law on this issue see Berger (2014) 'Religious diversity, education and the "crisis" in state neutrality' *Canadian Journal of Law and Society* 103.

<sup>75</sup> *Multani v Commission Scolaire Marguerite Bourgeoys*, [2006] 1 SCR 256 and *R (on the application of Begum) v. Head Teacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] AC 100. See further Hatzis above at pp ---- and the sources cited therein.

<sup>76</sup> *Zylberberg v Sudbury Board of Education* (1988), 65 OR (2d) 641 (CA) and *Lautsi v Italy* (2012) 54 EHRR 3.

<sup>77</sup> *R(E) v Governing Body of JFS* [2009] UKSC 15; [2012] 2 AC 728. See further McCrudden op cit fn xx supra.

<sup>78</sup> See especially pp --- and pp – above.

<sup>79</sup> Article 26(3) of the Universal Declaration of Human Rights.

<sup>80</sup> Article 18(4) International Covenant on Civil and Political Rights, see too Article 13(3) International Covenant on Economic and Social Rights.

As discussed above, both Canada and the Britain have a history of religious pluralism within educational provision but the focus on parental choice does not adequately respond to the interests of children. Whilst children may well benefit from an education that develops understanding of the background of their ‘cultural identity, language and values’<sup>81</sup> education is an important means by which children are equipped to question those parental values and to forge their own future. A focus on parental choice can also neglect the need to forge a cohesive society, particularly in the light of the increasing diversity within many states. States are therefore faced with a difficult balance between providing the conditions in which children can learn to respect others and question their own upbringing without imposing a state-sanctioned world view. Canadian history provides a particularly stark warning of the damage that can be wielded through the use of education as a means of trying to force assimilation through its use in undermining the culture, beliefs and language of indigenous people<sup>82</sup>

These issues have been raised sharply by the litigation surrounding Quebec’s introduction in 2008 of a Program on Ethics and Religious Culture (ERC), which seeks to give children a religious and ethical education from a neutral and objective perspective to prepare them for life in a pluralistic society.<sup>83</sup> The first challenge to the ERC came from Catholic parents at a state-run school<sup>84</sup> who objected to the mandatory nature of the course on the basis that to teach Catholicism alongside other religious viewpoints in this manner would be to introduce a form of relativism and interfere with the parents’ religious freedom to teach their beliefs as truth. In *SL v Commission scolaire des Chenes*, the Supreme Court unanimously rejected this challenge,<sup>85</sup> in part because the claim had been brought before the programme had been implemented meaning that the claim that it would interfere with the parents’ religious freedom were speculative in nature. The failure of the claim was not, however, merely due to its prematurity. The majority judgment gives a central place to the concept of state neutrality which, it found, had ‘developed alongside a growing sensitivity to the multicultural makeup of Canada and the protection of minorities.’<sup>86</sup> Although briefly acknowledging that absolute neutrality was impossible, the majority judgment was grounded in commitment to this vision of state neutrality as the means of mediating this multicultural reality. For the majority the parents’ claim, that introducing their children to a variety of religious facts was a breach of their religious freedom, was a rejection of this multicultural reality and a failure to understand the obligations on the Quebec government.<sup>87</sup> Any suggestion that the state was indoctrinating children, the fear that animated the international human rights guarantees for parental choice was, the majority found, mistaken.

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<sup>81</sup> Article 29(1)(c) United Nations Convention on the Rights of the Child.

<sup>82</sup> White and Peters op cit.

<sup>83</sup> <http://www.education.gouv.qc.ca/en/contenus-communs/parents-and-guardians/ethics-and-religious-culture-program/>. For the Quebec government’s explanation of the purposes underlying the initiative and the way in which it was brought to fruition see <http://www.education.gouv.qc.ca/en/contenus-communs/parents-and-guardians/ethics-and-religious-culture-program/background-for-the-erc-program/>. For an unofficial evaluation see Boisvert (2015) ‘Quebec’s ethics and religious culture school curriculum: a critical perspective’ *Journal of Inter-Cultural Studies* 380.

<sup>84</sup> All state schools in Quebec are now non-denominational.

<sup>85</sup> *SL v Commission Scolaire des Chenes* [2012] 1 SCR 235

<sup>86</sup> Ibid at [21] (Deschamps J.).

<sup>87</sup> Ibid at [40] per Deschamps J.

The ERC was once more before the Supreme Court in *Loyola High School v Quebec*,<sup>88</sup> this time at the instigation of a private Catholic school. The school had produced an ‘equivalent’ programme and applied for an exemption from teaching the ERC, as permitted by legislation. The Minister refused to grant an exemption, on the basis that Loyola sought to teach their programme from a religious perspective rather than the neutral means employed in the ERC. It was this decision, rather than the ERC itself, that was challenged in *Loyola*. This difference, together with the fact that Loyola was concerned with the collective religious identity formed by the school community and was a private institution rather than a state funded school meant that the ERC was approached in a very different way from SL and the Supreme Court unanimously found in Loyola’s favour.

The Supreme Court was united in accepting Loyola’s contention that to require the school to teach Catholicism from a neutral perspective was a violation of Loyola’s right to religious freedom. To tell a private Catholic institution how to teach Catholicism had a serious impact on religious freedom, including the right of parents to transmit their beliefs communally as well as in the home.<sup>89</sup> Loyola could not then be required to adapt a position of neutrality on its own founding purpose of teaching Catholicism, the Court was, however, split on the question of whether it could be required to teach other religious and ethical positions from a neutral perspective or whether it could do so from a Catholic perspective. For McLachlin CJC and Moldaver J, in the minority, such a requirement set an impossible standard and violated the religious freedom of teachers, parents and pupils. Whilst those teachers could be required to teach religious and ethical difference with respect and tolerance, they could not be required to teach all other perspectives as being equally credible and worthy of belief without undermining their own Catholic perspective and religious freedom. The majority rejected both the notion that it was not possible for a religious school to teach other viewpoints from an objective standpoint and the view that this interfered with their religious freedom. Again, the state’s commitment to neutrality could be understood through shared core values of equality, human rights and democracy meaning that the state had a legitimate interests in all citizens being able to conduct themselves with mutual respect in a plural society. The state must be neutral between religions but need not be neutral on the values it pursues. For this reason the Minister’s decision on the teaching of other religious and ethical viewpoints was upheld.

In England similar concerns have been raised as to the legitimacy of the process by which values have been used to limit religious expression, although the means by which these are imposed is very different to that in Canada. The European Court of Human Rights has interpreted the rights of parents to have their child educated in a manner that is ‘in conformity with their own religious and philosophical convictions’<sup>90</sup> so that it does not prevent the state from requiring the teaching of diverse religious and ethical beliefs, provided that they are taught in an ‘objective, critical and pluralistic manner’.<sup>91</sup> Regulation of education in England has tended to grant parents far more freedom to influence the religious content of their children’s education than that required by the ECHR. In particular, parents have the right to withdraw their children from both collective worship and religious education<sup>92</sup> and

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<sup>88</sup> [2015] 1 SCR 613.

<sup>89</sup> Ibid at [61]-[68].

<sup>90</sup> Article 2 of the First Protocol to the ECHR.

<sup>91</sup> *Kjeldsen, Busk and Pedersen v. Denmark* (1976) 1 EHRR 711. See also *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin).

<sup>92</sup> School Standards and Framework Act 1998, s. 71(1).

independent schools have been permitted to focus on preparing children for life within the religious community rather than wider society.<sup>93</sup> This settlement has, however, come under pressure from the imposition of British values discussed above. The change has primarily been driven by the integration of values derived from the government's anti-terrorism strategy into the inspection regimes for schools. Schools of all kinds are now under an obligation to 'actively promote' 'Fundamental British values'; namely 'democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs'.<sup>94</sup> Together these values have operated to restrict the ability of schools to seek to educate children in a manner that fails to prepare them for life in a plural society. Whilst there is clearly a legitimate public interest in requiring children to be properly prepared in this way, the way in which British values have entered schools, through the security agenda and the government's controversial anti-terrorism strategy, rather than through consideration of the educational rights and needs of children undermines confidence in their ability to act as collective, normative values.

## **Conclusion** [A heading; 14 bold]

Several of the contributors to this volume have concluded – and in quite forceful terms – that the solution adopted under Canadian law to particular moral and social issues is 'better' than its British equivalent, both in the substantive sense of the sophistication of the solution's content and in the procedural sense of the rigour of the decision-making process through which that content has been determined.<sup>95</sup> That conclusion would not seem appropriate in respect of the issues addressed in this chapter. Both jurisdictions display a degree of commonality of process and of outcome which betokens a carefully reasoned attempt to reconcile an often complex *mélange* of competing private and public interests.

The majority decision in *Loyola* might be thought to exemplify a judicial methodology which reaches for the notion of core, shared values as a means of mediating conflict between religious freedom and a plural society. But by way of conclusion, we might alight briefly on a legal problem which thus far has been presented only in the Canadian context.

As the most recent set of religious accommodation decisions in *Trinity Western*<sup>96</sup> demonstrate, the Supreme Court appears to be far from united in subscribing to the majority *Loyola* approach. While the dispute in this set of cases<sup>97</sup> falls outside the immediate remit of this

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<sup>93</sup> *R v Secretary of State for Education and Science, ex p Talmud Torah Machzikei Hadass School Trust* (1985) *Times*, 12 April.

<sup>94</sup> The Education (Independent School Standards) Regulations 2014, Schedule 1, reg 5(a). For maintained schools see Office for Standards in Education (Ofsted) (2018) *School Inspection Handbook* at paras 145 and 148. See too Independent Education Provision in England (Prohibition on Participation in Management) Regulations 2014/1977 para 2(5)(a) and Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014/2147 Reg 2(2)(b).

<sup>95</sup> Draghici's analysis of assisted dying is perhaps the most trenchant in this respect

<sup>96</sup> *Law Society of British Columbia v Trinity Western University* [2018] SCC 32 and *Trinity Western University and Law Society of Upper Canada* [2018] SCC 33.

<sup>97</sup> The cases concerned the question of whether the respective Law Societies could refuse accreditation to the proposed law school at an evangelical Christian university on the basis that its members were bound by a commitment to refrain from sexual conduct outside of different-sex marriage. The Supreme Court found that they could do so.

chapter, it provides an important reflection on the *Loyola* shared values debate. The majority, led by Abella J, who also gave the leading judgment in *Loyola*, affirm the legitimacy of decision makers reaching for these shared core values, not merely in interpreting Charter rights but in all decisions whether or not the Charter was directly engaged. The remaining four justices expressed serious concerns about this use of underdefined, judicially-imposed values<sup>98</sup> that operated as a ‘counterweight to constitutionalized and judicially defined *Charter* rights’<sup>99</sup> despite having no explicit basis within the Charter. Given the contested nature of concepts such as ‘equality’ the incantation of ‘Charter values’ risked operating as a rhetorical device that allowed judicial moral judgments to prevail over protected rights.<sup>100</sup> For the minority, the result was to limit diversity by restricting the action of private actors whose beliefs conflicted with these judicially imposed values. Speculating as to how a British court might argue and resolve such a problem should it ever arise presents us perhaps with a particularly useful vehicle in which to explore the potential and limitations of Canadian public law jurisprudence as a source of inspiration for our own legal system.

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<sup>98</sup> *Law Society of British Columbia v Trinity Western University* [2018] SCC 32 at [171]-[173] and [309]-[311].

<sup>99</sup> *Ibid* at [307].

<sup>100</sup> *Ibid* at [309].