

“PRIVATE” SCHOOLS, THEIR CHARITABLE STATUS AND THEIR PROPERTY RIGHTS: LEGAL BARRIERS TO ATTENUATION

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## I. Introduction

At its annual conference in September 2019, the UK Labour Party (then as now in opposition) voted in favour of making a manifesto commitment to “integrate all private schools into the state sector”.<sup>1</sup> The commitment was intended to “include”, but not be limited to, *inter alia*<sup>2</sup> the “[w]ithdrawal of charitable status and all other public subsidies and tax privileges, including business rate exemption” from such schools, and a commitment for private schools’ “[e]ndowments, investments and properties” to be “redistributed democratically and fairly across the country’s educational institutions”.

The suggested removal of charitable status from private schools harks back to “a Labour party manifesto promise during the Thatcher years”.<sup>3</sup> The party leadership, however, distanced itself from the more extreme elements of the conference proposal.<sup>4</sup> The manifesto ultimately published in advance of the 2019 general election (ostensibly rejected by a majority of voters) somewhat qualified and weakened the original language by promising to “close the

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<sup>1</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), available at [http://labour.org.uk/wp-content/uploads/2019/09/CAC-2-Final.pdf?fbclid=IwARIVfxg7wSLQWpt0CBXKa1ab2GjQu4TyejWxOmBEmToPhH4FM\\_bEjYI06uE](http://labour.org.uk/wp-content/uploads/2019/09/CAC-2-Final.pdf?fbclid=IwARIVfxg7wSLQWpt0CBXKa1ab2GjQu4TyejWxOmBEmToPhH4FM_bEjYI06uE), at p.22.

<sup>2</sup> The motion also sought to “[e]nsure [that] universities admit the same proportion of private school students as in the wider population (currently 7%)” (The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.22), a proposal that this paper will not discuss further.

<sup>3</sup> D. Morris, “Building a Big Society: Will Charity’s Creeping Reach Generate a New Paradigm for State Schools?” (2011) 33 *Journal of Social Welfare and Family Law* 209 at 217.

<sup>4</sup> H. Zeffman and R. Bennett, “John McDonnell cools on Labour purge of private schools”, *The Times*, 24 September 2019, available at <https://www.thetimes.co.uk/article/john-mcdonnell-cools-on-labour-purge-of-private-schools-58svvwxv>.

tax loopholes enjoyed by elite private schools and use that money to improve the lives of all children”, and to “ask the Social Justice Commission<sup>[5]</sup> to advise on integrating private schools and creating a comprehensive education system”,<sup>6</sup> even if there was a specific commitment to charge value-added tax (VAT) on private school fees.<sup>7</sup> It is nevertheless clear that the original motion stemmed from the membership’s concerns that the privileges associated with attending “private” schools meant that such schools “reflect and reinforce class inequality in wider society”.<sup>8</sup> It claimed that those who had attended “private” school were significantly over-represented in high-profile professions,<sup>9</sup> that such school pupils have 300% more spent on their education than those in “state” schools,<sup>10</sup> that “[p]articipation in private schooling is concentrated at the very top of the family income distribution”,<sup>11</sup> and that 63% of the public agreed that “it is unfair that some people get a better education and life chances for their children by paying for a private school”.<sup>12</sup> A majority of conference delegates thus sought to “challenge the elite privilege of private schools”.<sup>13</sup> The “on-going existence of private schools” was said to be “incompatible with Labour’s pledge to promote social justice, not social

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<sup>5</sup> The Labour Party, “It’s Time for Real Change: The Labour Party Manifesto 2019” (2019), at p.64 pledged to “replace the Social Mobility Commission with a Social Justice Commission, based in the Treasury, with wide-ranging powers to hold us, and future governments, to account”.

<sup>6</sup> The Labour Party, “It’s Time for Real Change: The Labour Party Manifesto 2019” (2019), at p.40.

<sup>7</sup> The Labour Party, “Funding Real Change” (2019), at p.39.

<sup>8</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.22.

<sup>9</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019”, at p.22, apparently citing Sutton Trust and Social Mobility Commission, “Elitist Britain 2019: The educational backgrounds of Britain’s leading people” (2019).

<sup>10</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.22, giving no source but borne out by J. Staufenberg, “Private schools spend three times more on each pupil”, *Schools Week*, 14 October 2016, available at <https://schoolsweek.co.uk/private-schools-spend-three-times-more-on-each-pupil/>.

<sup>11</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.22, giving no source but borne out by F. Green et al, “Who Chooses Private Schooling in Britain and Why?” (LLAKES Research Paper 62, UCL Institute of Education, 2017).

<sup>12</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.22, citing a Populus poll.

<sup>13</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.22.

mobility[,] in education”, and the movement’s opposition to “hierarchy, elitism and selection in education”.<sup>14</sup>

Rather than focus on the more political questions associated with the existence and effect of “private” schools,<sup>15</sup> this paper investigates the legal difficulties associated with implementing the Labour motion (which, as will become clear, is ambiguous in itself). The paper begins by outlining the current status of “private” schools within English charity and other law,<sup>16</sup> including by considering the very definition of a so-called “private” school. It then considers what the effect would be of *inter alia* removing charitable status from those schools, including how a redistribution of their property would compare with the current cy-près mechanism of redistributing the property of charitable purposes that have “failed”. Finally, it considers the potentially significant implications of the proposal for rights protected under the European Convention on Human Rights. Such rights include the right of peaceful enjoyment of possessions for natural or legal persons (in Article 1 of the First Protocol), as well as respect for the rights of parents to ensure education for their children “in conformity with their own religious and philosophical convictions” (in Article 2 of the First Protocol).

Some of the questions asked in this paper, and their possible answers, were considered by Joseph Jaconelli in a relatively short article around a quarter of a century ago,<sup>17</sup> itself critiquing a joint legal opinion on the attenuation of independent schools’ status written by Lord Lester and Lord Pannick.<sup>18</sup> It is hoped that this paper can nevertheless advance the literature by analysing the impact of significant developments in the law of charities since 1996 (not least the Charities Act 2006 and the consolidating Charities Act 2011),<sup>19</sup> the effect of withdrawal of fiscal privileges short of deprivation of charitable status, the particular proposal

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<sup>14</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.22.

<sup>15</sup> See, generally, P. Ford, “Independent Schools in Scotland: Should they be Charities?” in J. Picton and J. Sigafos (eds.), *Debates in Charity Law* (Oxford: Hart Publishing, 2020). The issue is a perennial matter of public debate in the UK: see, e.g., A. Bennett, “Fair Play”, *London Review of Books*, Vol. 36 No. 12, 19 June 2014, available at <https://www.lrb.co.uk/v36/n12/alan-bennett/fair-play>.

<sup>16</sup> This paper will focus on the law in England and Wales rather than in Scotland or Northern Ireland, though on occasion reference will be made to the UK as a whole.

<sup>17</sup> J. Jaconelli, “Independent schools, purpose trusts, and human rights” [1996] *Conveyancer and Property Lawyer* 24.

<sup>18</sup> A. Lester and D. Pannick, “Independent Schools: The Legal Case” (Independent Schools Information Service, 1991).

<sup>19</sup> Cf. M. Syngé, *The “New” Public Benefit Requirement* (Oxford: Hart Publishing, 2015).

to redistribute the relevant schools' property "across the country's educational institutions", the implications of Article 1, and the consequences of Article 2 in detail. It will also become clear that I depart from Jaconelli on some significant issues. This paper highlights that there are considerable potential pitfalls associated with implementing the Labour motion, particularly if the UK were to remain a party to the European Convention, but that the requirements of the Convention are not as clear cut as they may first appear.

## **II. The Current Status of "Private" Schools in English Law**

### *(1) What is a "Private" School?*

An important prior question is of course the very definition of a "private" school in the English context. While it is used in the Labour motion, has much popular resonance,<sup>20</sup> and has been employed by the judiciary,<sup>21</sup> the phrase "private school" does not apparently appear in any UK statute.<sup>22</sup> The Oxford *Dictionary of English* defines a "private school" as "an independent school supported wholly by the payment of fees".<sup>23</sup> While Labour's very point is that such schools are in fact indirectly supported by the state, "private" and "independent" schools are often regarded as synonymous,<sup>24</sup> and the latter do at least have a statutory definition. Under the Education Act 1996,<sup>25</sup> an independent school is defined as "any school at which full-time education is provided for" "five or more pupils of compulsory school age",<sup>26</sup> or "at least one

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<sup>20</sup> See, e.g., *The Guardian* Online Letters, "Abolishing private schools will make society fairer", 29 September 2019, available at <https://www.theguardian.com/education/2019/sep/29/abolishing-private-schools-will-make-society-fairer>.

<sup>21</sup> See, e.g., *R. (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) at [29]; [2012] Ch. 214, *NG v GA* [2019] EWHC 1412 (Fam); [2019] 2 F.L.R. 1223 at [31] per MacDonald J.

<sup>22</sup> Cf., e.g., 20 US Code 2393.

<sup>23</sup> A. Stevenson (ed.), *Oxford Dictionary of English*, 3rd edn (Oxford: Oxford University Press, 2010), at p.1413, entry \_\_\_\_\_ available \_\_\_\_\_ at [https://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m\\_en\\_gb0663090?rsk=3HvpGU](https://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0663090?rsk=3HvpGU).

<sup>24</sup> See, e.g., Gov.uk, "Types of School", available at <https://www.gov.uk/types-of-school/private-schools>.

<sup>25</sup> Education Act 1996, s.463, with some lack of clarity in the drafting.

<sup>26</sup> Essentially 5-16 years: Education Act 1996, s.8.

pupil of that age” with particular needs,<sup>27</sup> and “which is not a school maintained by a local authority” or a “non-maintained special school”. There are apparently around 2,500 such schools in the UK, educating around 6.5% of the total number of schoolchildren.<sup>28</sup> They include junior and senior, day and boarding schools.

It can perhaps be safely assumed that, by using the term “private” schools, Labour are in general referring to “independent” schools as legally understood. The definition of a “private” school is not merely of academic interest or merely necessary to delimit the scope of this paper. As we will see, it would likely be necessary to change the law of charities by legislation to implement Labour’s proposal, and as Jaconelli recognises it would thus be “critical” to define precisely what form of educational purpose is no longer to be considered charitable, while presumably leaving others within the category.<sup>29</sup>

## *(2) Charitable “Private” Schools: Their Status and the Benefits Accruing to Them*

Having been essentially judicially defined for centuries, valid charities in England and Wales<sup>30</sup> must now fall within the statutory definition introduced by the Charities Act 2006 and consolidated in the Charities Act 2011.<sup>31</sup> A “charity” is “an institution which” “is established for charitable purposes only”, and “falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities”.<sup>32</sup> There is a two-fold test to establish that a purpose is charitable. First, the purpose must fall within a recognised list of purposes,<sup>33</sup> and “the advancement of education” is one of those.<sup>34</sup> Secondly, however, the recognised charitable purpose must also be “for the public benefit”,<sup>35</sup> and “it is not to be presumed that a purpose of

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<sup>27</sup> Specifically a pupil for whom an education, health and care plan or a statement of special educational needs is maintained, or who is “looked after” (i.e. cared for with or without parental approval) by a local authority.

<sup>28</sup> Independent Schools Council, “Research”, available at <https://www.isc.co.uk/research/>.

<sup>29</sup> J. Jaconelli, “Independent schools, purpose trusts, and human rights” [1996] *Conveyancer and Property Lawyer* 24 at 33.

<sup>30</sup> Charity law differs in Scotland: C. Fairburn, “Charitable status and independent schools” (House of Commons Briefing Paper No. 05222, 2019), section 6.

<sup>31</sup> A review of the 2006 Act was published in 2012: R. Hodgson, “Trusted and Independent: Giving charity back to charities – Review of the Charities Act 2006” (London: Crown, 2012).

<sup>32</sup> Charities Act 2011, s.1(1).

<sup>33</sup> Charities Act 2011, s.2(1)(a).

<sup>34</sup> Charities Act 2011, s.3(1)(b).

<sup>35</sup> Charities Act 2011, s.2(1)(b).

a particular description is for the public benefit”.<sup>36</sup> On some interpretations, this represented a change to the previous position founded on case law, since there were indications that public benefit requirement *was* presumed in relation to charities for the relief of poverty, for the advancement of education and for the advancement of religion.<sup>37</sup> It is the “public benefit” requirement that is the more contentious aspect of charitable status, and goes to the heart of the motivation behind Labour’s proposal. Of the 1,364 schools represented by the umbrella organisation the Independent Schools Council in 2019, 74% held charitable status and the rest did not (presumably because they could not, or did not attempt to, demonstrate compliance with the public benefit requirement).<sup>38</sup> While any profits made by a charity must be reinvested in furthering its charitable purposes rather than being distributed to private individuals,<sup>39</sup> it has been claimed that there were over 900 for-profit schools operating in England in 2016.<sup>40</sup>

The principles surrounding the public benefit requirement as they apply to would-be charitable “private” schools were relatively recently considered in detail in *R. (Independent Schools Council) v Charity Commission for England and Wales*.<sup>41</sup> The Council asked the Tax and Chancery Chamber of the Upper Tribunal to quash parts of the Commission's guidance on the public benefit requirement.<sup>42</sup> That guidance, *inter alia*, provided that a valid public benefit must not be unreasonably restricted by ability to pay fees and that those in poverty must not be excluded from the opportunity to benefit from a charity’s purpose. The Council regarded the

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<sup>36</sup> Charities Act 2011, s.4(2).

<sup>37</sup> See, e.g., *Funnell v Stewart* [1996] 1 W.L.R. 288 at 295; [1996] 1 All E.R. 715 at 721 per Deputy Judge Hazel Williamson Q.C.

<sup>38</sup> Independent Schools Council, “ISC Census and Annual Report 2019” (London: Independent Schools Council, 2019) p.7. See R.J. Wilde et al, “Private Schools and the Provision of ‘Public Benefit’” (2016) 45 *Journal of Social Policy* 305 on schools’ current attempts to meet the requirement.

<sup>39</sup> *Re Resch’s Will Trusts* [1969] 1 A.C. 514; [1967] 3 All E.R. 915. Cf. J. Martin and L. Dunlop, “For-profit schools in England: the state of a nation” (2019) 34 *Journal of Education Policy* 726 on the “grey area” in this regard.

<sup>40</sup> J. Martin and L. Dunlop, “For-profit schools in England: the state of a nation” (2019) 34 *Journal of Education Policy* 726 at 729.

<sup>41</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214, noted by B. Sloan, “Public Schools for Public Benefit?” [2012] C.L.J. 45.

<sup>42</sup> Charity Commission, “Charities and Public Benefit: The Charity Commission's General Guidance on Public Benefit”; Public Benefit and Fee-Charging”; “The Advancement of Education for the Public Benefit” (all 2008 but superseded in light of the judgment). See now, e.g., Charity Commission, “Analysis of the law relating to public benefit” (2017).

guidance as erroneous and over-prescriptive, usurping trustees' discretion, and expressed concern at its uncertainty.<sup>43</sup>

Many of the propositions discernible from the Tribunal's lengthy judgment are potentially contestable, and political debates on the appropriate understanding of the concept of public benefit have continued since the decision.<sup>44</sup> It identified two aspects of "public benefit". The first aspect dictates that the nature of the charitable purpose itself must be beneficial to the community; the second requires that those who benefit from the purpose must be sufficiently numerous to constitute "a section of the public".<sup>45</sup> The case was said to be concerned the second aspect, in relation to which "[t]here was, under the pre-[2006] law, no presumption at all".<sup>46</sup> The Tribunal was at least highly sceptical, however, about whether there was truly a "presumption" in the usual sense of the word in relation to the first aspect either before the law was reformed in 2006. In any event, the Tribunal decided that section 3(2) of the 2006 Act (as it then was) addressed the first aspect only and was therefore irrelevant to the particular questions in the *ISC* case.

One of the interveners in the *ISC* case, the Education Review Group, prompted the Tribunal to consider some of the very issues later influencing Labour's 2019 proposal, essentially that "private schools have significant 'disbenefits' to society in terms, for instance, of removing able pupils from state schools and presenting barriers to social mobility".<sup>47</sup> The Tribunal held that neither a court nor the Commission could decide the political question of whether the public benefit in the first sense provided by independent schools was outweighed by the "disbenefits" arising from the charging of fees and the impact of independent schools on the public as a whole. It would be difficult, on the Tribunal's analysis, to demonstrate that an otherwise charitable purpose was rendered non-charitable because of its wider consequences for society.

The pertinent question, which the Tribunal saw as unaffected by the 2006 Act or any directly binding authority, was whether those able to pay school fees factually constituted a sufficient section of the public. The Tribunal distinguished between the purposes and the activities of a school. It decided "as a matter of principle" that a trust whose purposes exclude

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<sup>43</sup> The Attorney-General referred several questions to the Tribunal in the same hearing, and there were two interveners.

<sup>44</sup> C. Fairburn, "Charitable status and independent schools" (2019).

<sup>45</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [44].

<sup>46</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [83].

<sup>47</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [29].

the poor cannot be charitable.<sup>48</sup> This means that a school with the sole purpose of educating children whose families could afford to pay (substantial) fees representing the cost is not charitable. Conversely, a new school “which, as a matter of its constitution, can admit students whatever their ability to pay, but as a matter of fact (whether because of a policy of accepting only fee paying students or because of some financial imperative) does not do so”<sup>49</sup> would “generally speaking” be exclusively charitable.<sup>50</sup>

When considering whether the activities of an existing charitable school are consistent with the public benefit requirement, the focus would be primarily on the direct benefits, such as scholarships, provided to students. While the sharing of broadly educational facilities with state schools could contribute to the satisfaction of the public benefit requirement, the Tribunal doubted that making such facilities available to the community as a whole would be sufficiently direct to do so unless that somehow implemented an educational object. The Tribunal was also somewhat sceptical about the argument that independent schools provide a benefit by removing students from the state sector, albeit purporting to adopt an approach consistent with *Re Resch’s Will Trusts*, where the equivalent argument was taken into account in the context of a fee-paying hospital.<sup>51</sup>

In evaluating whether a school was doing enough to comply with its public benefit-related duties, the Tribunal held that the correct approach was to examine what a trustee would do in the circumstances of the particular school in question, and ask what should be done above a necessary *de minimis* or more-than-token threshold for the poor, although it did not obviously settle on a definitive meaning of “poor”. The Tribunal deliberately tried (but ultimately failed) to avoid the word “reasonable” in describing the relevant standard, robbing it of much content. Fundamentally it was for the “trustees of the school concerned to address and assess how their obligations might best be fulfilled in the context of their own particular circumstances”.<sup>52</sup> Trustees could properly exclude vast numbers of potential beneficiaries, provided they did so in a manner that was “rational and justifiable in the promotion of the public interest” and without acting capriciously.<sup>53</sup> The Tribunal also emphasised the need to ensure that facilities were at least ancillary to the advancement of education.

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<sup>48</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214, at [178].

<sup>49</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214, at [187].

<sup>50</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214, at [189].

<sup>51</sup> *Re Resch’s Will Trusts* [1969] 1 A.C. 514.

<sup>52</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214, at [217].

<sup>53</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [218].

Turning to the guidance itself, the Tribunal reluctantly concluded that the Commission had sought to impose the very “reasonableness” standard that the Tribunal had rejected. *Inter alia*, the guidance confused aims with activities, wrongly implied that there was a necessary obligation to give the poor the opportunity to benefit other than by going beyond the *de minimis* threshold and was sometimes obscure. The Tribunal therefore held that several passages of the guidance required correction (ultimately permitting an undertaking from the Commission to amend it), although the Tribunal was unable to provide the clarity requested by the Council's second submission.

The conclusion thus appears to empower trustees at the expense of the Charity Commission, but the level of uncertainty is considerable. It is telling that the Tribunal was subsequently forced to revisit the necessary alterations to the guidance.<sup>54</sup> Some of the principles enunciated by the Tribunal are questionable. For example, it was widely accepted prior to the 2006 Act that there *was* a presumption of public benefit of some sort in relation to educational charities *inter alia*.<sup>55</sup> But it seems unlikely that the judiciary alone, in the absence of specific legislation, would reverse the conclusion the activities of a “private” school are inherently charitable by their nature (subject to their availability to a sufficient section of the population and features such as non-profit-making status). As the Tribunal emphasised in the *ISC* case, “great weight is to be given to a purpose which would, ordinarily, be charitable; before the alleged disadvantages can be given much weight, they need to be clearly demonstrated”, such that there is “a considerable burden on those seeking to change the status quo”.<sup>56</sup> Moreover, in the particular context of charitable independent schools, the issues raised by the Education Review Group (largely the same as those raised by the Labour Party in 2019) were said to be “not really capable of judicial, rather than political, resolution”.<sup>57</sup> Whatever the difficulties with the Tribunal’s judgment, it does demonstrate the extent to which the charitable status of many independent schools in England and Wales is currently well established in the law. This inevitably has consequences for any proposed removal of that status, as desired by the Labour motion. The effect of rendering the provision of “private” education “non-charitable” by such legislation is considered in the next part of this paper.

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<sup>54</sup> *R. (Independent Schools Council) v Charity Commission* [2011] 12 WLUK 67.

<sup>55</sup> See, e.g., Explanatory Notes to the Charities Act 2006 at [25].

<sup>56</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [106].

<sup>57</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [109].

The benefits of charitable status, moreover, are considerable. In its evidence to the parliamentary Joint Committee on the Draft Charities Bill, the ISC estimated the value of the fiscal advantages of charitable status to its members to be some £88 million,<sup>58</sup> which “included the value of rates relief, exemption from tax on investment income, tax relief on gift aid for donors and relief from corporation tax”.<sup>59</sup> The relief on business rates was a specific target of the Labour conference motion, and the level of exemption varies according to the precise manner in which a building is used but can be total.<sup>60</sup> There is also tax relief on stamp duty.<sup>61</sup> But it is noteworthy that “[c]haritable schools [per se] do not obtain a VAT advantage, since education is an exempt supply”.<sup>62</sup> Legally speaking, charitable trusts do not have to satisfy the beneficiary principle (traditionally holding that a non-charitable trust must be able to identify the legal persons who can enforce it and cannot be an abstract purpose trust),<sup>63</sup> and they are exempt from the rules against perpetual trusts.<sup>64</sup> Conversely, regulation (most of which is performed in practice by the Charity Commission) is one of the disadvantages of charitable status.<sup>65</sup> Despite these considerable advantages, it is worth noting that, in 2017, the Conservative Government said that:

“No estimates of the sum likely to accrue to the public purse from changing the charitable tax status of independent schools have been made. Also, no estimate of ending the charitable status of independent schools have been made. Data held on charitable tax relief costs cannot be broken down into specific sectors.”<sup>66</sup>

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<sup>58</sup> Joint Committee on the Draft Charities Bill, “Evidence From The Independent Schools Council” (2004), available at <https://publications.parliament.uk/pa/jt200304/jtselect/jtchar/660/660we83.htm> at [11].

<sup>59</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [34].

<sup>60</sup> Gov.uk, “Business rates relief: Charitable rate relief”, available at <https://www.gov.uk/apply-for-business-rate-relief/charitable-rate-relief>.

<sup>61</sup> National Council for Voluntary Organisations, “Pros and Cons of Becoming a Charity” (2017), available at [https://knowhow.ncvo.org.uk/setting-up/setting-up-a-charity/charitable-status/pros\\_and\\_cons\\_of\\_becoming\\_a\\_charity](https://knowhow.ncvo.org.uk/setting-up/setting-up-a-charity/charitable-status/pros_and_cons_of_becoming_a_charity).

<sup>62</sup> *R. (Independent Schools Council) v Charity Commission* [2012] Ch. 214 at [34].

<sup>63</sup> See, e.g., *Morice v Bishop of Durham* (1805) 10 Vesey Junior 522; 32 E.R. 947.

<sup>64</sup> Perpetuities and Accumulations Act 2009.

<sup>65</sup> National Council for Voluntary Organisations, “Pros and Cons of Becoming a Charity” (2017).

<sup>66</sup> UK Parliament, “Private Education: Taxation: Written question – 1926”, available at <https://www.parliament.uk/written-questions-answers-statements/written-question/commons/2017-06-29/1926>.

In any case, it would in principle be possible to remove some of the benefits of charitable status from currently charitable independent schools without taking away their fundamental status as charities, and this is currently planned in relation to non-domestic rates in Scotland.<sup>67</sup> One way through which a “redistribution” of assets might be prompted would be through increased tax revenues collected from charitable private schools. Even non-charitable schools providing the currently VAT-exempt service of education could be subject to such a “redistribution” if (for example) that exemption were to be removed, albeit that the tax would essentially be passed to those paying fees. There is a precedent in the variation of the specific rules applied to charities, as illustrated by the fact that ecclesiastical corporations and certain related bodies are not considered “charities” for certain purposes under the 2011 Act.<sup>68</sup>

The removal of all (or almost all) benefits for currently charitable “private” schools for all (or almost all) purposes would, however, surely lead to allegations that they are effectively being deprived of their status, unless all charities were to be subject to the same deprivations. At that point, as Jaconelli recognised, “there would be little (if any) point in demarcating charity as an independent heading”.<sup>69</sup> In some circumstances, even changes to the tax regime falling some way short of the removal of charitable status could raise issues under the European Convention on Human Rights, as discussed in the last substantive section of this paper.

The following section, however, discusses the removal of charitable status and the redistribution of their property as a matter of “purely” domestic English Law.

### **III. The Removal of Charitable Status and the Redistribution of Property in Domestic Law**

The next important question to be addressed by this paper is what the Labour proposal means by “integration” of “private” schools into the state sector. At least the removal of charitable status and the redistribution of assets are clearly contemplated, but does this mean that the provision of education by “independent” schools is to be made *unlawful*? Even if “private” schools’ activities themselves are to remain permissible, it is difficult to see how independent

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<sup>67</sup> K. Barclay, “Report of the Barclay Review of Non-Domestic Rates” (Scottish Government, 2017); Non-Domestic Rates (Scotland) Act 2020.

<sup>68</sup> Charities Act 2011, s.10.

<sup>69</sup> J. Jaconelli, “Independent schools, purpose trusts, and human rights” [1996] Conveyancer and Property Lawyer 24 at 26.

schools could realistically operate without their assets, such that the effect of confiscation and redistribution would in substance render private education unlawful, although a “fair” and “democratic” redistribution might arguably stop short of stripping “private” schools of *all* their assets. Would the name (with its key connection to reputation) of a school count as a relevant “asset” to be redistributed, in addition to the more obvious land, endowment or income? Are “private” schools essentially to be *made* state schools by being nationalised? The answers to these questions are not rendered remotely clear by the Labour motion. This paper therefore begins the analysis by considering the scope for, and implications of, the removal of charitable status *per se*. As will be seen in the next sub-section, this could give way naturally to redistribution of assets through the *cy-près* system as currently understood, albeit that the system may need to be modified in order to accomplish Labour’s objective.

The notion that a particular sort of activity that was once charitable can cease to be so has some precedent in English Law.<sup>70</sup> For example, in *National Anti-Vivisection Society v Inland Revenue Commissioners*,<sup>71</sup> the House of Lords decided that the Society was not charitable, *inter alia*, because the benefits of vivisection outweighed the detriment. This was despite an earlier decision in *Re Fouveaux*<sup>72</sup> that organisations that were either “the predecessors” of the Society or “substantially identical for all relevant purposes”<sup>73</sup> were indeed charitable. While Synge supportably argues that this change was because of an error of law by failing to weigh benefit and detriment to the community in *Re Foveaux* in the first place,<sup>74</sup> that does not change the basic fact that the decision demonstrates that it is possible in principle for a purpose once regarded as charitable to cease to be so.

Interestingly, it is not only the Labour Party that has in recent years threatened “private” schools (or at least some of them) with a withdrawal of charitable status. In 2016, the Conservative Government consulted on proposals to require independent schools to provide further benefit to pupils in the state sector, such as by setting up or sponsoring a new school or offering funded places.<sup>75</sup> The Government proposed to “set new benchmarks that independent schools are expected to meet” in that regard, “in line with their size and capacity”, and said that

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<sup>70</sup> See also, e.g., *The City of London Rifle and Pistol Club, The Burnley Rifle Club* (1993) 1 Decisions of the Charity Commissioners 4.

<sup>71</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] A.C. 31; [1947] 2 All E.R. 217.

<sup>72</sup> *Re Fouveaux* [1895] 2 Ch. 501.

<sup>73</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] A.C. 31 at 42 per Lord Wright.

<sup>74</sup> M. Synge, *The “New” Public Benefit Requirement* (2015), at p.49.

<sup>75</sup> Department for Education, “Schools that work for everyone: Government consultation” (Crown, 2016).

the Government would “consider legislation to ensure that those independent schools that do not observe these new benchmarks cannot enjoy the benefits associated with charitable status”.<sup>76</sup> A consultation response was published in May 2018, but the response document does not appear to mention charitable status at all.<sup>77</sup>

In light of the appetite in several quarters for removal of the charitable status of at least some schools, the next sub-section of this paper considers how a redistribution of “private” schools’ assets might compare with, or even be accommodated within, the existing system for redistributing the property of charities whose purposes have “failed”.

*(1) A Comparison with Cy-près*

For much of the history of charity law, the jurisdiction has existed to redistribute the property of a charity whose charitable purpose has “failed”. This is known as cy-près, with its origins in a Law-French term meaning “as near as possible”, and the notion of “failure” has expanded over time.<sup>78</sup> In the context of this paper, the relevant question is how, if at all, the doctrine might apply to an organisation, specifically a school, whose purposes are fairly clearly charitable under the present law but would cease to be any longer, or how else such an organisation’s property might be redistributed.

The current cy-près rules can come into operation for a variety of reasons, now governed by section 62 of the 2011 Act, the most relevant being where a purpose has “ceased, as being useless or harmful to the community or for other reasons, to be in law charitable”.<sup>79</sup> Questionably, however, Jaconelli alternatively asserts that “[o]n the termination of charitable status, the beneficial interest in the schools’ property would vest by way of resulting trust in a multitude of persons and bodies” who provided the property (however difficult they might be

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<sup>76</sup> Department for Education, “Schools that work for everyone: Government consultation” (2016), at [14].

<sup>77</sup> Department for Education, “Schools that work for everyone: Government consultation response” (Crown, 2018). See also Written Parliamentary Question for Department of Education UIN 282372, tabled on 25 July 2019.

<sup>78</sup> See, generally, R.P. Mulheron, *The Modern Cy-près Doctrine: Applications & Implications* (London: Routledge, 2016).

<sup>79</sup> Charities Act 2011, s.62(e)(ii).

to identify),<sup>80</sup> perhaps by virtue of being potentially void non-charitable purpose trusts.<sup>81</sup> He notes, however, that such void trusts might be saved by the operation of the principle in *Re Denley's Trust Deed* whereby particular human legal persons *are* identified as beneficiaries notwithstanding the fact that a trust's objects are specified as purposes.<sup>82</sup> Jaconelli assumes that "pupils, parents and teachers, governors" would be the human beneficiaries able to enforce the trust if a *Re Denley* analysis were to be employed in this context,<sup>83</sup> though it is surely arguable that at least governors are more appropriately regarded as trustees per se. He also accepts that a previously charitable school could take a different form to avoid the rules on private purpose trusts.<sup>84</sup> Perhaps oddly, it is only after this assertion that he goes on to consider cy-près, seemingly because in his view there was nothing in the precursor to section 62 of the Charities Act 2011 to prevent the application of the default purpose trust rule, and also that a private educational institution is not "useless or harmful to the community".<sup>85</sup> Synge is surely correct to argue that it is only where a trust was *never* charitable that general principles of trust law should apply, and that the correct approach where a charity *becomes* non-charitable is for the trustees to apply for a cy-près scheme.<sup>86</sup> Consistently, *Tudor on Charities* opines that:

"If a particular charitable purpose is declared by statute to be no longer charitable, any property held for that purpose will be applicable cy-près under s.[62](1)(e)(ii), covering circumstances where the purpose "ceased, as being useless or harmful to the community or for other reasons, to be in law charitable"...Similarly, where a purpose becomes no longer charitable because of a change in social circumstances...property held for that purpose will be applicable cy-près."<sup>87</sup>

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<sup>80</sup> J. Jaconelli, "Independent schools, purpose trusts, and human rights" [1996] Conveyancer and Property Lawyer 24 at 28.

<sup>81</sup> J. Jaconelli, "Independent schools, purpose trusts, and human rights" [1996] Conveyancer and Property Lawyer 24 at 29.

<sup>82</sup> [1969] 1 Ch. 373; [1968] 3 All E.R. 65.

<sup>83</sup> J. Jaconelli, "Independent schools, purpose trusts, and human rights" [1996] Conveyancer and Property Lawyer 24 at 29.

<sup>84</sup> J. Jaconelli, "Independent schools, purpose trusts, and human rights" [1996] Conveyancer and Property Lawyer 24 at 30.

<sup>85</sup> J. Jaconelli, "Independent schools, purpose trusts, and human rights" [1996] Conveyancer and Property Lawyer 24 at 31, citing Charities Act 1993, s.13(1)(e)(ii).

<sup>86</sup> M. Synge, *The "New" Public Benefit Requirement* (2015), at p.54.

<sup>87</sup> W. Henderson and J. Fowles, *Tudor on Charities*, 10th edn (London: Sweet & Maxwell, 2015), at [10-065].

In cy-près terms, if the rules are indeed applicable, property already held by a charitable school would be subject to the rules on so-called “subsequent failure”, and thus not generally (subject to express provision in the gift’s terms) be returnable to those who provided it.<sup>88</sup> It would be particularly controversial for schools to lose their privileges and for their donors to lose control of their assets in this manner. Matters would be different, however, in the case of a gift to a charitable school that has essentially ceased to exist by the time the gift is able to come into effect. An example would be where a former pupil makes a gift in a will to a school, and neglects to update it after Labour implement their policy. Depending on the particular mechanism chosen to implement the policy, the people otherwise entitled to the would-be donor’s estate may be able to argue that they are entitled to the gift because the intended donee no longer exists, the gift is thus the subject of a so-called “initial failure” and the donor lacked the “general charitable intent” usually<sup>89</sup> required for the property to be applied cy-près because of a specific motivation to give the property to the particular school that the donor attended.<sup>90</sup>

Charities currently take many forms, including companies; charitable incorporated organisations; charities incorporated by Act of Parliament, by Royal Charter, by grant of letters patent, by persons acting under Royal licence, by prescription, by a lost Charter being presumed, or by custom; community benefit societies; unincorporated associations; or trusts (only the last two of which are unincorporated).<sup>91</sup> But in cases of “subsequent” failure, the particular form of the charity may not have a particularly significant impact on the application of its property. That said, there are specific rules relating to the application of cy-près in the case of charities “governed by charter, or by or under statute”.<sup>92</sup> Synge has also argued that the cy-près doctrine’s “application in the context of companies is debateable” for reasons including the fact that a company is the beneficial owner of its assets, even if she concedes that the differential treatment of charities based on their structure is “a situation which would be

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<sup>88</sup> *Re Wright* [1954] Ch. 347; [1954] 2 All E.R. 98.

<sup>89</sup> Cf. Charities Act 2011, s.63, which broadly allows property to be applied cy-près even when there is no general charitable intent if the donor cannot be identified or found or has disclaimed his rights to have the property returned.

<sup>90</sup> See, e.g., *Re Rymer* [1895] 1 Ch. 19; [1891-94] All E.R. Rep. 328.

<sup>91</sup> Law Commission, *Technical Issues in Charity Law A Consultation Paper* (Consultation Paper 220, 2015), at [1.13ff].

<sup>92</sup> Charities Act 2011, s.68.

unlikely to find judicial favour”.<sup>93</sup> In *Liverpool and District Hospital for Diseases of the Heart v Attorney-General*, Slade J held that:

“...the so-called rule that the court's jurisdiction to intervene in the affairs of a charity depends on the existence of a trust, means no more than this: the court has no jurisdiction to intervene unless there has been placed on the holder of the assets in question a legally binding restriction, arising either by way of trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes.”<sup>94</sup>

Moreover, the fact that *Re Finger's Will Trusts* (for example) applied a gift to a corporate body cy-près in a case of initial failure may suggest that cy-près would otherwise be generally applicable to such bodies.<sup>95</sup>

Ultimately, the fact that the removal of charitable status would almost certainly have to occur by legislation means that such redistribution of property from charities taking various forms would (presuming competent drafting) be dealt with in any event, including if necessary a modification of the 2011 Act's general inclusion of a purpose “recognised as charitable purposes...under the old law” within the current understanding of a charitable purpose.<sup>96</sup> That said, Synge accepts that there is a potentially difficult relationship between cy-près and removal of a charity from the register,<sup>97</sup> and that matters are especially complicated where the charity has taken the form of a company.<sup>98</sup> It should be noted, however, that:

“Certain charities are exempt from the requirement to register with the Charity Commission, and from other (but not all) provisions of the Charities Act 2011. They

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<sup>93</sup> M. Synge, *The “New” Public Benefit Requirement* (2015), at p.55. Cf., e.g., Law Commission, *Technical Issues in Charity Law: Supplementary Consultation* (2016), ch.2.

<sup>94</sup> *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch. 193 at 214; [1981] 1 All E.R. 994 at 1009-10.

<sup>95</sup> *Re Finger's Will Trusts* [1972] Ch. 286; [1971] 3 All E.R. 1050.

<sup>96</sup> Charities Act 2011, s.3(1)(m).

<sup>97</sup> M. Synge, *The “New” Public Benefit Requirement* (2015), at p.54.

<sup>98</sup> M. Synge, *The “New” Public Benefit Requirement* (2015), at p.55.

are usually regulated by another body (the ‘principal regulator’) whose functions overlap with those of the Commission.”<sup>99</sup>

Significantly for present purposes, exempt charities include<sup>100</sup> a further education corporation, a qualifying Academy proprietor, the governing body of any foundation, voluntary or foundation special school, a relevant “foundation body” and a sixth form college corporation, such that these institutions would not be removed from the register of charities per se.

Jaconelli describes the operation of cy-près in relation to a *charitable* school in these circumstances as “a respect in which the holding, followed by the loss, of charitable status is less advantageous than never to have had the status”.<sup>101</sup> Such is the nature of cy-près. In the case of a non-charitable school, the fate of its property would be determined by its legal structure. It should also be borne in mind that, if a non-charitable school is an unincorporated association, it is now likely that the property would go to the “members” by virtue of the “contract holding theory”,<sup>102</sup> despite earlier authority that such property might revert either to the donor(s) on resulting trust or as *bona vacantia* to the Crown.<sup>103</sup> Analogously with the *Re Denley* argument considered above, the “membership” of the association would have to be determined for these purposes, and the same candidates of pupils, teachers, parents and perhaps governors are likely to be considered. Once the membership is established, a principle of division would generally be applied with a starting point of equal division being implied in the absence of an express term, though it should be noted that there is a tendency in the case law for minors to be treated less favourably than adult “members”.<sup>104</sup>

Whatever the details and consequences of the structure, a mechanism other than cy-près would have to be devised for the state to be able to redistribute a non-charitable “private” school’s property to other institutions, and such a mechanism may raise issues under the European Convention (discussed in detail in the next section of this paper). In *Hanchett-*

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<sup>99</sup> Law Commission, *Technical Issues in Charity Law A Consultation Paper* (2015), at [1.26].

<sup>100</sup> Charities Act 2011, sch.3, paras.7-11.

<sup>101</sup> J. Jaconelli, “Independent schools, purpose trusts, and human rights” [1996] *Conveyancer and Property Lawyer* 24 at 30.

<sup>102</sup> See, e.g., *Re Horley Town Football Club* [2006] EWHC 2386 (Ch); [2006] W.T.L.R. 1817.

<sup>103</sup> *Re West Sussex West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch. 1; [1970] 1 All E.R. 544.

<sup>104</sup> *Re Horley Town Football Club* [2006] W.T.L.R. 1817; *Re GKN Bolts & Nuts Ltd etc Works Sports and Social Club* [1982] 1 W.L.R. 774; [1982] 2 All E.R. 855.

*Stamford v Attorney General*,<sup>105</sup> it was specifically held that for the property of an unincorporated association to revert to the Crown because there was only one remaining member of a non-charitable unincorporated association would be a *prima facie* breach of Article 1 of the Convention's First Protocol. That said, there are established circumstances when a dissolved company's assets will pass to the Crown as *bona vacantia*,<sup>106</sup> even if this should currently happen only where "assets or property are [not] transferred or dealt with before a company is dissolved".<sup>107</sup>

As for Jaconelli's argument that a "private" school is not by nature "useless or harmful to the community" such that its property cannot be subject to *cy-près*, Labour's premise is that such a school is precisely so harmful, and in any event section 62 also expressly covers situations where a purpose ceases to be charitable for "other reasons". If section 62 were to have the effect suggested by Jaconelli and preclude the operation of *cy-près* it would surely be reworded. There are precedents for this kind of statutory manipulation notwithstanding the general definition of a charity, and despite Meakin's claim of a "general principle that charitable objects cannot cease to be charitable because they have become outdated or impractical".<sup>108</sup> Even now, "[p]articular statutes deem particular kinds of institution to be or not to be charities when they would or might otherwise come within or not come within the general definition".<sup>109</sup> An example is that a "registered sports club" established for charitable purposes is (by virtue of the Charities Act 2011) to be treated as not being so established, such that it is deemed not to be a charity.<sup>110</sup>

Another "drafting" point is that many independent schools (or the trusts etc. constituting them) arguably perform charitable functions other than the advancement of education, such as the advancement of religion<sup>111</sup> or the prevention or relief of poverty.<sup>112</sup>

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<sup>105</sup> *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch. 173.

<sup>106</sup> Companies Act 2006, s.1012.

<sup>107</sup> Government Legal Department, "Bona vacantia dissolved companies (BVC1)" (2013), available at <https://www.gov.uk/government/publications/bona-vacantia-dissolved-companies-bvc1/bona-vacantia-dissolved-companies-bvc1#avoid-bona-vacantia>.

<sup>108</sup> R. Meakin, *The Law of Charitable Status: Maintenance and Removal* (Cambridge: Cambridge University Press, 2008), at p.108.

<sup>109</sup> W. Henderson and J. Fowles, *Tudor on Charities*, 10th edn (2015), at [1-005].

<sup>110</sup> Charities Act 2011, s.6.

<sup>111</sup> See, e.g., *St Mary and St Michael Parish Advisory Co Ltd v Westminster Roman Catholic Diocese Trustee* [2006] EWHC 762 (Ch); [2006] W.T.L.R. 881.

<sup>112</sup> See, e.g., *Cawdron v Merchant Taylors' School* [2009] EWHC 1722 (Ch); [2010] W.T.L.R. 775.

Assuming that those would remain valid charitable purposes per se even if Labour's proposal were implemented, care would have to be taken to avoid those being a "back door" through which many independent schools could potentially retain charitable status.

There is a further fundamental matter that would have to be considered if the redistribution of charitable schools' property is to be effected "across the country's educational institutions". It is, quite simply, that the current understanding of *cy-près* would mean that schools' property would go to *charitable* purposes that remained so (and were thus palatable). Once one of the circumstances in section 62 is activated, a scheme is devised to govern the application of the relevant property under section 67 of the 2011 Act. The *cy-près* scheme is devised by the court or the Charity Commission, which have the power to "make a scheme providing for the property to be applied" "for such charitable purposes",<sup>113</sup> and "(if the scheme provides for the property to be transferred to another charity) by or on trust for such other charity",<sup>114</sup> "as it considers appropriate".<sup>115</sup> In making its decision, the court or Commission must have "regard"<sup>116</sup> to "the spirit of the original gift",<sup>117</sup> "the desirability of securing that the property is applied for charitable purposes which are close to the original purposes",<sup>118</sup> and "the need for the [recipient] charity to have purposes which are suitable and effective in the light of current social and economic circumstances".<sup>119</sup> In addition, the court or Commission may "impose on the charity trustees of [the recipient] charity a duty to secure that the property is applied for purposes which are, so far as is reasonably practicable, similar in character to the original purposes".<sup>120</sup>

Under the current law, it would be relatively uncontroversial for assets from a dissolved independent school to be applied *cy-près* for the benefit of another charitable school. This is true despite the issues relating to general charitable intent discussed above, and potential debates about the suitability and effectiveness of the recipient school in the prevailing social and economic circumstances. But matters will be more complicated if private education is no longer to be regarded as charitable but the intended recipients of previously charitable property

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<sup>113</sup> Charities Act 2011, s.67(2)(a).

<sup>114</sup> Charities Act 2011, s.67(2)(b).

<sup>115</sup> Charities Act 2011, s.67(2).

<sup>116</sup> Charities Act 2011, s.67(2).

<sup>117</sup> Charities Act 2011, s.67(3)(a).

<sup>118</sup> Charities Act 2011, s.67(3)(b).

<sup>119</sup> Charities Act 2011, s 67(3)(c).

<sup>120</sup> Charities Act 2011, s 67(4).

are state schools. A related complication is that the Labour proposal clearly seeks the removal of charitable status from “private” schools but may contemplate such schools retaining some (though not all) of their property. This is clearly allowed to happen as a matter of practice under the existing law in relation to individual schools that lose their charitable status through insufficient “public benefit” provision.<sup>121</sup> To allow all such schools to retain property in the event that private education is rendered non-charitable in principle, however, is not necessarily compatible with the current understanding of *cy-près*.

A change in the legal nature of *cy-près* and/or state or “private” schools themselves might therefore be necessary to achieve Labour’s aim. A dizzying array of types of state school exists.<sup>122</sup> For present purposes, despite Morris’s assertion that “[c]haritable status...has long been associated with state schools,”<sup>123</sup> it is significant that “community schools, controlled by the local council and not influenced by business or religious groups”<sup>124</sup> are prevented by legislation from being charitable.<sup>125</sup> Other types of state school, by contrast, are automatically charitable.<sup>126</sup> Essentially, Labour would either have to: make all *state* schools charities in order to allow them to receive property via *cy-près*; limit the types of schools that are so to receive such property; change the fundamental nature of *cy-près* so that it did not mandate the transfer of previously charitable assets to other charities or charitable purposes *per se*; or redistribute the assets via a mechanism other than *cy-près* (which may be tantamount to compulsory acquisition by the state). These mechanisms might well have differing consequences for Article 1 of the First Protocol. In addition, of course, whichever mechanism is chosen would have to leave intact the very object of the exercise, i.e. to render the provision of *private* education non-charitable. Some elements of the Labour Party do not, however, appear to be shying away from a fundamental reorganisation of the school system, since another motion approved at the 2019 conference sought to stop “all academisations and the opening of academies and free

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<sup>121</sup> See, e.g., C. Turner, “Private schools abandon charitable status in bid to avoid ‘huge pressure’ to deliver ‘public benefit’”, *The Telegraph*, 27 April 2018, available at <https://www.telegraph.co.uk/education/2018/04/27/private-schools-abandon-charitable-status-bid-avoid-huge-pressure/>.

<sup>122</sup> Gov.uk, “Types of School”, available at <https://www.gov.uk/types-of-school>.

<sup>123</sup> D. Morris, “Building a big society: will charity’s creeping reach generate a new paradigm for state schools?” (2011) 33 *Journal of Social Welfare and Family Law* 209 at 210.

<sup>124</sup> R. Long, “The School System in England” (House of Commons Briefing Paper No. 07169, 2017), at p.3.

<sup>125</sup> School Standards and Framework Act 1998, s.23.

<sup>126</sup> School Standards and Framework Act 1998, s.23.

schools”,<sup>127</sup> with academies<sup>128</sup> and free schools<sup>129</sup> being funded by the Government but not controlled by local authorities. The rendering of more state schools as charitable would in any case, and somewhat ironically, continue a process that Morris identified as increasing by virtue of the 2010-2015 coalition government’s so-called “Big Society” policy that aimed to increase the role of the *private* sphere relative to the state in providing services.<sup>130</sup>

Ultimately, it is likely to be possible to achieve the Labour motion’s aims, whether amounting to nationalisation, a removal of charitable status or something falling short of that, as a matter of domestic law. But it is likely to require both extremely careful drafting in order to target the very precise “mischief” identified without also undermining it, as well as potentially fundamental changes to the law of charities, the nature of state schools and perhaps even property law more generally. Even if appropriate mechanisms are devised as a matter of purely domestic law,<sup>131</sup> however, the next section of this paper considers the potentially very significant implications of the European Convention on Human Rights for the policy agreed at Labour’s conference.

#### **IV. The Implications of the European Convention on Human Rights**

Any breach of the European Convention in the context of education policy would be politically as well as legally significant since, in contrast to the ambiguity of the currently governing Conservative party,<sup>132</sup> Labour apparently remain “firm[ly]” committed to the UK remaining a party to the Convention and the status granted to it in domestic law via the Human Rights Act 1998.<sup>133</sup> The particular articles at issue in this paper, however, are two of those whose inclusion in the Convention was most controversial.<sup>134</sup>

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<sup>127</sup> The Labour Party, “Conference Arrangements Committee: Report 2 to Conference 2019, Sunday 22 September 2019” (2019), at p.16.

<sup>128</sup> Gov.uk, “Types of School”, available at <https://www.gov.uk/types-of-school/academies>.

<sup>129</sup> Gov.uk, “Types of School”, available at <https://www.gov.uk/types-of-school/free-schools>.

<sup>130</sup> D. Morris, “Building a big society: will charity’s creeping reach generate a new paradigm for state schools?” (2011) 33 *Journal of Social Welfare and Family Law* 209.

<sup>131</sup> Cf. Human Rights Act 1998.

<sup>132</sup> Conservatives, “Get Brexit Done: Unleash Britain’s Potential: The Conservative and Unionist Party Manifesto 2019” (2019), at p.48.

<sup>133</sup> The Labour Party, “It’s Time for Real Change: The Labour Party Manifesto 2019” (2019), at p.65.

<sup>134</sup> See, e.g., N. Wahlström, “The Struggle for the Right to Education in the European Convention on Human Rights” (2009) 8 *Journal of Human Rights* 150, at 150-51.

*(1) Article 1 of Protocol 1*

Article 1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Allen notes that “[e]ven a cursory glance reveals that [Article 1 of the First Protocol] was not drafted with care”,<sup>135</sup> including via the changing language between “property” and “possessions”. It is interpreted as containing three distinct but connected rules, albeit that “modern case-law takes a very similar approach to all forms of interferences with property rights”.<sup>136</sup> Whatever its difficulties, Article 1 could be of significance if the state were to try to appropriate independent schools’ property, even if the bare text of the Article may make it appear as though a school has little in the way of complaint about any attempted confiscation and redistribution of its property.

An immediate issue is that the structure of a school could affect the very applicability of Article 1, since a charitable company is likely to be the beneficial owner of its assets<sup>137</sup> but the same is not necessarily true of a charitable trust.<sup>138</sup> Article 1 applies to “natural” and “legal” persons, and there may therefore be doubt as to whether a charitable *trust* even falls within that definition since a trust does not have a separate legal personality as a matter of English Law.<sup>139</sup>

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<sup>135</sup> T. Allen, *Property and The Human Rights Act 1998* (Oxford: Hart Publishing, 2005), at p.8.

<sup>136</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (Oxford: Oxford University Press, 2017), at p.577.

<sup>137</sup> See, e.g., M. Synge, *The “New” Public Benefit Requirement* (2015), at p.54.

<sup>138</sup> See, generally, I. Dawson and J. Alder, “The nature of the proprietary interest of a charitable company or a community interest company in its property” (2007) 21 *Trust Law International* 3.

<sup>139</sup> See, e.g., L. Tucker et al, *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015), at [3-071].

Meakin has gone as far as to suggest that “[i]t could be argued that charitable institutions themselves do not have rights under the Human Rights Act 1998”.<sup>140</sup> On the other hand, he later asserts that “[t]here is little doubt that charities own their property whether it is held on trust or in the case of a charitable company beneficially for its charitable purposes”, and that “[i]t is also clear that charities, whether incorporated or unincorporated, will be natural or legal persons within the wording of Article 1, Protocol 1”.<sup>141</sup> Whether charities are relevant “persons” is intermingled with whether they have relevant “possessions” and, as it was put by Rainey et al, “[i]t is for the Strasbourg organs to determine what falls within the concept of possessions in the Article having regard to the classification of the matter under national law”.<sup>142</sup> National law is not therefore conclusive,<sup>143</sup> and the meaning of “possessions” has been described as “autonomous”.<sup>144</sup> In *Holy Monasteries v Greece*, the applicant monasteries complained that laws facilitating the compulsory transfer of some of their property to the state violated Article 1, even though domestic law treated them as public authorities.<sup>145</sup> The Court agreed that they were non-governmental organisations, and that there was a “deprivation” of property for the purposes of Article 1.

Even if a school were to be considered a relevant legal person with relevant “possessions”, the text of Article 1 still appears to present considerable difficulties for a school arguing that the measures considered earlier in this paper would bring about a breach. It is implicit in the Labour proposal that it would be very much “in the public interest” for “private” schools to be deprived of their possessions and for those possessions to be redistributed to other schools. The mechanisms discussed in the previous section of this paper would presumably be “conditions provided for by law”, and Article 1 seeks not to “impair” “in any way” a state’s right to “enforce such laws as it deems necessary to control the use of property” either “in accordance with the general interest” or “to secure the payment of taxes”. The redistribution of schools’ property would again serve that interest in the view of a government seeking to

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<sup>140</sup> R. Meakin, *The Law of Charitable Status: Maintenance and Removal* (2008), at p.131

<sup>141</sup> R. Meakin, *The Law of Charitable Status: Maintenance and Removal* (2008), at p.137.

<sup>142</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (2017), at p.551

<sup>143</sup> See, e.g., *Depalle v France Application* (2012) 54 E.H.R.R. 17.

<sup>144</sup> See, generally, T. Allen, “The autonomous meaning of ‘possessions’ under the European Convention on Human Rights” in E. Cooke (ed.), *Modern Studies in Property Law: Volume 2* (Oxford: Hart Publishing, 2003).

<sup>145</sup> *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1.

implement the Labour proposal. A lesser withdrawal of charitable status would, moreover, secure the payment of taxes specifically protected under Article 1.

Article 1, however, may be more powerful than it first appears: Allen asserts that “the desire to apply overarching principles relating to discrimination and legality...led the [Strasbourg] Court to conclude that it would review laws imposing taxes [under P1-1], despite the conceptual distinctions between liabilities and property rights”.<sup>146</sup> Allen is clear, following *James v United Kingdom*,<sup>147</sup> that a “fair balance test applies to all interferences with possessions”, and that “[t]he second and third sentences...lay down criteria relevant to the fair balance, but other criteria may be relevant as well”.<sup>148</sup> He also asserts that “some of the jurisprudence on proportionality developed with respect to other Convention rights can be applied to P1(1)”.<sup>149</sup> So even if something is lawful it may still be subjected to a proportionality analysis, and “[t]he legality principle is so easily satisfied that the doctrine of proportionality now performs some of the functions that might have been left to it” and “[s]imilarly, the identification of the Rule is of questionable importance, since it seems to have little impact on the outcome of the case”.<sup>150</sup>

While there is a measure of deference to the national legal system as to what is “lawful”,<sup>151</sup> relevant “lawfulness” requires “the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions”.<sup>152</sup> The law must be accessible and predictable to comply with the legality requirement.<sup>153</sup> In *Fener Rum Erkek Lisesi Vakfi v Turkey*, which involved a foundation whose purpose was to provide educational facilities at a Greek Orthodox High School in Istanbul,<sup>154</sup> the European Court emphasised that the relevant measure must be “sufficiently accessible, precise and foreseeable”.<sup>155</sup> On the facts, the foundation acquired title to part of a building, but title was nullified at the behest of the Treasury, on the basis that the foundation did not have the required legal capacity to hold

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<sup>146</sup> T. Allen, *Property and The Human Rights Act 1998* (2005), at p.33.

<sup>147</sup> *James v United Kingdom* (1986) 8 E.H.R.R. 123; [1986] R.V.R. 139.

<sup>148</sup> T. Allen, *Property and The Human Rights Act 1998* (2005), at p.124.

<sup>149</sup> T. Allen, *Property and The Human Rights Act 1998* (2005), at p.124.

<sup>150</sup> T. Allen, *Property and The Human Rights Act 1998* (2005), at p.165.

<sup>151</sup> *Beyeler v Italy* (2001) 33 E.H.R.R. 52.

<sup>152</sup> *Grudić v Serbia* [2012] ECHR 708 at [74].

<sup>153</sup> T. Allen, *Property and The Human Rights Act 1998* (2005), at pp.96-100.

<sup>154</sup> *Fener Rum Erkek Lisesi Vakfi v Turkey* (2015) 60 E.H.R.R. 15.

<sup>155</sup> *Fener Rum Erkek Lisesi Vakfi v Turkey* (2015) 60 E.H.R.R. 15 at [50].

immovable property because such capacity was not provided for in its constitution. Even though Article 1 does not guarantee the right to acquire property and “[t]here is no doubt that Contracting States should enjoy a wide margin of appreciation in regulating the acquisition of land and other immovable property by legal entities such as foundations”,<sup>156</sup> the European Court held that:

“...the annulment of the title to the property in question, pursuant to case-law adopted sixteen and twenty-two years respectively after its acquisition, was not foreseeable for the applicant foundation. It could not reasonably have foreseen that its title, obtained many years earlier, would one day be annulled because of a new judicial interpretation of the applicable legislation, which in fact remained silent as to its capacity to acquire property.”<sup>157</sup>

There was thus no “lawfulness”, and the Court found a breach. There may be an argument that an extension of *cy-près*, via a removal of one of the major charitable purposes (namely the provision of private education) as previously understood after many centuries, would similarly fail to comply with requirements of predictability, foreseeability and precision. That said, *cy-près* in general is a well-established mechanism and a well-drafted and well-publicised statute (as distinct from a judicial *volte-face* thought unlikely in the previous section of this paper) might be able to ensure compliance in this regard. Any attempted “abolition” of “private” schools may nevertheless be considered relevantly “unpredictable” in light of the rights protected under Article 2 of the First Protocol (considered in the next sub-section of this paper), even if it is hardly likely to be described as arbitrary given that it is based on a particular ideology-driven policy. There may also be an issue founded on a legitimate expectation that the benefits associated with charitable status are expected to continue, based on the controversial treatment of a disability pension in *Bélané Nagy v Hungary*,<sup>158</sup> particularly given that the withdrawal of charitable status would not be “due to any changes in the [complainant]’s own circumstances, but to changes in the law or its implementation”.<sup>159</sup>

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<sup>156</sup> *Fener Rum Erkek Lisesi Vakfi v Turkey* (2015) 60 E.H.R.R. 15 at [52].

<sup>157</sup> *Fener Rum Erkek Lisesi Vakfi v Turkey* (2015) 60 E.H.R.R. 15 at [57].

<sup>158</sup> *Bélané Nagy v Hungary* [2016] ECHR 1114.

<sup>159</sup> European Court of Human Rights, “Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property” (Council of Europe, 2019), at [54].

Even if “lawful”, the measure at issue must also pursue a “legitimate aim” in the “public interest” for the purposes of Article 1. It has been said that “the margin of appreciation available to the legislature in the choice of policies should be a wide one, and its judgment as to what is ‘in the public interest’ should be respected unless that judgment is manifestly without reasonable foundation”.<sup>160</sup> The attempt to secure greater equality within society, clearly motivating the Labour proposal, is presumably unlikely to be considered something “manifestly without reasonable foundation” as a legitimate objective in the public interest. In the House of Lords in *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-Day Saints*, Lord Hope opined that Parliament’s decision to exclude a private (but nevertheless charitable) place of worship from a full non-domestic (or business) rate exemption was “within the discretionary area of judgment accorded to it by” Article 1’s second paragraph.<sup>161</sup> The fiscal benefits currently associated with charitable status would presumably mean that the state would in general pursue a legitimate aim in the public interest by seeking to regulate what did and did not count as charitable, and Meakin suggests that while “[t]he loss of tax reliefs following removal from the register would, *prima facie*, amount to a breach of Article 1, Protocol 1”, “it is arguable that the taxation of charities would be held to fall within the margin of appreciation allowed to member states as the tax relates to social and economic factors”.<sup>162</sup>

Any interference, however, “must also be reasonably proportionate to the aim sought to be realised”.<sup>163</sup> This means an interference with peaceful enjoyment of possessions “must strike a ‘fair balance’ between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights”, and there “must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions”.<sup>164</sup> In particular, “[t]he requisite balance will not be found if the person or persons concerned have had to bear an

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<sup>160</sup> *Grudić v Serbia* [2012] ECHR 708 at [75].

<sup>161</sup> *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-Day Saints* [2008] UKHL 56; [2008] 1 W.L.R. 1852 at [31]. The decision was upheld in *Church of Jesus Christ of Latter-Day Saints v United Kingdom* (2014) 59 E.H.R.R. 18; [2014] R.A. 322 without substantive consideration of Article 1 of the First Protocol.

<sup>162</sup> R. Meakin, *The Law of Charitable Status: Maintenance and Removal* (2008), at p.138. Cf. the consequences if an organisation that was *never* charitable were to be erroneously registered as a charity and its property applied cy-près: W. Henderson and J. Fowles, *Tudor on Charities*, 10th edn (2015), at [10-064].

<sup>163</sup> *Grudić v Serbia* [2012] ECHR 708 at [76].

<sup>164</sup> *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1 at [70].

individual and excessive burden”.<sup>165</sup> It may be arguable that there are other means of promoting equality in society by ensuring that state schools provide a sufficiently high-quality education and/or are adequately funded, and that redistributing the property of “private” schools to achieve the aim, rather than (for example) increasing taxation generally, excessively targets “private” schools. A possible counter-argument, of course, is that “private” schools are numerous such that their burden is not “individual”, particularly if *no* such school could operate under the implemented regime, and that the burden is not “excessive” in light of their direct contribution to the supposed inequality. There would nevertheless be an irony in the suggestion that the abolition of all “private” schools would be a more proportionate response than making it difficult or impossible for a few of them to operate.

An important consideration as regards proportionality is that “the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 (P1-1) only in exceptional circumstances”, even if “Article 1...does not... guarantee a right to full compensation in all circumstances”.<sup>166</sup> It is not clear how this compensation principle would apply in the context of redistributing “private” schools’ property. Since it is the very *wealth* of the schools that is being targeted, rather than only their specific buildings etc., the policy would be fatally undermined if the Government immediately had to compensate them at market rate (or even near it) for property taken. If schools were to be abolished or nationalised, moreover, it is uncertain whom the appropriate recipients of any compensation would be, which goes back to the difficulties over legal structures considered earlier. It may be, therefore, that a deprivation of property amounting to redistribution to other schools could realistically never be considered proportionate, even if the general charitable intention proviso discussed above would protect the rights of *donors* in ensuring at least some of the time that their property reached the intended recipient, which is potentially significant given that A1-P1 also protects the right to dispose of one’s property.<sup>167</sup> On the other hand, it may be possible to make the completely countervailing argument: in the event that a charitable school had to close down even in the context of the current legal regime, the *cy-près* mechanism is well established, and neither donors, officers, pupils nor fee-payers could reasonably expect to benefit from those assets. In the event of a closure, of course, parents etc. could reasonably

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<sup>165</sup> *Grudić v Serbia* [2012] ECHR 708 at [76].

<sup>166</sup> *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1 at [71].

<sup>167</sup> *Marckx v Belgium* (1979-80) 2 E.H.R.R. 330.

expect to obtain a refund of fees paid for an education not provided in accordance with a (potentially frustrated)<sup>168</sup> contract, but thus not otherwise. It is not necessarily therefore clear that any natural person has an expectation of compensation, and (subject to a challenge to the whole nature of *cy-près*) it may be difficult to argue that there is any point in a school receiving compensation if it is to be prevented from operating anyway. In addition, if a prohibition of independent schools and the consequent redistribution of their assets is essentially regarded as a “nationalisation”, there is likely to be a wide margin of appreciation as regards compensation.<sup>169</sup>

In any event, it should be noted that the relevant measure could be classed as a mere control of use of the schools’ property, rather than a deprivation *per se*, as in *Pye v United Kingdom*,<sup>170</sup> even if Rainey et al assert that “[t]he [Strasbourg] Court has brought together the tests it applies in relation to deprivations, the control of the use of property, and to other interferences with property, so that the questions the Court will ask in each of these circumstances raise essentially the same issues”.<sup>171</sup> The significance of such a classification as a control of use is that it would “side-step...” the issue of compensation.<sup>172</sup> It has been said that “[f]orfeiture and confiscation are regarded by the Court as control of use of property, to be considered under the second paragraph of Article 1 of Protocol No. 1 despite the obvious fact that they entail a deprivation of ‘possessions’”.<sup>173</sup> Harsh as it sounds, “forfeiture” and “confiscation” may be the appropriate characterisation of the expropriation of “private” schools’ property, if they are deemed no longer to be carrying out a lawful purpose. Meakin argues that “[c]harity [as a whole] will not be deprived of its property and will still control its use” in the event of application *cy-près*, “although the purposes for which the property can be used will have changed”.<sup>174</sup> This will not be much comfort for an individual school, however,

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<sup>168</sup> See, e.g., H.G. Beale (gen. ed.), *Chitty on Contracts*, 33rd edn (London: Sweet & Maxwell, 2018), at [23-022]ff. on “Subsequent Legal Changes and Supervening Illegality” as a basis of frustration.

<sup>169</sup> *Lithgow v United Kingdom* (1986) 8 E.H.R.R. 329; *Times*, 7 July 1986.

<sup>170</sup> *Pye v United Kingdom* (2008) 46 E.H.R.R. 45; (2007) 23 B.H.R.C. 405.

<sup>171</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (2017), at p.547.

<sup>172</sup> A. Goymour, “Property and housing” in D. Hofmann (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011), at p.286.

<sup>173</sup> European Court of Human Rights, “Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property” (Council of Europe, 2019) at [86], citing *AGOSI v United Kingdom* (1987) 9 E.H.R.R. 1; *Times*, 25 October 1986.

<sup>174</sup> R. Meakin, *The Law of Charitable Status: Maintenance and Removal* (2008), p.137.

and the argument put on behalf of the state may not hold if (as considered above) that school is regarded as a legal person with its own property rights for the purposes of the Convention, such that at the very least its use of property is controlled. In any event, Rainey et al imply that a measure controlling a school's use of property is likely to be permissible so long as it has the character of law, is in the general interest or has the purpose of securing the payment of taxes, and is deemed necessary by the state.<sup>175</sup> This would be a very light-touch approach, leaving a school with little in the way of redress.

It has been seen that the application of Article 1 to the redistribution of “private” schools' property, which itself could take several forms, involves many twists and turns. While a breach may not ultimately be found, the possibility for argument surrounding several of Article 1's provisions makes legal wrangling surrounding it fairly inevitable if a Labour Government were to press ahead with the conference-agreed policy.

## *(2) Article 2 of Protocol 1*

Article 2 of the Convention's First Protocol provides:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

Schabas makes the dramatic claim that “[d]uring the drafting of the European Convention and Protocol No. 1, more attention was devoted to the provision on the right to education than to any other right”, with the difficulties mainly relating to “the struggle between universal public education and the protection of private systems, generally of a confessional nature”.<sup>176</sup>

It is immediately clear that, for the purposes of this sub-section of the paper, the focus must shift from mainly “private” schools themselves towards the children they educate and the parents of those children. At first glance (of the text), it might be thought difficult to sustain a

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<sup>175</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (2017), at p.572.

<sup>176</sup> W.A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), at p.986.

claim that even the outright abolition of “private” schools could breach Article 2. Labour are by no means proposing to deny any child an education, and in fact seek to have a levelling effect on the standard of education provided by removing particular advantages apparently conferred by “private” schools. Moreover, it is not particularly convincing to argue that a desire to pay for a child’s education, separated off from “state” pupils albeit still at school, at an institution with all the privileges and property rights described elsewhere in this paper, *itself* represents a “cogent” philosophical conviction, even if the European Court of Human Rights has recognised “that overcrowded classes can be detrimental to the effectiveness of the education system in a way which hinders the specific training experience”.<sup>177</sup> A relevant philosophical conviction does not, for example, even include a linguistic preference,<sup>178</sup> and it is not clear that private education per se falls within the “confessional” issues generally at the core of Article 2 cases as described by Schabas.

As Schabas notes,<sup>179</sup> Ireland specifically made a declaration on signing the First Protocol that Article 2 was “not sufficiently explicit in ensuring to parents the right to provide education for their children in their homes or in schools of the parents’ own choice, whether or not such schools are private schools or are schools recognised or established by the State”.<sup>180</sup> In his partially dissenting opinion in *Campbell and Cosans v United Kingdom*, Sir Vincent Evans opined that if an opposition to corporal punishment is recognised (as it was by the majority in that case) as a relevant philosophical conviction for the purposes of Article 2, he did not see “how it can reasonably be applied so as to exclude from its scope all manner of other strongly held views regarding the way in which schools are organised”, including “the existence of independent schools”.<sup>181</sup> But in regard to such matters, he identified “insuperable practical difficulties in respecting equally the views of those who are opposed to and those who favour one system or the other”.<sup>182</sup>

In *Kjeldsen v Denmark*, however, albeit rejecting the substantive complaints of parents regarding compulsory sex education, the Court emphasized that “[t]he second sentence of Article 2 aims in short at safeguarding the possibility of pluralism in education”.<sup>183</sup> Citing this

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<sup>177</sup> *Tarantino v Italy* (2013) 57 E.H.R.R. 26; [2013] E.L.R. 375 at [13].

<sup>178</sup> *Belgian Linguistic Case* (1979-80) 1 E.H.R.R. 252.

<sup>179</sup> W.A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), at p.1006.

<sup>180</sup> Minutes of the meeting of the Committee of Ministers, 19 March 1952, VIII T.P. 202–5.

<sup>181</sup> *Campbell and Cosans v United Kingdom* (1982) 4 E.H.R.R. 293, Sir Vincent Evans, at [5].

<sup>182</sup> *Campbell and Cosans v United Kingdom* (1982) 4 E.H.R.R. 293, Sir Vincent Evans, at [5].

<sup>183</sup> *Kjeldsen v Denmark* (1979-80) 1 E.H.R.R. 711 at [50].

case, Rainey et al opine that “it would seem that there is a right of persons to establish private schools”.<sup>184</sup> Similarly, Wahlström finds within the case a responsibility placed on states “to permit private schools approved by the government”.<sup>185</sup> On Rainey et al’s analysis, Article 2’s protection of parental choice “allows parents either to enrol their children in State education, to withdraw their children from the State system and educate them privately whether at a private school or at home”.<sup>186</sup> The guide to Article 2 published by the Council of Europe, moreover, asserts that “Article 2 of Protocol No. 1 guarantees the right to open and run a private school, but the States do not have a positive obligation to subsidise a particular form of teaching”.<sup>187</sup> Lonbay, by contrast, cites *Kjeldsen* in support of the proposition that Article 2 does not per se prevent a state monopoly in education, and it is for this reason that he does not regard a parent’s views on private education as potentially giving rise to a breach even if recognised as a philosophical conviction.<sup>188</sup> While there is considerable ambiguity in the judgment, Lonbay’s view may not be tenable in light of the Court’s emphasis on the fact that the Convention’s *travaux préparatoires* “indisputably demonstrate...the importance attached by many members of the Consultative Assembly and a number of governments to...freedom to establish private schools”.<sup>189</sup> The European Court appears to suggest that this freedom is a minimum guarantee, *augmented* by respect for parental religious and philosophical convictions even within state teaching.

Even if Article 2 does not protect a right to private education per se, as a matter of practical reality a state may well struggle to *provide* a range of educational services, as distinct from simply facilitating the provision of education incorporating particular “religious and philosophical convictions” by at least quasi-independent institutions. On Lonbay’s analysis, although Article 2 “does not necessarily prevent a State monopoly in educational provision”,

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<sup>184</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (2017), at p.580.

<sup>185</sup> N. Wahlström, “The Struggle for the Right to Education in the European Convention on Human Rights” (2009) 8 *Journal of Human Rights* 150 at 159.

<sup>186</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (2017), at p.587.

<sup>187</sup> European Court of Human Rights, “Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights: Right to education” (Council of Europe, 2019), at [14], citing *Verein Gemeinsam Lernen v Austria* (1995) 20 E.H.R.R. CD78.

<sup>188</sup> J. Lonbay, “Rights in Education under the European Convention on Human Rights” (1983) 46 M.L.R. 345 at 349.

<sup>189</sup> *Kjeldsen v Denmark* (1979-80) 1 E.H.R.R. 711 at [51].

this is “providing that such education and teaching respects parental religious and philosophical conviction” and, while “[i]t may be possible for a State to satisfy all parental convictions within the State system”, “it could prove difficult and expensive”.<sup>190</sup> On Rainey et al’s analysis, whether the obligation to accommodate education according to parental philosophical or religious beliefs “would extend to the funding, or even partial funding, of private schools where this is the only way in which respect for particular convictions could be secured is, as yet, an unanswered question”.<sup>191</sup> Meakin, on the other hand, opines that “[i]f the closure of [independent] schools or application of their property *cy-près*” following removal from the register of charities “led to a loss of pluralism, including the right of parents to ensure that the education and teaching for their children was in conformity with their own religious and philosophical convictions”, “then it is arguable that there might be a breach of Protocol 1, Article 2 and discrimination under Article 14”.<sup>192</sup> In fact, the opinion of Lord Lester and Lord Pannick, as paraphrased by Jaconelli, was that “any change in the law which, even indirectly, forbids the continued existence of independent schools constitutes a breach of the European Human Rights Convention”.<sup>193</sup> The European Court itself has said that “the fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction”.<sup>194</sup>

As Schabas notes, however, “although article 2 ‘has no stated exceptions’, it is not an absolute right, and finds itself subject to implied limitations”.<sup>195</sup> The Court has emphasised that Article 2 “cannot be interpreted as imposing a duty on the Contracting States to set up or subsidise particular educational establishments”, even if “any State doing so will be under an obligation to afford effective access to them”.<sup>196</sup> “Private” schools are an example of the sorts

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<sup>190</sup> M. Lonbay, “Rights in Education under the European Convention on Human Rights” (1983) 46 M.L.R. 345 at 349.

<sup>191</sup> B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (2017), at p.578.

<sup>192</sup> R. Meakin, *The Law of Charitable Status: Maintenance and Removal* (2008), at p.152.

<sup>193</sup> J. Jaconelli, “Independent schools, purpose trusts, and human rights” [1996] *Conveyancer and Property Lawyer* 24 at 26.

<sup>194</sup> *Tarantino v Italy* (2013) 57 E.H.R.R. 26 at [52].

<sup>195</sup> W.A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), p.996, citing *Timishev v Russia* (2007) 44 E.H.R.R. 37 at [64]. See also G. van der Schyff, “Classifying the Limitation of the Right to Education in the First Protocol to the European Convention” (2006) 2 *International Journal of Education Law and Policy* 153.

<sup>196</sup> *Ponomaryovi v Bulgaria* (Application No. 5335/05), 28 November 2011, at [49].

of institution that a state is not obliged to subsidise.<sup>197</sup> The right of “access” is to “educational institutions existing at a given time”,<sup>198</sup> which *might* be said to relieve states of any responsibility to ensure that particular educational institutions, or forms thereof, continue to exist.<sup>199</sup> It might even preserve states’ freedom positively to ensure that a particular (form of) institution no longer exists, given that regulation of education by the state “may vary in time and place according to the needs and resources of the community and of individuals”.<sup>200</sup> The notion of “respect” for the purposes of Article 2 “cannot be interpreted to mean that parents can require the State to provide a particular form of teaching”.<sup>201</sup> There is no “right to education [such] as would require [states] to establish at their own expense, or to subsidise, education of any particular type or at any particular level”.<sup>202</sup> Significantly:

“As the first sentence of Article 2 of the Protocol (P1-2) taken by itself leaves intact the freedom of States to subsidise private schools or to refrain from so doing, the withdrawal of subsidies from schools which do not satisfy the requirements to which the State subjects the grant of such subsidies...does not come within the scope of this Article (P1-2).”<sup>203</sup>

It may be also be significant, however, that on the facts of the *Belgian Linguistic Case* where this pronouncement was made, the measures complained of did not “prevent French-speaking parents who wish to provide a French education for their children from doing so, either in non-subsidised private schools” or in a different region, and “in no way affect the freedom to organise, independently of subsidised education, private French-language education”.<sup>204</sup> If the freedom to ensure education similarly according to parental preference *were* in substance

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<sup>197</sup> European Court of Human Rights, “Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights: Right to education” (Council of Europe, 2019), at [3].

<sup>198</sup> See, e.g., *Ponomaryovi v Bulgaria* (Application No. 5335/05), 28 November 2011, at [49].

<sup>199</sup> See, e.g., M. Lonbay, “Rights in Education under the European Convention on Human Rights” (1983) 46 M.L.R. 345, at 349, fn. 20.

<sup>200</sup> *Belgian Linguistic Case* (1979-80) 1 E.H.R.R. 252 at 279.

<sup>201</sup> *Lautsi v Italy* (2012) 54 E.H.R.R. 3 (2011) 30 B.H.R.C. 429 at [61].

<sup>202</sup> *Belgian Linguistic Case* (1979-80) 1 E.H.R.R. 252 at 281.

<sup>203</sup> *Belgian Linguistic Case* (1979-80) 1 E.H.R.R. 252 at 299.

<sup>204</sup> *Belgian Linguistic Case* (1979-80) 1 E.H.R.R. 252 at 300.

curtailed via implementation of another policy (such as the one embodied in Labour's proposal), however, matters may be different.

The implications of Article 2 for Labour's proposal are not, therefore, particularly clear. The withdrawal of at least some fiscal privileges associated with charitable status would be permissible. The explicit abolition of private schools would probably amount to a violation. The real difficulty, however, is ascertaining at what point (if at all) the first of these becomes tantamount to the second, particularly in circumstances where "private" schools already both exist and receive subsidies. A Labour Government would have to tread extremely carefully in prejudicing the future operation of private schools if it wished the UK to remain a party to the European Convention, particularly if it struggled to ensure sufficient pluralism in state-provided education.

## **V. Conclusion**

This paper has shown that the removal of charitable status from "private" independent schools and/or the redistribution of their assets to other schools may be possible, but would be fraught with legal difficulties. It would clearly require legislation, and fundamental changes to the law of charity, the law of property and/or the legal status of at least some existing non-"private" schools as well as "private" ones themselves. It may also violate the European Convention on Human Rights, particularly if the removal of charitable status and/or redistribution of assets would in substance prevent independent schools' continued operation. But the ECHR implications are not, according to the analysis undertaken in this paper, nearly as clear-cut as some previous commentators have suggested. If any future Government (Labour or otherwise) were to remain wedded both to a policy of redistributing schools' assets and to one of remaining a party to the Convention, that Government would in any case have to act very cautiously indeed.

The removal of certain *benefits* of charitable status, falling fairly considerably short of removing the status altogether, would be significantly easier, in the sense that it would necessitate fewer *fundamental* changes charity or education law and reduce the scope for challenge. But it would still require legislation and risk violating the European Convention unless carried out very carefully. Ultimately, this paper has cast light on dangerous uncertainty not only in the Labour Party's 2019 proposal, but also in the law of charities and the European Convention.