

Human Rights, Fair Treatment, and Funding of Private Schools in Canada

Romulo F. Magsino

memorial university of newfoundland

Private schools and their supporters still receive differential treatment in Canada. The disadvantage they suffer differs from province to province although, as a whole, the region west of Ontario treats them more favourably than does any other. Such disadvantage is accompanied by the dominant viewpoint that parents sending or wishing to send their children to private schools do not deserve government assistance. The need for public education has been perceived to be so compelling that nothing is seen to be wrong in penalizing parents, financially or otherwise, for choosing private schools for their children.

Examination of entitlement to human rights can contribute to developing a more sympathetic view of the funding of private schools. Equality or justice, a fundamental human rights principle, requires that everyone be treated fairly or in a non-discriminating way and that any institution or person practising differential treatment prove relevant and over-riding grounds. This leads to the conclusion that acceptance of human rights principles in Canada imposes a *prima facie* obligation on government to support private-school parents no less than it does their public-school counterparts. This does not mean that the right to equal support may not be over-ridden. It does imply, however, that discriminatory presumptions underlying governmental policy on funding of private schools must now be reversed unless compelling reasons are demonstrated.

Au Canada, on traite toujours les écoles privées et leurs partisans de façon différente. Les désavantages qu'ils ont à subir varient d'une province à l'autre, mais de façon générale, ils semblent mieux traités dans l'Ouest que partout ailleurs au pays. On considère également que les parents qui désirent envoyer, ou qui envoient, leurs enfants dans des institutions privées n'ont pas droit à l'aide du gouvernement. Le système d'éducation public est perçu comme étant obligatoire, et on ne voit rien de mal à pénaliser les parents, financièrement ou autrement, pour avoir choisi d'envoyer leurs enfants à l'école privée.

En examinant la question dans l'optique des droits de la personne, on se doit d'être beaucoup plus sympathique à la cause du financement des institutions privées. Les principes d'égalité et de justice, qui constituent des droits fondamentaux, exigent que tous soient traités de façon juste et non discriminatoire et que toute personne ou institution ne satisfaisant pas à cette règle ait la charge de justifier ses agissements. On en conclut donc que l'adoption au Canada du principe de l'égalité des droits impose au gouvernement l'obligation légitime de venir en aide aux parents partisans de l'école privée, de la même façon qu'il le fait pour ceux qui optent pour l'école publique. Cela ne signifie pas que l'on ne peut outrepasser cette décision. Toutefois, les présomptions discriminatoires à la base de la politique gouvernementale sur la financement des institutions privées peuvent maintenant être renversées, à moins qu'on puisse y apporter des justifications irréfutables.

INTRODUCTION

The issue of government support for private schools continues to arouse spirited controversy in Canada. The Ontario situation, where the

government decision to fund Catholic schools completely is believed to have contributed significantly towards the downfall of a Tory administration, illustrates how powerful passions are and how agitated people become over such an issue.

Whether in the court of law or in public forums, heated debates on this issue have elicited numerous arguments of various types, particularly legal, economic, and ideological. Characteristically, one perspective which draws strength from our moral stature as human beings is left unarticulated. By ignoring this perspective, many arguments have remained anchored on narrow self-interests and legal technicalities.

This paper attempts to highlight the contribution of the human rights perspective to the debate over the funding of private schools. This perspective insists that every person as a human being deserves fair treatment. Consequently, one may argue that private school supporters, like public school supporters, have the *prima facie* moral right to support from government. This, of course, is not to say that the argument based on the principle of fair treatment automatically overrides all other considerations relevant to the debate over the funding of private schools. It is to insist, however, that departure from this principle is justifiable only when other more compelling considerations obtain and that, without such considerations, this principle requires all possible efforts to be made to practice it. Assuming that fair treatment is everyone's entitlement, the human rights perspective places the burden of justification on anyone who would maintain preferential treatment of public school supporters and deny support to their private school counterparts.

HUMAN RIGHTS IN THEORETICAL DISCOURSE

Nearly four decades of thoughtful discussion have not settled many issues related to human rights (Machan, 1980). Lack of consensus on ethical and conceptual matters still obtains with respect to definition, content, and justification. Nevertheless, Hook provides in a 1965 paper a definition which appears to capture the notion's essential ingredients. The expression *human rights*, he says, refers to a "justifiable claim to certain powers or goods and services, [and] to certain modes of treatment, especially freedom from interference, which, upon reflection, we acknowledge we have an obligation or duty to respect" (1975, p. 270). Golding has subsequently distinguished two types of rights within such a notion: (a) option or freedom rights, pertaining to Hook's "certain powers" and "freedom from interference" and (b) welfare or equality rights, comparable to Hook's "goods and services" (1968, pp. 540–548).

Why individuals and groups should be entitled to human rights is still

debated in ethical and socio-political theory. There appears to be some agreement, however, that human rights are recognized and provided for in light of the ideals held in a community. Whether an individual or group has such rights *qua* human rights is a function of our societal ideals premised on "the defensibility of the notion of human community" and on "the defensibility of any fairly concrete conception of the good life for mankind" (Golding, 1968, p. 549). Needless to say, consensus has not been reached on these premises. This writer is convinced, however, that a very strong case can be built in support of such premises. The outline of such a case is presented later.

In any case, the absence of consensus on the justification of human beings' possession of human rights is not as debilitating for societal policy making as it may sound. Hook rightly observes that most of society is much more concerned about entitlement to human rights than about agreement on abstruse, theoretical justification for such rights. Acceptance of people's entitlements results more from "our pragmatic, reflective commonsense judgments" (Hook, 1975, p. 271) which enable us to proceed with urgent socio-political and legal arrangements for the benefit of mankind even before theoretical consensus materializes (if it ever does).

EQUALITY AS A PRESUPPOSITION OF HUMAN RIGHTS

For our purposes, what is important is that a survey of theoretical viewpoints reveals widespread agreement concerning the motivating principle behind the notion of human rights. As Martin and Nickel put it, "the egalitarian thrust of the human rights movement, with its accompanying attacks on privilege, discrimination and caste, has been one of its most salient features" (1980, p. 177). Despite scattered dissent, the egalitarianism behind the notion of human rights has come to be accepted. Nevertheless, when Hook observed that "every pronouncement in favor of human rights stresses some principle of equality" (1975, p. 272), he recognized another pestering yet significant problem. How is this principle to be conceived and given concrete expression? About 30 years ago, Isaiah Berlin called upon historians of ideas to identify the "pure ore of egalitarianism proper" (1955–1956, p. 236). However, success for them, as well as for ethical and political theorists, remains elusive. It is now clear that the concept of equality lends itself to at least three competing views: the conservative, the liberal, and the socialist (Lakoff, 1964). The conflict continues between those who see equality variously as appearance of impartiality and denial of favouritism in a well-ordered, meritocratic society; as equality of opportunity to compete

in a free society; and as equality of entitlement to various goals or enjoyments in life.

A point of agreement may be noted among these competing views however. While it may not prove to be the "pure ore of egalitarianism," the dictum of similar treatment where no relevant differences exist promises to be unexceptionable for these views. Thus, when the conservative insists on privileged education for a particular elite group, he assumes that members of this group (marked by talent or aptitude, for example) deserve similar education because they share something in common. The liberal, in opening the gates of fair competition to all, assumes similar potential in everyone to engage in rational pursuit of perceived goals in life. Differential success or failure then becomes a function of one's persistence and industry. Finally, when the socialist demands the abolition of classes, equality of rights, equality in social status and economic benefits, and equality before the law, he presupposes common humanity in men. Given their implicit, if not explicit, acceptance of similar treatment where no relevant differences exist, the three conceptions are seen to differ only with regard to what they would count as relevant differences. Naturally, policy makers must confront this matter wherever equality is invoked and implemented. This is an issue to which we will return later. At this stage, however, we may state formally the element in equality which proves acceptable and non-controversial, namely, *formal justice* (or *fair treatment*). In Perelman's words, formal justice (or fair treatment) is "a principle of action in accordance with which beings of one and the same essential category must be treated in the same way" (1963, p. 16).

FAIR TREATMENT AND PRIVATE SCHOOLS IN VARIOUS PROVINCES

Despite the general acceptance of formal justice or fair treatment as a human right, private schools and parents supporting them are clearly treated in different, discriminating ways. The extent to which similarity of treatment is denied differs in Canada and the United States. In the latter, private schools are almost invariably denied direct financial support by the government. Legislative attempts to ameliorate the difficulties encountered by religious schools in particular have been blocked by the wall of separation between church and state which American courts have constructed over several decades. Recent Supreme Court decisions have upheld state-financed provisions for testing and for diagnostic and therapeutic services in parochial schools and have validated a law directing the state to reimburse non-public schools for costs incurred when complying with certain requirements for attendance reporting and

record keeping (*Wolman v. Walter*, 1977). Parents can also be reimbursed for costs not required in public schools: books, meals, transportation, and medical expenses. These, however, hardly lighten the burden on private school parents who pay for tuition of their children and are also assessed property taxes, part of which is used for public schooling.

In some ways, the Canadian scene appears more faithful to the ideal of fair treatment. Special note must be made immediately – because most private schools are religious or denominational – of the fact that, in Canada, religious or denominational schools are not necessarily private schools as they are in the United States. Church and State have been engaged to a significant degree in a partnership in the educational enterprise (Wilson & Lazerson, 1982). The most extensive partnerships are in Newfoundland and Quebec. Newfoundland's public schools, almost completely (about 95%) financed by the government, are administered by denominational school boards classified as Roman Catholic, Integrated (i.e., Anglican, United Church, and Salvation Army), Pentecostal, and Seventh Day Adventist. Quebec's Catholic and Protestant schools make up a dual system of public schools supported by the government. Ontario, Saskatchewan, and Alberta all have systems of separate Catholic schools which are regarded simply as "a special form of common [i.e., public] schools" (*Tiny Roman Catholic Separate School Trustees v. The King*, 1928, p. 387). Again, as such, they receive financing from the government. New Brunswick, Nova Scotia, and Prince Edward Island have, by law, only secular, publicly supported schools. Actually, however, certain schools have been identified as largely Catholic or Protestant, and parents thus send their children to the appropriate school. Moreover, members of religious orders are employed as teachers in consideration of the denominational character of a community. Altogether, these arrangements point to attempts in Canada to provide fair treatment to all – particularly the religious parents – with respect to governmental support for parental efforts to educate children. The extent of attempts to accommodate their entitlements within the public school context indicates the commitment of Canadian society to the principle of fair treatment.

Similar commitment is far less visible, unfortunately, in relation to parental efforts to educate their children outside the public school context. Private schools – schools which come under an administration other than that of provincial departments of education – clearly lack the governmental support given to their public counterparts. The extent of denial of such support again varies across Canada (Phillipson, 1978). Thus, Newfoundland, New Brunswick, and Ontario give no support whatsoever to private schools.¹ The refusal of Prince Edward Island to

provide support is just about as absolute, with one exception. The one and only private school in Prince Edward Island, a Seventh Day Adventist School, is allowed free textbooks for its pupils. Similarly, private schools in Nova Scotia may obtain free textbooks and related instructional materials from the provincial School Book Bureau under the same conditions as these materials are made available to public schools. The remaining five provinces, however, extend more substantial assistance to private schools. Provincial policies differ with respect to the extent and form of such assistance.

Manitoba (I. Maurstad, personal communication, 1984) provides financial support in several ways for private schools that offer an education equal to that in public schools and that are staffed by teachers with valid teaching certificates. Effective 1 January 1983, the following were made available: direct financial aid in the amount of \$480 per full-time equivalent pupil; print and non-print materials at \$30 per pupil through the Manitoba Textbook Bureau; \$480 per pupil who used shared services such as libraries, shops, and the like in the public schools; and transportation support at \$400 per transported pupil plus 62.5 cents per loaded kilometre for distances per bus route in excess of 80 loaded kilometres per day.

Saskatchewan (K. C. Kirby, personal communication, 1984; Phillipson, 1978) regards all schools not qualifying for full provincial funding as private schools. Many offer programs on a non-denominational basis although most are operated by religious groups. The province provides no financial support to private primary and elementary schools, but most high schools (Grades 9–12) qualify for some departmental grant. This grant, somewhat less than that received by public and separate school systems (around 80%), is paid directly on the basis of students in attendance. Capital grants of 10% of approved costs are also available to these schools. Also, special schools for handicapped or emotionally disturbed children operate from monies paid by the school board which sends those children to them. Such school boards are, in turn, given corresponding grants by the government.

Alberta has one of the most generous schemes for the support of private schools. Alberta's *School Grants Regulations* (1983) define a Category 1 private school under the *Private Schools Regulations* as one which offers instruction at either the elementary, junior high, or senior high level; provides such instruction using at least one full-time teacher (who holds a valid certificate of qualification issued under the Department of Education Act) for every 25 full-time pupils; has been in operation for a minimum of one year from date of approval as Category 1 private school; and is not operated for profit (Alberta Department of

Education, 1983, pp. 14–15. In 1983, the province had the following rates per pupil for various grant types (G. Baron, personal communication, 1984):

Basic Instruction

Early Childhood Services	\$1,006 per pupil
Elementary (Grades 1–6)	\$1,257 per pupil
Junior High (Grades 7–9)	\$1,318 per pupil
Senior High (Grades 10–12)	\$1,509 per pupil

Early Childhood Transportation \$2 per day

Reading Materials (Elementary) \$3.40 per pupil

Extension Programs (Senior High)

Day Program

Students receiving less than 25 hours of instruction/credit	\$40.30 per credit
Students receiving at least 25 hours of instruction/credit	\$60.40 per credit

Evening Program \$40.30 per credit

Summer Program \$40.30 per credit

British Columbia (E. L. Bullen, personal communication, 1984) assists private (independent) schools as a result of the passage of its Independent Schools Support Act (1977). Consolidated in 1981, the act provides for instructional grants based on the number of “qualifying” pupils, the classification of the school, and a percentage (higher or lower depending on the classification of the school) of the average operating cost per pupil in the public school system. Classification 1 (lower percentage) requires only that the school program not promote racial or ethnic superiority, religious intolerance or persecution, or social change through violent action; that facilities of the school be adequate; and that the school be in continuous existence for three years. Classification 2 (higher percentage) stipulates, in addition to Classification 1 requirements, that a school meet ministry of education requirements for minimum instructional time, a pupil testing program, external evaluation, learning assessment program, and certification of teachers. As of the 1981–82 school year, the grant for Classification 1 was 9% and for Classification 2, 30%.

Quebec has, over the years, had the distinction of spending the most on private education and of having the largest number of private school pupils (Statistics Canada, 1983). Its governance of private education is

carried out by the minister of education, but a Private Education Advisory Commission (of nine members, at least six of whom are appointed after consultation with groups most representative of the directors, teachers, and parents of private school pupils) plays a variety of advisory roles under the Private Education Act. The ministry provides a grant equal to 80% of the average cost per pupil to a school declared to be of "public interest." However, a school may be recognized for a grant, subject to regulations, even though it has not been so declared. In this case, the grant basis is reduced to 60%. Private schools operating under permit and providing self-improvement education do not receive grant money (Phillipson, 1978).

Table 1 will shed further comparative light on the extent of provincial assistance to private schools.²

TREATING PRIVATE SCHOOLS FAIRLY: WHOSE BURDEN OF PROOF?

The facts, whether in Canada or in the United States, are compelling. It is clear that numerous private schools, and thus parents sending their children to such schools, are treated differentially. Not only are these parents treated as if they deserve less, but present arrangements penalize them through double educational expenditures.

The irony in this is the largely unquestioned assumption of public and governmental authorities that nothing is wrong with this state of affairs. Private schools and their supporting parents who claim equal financial support are mainly perceived as asking for special favours from the government, as if they are not entitled to financial support in education. Consequently, the burden of proof frequently falls on their shoulders to make a case for equal treatment from the government or the body politic.

Governments' complete or near-complete monopoly of schooling, established and taken for granted for several decades now, explains much current prejudice against private schools and their supporting parents. What is generally not perceived is the recent exposition of the fact that behind government monopolies of schooling are histories of government prejudice against private schools and, consequently, histories of questionable curtailments of the rights of private school supporters. Intrusive government action exists in Canada despite the comparatively enlightened policies about private schooling in some provinces. The case of the Catholic Church participation in education illustrates this point.

Pius XI might not have had Canada in mind when he stated in 1929 that the school as an institution "owes its existence to the initiative of the family and of the Church, long before it was undertaken by the State" (1939, p. 59). Though this claim may be questioned as a universal statement, it is

difficult to debate in Canadian education, where the formative role of various religious denominations is undisputed (Phillips, 1957; Sissons, 1959; Rowe, 1964). Although the Catholic Church received many glowing commendations for initiatives in establishing and maintaining schools in the country (Phillips, 1957, pp. 303–304), its inability to provide for isolated and dissentient populations eventually led to state initiatives, some as early as the first half of the nineteenth century (Wilson, Stamp, & Audet, 1970). A general pattern of state action, as Lawr and Gidney saw it, was exhibited in several provinces: Central boards or ministries of education were established to control to some degree the curricula, textbooks, and teacher certification; chief executive officers were appointed to administer and enforce school laws with the help of inspectorates; the government grant to public education was enlarged; and traditional voluntary methods of school financing were superseded by property taxation (Lawr & Gidney, 1973, p. 51). By the mid-nineteenth century, the progress of public education in the country was being hailed as a cardinal achievement. This achievement came about, however, at a great cost – particularly, a serious injustice to the Catholic Church and Catholic parents. Certain other religious groups would suffer similarly at later times.

In the case of New Brunswick, the Catholic Church opposed the Common Schools Act (1871) which required all schools receiving government aid to be non-sectarian and free. The case reached the Canadian Supreme Court which in *Ex parte Renaud* (1873) admitted that, before Confederation and the passage of the act, provincial sectarian schools were recognized by the legislature and aided from public revenues. Yet the court declared that on a strict construction of a right – one which must be conferred and sanctioned by law – these schools did not have legal rights insofar as they were not specified in the Parish Schools Act of 1858, the school law in operation prior to Confederation (*Ex parte Renaud*, 1873, pp. 277–279, 291–293). Thus, the court declared that the New Brunswick legislature acted within its area of competence in passing the act. On a technical definition of rights, the court allowed the government to demolish a system that stood on its way.

What happened in Manitoba is notable too. The Manitoba Act (1870), which brought the province into Confederation, sought *explicitly* to protect the rights of denominational schools which any class of persons had *not only by law but also by practice*. However, 20 years later, the provincial legislature passed the Public Schools Act (1890) which established a system of non-sectarian schools and taxed all rate payers, including Catholics and Protestants. The Catholics appealed to the Canadian Supreme Court which found in their favour. However, the

TABLE 1
Allocation of Resources by province and year

<i>Years and Categories</i>	<i>Quebec</i>			<i>Manitoba</i>		
	<i>Prov. Funding</i>	<i>Enrolment</i>	<i>\$ Per Child</i>	<i>Prov. Funding</i>	<i>Enrolment</i>	<i>\$ Per Child</i>
1979–1980						
Private Schools:						
Religious/Denominational						
Secular						
Total	\$ 129,243,000	72,849				
Public Schools			\$ 1,978			
Private Schools:			\$ 1,774			
Religious/Denominational						
Secular						
1980–1981						
Private Schools:						
Religious/Denominational				\$ 2,405,742	6,514.5	
Secular				\$ 361,673	975	
Total	\$ 143,789,000	72,447		\$ 2,767,415	7,489.5	
Public Schools			\$ 2,627			\$ 2,235
Private Schools:			\$ 1,985			
Religious/Denominational						\$ 369
Secular						\$ 371
1981–1982						
Private Schools:						
Religious/Denominational				\$ 2,683,864	6,759.5	
Secular				\$ 408,254	1,064	
Total	\$ 150,681,000	72,781		\$ 3,092,118	7,823.5	
Public Schools			\$ 3,159			\$ 2,607
Private Schools:			\$ 2,070			
Religious/Denominational						\$ 397
Secular						\$ 384
1982–1983						
Private Schools:						
Religious/Denominational				\$ 3,008,564	6,761	
Secular				\$ 428,736	1,044.5	
Total	\$ 163,323,000	72,550		\$ 3,437,300	7,805.5	
Public Schools			\$ 3,110			\$ 2,874
Private Schools:			\$ 2,251			
Religious/Denominational						\$ 445
Secular						\$ 410
1983–1984						
Private Schools:						
Religious/Denominational						
Secular						
Total	\$ 168,910,000	75,303				
Public Schools			\$ 3,192			
Private Schools:			\$ 2,243			
Religious/Denominational						
Secular						

TABLE 1 (Concluded)
Allocation of Resources by province and year

[illegible]

government brought the case to the Privy Council which declared the act valid. Lord MacNaghten's judgment did not hide where his sympathies lay when he wrote in *City of Winnipeg v. Barrett* (1892):

But then it is said that it is impossible for Roman Catholics ... to send their children to public schools ... and that therefore Roman Catholics ... who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics ... find themselves unable to partake of advantages which the law offers to all alike. (Whyte & Lederman, 1975, p. 773)

Ironically, the Privy Council executed an amazing turnabout not too long after this decision. When the Catholic minority appealed for relief to the Governor-General in Council, the federal government sought an opinion from the Supreme Court which answered negatively in conformity with the *Barrett* decision. The minority then appealed to the Privy Council which ruled that the Public Schools Act prejudiced the rights of the Catholics and opened the way for remedial parliamentary legislation (*Brophy and the Attorney-General of Manitoba*, 1895). Political developments precluded any remediation however (Clark, 1968). In any case, the ideology behind public school movement all across the country had become too strong for provincial and federal governments to consider seriously the entitlements of Catholic schools and their supporting parents.³

The genesis of the differential treatment of private – particularly religious – schools in Canada has its counterparts in England (Beales, 1963; West, 1970) and in the United States (Buetow, 1970). History cannot be undone however. The public school ideology, with its emphasis on social cohesion, common values, and economic efficiency, remains deeply imbedded in the public mind and in institutional requirements. It is necessary to repair the harm brought by the single-minded drive to establish monolithic school systems.

Attempts at reparation have, unfortunately, begun badly. With the public school ideology solidly entrenched, private school advocates are frequently led to argue the merits of private education as an alternative to public education and therefore deserving government support. If, however, the human right to fair treatment is indeed an established principle in our society, this line of argument begins from the wrong end. If there is a presumption in favour of treating everybody fairly or in a non-discriminating way, the burden of proof falls on an institution or

person practising differential treatment of others to prove that the practice can be justified. Unless the institution succeeds in this demonstration, it must establish a situation of fair, non-discriminating treatment.

TOWARDS FIDELITY TO A SOCIETAL PRINCIPLE

Justification of a situation of differential treatment calls for the establishment of criteria by which it can be shown that the persons and institutions discriminated against differ enough to warrant different treatment. Obviously, the nature of these criteria remains a contentious problem which may never be resolved in ethical and political theory. Several competing criteria have been advanced: to each according to *merits*, to each according to *works*, to each according to *needs*, to each according to *rank*, to each according to *legal entitlement*, and to each *the same thing*" (Perelman, 1963, pp. 16–29).

Extensive discussion of these criteria is not possible in this paper. Certain observations leading to some reasonable conclusions may be made nonetheless. The final criterion, giving each the same, is perhaps the only truly egalitarian one that does not admit of proportionality. This is what makes it objectionable. For, to take a simple but decisive instance, must a critically ill patient wait at the counter of a medical clinic like everybody else? This criterion may be made more acceptable if modified to read, "to each member of the same essential category, the same thing." So framed, it becomes indistinguishable from our idea of formal justice or fair treatment and is thus no longer a criterion candidate. The fifth criterion, legal entitlement, can be set aside insofar as it is part of the unfair situation to which objection is made. Legal decisions and the legislation depriving private schools of government support are themselves being challenged as engendering situations which violate the principle of fair treatment. This criterion is therefore disqualified. The same may be said of the fourth criterion, rank. Clearly, the public school systems are ranked by law and official policy as superior or prior to private schools. This ranking is being questioned. For it to be justifiable, it must survive evaluation based on other criteria.

Merit, works, and needs remain as the three prominent competing criteria by which public and private schools may be assessed with respect to their treatment in allocating limited financial resources. For purposes of this paper, however, they need not be viewed as competing criteria. To show the strength of the case for government support of private schooling, we may invite the use of all three criteria by those giving preferential treatment to public schools on one hand and inferior treatment to private schools on the other.⁴

The weight of evidence now accumulating does not appear to justify unquestioning, exclusivistic allegiance to the public school ideology. The long-held view that only public schools will bring about individual and social good has become objectionable in light of numerous studies not only by humanistic educational theorists but also by educational researchers and scholars like Kraushaar (1972), Erickson (1969), Coons and Sugarman (1978), Erickson, MacDonald, and Manley-Casimir (1979), Coleman, Hoffer and Kilgore (1982) and Arons (1983) and by the Institute for Contemporary Studies (1977). These studies reveal not only that many criticisms of private schools are ungrounded but also that many virtues extolled in public schools may be illusory. On balance, it appears that the long-accepted policies on the two forms of schooling should be adjusted if not reversed.

Naturally, public suspicions of private schooling will not easily melt away. The contemporary climate of opinion, however, seems to be creating a social reality which conforms more closely to social ideals. Recent developments in Canada leading to funding of private schools in British Columbia, Alberta, and Manitoba certainly reflect a gradual change in public sentiment. Legislation granting parents tax credits for private school tuition and court declarations affirming the validity of one example of such legislation are indeed positive American indicators.

Human rights ideals – specifically the principle of fair treatment – have long been distilled in the United States. Early in its history, the American Supreme Court elaborated on the 14th Amendment to the Constitution by saying that it “requires that all persons ... shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” The court also stated, through Justice Brandeis, that the doctrine of equality implies that differential classification “must rest upon a difference which is real ... so that all actually situated similarly will be treated alike.” Later, the court noted that a differential classification “must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike” (Blum, 1958, pp. 112, 117).

In Canada, the idea of a human right to fair treatment has been part of the ideals and the law of the nation. It is expressed in the 1960 Canadian *Bill of Rights* which, among other things, reads (cited in Trudeau, 1968, pp. 83–84):

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely ... (b) the right of the individual to equality before law and the protection of the law

It appears also among the ideal principles of law enumerated in the 1982 *Charter of Rights and Freedoms*. As Trudeau observed, most of the principles in this document are not totally new or different. "Canadians," he wrote, "have tended to take most of them for granted over the years" (Ministry of Justice, 1982, p. ii). One difference, as legal commentators have noted, is that the equality rights provision (s.15) in the *Charter* prohibits even more grounds for discrimination and provides even greater protection than its counterpart in the 1960 *Bill of Rights*.⁵ Thus, sex, age, and physical or mental disability as grounds for discrimination have been additionally proscribed; significantly, there appear four equality rights phrases instead of two in the 1960 *Bill*. This has led Tarnopolsky to conclude that "The inclusion in Section 15(1) of four equality clauses must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well" (1983, p. 255).

Reference to official legal documents, whether national or international in scope, is the first significant step to justifying human rights. Particularly in a democratic society where laws are adopted through an open, public process, the adoption of human rights principles as part of the law demonstrates the universal acceptability of such principles. The legal adoption of these principles therefore becomes *prima facie* evidence that society sees them as legitimately expressing what it finds desirable or valuable in human life. This adoption, in other words, demonstrates the acceptance of a conception of the good life for human beings.

The next step, however, goes to the very foundations of the law. For the question arises: what purpose does the law serve? At the risk of simplifying a complex issue, we may note that, among other things, the law serves to institutionalize, stabilize, and enforce a social order suitable for human beings. Here, finally, we are on to the bedrock of the justification of human rights. Eventually, we must see that to justify any social order at all, it must be founded on an acceptable notion of human nature. Despite protestations against such a thing as human nature, common intuition says we perhaps know better. Human nature is expressible in terms of prerequisites for survival and of capacities available for determining the kind of life suitable for individuals and society at large.

In a very real sense, the idea of human rights is also an *ideal*. In espousing human rights, we are announcing the main outlines of the human life we value and wish to pursue. Aware of our possibilities as human beings and committed to the worth of such possibilities, we envision a framework of interrelationships among individuals and between individuals and their government. Human rights statements and

documents, forward-looking as they are, are idealized frameworks delineating the boundaries of human interrelationships required to insure that human life will flourish in a truly humane society. Human rights are solidly founded on incontrovertible facts about human nature. But they point to the future – to what we, individually and socially, may not yet be but ought ideally to become.

NOTES

¹ This conclusion reflects information provided in letters from education officials contacted in these provinces. Hunter, Education Officer for Private Schools in Ontario, summed up the situation in these provinces: "There has never been funding for private schools nor is there accommodation in the form of free textbooks or the provision of transportation as may be found in some areas" (R. J. Hunter, personal communication, 1984).

² This table includes raw figures obtained from the responses of educational authorities cited earlier.

The author would like to acknowledge the assistance given by department and ministry of education officials who provided information and responded to a questionnaire related to this study: J. Andrews, Statistician, School Services Division (Newfoundland and Labrador); J. Babin, Director of Economic and Demographic Studies (Quebec); G. Baron, Manager of Grants Administration (Alberta); E. L. Bullen, Inspector of Independent Schools (British Columbia); R. J. Hunter, Education Officer, Private Schools (Ontario); K. C. Kirby, Director, Educational Administration (Saskatchewan); I. Maurstad, Assistant Director, Finance (Manitoba); W. H. Vincent, Director, Grants and Finance, Public Education (Nova Scotia); and R. Wilson, Director, Finance and Administration (New Brunswick). Information and responses from Mr. Y. Dupuis, Chief, Education Finance (Statistics Canada) are also appreciated.

³ For a good account of the tempestuous church-state relationships in Alberta and Saskatchewan during the last quarter of the 1800s and early in the 1900s, see Lupul (1974).

⁴ This rather strong statement needs qualification in the case of élitist private schools which cater to the rich and exist partly to promote social advancement or inbreeding. Clearly, one may question whether they need, or deserve, public support at all.

Obviously, the case of such schools is complicated and cannot be examined here. There may well be several ways of dealing with this case without damaging the strength of the human rights perspective. One interesting possibility may be to suggest that the per capita grant to provide for children in such schools should not exceed what is granted to children in public schools, that private school parents should shoulder whatever expenditure exceeds the grant, and that the grant will be given only where these parents are taxed adequately and proportionately for them to contribute their fair share towards public good. Assuming that parents have a right (if not an obligation) to give their children the benefits of their efforts, there may be an arguable case for such a grant. In any case, this paper assumes that the same treatment of private school parents (by giving them grants comparable to public school funding) may be overridden when stronger considerations obtain. However, the overriding force of these considerations must be demonstrated, not assumed.

⁵ The provision on equality which private, particularly religious school parents, might appeal to, is as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without

discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Considering that the *Charter* guarantees freedom of conscience and religion in s.2 and that, in Canada, freedom of religion has been interpreted by the courts to include transmission of beliefs to the young, an appeal to s.15 for funding of religious schools appears quite respectable.

REFERENCES

- Alberta Department of Education. (1983, June 30). *The school grants regulation* (Alberta Education Grants Order, 1983). Edmonton: Department of Education.
- Arons, S. (1983). *Compelling belief*. New York: McGraw-Hill Book Co.
- Beales, A. C. F. (1963). *Education under penalty*. London: The Athlone Press.
- Berlin, I. (1955–1956). Equality. *Proceedings of the Aristotelian Society*, New Series, 56.
- Blum, V. (1958). *Freedom of choice in education*. New York: Macmillan.
- Brophy and the Attorney-General of Manitoba*. (1895). A. C. 202.
- Buetow, H. A. (1970). *Of singular benefit: The story of Catholic education in the United States*. New York: Macmillan.
- City of Winnipeg v. Barrett*. (1892). A. C. 445
- Clark, L. (Ed.). (1968). *The Manitoba school question: Majority rule or minority rights?* Toronto: Copp Clark.
- Coleman, J., Hoffer, T., & Kilgore, S. (1982). *High school achievement: Public, Catholic and private schools compared*. New York: Basic Books.
- Coons, J. E., & Sugarman, S. D. (1978). *Education by choice: The case for family control*. Berkeley, CA: University of California Press.
- Committee for Public Education and Religious Liberty v. Regan*. (1980). 48 U. S. L. W. 4168.
- Erickson, D. (Ed.). (1969). *Public controls for nonpublic schools*. Chicago: University of Chicago Press.
- Erickson, D., MacDonald, L., & Manley-Casimir, M. (1979). *Characteristics and relationships in public and independent schools*. San Francisco: Center for Research on Private Education, University of San Francisco.
- Ex parte Renaud*. (1873). 14 N.B.R. 273.
- Golding, M. P. (1968, October). Towards a theory of human rights. *Monist*, 52(4), 521–549.
- Hook, S. (1975). *Revolution, reform and social justice*. New York: New York University Press.
- Institute for Contemporary Studies. (1977). *Parents, teachers and children*. San Francisco: Institute for Contemporary Studies.
- Kraushaar, O. F. (1972). *American nonpublic schools: Patterns of diversity*. Baltimore, MD: Johns Hopkins University Press.
- Lakoff, S. (1964). *Equality in political philosophy*. Boston: Beacon Press.
- Lawr, D., & Gidney, R. (1973). *Educating Canadians: A documentary history of public education*. Toronto: Van Nostrand Reinhold Limited.
- Lupul, M. (1974). *The Roman Catholic Church and the Northwest school question: A study of church-state relations in Western Canada, 1875–1905*. Toronto: University of Toronto Press.

- Machan, R. (1980, April). Some recent work in human rights theory. *American Philosophical Quarterly*, 17(2), 103-115.
- Martin, R., & Nickel, J. (1980, July). Recent work on the concept of rights. *American Philosophical Quarterly*, 17(3), 165-180.
- Ministry of Justice (Canada). (1982). *The Charter of Rights and Freedoms: A guide for Canadians*. Ottawa: Minister of Supply and Services.
- Perelman, Ch. (1963). *The idea of justice and problem of argument*. London: Routledge and Kegan Paul.
- Phillips, C. E. (1957). *The development of education in Canada*. Toronto: W. J. Gage & Co.
- Phillipson, J. (1978, September 27). *Other education in Canada*. Paper presented at the meeting of the Canadian Education Association, Quebec.
- Pius XI. (1939). Christian Education of Youth. In *Seven Great Encyclicals* (pp. 37-60). Glen Rock, NJ: Paulist Press.
- Rowe, F. (1964). *The development of education in Newfoundland*. Toronto: The Ryerson Press.
- Sissons, C. B. (1959). *Church and state in Canadian education*. Toronto: The Ryerson Press.
- Statistics Canada. (1983). *Advance statistics on education*. Ottawa: Minister of Supply and Services.
- Tarnopolsky, W. S. (1983). The equality rights in the Canadian *Charter of Rights and Freedoms*. *The Canadian Bar Review*, 61(1), 242-264.
- Tiny Roman Catholic Separate School Trustees v. The King*. (1928). A. C. 363.
- Trudeau, P. E. (1968). *A Canadian charter of human rights*. Ottawa: Information Canada.
- West, E. G. (1970). *Education and the state*. London: The Institute of Economic Affairs.
- Whyte, J., & Lederman, W. (1975). *Canadian constitutional law*. Toronto: Butterworths.
- Wilson, J. D., & Lazerson, M. (1982). Historical and constitutional perspectives on family choice in schooling: The Canadian case. In M. E. Manley-Casimir, (Ed.), *Family choice in schooling* (pp. 1-21). Lexington, MA: D. C. Heath & Co.
- Wilson, J. D., Stamp, R., & Audet, L. P. (Eds.). (1970). *Canadian education: A history*. Scarborough, ON: Prentice-Hall.
- Wolman v. Walter*. (1977). 433 U.S. 229.

Die unterschiedliche Behandlung privater Schulen und ihrer Anhänger besteht in Kanada weiterhin. Der Grad der Benachteiligung ist von Provinz zu Provinz verschieden. Westlich von Ontario ist die Behandlung jedoch großzügiger als anderswo. Die Benachteiligung läuft parallel mit der vorherrschenden Ansicht, daß Eltern, die ihre Kinder in private Schulen schicken oder schicken wollen, keine staatliche Unterstützung verdienen. Die Notwendigkeit der öffentlichen Schulerziehung wird für so zwingend gehalten, daß man nichts falsch daran findet, Eltern finanziell oder anderweitig zu benachteiligen, wenn sie private Schulen für ihre Kinder vorziehen.

Durch eine Untersuchung des Anspruchs auf Menschenrechte können jedoch verständnisvollere Ansichten über die Finanzierung privater Schulen herbeigeführt werden. Das grundsätzliche Menschenrecht der Gleichheit und Gerechtigkeit fordert, daß alle fair und ohne Diskriminierung behandelt werden und daß Personen oder Körperschaften, die unterschiedliche Behandlung ausüben, verpflichtet sind, dafür relevante, zwingende Gründe anzugeben. Das führt zu dem Schluß, daß die Anerkennung der fundamentalen Menschenrechte in Kanada den Staat prima facie dazu zwingt, private Schulen ebenso zu unterstützen wie öffentliche Schulen. Das soll keineswegs heißen, der Staat könne sich nicht

über das Recht auf gleiche Unterstützung hinwegsetzen. Es heißt aber, daß staatliche Maßnahmen, die auf diskriminierenden Vorurteilen beruhen, nunmehr abzuschaffen sind, sofern keine zwingenden Gründe vorliegen.

En Canadá, las escuelas privadas y sus partidarios aún sufren de tratamiento diferente. Su desventaja varía de provincia en provincia pero, en general, se les trata mejor en la región al oeste de Ontario que en las otras áreas del país. Se considera igualmente que los padres que están enviando o desean enviar a sus hijos a escuelas privadas no tienen derecho a ayuda gubernamental. Se percibe al sistema de educación pública como obligatoria, y en nada parece injusto penar a los padres, ya sea financieramente o de otra forma, por elegir escuelas privadas para sus hijos.

Al examinar la cuestión desde el punto de vista de los derechos humanos, se debe tener mucha más simpatía por la causa del respaldo financiero de las escuelas privadas. Los principios de igualdad y de justicia, que constituyen derechos fundamentales, exigen que todos sean tratados de manera justa y no discriminatoria, y que toda institución o persona que no satisfaga esta norma deba justificar sus actos. Esto nos lleva a la conclusión de que la adopción de los principios de derechos humanos en Canadá impone al gobierno la legítima obligación de ayudar a las escuelas privadas a un nivel no menor del de sus contrapartes públicas. Esto no quiere decir que el derecho a igual respaldo financiero no pueda ser anulado. Implica, sin embargo, que la presunción discriminatoria que subyace las políticas gubernamentales en lo que atañe el respaldo financiero de las escuelas privadas puede ahora ser invertida, a menos de que se demuestren razones apremiantes.

Romulo Magsino is Professor of Education at Memorial University of Newfoundland, St. John's, Newfoundland A1B 3X8. His recent publications focus on the impact of the law and human rights principles on Canadian education.