# 8 A view from education and employment law

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## Introduction

Employment law and education law have been developing side by side in the UK and elsewhere for a number of decades, often without due recognition of the courts' tendency to 'borrow' doctrines from one realm and transplant them to the other. Indeed, notwithstanding the clear differences between two of the Beveridge giant-slayers (education and employment, which address ignorance and idleness, respectively), the similarities are striking, as a matter of substance as well as law. First, while education is traditionally thought of as addressing children who are developing and require protection, employment policy, across the EU and in Member States domestically, has embraced the concept of lifelong learning, thus suggesting that education continues to take place well into adulthood. The mirror image of this insight is that education has gradually, but clearly, moved towards the experiential, 'learning through doing', and an awareness of the need not only to educate *per se*, but to prepare children for the world of work. In addition, schools and workplaces are both institutions in which children and adults, respectively, spend a substantial portion of their time and, for this reason, have a significant influence on people's wellbeing and identity. Despite clear contextual differences, both education and employment involve significant inequalities of power, which are expressed both in the ability to determine the terms of engagement in the respective activity, and in the extent of freedom and autonomy people can demonstrate in numerous micro-decisions within these contexts.

Second, the similarities in practice give rise to legal parallels. These run from the start of the relationship – as manifested in cases involving the acceptance and rejection of students and employees on the basis of protected characteristics or, more recently, tests; during the relationship, where they may involve tensions that arise due to a student's or an employee's religious beliefs, the enforcement of dress codes, privacy, surveillance, working from home rather than from an office, and more general issues of discipline and control; and,

finally, at the end of the relationship where they involve cases of exclusion and dismissal that rely on similar, albeit not identical, principles and interests.

And so, while there are also important differences between the two realms (most obviously, with respect to the age of the individuals involved), the similarities between them offer a promising starting point for the development of a research agenda that relates to both realms in a post-Covid world, but may transcend beyond, to other spheres of social welfare.

We identify five central themes for such research, and discuss them with references to central examples that highlight their relevance and importance. The themes are:

1. Discipline and Power or Democracy and Partnership?
2. The Blurring of Boundaries between the Public and the Private.
3. Conditionality.
4. Access to Justice.
5. Outsourcing and the technological revolution.

## Discipline and power or democracy and partnership?

Otto Kahn-Freund (1972: 8) famously described the relationship between an employer and a worker as 'typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination'. Almost 50 years later, Hugh Collins (2018) asked us to imagine a government which announces to its subjects that they must obey all instructions to the letter, always praise it, never criticise it; treat senior members of the government with deference and uncritical obedience; and that, to ensure compliance, the government may use every means of oversight and surveillance and monitor behaviour in public spaces and at home. Then he suggested substituting the word 'government' for the word 'employer' in this Orwellian portrayal, and concluded that it describes, fairly accurately, the modern employment relationship. Elizabeth Anderson (2017) referred to this as 'Private Government', and added the following subtitle to her book on this subject 'How employers rule our lives (and why we don't talk about it)'. We find, then, that while the traditional articulation of the employment relationship viewed managerial power and, in a manner that indeed chimes with public law discourse, managerial prerogatives as integral features of the modern employment relationship, contemporary critiques question our acquiescence to this state of affairs and encourages us to 'talk about it'.

In doing so, this account tracks what has taken place within the sphere of education. The view that education demands hierarchy and discipline stems from a rationale that is not applicable to other realms of social welfare, including employment: the fact that schools, alongside parents, play a role in the moral upbringing of children. It is said, therefore, that schools are justified not only in penalising infringements to school rules, but also in deploying the expressive power of punishment to enforce moral norms (Warnick, 2022). The fact that schools stand *in loco parentis* (in the place of parents), was, for example, referred to repeatedly in a recent Supreme Court case (*Mahanoy*, 2021) which is considered below.

It is, we argue, fair to say that there is a new, and reinvigorated, interest in the place of power, on the one hand, and the role of democratic ideals, on the other, in both those realms. To an extent, the tension between the two has always been there, but a heightened appreciation of the (human) rights agenda has brought this tension to the fore, and is likely to be even more pronounced in the future. The theoretical question, which is brought about so clearly in Collins' quote and by Anderson's book, is whether democratic ideals which are held in such high regard on a daily basis, have any place in the structures where children (schools) and adults (workplaces) spend most of their waking hours,

But if power and discipline are understood in a relatively straightforward manner, when one turns to charting democratic requirements within the school and the workplace, one may identify, in line with other chapters in this book, two subjects for inquiry – the procedural and the substantive. The *procedural* aspect of democracy refers to the decision-making process within particular realms, whereas the *substantive* aspect of democracy concerns values that are viewed as integral to democratic structures, such as freedom of speech, privacy and the protection of human rights and (some version of) equality.

Notwithstanding the clear, and well worn, distinction between the two aspects of democracy, it is often overlooked. Thus, Collins and Anderson, for example, note the (procedurally) almost-absolute power of employers to dictate instructions that must be obeyed, as well as substantive issues such as restrictions of speech and privacy. Indeed, as Lon Fuller (1964) and John Rawls (1999) have shown, in different contexts, how the two – the procedural and the substantive – are often related, as legitimate procedures are far more likely to lead to 'good' decisions. However, their theoretical foundations are very different, and thus are worthy of further inquiry. Moreover, both potential areas of research are likely to have profound effects across a range of social welfare concerns, in different ways.

First, with respect to the procedural aspect of democracy, the maxim *nihil de nobis, sine nobis* ('nothing about us, without us') has a long history as a battle-cry for full and direct representation and participation. And yet, its realisation in the world of work has not only been incomplete, but disappointingly regressive. Following a short burst of enthusiasm for work councils, trade union participation, worker representation, student councils and democratic schools, the 1980s and 1990s saw a period of decline in trade union membership and power alongside a feeling of disenchantment with (and perhaps fear of) participation. The post-Covid world may see the pendulum swinging once more. As one cannot cross the same river twice, the articulation of worker (McGaughy, 2019) and trade union (Bogg and Novitz, 2014) power and representation is, and should be, investigated and articulated in different ways. Participatory practices within schools should also be restructured to better align contemporary norms concerning childhood, parenthood, and learning and the various roles of each participant in educational communities.

Moreover, there are currently calls, following fantastic successes 'on the ground', to enhance worker voice in areas that were traditionally marginalised, such as agriculture (Dias-Abey, 2018) and domestic work (Albin and Mantouvalou, 2015) as well as at the 'new frontiers' of the gig economy (Bertolini and Dukes, 2021). Doing so could potentially galvanise not only suggestions for student representation in educational decision making, but also for tenants' associations, patients' representation, council and government responsibilities in areas of planning and the environment, and more.

Insofar as 'substantive' ideas of democracy are concerned, we should ask whether, and also perhaps to what extent, human rights apply to realms such as the workplace and the school. Thus, for example, insofar as free speech is concerned, the US Supreme Court, in *Tinker*,[1] declared that students do not 'shed their constitutional rights to freedom of speech or expression' even 'at the school house gate'. Over 50 years later, the US Supreme Court had the opportunity, in *Mahanoy*,[2] to revisit, reaffirm and strengthen *Tinker*. This case concerned a high school cheerleader who wasn't accepted by the varsity (senior) cheerleader squad or by the softball squad. While visiting a convenience store with a friend, she posted on Snapchat 'Fuck school, fuck softball, fuck cheer, fuck everything'. A few of her friends took screenshots of the posts, and those made their way to the school, and to the coach of the cheerleading squad. Following this, the student was suspended from the cheerleading squad for the next year. She then filed a lawsuit for the violation of her right to free speech, protected under the First Amendment of the US Constitution. Writing for the Supreme Court, Justice Breyer contributed a phrase to sit alongside Tinker's 'school-house gate' when he explained that it is not only the case that

schools should not punish students for unpopular expression, but they also have an interest in protecting it. 'America's public schools', he explained, 'are the nurseries of democracy'. The free exchange of ideas, he continued:

> facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the people's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it'.

To what extent, however, does this approach apply beyond freedom of speech in American schools? As we see immediately below, British courts have been far more restrictive in their willingness to embrace freedom of speech in the workplace, and rights such as privacy do not carry much weight either. In other words, the role of human rights beyond the state is still very much part of the new frontier. If any change is recognised, it is that the pandemic has lent additional urgency to this inquiry, for reasons that we explain below.

## Blurring of boundaries between work/school and 'life'

Once upon a time, the boundaries between work and home, and school and home, were relatively clearly demarcated in terms of place and time. Workers would clock in and clock out of the physical workplace, and the start and end of the school day were marked, at the school, by bells and whistles. Those practices have been securely in the past for some time, as a growing number of workers work from home for part of the week, and children take part in a growing number of activities (trips, expeditions, competitions, etc) through the school but outside school premises and the school day. Technology has had a clear and obvious effect as well, as emails and school/work apps and social media have meant that workplaces and schools can 'engage' with workers and students at all hours, and the latter may post content about the former at any time, from any place. And if those trends developed at a leisurely pace, the Covid-19 pandemic accelerated them exponentially. The 'prediction' that workers will not return to the office to the extent that they did pre-pandemic has become an obvious truism, with only its consequences to be determined (Barrero, Bloom and Davis, 2021). And with millions of children and students learning from home through live streaming, pre-recordings and online assessments during lockdowns, the world of education seems to have been pushed beyond the proverbial point of no return. Given that school/work takes place

outside the traditional boundries of time and place, the application of human rights protections in these contexts becomes especially salient.

As luck would have it, two cases – one from each field of law – were reported recently, both dealing, broadly speaking, with a similar set of facts: a student/worker voiced their opinion outside the school/workplace and was sanctioned for doing so. The education case – *Mahanoy* – was introduced above. But while we noted the clear line from *Tinker*, it is important here to highlight the distinction between the two cases: namely, at issue in the instant case, for the first time, was the school's interest and power to regulate student speech that takes place *beyond* the school-house gate.

The employment case – *Forstater v CGD Europe*[3] – concerned the 'gender critical' beliefs the claimant, which included remarks over social media to the effect that sex (unlike gender) is immutable, that 'trans women are male' and 'trans men are female'. When her consultancy contract was not renewed, she brought proceedings, claiming that her freedom of speech and belief were curtailed. After the Employment Tribunal dismissed her appeal,[4] the Employment Appeal Tribunal (EAT) upheld it, concluding (justifiably, we think) that the claimant's beliefs did fall in the range of beliefs worthy of protection. Surprisingly, however, the ET and EAT did not even mention the right to free speech. Against that background, it is superfluous to add that they did not mention the fact that the speech in question occurred outside the workplace, or the claimant's private life when posting on social media platforms (assuming that is not an oxymoronic idea).

Returning to *Mahanoy*, it is relevant to note for present purposes that the SC was clear that, while the school's power is *limited* when speech takes place outside the campus, it does not disappear. First, it listed a series of contexts in which the student is physically off campus, but is under the responsibility of the school, and thus should be treated as if she was on campus. These include travel to/from school, school trips, and speech taking place during remote learning, on school websites or computers, or as part of activities for obtaining credit. Second, even when 'truly' off campus, the school has a strong interest in regulating speech in cases such as serious or severe bullying, harassment targeting particular individuals, and in threats aimed at teachers or other pupils.

On campus, the SC explained, the school repeatedly and justifiably regulates speech. A teacher may require students to be completely silent, to answer a particular question, to present in front of the class, to stick to the topic, etc. The margins for 'disruption' in the classroom may be quite minimal. Off

campus, however, there are features that diminish the school's interest in regulating speech. Justice Breyer noted that:

> from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more sceptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.

A similar sentiment can be found in UK jurisprudence, in the employment context. In *Smith v Trafford Housing Trust*,[5] the High Court found in favour of a claimant who objected, on his Facebook page, to the British government's intention to lift the ban on same-sex marriage ceremonies in churches, by calling it 'an equality too far'. Briggs J found that the tone of the post was not offensive, let alone homophobic. And while some colleagues may find the post very objectionable, there was, crucially, a minimal link between the claimant's Facebook page and his place of employment. In a manner that strikes a tone that is similar to that of the main corpus of education law cases in the US (but is rare in employment law cases in the UK), Briggs J noted (at [66]):

> Of course, an employer may legitimately restrict or prohibit [the promotion of religious or political beliefs] at work, or in a work-related context, but it would be *prima facie* surprising to find that an employer had, by the incorporation of a code of conduct into the employee's contract, extended that prohibition to his personal or social life.

However, in keeping with the desire to assess such cases in a 'fact intensive context' (ibid., [68]), the court, even against this promising analysis, did not offer more principled guidance and criteria, of the kind noted above. Modern technology's power to connect everyone, synchronously or asynchronously, through reciprocal consent (as virtual 'friends') or through 'following' one another, means that managers and teachers can 'track' workers and students; and colleagues and peers can follow each others' whereabouts and utterings. But well beyond these spheres: for doctors and patients, landlords and tenants, claim officers and beneficiaries, the collapse of the private and the public, which was the aim of second and third generations feminists (e.g. Gavison, 1980), may lead to issues that have yet to be mapped, analysed and better understood.

## Conditionality, public health and 'No jab, no entry' policies

Although a number of commentators have been quick to criticise policies that make access to benefits or services conditional on an individual's behaviour, one can trace them to the early days of England's Poor Laws, in the seventeenth century (Paz-Fuchs, 2008). At the time, and for the next four centuries, support for the indigent has been conditional on willingness to accept (any) work, and refusal to do so could lead to severe sanctions. But while most policies have had a work orientation at their core, there was always an imaginative, almost endless, periphery into which they could expand, such as 'no benefits if you…': do not marry the father of your children; are the mother of truant children; do not vaccinate your children, and so on.

The latter – vaccination policies – has been catapulted from the periphery to the centre of public attention as a consequence of the pandemic, with a number of jurisdictions – local, regional and national – and numerous private and public organisations considering and implementing 'no jab, no access' policies, and in the workplace, the catchy 'no jab, no job'.

In the vast majority of cases, vaccine mandates are not 'mandatory' *per se*, in the sense of imposing fines or criminal sanctions for refusing vaccinations. Instead, these schemes are referred to as 'quasi-mandates' (Rough, 2021), part of the 'new conditionality', which connects 'two previously distinct policy domains. These policies are characterised by making eligibility for a service or benefit in one domain conditional on a circumstance or behaviour in a second domain' (Henman, 2011: 3). With respect to the conditions assessed here, they provide an interesting bridge between three arenas of social welfare: health, education and work. To complicate matters further, the latter two overlap at times, as in the case of requiring not only pupils, but also teachers, to get vaccinated as a condition of employment, partly because of their duty of care towards school children, some of whom may be medically at-risk (see, by analogy, Morris, 2021).

Notwithstanding the concern expressed by lawyers, activists, educationalists and professional bodies, a majority in most countries are so supportive of such policies that it has been concluded that the 'political limits to the growth of conditionality are fast disappearing' (Curchin, 2019: 792). Thus, it has become politically viable to condition access to services and benefits on vaccination, through schemes referred to as 'vaccine mandates' or 'vaccine passports' (Brownstein, 2021). In particular, the context of a global pandemic has led to

placing conditions on access, in this case – to work and employment – that would have been inconceivable a few years before. An indication to that effect, and to the above insight regarding the dissolving of political constraints, can be evidenced by the change of approach taken by the American Civil Liberties Union when compared to its position in, 2009, against the background of the H1N1 flu virus. In 2009, the ACLU stated that a mandatory vaccine programme for health workers was 'not warranted' (ACLU, 2009: 11) and that ordering people to choose between a vaccine and losing their job was 'coercive, invasive and unjustifiably intrudes upon their fundamental rights' (NYCLU, 2009). The ACLU stated, 12 years later, that it sees 'no civil liberties problem with requiring Covid-19 vaccines in most circumstances' (ACLU, 2021; Berman, 2021).

At the time of writing (December, 2021), vaccine 'mandates' constitute an exemplary case-study for conditionality in employment and education, with the UK initially announcing that vaccinations would be mandatory for all care home workers (DHSC, 2021) and, subsequently, from April, 2022, for the 1.45 million NHS workers (Campbell, 2021); while, in the US, New York City is now requiring all 300,000 municipal workers to get vaccinated or lose their jobs, and other American cities are following suit (Otterman, 2021).

We should note that whilst the breadth of such policies in the work realm is unprecedented, 'vaccine mandates' for children, i.e., denying public education to children who are not vaccinated, have been in place since the 1850s in the US (Massachusetts), and since 1889 in Europe (Italy), as part of the (successful) effort to eradicate smallpox (Malone and Hilman, 2007). Beyond state schools, Australia has used the benefit system to implement a 'no jab, no pay' policy, denying parents Family Tax benefits and Child Care benefits if they do not immunise their children (Curchin, 2019); and four Australian states have a 'no jab, no play' scheme, in which non-immunised children are excluded from nursery (Draeger, Bedford, and Elliman, 2019). And so, the debate over the legitimacy of 'vaccine passports' (in the current UK jargon) will probably rumble on across a range of different contexts, including travel, hospitality, housing and accommodation, services, and welfare benefits (Dwyer, 2019) in addition to employment and education. It is thus important to view it within the broader lens, namely that of conditionality, or the ability to demand particular behaviour as a new condition for accessing rights, and to develop a principled framework for deliberation as to the limits of legitimate and legal conditionality (Paz-Fuchs, 2008). Developing this framework requires

bringing together a number of strands of research, in terms of discipline and methodology. These will include the following:

1. A philosophical inquiry: When, and to what extent, is it right to state that what one cannot do directly (e.g., impose criminal sanctions for refusal to receive vaccination), one cannot do indirectly (condition access to benefits or services on vaccination status)?
2. A constitutional inquiry concerning rights: To what extent should the relevant rights involved (to education, work, housing, welfare, etc), their constitutional status and our accepted articulation and interpretation of the rights, affect our tolerance of conditionality on accessing them?
3. An empirical inquiry concerning effectiveness: Pragmatically, does conditionality work? For example, and in contrast to other countries, noted above, the British government has considered, and yet ultimately rejected, recurring pressures to condition school admissions on vaccination (Rough, 2021). The main reason given for this is that mandatory policies risk 'alienating parents unnecessarily', pushing them towards the sceptical, anti-vaccination camp, while 'evidence that mandatory vaccination has been effective in other countries is not conclusive, and no evidence exists in relation to the UK' (Draeger, Bedford, and Elliman, 2019).
4. A socio-legal inquiry concerning the formal and informal processes for decision-making: What are the limits on conditionality in theory, and who sets the conditions in practice? Allowing state officials, elected, unelected and at field level, to decide that a right that was previously 'universal' will, from now on, be 'conditional', may lead to significant abuse. Vaccines offer an example of conditioning education and work on health measures; but a earlier example involved conditions placed on accessing health care itself. In Oregon, the Health Services Commission, an unelected agency, devised a formula to govern the allocation of resources on a combination of cost-utility measurements and 'public attitudes and values' (Dixon, 1991). The implication being that, where relevant, 'lifestyle choices' such as poor diet and smoking may bar an individual from health care.
5. A political (science) inquiry concerning the relevant stakeholders: In the employment realm, it is imperative to create structures for taking account of workers' 'voice', individually and collectively, both in general (Bogg and Novitz, 2014) and, in particular, with respect to vaccination mandates (Bogg and Countouris, 2021). Thus, for example, the aforementioned mandate for New York city employees was completed following negotiation and agreement with the relevant unions (Otterman, 2021).
6. A legal, and perhaps law and culture, analysis of exemptions to rules: Which exemptions to conditionality – religious, conscientious, medical, etc – should be allowed and how should they be implemented? In the US,

the Supreme Court denied an application for emergency, injunctive relief submitted against a Maine regulation that required all healthcare workers to receive Covid-19 vaccinations if they wished to keep their jobs.[6] The majority in the Court did not engage with the substantive argument, which focused on the fact that the regulations contain medical, but not religious, exemptions.

7. A legal, and perhaps socio-legal, analysis of the 'privatisation' of mandates: To what extent is the identity of the condition-imposing body relevant? For example, the majority of employees work in the private sector, and some private employers (e.g., Pimlico Plumbers) have clarified their intention to move ahead with such restrictions for existing or perhaps only for new, workers, well before the government announced its approach (Espiner, 2021; BBC, 2021). Thus, a judicial challenge at this stage could target an individual employer. However, matters could be more complicated as governments enter the fray with a case in point being the aforementioned example of vaccine requirements for care home workers, who are employed predominantly by private companies and agencies (DHSC, 2021).

## Access to justice

For T.H. Marshall, access to justice was an integral part of the welfare state, and he therefore argued that access to justice should be guaranteed as part of the structure of civil, political, social and economic rights (Marshall, 1950). More recently, it has been recognised that 'rights are valueless if they cannot be realised … it is therefore essential that all … citizens have fair and equal access to justice' (Lord Neuberger, 2013, [26]–[28]). The Bach Commission Report (2017), which connected access to justice to another foundational principle, opened with the following, powerful statement:

> We live at a time when the rule of law is under attack. Too many powerful institutions pay lip service to the concept of access to justice without having sufficient regard for what it actually means. It is, after all, fairly simple: unless everybody can get some access to the legal system at the time in their lives when they need it, trust in our institutions and in the rule of law breaks down. When that happens, society breaks down.

The ambitious digitisation agenda for courts and tribunals is, at least in part, justified and motivated by the aim of 'administering justice more efficiently and effectively and improving access to justice' (House of Commons Committee of Public Accounts, 2019). And so, against the background of a growing interest from policy makers in facilitating and improving access to justice, academics and courts are now beginning to probe the contours of the

concept, with the starting point that it 'defies definition' (Genn, 2008: 15) and is 'inherently ambiguous'.[7]

The law relating to employment and education offers some interesting starting points for such an inquiry. First, in the now-celebrated decision in *Unison*,[8] the UK Supreme Court struck down the Fees Order which imposed employment tribunal fees of up to £1,200 (contingent on the type of claim) on the grounds that they 'effectively prevent[ed] access to justice, and [were] therefore unlawful'.[9] In his decision, Lord Reed relied on the 'common law right of access to justice',[10] which is ascertained in the 'real world', through empirical data, and through (judicial) suppositions (see Bogg, 2018).[11] This is another area of potentially fascinating research, even beyond the realm of access to justice, elucidating when the courts do, the courts take account of policy in the 'real world', and not settle for legal and logical constructions (see Paz-Fuchs, 2020)? Intriguingly, in its reasoning, the court referred to the need to identify 'systematic unfairness' (Prassl-Adams and Prassl-Adams, 2020), that is – when there is a risk that a prohibitive bar on access to justice 'renders it futile or irrational to bring a claim'[12] as is the case, for example, when the fee is higher than, or even equal to, the amount claimed. It seems clear, then, that access to justice, often interpreted by lawyers as access to rights, invites empirical legal scholars to contribute to doctrinal and theoretical development.

In education law, an example of the growing role of access to justice can be found in the situation of children with disabilities, an expanding issue of interest in its own right. Alongside developments in the services available and the resources invested in the education of children with disabilities, legislators have instated procedural safeguards with the aim of increasing the role of parents in decision-making. For example, the American Individuals with Disabilities Education Act (IDEA, 20 U.S.C. § 1412) awards parents the right to inspect and review their child's educational records, to participate in meetings related to the identification of disability, placement of the child and services and independent educational evaluations, and also requires parental consent for various actions and the right to appeal decisions. In England and Wales, the SEND Code (Department of Education and Department of Health, 2014) similarly provides that children, young people and parents should be involved in deciding whether special educational provisions are required, and in designing the delivery of services[13] and monitoring them.[14] To ensure effective participation the code requires making information, advice and support available to all parties.[15] The code also sets a detailed system of dispute resolution and appeals which include procedural protections for children, yound people and parents.[16]

Procedural protections are an extremely important means to promoting substantive rights as well as giving individuals and families the opportunity to choose services that best reflect their preferences. Making the most of procedural protections, however, requires skills and resources that are not distributed equally in society, giving rise to concerns that children from disadvantaged backgrounds may be shortchanged in the educational decision-making process, resulting in over-placement in special education, placement in restrictive settings where less restrictive settings are possible, and being provided with insufficient adjustments. Given these concerns, and the growing role of law in the special education context, attention needs to be given to providing parents with sufficient information and guidance, and making legal or para-legal representation available for crucial decisions.

## From meritocracy through big data to outsourcing

Developing technology has created a revolution in the area of decision-making, using algorithms to make individually-tailored, big data based decisions. Algorithms are used in some cases to match employers with suitable jobseekers (Raub, 2018) and to assign students to courses and streams (Har-Carmel and Ben-Shahar, 2017). This form of decision-making requires expertise for developing and operating, making outsourcing unavoidable in many cases (Thomas, 2022).

Use of algorithms for decision-making, as well as outsourcing services that support them, raise important questions for legal research, including privacy and data protection, due process and transparency. More specifically for education and employment, and for social welfare law more generally, some of the issues seem especially urgent (Henman, 2022).

First, algorithms are increasingly used to inform hiring/admission decisions, assessment and dismissal/exclusion. Schools and workplaces are both built on a meritocratic ethos; entry to the institution, evaluation and, in some cases, the end of the relationship are related to the individual's performance – their capabilities, skills and efforts. Moreover, there is a significant overlap in the types of abilities on which schools and workplaces focus. Schools explicitly aim to develop the types of abilities that are valued by employers, and the credentials that reflect the abilities acquired by children at school are an important gatekeeper to employment and promotion. Expected performance, understood as an integration of skills and effort are considered appropriate criteria for the

allocation of resources and rewards in both domains, and are the alternative to irrelevant and discriminatory considerations such as race, age or sex.

However, the use of 'ability' as a criterion for allocating places has been subject to legal challenges in both domains, mostly in the context of admissions, because it may *result* in indirect discrimination. The US Supreme Court began developing this jurisprudence very early on, both in the employment realm[17] and in the education context.[18] In the former, the Court in *Griggs* found that 'practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the *status quo* of prior discriminatory employment practices'.[19] And in the latter, the Court stressed that the poor abilities that Black students demonstrated reflected past injustices inflicted on them – namely segregated and inferior education. Recent jurisprudence, however, has been less receptive to challenges concerning ability grouping, when no direct causal link could be made to past injustice (Har-Carmel and Ben-Shahar, 2017).

Elsewhere, the European Court of Human Rights (ECtHR) has repeatedly struck down ability-based allocation policies that resulted in significant overrepresentation of children from the Roma community in lower streams and in special education (Suk, 2018). In the town of Ostrava in the Czech Republic, for example, Roma children made up a mere 2.26 per cent of the primary school population but accounted for 56 per cent of pupils assigned to special schools. These appalling numbers were the result of tests that the court found to be biased in terms of culture and language. The ECtHR reaffirmed this ruling in subsequent cases concerning the Roma in Greece (*Sampanis v Greece*, 2008), Croatia (*Orsus v Croatia,* 2003), and Hungary (*Horvath and Kiss v Hungary*, 2013).

However, it was only recently that these issues began to gain traction in the employment context in the UK. In *Essop v Home Office* (2017), the Supreme Court accepted the claimants' challenge to the legitimacy of requiring a Core Skills Assessment (CSA) as a condition for promotion in the civil service. Reversing the Court of Appeal's reasoning in this matter (*Home Office v Essop*, 2015; for a critique see Khaitan, 2016), the SC held that the fact that an independent review of the CSA found that the pass rates of BME candidates and candidates over 35 were significantly lower than non-minority and younger workers was sufficient to establish indirect discrimination.

The use of big data analytics for decision-making has the potential to change the field significantly. Decisions based on data analysis can overcome some of the human biases that affect hiring decisions and educational evaluations

(Houser, 2019). On the other hand, algorithms may recreate and reinforce discriminatory tendencies in these fields (Henman, 2022). For example, the data used to 'teach' algorithms the characteristics of the ideal employee, or the successful student, may be subject to biases embedded in society. The algorithm's future predictions will seek similar candidates thereby recreating social injustice. An example of 'big data's disparate impact' (Barocas and Selbst, 2016) that lies between education and employment took place when St George's Hospital in London developed a programme that sorted medical school admission based on past admission decisions. However, these past decisions had systematically disadvantaged equally meritorious female candidates and candidates from racial minorities (Ibid).

Importantly, relying on algorithms to inform decision-making (or to replace human decision making altogether) introduces new players into the field, creating an inevitable shift in the responsibilities of traditional decision-makers (Thomas, 2022). On the one hand, the ethics and legal duties involved in public sector decision-making do not readily apply to the designers and developers of algorithms, who do not typically have expertise in the specific subject matter at hand. On the other hand, the traditional decision-makers are no longer responsible for generating and analysing the available data and reaching a rational and explainable decision. And while private employers are not under the same duties in their decision-making, the duties they do hold may be harder to implement when decision-making is outsourced to companies that supply data analysis services.

This trend will, in all probability, be enhanced in the aftermath of the Covid-19 crisis, which introduced on-line learning and work. While many lamented the loss of face-to-face interaction and were pleased to return to the office and schools, the use of technology will become routine practice, in both domains. These data-rich technologies introduce opportunities to further rely on data analysis to evaluate performance in schools and on the job and inform decisions in both domains.

## Conclusion

This chapter has sought to contribute to setting a research agenda for social welfare law and policy in a post-Covid, digital age, by comparing two domains in life and in law – employment and education. The cross-fertilisation of the two fields highlights, we think, some of the most pressing challenges for social welfare law, as well as some future directions for institutions that are

democratic, inclusive and accessible, and which aim to ensure the rights of all members of society. The methodology used in the chapter, which seeks to bring together distinct areas of law and to analyse their similarities (and differences), involves reaching beyond traditional doctrinal boundaries between legal domains.

## Notes

1. *Tinker v Des Moines School District* 393 US 503 (1969) [students may wear arm bands to protest the Vietnam war].
2. 594 US (2021).
3. UKEAT/0105/20/JOJ (10 June, 2021).
4. Case 2200909/20, 19 *Forstater v CGD Europe* (December, 2019).
5. [2012] EWHC 3221 (Ch)
6. *Does v Mills* 595 US (2021).
7. *KA & NBV v London Borough of Croydon* [2017] EWHC 1723 (Admin), [2017] 7 WLUK 165 [40]
8. *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.
9. Ibid., [98].
10. Ibid., [64]
11. Ibid., [93].
12. Ibid., [96]
13. Ibid., [3.18]
14. Ibid., [3.44, 9.168]
15. Ibid., [ch. 1, ch. 2].
16. Ibid., [ch. 11]
17. *Griggs v Duke Power Co*, 401 US 424 (1971).
18. *Hobson v Hansen* 269 F Supp 401 (DDC 1967).
19. *Griggs*.

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