Private Schools and Tax Advantage in England and Wales — the *longue durée*[1]

Rebecca Boden (Tampere University, Finland)

Jane Kenway (Monash University Australia)

Malcolm James (Cardiff Metropolitan University, UK)

Corresponding author: Professor Rebecca Boden rebecca.boden@tuni.fi, New Social Research, Tampere University, Kalevantie 4, Tampere 33500 Finland

[1] Our thanks to both reviewers and the Editor for feedback that was valuable in refining this paper.

Abstract
England and Wales have a sizeable fee-paying private school sector including well-resourced elite schools conferring considerable advantage on their students. The majority have charitable status, yielding substantial tax breaks. This significant source of funding for the sector has attracted comparatively little attention from educational researchers. This paper offers a critical socio-legal historical analysis of the tax treatment of these schools. It demonstrates that they emerged through the complex intersection of tax and charity law over some 400 years. It also shows that, since the 19th century particularly, this involved the purposive intervention of ruling elites in defence of class privilege. . Our analysis of the power relationships involved helps explain why these taxation arrangements have endured over time and have proven so intractable.

Key words. Private schools, taxation law, charity law, public benefit, socio-legal history

Introduction

State financing of schools invariably provokes questions regarding educational and social inequalities and the redistributive justice potential. Austerity policies have adversely impacted state school funding in England and Wales since 2010, resulting in much public disquiet and debate. However, the state funding that takes a more circuitous route, involving sizeable tax concessions for private (fee-paying) schools that have charitable status, and which are frequently very resource-rich, has received significantly less detailed and direct attention from researchers (e.g. Lowe, 2020); much of that research is now dated (e.g. Walford, 1987; Walford and Robson, 1988). In contrast, there has been, in the last ten years at least, a relatively significant and contentious popular debate about the status and privileges of these schools. This paper begins with the premise that appropriate historical studies are necessary to challenge 'the parochialism of the present' (Harris, 1983, 332) and to unmask the power relations inherent to these long-standing tax concessions. We chart how these tax arrangements arose over an extended time period through the tight entanglement of tax law, charity law and the interventions of legal, political and educational elites. Adopting a socio-legal historical perspective, we unravel the principal strands of this entanglement to explicate the current situation.

Scotland and England have distinct legal systems, including charity law; English law applies in Wales. This paper focuses on England and Wales, where most of the schools are located. As Wales is home to comparatively few private schools, and for simplicity, we refer to England and Wales as ‘England’ in the rest of this paper.

Contexts and concepts

6.5% of children attend fee-paying private schools in the UK at any one time (Independent Schools Council, 2018). These variously labelled schools have heterogeneous status and resources. The terms ‘private’, ‘fee paying’ and ‘independent’ apply to them all, but only the most prestigious are called ‘elite’, and they regard themselves as having ‘public school’ status (Kenway et al, 2017). The nomenclature is slippery and, as Simon (1975) illustrates, membership of the ‘public school’ category has long been contested, shifting and expanding over time. Most private schools model themselves on these elite schools and, arguably, they all benefit from being associated, no matter how remotely, with them. For clarity, we only use the term ‘private schools’.

The private schools that are our focus all have charitable status. In 2016, the UK government estimated that there were 2300 private schools in the UK – including some very small organisations with pupil numbers in single digits. Of these, some 1300 have charitable status. The Independent Schools Council, which represents almost 1400 of the more substantial schools, reported in 2019 that 74% of its member organisations – 1012 schools – held charitable status (Fairburn 2019).

Private in the sense of not state-owned, these charitable schools are also not-for-profit – they have no shareholders or other private owners legally entitled to extract financial surpluses/profits, which must instead be retained for use towards the organisation’s charitable purposes. They all charge fees and the cost is high, albeit with around 4-8% of fees being remitted via full or partial scholarships or bursaries. Whilst median household disposable

income in the UK in 2017 was £29,600 (Office of National Statistics, 2019), fees for boarding students at the most expensive private schools are typically £35-£40,000 a year (*The Times* 4 March 2017). Even the fees at day schools in the North and Midlands, well-regarded and highly ranked academically but less socially prestigious, are £14,300 a year (Independent Schools Council, 2019).

The tax position of these charitable schools is technically complicated. The legal language is often obscure and, the underlying principles can be counterintuitive and are frequently masked by apparent objectivity and the rhetoric of normalisation. The schools, and their private donors, enjoy complete or partial exemption from a wide range of taxes.

Tax breaks explicitly relieve particular organisations or classes of individuals from taxes otherwise payable. Because this has the same net effect in bookkeeping terms as the state collecting taxes and then spending them, tax breaks are classed as a form of public expenditure known as 'tax expenditure'. As tax expenditure is income foregone, it generally escapes annual budgetary scrutiny because there is no actual decision to spend cash. Tax expenditures also suffer from non-reporting; tax not due is rarely reported or calculated, the government provides no official estimates and UK taxpayers have an absolute right to confidentiality. Tax expenditure is an imprecise tool for spending public money effectively due to its relative lack of transparency, enabling the hidden operation of power in favour of certain organisations and classes of individuals (Boden, Childs and Wild 1995).

Private schools' tax breaks are public expenditure that directly benefits them. The precise value of these concessions is unknown – the government makes no estimates (Fairburn 2019). In 2014 the Labour party estimated that the value of Income Tax relief to these schools was £700m (*The Telegraph,* 24 November 2014). A 2017 study, based on Freedom of Information Act requests, estimated that the schools' partial exemption from local property taxes was worth a further £105m a year (*The Guardian,* 11 June 2017). The schools are not subject to Value Added Tax because education is an exempt supply under VAT law. The value of this exemption is estimated (again by the Labour party) at £2.2 billion a year (*The Guardian,* 6 April 2017). Private schools also claim refunds on some tax paid by donors on their donations, and are exempt from Capital Gains Tax. No estimates of the value of these reliefs are available. These sums are likely to be significant – possibly in excess of £3 billion a year. Schools also benefit from additional tax-incentivised donations by tax relief on gifts and Inheritance Tax (Chesterman, 1999). The UK government's predicted expenditure on state school education in 2019 is £87.7bn (UKPublicspending.co.uk, 2019), suggesting that, per child, the entire private school sector (including non-charities) receives tax relief roughly equivalent to half the level of public expenditure on state school students. The amount per student in charitable schools will be greater, but cannot be estimated.

A condensed socio-legal history

Tax breaks for private schools have a complex legal history best understood via a critical socio-legal, rather than a doctrinal, legal historical approach. Doctrinal approaches focus on statutes, cases, scholarly commentaries and judges' decisions. Critical socio-legal approaches utilise these resources, but also address pertinent aspects of the law-in-practice, its meanings and functions, in an interdisciplinary manner. They interrogate the 'ampersand' in the socio-legal (Fisk, 2019) via a both-ways, both-and approach, examining how society influences the law and how the law influences society. In this paper we bring the history of tax law into

conversation with two strands of critical sociology—tax (e.g. Boden, Killian, Mulligan and Oats, 2010; James, 2017) and elite schools (e.g. Kenway and Koh, 2015). Both fields examine and expose the material, institutional and discursive resources that society's most powerful and privileged groups mobilise in their own interests.

We adopt a linear temporality to reveal, over the *longue durée*, how the particular legal, political and social dynamics are deeply entrenched. While identifying the slow and steady accretion of their normalisation, we also show how these dynamics have been regularly renewed, or strategically readjusted, in comparatively short but decisive episodes. As researchers of the socially dominant, we clarify the naming practices involved, the meanings they mobilized and who their representations represented. Our primary sources are court and media reports, official reports, political party manifestos, legislation and parliamentary proceedings read through the lens of law, education and social policy research.

Charity: for the poor or the wealthy?

The English law concept of charity dates from the late 16th and early 17th centuries, when feudalism and its associated systems of poor relief were in decline. This necessitated new laws and, as disputes ensued, the courts became involved. Over time, these court cases generated case (common) law via precedents, interpolating the legislation to produce a complex assemblage. A suite of Elizabethan Poor Laws were enacted, including the Charitable Uses Act 1601, which was designed to regulate and protect charitable assets. The Preamble included education as a charitable purpose.

> Whereas Landes Tenementes Rentes Annuities Profittes Hereditamentes, Goodes Chattels Money and Stockes of Money, have bene heretofore given limitted appointed and assigned, as well by the Queenes most excellent Majestie and her moste noble Progenitors, as by sondrie other well disposed persons, some for Releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities… (quoted in Scott and Wethered, 2012: 1)

Under the Act, a charitable purpose was one that fell within the definitions in the preamble, existed for public (not private) benefit and for the relief of poverty (Malik, 2008). Sir Francis Moore, an eminent lawyer, stated in 1607 that that 'poverty is the principal and essential circumstance…within the compass of this Statute' (Jones, 1983:121). In 1700 the courts ruled that only free schools were included under the Charitable Uses Act 1601 because, whilst education was a charitable purpose, charging fees was incommensurate with the relief of poverty (Jones, 1983).

Law is dynamic, and the Mortmain and Charitable Uses Act 1735 effectively removed the absolute requirement regarding the relief of poverty (Jones, 1983). In the 1805 case of *Morice v Bishop of Durham*, the judge, reflecting the 1601 Act, classified charitable purposes as: the relief of the indigent, the advancement of learning, the advancement of religion, and the advancement of objects of general public utility (Malik, 2008), conducted for the benefit of the public.

Due to the persistence in law of the Preamble to the 1601 Act, all schools, whether for the poor or not, could now be charities if they provided public benefit – which was not, and still is not, defined in statute. In 1807, the courts ruled that the not-for-profit Rugby and Harrow schools, despite admitting fee-paying students, could have charitable status (Jones, 1983). In the 1827 case of *Attorney General v Lord Lonsdale* the heirs to an estate argued that a school endowed under an aristocrat's will could not be charitable because 'being for the education of gentlemen's sons, is not a charity'. The judge disagreed, stating that 'the institution of a school for the sons of gentlemen, is not, in popular language, a charity; but in view of the Statute of Elizabeth [the 1601 Act], all schools for learning are so to be considered' (Reports of Cases, 1843:110).

By the late 19th century, the determination of charitable status had been reserved to the courts, presided over by judges who have the power to make the law mean what they say it means (James, 2010). In 1891 Judge Lord MacNaughten defined charity authoritatively for legal purposes, noting that this differed from the 'popular meaning'.

> That according to the law of England a technical meaning is attached to the word "charity," and to the word "charitable" in such expressions as "charitable uses," "charitable trusts," or "charitable purposes," cannot, I think, be denied…How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefitted the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. (Commissioners for Special Purposes of Income Tax v Pemsel, [1891] A.C. 531)

During the 19th century the definition of charity thoroughly departed from its popular meaning, evolving into a complex legal concept. This happened at the hands of judges with strong links to elite private schools. Also during the 19th century the schools that came to be called the Great Schools were transformed.

These schools departed from their origins as 'societies of boys' and gradually became elite institutions. The 1810 case of *Attorney-General v Earl of Clarendon,* concerning Harrow School, graphically illustrates the emerging class power struggles. The school was challenged over the admission of large numbers of 'the sons of the nobility and gentry of this kingdom' who, it was alleged, rendered 'it impossible for such poor children to remain in the school; being constantly scoffed at and illtreated' or their families to keep up with the expenditure required for the boys' upkeep (Vesey, 1845:492). In the 1842 case of *Attorney-General v Earl of Stamford,* it was argued that the education provided had been 'adapted almost exclusively for the wealthier classes' (Synge, 2015:188). Many schools had endowments or foundations to benefit poor boys. But, as they developed into institutions designed to produce men of the 'right' moral fibre, concerns arose that admitting the lower orders might adversely affect the schools' moral character (Kenway and Fahey, 2015). School governors being granted discretion to give scholarships to whomsoever they pleased resolved these concerns; their decisions tended to favour the upper classes of modest means (Shrosbee, 1998). Schools founded to educate the poor (Lowe, 2020) increasingly served the (usually wealthy) elite – breeding grounds for statesmen, military officers and colonial overlords (Chandos, 1984).

They were central to sustaining and adapting the class structure of England as the sons of wealthy industrialists joined those of the gentry to gain powerful connections and class 'polish'. The schools emphasised hierarchy, generated a sense of entitlement to rule and helped forge life-long and inter-generational bonds (Gaythorne-Hardy 1977).

Intensely conservative, the schools opposed an increasingly secular state and increased public provision of education for the lower orders. The prospect of an educated working class was an anathema (Ball 2005). The schools used their considerable influence and connections in legal, political and media institutions to advance their own, and their past and present students', interests. Lowe (2020) meticulously documents how the prestigious 'Great Schools' (Charterhouse, Eton, Harrow, Merchants Taylors, Rugby, Shrewsbury, St Paul's, Westminster and Winchester) worked with Conservative parliamentarians in the first half of the 19th century to ensure that they were excluded from the general regulatory regime for charities then being developed by the state.

This position was confirmed by the 1864 Clarendon Commission report on the management, finance and educational provision of the Great Schools (Clarendon Report, [1864] 2005), which recommended that they become autonomous institutions. The ensuing Public Schools Act 1868 freed seven of the nine schools from any government, crown or church control (St Paul's and Merchant Taylor's School successfully argued they should be excluded). They were deemed 'public schools' because the only entry restriction was fees, not locality or religious affiliation (Kenway and Fahey, 2015). The Great School system established a governance model to which many other schools aspired. In 1869 the Headmasters' Conference (HMC) was formed, eventually becoming a powerful lobbying force for the sector once initial internal tensions around issues of status were resolved (Honey, 1977).

Trade or a charity?

Unsurprisingly, the schools turned their attention to fiscal matters. Income Tax was introduced permanently in 1842, and the Great Schools were immediately exempted (Jones, 1983). They were all endowed schools – charitable trusts unable to distribute profits and with no private owners. Although some, by this point, charged fees, they were deemed not to be trading and therefore not subject to Income Tax on surplus income.

In contrast, the emerging non-endowed schools were considered to be trading and became subject to Income Tax as if they were commercial businesses (Jones, 1983). Whilst, by the end of the 19th century, they were mostly not making any profit to be taxed on, they were paying various property taxes. After 1874, when appeals against the tax authority's decisions became possible, a number of schools took court cases, with varying success, to establish that they were akin to the Great Schools and so exempt from all taxes (Jones, 1983). These were attempts to change the legal status of individual schools, rather than the law itself.

A decisive episode that demonstrates the schools' self-interested tenacity, and powerful networks, involved the non-endowed, not-for-profit Brighton College. It operated at a loss until 1910, but then started achieving a trading surplus, resulting in tax charges. Edwardes Jones, a former pupil, member of the college's governing council and a King's Counsel persuaded the college that the tax assessments could be challenged and offered his services *pro bono*. Some exemptions were achieved by 1917 and incorporated into law by 1918. In 1921, the tax authorities conceded all points on property taxes on the eve of a court hearing (Jones, 1983).

By 1921 the college became subject to a new Corporation Profits Tax, which would capture the college's surplus income. An arrangement was made for a question to be asked in the House of Commons by JFP Rawlinson, the MP for Cambridge University (Oxford and Cambridge then had their own members of parliament) and a representative of the university on the college's council. Rawlinson lobbied hard: the Finance Act 1921 exempted all charitable, non-profit distributing companies or those established solely for religious or educational purposes from Corporation Profits Tax (Jones, 1983).

Edwardes Jones' final battle was for exemption to Income Tax on profits. In 1923 the Special Commissioners (a tax tribunal) ruled that the college was carrying on a taxable trade because it charged fees. The college appealed to the High Court, with Edwardes Jones as one of the barristers and the chair of the school governor's own law firm acting as solicitors. Brighton College argued that, because it could not distribute profits, it was not carrying on a trade. The judge agreed, leading *The Times* to commend him and to urge a change in the law for all private schools. The tax authorities appealed to a higher court (Jones, 1983).

By 1917, some 30 of the newer Victorian non-endowed schools, including Brighton College, had joined the HMC. They were anxious to achieve the same tax advantages as the Great Schools. In 1923 the HMC joined Brighton College in the legal fray, providing a sizeable £2000 fighting fund. In 1924, the Court of Appeal overturned the High Court's decision, ruling that it was not within the definition of a trade that one aimed to make a profit for distribution. In 1925 the House of Lords (as the Supreme Court was then known) rejected Brighton College's further appeal, ruling that 'in providing an education for money' the college was carrying on a trade and the use of those profits was immaterial to its tax status (Jones, 1983:127). The decision was unanimous, but one judge noted that he felt unhappy at the label of 'trade' being applied in these circumstances. Another noted that few of these schools made a trading profit anyway, and that their income from property and investments was already free of tax (Jones, 1983).

Yet these meagre bills proved inflammatory. Having exhausted its legal options, Brighton College, with the support of other HMC schools, sought to change the law. *The Times* noted that 'it is not a bad thing that the matter should be settled and the road cleared for legislation' (Jones 1983:127). Rawlinson raised the matter in parliament again. The headmaster of Eton suggested that the government had every reason to wish the public school system well: all 21 men in the 1926 cabinet went to a private school – 18 to the 'Great Schools' and seven alone to Eton (Jones, 1983).

The schools shifted to a more public-spirited stance. They claimed that by providing education at direct parental expense, they relieved the public exchequer of significant cost and left more resources for state schools. In challenging economic times the government was reluctant to grant further tax breaks; the few schools that had made a trading profit were in a privileged position, and tax relief would simply advantage them further, allowing capital accumulation at a time of straitened public finances. Despite these counter-arguments, in 1927 all charities were exempted from Income Tax on trading profits that arose in the course of the primary activity of the charity. This change is remarkable as it was introduced in the Budget of Expedients, designed to repair the country's finances after the General Strike (Sabine, 1966).

These successive legal and parliamentary triumphs had unfolding consequences over the 20th and early 21st centuries.

.

Recent parliamentary politics versus the courts

Britain's two main parties have consistently split along party lines regarding the tax and charitable status of private schools. The Conservative party was, and remains, the schools' ally – a significant number of past and present Cabinet members attended them (Sutton Trust, 2019). The Labour party initially lacked a strategy for directly tackling the issue (Tapper, 2003). It initially supposed that the growth in, and improvement of, the state sector would lead to private schools withering away (Moffat, 1989). However, private schools continued to prosper during the 20th century, extending their remit to the burgeoning middle classes. Indeed, the schools accrued yet further tax advantages. For instance, in 1960 they were exempted from 50% of local property taxes and local authorities could give a greater exemption if they wished (Walford, 1987).

Only in its February 1974 election manifesto did Labour announce that 'all forms of tax-relief and charitable status for public schools will be withdrawn' (Labour Party, 1974a). By its October 1974 manifesto, this had hardened to a commitment to 'withdraw tax relief and charitable status from Public Schools, as a first step towards our long-term aim of phasing out fee paying in schools' (Labour Party, 1974b). This policy was never implemented because the Labour government became embroiled in bitter industrial disputes, followed by the election of the Conservative government of Margaret Thatcher in 1979.

Thatcherism advocated the withdrawal of the state from service provision, as far as was practicable, emphasising 'individual choice'. As studies have subsequently shown educational choice has proved illusory for many (e.g. Ball, Bowe and Gewitz, 1996). Significant tax reductions, especially for higher earners, transferred financial resources from the state to taxpayers, delegating spending decisions to private, unaccountable individuals and businesses (Chesterman, 1999). Private philanthropy (as opposed to state entitlement) was promoted by the extension of tax breaks for charitable donations.

These reforms significantly boosted private schools' finances by giving the wealthy a greater ability to pay fees and by encouraging donations. Tax breaks on charitable donations provide relief at individuals' marginal (highest) rate, so the higher one's rate of tax, the more the tax refunded These changes were therefore regressive: the wealthy could not only give more absolutely to their causes than the poor could, but also got a larger proportional tax rebate (Chesterman, 1999). Whilst school fees do not count as charitable donations, wealthy taxpayers can now make substantial donations to their old, or their children's schools, and the tax that should have been paid on this sum will be refunded, split between the school and the donor.

By 1986, the Tory government had extended the tax relief that companies could claim on donations to charities, making it easier for wealthy parents or alumni to make tax-deductible donations to their children's schools via their own incorporated businesses. Walford (1987) explains that, subsequent to these changes, the schools developed sophisticated fund raising efforts, further cementing their social and political networks. Additional advantages came with an exemption from the tax payable on legal transactions such as property purchases and, very importantly, Inheritance Tax. Walford (1987) gives the example of an Old Boy of Giggleswick School who died in 1986 leaving £1m to his alma mater. The school got the full amount. Had he died three years earlier, there would probably have been a £450,000 tax bill.

Tony Blair's 1997 New Labour government espoused Third Way policies in which the state works in partnership with private providers. Charitable private schools were to be encouraged to contribute their (implicitly) superior expertise to improving the wider educational sector (Dunn, 2012). Importantly, the government's strategy unit saw a problem with organisations that met the legal definition of charitable purpose but did not meet public expectations of delivering public benefit (Synge, 2015). The strategy unit wanted the government to assess each charity's public benefit, including private schools, on a case-by-case basis and, where it was deemed inadequate, to work with the organisation to improve it (Synge, 2015; Dunn, 2012).

Problematically, the strategy unit did not fully understand charity law, as developed in the courts (Synge, 2015). As Synge explains, the unit conflated charitable *purposes* with charitable *activities* – yet they are different in law. *Purposes* are stated aims whereas *activities* are what charities actually do. This confusion led the strategy unit to believe that private schools were obliged to work in partnership with the public sector – an approach ultimately doomed to failure (Dunn 2012).

Competing notions of public benefit

The ensuing Charities Act 2006 gave the first English statutory definition of a charity. This confirmed common law – they had to be established for charitable purposes (which were listed, and included the advancement of education) and be for public benefit. The Act provided no statutory definition of public benefit, leaving it to common (case) law, with guidance on the law to be issued by a new Charity Commission, accountable to parliament.

The Commission issued its guidance in 2008, having apparently taken no external legal advice (Synge, 2015). Two aspects of the guidance proved contentious. The first was that people in poverty should not be excluded from the opportunity to benefit from charities' activities. The second was that fees charged by charities should not unduly restrict the opportunity of people to participate. Effectively, this guidance sought to compel school trustees to permit all poorer people ready access to private schools. The Commission issued further guidance on fee-charging, stating that 'offering free or subsidised access is an obvious and, in many cases, the simplest way in which charities can provide opportunities to benefit for people who cannot afford fees' (Fairburn, 2019:19). It noted that this was not compulsory.

The Commission assumed that it could specifically direct charities towards what it considered appropriate public benefit activities (Synge, 2015). It started undertaking assessments of the public benefit provided by individual charities, including private schools. Two schools were found wanting and given a year to 'to show how they would ensure a sufficient opportunity to benefit in a material way for those who could not afford the fees, including people in poverty' (Fairburn, 2019: 19). Addressing the HMC in 2009, Charity Commission chair Suzi Leather insisted that the Commission's guidance properly reflected the law. However, she said 'the law is not static, and we have had to consider how the legal authorities, many of which were decided in a different social climate, should be interpreted in a modern context' – she expected charities to comply with the guidelines within five years (Holt, 2009). Leather acknowledged that legal challenges to the Commission's guidance were inevitable.

Private schools responded to regulatory pressure by starting to increase the numbers of means-tested scholarships offered. However, they simultaneously reverted, once again, to the courts (Synge, 2015). The Independent Schools Council, an umbrella body of seven associations including the HMC, applied for judicial review of the Commission's guidance, arguing that it was 'erroneous and over prescriptive, usurping trustees' discretion, and expressed concern at its uncertainty' (Sloan, 2012: 45). Simultaneously, the Attorney General (the government's chief legal adviser) Dominic Grieve sought clarification from the Upper Tribunal (the principal tax court) on the public benefit requirements of private schools. He argued that there appeared to 'be uncertainty as to the operation of charity law in the context of fee-charging independent schools' (Fairburn, 2019: 20). Grieve attended Westminster School – one of the Great Schools.

In its lengthy and complex 2011 judgement, the Upper tribunal identified two aspects of the public benefit test. The first 'dictates that the nature of the charitable purpose itself must be beneficial to the community' (Sloan, 2012: 45). The court concluded 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 "dis-benefits" arising from the charging of fees and the impact of independent schools on the public as a whole. It would be difficult to demonstrate that an otherwise charitable purpose was rendered non-charitable because of its wider consequences for society. (Sloan, 2012: 45)

The court confined itself to the second aspect, which 'requires that those who benefit from the purpose must be sufficiently numerous to constitute "a section of the public"' (Sloan, 2012: 46), which it ruled was a matter of common law. Sloan (2012:46) notes

> 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 sceptical about the argument that independent schools provide a benefit by removing students from the state sector.

The court concluded that private schools can be charities unless their constitution specifically debars those unable to afford the fees or where they must always charge full fees (Synge, 2015) – neither of which applied to the schools. It also found that activities in pursuit of charitable purposes are solely the trustees' responsibility, and cannot be directed by the courts or the Charity Commission. This meant that private schools could not be obliged to offer significant numbers of means-tested scholarships. The court also ruled that the Commission's guidance that fee levels must not exclude poorer people was simply 'wrong' (Synge, 2015:186).

Concurrent with this case, the new Conservative-led government was pushing new charities legislation through parliament. The 2011 Act, which replaced much of the 2006 Act, still defined a charity as an organisation established for charitable purposes providing public benefit, and again left the matter of what constituted public benefit to common law. In a new

development, automatic presumption of public benefit associated with any purpose was specifically debarred. Schools must therefore now demonstrate that they provide public benefit.

The new Act engendered a new Charity Commission, which again had to produce guidance on the common law of public benefit – this time incorporating the Upper Tribunal's decision. The Commission's guidance notes that

- In determining whether a school is acting in the public benefit, the primary focus must be on the direct benefits it provides (such as scholarships), although all of the charitable benefits can be taken into account.
- A student whose family can pay fees is no less a potentially beneficiary than one without the possibility of having their fees paid – both need an education.
- The extent to which schools need to charge fees to meet their expenses can be considered and, if there is a reliance on fee income, for 'admissions to be weighted in favour of potential beneficiaries able to pay fees' (Fairburn 2019: 10).
- When fees are so high that poor families could not afford them, the trustees must provide a benefit for the poor above the minimal or tokenistic – beyond that, the level of provision is at the discretion of the trustees.
- The definition of 'poor' caused some issues and the Commission stated that schools might look not just at a student's family circumstances, but also whether other charities might give assistance.
- If the school provides luxurious facilities then the onus of demonstrating public benefit is increased.
  (summarised from Fairburn, 2019)

In further guidance on how fee-paying schools might enable the poor to benefit (Charity Commission, 2013), the first item on the list was bursaries or assisted places, but there were numerous other suggestions, such as sponsoring state academy schools; distributing funds via a grant making body; allowing state school pupils to use facilities such as swimming pools; seconding staff; or, having joint cultural activities with state schools.

In 2012 a review into the operation of charity law mandated under the Charities Act 2006, chaired by Lord Hodgson of Astley Abbotts, was published. Hodgson is a Conservative member of the House of Lords who attended Shrewsbury – one of the Great Schools. His review recommended against a statutory definition of public benefit 'in order to retain the flexibility attached to the common law definition' (Fairburn, 2019: 22). The Conservative-led government agreed. In 2013 the House of Commons Public Administration Select Committee published its report into public benefit and charities. The report argued that 'it is for Parliament to resolve the issues of the criteria for charitable status and public benefit, not the Charity Commission, which is a branch of the executive' (Public Administration Select Committee, 2013: para 86). The Conservative-led government disagreed, stressing the importance of the flexibility provided by the courts, enabling them to respond to social change. The emphasis on flexibility appears disingenuous given the significant jurisprudential consensus that common law is incremental and not particularly agile (Vos, 2018).

In 2012 Commission chair, Suzi Leather told the Public Administration Select Committee that 'the issue of charitable status of independent schools was "one that is heavily ideologically laden in public debate"' (Fairburn, 2019: 22). Arguably, the regulatory and

legal processes are too. The Upper Tribunal case and the 2011 Act were mutually reinforcing in quashing the attempted Blairite reforms. They sequestered the issue of public benefit to the courts.

This is potentially jurisprudentially problematic –the system of common law requires judges to build upon their predecessors' decisions with marginal adaptations over time. This makes radical change difficult. Judges' decision-making in these obscure areas of law has only limited public scrutiny and no democratic control. Judges are far from representative of citizens –as recently as 2019, 'senior Judges were the most rarefied group' amongst the UK's elite, 'with two thirds attending private schools and 71% graduating from Oxbridge. In fact over half (52%) of senior judges took the same pathway from independent school to Oxbridge and then into the judiciary' (Sutton Trust and the Mobility Commission, 2019).

In September 2016, the Conservative government launched an education consultation paper (Department for Education, 2016). Concerned primarily with the state sector, the consultation noted the tax privileges enjoyed by private schools, that between 2010 and 2015 their fees rose four times faster than average earnings growth, and that the percentage of their pupils who came from overseas has gone up by 33 per cent since 2008. It called upon larger private schools to do more to help the struggling state sector by either sponsoring a state academy or setting up a free school (but without paying any capital or operating expenses), or offering a greater proportion of fully-funded bursaries for those unable to pay full fees. Smaller schools were invited to provide less substantial 'partnership' assistance via, for instance, teacher development activities. Crucially, the consultation document stated

> We think it is essential that independent schools deliver these new benchmarks. If they do not, we will consider legislation to ensure that those independent schools that do not observe these new benchmarks cannot enjoy the benefits associated with charitable status, and to result in the Charity Commission revising its formal guidance to independent schools on how to meet the public benefit test, putting the new benchmarks on to a statutory footing. (Department for Education, 2016: 16).

Theresa May launched this consultation in her first major policy speech as Tory Prime Minister. The backlash from the schools was immediate; the heads of prestigious schools lambasted May for being 'cheeky', 'cheap' and not understanding that the schools were a 'very successful part of the British economy' (*The Telegraph*, 9 September 2016).

The government's 2018 response to consultation (Department for Education, 2018a) took a softer line and made no mention of changing any school's charitable status. Rather, it emphasised the joint understanding that it had reached with the ISC, and which was published alongside the response (Department for Education, 2018b). Under this, the ISC undertook to require member schools to promote social mobility through scholarships, but greater emphasis was placed on working in partnership with the state sector – by sponsoring schools or providing joint activities (such as sports or other cultural events). It was acknowledged that the Upper Tribunal had ruled that trustees had ultimate decision-making powers regarding schools' activities. The schools were not required to support the state sector financially, and the government was fulsome in its recognition of the value of the sector. The ISC and the government set up joint working arrangements to facilitate private school sponsorship of, and joint activities with, state schools, but not scholarships (Fairburn, 2019).

Capitalising on anti-elite and anti-austerity sentiments, the Labour party mobilised against the schools, initially through a Twitter hashtag #AbolishEton. Labour's November 2019 manifesto for the general election, committed a Labour government to

> close the tax loopholes enjoyed by elite private schools and use that money to improve the lives of all children, and we will ask the Social Justice Commission to advise on integrating private schools and creating a comprehensive education system. (Labour Party 2019:40)

However, Boris Johnson (an Old Etonian) led the Conservatives to a landslide victory in the December 2019 election. Unsurprisingly, in September 2019 his government announced that it had no plans to change the tax status of the schools.

Concluding remarks

Public subsidy, through the tax regime, of not-for-profit organisations delivering desirable public benefit is a reasonable proposition. However, as this paper suggested, the tax reliefs enjoyed by private schools suffer from fundamental, institutionalised flaws that ultimately make for poor education policy.

To clarify, private schools' tax breaks come as tax expenditures, and therefore escape any regular budgetary scrutiny in parliament. This represents the operation of power through non-decision making (Lukes, 2005). This non-decision making is compounded by the sequestration to the courts of decisions as to what constitutes public benefit, making it a matter of common law – parliament has provided no statute. Statutory law involves the inscription of social values as formal rules, with parliamentary scrutiny laying bare the choices. Common law, in contrast, takes a doctrinal approach – the repeated, technical application of precedent, which promotes the myth that the law is objective and impartial. The doctrinal approach promotes incrementalism (Vos, 2018), rendering radical change elusive. Common law shifts decision-making to the relatively unaccountable courts, wreathed in arcane and obscure language, where law made by judges who were, and significantly still are, the successful products of private schools.

In sum, this paper explains the elaborate legal and linguistic logics associated with the significant tax concessions that private schools in England currently receive. It shows how the legal concepts of *charitable status, charitable purposes, charitable activities and public benefit* are central to the provision of such breaks. The current situation evolved over some 400 years. We unveiled its complex, and sometimes contested, socio-legal history by drawing together insights from critical studies of law, taxation and elite schools. We demonstrate that ruling elites associated with elite private schools consistently mobilised the considerable resources at their disposal to ensure that, no matter what the occasional challenges, tax and charity law continue to operate in their favour. We show how these material, institutional and discursive resources were put to use in the courts and, where that failed, in parliament to normalise and legitimise their privileges down through the centuries.

We observed at the outset that the funding of state schools in England and Wales in times of austerity has been and continues to be a highly visible and contested issue because inadequate funding adversely impacts social equity. This paper has highlighted the existence of a 'dark', parallel education funding stream that overwhelmingly benefits those who are already significantly socially advantaged, provided at the expense of the generality of all taxpayers. This anomalous and socially iniquitous position arises for two reasons. First, the private

school sector, and those who support it, are able to collectively mobilise the power of doctrinal law through the courts to perpetuate their privileged tax status. Second, and crucially, such operations of power are effectively hidden from wider public view by the complexity of legal linguistics and processes, the pseudo-objectivity of the law, and parliamentary budgetary processes which fail to make this public expenditure on education a matter of regular parliamentary debate and accountability. There are no significant legal obstacles to changing tax law to remove these tax breaks, but parliament must do this through statute; it has thus far distinctly failed to grasp this nettle.

References

Ball, S., Bowe, R. Gewitz, DS. (1996) School Choice, social class and distinction: The realization of social advantage in education, *Journal of Education Policy*, 11 (1)

Ball, S., (2005). *The Education Debate,* Bristol: Policy Press

Boden, R., Childs, M., and Wild, W. (1995). Pride and prejudice: Women, Tax and Citizenship, *Critical Perspectives on Accounting*, 6, 125-48

Boden, R., Killian, S., Mulligan, E., and Oats, L., (2010). Critical perspectives on taxation, *Critical Perspectives on Accounting*, 21, 541-4

Campbell, E., (1958). Thomas Hobbes and the common law, *Tasmanian University Law Review,* 1, 20-45

Chandos, J., (1984). *Boys together: English public schools 1800-1864*, London: Hutchinson

Chesterman, M., (1999). Foundations of Charity Law in the new welfare state, *Modern Law Review*, 62, 333-49

Charity Commission, (2013). *Charging for services: Illustrative examples of benefits of benefits for the poor,* Accessed at https://www.gov.uk/government/publications/charging-for-services/charging-for-services-illustrative-examples-of-benefits-for-the-poor 19 January 2020.

Clarendon Report, [1864] (2005) *The Clarendon Report: English Public Schools in the Nineteenth Century*, London: Bloomsbury Publishing

Commissioners for Special Purposes of Income Tax v. Pemsel, (1891). A.C. 531 Accessed at http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912668a6ae5511fce7ec38e48257df8003568fc/$file/2668.pdf 30 March 2020

Department for Education, (2016). *Schools that work for everyone: Government consultation.* Accessed at https://consult.education.gov.uk/school-frameworks/schools-that-work-for-everyone/supporting_documents/SCHOOLS%20THAT%20WORK%20FOR%20EVERYONE%20%20FINAL.PDF 21 January 2020

Department for Education, (2018a). *Schools that work for everyone Government: consultation response*, Accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706243/Schools_that_work_for_everyone-Government_consultation_response.pdf#page=9 21 January 2020

Department for Education, (2018b). *Joint understanding between DfE and Independent Schools Council (ISC),* accessed at https://www.gov.uk/government/publications/joint-understanding-between-dfe-and-independent-schools-council-isc/joint-understanding-between-dfe-and-independent-schools-council-isc 21 January 2020

Dunn, A., (2012). Using the wrong policy tools: Education, Charity, and Public Benefit, *Journal of Law and Society*, 39, 492-514

Fairburn, C., (2019). *Charitable status and independent schools*, House of Commons Briefing Paper Number 05222. Accessed at https://commonslibrary.parliament.uk/research-briefings/sn05222/#fullreport 17 January 2020

Fisk, C. L., (2018). &:_ Law and Society in Historical Legal Research, *The Oxford Handbook of Legal History,* Edited by Markus D. Dubber and Christopher Tomlins

Gathorne-Hardy, J., (1977). *The public school phenomenon*. London: Hodder and Stoughton.

Galligan, D.J., Ed (1995). *Socio-Legal Studies in Context: The Oxford Centre Past and Future,* Oxford: Blackwell

Guardian, The (6 April 2017). *Jeremy Corbyn: add VAT to private education fees to fund school meals,* by Mason, R. Accessed at **https://www.theguardian.com/education/2017/apr/05/fund-free-school-meals-jeremy-corbyn-add-vat-private-education-fees** 10 December 2019

Guardian, The (11 June 2017). *Private schools to save £522m in tax thanks to charitable status.* Accessed at **https://www.theguardian.com/education/2017/jun/11/private-schools-tax-charitable-status-eton-dulwich-college** , 20 January 2020

Harris, D.R., (1983). The development of socio-legal studies in the United Kingdom *Legal Studies,* 3, 315-333

Holt, A., (2009) Charitable schools have years to meet public benefit, *Charity Times 8 October.* Accessed at https://www.charitytimes.com/ct/schools.php 18 January 2020

Honey, J. R. de S., (Ed.). (1977). *Tom Brown's universe: The development of the Victorian public school*. London/Dorset: Millington Books

Independent Schools Council, (2018). *ISC's research team works to ensure that ISC is the hub of accurate and timely information on the independent sector in the UK.* Accessed at https://www.isc.co.uk/research/ 17 January 2018

Independent Schools Council, (2019) Census Report 2019, accessed at https://www.isc.co.uk/media/5479/isc_census_2019_report.pdf 29 March 2020

James, M.D., (2010). Humpty Dumpty's guide to tax law: Rules, principles and certainty in taxation, *Critical Perspectives on Accounting,* 21, 573-83

James, M.D., (2017). *The Glorification of Plunder: States, Power and Tax Policy*, London: Spiramus Press

Jones, M.D.W., (1983). Brighton College v. Marriott: Schools, charity law and taxation, *History of Education,* 12, 121-32

Kenway, J. and Fahey, J. (2015). The gift economy of elite schooling: the changing contours and contradictions of privileged benefaction, *British Journal of Sociology and Education,* 36 95-115.

Kenway, J. and Koh, A., (2015). Editorial: Sociological silhouettes of elite schooling. *British Journal of Sociology of Education,* 36, 1-10

Kenway, J., Fahey. J., Epstein, D., Koh. A., MacCarthy, C., and Rizvi, F. (2017). *Class Choreographies: Elite Schools and Globalization*, London: Palgrave MacMillan

Labour Party, (1974a). *Let us work together - Labour's way out of the crisis*, manifesto of the Labour Party, Accessed at http://www.labour-party.org.uk/manifestos/1974/feb/1974-feb-labour-manifesto.shtml on 17 January 2020

Labour Party, (1974b). *Britain will win with Labour*, manifesto of the Labour Party, Accessed at http://www.labour-party.org.uk/manifestos/1974/Oct/1974-oct-labour-manifesto.shtml 17 January 2020

Labour Party, (2019). *It's time for real change: Labour party manifesto 2019,* accessed at https://labour.org.uk/wp-content/uploads/2019/11/Real-Change-Labour-Manifesto-2019.pdf 25 November 2019.

Lukes, S. (2005). *Power: A radical view*, (2nd edition), London: Palgrave MacMillan

Malik, N., (2008). Defining "Charity" and "Charitable Purposes" in the United Kingdom, *The International Journal of Not-for-Profit Law***,** 11. Accessed at https://www.icnl.org/resources/research/ijnl/defining-charity-and-charitable-purposes-in-the-united-kingdom 16 November 2019

Moffat, G., (1989). Independent schools, charity and government, in *Charities and Government,* Ware, A. (ed), Manchester: Manchester University Press

ONS, (2018). Statistical Bulletin: Household disposable income and inequality in the UK: financial year ending 2019, accessed at https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householddisposableincomeandinequality/financialyearending2019 29 March 2020.

Public Administration Select Committee, (2013). The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006, *Third Report of Session 2013–14,* HC76, London: HMSO. Accessed at https://publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/76/76.pdf on 20 January 2020.

Reports of Cases, (1843). Reports of Cases Decided in the High Court of Chancery, Vol 2, New York: Gould, Banks & Company. Accessed at https://books.google.co.uk/books?id=j2cwAAAAIAAJ&pg=PA105&lpg=PA105&dq=attorney+general+v+lord+lonsdale+1827&source=bl&ots=neKF1OZa58&sig=uOTyLyk0Y2SJKerg7h0KpzxKIIE&hl=en&sa=X&ved=0ahUKEwjpjZHVkJ7QAhVUGsAKHc9bBHkQ6AEIKDAE#v=onepage&q=attorney%20general%20v%20lord%20lonsdale%201827&f=false 21 January 2020

Sabine, B.E.V., (1966). *A History of Income Tax,* London: Routledge

Scott, M., and Wethered, S., (2012). *Charity Law Handbook,* London: Spiramus

Shrosbree, C., (1998). *Public schools and private education: the Clarendon Commission, 1861-64, and the Public Schools Acts,* Manchester: Manchester University Press

Simon, B., (1975). Introduction. In B. Simon & I. Bradley (Eds.), *The Victorian public school: Studies in the development of an institution.* Dublin: Gill and Macmillan.

Sloan. B., (2019). Public schools for public benefit? *Cambridge Law Journal* 71,1: 45-47.

Synge, M., (2015). *The 'new' public benefit requirement*, Oxford and Portland Oregon: Hart

Sutton Trust and the Mobility Commission, (2019). *Elitist Britain 2019,* Accessed at https://www.suttontrust.com/wp-content/uploads/2019/06/Elitist-Britain-2019.pdf 20 January 2020

Tapper, T., (2003). From Labour to New Labour: bridging the divide between state and private schooling, in *British Private. Schools,* G. Walford (ed), London: Woburn

Telegraph, The (9 September 2016), *Theresa May takes on private schools as she warns institutions must do more to help poor children*, Accessed at http://www.telegraph.co.uk/news/2016/09/09/theresa-may-takes-on-private-schools-as-she-warns-institutions-m/ 15 November 2016.

Telegraph, The (24 November 2014), Labour plans to strip independent schools of tax relief. Accessed at http://www.telegraph.co.uk/news/politics/labour/11251630/Labour-plans-to-strip-independent-schools-of-tax-relief.html 20 January 2020

Times, The (4 March 2017). Private fees about to pass £40,000 mark, Woolcock N, accessed at **https://www.thetimes.co.uk/article/private-tuition-fees-set-to-top-40-000-k7dl56pxh** 19 January 2018.

UKpublicspending.co.uk, (2019). accessed at https://www.ukpublicspending.co.uk/uk_national_education_analysis on 5 April 2019.

Vesey, F. (1845) Reports or Cases Argued and Determined in the High Court of Chancery, Boston: Little & Brown. Accessed at https://books.google.fi/books?id=xWMwAAAAIAAJ&pg=PA492&lpg=PA492&dq=Attorney-General+v+Earl+of+Clarendon+school+poor+scholars&source=bl&ots=A8h6eTsQ7e&sig=ACfU3U0NEVSX7nH64SX4ZFuzh-e0gqAYwQ&hl=en&sa=X&ved=2ahUKEwj20uGht7_oAhVOXhUIHe3bBCIQ6AEwA3oECAYQAQ#v=onepage&q=Attorney-General%20v%20Earl%20of%20Clarendon%20school%20poor%20scholars&f=false 29 March 2020

Vos, G., (2018) Incremental Changes to the Common law, in *The UK Supreme Court Yearbook,* Vol 9, 56-66.

Walford, G. (1987) How dependent is the independent sector? *Oxford Review of Education,* 13 (3): 275-96.

Walford, G. and Robson M.H, (1988). UK tax policy and independent schools, *British Tax Review*, 2, 38-54

Wilde, R.J., Green, F., Taylor-Gooby, P., and Wiborg, D., (2016). Private Schools and the Provision of 'Public Benefit', *Journal of Social Policy*, 45:2, 305-323