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Searching for a Suitable Education: A Comparative Law Analysis of State Regulation of Independent Faith-Based Schools

1. Introduction

State regulation of faith-based schools is an especially fraught issue because it pits liberal democratic and pluralistic values against one another. Ethical pluralism demands that the liberal democratic state respect the diversity of its citizenry, and the diversity of their ethical values, for its own survival as well as theirs[1]. Yet the survival of the liberal democratic state also depends upon its citizens' receipt of an education that prepares them for informed participation in a democratic system[2]. In examining the legal structures that the United Kingdom, the United States and Israel have built – or declined to build – in order to regulate independent faith-based schools, this essay will assess each state's balancing of right against right in its efforts to define and provide a suitable education.

To that end, this essay first examines how our international human rights instruments attempt to balance, within the universal right to education, the competing interests of state, parent and child. It also describes the efforts of two educational pluralist thinkers to situate the right to an independent, faith-based education within that larger framework.

1 *The Many…*, p. 14.

2 R. Davies, *A Suitable…*, p. 16–32, 19.

It then compares the approaches of the diverse legal systems in the United Kingdom, the United States and Israel toward the provision of, and regulation of, independent faith-based education. It attempts to discover how balancing the same set of rights can produce, in three different contexts, three entirely different understandings of suitable faith-based education.

2. The Universal Balancing Act

As members of the United Nations, the United States, the United Kingdom and Israel all recognize a universal right to education. But to whom does the „right to education" rightly belong? And, in a conflict between right-holders, to which right-holder's interest do courts defer? To the state, so that it may ensure the democratic and economic well-being of its future citizens, and in doing so ensure its own future?[3] To religious communities, who have a right to preserve their way of life?[4] To parents, who have a right to raise their children in the ethical framework of their choice?[5] To children, who need the autonomy to make their own ethical choices?[6] The component covenants that make up the International Bill of Human Rights affirm the universal right to education even as they reveal, upon closer examination, an acknowledgement of the shifting balance between the competing interests of state, parent and child.

The Universal Declaration on Human Rights (the „UDHR") was adopted by the United Nations General Assembly on 10th December 1948, with „yes" votes from both the United States and the United Kingdom. Israel, whose first application to the United Nations still awaited the review of the Security Council, did not participate[7]. The UDHR is not legally binding and only becomes part of any UN member state's domestic law incorporation into its legislation or judicial decisions[8]. Nevertheless, the UDHR and the covenants that follow it are both descriptive

3 W. Galston, *Parents*…, p. 211.

4 M. Fish, *Ethical*…, p. 196.

5 S. Burtt, *The Proper*…, p. 243.

6 J. Feinberg, *The Child's*…

7 Decision on Israeli Membership Application Postponed by United Nations Committee, „Jewish Telegraphic Association Daily News Bulletin", 5 Dec. 1948, https://www.jta.org/1948/12/05/archive/decision-on-israeli-membership-application-postponed-by-united-nations-committee.

8 M.S. McDougal, H.D. Lasswell, Lung-chu Chen, *Human*…, p. 261, 269.

and prescriptive expressions of the „working expectations" of the international legal community[9].

The UDHR draws the contours of the fundamental right to education in Article 26. Art. 26 (1) makes elementary education both free and compulsory[10], and Art. 26 (2) establishes the liberal-pluralistic aims of that education, and the interest of the United Nations in it: „Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace"[11]. Art. 26 (3), however, qualifies the right to education by balancing it against a „prior" parental right: „parents have a prior right to choose the kind of education that shall be given to their children"[12].

The International Covenant on Economic, Social, and Cultural Rights („ICESR") and the International Covenant on Civil and Political Rights („ICCPR") codify the human rights expressed in the UDHR and provide mechanisms for the implementation of the UDHR rights[13]. All of the three UN member states discussed in this essay have ratified the ICCPR. The United Kingdom and Israel have also ratified the ICESCR; the United States, however, has not.

In codifying the UDHR right to education, the ICESCR and ICCPR also complexify it. The ICESCR echoes the UDHR's language as to the fundamental aims of education. However, it adds additional limits to parents' right to choose:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State

9 M.S. McDougal, H.D. Lasswell, Lung-chu Chen, *Human*…, p. 262.

10 UDHR, Art. 26 (1).

11 UDHR, Art. 26 (2).

12 UDHR, Art. 26 (3).

13 Office of the High Commissioner for Human Rights, *The International Bill of Human Rights*, Fact Sheet, United Nations, Geneva 1996.

> and to ensure the religious and moral education of their children in conformity with their own conviction[14].

The „prior right" described in the UDHR has been replaced by the less binding „respect", and the parents' choice as to „kind of education" has been qualified; in the ICESCR, it becomes a choice among only those schools that „conform to such minimum educational standards as may be laid down or approved by the State". „Conform[ity]" to state educational standards takes priority, both in substance and in sentence structure, with „conformity" to parents' religious conviction.

The ICCPR, meanwhile, addresses „negative" rights that enjoin violative state action, rather than „positive" rights that require state implementation[15]. Therefore, it does not deal directly, as the ICESCR does, with the right to education. However, Art.18 (4) of the ICCPR makes the same statement as the ICESCR of „respect (…) for the liberty of parents (…) to ensure the religious and moral education of their children in conformity with their own convictions". Manfred Nowak, the Secretary General of the European Inter-University Center for Human Rights and Democratisation, characterizes the ICCPR's „respect" for parental choice and parental conviction as only a „modest" right[16]. Yet Nowak allows that the same „modest" right, taken in combination with the ICCPR's anti-discrimination provision, ensures that the ICCPR protects the establishment of independent faith-based schools[17].

The UDHR, ICESCR and ICCPR enshrinea universal right to education that may ring true in theory but conflict with other rights in practice: „whilst few would doubt the ethical imperative of developing the child „to their fullest potential" in rhetorical terms, it is less than clear what this means"[18], Aberystwyth University's Professor Richard Davies notes wryly. Furthermore, „it is, of course, the fact that such frameworks and their practical implications are loosely coupled that makes them suitable for international policy, and yet unsuitable

14 ICESCR, Art. 13 (3).

15 P. Sieghart, *The International*…, p. 25.

16 M. Nowak, *CCPR*…, p. 331 – quoted in J. Rivers, *The Law*…, p. 243.

17 M. Nowak, *CCPR*…, p. 331 – quoted in J. Rivers, *The Law*…, p. 243.

18 R. Davies, *A Suitable*…, p. 16–32, 20.

for educational practice"[19]. Yet it is precisely their „educational practice" that the International Bill of Human Rights asks its member states to regulate. Therefore, Davies and other educational pluralists attempt to distill policy into practice; they continue to debate when and how an independent, faith-based education may fulfill the aims expressed in the International Bill of Human Rights.

In an essay on his own decision to send his son to a private Jewish school, the Brookings Institution's senior fellow William Galston argues for a „rebuttable presumption" that „the choices of parents with regard to the rearing of their children are immune from state interference"[20]. According to Galston, a parent's liberty to make child-rearing choices that express his ethical framework is a necessary to the development of his child's own ethical framework[21]. Furthermore, it is necessary to the development of the child as a pluralist, who respects the „expressive liberty" of other citizens. A suitable education, according to Galston, incorporates parental choice as a mean of helping children understand that other citizens will and should live according to moral principles that they themselves may reject, and „internalize norms of self-restraint and a principled refusal to use coercion in order to enforce their own way of life"[22]. Thus prioritizing parental choice eventually benefits both child and state.

In balancing the competing rights of parent and child, William Galston draws a useful parallel between a child's ethical development and linguistic development. Courts in the Europe and the United States have upheld the parental right to instruct one's child in the language of one's choice[23]. „It would be absurd", Galston argues, to suggest „that parents limit their children's future by teaching them a specific language, the language of their society or tribe. (…) Knowing at least one language is a precondition for the mental development needed to learn others. Similarly, unless one is taught to understand an ethical or religious orientation from

19 R. Davies, *A Suitable*…, p. 16–32, 20.

20 G. Stopler, *The Right*…, p. 743, 760.

21 W. Galston, *Parents*…, p. 224–225.

22 G. Stopler, *The Right*…, p. 716.

23 E.g. *R v. Dyfed CC ex p. S (Minors)* (1995) E.L.R. 98; *Case Relating to Certain Aspects of Laws on the Use of Languages in Education in Belgium* (1979–80) 1 E.H.R.R. 252; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

the inside, one will lack the basis for comparing it to alternative understandings". Under Galston's formulation, raising and educating a child within a specific religious ethos does not limit that child's autonomy. Rather, it promotes the development of „understanding" and „tolerance" – exactly those pluralistic values that the UDHR and ICESR place at the heart of a suitable education.

Galston does qualify his rebuttable presumption in favor parental choice in one vital way: he demands that children have an „enforceable right of exit" from the religious communities in which they are raised. And that right must be more than merely formal; communities may not educate „in ways that disempower individuals – intellectually, emotionally, or practically – from living successfully outside their bounds"[24]. The pluralistic advantage of educating a child within his parents' moral and ethical framework is lost if that education does not allow the child to reason „intellectually", engage „emotionally", or live „practically" under any other framework. Galston's is a high bar; only when the presumption in favor of parental choice has been rebutted by „what amounts to educational abuse and neglect"[25] may the state act to protect the right of exit by regulating faith-based education.

In contrast to Galston, Jeffrey Spinner-Halev examines the balancing of rights in the provision of faith-based education through a lens of community autonomy rather than individual autonomy. According to Spinner-Halev, religious communities possess autonomous identities and ways of life, which are dependent upon some degree of faith-based isolation or restriction for their survival[26]. Spinner-Halev theorizes that children belonging to religious minority communities who „constantly find themselves at odds with the norms of their school or their classmates" will alter their behavior, both at school and, potentially, at home[27]. The end result is a form of diluted cultural pluralism where all children „live within the dominant culture, colored perhaps with a few strands of minority cultures"[28]. For that reason, Spinner-Halev suspects that ar-

24 W. Galston, *Parents*…, p. 284, 301.

25 W. Galston, *Parents*…, p. 300.

26 J. Spinner-Halev, *Surviving*…, p. 116–118.

27 J. Spinner-Halev, *Surviving*…, p. 117.

28 J. Spinner-Halev, *Surviving*…, p. 116.

guments like Galston's, which conceive of cultural pluralism in service of the development of individual autonomy, will inevitably undermine true pluralism[29]. Spinner-Halev contends that suitable faith-based education must preserve the autonomy and identity of the religious community from which it springs.

Spinner-Halev acknowledges that some private faith-based schools may „stifle autonomy" rather than „combin[ing] it with community"[30]. For that reason, he takes only a „moderate separatist" position, encouraging state education systems to and religious communities to interface their educational approaches. Spinner-Halev's ideal compromise involves a „split-day" schedule wherein religious students spend part of their day in religiously-affiliated schools and part in public schools[31]. The time devoted to „religiously affiliated education would help secure for the students a deep understanding of their way of life. These students can then attend common schools and face other ways of life and ideas with a firm grounding in conception of the good; a conception that they may decide" – by making a meaningful choice rather than succumbing to conformist pressure – „to alter or to retain"[32]. The state, meanwhile, can reconcile its legally mandated neutrality with its interest in educational and cultural pluralism by funding cooperation efforts between public and religious private schools[33].

Galston puts parental choice at the forefront of his argument by relating it to individual autonomy; Spinner-Halev considers parental choice as a part of community autonomy instead. Galston's theoretical state may make legislative regulations that are necessary to preserve religious students' right of exit; Spinner-Halev's state engages in less direct regulation through financial incentives for the cooperation of private religious and public secular education. Yet, despite their differences, both theorists believe that independent faith-based education can be a form of „suitable education", that it can meet the lofty aims of the UDHR even as it insists upon the primacy of the parental right to educational choice.

29 G. Stopler, *The Right*…, p. 757.

30 G. Stopler, *The Right*…, p. 757.

31 J. Spinner-Halev, *Surviving*…, p. 126.

32 J. Spinner-Halev, *Surviving*…, p. 118.

33 J. Spinner-Halev, *Surviving*…, p. 127.

3. In Search of the Suitable Faith-Based Education

Providing a suitable education of the sort envisioned by Galston and Spinner-Halev proves more difficult in practice than in theory. In the following pages, this essay will discuss the parameters set for a suitable faith-based education by three different liberal democracies: the United Kingdom, the United States and Israel. In the United Kingdom, a long-standing tradition of state regulation of faith-based education has led to an extensive statutory and regulatory framework that metes out modest freedoms to faith-based schools. In the United States, a Constitutional „wall of separation" between church and state means that states are severely limited in their ability to regulate faith-based education without infringing on religious parents' First Amendment rights. Finally, in Israel, recent legislation has guaranteed that the state will continue to provide financial support for faith-based education, even without any concurrent power to regulate its content.

All three states recognize, like our aforementioned human rights instruments and theorists, that parents have a right to provide their children with independent faith-based education. Yet each has crafted its own methods for balancing the various rights at stake in the provision of faith-based education and for making the difficult decision to intervene in faith-based education that may be „unsuitable".

3.1. In the United Kingdom

Even secular education in the United Kingdom is characterized by what scholar Julian Rivers refers to as a religious „residue"; the ecclesiastical school system in the United Kingdom long predates secular state-run schools, and W.E. Forster's Elementary Education Act of 1870 only allowed for the creation of public[34] rate-funded elementary school after approximately a century's worth of failed legislative attempts to provide for universal education via denominational faith-based schools[35]. The rate-funded schools, created by the 1870 Elementary Education Act,

34 I use the term „public school" here as it is used in American parlance to denote a state-run school.

35 J. Rivers, *The Law*…, p. 234–235.

supplemented a patchwork of educational grants to the Anglican National Society, the non-denominational British Foreign School Society and the Catholic Poor School Committee, among others[36]. Meanwhile, Congregationalist „voluntaryists" advocated a separationist approach that turned away state aid and – with it – state oversight[37].

In 1902, Balfour's Education Act drew the „voluntary" – and largely faith-based – schools into the state-maintained fold. It also provided the precursor to today's practice of differentiation in the UK between „voluntary aided" schools and „voluntary controlled" schools, which accept different levels of state funding and concurrent state oversight[38]. However, fully independent schools were and are still permitted, in keeping with the spirit of the original „voluntaryists", to refuse any maintenance by the State and its secular Local Education Authorities („LEAs").

As of 2008, approximately 7% of children domiciled in England and Wales received their compulsory education in fully independent schools[39]. Although approximately 0,5% of school-age UK children are homeschooled, the desire for faith-based educational content is not among the reasons parents commonly give for electing to educate their children at home[40]. Therefore, the fully independent schools are the closest analogue in the United Kingdom to the independent faith-based schools operating in the United States and in Israel. Yet the term „fully independent" is something of a misnomer; while fully independent schools are not governed by the LEAs or bound to follow the National Curriculum, they do not operate „fully independent" of governmental oversight. While fully independent status allows a school to educate according to a „religious dimension not present in maintained schools"[41], that „religious dimension" does not excuse them from compliance with State-dictated minimum standards.

What, then, are the UK minimum standards for a suitable education and how can a fully independent faith-based school provide it? UK case

36 J. Rivers, *The Law*…, p. 236.

37 J. Rivers, *The Law*…, p. 236.

38 J. Rivers, *The Law*…, p. 239–240.

39 DCSF/National Statistics, *The Composition of Schools in England*, June 2008, table 2.1.

40 M. Issimdar, *Homeschooling in the UK Increases 40% Over Three Years*, *BBC News*, 26 Apr. 2018.

41 J. Rivers, *The Law*…, p. 240.

law on the subject is sparse[42]. In what little case law we have, the UK courts take a pluralistic view. The term „suitable education" first appears in 1982 in *Harrison and Harrison v. Stevenson*, in which the Queen's Bench Division held that a suitable education is one that „prepare[s] the children for life in modern civilised society"[43]. The Worcester Crown Court elaborated on that definition in *R v Secretary of State for Education and Science, ex parte Talmud Torah Machzikei Hadass School Trust*. In holding that an Orthodox Jewish school had failed to provide a suitable education, J. Woolf defined the suitable education as one that „primarily equips a child for life within the community of which he is a member, rather than the way of life in the country as a whole, as long as it does not foreclose the child's options in later years to adopt some other form of life if he wishes to do so"[44]. Under J. Woolf's formulation, „modern civilised society" becomes not one but many communities, and „suitability" is defined not objectively but within the subjective context of each community's „way of life".

In demanding that a suitable education „does not foreclose the child's options in later years to adopt some other form of life", J. Woolf has, in theory at least, endowed UK children with right akin to William Galston's „enforceable right of exit". Yet critics have suggested that J. Woolf's formulation is too conservative; an education that „does not foreclose a child's option" to leave the religious fold may still compromise „the ability to imagine alternative [doctrines] and the willingness to consider their point and worth"[45]. In such a setting, J. Woolf's right of exit runs the risk of becoming exactly the sort of mere formalism William Galston rejected. Case law, by itself, fails to guide schools and parents in the balancing of rights necessary for a suitable faith-based education.

However, that sparseness is more than made up for by extensive legislation. The Education Act of 1944 („1944 Act"), as modified by the Education Act 2002 („2002 Act"), lays out a framework for the registration and inspection of fully independent schools. Each independent school must

42 R. Davies, *A Suitable*…, p. 17.

43 *Harrison and Harrison v. Stevenson* (1982) QB (DC) 729/81 (unreported).

44 *R v Secretary of State for Education and Science, ex parte Talmud Torah Machzikei Hadass School Trust* (12 Apr. 1985) – quoted inR. Davies, *A Suitable*…, p. 18.

45 R. Davies, *A Suitable*…, p. 19, 24–25.

register with the Secretary of State; as part of registration, the school may declare its religious ethos[46]. Although the 1944 Act only contained the usual mandate that the education provided by independent schools be „efficient and suitable", the 2002 Act also authorized the creation of quality standards for fully independent schools[47]. In the wake of the 2002 Act, England and Wales have both promulgated regulations requiring each independent school to craft a written policy that describes its approach to personal, social and health education in keeping with its stated religious ethos[48]. Nor can the school's stated religious ethos exempt it from providing an education that „enable[s] pupils to distinguish right from wrong and to respect the law", „provide[s] pupils with a broad general knowledge of public institutions and services" and „assist[s] pupils to acquire an appreciation of and respect for their own and other cultures in a way that promotes tolerance and harmony between different cultural traditions"[49].

Importantly, the 2002 Act also provides for the enforcement of its mandates to fully independent schools. Fully independent schools are not subject to LEA regulation or inspection, but they must nevertheless undergo inspection by a Secretary-of-State-approved provider[50]. Some of the approved providers are themselves religious in character, and so perhaps are better able to carry out inspections that will, necessarily, involve „the tensions between religious and secular requirements" for faith-based schools[51]. If a school fails its inspection, the Secretary of State may order it to produce an action plan to remedy its deficiencies[52]. Finally, if the school cannot produce an action plan that meets with governmental approval, the Secretary of State may require part or all of a fully independent school to close[53].

The operation of fully independent faith-based schools within the UK education system relies on a carefully calibrated balancing of the rights

46 R. Davies, *A Suitable*…, p. 261.

47 Education Act 2002, § 157.

48 SI 2003/1910 (England) and SI 2003/3234 (Wales).

49 SI 2003/1910 (England) and SI 2003/3234 (Wales), sched. 1, para. 2.

50 J. Rivers, *The Law*…, p. 262.

51 J. Rivers, *The Law*…, p. 262.

52 Education Act 2002, § 165 (3)-(5).

53 Education Act 2002, § 165 (6).

and interests at stake. In a system that mandates registration and inspection for all schools, fully independent status does not exempt fully independent schools from following state legislation, or the regulations promulgated pursuant to that legislation. Nor does it exempt a school from minimum curricular standards, or from inspections to ensure that those standards are enforced. Instead, fully independent status offers faith-based schools some additional flexibility in constructing a curriculum in keeping with their religious ethos and gives them the chance to engage with the state. Therefore, the inspection of fully independent faith-based schools, and any related proceedings, are made by a representative who understands the strictures and nuances of their faith. In return for these modest freedoms, fully independent schools forego funding from the state and rely instead on donations from religious and charitable institutions, and on the fees paid by their pupils' parents. Presumably, given the obvious financial advantages of state subsidization, the fully independent schools appeal to only those communities, educators and parents who are most insistent upon exercising their right to education „in conformity with their own conviction" to the fullest extent possible under UK law.

However, the inclusion of fully independent faith-based schools in the UK system has not gone without criticism. „Regrettably" – the University of Antwerp's Professor Leni Franken concludes – „it seems very difficult for the state to prepare *all* youngsters to a minimal extent for life in society without infringing upon parental rights, children's rights, the freedom of religion, and the freedom to educate"[54]. Critics may believe, as Professor Franken does, that schools whose curriculum replaces Darwinism with creationism, or critical thinking with religious dogma, prevent „the development of students into critical, autonomous citizens" and so do a disservice to the interests of both the children and the state[55]. Alternatively, parents and religious communities may justifiably feel that the UK education system has not been respectful enough of *their* interests. A regulation that requires „pupils to acquire an appreciation of and respect for their own and other cultures in a way that promotes tolerance and harmony between different cultural traditions" would seem

54 L. Franken, *Liberal*…, p. 194.

55 L. Franken, *Liberal*…, p. 193.

to contradict J. Woolf's holding, in *Ex Parte Talmud Torah Machzikei Hadass School Trust*, that a child need only be prepared for his own community's way of life.

In recent years, independent faith-based schools have also been forced to contend with the public perception that they encourage social and ethnic segregation[56]. Faith-based schools in the UK are legally permitted to engage in self-segregation in that they are exempted from the non-discrimination provision of the Equality Act 2006[57]. Schools with a religious designation may legally discriminate on religious grounds when choosing which prospective pupils may be granted admission[58], provided that a school's religious preference is not in fact a coded expression of racial or ethnic discrimination. However, the lines between pure religious preference and ethnic discrimination are often blurry. In *R(E) v. Governing Body of JFS*, a bare 5–4 majority of the UK Supreme Court held that an Orthodox Jewish faith-based school that conditioned admission upon a pupil's Judaism by matrilineal descent was in fact discriminating based on ethnicity[59]. The dissenting Justices, however, felt that no clear religious-ethnic distinction could be drawn when halakhic Jews do not define membership in their religious group by voluntary association, but by descent[60]. Furthermore, even when distinguishing between pure religious preference and ethnic discrimination is possible, it does not alter the public perception that independent faith-based schools – especially Muslim schools in post-9/11 Britain – allow the self-segregation and radicalization of minorities, creating spaces that are „almost completely cut off from the surrounding society"[61].

3.2. In the United States

Unlike the United Kingdom, where state subsidization and regulation of faith-based schools predates the development of a secular public school

56 I. Niehaus, *Emancipation*…, p. 113.

57 Equality Act 2006, § 50 (1) (b).

58 J. Rivers, *The Law*…, p. 256.

59 *R(E) v. Governing Body of JFS*, 2 WLR 153 (2010).

60 S. Mancini, *To Be*…, p. 481, 490.

61 I. Niehaus, *Emancipation*…, p. 116–17.

system, the United States has never tried its hand at the national regulation of faith-based schools. Such an activity would be considered Constitutionally impermissible. The United States Constitution's Establishment Clause and Free Exercise Clause dictate that „Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof"[62]. The Supreme Court of the United States has long read those two clauses as requiring a „wall of separation" between church and state[63]. While public education stands on one side of the wall in the purview of the state, faith-based education and a parent's right to choose it for her child, stands squarely on the other.

In *Pierce v. Soc'y of Sisters*, the Supreme Court of the United States upheld the parental right to choose a private, faith-based education for one's child: „The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"[64]. *Pierce*'s wording is familiar to us – once again we see parental educational choice cognized as a „right" conditioned upon a „duty". The implication remains that, if a parent fails to do his or her duty, the state possesses some regulatory authority.

And indeed, in response for their recognition of the parental „right" and „duty", *Pierce* authorizes states to „reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, (…) that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare"[65]. Again, *Pierce* employs criteria that should be familiar to us by now. States have an interest in ensuring that a child „attends some" educational program that teaches him or her material „essential to good citizenship"; they also have a means of enforcing that interest via „reasonable regulation".

The *Pierce* Court was silent as to the circumstances in which „reasonable regulation" could intrude upon the right to faith-based education.

62 U.S. Const. Amend. I

63 *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (attributing the phrase „wall of separation" to Thomas Jefferson).

64 *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

65 *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925).

Nevertheless, in a nation where 85%–90% of private school attendees study at faith-based institutions[66], a case involving state regulation of faith-based education was bound to arise. In *Wisconsin v. Yoder*, the United States Supreme Court vacated the convictions of three Amish fathers who removed their children from state schools at age 14, in keeping with Amish religious practice and in violation of Wisconsin's compulsory school attendance law[67]. The state argued that its exercise of its compulsory attendance laws was among the „reasonable" methods of ensuring a suitable faith-based education that were contemplated in *Pierce*.

The three Amishmen argued in response that their children, by leaving the public high school, would not be foregoing education, but rather exchanging one form of education for another, which aligned more closely to their religious way of life. This form of faith-based education may not have taken place in a classroom, the Amishmen contended, but it was education nonetheless[68]:

> During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and „doing" rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism[69].

Furthermore, the Amishmen contended, their unique form of faith-based higher education was essential to the survival of their way of life. Without it, their children's salvation was imperiled[70], and so were the next generations of the Amish church community[71].

66 J.F. White, *Regulation*…, p. 357.
67 *Wis. v. Yoder*, 406 U.S. 205, 207 (1972).
68 S.F. Peters, *The Yoder*…, p. 90–91.
69 *Wis. v. Yoder*, 406 U.S. 211 (1972).
70 *Wis. v. Yoder*, 406 U.S. 209 (1972).
71 *Wis. v. Yoder*, 406 U.S. 212 (1972).

The Court acknowledged that „a State's interest in universal education, however highly the court ranks it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children"[72]. The balance, in this case, favored Yoder: Wisconsin had not articulated a sufficient „compelling interest" to justify the heavy burden it had placed on the Amishmen's First Amendment rights[73].

What lessons does *Yoder* hold for modern-day seekers of a suitable faith-based education? We know from *Yoder* that, without ever echoing the language of J. Woolf in *ex parte Talmud Torah Machzikei Hadass School Trust*, the United States has endorsed a similar definition of „suitable education". In finding for the Amishmen, the Supreme Court validated a faith-based education that prepared children for life within their unique religious community and not for life in the outside world. Yet it also took care to note that the Amish faith-based had nevertheless provided its children with an „enforceable right of exit"[74] the Court described the Amish „learning-by-doing" philosophy as an „ideal vocational education" for those children who might choose to enter the wider world[75].

Thomas Berg, writing for the U.C. Davis Law Review, suggests that *Yoder* also tells us that the „compelling interest" test „should require the state to adhere to a fairly ideologically thin" and „results-based approach" to evaluating faith-based education[76]. In Yoder's case, the „results-based" approach meant that the Supreme Court did not attempt to interpret or evaluate Amish beliefs concerning good citizenship; it merely observed that those members of society who received an Amish faith-based education tended to be law-abiding and productive citizens[77]. In a more modern context, the „results-based approach" might mean that „religious schools could be required to teach students how to reason from one premise to another, but they could not be required to rule out some

72 *Wis. v. Yoder*, 406 U.S. 214 (1972).

73 *Wis. v. Yoder*, 406 U.S. 215 (1972).

74 To use William Galston's terminology.

75 *Wis. v. Yoder*, 406 U.S. 224 (1972).

76 T.C. Berg, *State*…, p. 531, 537–538.

77 *Wis. v. Yoder*, 406 U.S. 212.

premises like religious authority on the ground that they are inconsistent with the (unrealistic) image of a decision maker guided solely by his own reason"[78].

Given the parameters set by *Pierce*, *Yoder*, and the „wall of separation", states may well feel that their efforts at the „reasonable regulation" of faith-based education are severely limited. However, a recent case, *Zelman v. Simmons-Harris*, gives states a new and indirect means of regulating faith-based education: the voucher system. Under *Zelman*, families who participate in school choice voucher programs are free to use the vouchers to fund an independent faith-based education for their children, provided that the voucher program itself is value-neutral[79].

Both states and parents may benefit from the indirect subsidization of independent faith-based schools via voucher. As we have seen in the United Kingdom, state subsidization of faith-based schools can lead to some degree of control over the secular aspects of faith-based education[80]. States can exert indirect control over a faith-based school's curriculum by conditioning its eligibility for the voucher program on its ability to meet state educational standards, as Ohio did in *Zelman*[81]. Yet vouchers do not erode the right of parental choice; once parents receive a voucher, they can use it at the educational institution of their choosing[82]. Vouchers, and the financial savings they represent, may also encourage religious parents who would otherwise homeschool their children to move their children into a faith-based independent school, and out of an environment that is even less hospitable to state regulation[83].

3.3. In Israel

Since 1953, Israel has differentiated between „official recognized" schools that are both registered with and fully supported by the state (akin to the United Kingdom's community schools), and „non-official

78 T.C. Berg, *State*…, p. 531, 537–538.

79 *Zelman v. Simmons-Harris*, 536 U.S. 639.

80 L. Franken, *Liberal*…, p. 141.

81 G. Stopler, *The Right*…, p. 773.

82 G. Stopler, *The Right*…, p. 773.

83 C.J. Ross, *Fundamentalist*…, p. 991, 992.

recognized" schools that are registered with the state but only partially supported by it (akin to the United Kingdom's voluntary aided and voluntary maintained schools)[84]. In a third category of „exempt institutions", the Minister of Education may „exempt pupils from the obligation of regular study at a recognized educational institution"[85]. These „exempt institutions" would be directly analogous to the fully independent faith-based institutions in the United Kingdom and the United States, but for one crucial wrinkle: despite their failure to follow a national curriculum, or – in many cases – to provide any secular education whatsoever, they still receive state funding[86].

Israel's 1953 State Education Law authorized the Ministry of Education to set a national „core curriculum" for official[87] and non-official[88] recognized schools. The initial core curriculum was tasked with teaching students „the values of Jewish culture and the achievements of science", „practice in agricultural work and handicraft" and „striving for a society built on freedom, equality, tolerance, mutual assistance and love of mankind"[89]. In modern-day Israel, the core curriculum includes „the study of Judaism, citizenship, geography, Hebrew, English, math, sciences, and physical education"[90]. In Arabic schools, instruction in Judaism is replaced by instruction in Arabic heritage, and instruction in Hebrew is replaced by instruction in Arabic[91].

The State Education Law also authorized the creation of State Education Regulations to budget state support for non-official recognized and exempt institutions[92]. The State Educations Regulations employed a sliding scale: if students at a non-official recognized school spend

84 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 1 (2008).

85 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 1 (2008).

86 G. Stopler, *The Right*…, p. 750.

87 State Education Law, 5713–1953 § 4.

88 State Education Law, 5713–1953 § 11.

89 State Education Law, 5713–1953 § 2.

90 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 31 (2008).

91 G. Stopler, *The Right*…, p. 39.

92 State Education Regulations, 5714–1953 (Isr).

a minimum 75% of their study hours learning material that appears on the core curriculum, they receive a minimum 75% of the state funding allocated to an official recognized school[93]. However, since several consecutive Ministers of Education refused to obey § 11 of the State Education Law and set out a core curriculum for ultra-Orthodox institutions, the sliding scale could not be applied to the ultra-Orthodox institutions[94]. Nevertheless, they continued receiving state funds[95].

The ultra-Orthodox schools make a particularly fascinating case study for this essay because they bring the tension between the rights of parents, children, religious communities, and state to a fever pitch. For ultra-Orthodox young men, full-time Torah study is not incidental to or separable from the practice of Judaism. Instead, „the continuous study of Torah has always been a central ideal in Jewish tradition and is considered the equivalent of all other religious commandments"[96]. Even as adults, almost half of ultra-Orthodox men spend their days in religious study, with no other occupation or source of income aside from state-funded stipends[97]. An education that contains enough secular material to qualify as suitable for the liberal democratic state is inherently *unsuitable* for the practice of ultra-Orthodox Judaism, and vice versa[98].

In 2005, that tension was brought before the Israeli Supreme Court for the first of the „core curriculum cases". J. Levy issued an ultimatum: the Ministry of Education was to be given three years to design and incorporate a core curriculum into ultra-Orthodox primary and secondary schools. Failure to do so would cause the Court's *decree absolute* to take effect and „cancel allocations to the institutions that teach religious studies and that do not fulfill the conditions and the criteria set by law for recognition of 'recognized institutions', which would entitle them to financial allocations"[99].

93 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 1 (2008).

94 G. Stopler, *The Right*…, p. 750.

95 G. Stopler, *The Right*…, p. 750.

96 G. Stopler, *The Right*…, p. 749.

97 G. Stopler, *The Right*…, p. 749.

98 U. Spiegel, *Talmud…*

99 *Secondary School Teachers Organization v. Minister of Educ. Isr.*, HCJ 10296/02 § 20 (2005).

Three years later, the Israeli Supreme Court contended again with the Ministry of Education's failure to implement a core curriculum. In *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, the Ministry of Education argued that the implementation of a core curriculum in the *yeshivot* was incompatible with „the right of sectors who follow particularistic life-styles to preserve their identity and their cultural and religious particularity"[100]. The Ministry proposed instead that the *yeshivot* should be granted „exempt institution" status *en masse*. While admitting that „the existence of a large number of pupils who are not exposed to the core contents, and are not educated to values of Zionism and democracy, has future problematic consequences for the character of Israeli society"[101], the Ministry argued that „cessation of Torah study for any purpose whatsoever, including for the purpose of secular study, involves serious damage to the root of the belief system and the way of life"[102] of the ultra-Orthodox Jews. Therefore, the Ministry contended that classifying the *yeshivot* as exempt institutions was the proper way to balance „the requirements of the law and the demands of life" for their country's largest religious minority[103].

Speaking for the Israeli Supreme Court, J. Procaccia refused to accept the Ministry's proposed balance of the religious and parental rights of ultra-Orthodox Jews, and the interests of the democratic Israeli state. J. Procaccia viewed the „exempt institution" solution proposed by the Ministry as „a jarring, problematic position"[104], a failure to recognize that „respecting the autonomy of the family to choose the educational line that it desires for its children" does not permit the complete abdication of „the authority of the State, and at times its obligation as well, to intervene in this

100 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 15 (2008).

101 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 15 (2008).

102 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 19 (2008).

103 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 15 (2008).

104 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 46 (2008).

autonomy for the sake of protecting the child's welfare and his rights, and to achieve the general social objective of creating a common denominator of basic educational values that unite all members of society"[105]. J. Procaccia and the Israeli Supreme Court, like the ICESCR, „respect" parental autonomy; yet they do not allow mere „respect" to eclipse the state's position as protector of its future citizens' rights and provider of „basic educational values".

Had J. Procaccia's judgment taken effect, we might have seen the non-official recognized and exempt *yeshivot* forced to provide a suitable education, subject to a regulatory and enforcement framework like the one at work in the United Kingdom. Instead, only days before J. Procaccia's judgment was published, the Israeli Knesset passed the Unique Cultural Educational Institutions Act of 2008 (the „2008 Act"). The 2008 Act's stated purpose was „to enable the existence of the educational institutions of the ultra-Orthodox community and similar unique cultural communities, in view of the need to respect the rights of such unique cultural communities, and to enable them to maintain their own educational institutions"[106]. In other words, the Act affirmed the Ministry of Education's position that the rights of „unique cultural communities" and the continued existence of those communities, depended on the state's funding their faith-based education, even against its own interest in promoting liberal democratic thought. Israel had legislated its way around the requirement for a suitable education.

The position of the 2008 Act and the arguments of the Ministry of Education in *Ctr. for Jewish Pluralism* are both reminiscent of Jeffrey Spinner-Halev's conviction that children, when their religious identity-affirming practices are at odds with the behavior of their classmates, will cease to practice their religion. The Act assumes that the ultra-Orthodox way of life is dependent on the continued existence of the *yeshivot* to preserve its status as a „unique cultural community". This is not necessarily the case in modern-day Israel. According to a study by Israeli sociologists Tehila Kalagy and Orna Braun-Lewensohn, Ultra-Orthodox women

105 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 55 (2008).

106 Proposed Act: Unique Cultural Education Institutions, 239 Proposed Acts 350 (June 23rd, 2008) – quoted in G. Stopler, *The Right*…, p. 753.

who are required by economic necessity to receive a secular education and join a secular workforce do not come to disregard the principles of their faith; on the contrary, they become its „torch-bearers", the family and community members who are most insistent on the rigid practice of ultra-Orthodox Judaism[107]. In fact, most of the women in Kalagy and Braun-Lewensohn's focus group expressed a desire to educate their own sons in the *yeshivot*[108].

It is also tempting to argue that ultra-Orthodox Jews in Israel are comparable to the American Amish community whose right to a religious education was upheld in *Wisconsin v. Yoder*. True, Jeffrey Spinner-Halev theorized that the *Yoder* community's isolation was central to the survival of their way of life[109]. We might assume, from the language of the Act, that the isolation of young ultra-Orthodox men in the *yeshivot* is similarly central to the ultra-Orthodox Jewish way of life. Yet Spinner-Halev emphasized that the religious community discussed in *Yoder* practices isolation in order to promote self-reliance above all; its adherents ensure their own continued survival without „press[ing] the state for financial favors of funds to establish institutions for themselves"[110]. Ultra-Orthodox graduates of the *yeshivot*, in contrast, sustain their religious way of life primarily through state funding[111], and the 2008 Act may itself be viewed as a successful attempt to „press the state for financial favors". Furthermore, as New York University's Tikvah Fellow Gila Stopler notes, any perception of the ultra-Orthodox as an isolated community ignores the ultra-Orthodox community's „extensive political power" in Israel and its influence on the Israeli civil law system: individuals educated in *yeshivot* have a hand in „determining the legal status of other citizens' marriages and divorces, of their conversions, and of their children's religious status on the basis of their own radical religious ideology"[112].

107 T. Kalagy, O. Braun-Lewensohn, *Agency*..., p. 1–21.
108 T. Kalagy, O. Braun-Lewensohn, *Agency*..., p. 17.
109 J. Spinner-Halev, *Surviving*..., p. 50–51.
110 J. Spinner-Halev, *Surviving*..., p. 50–51.
111 J. Spinner-Halev, *Surviving*..., p. 76.
112 J. Spinner-Halev, *Surviving*..., p. 793.

Regardless of whether the 2008 Act rightly or wrongly assumed that the removal of state funding from the *yeshivot* would result in the decline of the ultra-Orthodox faith, there is no denying that „the model of autonomy for Ultra-Orthodox education which the Act establishes (…) is one which combines generous state funding with an almost complete lack of state supervision over the content of education"[113]. It is a combination we have not seen in the United Kingdom, where the slow disestablishment of the Anglican church yielded an educational system that allows the State to regulate most aspects of independent faith-based education. Nor is it a combination we have seen in the United States, where the Establishment Clause mandates that independent faith-based schools experience both a lack of state funding and a lack of state oversight.

For Gila Stopler, Israel's decision that *yeshivot* should receive state funding while failing to provide a suitable education is deeply bound up with its undefined status as a „Jewish state"[114]. Stopler posits that the Israel's Basic Laws can be read in two conflicting ways: either the term „'Jewish state' should be understood as a national definition designating the character of Israel as the home of the Jewish people, where Jews realize their right to self-determination", or as „an establishment of the Jewish religion in the state"[115]. If the former reading wins out, then Israel stands for the „right to self-determination" above all, and an education that refuses to provide an enforceable right of exit from a minority religious community appears as it did to Justice Procaccia: „jarring and problematic"[116] for the Israeli right to self-determination. However, if the words „Jewish state" imply some partial establishment of the Orthodox Jewish faith within the Israeli legal system, then they provide some legal shelter for an education that aims not to be suitable in a liberal democracy, but – rather – suitably *Jewish*.

113 J. Spinner-Halev, *Surviving*…, p. 745.

114 J. Spinner-Halev, *Surviving*…, p. 785.

115 J. Spinner-Halev, *Surviving*…, p. 785.

116 *The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al.*, HCL 4805/07 § 46 (2008).

4. Conclusion

There is no straightforward definition, in international or domestic law, of a suitable faith-based education. In this context, „suitability" depends on a delicate balance between the rights of parents, children, minority religious communities and the liberal democratic state. True, there are ways of tilting the balance: in the United States, we may use the Constitutional „wall of separation" between church and state to curb our inquiry. In Israel, we may change the relative weight of religious and state rights by concluding that religious establishment in the „Jewish state" makes a wholly religious education suitable for the Israeli state. In the United Kingdom, we may attempt to game the balancing test in advance, by designing extensive statutory categorization and regulation to separate those faith-based schools that provide a „suitable education" from those that fail to do so.

Yet those few cases that are willing to grapple with the balancing test – *Yoder*, *Ex Parte Torah Trust* and the Core Curriculum cases, for instance – are each able to discern whether a particular restriction on faith-based schooling, as applied to a particular set of religious children, is a necessary part of a „suitable education". We might say that education, defined by the UDHR as „the full development of the human personality", is different for every child. Education takes place on a case-by-case basis; it deserves to be adjudicated on one too.

Summary

State regulation of independent faith-based schools necessarily involves the balancing of multiple human rights vested in parents and children who identify simultaneously as citizens of a liberal democratic state and practitioners of a religion that rejects straightforward secular education. Ethical pluralism demands that the liberal democratic state respect the diversity of its citizenry and the diversity of their ethical values, for its own survival as well as theirs; yet the survival of the liberal democratic state also depends upon its citizens' receipt of an education that prepares them for informed participation in a democratic system. This essay examines the attempts of three liberal

democracies – United Kingdom, the United States and Israel – to regulate independent faith-based schools, and so provide a suitable education for religious minority students.

Keywords: suitable education, religious education, faith-based education, faith-based school, religious pluralism

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