

THE RIGHT TO AN EXCLUSIVELY RELIGIOUS EDUCATION—
THE ULTRA-ORTHODOX COMMUNITY IN ISRAEL IN
COMPARATIVE PERSPECTIVE

*Gila Stopler**

TABLE OF CONTENTS

I.	INTRODUCTION	744
II.	UO EDUCATION IN ISRAEL—BACKGROUND	747
	<i>A. The UO Community</i>	747
	<i>B. The Israeli Education System and UO Education</i>	750
	<i>C. The Core Curriculum Cases</i>	751
	<i>D. The Act</i>	753
III.	THEORETICAL AND COMPARATIVE PERSPECTIVES ON EDUCATIONAL AUTONOMY FOR RELIGIOUS COMMUNITIES	754
	<i>A. Theoretical Perspectives</i>	754
	<i>B. Comparative Perspectives</i>	763
	1. <i>The Netherlands</i>	764
	2. <i>Britain</i>	767
	3. <i>The United States</i>	771
	4. <i>Malaysia</i>	775
	5. <i>Turkey</i>	778
	<i>C. Lessons from Theory and from Comparative Law and Practice</i>	781
IV.	UO EDUCATION IN ISRAEL—AN ANALYSIS	785
	<i>A. State-religion Relations in Israel</i>	785
	<i>B. What Does All This Have to do with the UO?</i>	788
	<i>C. The UO Community in Israel—Partial Citizens or a Prodigious Enclave Community?</i>	790
V.	CONCLUSION.....	794

* Senior lecturer, Academic Center of Law and Business, Israel; 2011–2012 Tikvah Fellow, Tikvah Center for Law and Jewish Civilization, New York University School of Law; JSD, New York University School of Law, 2004. This Article was mostly written during my time as a Tikvah Fellow at NYU School of Law. I would like to thank Professors Joseph Weiler and Moshe Halbertal for their support and advice.

I. INTRODUCTION

The right of parents, and of the communities in which they live, to educate their children according to their own beliefs is a fundamental one, and educational pluralism is an essential aspect of respect that liberal democratic states must show to their diverse citizenry. Accordingly, Article 18 of the International Covenant on Civil and Political Rights (ICCPR) states that: “The States Parties to the present Covenant undertake to have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions.”¹ Nevertheless, while respect for parents’ and communities’ decisions with regard to the form and content of their children’s education should be the rule, there are instances in which the liberal democratic state is allowed and indeed required to assert its authority in educational matters in order to protect the rights and interests of others as well as the public’s interests.

The Israeli education system is a pluralist system that caters to the diverse communities existing in Israeli society. This is especially true with respect to the large Jewish religious communities, which—in addition to a public religious education system—enjoy private education systems, the largest of which is the ultra-Orthodox (UO) education system. The UO system, despite being private, is heavily funded by the state. In recent years the Israeli Supreme Court has heard two important cases involving the UO education system, which have brought to the fore the conflict between religious educational autonomy and the authority of the liberal democratic state. These cases (the Core Curriculum cases) have highlighted the worrying fact that the UO educational system for boys does not teach the core curriculum, which includes, in addition to basic subjects such as math and English, lessons in citizenship and core democratic values such as tolerance and equality.²

UO schools for boys have for years restricted their curriculum strictly to religious studies, because according to UO ideology the study of the Torah is

¹ International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171.

² HCL 4805/07 The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al. (unreported), *available at* http://elyon1.court.gov.il/files_eng/07/050/048/r28/07048050.r28.htm (last visited Feb. 20, 2015 (unpublished)).

every man's highest obligation and is the equivalent of all other religious commandments.³

A few days before the Court was scheduled to rule that the state may not continue to fund UO private schools that do not teach the core curriculum, the Israeli parliament passed a law that circumvented the Court's expected ruling—the Unique Cultural Educational Institutions Act (the Act).⁴ The Act grants UO high schools (Yeshivot Ketanot) 60% of the funding awarded to public schools, regardless of whether they teach any part of the core curriculum.⁵ Although the Act applies only to high schools, the de facto situation is that UO schools for boys have for years been teaching almost exclusively religious studies at all levels of schooling while still receiving extensive state funding.⁶ Thus, the model of autonomy for UO education which the Act establishes, and which has existed de facto even prior to the act, is one which combines generous state funding with an almost complete lack of state supervision over the content of education.

In Part II of this Article I will describe the UO community, its educational system, the Supreme Court core curriculum cases, and their end result—the enactment of the Act. The proponents of the Act claimed that allowing this form of autonomy in education to the UO is required normatively, from the perspective of liberal multicultural theory, and is appropriate in a democratic society. In Part III of this Article I will first examine the views of five liberal thinkers with regard to the contours of the autonomy that should be granted to religious education. These thinkers disagree on the extent to which the state should allow the existence of private religious education, the extent to which it should finance such education, and the extent to which it should intervene in private religious education in order to ensure that these schools maintain an adequate level of civic education. This disagreement roughly matches the distinction between the autonomy-based conception of liberalism and the diversity-based conception of liberalism.⁷

I will then perform a comparative legal analysis of the autonomy granted to religious communities in the area of education in five countries. I will discuss the education of Muslims in the Netherlands and Britain, private

³ See Ehud (Udi) Spiegel, *Talmud Torah is Equivalent to All: The Ultra-Orthodox (Haredi) Education System for Boys in Jerusalem*, at vi (The Jerusalem Institute for Israel Studies, Series No. 405, 2011).

⁴ The Unique Cultural Educational Institutions Act, 5769-2008, § 1 (Isr.).

⁵ *Id.*

⁶ See Spiegel, *supra* note 3, at xvi.

⁷ See generally William Galston, *Two Concepts of Liberalism*, 105 ETHICS 516 (1995).

religious education in the United States, the Imam Hattip religious schools in Turkey, and private Muslim education in Malaysia. The first three countries I discuss—The United States, the Netherlands and Britain—are liberal democracies, while the last two—Turkey and Malaysia—are not liberal countries. In both Malaysia and Turkey the majority Muslim religion plays a crucial role in shaping the national ethos and the relations between the state and religion are much closer than they are in liberal democracies.⁸ Although Israel is customarily considered a liberal democracy and is compared to western liberal democracies, its state structure contains some significantly illiberal elements, such as the establishment of the Orthodox Jewish religion in the state. Consequently, as I will show, important insights can be gained from comparing Israel to countries in which the state is similarly closely intertwined with religion.

I will claim that in liberal countries, as well as in the writings of liberal theorists, it is possible to identify two models of autonomy in religious education. One model—which can be found in countries such as Britain and the Netherlands—combines a relatively high degree of supervision over the content of education with the grant of state funding, and the second model—which can be found in the United States—combines almost no state funding with rather lax supervision. A third model can be observed in non-liberal Malaysia and Turkey. Because religion and the state are closely intertwined in this third, non-liberal model where the state uses religion as a source of legitimacy and authority, the autonomy granted to private religious educational institutions is highly restricted. The theoretical and legal analysis will lead me to conclude that the form of educational autonomy granted to the UO is neither required normatively nor comparable to the autonomy granted to the educational systems of religious groups in the countries discussed. Israel, which does not fit any of the above-mentioned models, emerges as a unique hybrid that, on the one hand, gives extensive religious autonomy in education to the UO community—on misguided liberal grounds—while, on the other hand, allowing this same community to retain control over the Israeli religious establishment and to enforce its increasingly radical religious ideology through this establishment. Thus, in Part IV of the Article I will conduct a detailed analysis of the position of the UO community in the Israeli polity, considering, among other things, the

⁸ As we will see *infra* Part III.B.5, despite the fact that Turkey is an allegedly staunchly secular state, the Muslim religion is in fact closely intertwined with the state and highly important for the national ethos.

unique structure of religion-state relations in Israel and the position of the UO within this structure. I will claim that far from being a disempowered enclave community or partial citizens, the UO community in Israel emerges as what I will call a prodigious enclave community, which is politically strong and highly influential.

I will claim further that, because of this status, the multicultural discourse used to justify the Act and the accommodations that it offers is misplaced. My conclusion in Part V will be that the right to an exclusively religious, state-funded education that was granted to the UO community by the Act is the result of a political power play—that cannot be justified theoretically or comparatively and that constitutes a challenge to the rights of others as well as to the already shaky liberal democratic foundations of Israel. I will therefore offer some thoughts as to the measures that Israel could take in order to thwart the threat to its democratic structure that the current situation poses, and will claim that, among other things, the state should cut funding to any school that does not teach the core curriculum.

II. UO EDUCATION IN ISRAEL—BACKGROUND

The UO educational system is the largest private educational system in Israel and the one that gets the most generous state funding and the least supervision. Before discussing the Israeli educational system and the recent core curriculum cases, which demonstrate the problematic nature of the UO educational system, it is important to give a short overview of the UO community in Israel.

A. The UO Community

The UO Jewish community in Israel consists of around 800,000 people, comprising about 10% of the Israeli population.⁹ The UO community, known in Hebrew as the Haredi community, or the Haredim, gets its name from the proverb in Isaiah 66:5 “Hear the word of the Lord, you who tremble

⁹ It is very hard to produce accurate estimates of the size of the ultra-orthodox community, and the estimates vary according to the measuring methods used. See Fridman et al., THE ISRAELI CENTRAL BUREAU FOR STATISTICS, *Measurement and Estimates of the Population of Ultra-orthodox Jews*, 4–5, 51, 54 (2011) [Hebrew].

(haredim) at His word.”¹⁰ The UO are a radical segment within Orthodox Judaism, and while there are many subgroups within the UO community they all distinguish themselves from other Jews by their dress, attitudes, world view and the character of their religious lives.¹¹ The three main subgroups in the UO community are the Lithuanians, the Hasidim, and the Sephardi UO, but these subgroups are themselves divided into many different sub-communities.¹² According to Samuel Heilman and Menachem Friedman, the UO can be considered fundamentalists in that they believe in the fundamental truths of their religion, which they assume, are unchanging from the time of Abraham, and they look to the past as “the great teacher.”¹³ Furthermore, a crucial feature of their existence is “a refusal to endorse or legitimate contemporary Western culture” and their entire lives are dedicated to “fortifying their own way of traditional Judaism” in opposition to modernity.¹⁴ Thus, while UO fundamentalism is built on a commitment to an idealized past, this past has in fact never existed and is constructed and reconstructed by UO sages in opposition to developments in modern culture and society.¹⁵ The UO community has objected to the establishment of the state of Israel and still retains an anti-Zionist ideology to this very day.¹⁶ Furthermore, the UO consider themselves, and are often perceived by others as, a secluded enclave community. Nevertheless, UO representatives have served in the Israeli Knesset and been involved in Israeli politics since the establishment of the state and their political power, as well as their power in Israel’s religious establishment, has grown considerably over the years.¹⁷

The UO community is the fastest growing religious community in Israel. The average fertility rate of UO women stands at almost 7.7 children per woman, as opposed to 2.6 children per woman for the Jewish population in general.¹⁸ Only about 37% of UO men work while almost half of UO men

¹⁰ Samuel Heilman & Menachem Friedman, *Religious Fundamentalism and Religious Jews: The Case of the Haredim*, in *FUNDAMENTALISMS OBSERVED* 197, 198 (Marty & Appleby eds., 1994).

¹¹ *Id.* at 197, 199.

¹² See Spiegel, *supra* note 3, at xviii.

¹³ Heilman & Friedman, *supra* note 10, at 197.

¹⁴ *Id.* at 198.

¹⁵ *Id.* at 257.

¹⁶ MENACHEM FRIEDMAN, *THE HAREDI (ULTRA-ORTHODOX) SOCIETY – SOURCES, TRENDS AND PROCESSES* 19–20 (1991).

¹⁷ *Id.* at 52–54, 188–91.

¹⁸ The data is from of 2001. Hagai Levin, *The NATIONAL ECONOMIC COUNCIL, The Haredi Sector in Israel: Empowerment through Workforce Integration* 10 (2009) [Hebrew].

study religious studies in Yeshivot and Kolelim and receive stipends from the government in return.¹⁹ More than 50% of the UO women work, but most of them work only part time, due to their domestic duties.²⁰ Because of the combination of very high fertility rates with very low workforce participation the UO community is the poorest community in Israel and its mode of existence is heavily dependent on state funding and on donations.²¹ It should be noted that the UO community at the time of the establishment of the state of Israel was quite different, with UO women's fertility rates being similar to those of other Jewish women and with UO men quitting their religious studies and finding jobs upon marriage.²² Experts have related the radical change in the structure of the community to the combination of generous financial support by the state and the changing religious and social norms within the community as it continued to grow and to gain a more powerful position in Israeli society.²³

The continuous study of Tora (Talmud Tora) has always been a central ideal in Jewish tradition and is considered the equivalent of all other religious commandments.²⁴ While throughout history this ideal—which is practically impracticable due to the need to earn a living—has been fully realized only by a few select sages, in contemporary UO society in Israel the full realization of this ideal has become the sole goal of the UO education system.²⁵ Consequently, the UO education system centers on teaching all boys rigorous religious studies throughout their school years with almost no secular subjects being taught.²⁶ This paves the way for boys in the UO community, after finishing Yeshivot Ketanot (the UO equivalent to high school), to continue their full time religious studies in Yeshivot Gdolot (until

¹⁹ *Id.* at 13.

²⁰ *Id.* at 14–16.

²¹ *Id.* at 41–43.

²² GERSHOM GORENBERG, *THE UNMAKING OF ISRAEL* 165–66 (2011).

²³ Norma Gurovich & Eilat Cohen-Kastro, *Ultra Orthodox Jews—Geographic Distribution and Demographic Social and Economic Characteristics of the Ultra-Orthodox Jewish Population in Israel 1996–2001* (Central Bureau of Statistics—Demography Sector 53–54, Working Paper No. 5, 2004) [Hebrew], available at http://www1.cbs.gov.il/reader/paperwork/pw_e.html; Eli Berman, *Subsidized Sacrifice, State Support of Religion In Israel*, 12 (The Pinhas Sapir Center for Development Tel Aviv University, Discussion Paper No. 2-99, December 1998), available at <http://sapir.tau.ac.il/papers/sapir-wp/2-99.pdf>.

²⁴ Spiegel, *supra* note 3, at vi.

²⁵ *Id.* at xxiv.

²⁶ *Id.*

their marriage) and later in Kolelim.²⁷ As already mentioned, currently almost half of UO men devote all their time to religious studies in these institutions and their only income is stipends they receive from the state.²⁸

B. The Israeli Education System and UO Education

The Israeli educational system consists of three types of schools—public schools, private schools that must go through a process of recognition by the state (recognized schools), and private schools that have been exempted from the recognition (exempt schools).²⁹ According to Israeli law, in order to achieve recognition a school must teach at least 75% of the core curriculum as set by the Ministry of Education. A recognized school that teaches the core curriculum is eligible for 75% of the state funding given to public schools.³⁰ The two largest networks of UO schools are an exception to this rule. These schools are recognized schools, comprise more than half of the UO educational system, and receive 100% of the funding that public schools receive, despite being private.³¹ The UO educational system is the largest private school system in Israel, and it consists of both recognized and exempt schools. One out of every four students in the Jewish educational system attends an UO school. Although the law stipulates that only recognized schools that teach the core curriculum can be funded by the state, both recognized and exempt UO schools are funded by the state, even though the UO schools for boys do not teach the core curriculum or teach only small parts of it. In order to circumvent the enforcement of the core curriculum in UO schools, over the years consecutive Ministers of Education have abstained from officially defining the core curriculum, despite the fact that the Public Education Act requires them to do so.³² Only after a petition against the Ministry of Education was filed to the Supreme Court requesting an order requiring the ministry to publish an official core curriculum and

²⁷ Yaacov Lupu, *Haredi Opposition to Haredi High-School Yeshivas*, The Floersheimer Institute for Policy Studies, 30 (2007).

²⁸ Levin, *supra* note 18, at 13.

²⁹ Mandatory Study Act, 5510-1949, SH No. 26, p. 287.

³⁰ State Education (Recognized Institutions) Regulations, 5714-1953 (Isr).

³¹ The Budgetary Principles Law, 5745-1985, 37 LSI 61, § 3(A).

³² State Education Act, 5713-1953 7 LSI 113, §§ 11, 34(3); Lotem Peri Hazan, *The Regulation of Ultra Orthodox Education in Israel – Politics, Law and In Between*, in REGULATION OF EDUCATION (Yossi Yona ed., 2012), 5 [Hebrew].

enforce it on all schools, was an official core curriculum established for elementary schools.³³

C. *The Core Curriculum Cases*

In 2002 a petition was filed with the Supreme Court, asking it to declare illegal and discriminatory the Ministry of Education's practice of funding UO schools despite the fact that these schools do not teach any part of the core curriculum and provide an exclusively religious education.³⁴ In its response to the petition, the Ministry of Education asked the court to grant it a period of three years to incorporate the core curriculum in UO schools gradually and with cultural sensitivity.³⁵ The court accepted the respondent's request, ruling that requiring the implementation of the core curriculum in UO schools, while granting the state three years to accomplish this goal in cooperation with the UO community, struck the proper balance between respect for the educational autonomy of the UO community, the rights of children, and the interests of the state.³⁶ The Court explained that the purpose of the core curriculum is to enable students to acquire basic knowledge, skills, and values that are essential to allow each student to function independently in a pluralistic society, and it is based on shared universal humanistic values and on the character of Israel as a Jewish and a Democratic state.³⁷ In addition, the core curriculum is intended to give every child in Israel the basic skills to create a life for himself and to fulfill his right to have an equal opportunity to develop his personality and his self, both as a child and as an adult.³⁸ The core curriculum includes the study of Judaism, citizenship, geography, Hebrew, English, math, sciences, and physical education.³⁹

When, after three years, petitioners realized that the state and the UO educational authorities had done nothing to implement the law and to introduce the teaching of the core curriculum in UO boys' schools, while at

³³ HCL 2751/99 Paritski v. The Minister of Educ. [2000] (unreported) (Isr.).

³⁴ HCJ 10296/02 Secondary School Teachers Organization v. Minister of Education IsrSC 59(3) 224 [2005] (judgment of J. Levy § 1).

³⁵ *Id.* §§ 2–5.

³⁶ *Id.* § 19.

³⁷ HCL 4805/07 The Ctr. for Jewish Pluralism – The Movement for Progressive Judaism in Isr. v. Ministry of Educ. et al. (judgment of J. Procaccia § 31).

³⁸ *Id.*

³⁹ *Id.* In Arab schools the core curriculum includes Arabic in addition to Hebrew and Arab heritage instead of Judaism.

the same time the funding for these schools continued unabated, they petitioned the court again requesting another court order against the Ministry. This time the Ministry of Education notified the court that it had concluded that at the present time it was unwise to enforce the introduction of the core curriculum in UO high schools for boys, and asked the court to permit it to continue its attempts to reach an agreement with the UO community as to the implementation of the core curriculum.⁴⁰ The ministry acknowledged that having tens of thousands of students each year exempted from the teaching of the core curriculum jeopardizes important state interests, but opined that under the circumstances this was the right thing to do.⁴¹

The court categorically rejected the position of the Ministry of Education, viewing the failure to implement the core curriculum in UO boys' schools as a serious violation of the rights of UO school children to education and to equal opportunities, and as a threat to important state interests. While the court acknowledged the importance of the autonomy of parents to decide on the education of their children, it opined that the importance of a common core curriculum is especially high in a country such as Israel where the divisions in society are deep and widespread.⁴² Furthermore, the right of parents to autonomy in choosing their children's education cannot supersede the right of the child to have a basic education that supplies him with the skills which allow him to fulfill his personality and his capabilities.⁴³ The court agreed that deep cultural differences might justify a more gradual enforcement of the core curriculum on certain cultural groups, but stressed that the need for gradual implementation of equal enforcement cannot be used to dispense with equal enforcement altogether as the ministry of education was attempting to do in the case at hand.⁴⁴

Nevertheless, though the court was set to give an order mandating the enforcement of the core curriculum for the coming school year and terminating the funding of all schools that refuse to implement it, the Court did not do so.⁴⁵ A few days before the judgment was due to be published, and after it was already written, the Knesset passed the Unique Cultural

⁴⁰ *Id.* §§ 15–16.

⁴¹ *Id.* § 17. The UO educational authorities objected to the suggestion to reduce their funding to 55% and insisted that it be kept at 75% and that they be exempt from the duty to teach the core curriculum.

⁴² *Id.* § 58.

⁴³ *Id.* § 55.

⁴⁴ *Id.* §§ 76–79.

⁴⁵ *Id.* § 83.

Educational Institutions Act (the Act), which exempts UO boys' high schools from the duty to teach the core curriculum, while continuing to grant them state funding.⁴⁶ Because the Act changed the legal situation pertinent to the case while court proceedings were still in progress, the court refrained from issuing any orders, but published the detailed written opinion it had already prepared.

D. The Act

The Act was an initiative of the UO Knesset members aimed at circumventing the coming decision of the court and was passed with the support of secular Knesset members.⁴⁷ The explanatory notes for the proposed Act stated that the Act's purpose is to enable the existence of the educational institutions of the UO 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.⁴⁸ The Act defines a "unique cultural educational institution" as an educational institution, which gives systemic education that originates from the way of life of the unique cultural group and is in accordance with the unique characteristics of the group.⁴⁹ The only group to which the act explicitly applies is the UO community.⁵⁰ The Act grants UO high schools (Yeshivot Ketanot) 60% of the funding awarded to public schools, regardless of whether they teach the core curriculum, thus enabling them not to teach their students any basic skills, such as math, English, or citizenship education. Although the Act applies only to high schools, the *de facto* situation is that UO schools for boys have taught almost exclusively religious studies at all levels of schooling while still receiving extensive state funding for years.⁵¹ Thus, the model of autonomy for UO education which the Act

⁴⁶ The Unique Cultural Educational Institutions Act 2008, § 1.

⁴⁷ Tami Harel Ben Shachar, *Educational Autonomy, The Core Curriculum, and Public Funding of Education — The Special Cultural Educational Institutions Act, 2008*, 12 MISHPAT U'MIMSHAL 281; *see infra* notes 52–53 and accompanying text.

⁴⁸ Proposed Act: Unique Cultural Education Institutions, 239 Proposed Acts 350 (June 23, 2008).

⁴⁹ *Id.* The only group to which the Act explicitly applies is the UO community. The Minister of Education has the authority to recognize other groups as unique cultural groups for the purpose of the act, but thus far no other group has been recognized as such.

⁵⁰ *Id.* the Minister of Education has the authority to recognize other groups as unique cultural groups for the purposes of the act, but thus far no other group has been recognized as such.

⁵¹ Spiegel, *supra* note 3.

establishes, and which existed in practice prior to the act, is one which combines generous state funding with an almost complete lack of state supervision over the content of education.

To conclude, the UO educational system in Israel is a private, religious one that is heavily funded by the state but at the same time subject to very little state control. One could argue, as the supporters of the Act have, that giving religious parents and communities a free hand to determine the education of their children and helping them to fund this education is required as a matter of multicultural justice and freedom of religion. In order to evaluate this claim, in the next section I will review the positions of different theorists on this issue and describe the way in which five different countries deal with the educational systems of religious groups.

III. THEORETICAL AND COMPARATIVE PERSPECTIVES ON EDUCATIONAL AUTONOMY FOR RELIGIOUS COMMUNITIES

A. Theoretical Perspectives

Education plays a crucial role in shaping world views and the identities of children and of young adults. As philosopher Elizabeth Minnich argues, “education is of critical importance. It is in and through education that a culture, and polity, not only tries to perpetuate but enacts the kinds of thinking it welcomes, and discards and/or discredits the kinds it fears.”⁵² For this reason educational autonomy is highly important for religious minorities. Nevertheless, for the same reason, partial state control over private education seems necessary to ensure that important interests of the liberal democratic state are not jeopardized.

When assessing autonomy in religious education the rights and interests of three actors should be taken into account.⁵³ First, the interest of the parents, whose right to decide the education of their child is part of their religious freedom.⁵⁴ Most often the parents belong to a religious community and aspire to inculcate in the child that community’s religious values and

⁵² ELIZABETH MINNICH, *TRANSFORMING KNOWLEDGE* 53 (1990).

⁵³ ROB REICH, *BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION* 148–49 (2002).

⁵⁴ Galston refers to this right as their right to expressive liberty. *See, e.g.*, WILLIAM GALSTON, *THE PRACTICE OF LIBERAL PLURALISM* 45 (2005).

way of life, an interest which they share with the community.⁵⁵ The second actor is the child, whose right to an enabling education and to equal opportunities can be jeopardized by her parents' educational choices for her.⁵⁶ Finally, the third actor is the state; as we will see, many theorists argue that the continued existence of the state as a functioning democracy depends on its citizens' ability to participate in the life of a modern democratic state, an ability that can only be acquired through education.

Liberal thinkers disagree on how the balance should be struck between these different sets of interests, and consequently about the extent to which the state should allow the existence of private religious education, whether it should finance such education, and whether it should intervene in private religious education in order to ensure that private religious schools maintain an adequate level of civic education. This disagreement roughly matches the distinction between the autonomy-based conception of liberalism and the diversity-based conception of liberalism.⁵⁷ In what follows I will describe the positions of five theorists. I will start with Brian Barry, who holds an autonomy-based conception of liberalism and who is perhaps the most avid supporter of state control over education, and end with Chandran Kukathas, whose strong diversity-based conception of liberalism leads him to eschew any state control over private education. In between, I will discuss the more nuanced approaches of Eamonn Callan, Jeff Spinner-Halev, and William Galston. Another relevant distinction which is worth noting between these theorists is between those who support government funding for private schools if it is accompanied by close regulation by the state, and those who object to government regulation of private religious schools but at the same time also object to government funding for such schools. When discussing country case studies we will see that a similar distinction emerges in the practice of liberal states with respect to private religious schools.

Brian Barry is a strong believer in the right and duty of the state to have a say in the way parents and communities educate their children, in order to safeguard both the interests of the state and the rights and interests of the child.⁵⁸ As far as the interests of the state are concerned, Barry argues that

⁵⁵ The right to instill their values and lifestyle to their children is also part of the parents' right to culture.

⁵⁶ As will be discussed below, different theorists have different perspectives as to what an enabling education entails.

⁵⁷ Galston, *supra* note 7, at 526–27.

⁵⁸ BRIAN BARRY, *CULTURE AND EQUALITY* 209 (2001). According to Barry there is no group right to the education of children, only the right of the parents. Nevertheless, the group

all citizens have an interest in the future of their society and that the future of society, “including its economic prosperity, its social stability and even its continued existence as a distinctive entity, depends on the way in which those who are now children turn out.”⁵⁹ In terms of the interests of the children, Barry argues that there are three aims that a proper education should fulfill. The first aim of education, which Barry terms functional education, is to equip the child with the competences required to function successfully in the society into which she will grow up.⁶⁰ The second aim of education, which Barry calls education for living, is to equip the child with knowledge that exceeds the functional knowledge needed to obtain a job and which allows the child to better understand the world around her, to develop an aesthetic appreciation and a critical capacity.⁶¹ The third aim of education according to Barry should be to develop in the child a capacity for autonomy.⁶² Barry supports a multicultural education insofar as it means that the curriculum is inclusive and pays attention to the various groups that exist in society.⁶³ Nevertheless, he insists that all schools must have a common curriculum. He is concerned that the proliferation of separatist schools which admit only students of certain ethnicities and religions and refuse to teach the common curriculum, will lead to the disintegration of society. According to him “there is, quite simply, little chance for a society to operate in a way that serves the long run interests of any of its members if it is divided up into mutually exclusive groups who have not only gone to different schools but have followed different curricula in them.”⁶⁴ Barry’s emphasis on a common curriculum and on tight state regulation of both public and private schools can explain why he does not object to state funding of private schools and sees it as a question of only minor significance. While he is willing to allow state funding for suitable private religious schools,⁶⁵ he insists that private religious schools such as the Christian fundamentalist schools in the United States, which teach only creationism and whose biology textbook explains that evolutionary theory is

to which the parents belong has a crucial influence on the education that the children receive. *Id.* at 207.

⁵⁹ *Id.* at 209.

⁶⁰ *Id.* at 212–20.

⁶¹ *Id.* at 221–24.

⁶² *Id.* at 224–25.

⁶³ *Id.* at 238.

⁶⁴ *Id.* at 237.

⁶⁵ *Id.* at 204–05.

a creation of Satan that is used effectively against Christians, must be shut down.⁶⁶

Eamonn Callan maintains that states should fund private religious education out of respect for parents' right to educate their children according to their beliefs. Nevertheless, he holds that states are entitled to give preference to public common education in order to promote the important state interest in civic education. According to Callan, in their educational policies states should recognize religious groups with which individuals identify in order "to give equal respect to individual human beings whose very identity is constituted by different religious commitments."⁶⁷ Nevertheless, his approach gives prominence to the ends of civic education. He posits that while religious education is important for the perpetuation of the religious identities of citizens, civic education is essential for the shared interest of all citizens in the continued existence of a liberal democratic state. Consequently, if the partiality of the state to common, secular public schools, serves the interests of civic education, then it is justified and should not be considered arbitrary.⁶⁸

Callan argues that the most important function of common schools is to enable children to engage in inclusive deliberation.⁶⁹ He posits that in a pluralist society everybody has to be educated to give respect to others by making what Bernard Williams calls "the effort at identification."⁷⁰ Thus, in order to show respect to another, one must ensure that the other person "should not be regarded as the surface to which a certain label can be applied, but one should try to see the world (including the label) from his point of view."⁷¹ This is a duty that all of us owe each other, regardless of

⁶⁶ *Id.* at 249.

⁶⁷ Eamonn Callan, *Discrimination and Religious Schooling*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 45, 50 (Will Kymlick & Wayne Norman eds., 2000).

⁶⁸ *Id.* at 54–55. Callan takes for granted that the state has an interest in maintaining its liberal democratic character, but in Israel this is the bone of contention. If there is no agreement that the state needs to continue to be a liberal democracy, then the need for civic education can no longer justify either preference to public schools or impositions on private religious schools. Here again it seems that the essence of the problem lies in Israel's definition as a Jewish state—the UO can say "our education is certainly compatible with promoting the Jewishness of Israel and there is no agreement on its liberal democratic nature." For too long the state assumed that it is enough that the UO promote the Jewish component of the state.

⁶⁹ *Id.* at 61.

⁷⁰ *Id.* at 60 (citing Bernard Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS, AND SOCIETY* 117 (W.G. Runciman & Peter Laslett eds., 3d series, 1969) (1967)).

⁷¹ *Id.*

our religious beliefs. This effort of identification does not necessarily lead to affirmation of the others' point of view, and it can lead to mutual criticism, as well as to self-criticism.⁷² Common schools have a unique contribution to civic education because they can serve as a forum for inclusive deliberation in which children are exposed to those who are different than themselves and engage with them. In common schools children can participate in open discussions in which diverse opinions are voiced, debated, and evaluated, and through which they can evaluate the norms by which their communities live.⁷³ According to Callan, while religious schools can encourage other aspects of civic education, they cannot serve as arenas for inclusive deliberation, which is a vital component of civic education.⁷⁴ Consequently, he believes that in order to strike the proper balance between the important state interest in promoting civic education and the right of religious communities to religious education funded by the state, the state should fund private religious education for younger children (while carefully regulating it), but should refrain from funding religious schools in the later years of education in order to encourage more parents to send their children to common public schools.⁷⁵

Although, like the two preceding theorists, Jeff Spinner-Halev believes that autonomy is centrally important for liberal theory and society, he nevertheless believes that as long as the secular mainstream society supports autonomy and gives people a range of options to choose from, not every religious minority group has to support autonomy as well. In his opinion, minority communities need not inculcate autonomy, because as long as their members are not being coerced and are not denied a decent education, their ability to see the different ways of life surrounding them suffices to make them able to choose.⁷⁶ Thus, Spinner-Halev rejects arguments for cultural pluralism that are based on autonomy as arguments that wrongly undermine and restrict pluralism.⁷⁷

Spinner-Halev defends the right of parents to send their children to a private religious school in order to situate them in a community and enable

⁷² *Id.* at 61.

⁷³ *Id.* at 64.

⁷⁴ *Id.* at 64 (citing J. Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLICY: NORMATIVE ANALYSIS OF THE STATE* 31 (A. Hamlin & P. Petit eds., 1989)).

⁷⁵ *Id.* at 66.

⁷⁶ JEFF SPINNER-HALEV, *SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP* 50–51 (2000).

⁷⁷ *Id.* at 55.

minority communities to retain their identities.⁷⁸ Furthermore, he argues that it is important for children to be raised with specific values and have a strong base in a particular way of life, in order to be able, later on, to make a meaningful choice whether to change them.⁷⁹ Thus, liberals should not worry about children who are raised into relatively closed communities with strong values, as long as at some point they are exposed to other ways of life. More worrisome to him is the situation of children who are raised with no worldview, because such children will not know how to choose one for themselves.⁸⁰

Nevertheless, in spite, or perhaps because, of his insistence that religious communities within liberal societies do not have to foster their members' autonomy, Spinner-Halev is critical of private religious schools and emphasizes the importance of public schools. He argues that an important problem with many religious schools is that they are not diverse and do not expose their students to a diversity of ideas or of ways of life.⁸¹ The exposure of students to diverse ideas and practices encourages them to think creatively, critically and autonomously.⁸² Consequently, public schools are important since they get children from different backgrounds together and enable them to learn about one another and to learn how to work together. Such experience prepares them better for citizenship in a complex, diverse, modern world.⁸³

Spinner-Halev further qualifies his defense of religious schools stating that it applies only to schools that are not all encompassing, that belong to moderate religious communities, and that do not stifle autonomy, but combine it with community. According to him, "[a] community that tries to prevent its children from having any contact with outsiders, even as they become teenagers, is not combining autonomy and community. It is using the community to stifle autonomy."⁸⁴ Furthermore, although he supports the existence of moderate religious schools, he believes that religious schools should not be funded by the state for two reasons. First, some of the religious schools are not moderate and do not encourage liberal citizenship, and direct

⁷⁸ See *id.* at 73.

⁷⁹ *Id.* at 76.

⁸⁰ *Id.*

⁸¹ Jeff Spinner-Halev, *Extending Diversity: Religion in Public and Private Education*, in *CITIZENSHIP IN DIVERSE SOCIETIES*, *supra* note 67, at 68.

⁸² *Id.* at 71.

⁸³ *Id.*

⁸⁴ *Id.* at 77.

funding to such schools “would harm the important cause of creating and sustaining a common citizenship.”⁸⁵ Second, in order to encourage parents to send their children to public schools, which are inclusive and promote diversity, the state should refrain from financing private religious schools.⁸⁶ However, he believes that, in order to encourage religious parents to send their children to public schools, the schools should be willing to make some accommodations and to grant some exemptions from the standard curriculum for religious students upon their parents’ request.⁸⁷ Thus, he believes that the *Mozert* case in which the court denied the request of fundamentalist parents to require a public school to exempt their children from various parts of the curriculum, including from texts which teach that girls are equal to boys or that teach evolution, was wrongly decided.⁸⁸ In his opinion, the goal of exposing as many children as possible to the most liberal education possible is better achieved by giving partial exemptions to religious children that enable them to continue in the public school system than by denying such exemptions, thereby causing their parents to move them to a religious fundamentalist school or to homeschool them.⁸⁹

Unlike Barry and Callan, William Galston is situated firmly within the camp of diversity liberals, who reject autonomy as the liberal point of departure and instead offer “an account of liberalism that gives diversity its due.”⁹⁰ Galston argues that taking diversity seriously in the educational context means that while any educational policy should balance between the rights and interests of parents, children and the state, the rebuttable presumption should be that the choices of parents with regard to the rearing of their children are immune from state interference.⁹¹ He posits that because parenting is one of the central meaning-giving tasks of our lives, and because every parent hopes to create relations of intimacy with his children, the ability of parents to raise their children in a manner consistent with their deepest commitments is an essential element of their liberty that should be respected by the state.⁹² Educational diversity is important, not only out of

⁸⁵ *Id.* at 79.

⁸⁶ *Id.* at 81.

⁸⁷ *Id.* at 94.

⁸⁸ *Id.* at 91; see *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (1987).

⁸⁹ Spinner-Halev, *supra* note 81, at 93–94.

⁹⁰ Galston, *supra* note 7, at 523–24.

⁹¹ William Galston, *Parents, Government, and Children: Authority over Education in a Pluralist Liberal Democracy*, 5 LAW & ETHICS OF HUMAN RIGHTS 284, 288 (2011).

⁹² *Id.* at 295.

respect to the rights of parents, but also because it is essential for the development of children's individuality.⁹³

Nevertheless, while parents and communities have the right to educate children according to their beliefs and ways of life, and even to isolate them to some extent from outside influences, Galston maintains that there are important limits to this right. First, the education that parents provide for their children must ensure that children have more than a merely formal right of exit. Thus, communities and parents cannot educate children "in ways that disempower individuals—intellectually, emotionally, or practically—from living successfully outside their bounds."⁹⁴ States are allowed to insist that education develop what Galston calls "social rationality," which is the kind of understanding needed to participate in the society, economy, and polity, and they are allowed to intervene against forms of education "that are systematically disabling when judged against the norm."⁹⁵ Furthermore, according to Galston, in societies characterized by deep diversity of moral and religious views, educational freedom should be respected only "to the maximum extent consistent with the maintenance of civic unity and stability."⁹⁶ The state has the right to ensure that all children are taught that other citizens have the right to live according to understandings of the good life, which they themselves reject, and internalize norms of self-restraint and a principled refusal to use coercion in order to enforce their own way of life.⁹⁷ Thus, according to Galston "the liberal state has a legitimate and compelling interest in ensuring that the convictions, competencies, and virtues required for liberal citizenship are widely shared."⁹⁸

At the extreme end of the diversity camp Chandran Kukathas posits that the good society should downplay the role of the state in the education of subjects. He argues that since two core principles of liberalism are toleration of diversity and limited government, it cannot be part of the purpose of the liberal state to educate its citizens or to shape their thinking.⁹⁹ The state should allow communities to educate their children according to their own

⁹³ *Id.* at 299.

⁹⁴ *Id.* at 301.

⁹⁵ Galston, *supra* note 7, at 525.

⁹⁶ Galston, *supra* note 91, at 305.

⁹⁷ *Id.* at 295.

⁹⁸ Galston, *supra* note 7, at 529.

⁹⁹ Chandran Kukathas, *Education and Citizenship in Diverse Societies*, 35 INT'L J. EDUC. RES. 319, 321–22 (2001).

beliefs, although it need not subsidize such education.¹⁰⁰ Furthermore, the state should even allow communities such as the gypsies, that do not value schooling and that believe that they can educate their children satisfactorily through informal instruction in the ways of their culture, not to send their children to school at all.¹⁰¹ Kukathas objects to any form of civic education:

[T]he liberal state is one that is held to a very exacting standard. It must tolerate in its midst those who would work towards its destruction. And it must resist the temptation to turn its fiercest critics into compliant believers in the liberal creed. The last thing a liberal state should offer its subjects is education—even if that should be a liberal education.¹⁰²

He criticizes the position that a liberal polity must educate citizens to participate in a shared political framework and to affirm shared political principles, such as the obligation to respect the rights of fellow citizens regardless of their religious convictions.¹⁰³ To the contrary, he argues, “what characterizes a liberal political order is not shared political commitments but institutions which enable people whose moral, religious, cultural *and political* commitments differ.”¹⁰⁴ According to Kukathas, it is hard to see how the same political order that allows people to hold illiberal and even anti-liberal views, and allows them to proselytize those views and even run for office on their basis, can justify inculcating particular liberal values or virtues in its citizens. As he succinctly puts it “Liberalism does not run re-education camps.”¹⁰⁵ Kukathas rejects the conviction that liberal citizens do not come into existence naturally but have to be made. He believes that liberal citizens do, in fact, emerge ‘naturally’ in all liberal societies—and “even in societies in which liberal freedoms are only weakly honored . . .”

¹⁰⁰ CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* 162 (2003).

¹⁰¹ Chandran Kukathas, *Are There Any Cultural Rights*, 20 *POLITICAL THEORY* 105, 126 (1992).

¹⁰² Kukathas, *supra* note 99, at 323.

¹⁰³ *Id.* at 326–27.

¹⁰⁴ *Id.* at 328. This is of course facetious because the question is how to guarantee that these institutions go on existing if people are not committed to their pluralist and egalitarian nature. In his conclusion, Kukathas suggests that perhaps liberalism should not be as sanguine as he seems to suggest that it should be, but for some reason this does not change his conclusions. *Id.* at 330.

¹⁰⁵ *Id.* at 328.

and that liberal societies can survive even when many of their citizens are not committed to liberalism and do not take any interest in politics whatsoever.¹⁰⁶ Kukathas is very clear in his emphasis on toleration and in his critique of the limits placed on communities. Nevertheless, while failing to qualify the sweeping toleration he advocates, he is careful to note that such qualifications are due,¹⁰⁷ and that his theory is probably not feasible for any actual liberal state.¹⁰⁸

To conclude, we see that among the theorists discussed, those who support government funding for private schools insist that it should be accompanied by close regulation by the state, while those who object to government regulation of private religious schools also object to government funding for such schools. Thus, despite their widely diverging views it seems that none of the theorists discussed would support the current treatment of UO education in Israel, which is given extensive funding by the state but has complete freedom to decide the content of its curriculum. Furthermore, with the exception of Kukathas, all the theorists discussed believe that children have the right either to receive education for autonomy or at least to receive an education that will enable them to exit their community later on in life if they choose to do so. It seems that the education that boys in the UO community receive, which is focused entirely on religious studies and eschews any civic education, is precisely the type of education that prevents them from having any meaningful right of exit.

B. Comparative Perspectives

In what follows I will discuss private religious education in five countries, three of which are liberal democracies—the Netherlands, the U.K. and the U.S.—and two non-liberal democracies—Malaysia and Turkey, one of which is avowedly religious while the other avowedly secular. I chose to examine these particular countries because, in addition to their varied constitutional structures and ideological commitments, in all of them the question of private religious education (especially Muslim education) has been a cause for public debate and concern. The discussion will show that the two models of state treatment of private religious education that exist in

¹⁰⁶ *Id.* at 329.

¹⁰⁷ *Id.* at 329–30.

¹⁰⁸ KUKATHAS, *supra* note 100, at 267. In this book Kukathas puts forth a liberal theory based on the primacy of toleration, which he calls the liberal archipelago. Nevertheless, in the conclusion of the book he concedes the impracticability of his theory for actual liberal states.

liberal countries are either state funding accompanied by close regulation (the Netherlands and the U.K.) or no state funding with limited regulation (the U.S.). Despite their markedly different treatment of religion, both non-liberal countries exhibit a similar model of close regulation with almost no government funding. The comparison that follows between these five countries and Israel highlights both how unique the Israeli model of extensive funding for UO education with almost no regulation is, and how the problem is exacerbated by Israel's unique state-religion relations.

1. The Netherlands

The educational system in the Netherlands is characterized by a dual system of education that allows for the existence of a large number of private schools that are fully funded by the state alongside a system of public schools. This unique system is a result of the process of pillarization which occurred in the Netherlands at the beginning of the twentieth century and which led to the segregation of Dutch society into pillars along religious and ideological lines, each pillar containing its own political parties, labor unions, hospitals, media, clubs, schools, etc.¹⁰⁹ while a process of de-pillarization has occurred in the Netherlands since the 1960s, the educational system has remained divided along denominational lines. Thus, in 2005 only 33% of the primary schools in the Netherlands were public, 30% were Protestant, 30% were Roman Catholic, and the rest belonged to other denominations and ideologies such as Islamic schools and Montessori schools.¹¹⁰ The freedom of education is guaranteed in article 23 of the Dutch constitution. According to the article, “[a]ll persons shall be free to provide education,” but this right is subject to the right of the authorities to supervise the schools, “to examine the competence and the moral integrity of the teachers,” and to set the standards required of schools through acts of parliament.¹¹¹ The supervision of private schools must be done “with due regard . . . to the freedom to provide education according to religious or other belief.”¹¹² “Private primary schools that satisfy the conditions laid down by

¹⁰⁹ Geert Driessen & Michael S. Merry, *Islamic Schools in the Netherlands: Expansion or Marginalization?*, 37 INTERCHANGE 201, 203 (Nov. 2006).

¹¹⁰ *Id.*

¹¹¹ GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [Constitution] Feb. 17 1983, art. 23, §§ 2, 5 (Neth.), available at http://www.servat.unibe.ch/icl/nl00000_.html.

¹¹² *Id.* art. 23, § 5.

acts of parliament” are entitled to public funds equal to those received by public schools.¹¹³

The constitutional right to freedom of education had enabled the Muslim community in the Netherlands to establish Islamic schools, and as of 2006 there were forty-six Islamic primary schools and two Islamic secondary schools in the Netherlands. Rather strict conditions have to be met in order to establish a fully funded private school and the existing schools do not meet the demand for Islamic schools within the Muslim community and are attended by only about 10% of Muslim primary school children.¹¹⁴ Strict requirements have to be met not only in order to establish a funded school but also in order to ensure its continued funding.¹¹⁵ Thus, although private schools have rather extensive autonomy in determining what is taught and how, this autonomy is restricted by qualitative and quantitative standards that private schools have to meet, including teacher qualifications, curriculum requirements, and, in secondary schools, “the examination syllabus and the national examinations.”¹¹⁶ The requirement that schools must employ only teachers that hold certain degrees and qualifications has proven to be quite significant in the context of Islamic schools and has resulted in teachers in these schools being mostly non-Muslims.¹¹⁷ While religious schools may deviate from government attainment targets and substitute them with their own targets if they can show that this is necessary from their religion’s perspective, the substitute targets must be equivalent in quality. This means, for example, that a school will probably not be allowed to replace the teaching of the theory of evolution with the teaching of creationism because the latter will not be regarded the equivalent of the former.¹¹⁸

¹¹³ *Id.* art. 23, § 7.

¹¹⁴ Driessen & Merry, *supra* note 109, at 204.

¹¹⁵ There are private schools that do not meet the criteria and are therefore not government funded. Currently, approximately 1% of all primary and secondary schools are not government funded. The Ministry of education visits these schools regularly. It does not evaluate their educational process, “but checks are performed by specially trained inspectors to make sure the schools comply with legal obligations, such as the minimum amount of teaching time and attainment targets.” *The Dutch Inspectorate of Educ.*, MINISTRY OF EDUC., CULTURE & SCI., <http://www.onderwijsinspectie.nl/english> (last visited May 25, 2014).

¹¹⁶ Ben P. Vermeulen, *Regulating School Choice to Promote Civic Values: Constitutional and Political Issues in the Netherlands*, in *EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE* 31, 46 (Wolf et al. eds., 2004).

¹¹⁷ *Id.* at 42.

¹¹⁸ *Id.* at 48.

Since the late 1980s, the existence of private Islamic schools has generated public discussions in the Netherlands concerning the desirability of such schools.¹¹⁹ While opponents feared that such schools would hinder the integration of Muslim immigrants into Dutch society by considerably diminishing the contact of Muslim children with native Dutch children, their proponents argued that these schools would promote the social integration of Muslims while allowing them to maintain their own identity.¹²⁰ After the attacks of September 11, 2001 against the United States, the influence of political Islam on Islamic schools and its consequences for the integration of Muslim children into Dutch society became a central theme of the public debate surrounding these schools.¹²¹ Inspections in Islamic schools done by the Ministry of Education concluded that the quality of the religion classes and the religion teachers left much to be desired in many of the schools. This was not surprising since, at the time, teachers of religious classes were the only teachers who did not have to comply with any legal conditions (diplomas or other qualifications), and the classes lacked curriculum and method.¹²² Consequently, in the beginning of the 2007 academic year, all Dutch Islamic primary schools were provided with an official Islamic teaching curriculum, which was developed by the Foundation for Teaching Methods (SLO) and the Board of Islamic Schools Organization (ISBO)—an umbrella organization of forty-two Muslim schools in the Netherlands.¹²³ At the same time, new legal requirements that require Islamic Studies teachers to have teacher diplomas were put into effect.¹²⁴

The Dutch “rejection of the state as a moral educator” has led to the absence of a separate subject of citizenship education from the national curriculum for many years.¹²⁵ However, after concerns were raised as to the ability of Islamic schools to further integration and to inculcate pluralist and democratic values, the Primary Education Act and the Secondary Education Act were amended to require schools to offer education that is aimed at

¹¹⁹ Wasif A. Shadid & Peter Sjoerd Van Koningsveld, *Islamic Religious Education in the Netherlands*, 38 EUROPEAN EDUCATION 76, 83 (2006).

¹²⁰ *Id.* at 84.

¹²¹ *Id.* at 85.

¹²² *Id.* at 86.

¹²³ Lisa Baughn, *Islamic Education in Europe*, EURO-ISLAM.INFO, <http://www.euro-islam.info/key-issues/education/> (last visited May 25, 2014).

¹²⁴ Inga Niehaus, *Emancipation or Disengagement? Islamic Schools in Britain and the Netherlands*, in ISLAM IN EDUCATION IN EUROPEAN COUNTRIES: PEDAGOGICAL CONCEPTS AND EMPIRICAL FINDINGS 113, 120 (Aurora Alvarez Veinguer et al. eds., 2009).

¹²⁵ Vermeulen, *supra* note 116, at 49.

developing active citizenship and social integration. As with other curricular subjects, schools are free to shape their own citizenship education curriculum, but must present it to the Ministry of Education, which is charged with monitoring and evaluating it.¹²⁶

To conclude, the state in the Netherlands gives extensive funding to private religious schools but, at the same time, closely monitors them in order to ensure that they meet the state's qualitative standards. The concern for social integration and adherence to democratic values, brought about by the relative expansion of Muslim schools, has led the state to introduce citizenship education as a mandatory subject in all schools.

2. Britain

In England there are approximately 6,900 maintained faith schools that make up one-third of all state-maintained schools.¹²⁷ The overwhelming majority of these schools belong to Christian denominations, such as the Church of England and the Catholic Church. Only around fifty maintained faith schools are non-Christian, thirty-seven of which are Jewish.¹²⁸ Most of the maintained faith schools are Voluntary Aided, while others are Voluntary Controlled.¹²⁹ Voluntary Aided schools are funded up to 90% by the state and local authorities while the rest of their budget comes from the religious bodies with which they are affiliated.¹³⁰ The governing bodies of maintained faith schools have control over school admissions and the teaching of religious education.¹³¹ Nevertheless, all state-maintained schools must fully

¹²⁶ BERTHOLD VAN LEEUWEN, SLO NATIONAL INSTITUTE FOR CURRICULUM DEVELOPMENT, *INCLUSIVE EDUCATION IN THE NETHERLANDS* 44 (2007).

¹²⁷ ROB BERKELEY, THE RUNNYMEDE TRUST 11 (2008), *available at* <http://www.runnymedetrust.org/uploads/publications/pdfs/RightToDivide-2008.pdf>. Note that this number refers only to schools in England while Britain is composed of England, Wales, and Scotland. However, since the vast majority of Muslims in Britain reside in England, the arrangements concerning faith schools in England are those that are most relevant to my concerns. *See* British Muslims in Numbers A Demographic, Socio-economic and Health Profile of Muslims in Britain drawing on the 2011 Census, The Muslim Council of Britain, 16 (2015), http://www.mcb.org.uk/wp-content/uploads/2015/02/MCBCensusReport_2015.pdf.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Damian Breen, *A Qualitative Narrative of the Transition from Independent to Voluntary Aided Status: A Problem for the Concept of the 'Muslim School,'* in *ISLAM IN EDUCATION IN EUROPEAN COUNTRIES: PEDAGOGICAL CONCEPTS AND EMPIRICAL FINDINGS*, *supra* note 124, at 95–96

¹³¹ KERRY O'HALLORAN, *RELIGION, CHARITY AND HUMAN RIGHTS*, 169 (2014)

incorporate the national curriculum.¹³² In recent years there has been an extensive public debate in England regarding the role of faith schools in society and the continued, and even increasing, government funding of such schools. Faith schools have been accused of undermining social cohesion and heightening segregation along class, faith, and ethnic lines; using unfair admissions policies that favor socio-economically privileged families; and religious indoctrination.¹³³ Supporters of faith schools have argued that faith schools further the common good, give children a sense of their own identity and promote choice, diversity, moral values and discipline.¹³⁴ While the events of 9/11 played a role in the debate, Muslim state-maintained schools were not the focus of the debate, since they are only a miniscule part of the faith maintained schools in England.¹³⁵

There are about half a million Muslim children in British schools, and they comprise between 5% and 6% of the total school population.¹³⁶ The vast majority of Muslim children attend public community schools or Church schools, and “only [around 1%] of the Muslim children are educated in independent or state-maintained Muslim schools.”¹³⁷ Britain has 127 independent Islamic schools, the most in any European country.¹³⁸ Since Muslim independent schools do not receive any state funding, they are usually small and suffer from severe financial limitations.¹³⁹ A number of Islamic independent schools have applied in recent years for state funding, but since the process is extensive and often depends on political power relations, only eleven schools have managed to gain a Voluntary Aided status.¹⁴⁰ The structural, legal, and political obstacles to the inclusion of a large number of Muslim schools in the state sector have been exacerbated by the public debate over state support for faith schools.¹⁴¹

While Voluntary Aided schools must fully incorporate the national curriculum, independent Muslim schools can determine their own curriculum but have to meet academic standards that are checked through periodic

¹³² Breen, *supra* note 130, at 105.

¹³³ BERKELEY, *supra* note 127, at 18.

¹³⁴ *Id.*

¹³⁵ *Id.* at 3, 45.

¹³⁶ Niehaus, *supra* note 124, at 114.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Breen, *supra* note 130, at 101.

¹⁴⁰ Niehaus, *supra* note 124, at 114–15 n.4.

¹⁴¹ *Id.* at 115.

inspections and compulsory national tests.¹⁴² The Independent School Standards regulations require independent schools to provide their students with an education that, among other things, “gives pupils experience in linguistic, mathematical, scientific, technological, human and social, physical and aesthetic and creative education” and that ensures “adequate preparation of pupils for the opportunities, responsibilities and experiences of adult life.”¹⁴³ In addition, the independent school must educate its students to respect the law and to contribute to the community, and it must “provide pupils with a broad general knowledge of public institutions and services in England; [and] assist 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.”¹⁴⁴

All independent schools, including independent faith schools, go through periodic inspections and may face closure if they fail to meet the required standards.¹⁴⁵ In a case involving a Jewish Hasidic private school that was threatened with closure for not teaching any secular subjects, it was held that in general, in order to be considered “suitable,” education must “prepare the children for life in modern civilised society” and “enable them to achieve their full potential.”¹⁴⁶ Nevertheless, education by independent faith schools of religious communities will be considered ‘suitable’

if it 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.¹⁴⁷

¹⁴² *Id.*

¹⁴³ The Education (Independent School Standards) Regulations, 2010, S.I. 2010/1997, sched. 1, pt. 1 (Eng.).

¹⁴⁴ *Id.* at pt. 2.

¹⁴⁵ JANE FORTIN, *CHILDREN’S RIGHTS AND THE DEVELOPING LAW* 423 n.124 (3d ed. 2009) (reporting that forty-five independent schools were closed between 2004 and 2007, including one Muslim school).

¹⁴⁶ *Harrison & Harrison v. Stevenson* [1981] (unreported), Worcester Crown Ct., available at <http://freedom.edyourself.org/edact.htm>.

¹⁴⁷ *Id.*; *R v. Sec’y of State for Educ. & Sci.* [1985] (unreported).

Consequently, the school was obliged to implement a secular curriculum, which it was required to further amend following continual inspection, until its secular curriculum was found to be satisfactory.¹⁴⁸

In order to meet the standards set by the regulations, as well as for lack of financial resources, many of the independent Muslim schools follow the national curriculum and use existing textbooks, although the more conservative schools leave out aspects of the curriculum that are regarded by them as 'un-Islamic,' such as music, dance and figurative arts.¹⁴⁹ The independent Muslim schools vary in their educational approaches and in their level of religious observance, but all of them offer Islamic education through special Islamic instruction, communal prayers, special dress codes, and observance of the Islamic calendar.¹⁵⁰ Unlike in the Netherlands, in Britain most of the staff in Islamic schools are themselves Muslim, and thus it is easier for them to create and maintain an exclusive Muslim environment.¹⁵¹ Following the 9/11 attacks and the increasing concerns that Islamic schools might isolate Muslim children from the larger society, a new citizenship curriculum was introduced in British schools in 2002 and in 2007, and Voluntary Aided schools were required "to actively promote . . . social cohesion."¹⁵² This is done through participation in a "citizenship and social cohesion" program, which is compulsory for all state-funded schools, and through other measures such as student exchange programs between Muslim and non-Muslim schools and community outreach programs.¹⁵³ Some studies show that, while in the past educators and parents have emphasized the role of Islamic schools in the process of islamization of their students, the current focus of many Islamic schools is on providing good academic results in a supportive environment that will enable

¹⁴⁸ The Office for Standards in Education inspected the school in 2007 and found that while its religious curriculum was good, its secular curriculum was unsatisfactory in several respects and had to be expanded and improved. (OFSTED, TTMH BELZ DAY SCHOOL: INSPECTION REPORT (2007), *available at* <http://www.ofsted.gov.uk/inspection-reports/find-inspection-report/provider/ELS/100294>). A subsequent inspection in 2010 found that a new secular curriculum had been introduced and that the secular curriculum was now satisfactory (OFSTED, TALMUD TORAH MACHZIKEI HADASS AT THE WODLANDS: INDEPENDENT SCHOOL STANDARD INSPECTION REPORT (2010), *available at* <http://www.ofsted.gov.uk/inspection-reports/find-inspection-report/provider/ELS/100294>).

¹⁴⁹ Niehaus, *supra* note 136, at 117–18.

¹⁵⁰ *Id.* at 116.

¹⁵¹ *Id.*

¹⁵² *Id.* at 121.

¹⁵³ *Id.* at 122.

the students to prepare for their roles in the job market and as active citizens.¹⁵⁴

To conclude, while in Britain as in the Netherlands, the state is willing to give extensive funding to faith-based schools (although in practice mostly Christian schools enjoy this funding), it also monitors these schools closely, including requiring them to teach the full national curriculum and a “citizenship and social cohesion program.” Independent faith schools are relatively few in number, and although they are not required to teach the national curriculum, they are inspected to ensure that they give children an adequate education that includes secular studies and teaches tolerance and harmony between different cultural groups.

3. *The United States*

In 1925, in *Pierce v. Society of Sisters*, the U.S. Supreme Court struck down an Oregon law that made it mandatory for parents to send their children to public schools, holding that:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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.¹⁵⁵

Nevertheless, while parents have a fundamental liberty to give their children private religious education, the constitutional “wall of separation” between church and state was held to prohibit any direct government funding for private religious education.¹⁵⁶ Even though the state cannot fund private religious schools, it retains, under *Pierce*, the power

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 teachers shall be of good moral character and patriotic disposition, that

¹⁵⁴ *Id.* at 125.

¹⁵⁵ *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

¹⁵⁶ *E.g.*, *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 16 (1947).

certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.¹⁵⁷

The Supreme Court has never specified what kind of state regulation of private schools constitutes “reasonable” regulation, but, in general, the regulation in the United States is less intrusive and less comprehensive than the regulation in Europe.¹⁵⁸ An important reason for the lax regulation of private religious schools is the fear that tighter regulation will create an overentanglement of government with religion and violate the free exercise rights of religious communities.¹⁵⁹ Nevertheless, most states impose various curricular requirements on private schools, regardless of their religious character or of the fact that they are not funded by the state.¹⁶⁰ In the school year 2009–2010 there were almost 5.5 million students in private schools, 80% of whom attended religiously affiliated schools.¹⁶¹ Students in private schools constitute around 10% of the students in the United States.¹⁶²

The strict prohibition on state funding for religious private schools has been narrowed in recent years. In an important 2002 decision, the U.S. Supreme Court held that a voucher program which gives parents tuition aid through vouchers which they can use towards tuition costs in any private school of their choice, including private religious schools, does not violate the Establishment Clause of the First Amendment to the U.S. Constitution.¹⁶³ This decision has paved the way for indirect government funding of private religious schools.¹⁶⁴ The Ohio program approved by the Supreme Court

¹⁵⁷ *Pierce*, 286 U.S. at 534.

¹⁵⁸ Richard W. Garnett, *Regulatory Strings and Religious Freedom: Requiring Private Schools to Promote Public Values*, in EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE, *supra* note 116, at 324, 329; *see also* REICH, *supra* note 53, at 147.

¹⁵⁹ John F. Witte, *Regulation in Public and Private Schools in the United States*, in EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE, *supra* note 116, at 355, 360.

¹⁶⁰ Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991, 992 (2010) (citing Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 393). For a court case rejecting a challenge to state supervision of private schools see *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987).

¹⁶¹ *Facts and Studies*, COUNCIL FOR AMERICAN PRIVATE EDUCATION, <http://www.capenet.org/facts.html> (last visited Feb. 23, 2014).

¹⁶² *Id.*

¹⁶³ U.S. CONST. amend. I.

¹⁶⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

required participating private schools to meet statewide educational standards, to agree not to discriminate on the basis of race, religion, or ethnic background, and not to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.”¹⁶⁵ Despite the considerable entanglement of the state in religious messages that this form of state supervision over religious private schools that accept vouchers might require, the Court did not strike down these requirements. However, while it seems that the U.S. Constitution does not forbid such supervision of private religious voucher schools, it does not require it either. Consequently, it is up to the individual states to decide what sort of conditions to attach to their voucher programs, and this can potentially open the way to indirect state funding of private religious schools that do not meet educational standards and that teach discrimination and hatred. While this should certainly be of concern, the small number of children currently participating in voucher programs in the U.S. makes this concern less pressing.¹⁶⁶

In addition to private religious schools, home schooling is a second form of private education, which is mostly religious and which has grown considerably in recent years in the United States. It is estimated that around 1.5 million children (almost 3% of school-aged children) are being homeschooled in the U.S.¹⁶⁷ Almost 90% of the parents who homeschool their children do so because of their religious beliefs.¹⁶⁸ Most of them “have religious objections to placing their children in a public, or even a private, school environment.”¹⁶⁹ Homeschooling is dominated by conservative Christian parents, although other deeply religious parents are also increasingly turning to homeschooling.¹⁷⁰ Interestingly, the number of homeschooled children is almost double the number of children in private, conservative Christian schools,¹⁷¹ a fact which seems to indicate that conservative Christian parents have a preference for homeschooling. Several state and federal courts have rejected the claim that homeschoolers are

¹⁶⁵ *Id.* at 645 (internal quotations omitted).

¹⁶⁶ According to data from the school year 2008–2009, only 171,000 students in the U.S. participated in voucher programs. Council for American Private Education, *Stimulus Plan Provides Mixed Results for Private Schools*, 343 CAPE OUTLOOK 3 (2009), available at <http://www.capenet.org/pdf/Outlook343.pdf>.

¹⁶⁷ Ross, *supra* note 160, at 996.

¹⁶⁸ *Id.* at 998.

¹⁶⁹ REICH, *supra* note 53, at 146 (internal quotations omitted).

¹⁷⁰ Ross, *supra* note 160, at 997–98.

¹⁷¹ REICH, *supra* note 53, at 145.

constitutionally entitled to complete freedom from state supervision.¹⁷² For example, the U.S. Court of Appeals for the Third Circuit rejected a claim by conservative Christian parents against Pennsylvania's homeschooling laws.¹⁷³ Pennsylvania requires parents who are homeschooling their children to provide instruction for a minimum number of days and hours in certain subjects and to submit a portfolio of teaching logs and the children's work product for review. In addition, it requires homeschooled children to take "nationally normed standardized achievement tests in reading/language arts and mathematics" in grades three, five, and eight, or to take statewide tests administered at these levels.¹⁷⁴ The parents claimed that the state's supervision violates their right to freedom of religion since it is their sincerely held religious belief that God has given them the exclusive responsibility for educating their children.¹⁷⁵ The court rejected the claim, holding that "the particular right asserted in this case—the right to be free from all reporting requirements and 'discretionary' state oversight of a child's home-school education—has never been recognized."¹⁷⁶ Nevertheless, in most states in the U.S. homeschooling is significantly less regulated than private schools, and in some states such as Alaska, it is not regulated at all.¹⁷⁷ The considerable number of homeschooled children, coupled with the fact that most of the parents choose to homeschool their children in order to prevent their exposure to different world views and to critical thinking, has raised concerns regarding these children's lack of civic education and especially their lack of "exposure to the constitutional norm of tolerance."¹⁷⁸

To conclude, while the regulation of private schooling in the U.S. is lax and that of homeschooling is minimal or non-existent, these forms of schooling are not funded by the state, and where private schools are partially funded through vouchers their regulation is tighter. The fact that private schooling is not funded by the state can explain its relatively small size and serve as a partial check on the expansion of forms of religious education that might be inimical to the interests of children and of the liberal state.

¹⁷² Ross, *supra* note 160, at 993.

¹⁷³ *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 237 (3d Cir. 2008).

¹⁷⁴ *Id.* at 238.

¹⁷⁵ *Id.* at 234.

¹⁷⁶ *Id.* at 247.

¹⁷⁷ Ross, *supra* note 160, at 993; *see also* REICH, *supra* note 53, at 147, 168–69.

¹⁷⁸ Ross, *supra* note 160, at 991.

4. Malaysia

Unlike the countries discussed so far, Malaysia is not a secular liberal democracy but an Islamic federation. Article 3 of the Malaysian constitution states that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.”¹⁷⁹ Around 40% of Malaysia’s population is non-Muslim.¹⁸⁰ Religion and ethnicity are closely intertwined in Malaysia, and while the country maintains a façade of interracial harmony and religious pluralism, clear preference is given in the constitution and in federal law to the Malay ethnic group, who are generally Muslims.¹⁸¹ While Islam has always played an important role in Malaysian politics and public sphere this role has increased in recent years as the increasingly successful PAS opposition party has pushed a stricter form of Islam to counter the ruling UNMO party’s more moderate form (Islam Hadhari or civilizational Islam).¹⁸² As will be discussed below, this struggle has also had implications for Islamic education in Malaysia.

The Malaysian constitution guarantees individual religious freedom and the right of every religious group to manage its own religious affairs.¹⁸³ However, the constitution includes special provisions for Islam, which both give preference to Muslims but at the same time restrict their behavior. For example, the constitution allows state and federal law to “restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.”¹⁸⁴ Consequently, it is forbidden to propagate non-Muslim religious doctrines to Muslims, and those wishing to propagate Muslim religious doctrines and beliefs to Muslims must obtain permission from state

¹⁷⁹ Constitution of Malaysia Aug. 27, 1957, Part I, art. 3.

¹⁸⁰ Farish A. Noor, *From Pondok to Parliament: The Role Played by the Religious Schools of Malaysia in the Development of the Pan-Malaysian Islamic Party (PAS)*, in *MADRASA IN ASIA: POLITICAL ACTIVISM AND TRANSNATIONAL LINKAGES* 191, 192 (Farish A. Noor et al. eds., 2008).

The largest minority in Malaysia is the Chinese minority, which comprises almost 24% of the population. In addition to primary national schools in the Malay national language, the national government provides primary education in government schools and in government—assisted schools in which the languages of instruction are Mandarin (21% of primary school students) and Tamil (3% of primary students). Richard G. Kraince, *Reforming Islamic Education in Malaysia: Doctrine or Dialogue?*, in *MAKING MODERN MUSLIMS: THE POLITICS OF ISLAMIC EDUCATION IN SOUTHEAST ASIA* 106, 115 (Robert W. Hefner ed., 2009).

¹⁸¹ RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 128 (2010).

¹⁸² *Id.* at 128–29.

¹⁸³ Constitution of Malaysia, *supra* note 179, at Part I, art. 11(3).

¹⁸⁴ *Id.* at Part I, art. 11(4).

religious departments.¹⁸⁵ The control over the propagation of Muslim religious doctrines granted to the government in the constitution has enabled the government, among other things, to clamp down on dissident Muslim organizations and shut down their schools.¹⁸⁶

In terms of religious education, article 12 of the constitution states that: "Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law."¹⁸⁷ Nevertheless, the article gives a clear preference to Islam over other religions with respect to state funding, stating that "it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose."¹⁸⁸ Consequently, only Muslim religious schools can be funded by the state in Malaysia.¹⁸⁹

The close ties between Malay identity and Islam, and the government's resolve to affirm Malay hegemony, have led to the increasing importance of Islamic education and to attempts to systematize it within the national system.¹⁹⁰ In 1961, Islamic education was incorporated into the curriculum of national primary and secondary schools, and this has "led to a . . . decline in enrollment in both state and private Islamic schools."¹⁹¹ These changes were consistent with the policy of gradual absorption of Islamic educational institutions and practice into the broad national educational system, and with the increasing emphasis on Islam as a prominent part of the national Malay identity and culture.¹⁹² In 1973, a separate religious education division was established that is in charge of Islamic educational policy and curriculum, the recruitment of Islamic education staff, and the raising of standards in both national Islamic schools and government assisted Islamic schools.¹⁹³ One of the goals of the Islamic Education Division is to take over state Islamic

¹⁸⁵ AHMAD FAUZI ABDUL HAMID, *ISLAMIC EDUCATION IN MALAYSIA* 25 (2010).

¹⁸⁶ For example, the government banned the Darul Arqam movement in 1994 and closed down its schools. *Id.* at 60–63.

¹⁸⁷ Constitution of Malaysia, *supra* note 179, at Part I, art. 12(2).

¹⁸⁸ *Id.*

¹⁸⁹ HAMID, *supra* note 185, at 25.

¹⁹⁰ *Id.* at 29.

¹⁹¹ *Id.* at 27.

¹⁹² *Id.* at 28.

¹⁹³ *Id.* at 29.

schools and private Islamic schools and turn them into national Islamic schools with a uniform syllabus.¹⁹⁴

The nature of Malaysia's private Islamic education has aided this process. Private Islamic schools in Malaysia are governed by independent boards, and their funds come from relatively low student fees and private contributions. However, due to financial difficulties many of these schools have turned to the government for financial assistance and have become semi-independent government-assisted Islamic schools.¹⁹⁵ After 9/11, the pressure on private Islamic schools to conform to national authorities increased, and funding has been withdrawn from hundreds of schools.¹⁹⁶ While some of these schools have closed for lack of funding, others have forgone their independence and become fully aided government Islamic schools.¹⁹⁷ The private Islamic schools whose funding has been cut have been accused of stoking Islamic extremism and being tied to Islamic militants.¹⁹⁸ In addition, the Malaysian government claimed that the non-religious curriculum in these schools was so deficient that it left the children graduating from them virtually unemployable.¹⁹⁹ Furthermore, in order to persuade people not to enroll their children into these schools, the government claimed that while 90% of the graduates of government schools qualified for admission to Malaysian universities, less than 25% of the graduates of private Islamic schools were similarly qualified.²⁰⁰ However, critics claim that the main motivation for the funding cuts was political, as these schools were connected to the PAS opposition party that threatens the continued rule of the UNMO party.²⁰¹ The funding cut combined with the government's campaign against the quality of private Islamic schools and the parallel expansion of the Islamic education curriculum in national schools have led to a sharp decline in enrolment in private Islamic schools.²⁰² By 2004 these schools had suffered a decrease of more than 50% in their enrolment and their student body represented only 0.7% of the total student population in Malaysia.²⁰³

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 45.

¹⁹⁶ *Id.* According to Noor, funding was cut to 260 schools. Noor, *supra* note 180, at 209.

¹⁹⁷ HAMID, *supra* note 185, at 4, 45.

¹⁹⁸ Jonathan Kent, *Malaysia's doubts over Muslim schools*, BBC NEWS, Apr. 3, 2003, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/2913565.stm>.

¹⁹⁹ *Id.*

²⁰⁰ Noor, *supra* note 180, at 211.

²⁰¹ *See id.* at 192.

²⁰² Kraince, *supra* note 180, at 124–25.

²⁰³ *Id.* at 125.

Following the Malaysian government's Ninth Malaysian Plan for the years 2006–2010, all private Islamic schools in Malaysia were required to adopt the official Islamic education curriculum, thereby creating a homogenous Islamic education curriculum in all Malaysian schools.²⁰⁴

To conclude, Islam is given a prominent role in Malaysia, and the Malaysian constitution gives preference, power, and money to Islam and to Muslim religious authorities. Nevertheless, the Malaysian legal system ensures that the state maintains complete control over the interpretation of Islam and over religious authority. This state of affairs enables the government to dictate the form and content of Islamic education and to retain a high degree of control over private Islamic schools.

5. Turkey

When the Republic of Turkey was proclaimed in 1923 religion was banished from the public sphere.²⁰⁵ Hundreds of religious Muslim schools (medreses) that were seen as incompatible with modern academic requirements were closed, and the state established compulsory schools that followed a national curriculum devoid of any religious instruction.²⁰⁶ Although secularization was central to the Kemalist modernization project, and various Muslim practices such as the pilgrimage to Makkah (hajj) were banned by law until 1947, Islam continued to play an important role in the Kemalist understanding of the Turkish nation due to Islam's importance as the "unspoken bond" that created the Turkish nation from a multitude of separate ethnic groups (including Anatolians, Kurds, Caucasians, Albanians, Bosnians Tartars, etc.).²⁰⁷ The introduction of democracy in 1946, along with the realization that the official ban on any form of religious education was leading many to seek it via channels over which the state has no control, led to the gradual reintroduction of religion into the public sphere and into

²⁰⁴ HAMID, *supra* note 185, at 46–47.

²⁰⁵ Bekim Agai, *Islam and Education in Secular Turkey: State Policies and the Emergence of the Fethullah Gulen Group*, in *SCHOOLING ISLAM: THE CULTURE AND POLITICS OF MODERN MUSLIM EDUCATION* 149, 150 (Robert W. Hefner & Muhammad Qasim Zaman eds., 2007). Nevertheless, the 1924 constitution stated that Islam was the religion of the Turkish state, and while this article was removed in 1928, the principle of laicism (secularism) was put in the constitution only in 1937. Levent Köker, *Religion, Education and the Turkish Constitution: A Critical Assessment*, *TURKISH REVIEW* 36 (2010), also available at <http://leventkoker.blogspot.com/2013/12/religion-education-and-turkish.html>.

²⁰⁶ Agai, *supra* note 205, at 150.

²⁰⁷ *Id.* at 151.

the state system of education.²⁰⁸ Consequently, the notion of laicism, which initially meant a complete ban on Islam, was transformed to mean the control of religious expression by the state, and the following years saw a gradual increase in state-controlled Islamic education.²⁰⁹ In the 1980s, the role of Islam in Turkish society strengthened further. Islam was portrayed as a national trait of the Turks and as a source of social and moral stability, and obligatory religious courses were introduced in state schools.²¹⁰

Although Turkey is defined in its 1982 constitution as a secular state,²¹¹ state control over Islamic education and its compulsory introduction into state schools are enshrined in the constitution. Article 24 of the constitution stipulates that: “Religious and moral education and instruction shall be conducted under state supervision and control,” and determines that “instruction in religious culture and morals shall be . . . compulsory . . . in the curricula of primary and secondary schools.”²¹² The content of education and the control of the state over it are further guaranteed by article 42 of the constitution, which states that: “Education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis on contemporary scientific and educational principles, under the supervision and control of the State. Educational institutions contravening these provisions shall not be established.” The article further stipulates that: “The freedom of training and education does not relieve the individual from loyalty to the Constitution,” and ensures the conformity of private education by requiring that “the principles governing the functioning of private primary and secondary schools shall be regulated by law in keeping with the standards set for the state schools.”²¹³

The secular state, through its Directorate for Religious Affairs, which controls 70,000 mosques and thousands of Qur’anic courses and supervises private forms of religious activities, is the most important religious player in Turkey.²¹⁴ The compulsory religious instruction given in all state schools follows a relatively progressive form of Islam advanced by the state, which has been called “Turkish-Islamic-Synthesis,” and which is aimed at

²⁰⁸ *Id.* at 152; see also Diren Çakmak, *Pro-Islamic Public Education in Turkey: The Imam-Hatip Schools*, 45 MIDDLE EASTERN STUD. 825, 829 (2009).

²⁰⁹ Agai, *supra* note 205, at 152.

²¹⁰ *Id.* at 152–53; Çakmak, *supra* note 208, at 833.

²¹¹ Constitution of the Republic of Turkey Nov. 7, 1982, art. 2.

²¹² *Id.* art. 24.

²¹³ *Id.* art. 42.

²¹⁴ Agai, *supra* note 205, at 153–54.

undermining Islamic influences outside of state control and assisting in the project of national homogenization.²¹⁵ The deep involvement of the Turkish secular state with religion has made it necessary for the state to have schools that can train students to perform religious functions in the community. This has led the Turkish Ministry of Education to establish vocational schools for Imams (prayer-leaders) and Hatips (preachers)—the Imam Hatip Schools—whose operation began in 1951.²¹⁶ Imam Hatip schools teach the full curriculum that is taught in general high schools, while adding to it a considerable number of religious vocational courses, and initially they included both junior high school (6–8) and high school (9–12) grades.²¹⁷

While the state retains full control over Imam-Hatip schools, and provides the teachers, and pays for their salaries, all other school expenses are covered by private donations.²¹⁸ The private donations given to these schools on the basis of their religious appeal are used to provide a better learning environment for the students, such as a better teacher-student ratio than in other public schools.²¹⁹ The Imam-Hatip schools became very popular among the more pious Muslim parents, who seized the opportunity to send their children to a school that gave them both secular and religious education, and by the mid-1990s about 10% of all students in Turkey went to Imam-Hatip schools.²²⁰ One reason for these schools' popularity was that while they enabled their graduates to go on to become Imams and Hatips, they also enabled them to go on to study any university subject they desired, and graduates would usually achieve high scores on the central university entry exam.²²¹

The growing popularity of the Imam-Hatip schools has generated an extensive public debate regarding their desirability, with opponents arguing that these schools are a threat to Turkey's laicism and a hotbed for political

²¹⁵ *Id.* at 156.

²¹⁶ Çakmak, *supra* note 208, at 830; Mustafa Öcal, *From the Past to the Present: Imam and Preacher Schools in Turkey—An Ongoing Quarrel*, 102 RELIGIOUS EDUC. 191, 195 (2007).

²¹⁷ Öcal, *supra* note 216, at 196.

²¹⁸ *Id.* at 197.

²¹⁹ Agai, *supra* note 205, at 154.

²²⁰ *Id.*

²²¹ *Id.* Although women are not employed as Imams or Hatips, Imam-Hatip schools accepted girls and even had the highest proportion of girls of all high schools. *Id.*; see also Çakmak, *supra* note 208, at 831–32. This may be due to the fact that conservative parents felt it is safer to send their daughters to religious educational institutions, and Imam-Hatip schools are the only option for such education in Turkey.

Islam.²²² These concerns have led, from 1997 onward, to the enactment of reforms that significantly restricted Imam-Hatip schools and their graduates. The first reform required all students to attend general, non-vocational, schools for the first eight years of their education, thereby canceling the junior high section of the Imam-Hatip schools.²²³ The second, even more significant reform, implemented in 1999, changed the admission criteria for universities, making it almost impossible for Imam-Hatip graduates to enter any department except for theology faculties.²²⁴ In addition, Imam-Hatip graduates were denied access to police schools and other sensitive positions.²²⁵ These measures resulted in a sharp drop in student enrolment and the closure of many Imam-Hatip schools.²²⁶ However, these reforms were recently overturned by the Turkish government led by the Justice and Development party (AKP).²²⁷

To conclude, although the Turkish state is defined as a secular state, it employs a significant state apparatus to disseminate a state generated form of Islam, and retains tight control over Islamic education.

C. Lessons from Theory and from Comparative Law and Practice

The review conducted above of theoretical literature on religious education and of the comparative law and practice of liberal and non-liberal countries reveals that while there are significant differences between the different theorists reviewed and between the different countries reviewed, some general conclusions that are pertinent to religious education in general and to the UO education in Israel in particular can be drawn.

First, while in all surveyed countries there is, at least on the legal level, state control over private religious education, in the U.S. this control is less strict than in the other countries. This can be explained both by the strong

²²² Agai, *supra* note 205, at 154; Öcal, *supra* note 216, at 197; Çakmak, *supra* note 208, at 839–41. Çakmak posits that the Imam-Hatip schools have made a significant contribution to the resurgence of Islamism in Turkey (many of Turkey's current leaders are graduates of these schools) and that under the current rule of the Islamist Justice and Development Party they pose a more serious threat to Turkish democracy than in the past.

²²³ Agai, *supra* note 205, at 154–55.

²²⁴ Öcal, *supra* note 216, at 199.

²²⁵ Agai, *supra* note 205, at 154–55.

²²⁶ *Id.*; Çakmak, *supra* note 208, at 836.

²²⁷ M. Kemal Kaya & Halil M. Karaveli, *Remolding Compulsory Education, the AKP Erases a Secularist Legacy—and Seeks to Check the Gülen Brotherhood*, CTR. ASIA-CAUCASUS INST. & SILK RD. STUDIES PROGRAM, <http://www.silkroadstudies.org/new/inside/turkey/2012/120402a.html>.

constitutional separation between church and state, which prevents government entanglement with religion, and by the strong ethos of negative liberty and of small government, which reduces government involvement in the private sphere to a minimum. Nevertheless, the same constitutional principles that restrict the control over religious education in the U.S. also work to prevent funding of religious schools. In the Netherlands and in the U.K. where there is extensive funding for religious education there is also quite extensive control over this education and while in both countries there exists the option of running a private school with no state funding and with considerably less supervision, this option is utilized by very few. In the non-liberal democracies (Malaysia and Turkey) close supervision exists regardless of funding.

Thus, in the three liberal democracies examined there is a direct link between the extent of funding and the extent of supervision. A similar close relationship between funding and supervision can also be found among the liberal theorists reviewed. This link is important, because it ensures that government money that is used to support and expand the private religious education system is not used towards purposes that are inimical to the liberal democratic state. Unfortunately, this is not the case with the UO education system in Israel, which receives extensive funding despite its refusal to teach the core curriculum.

Second, although the three liberal democratic countries surveyed differ in the amount of funding that they give religious education and have different degrees and methods of control, neither of their systems is considered incompatible with the right to religious freedom or with the right to culture. This is important from the perspective of UO education in Israel, whose supporters claim that despite the heavy funding that it receives from the state, any supervision of it and any enforcement of standards would be a violation of the parents' religious freedom and of the community's right to culture.

Third, In the four countries in which Muslim education was surveyed—England, Netherlands, Malaysia and Turkey—a major concern for parents in their choice of school is the need to give their children good secular education, in addition to religious education, in order to enable them to integrate in society and find good jobs in a modern economy. Thus, the need to acquire sufficient skills to find good jobs has an important integrative and de-radicalizing role. This need leads schools to maintain a high level of secular education and may even lead parents to withdraw their children from

schools that do not do so.²²⁸ Furthermore, most theorists discussed agree that a curriculum comprised exclusively of religious studies is inimical to the rights of children. While Barry and Callan believe that children have the right to receive an education that develops their autonomy, Spinner-Halev and Galston settle for an education that guarantees the children's right of exit in the sense that it enables them later on in life to live outside the community if they choose to do so. The same concern for ensuring children's right of exit was expressed by the Israeli court in the *Core Curriculum* cases and by the British court.²²⁹ Nevertheless, the current situation in the UO education in Israel, which has been reinforced and made legal by the Unique Cultural Educational Institutions Act, is that UO schools for boys teach exclusively religious studies, and that consequently, young UO adults have almost no option of exiting their community.²³⁰

Fourth, most of the theorists discussed, except Kukathas, also emphasize the right and the duty of the liberal state to encourage and even ensure that children receive some form of civic education that educates them to tolerance and to life in a pluralistic diverse democratic society. Similarly, in both England and the Netherlands such civic education is mandatory. In the UO education system in Israel no such education is provided, despite the fact that one out of every four students in the Jewish education system studies in an UO school and that data shows that the UO community is the most intolerant towards diversity, markedly more so than other groups in Israel.²³¹

To summarize, the treatment of UO education in Israel is not required by the right to religious freedom of UO parents and community. It also violates the right of UO children to education and to equal opportunity and jeopardizes the sustainability and the democratic structure of the state due to

²²⁸ See discussions of Turkey, Britain, and Malaysia, *supra* Parts III.B.2, 4–5.

²²⁹ For the British court, *see supra* note 147 and accompanying text.

²³⁰ FRIEDMAN, *supra* note 16, at 188.

²³¹ The 2010 Israeli Democracy Index recently published by the Israeli Institute for Democracy found that the greater the level of religious observance, the stronger the objection to equality of rights between Jews and Arabs. Thus, one of the issues that the survey examined was to what extent the notion that citizenship is a legal status conferring equal rights has been internalized by the Israeli public. According to the findings in the survey, while 51% of the general public support full equality of rights between Jews and Arabs, a breakdown of the Jewish public by religiosity shows that only 33.5% of secular Jews are opposed to such equal rights, in contrast to 51% of traditional Jews, 65% of religious Jews, and 72% of ultra-Orthodox Jews who are opposed to equal rights. These findings correspond to similar findings in earlier surveys. Asher Arian et al., The Israel Democracy Institute 2010, *Auditing Israeli Democracy—2010 Democratic Values in Practice*, 8, available at http://www.idi.org.il/PublicationsCatalog/Documents/Book_7114/madad_2010_eng_abstract.pdf.

the inordinately high number of children who are not exposed to any form of secular and civic education. I could finish here, but my claim against the right to an exclusively religious education granted to the UO through the Unique Cultural Educational Institutions Act runs deeper than that. I claim that the state religion structure in Israel and the unique position of the UO community within this structure and in the Israeli polity significantly exacerbate the problem and that the comparative perspective can help us to understand this.

Thus, the *Fifth* conclusion that can be drawn from the comparative analysis concerns countries in which religion plays an essential role in their national identity. While the two non-liberal countries surveyed—Turkey and Malaysia—differ from each other markedly in their state religion relations, in both countries Islam is heavily entangled with the state and is used by the state as a unifying factor. In this respect both countries resemble Israel, in which, as will be further discussed below, the Jewish religion plays a crucial role in its self-identity, and is heavily entangled with the state. There is one crucial difference between the situation in Israel and that in Malaysia and in Turkey, which is highly relevant for our purposes. Because Malaysia and Turkey acknowledge and promote the importance of Islam in their national life and its power over the population, they control Islam tightly, limiting dissent and endorsing a unitary version of a state controlled religion. While this state of affairs is illiberal and disrespectful of individual rights, it is effective in preventing the power of religion from being turned against the state. Conversely, Israel, while emphasizing the importance of the Jewish religion to the national ethos and giving the Orthodox Jewish religion both state power and state budgets, refrains from controlling it. This is because controlling religion in the way that Malaysia and Turkey do would go against another important component of Israel's ethos—the liberal component. Consequently, Israel emerges as a unique hybrid which attempts to reconcile two irreconcilable ideals: on the one hand it gives considerable state power and state funds to its preferred religion—Orthodox Judaism (and is therefore an instance of what Hirschl calls a constitutional theocracy), but on the other hand, and at the same time, it attempts to respect liberal ideals such as religious freedom in all areas not directly under the control of religious law. Tellingly, as will be discussed below, the failure of this theocratic-liberal hybridity does not manifest itself through Israel's relatively decent treatment of its Muslim and Christian minorities, but through its unremitting, and indeed exaggerated, respect to the religious freedom of adherents of its

dominant religion—Orthodox Judaism—of which the UO Jewish minority is an important component.

In the next part of the Article I will describe how the combination of state power and state funds for Orthodox Judaism coupled with extensive freedom for its adherents to pursue and to radicalize their religious beliefs has resulted in the UO's minority exponential growth and in its radicalization to an extent that today poses a threat to the liberal democratic ideals on which Israel is based and requires a change of policy towards the UO education system.

IV. UO EDUCATION IN ISRAEL—AN ANALYSIS

In order to explain the uniqueness of the Israeli situation and the depth of the problem that the current status of the UO educational system poses for Israel, it is important first to give a short overview of state-religion relations in Israel.

A. State-religion Relations in Israel

Unlike most other liberal democratic states, whose definitions do not include references to the ethnic or religious character of those states, Israel is defined in its Basic Laws as a Jewish and Democratic state. This definition is relatively new and was adopted as part of the first of two Basic Laws on human rights—Basic Law: Human Dignity and Basic Law: Freedom of Occupation.²³² However, the origins of this definition can be traced to the Israeli declaration of Establishment, which states that Israel is to be a “Jewish state,” but at the same time that it will “ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.”²³³ It is important to note that there is an ongoing and as of yet unsettled debate with regard to the exact meaning of the definition of Israel as a Jewish state. While some consider that the definition of Israel as a Jewish state mandates an establishment of the Jewish religion in the state, and the granting of legal authority and status to the Jewish religion, others

²³² Basic Law: Human Dignity & Liberty, 5752-1992, SH No. 1391, p. 60 (Isr.), *available at* http://knesset.gov.il/laws/special/eng/basic3_eng.htm; Basic Law: Freedom of Occupation, 5752-1992, SH No. 187, p. 60 (Isr.) (null), *available at* http://knesset.gov.il/laws/special/eng/basic5_eng.htm.

²³³ The Declaration of the Establishment of the State of Israel, Iyar 5, 5708 – May 14, 1948, Official Gazette No. 1 p. 1, *available at* http://Knesset.gov.il/docs/eng/megilat_eng.htm.

dispute this reading of the Basic Laws. They argue that the definition “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, and not as an establishment of the Jewish religion in the state.²³⁴ Regardless of this debate and long before the enactment of the Basic Laws, the Jewish religion in its Orthodox version has been partially established in the state through laws granting legal status to Orthodox Jewish religious authorities in several areas, the most important of these being that of personal laws. This partial establishment originates in the pre-state era and in the need of the leaders of the Zionist movement to secure the support of the religious factions within the Jewish community for the establishment of the Jewish state, and it has come to be known as the “Status Quo.”²³⁵ Some argue that this partial establishment was also motivated by the need of the new Zionist secular regime to gain legitimization by maintaining a connection with the Jewish past.²³⁶ Be that as it may, the Israeli model of state-religion relations, which, from the outset, has given substantial preference to the Orthodox Jewish religion, deviates from the classical liberal model that aspires to treat all religions equally and neutrally.

The most important aspect of the partial establishment of Orthodox Judaism is that all Jews in Israel are subject to Orthodox Jewish religious personal laws. At the same time, it is important to note that members of other recognized religious communities, such as Muslims and various Christian denominations, are also subject to the personal religious laws of their particular religions.²³⁷ This state of affairs was first instituted during

²³⁴ See Avigdor Levontin, *Jewish and Democratic: Some Personal Reflections*, in *THE STATE OF ISRAEL: BETWEEN JUDAISM AND DEMOCRACY* 281 (Yossi David ed., 2003) (taking a position against interpreting the term Jewish in the Basic Laws as including the Jewish religion). *But see* Menachem Elon, *Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom*, 17 *IUNEI MISHPAT* 659, 668–70 (1993) [Hebrew] (taking a position supporting the inclusion of the Jewish religion in the term “Jewish”).

²³⁵ Daphne Barak-Eze, *Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change*, 30 *CARDOZO L. REV.* 2495 (2009). For more on the “Status Quo” see *id.* at 2507 n.2 and accompanying text.

²³⁶ Yonatan Shapira, *Secular Politicians and the Status of Religion in the State of Israel*, in *MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE*, *THE ARIEL ROSEN-ZVI MEMORIAL BOOK* 663, 669 (Menachem Mautner et al. eds., 1998).

²³⁷ The authority of the various religious communities was established through legislation from the period of the British Mandate and was later incorporated into Israeli law. *The Palestine Order in Council Sign* 51–52 (1922). The detailed authority of the Jewish

the period of Ottoman rule over the Eretz-Israel/ Palestine region, was maintained by the British Mandate, and later by the State of Israel.

The imposition of the religious personal laws of the various religious communities on all residents and the lack of an alternative civil marriage, constitutes a violation of the right to freedom of conscience and belief, as well as a violation of the rights of women who are subject to the discriminatory patriarchal religious laws of the various religious communities.²³⁸

While establishing an exclusively religious system of laws in matters of marriage and divorce is probably the most serious entanglement of religion within the Israeli state, there are several other areas in which religion, and in particular the Orthodox Jewish religion, is given a preferred status by the state, either through statutes or through administrative decisions, which confer to it state power as well as money. Thus, the state has established a chief rabbinate and has given full control over it to Orthodox Judaism.²³⁹ The Chief Rabbinate is a powerful state organ that enjoys large budgets and controls the religious services given by the state to the Jewish population. Some of the state and municipal institutions established and financed by the state and subject to the religious authority of the Chief Rabbinate are the rabbinical courts that deal with matters of marriage and divorce of Jews in Israel, the regional religious councils, which deal with the supply of religious services—such as burial (public cemeteries in Israel are overwhelmingly religious), synagogues, kashrut (Kosher certification of food), etc.—to Jews on a regional basis, and the conversion courts, which deal with conversion to Judaism.²⁴⁰

Rabbinical Courts is set out in The Jurisdiction of Rabbinical Courts (Marriage and Divorce), Acts 5713-1953, 7LSI 139 (Isr.).

²³⁸ Gila Stopler, *The Ultra-Orthodox Community in Israel and the Right to an Exclusively Religious Education*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 312, 322 (Susana Mancini & Michael Rosenfeld eds., 2014) (citing Frances Raday, *On Equality*, in WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY 19 (F. Raday et al eds., 1995)).

²³⁹ Chief Rabbinate of Israel Law, 5740-1980, SH No. 965, p. 90 (Isr.).

²⁴⁰ Jewish Religious Services Law, 5731-1971, SH No. 628, p. 130 (Isr.).

B. What Does All This Have to do with the UO?

Despite the UO community's anti-Zionist ideology and its enclave mentality, the UO community holds key positions in Israel's religious establishment. UO Rabbis have been serving as judges in the Rabbinical Courts system, to which all Jews are subject in matters of marriage and divorce, from its inception.²⁴¹ In fact, UO Rabbis form the majority of rabbinical court judges, and at time of writing all but one of the judges on the Great Rabbinical Court, which is the highest rabbinical court and hears appeals from all the regional rabbinical courts, are UO.²⁴² Through their positions, the UO judges are authorized to impose their version of ultra-orthodox Jewish religious law on all Jews in Israel. In recent years, with the increasing radicalization in the UO community, the rulings of rabbinical courts have become more conservative and more detrimental to the rights of women and to the rights of converts. To give just one example, a rabbinical court has recently ruled that a wife who sued her husband for damages because of his refusal to release her from their marriage for ten years is herself to blame for his continuous refusal to divorce her, and that until she consents to her husband's financial demands she is not entitled to the divorce.²⁴³

In addition, the influence of UO political parties, which began as early as the establishment of the state, has strengthened considerably ever since.²⁴⁴ This influence has allowed UO politicians to obtain considerable budgets for the UO community, which support their Yeshiva studies and their increasing families.²⁴⁵ It has also allowed the UO community to have significant impact on general issues affecting Israeli society at large, by serving in key positions such as the Minister of Interior, the Minister of Housing, the deputy Minister of Health, the Minister of Religious Services, the head of the Parliament (Knesset) Finance Committee, and the Mayor of Jerusalem. In their capacities in the government, in the Knesset and in the local municipalities,

²⁴¹ Nissan Slomiansky, *The Appointment of Rabbinical Court Judges – An Ultra-Orthodox State or a Zionist State?*, NE'EMANEI TORAH VA'AVODAH, <http://www.toravoda.org.il/node/584> (last visited Feb. 23, 2014) [Hebrew].

²⁴² Uri Polack, *For the First Time in a Decade: A Religious Zionist Judge on the Great Rabbinical Court*, KIPA.CO.IL (Mar. 25, 2012, 9:12 AM), <http://www.kipa.co.il/now/47971.html> [Hebrew].

²⁴³ Rivka Luvitch, *Rabbinical courts, raise the anchor!*, YNET (Feb. 8, 2011, 2:07 PM), <http://www.ynet.co.il/articles/0,7340,L-4025574,00.html> [Hebrew].

²⁴⁴ See generally Barak-Erez, *supra* note 235.

²⁴⁵ Heilman & Friedman, *supra* note 10, at 189.

UO politicians and public servants strive to force their ultra-Orthodox religious ideology on the public at large, in contravention of the liberal values of the state. To give one example, in Jerusalem UO politicians controlling the municipal government have for years been denying municipal budgets to the Homo-Lesbian community in Jerusalem despite repeated court rulings holding that such denial is discriminatory and illegal.²⁴⁶ To give another example, the deputy Minister of Health, who is a member of an UO political party, has initiated segregation between men and women in official events held by the Ministry of Health. In November 2011, the minister instructed that two women, a doctor and a nurse, who received an award from the Ministry of Health for their research, may not come up on stage to receive their award at the official award ceremony. The women were required to send a male representative to receive the award in their name, while they had to observe the ceremony from the balcony of the segregated auditorium to which all women were restricted.²⁴⁷ A final example is a religious ruling issued in 2010 by fifty municipal Rabbis, both ultra-Orthodox and religious Zionist, forbidding the sale and rental of homes to gentiles, particularly to Arabs.²⁴⁸ All of these examples involve UO public servants who receive their salary from the state and claim to be acting within their authority.

The above account demonstrates how UO state officials, representing the UO community, are engaged in strengthening the hold of ultra-Orthodox religious ideology in the Israeli government and in the Israeli public sphere and have significant impact on the lives of all Israelis. At the same time, these officials contend that the UO educational system is entitled to full autonomy as part of the freedom of religion and of the multicultural respect owed to the UO community as a secluded religious minority which is dedicated to its deeply religious (yet deeply illiberal) way of life. This position was adopted by the Knesset in the Unique Cultural Educational Institutions Act which exempts UO high school students from studying the core curriculum. However, in light of the considerable state power that the UO community wields through its representatives, the allegedly multicultural accommodation legislated through the Unique Cultural Educational

²⁴⁶ See C.A. 343/09 Open House v. Jerusalem (Sept. 14, PD [2010] (Isr.) (unreported)).

²⁴⁷ Ethan Bronner & Isabel Kershner, *Israelis Facing a Seismic Rift Over Role of Women*, N.Y. TIMES (Jan 14, 2012), <http://www.nytimes.com/2012/01/15/world/middleeast/israel-face-s-crisis-over-role-of-ultra-orthodox-in-society.html?pagewanted=all>.

²⁴⁸ Kobi Nahshoni, *50 municipal rabbis: Don't rent flats to Arabs*, YNET (Dec. 7, 2010, 5:24 PM), <http://www.ynetnews.com/articles/0,7340,L-3995724,00.html>.

Institutions Act is theoretically unsound and poses a serious threat to the liberal democratic infrastructure of the state. The idiosyncrasy of providing this type of multicultural accommodation to the UO in Israel can be best understood by comparing their situation to that of two American enclave minorities—the Amish and the Satmar Hasidim of Kiryas Joel.

C. The UO Community in Israel—Partial Citizens or a Prodigious Enclave Community?

When considering the appropriateness of multicultural accommodations for illiberal minorities, Jeff Spinner-Halev introduces a useful distinction between full citizens and partial citizens. He argues that, in general, all citizens of the state must adhere to moral requirements of liberal citizenship, including citizens belonging to illiberal minority communities. However, a narrow exception to this rule can be made in the case of minority communities whose behavior vis-à-vis the state entitles them to be considered partial citizens and, consequently, be partially exempt from some of the requirements of liberal citizenship.²⁴⁹ According to Spinner-Halev many illiberal religious groups want to lead their lives away from the mainstream community in order to maintain a distinct identity. Nevertheless, partial citizens are only those isolationist groups whose separation from the liberal state and society is almost complete. Members of such groups must not involve themselves in politics, they must not “press the state for financial favors of funds to establish institutions for themselves,” and they should not “ask for things that will harm other citizens.”²⁵⁰ Spinner-Halev believes that allowing partial citizenship under such conditions will not threaten liberal citizenship because the conditions for becoming partial citizens are so difficult that there is very little likelihood that many groups will choose this path. Thus, partial citizenship rests on a bargain: “as long as the group stays away from the common life of the country, and doesn’t try to eat at the public trough, then society can agree that citizenship has fewer claims on them than on others.”²⁵¹

In terms of education, Spinner-Halev maintains that while partial citizens cannot be exempt from the duty to teach their children basic skills, they can be exempt from teaching them the critical thinking skills that future citizens

²⁴⁹ SPINNER-HALEV, *supra* note 76.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 71–72.

in a liberal democracy need to acquire.²⁵² A group that, according to Spinner-Halev, is entitled to a status of partial citizenship is the Amish in the United States. Consequently, he supports the *Yoder* decision, which exempted the Amish in Wisconsin from the legal duty to send their children to school for the last two years of the state's compulsory education.²⁵³ In its decision, the Court relied heavily on the nature of the Amish as a law-abiding, "separate, sharply identifiable and highly self-sufficient community" which is self-sustaining to such an extent that it rejects any form of public welfare.²⁵⁴ The court further held that the Amish carried the burden of demonstrating that the vocational education that they want to offer their children in lieu of the compulsory state education is able to provide them with basic skills such as "reliability, self-reliance, and dedication to work," and that there are probably few other religious groups or sects who could carry such a burden.²⁵⁵

Conversely, Spinner-Halev argues that isolationist groups that want to retain their separation, but at the same time want the state to help them, do pose a real threat to society. An example of such a group, which Spinner-Halev discusses, is the Satmar Hasidim of Kiryas Joel in New York. In particular, he criticizes the establishment of a publicly-funded school exclusively for Satmar children with disabilities.²⁵⁶ He argues that public funds should only be used to support public schools that are open to all and not public schools that provide separate education to children of insular groups.²⁵⁷ Because the Satmars want to use public funds to educate their children separately from other children they cannot be considered partial

²⁵² *Id.* at 72. A similar suggestion is made by Galston with respect to the imposition of the demands of education for shared citizenship on all groups. According to his suggestion, groups that are willing to abide by the basic laws of the community without making full claims upon it may be given some form of intermediate status and be exempted from some of the requirements of full citizenship. Galston, *supra* note 7, at 529.

²⁵³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For a detailed criticism of the view that the Amish are a secluded minority which does not utilize political power see BARRY, *supra* note 58, at 176–93.

²⁵⁴ *Yoder*, 406 U.S. at 222, 225.

²⁵⁵ *Id.* at 224, 235–36.

²⁵⁶ The law establishing the special school district for the Satmar was struck down by the U.S. Supreme Court in *Board of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994), but a subsequent law allowing for the reestablishment of the special school district was affirmed by a state court. Tamar Lewin, *Controversy Over, Enclave Joins School Board Group*, N.Y. TIMES (Apr. 20, 2002), <http://www.nytimes.com/2002/04/20/nyregion/controversy-over-enclave-joins-school-board-group.html>.

²⁵⁷ SPINNER-HALEV, *supra* note 76, at 80–81.

citizens. In addition, Spinner-Halev argues that the Satmars should not be considered partial citizens because many of them use food stamps and live in public housing, and because they vote. In fact, he observes that it is because the Satmars vote, and because they usually vote en bloc, following the directions of their rabbi, that politicians were willing to cater to their demand for a separate school district.²⁵⁸

Will Kymlicka holds a similar position to Spinner-Halev's. According to him, as long as isolationist groups are small and sincerely committed to their self-imposed isolation they pose no threat to liberal citizenship and to a stable liberal order and can therefore be exempted from some obligations of citizenship, such as sending their children into common public schools for part of their education.²⁵⁹ Nevertheless, Kymlicka emphasizes that such groups should not be encouraged, since they are free-riders on a stable liberal order which they do not help maintain, but posits that as long as they remain small the liberal state can afford to accept them.²⁶⁰

Despite the fact that the UO are portrayed by supporters of the Unique Cultural Institutions Act as partial citizens similar to the Amish, who should be entitled to exemptions from the obligations of citizenship, they are, in fact, very different from the Amish. The UO are deeply involved in state and municipal politics, and their community is heavily funded by the state. In fact, perhaps ironically, the UO's extensive involvement in politics and their extensive funding by the state are what enabled UO leaders to create and maintain the semi-enclave for which they are now claiming multicultural protection. The generous state funding for religious education from early childhood through late adulthood has enabled the transformation of the UO community into a community of learners in which an unprecedented number of adult men study religious studies and do not need to work for a living. This enables these men to lead most of their lives without having to step out of the UO community. In addition, state funding of UO men's religious studies has enabled the UO educational system to shun any secular studies, since many of its graduates continue their religious studies into adulthood and consequently do not have to find jobs. The shunning of any secular education and the exclusive focus on religious studies made possible by

²⁵⁸ *Id.* at 79–80.

²⁵⁹ WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP 305–07 (2001).

²⁶⁰ *Id.*

increasing state funding has led to the growing radicalization of the UO community.²⁶¹

Due to its size, the UO community cannot even be compared to the Satmar Hasidim of New York, despite the fact that both communities subsist mainly on public funds, which they obtain using their political power. The UO are by no means a small minority whose freeriding can be easily absorbed by the larger Israeli society. Almost one out of every three Jewish students in the Israeli primary school system is educated in an UO school, and the number is continuously increasing owing to the UO community's high fertility rates.²⁶² This means that the number of school children who are not taught basic skills and civic education and are given an exclusively religious education is very high, creating serious concerns as to Israel's continued economic sustainability and democratic stability.

Furthermore, because of the unique religion-state relations in Israel the power that the UO community holds over other citizens and its ability to undermine the liberal democratic structure of the state are considerable. The establishment of the Orthodox Jewish religion in the state has enabled the UO community, through its representatives in the religious establishment, to become the official interpreters of the Jewish religion, 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.²⁶³ In addition, the lack of separation between religion and the state coupled with the UO's extensive political power enables them to deepen the hold of their radical interpretation of the Jewish religion over the Israeli public sphere. Consequently, one could argue that far from being a disempowered community, the UO is a *prodigious* enclave community that uses its political and state power both to guarantee its own flourishing and expansion, and to enforce its ideology on the rest of society. Thus, unlike the Amish or even the Satmars, the UO do not isolate their members from mainstream society merely as a means of maintaining their separate way of life, but also as a means of fostering a radical religious ideology which they can then impose on others.

²⁶¹ FRIEDMAN, *supra* note 16, at 80–86.

²⁶² Yarden Skop, *Forecast: Only 40% of Israeli students will attend nonreligious schools by 2019*, HA'ARETZ DAILY, Aug. 7, 2013, <http://www.haaretz.com/news/national/premium-1.540130>.

²⁶³ It should be noted that another group which is influential group in the Israeli religious establishment are the religious Orthodox Zionists, but the UO are the more powerful of the two groups.

This last point relates to a final important distinction between the UO and other isolationist groups. Most isolationist groups do not challenge the liberal democratic structure of the country within which they reside. Even the Satmars in New York, who are UO Jews themselves, whose way of life is quite similar to that of the UO in Israel, who use their voting power to their advantage, and who avail themselves of government funds, have no intention of challenging the liberal structure of the United States. They are, in fact, supportive of it, since it guarantees their religious freedom and their rights as a minority culture.²⁶⁴ Furthermore, the Satmars' small size, as well as the separation of church and state that exists in the United States, precludes their ability to enforce their illiberal religious ideology on others. Conversely, the UO community in Israel has, from early on, challenged the liberal democratic structure of the state and has been given state power and political influence that have enabled it to gradually erode this structure and implement its own illiberal religious ideology. Under these circumstances it is wrong to view the UO community as a disempowered minority that is entitled to a multicultural accommodation of its illiberal practices.²⁶⁵

V. CONCLUSION

Almost one out of every three Jewish children in the Israeli primary school system is educated in the UO educational system, which is heavily funded by the state but does not teach boys almost any secular subjects. This state of affairs poses a serious threat to the continued sustainability and stability of Israeli democracy. Those who support the continuation of this status quo claim that it is required by the right of UO parents and the UO community to freedom of religion and to multicultural accommodation. The survey of theorists and countries presented in Part III refutes this claim. Furthermore, supporters of the continued exemption of UO education from the core curriculum regard the UO community as an enclave community and fail to take into consideration both its extensive political power and its hold over Israel's religious establishment, which, due to Israel's state-religion relations, yields considerable power over the lives of all Israelis. Thus, they fail to take into account the violation of rights that women, Arabs,

²⁶⁴ JONATHAN D. SARNA, *AMERICAN JEWS AND CHURCH-STATE RELATIONS THE SEARCH FOR "EQUAL FOOTING,"* at iii-iv, 33 (1989) (discussing the views of Jews in the USA regarding religious freedom and the separation of church and state).

²⁶⁵ See also KYMLICKA, *supra* note 259, at 172-76 (commenting on the respect for liberal democratic values as the basis for multicultural policies).

homosexuals, converts, and others suffer as a consequence of the application of deeply illiberal Ultra-Orthodox religious ideology by OU politicians and state officials—who are the products of an UO education system that shuns any civic education.

The aforementioned suggests that it is imperative to introduce the core curriculum into the UO educational system. However, since the UO educational system is known for its lack of cooperation with the state and for being almost impenetrable to outside supervision, direct enforcement of the core curriculum may prove impracticable.²⁶⁶ It would seem that a more suitable way to go about creating the necessary change in the UO educational system is by cutting funding to any UO school that does not teach the core curriculum, including citizenship education. Cutting funding is both less intrusive than direct and universal enforcement, and, as the experience in the countries discussed in this article shows, cutting funding is an efficient means of ensuring that schools conform to state requirements. Supervision over the teaching of the different subjects by schools that choose to receive funding can be done by testing students' knowledge in each subject, a method which is both less intrusive and more accurate than direct supervision of instruction.

However, in this Article I have tried to show that the characteristics of the UO educational system cannot be understood or assessed without understanding the structure of the UO community and its position in the Israeli polity. It would have been impossible for the UO educational system to shun all forms of secular education if the UO community were not able to offer most of its young male adults the option of continuing their religious studies for an unlimited time with government funding. Consequently, an essential step in order to encourage the UO educational system for boys to teach secular studies is to gradually cut the funding for most of the adult men who study in UO religious institutions of higher education—Yeshivot Gdolot and Kolelim—and retain funding only for a select few on the basis of excellence. As the experience of other countries shows, the realization that most of their graduates will have to find jobs in the modern world, coupled with the need for state funding, would encourage UO schools to introduce adequate secular studies that would be supervised by the state. It is important to note that, despite the central importance of Talmud Tora as a religious precept, it has in the past always been the case in UO communities, both in Israel and abroad, that only those who excel in Yeshiva studies

²⁶⁶ Spiegel, *supra* note 3, at 107–09; Lupu, *supra* note 27, at 32–33.

become professional learners, while all others go out to work and earn a living that supports them as well as their communities.²⁶⁷ The transformation of the UO community in Israel into a community in which most men are learners and do not work for a living is a modern phenomenon facilitated by the UO community's political power, which has enabled it to obtain ever-increasing budgets for its religious institutions.²⁶⁸

Finally, a third step that must be taken in order to facilitate the introduction of secular studies in UO schools is to gradually require candidates for public service positions in Israel's religious establishment to meet minimal requirements for secular studies, including citizenship education. The fact that most, if not all, UO representatives in Israel's religious establishment lack secular education, and especially citizenship education, including education for tolerance and equality, has serious implications for the rights of all Israelis. It is hardly surprising that UO public servants apply their radically illiberal religious ideology to the citizens they are expected to serve, when this ideology is the only one they have ever been exposed to. If UO public servants were exposed from an early age to secular education and to citizenship education, they might be more open to accepting the diversity which characterizes modern Israeli society and to endorsing the state's legal commitment to equality and pluralism, as their position in the public service requires them to do. Although studying the core curriculum may not be sufficient to instill in UO public servants, and indeed in any public servant, the necessary commitment to equality and pluralism that must characterize the public service in a liberal state, it is certainly a prerequisite.

²⁶⁷ Lupu, *supra* note 27, at 42–47.

²⁶⁸ *Id.*; FRIEDMAN, *supra* note 16, at 188–91.